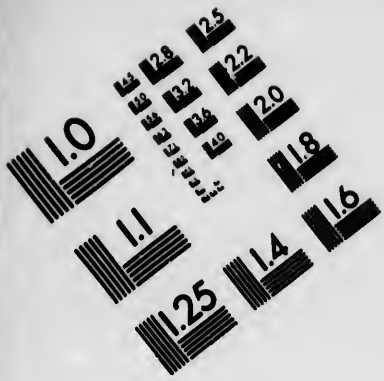

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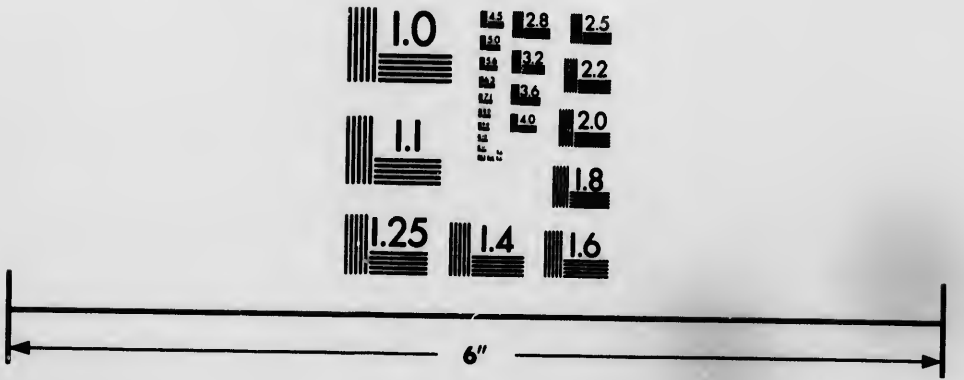

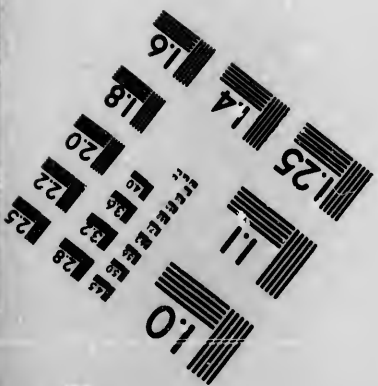

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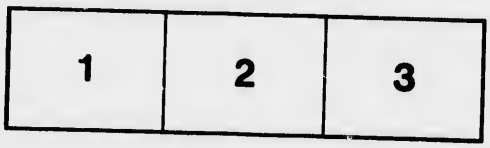

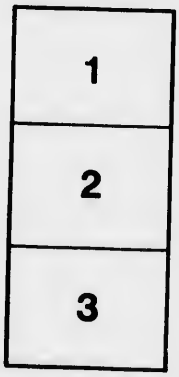

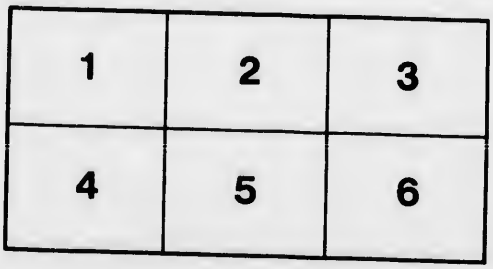

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO.

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

VOLUME XVII.

TORONTO:

HENRY ROWSELL,

KING STREET.

1871.

MEMORANDUM.

On the 27th day of December, 1869, the Hon. Vice-Chancellor Spragge was appointed Chancellor in the stead of the Hon. P. M. VanKoughnet, deceased; and, on the same day, Samuel Henry Strong, Esquire, Q. C., was appointed one of the Vice-Chancellors in the stead of the Hon. V. C. Spragge.

HENRY ROWSELL, LAW PRINTER, KING STREET, TORONTO.

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

" OLIVER MOWAT, *Vice-Chancellor.*

" SAMUEL HENRY STRONG, *Vice-Chancellor.*

" JOHN SANDFIELD MACDONALD, *Attorney-General.*

A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name:

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING JANUARY, 1870.

RASTALL v. THE ATTORNEY GENERAL.

Principal and surety—Recognizance.

Two persons became bound for the due appearance of a person confined in gaol on a criminal charge and the recognizance was prepared, as if the accused and his two sureties were to join therein: but the justice discharged the prisoner without obtaining his acknowledgment of the recognizance, *Held*, that this had the effect of discharging the sureties.

Statement.

The bill in this case was filed by *Richard Rastall* and *John McLeod* against her Majesty's *Attorney General* and *Henry Rastall*, and alleged that *Henry Rastall* having been committed for trial on a charge of larceny by certain justices of the peace for the County of Huron, and being in cutsody under such commitment in the common gaol in the County of Huron, the County Judge made an order for his release on bail, on his entering into a recognizance for $2,000, and procuring two sureties to become bound for $1000 each; that accordingly the plaintiffs as bail acknowledged a recognizance, which was set forth in the bill, and in which *Henry Rastall* was named as a party, conditioned for the appearance of *Henry Rastall* for trial at the first court

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Rastall v. Attorney General.

of competent jurisdiction, to be held in the county; whereupon the prisoner was released by the order of the justice without having acknowledged the recognizance, and that upon his release he absconded to the United States where he has since remained; that the recognizance was estreated at the next sitting of the Court of Quarter Sessions for the county, and having been entered on the roll of extents, execution was issued thereon under which the plaintiffs' goods had been seized by the sheriff, who was about to sell them.

The bill further alleged that the plaintiffs executed the recognizance upon the understanding that *Henry Rastall* was to execute it also, and prayed that the plaintiffs might be declared to be discharged from liability, and the recognizance delivered up to be cancelled, and that the sheriff might be restrained from proceeding to enforce the execution.

Statement.

The *Attorney General*, by his answer, admitted the order for bail and the execution of the recognizance, and that execution had issued upon it. He also stated that it was as much owing to the negligence of the plaintiffs themselves as to any other cause that there was no acknowledgment by *Henry Rastall*, and that the plaintiffs might have procured *Henry Rastall* to "execute," if they had thought fit. The *Attorney General* also stated that neither he nor any other person acting on behalf of the Crown ever made any representations to the plaintiffs that *Henry Rastall* should execute the recognizance before being discharged.

A consent paper was put in, signed by the solicitors on both sides, by which it was agreed that the cause should be heard by way of motion for a decree against the *Attorney General*, which contained admissions that *Henry Rastall* did not acknowledge the recognizance; that there was nothing to prevent the plaintiffs from

going to the gaol and seeing to the execution themselves. Upon these materials the cause was argued before Vice Chancellor *Strong*.

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Rastall v. Attorney General.

Mr. *Spencer*, for the plaintiffs.

Mr. *McGregor*, for the *Attorney General*.

The bill was *pro confesso* against *Henry Rastall*.

The cases cited are referred to in the judgment.

STRONG, V. C.—[After stating the facts as above set forth]. It is well settled by authority that if this was a case between subject and subject, the plaintiffs would be entitled to the relief which they pray (*a*). These cases clearly establish that under circumstances like the present, the surety is sought to be made liable in a manner, and to an extent different from that which he stipulated for; and that by the omission to bind the principal, his risk is increased. The sole question here therefore is, does it make any difference that in the present case the decree is sought against the Crown? A recognizance is a contract of record, and there is no reason that I have heard in argument at the bar, or have been able to suggest to myself why the same rule should not apply to sureties under such contracts as to them whose obligations are created by bond. The case may therefore be regarded as if it were that of a Crown debt created by bond. Then it is clear that on the Revenue side of the Court of Exchequer in England, relief can be obtained by Crown debtors on equitable grounds; and this by the express enactment of the statute 33 Henry VIII., cap. 39, sec. 79, which is as

January 18.

Judgment.

(*a*) Evans v. Bremridge, 2 K. & J. 174; same case on appeal, 2 Jur. N. S. 311; Bonser v. Cox, 1 Beavan 379; Rice v. Gordon, 11 Beavan 265, and Rykert v. Platt, in this Court (not reported), decided by the present Chancellor and the late V. C. *Esten* in 1855.

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follows:—"Provided always, and it be enacted by the authority aforesaid, that if any person or persons of whom any such debt or duty is, or at any time hereafter, shall be demanded or required, allege, plead, declare, or shew, in any of the said courts, good, perfect, and sufficient cause and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty; or why such person or persons ought not to be charged or chargeable to or with the same, and the same cause or matter so alleged, pleaded, declared, or shewed, sufficiently proved in such one of the said courts as he or they shall be impleaded, sued, vexed, or troubled for the same, that the said courts, and every of them, shall have full power and authority to accept, adjudge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded, sued, vexed, or troubled for the same, anything in this present act, before mentioned, to the contrary notwithstanding." This court, by statute 28 Vic. ch. 17, sec. 2, has conferred on it the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses.

Judgment.

As to the argument that the plaintiffs ought themselves to have procured the acknowledgment of the recognizance by the prisoner, and that the omission to do so arose from their negligence, I am of opinion that it was not incumbent on them to do anything of the kind, even if they could have procured the prisoner, to be brought before the magistrate for the purpose. In the taking of bail the justices must be considered as acting for the Crown, and it was their duty to have seen that the recognizance was duly perfected; as in an ordinary contract by bond or covenant, it has been held to be the duty of the creditor to see that the principal or co-surety duly executed the instrument. The plaintiffs had a right to rely on the due acknowledgment by the prisoner being obtained from the form of the judge's

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order, which required his own recognizance as well as that of the sureties, and only authorized his liberation on those terms; and the prisoner was, in fact, named as a party in the same recognizance, which the plaintiffs themselves executed, thus further inducing them to suppose that it would be perfected by the prisoner before he was discharged from custody. I think it clearly appears that the contract which the plaintiffs entered into was that they would become sureties for *Henry Rastall's* appearance, provided he also entered into his own recognizance to appear. I need not say that the plaintiffs are not called upon to shew that they have sustained any substantial injury by the omission to procure *Henry Rastall's* acknowledgment. Many authorities establish this. It is sufficient to quote one case: *Bonar* v. *McDonald* (*a*).

Judgment.

I think there should be a decree for the plaintiffs, declaring that they ought not to be bound by the recognizance, and that the same ought not to be enforced against them; that the recognizance should be delivered up to be cancelled and the entry on the roll vacated; and that proceedings on the execution ought to be stayed, and decreeing the same accordingly. I cannot accede to Mr. *McGregor's* application that the cause should stand over to a formal hearing; the question before me is purely one of law, and I cannot act on the suggestion that there *may* be some facts in the case not stated in the *Attorney General's* answer of which evidence might be given at the hearing, and this especially after the *Attorney General's* consent that the cause should be heard on motion for a decree. I cannot give costs against the Crown.

(*a*) 3 H. of L. cases, 226.

1870.

SMITH v. HENDERSON.

Principal and agent—Foreign lands, trust in—Costs.

Where a trustee of lands situated in a foreign country is resident within this province, the court will decree an execution of the trust.

A principal filed a bill against his agent for an account of his dealings, and the agent claimed by his answer that the principal was indebted to him. On taking the account, however, a balance was found against the agent of $282. The court ordered the defendant to pay the costs of the suit.

Hearing on further directions.

Mr. *S. H. Blake*, for the plaintiff.

Mr. *McGregor*, for the defendant.

The only question discussed was as to who should bear the costs of the suit; the defendant contending that, although the account, as finally taken between the parties, shewed a balance against him, still no fraudulent or improper conduct could be alleged against him: the most that could be said was that he had not kept the accounts correctly.

January 18. Judgment. STRONG, V. C.—This is a suit for an account by a principal against his agent, and also to establish a trust of some lands in the State of Illinois. The defendant by his answer denied the trust, and stated that he had fully accounted, and that there was nothing due from him. By the decree it was referred to the Master at Brockville to take the accounts, and to inquire as to the terms on which the lands had been conveyed, and the Master was directed to report anything affecting the costs of the suit. By his report the Master finds the defendant to be debtor to the plaintiff in a balance of $282 06, and that the Illinois lands were conveyed to the defendant on an express trust. He also, as affecting

the question of costs, appends to his report schedules shewing the items claimed by the defendant and those allowed to him, and the account claimed by the plaintiff.

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Smith v. Henderson.

I had some doubt as to how far the Court would decree the execution of a trust in foreign lands, since the decision of the present Lord Chancellor, in the matter of *Holmes* (*a*). But the facts of that case are peculiar, as it was there sought to have a trust of land in this country executed, against the Crown, in the Court of Chancery in England; and I do not think it can affect the well established doctrine, doubted as it may be by some text writers (*b*), that the Court acting *in personam* will, as against a defendant within the jurisdiction, decree a trust of land in a foreign country; *Penn* v. *Lord Baltimore* (*c*), *Kildare* v. *Eustace* (*d*), *Westlake* on Private International Law, sections 64-66.

Judgment.

As to the costs I am clear that the defendant ought to pay them. The plaintiff succeeds substantially on every question raised. Upon the accounts the defendant is found a debtor to the amount of $282 06, though he insists by his answer that the plaintiff is in his debt. I cannot conceive a stronger case for costs; *May* v. *Biggenden*, (*e*) which was relied on by both the learned counsel, is an authority for the plaintiff, if any is required in so plain a case.

(*a*) 2 J. & H. 527.
(*c*) 2 W. & T., Lg. Cases, 767.
(*d*) 1 Vern., 419, 422.
(*b*) *Vide Phillimore's* International Law, vol. iv., p. 543.
(*e*) 24 Beav. 207.

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HUTCHINSON v. SARGENT.

Administration suit—Costs.

The next friend of infants filed a bill, against the mother of the infants—their guardian appointed by the Surrogate Court—and her husband, alleging certain acts of misconduct which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of the defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party.

Hearing on further directions. The facts appear in the report of the case on the orignal hearing, *ante* Vol. XVI. page 81, and the judgment on the present hearing.

Mr. *Morgan*, for the plaintiffs, asked that the decree to be now made should order the defendants to pay the costs, they having been delayed with the receipt of personalty to the amount of upwards of $140 beyond the sum for which they had given credit to the estate in the accounts brought by them into the accountant's office. He referred to *Bennett* v. *Atkins*. (*a*) *Blain* v. *Terryberry*. (*b*)

Mr. *S. M. Jarvis*, for the defendants, contended that the facts found by the report clearly shewed that this was a case in which not only should the plaintiff not receive costs, but that the next friend should be ordered to pay the defendants their costs. The language of the court in *Bartlett* v. *Wood*, (*c*) was strictly appliable to the present case.

January 18. Judgment. STRONG, V. C.—The bill in this case was filed by the infant children of *William Hutchinson*, deceased, who

(*a*) 1 Y. & C. Ex. 247. (*b*) 12 Gr. 221.
(*c*) 8 W. R. 85.

died intestate, suing by *George Hutchinson*, their next friend, against their mother *Anne Sargent*, as administratrix of her late husband's estate, *Richard Sargent*, her second husband, and *Ruth Hutchinson;* and it alleged in substance that *William Hutchinson* was entitled by devise from his father, *John Hutchinson*, to a parcel of land which was subject to a mortgage created by *John Hutchinson*, the testator, in favour of one *Thomas Robinson*, on which a large sum of money was then due, and also to a charge in favour of the executors of *John Hutchinson* to the amount of $225; that a bill had been filed by the assignee of the mortgagee for foreclosure, and the executors of *John Hutchinion* threatened a suit to raise the charge; that the defendants, the *Sargents*, pretended that this mortgage and charge were neither of them payable out of the personal assets, but ought to be borne by the land itself, whilst the plaintiffs charged "that the same ought to be paid, or at least the balance due on the mortgage ought to be paid out of the personal estate of the intestate." The bill also stated that a sale of this land was more beneficial to the infants than a partition, and that the value of the dower, which *Anne Sargent* was entitled to, ought to be ascertained, and that the defendant *Ruth Hutchinson*, was the widow of *John*, the testator, and claimed to be entitled to dower. The bill also made serious charges of misconduct against the defendants, the *Sargents*, as follows: — "The said intestate was, at the time of his death, possessed of and entitled to a considerable quantity of personal estate, the exact value and particulars whereof the plaintiffs are unable to set forth, but which amounted in value to $3000, or thereabouts; and the defendants possessed themselves of the said personal estate, and have disposed of and appropriated to their own use large portions thereof, and the rest they still retain." And "the said defendant, *Richard Sargent*, is a person of no means, and is, in fact, insolvent; and the defendant, *Anne*

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Hutchinson v. Sargent.

Judgment.

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Sargent, is possessed of no separate estate." And again, "the said defendants have been and are misapplying and wasting the said personal estate, and the plaintiffs are apprehensive that the same will be, and, in fact, it will be, wholly lost, unless a receiver be appointed or the defendants be restrained from further intermeddling with the said estate, and from parting with any portion "thereof." The bill prayed for an account of the personal estate, and that the same might be administered by the court. That it might be declared that the mortgage and charge, or the mortgage alone, were payable out of the personal estate. That the land might he sold free from the dowers of Mrs. *Sargent* and Mrs. *Hutchinson;* and that the value of their dower interests might be ascertained.

By their answers the *Sargents* positively denied the charges of misconduct; they admitted the receipt of assets to the amount of $2200, or thereabouts, which they stated had been duly applied; they insisted that *Rachel Hutchinson* having accepted a certain provision under her husband's will, had thereby elected against her dower; and that the charge and mortgage were not payable out of the personalty. They also stated that no application for an account had ever been made to them. *Ruth Hutchinson* answered claiming her dower.

Judgment.

The cause was heard by way of motion for a decree before my brother *Mowat* (*a*), who dismissed the bill against *Ruth Hutchinson*, without costs, and made the usual administration decree, reserving further directions and costs, and the cause now comes on upon the accountant's report, which finds that the personalty has all been duly administered, except a small balance, and that the defendants are chargeable with the balance in hand, amounting to $22.78.

(*a*) See ante Vol. XVI., p. 81.

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Hutchinson v. Sargent.

The sole question in dispute, and the only point argued before me was as to the disposition of the costs.

The contention of the plaintiffs' counsel was that the costs ought to be paid by the defendants, or, at all events, out of the estate; the liability of the defendants to pay costs being put on the ground that a balance had been found due by them, or failing that, because the accountant had surcharged the defendants with a larger amount of personalty than they admitted to have received in the account which they carried into the office.

The defendants' counsel, on the other hand, insists that the next friend of the infants having unncessarily instituted a litigation which has had no results beneficial to the infant, and on which he has substantially failed, ought to be ordered to pay the defendants' costs.

Judgment.

At the conclusion of the argument, I expressed my opinion, to which I adhere, that there was not any ground for ordering the defendants to pay costs. There was not the slightest evidence before the accountant, so far as I can see, of the misconduct attributed to the defendants by the bill, and I cannot accede to the argument that they should be ordered to pay costs merely because they were surcharged with more than they admitted to have received, especially having regard to the statement in their answer that no account was ever sought from them before the filing of the bill. Moreover, it lies on the next friend seeking to charge the defendants personally with costs to point out how they have been guilty of misconduct. In proof of this I am referred to the accountant's report, which finds that the personal estate come to the hands of the defendants amounts to $2,747.79, "the particulars whereof," the report states, "are set forth in the first schedule to this my report now remaining in my office ready to be produced." On

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calling for this schedule, I am furnished by the accountant with the accounts brought in by the defendants from an informal memorandum, in which I may infer that they were surcharged by the accountant, in all with a sum of $142.87; but what were the particulars of the surcharge, or whether the items of it were designedly omitted, or whether the questions involved in it were or were not such as the defendants might fairly have raised, I am unable to ascertain. Am I then to conjecture that the items of their surcharge were fraudulently omitted from the account brought in? I do not think that I can do so.

Then the other ground on which costs are claimed from the defendants, namely, that the balance of $22.78 is found to be in their hands is manifestly insufficient either to charge them with or deprive them of costs. I am, therefore, clear that there is nothing in the case to justify me in withholding from the defendants their costs.

Judgment.

The only questions that remain then are, how are the defendants' costs to be paid? out of the estate, (which consists of the surplus purchase money of land sold in the mortgagee's suit), or by the next friend? And is the next friend to have his costs or the plaintiffs' out of the estate? In the first place, as to the costs up to the hearing: I have no doubt but that the Vice Chancellor, on the motion for decree, would have disposed of them adversely to the next friend, had that been the proper time for an adjudication as to them, for the decree made was one which could have been obtained without a bill on motion. Moreover, the contention that the mortgage and charge were payable out of the personal estate, was, on the face of it grossly erroneous, and, as my brother *Mowat* observes in his judgment, was not for the interests of the children.

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Then as to *Ruth Hutchinson's* dower, which the bill alleged she was entitled to, it was determined that she had elected against it, so that as to this part of the case we have the bill insisting that the estate of the infants was liable to a charge from which it had clearly been exonerated.

As to the charges of misconduct made by the bill against the *Sargents*, the Vice Chancellor determined that there was no proof in support of them. It is clear, therefore, that the defendants' costs, up to the hearing must be paid by the next friend personally (*a*).

Then as to the subsequent costs, I have already determined that the defendants are entitled to receive them, so that as between the next friend and the infants the question is reduced to this: Am I to determine that this suit, which appears to have had for its sole end the securing the due application of $22.78, was so beneficial to these children as to warrant an expenditure on account of it out of their small patrimony of from $150 to $200? There can of course be but one answer to such a question; and the order must therefore be that all the costs of the suit be paid by the next friend. The costs given against the next friend can only be taxed between party and party, and the defendants must have the difference between party and party and solicitor and client costs out of the estate. As to authority, if any is needed, I refer to *Anderton* v. *Yates* (*b*).

Judgment.

If the next friend before instituting a suit had sought and been refused an account; or if he had been able to shew that there was anything in the conduct of the defendants to raise a suspicion of maladministration, I should probably have come to a different conclusion;

(*a*) Moodie v. Leslie, 12 Gr. 537. (*b*) 5 De Gex. & S. 202.

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but this litigation appears to have been entered upon recklessly, without any adequate cause, and although it is not the policy of the court to discourage persons from acting as the next friend of infants, it is, on the other hand, important, that those who assume the office will assure themselves that there really are some grounds for seeking the aid of the court, before they run the risk of subjecting the infants' estate to costs.

I strongly suspect from the frame of the bill that this suit was instituted to subserve the interests of other persons than the infants, but I have not allowed my judgment to be influenced by any consideration of the kind. I have said more, probably, than the importance of the case itself demands, but as the principles involved are of general application I have thought it proper to give the reasons for the decision fully.

Judgment.

The defendants—the mother, as I understand, being the guardian appointed by the Surrogate Court—are to apply to have the surplus purchase money belonging to the infants, when it comes into court in the mortgage suit, transferred to the credit of this cause.

NELLES v. VANDYKE.

Præcipe decree, appeal from—Practice.

Where a party to a cause is dissatisfied with the manner in which the registrar takes the account between the parties and desires to have the decree drawn up by the officer on *præcipe*, varied, it is not necessary to rehear the cause; the proper mode is to present a petition to the court for that purpose.

This was a petition presented by the defendant praying to have the decree drawn up by the deputy registrar at St. Catharines, varied on the ground that sufficient

credits had not been given to the defendant in taking the account. 1870.

Nelles v. Vandyke.

Mr. *McLennan*, in support of the petition.

Mr. *Moss*, contra.

STRONG, V. C.—The bill in this case was filed by the mortgagee against the mortgagor, praying a sale, and was indorsed with the notice prescribed by order 436, the form of which is given in the schedule "S" of the General Orders; and a disputing note having been filed the account was taken by the deputy registrar at St. Catharines, before whom several witnesses were examined, and a decree was drawn up embodying the result of that account. The defendant being dissatisfied has presented a petition praying that the decree may be reviewed or varied by the allowance to the defendant of an item of $67.25, which the deputy registrar refused to give the defendant credit for. This petition is supported by an affidavit of one *Wolverton*, who was not called as a witness before the deputy registrar. Judgment.

On the hearing of this petition, Mr. *Moss*, for the plaintiff, objected to the mode of proceeding by petition, contending that the decree could only be varied on a rehearing.

The General Orders (432, 433, 435, 436) which regulate the practice of taking the account by the registrar before decree make no provision for the procedure to be adopted when either party is dissatisfied with the registrar's decision, and I am told by the learned counsel who appeard on the petition, and by the registrar, that no practice has been established by any decided case. The object of taking the account in this manner before decree is obviously to expedite and simplify the proceedings, and save expense; and it never could have

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been intended to have debarred the parties, in such cases, from appealing in some mode to the court, in case they felt aggrieved by the registrar's finding.

In what form then is this appeal to be? But two have or can be suggested: that by petition adopted by the defendant in the present instance, or a rehearing as contended for by Mr. *Moss*. It would be very inconsistent with the spirit of the General Orders I have referred to, if so dilatory and costly a proceeding as a rehearing had to be adopted to rectify every error of the registrar in taking an account, whilst, in the more important classes of cases referred to the master, the dissatisfied party can at once appeal to a single judge. I am, therefore, of opinion that the proceeding by petition was rightly adopted by the defendant; and that cases of this nature must form an exception to the rule that a decree can only be varied on a rehearing.

Judgment.

I do not think, however, that I can look at the affidavit of *Wolverton*, but I must follow as closely as possible the analagous practice on appeal from the master, and confine myself to the evidence before the deputy registrar. Having regard to the note made by the deputy registrar, of the grounds of his decision, and after considering the evidence, I think the officer was wrong in his conclusion, and that the disputed item ought to have been allowed. I refer particularly to the evidence of *Brook* and *Lewis*, and to the entries in the books which I do not think can be said to have been fabricated. I shall therefore direct the deputy registrar to retake the account, and, if necessary, to varv the decree according to the result of it.

I give leave to each party to adduce other evidence; this will give the plaintiff an opportunity of tendering himself as a witness, (under the Act of last session) which it is fair he should have, and the defendant can

examine *Wolverton*. I give no costs of the petition, as the defendant might have saved the necessity of it had he called *Wolverton*, the materiality of whose evidence is obvious without looking at his affidavit.

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As to the costs of retaking the account; there will be none if the defendant succeeds in varying it; if the result should be favourable to the plaintiff, his costs are to be added to his principal and interest as part of his costs of the cause.

CLARK v. CLARK.

Will, construction of—Legacies charged on corpus—Maintenance charged on annual profits.

A testator devised a portion of his real estate to his widow and his eldest son *James*, jointly, and his heirs, "my wife *Jane* to have and to hold the aforesaid premises as long as she remains my widow for my wife's *Jane Clark's* support and my small children's support, to be accepted by her in lieu of dower; and after her death my wife's part will belong to my son *James Clark*, aforesaid. * * * My son *James Clark*, aforesaid, will pay to my daughters [naming them] two hundred dollars each when they become of the age of twenty-one years, that is, each as she becomes of the age of twenty-one years." The testator then devised other real estate to his four younger sons, and proceeded to direct that his five sons should "remain on the old farm [the land devised to the widow and eldest son] and work together, and the proceeds of their work except what is necessary for the maintenance of the family, that is, for food and clothing, is to pay for the land already purchased * * and if any of my sons aforesaid does not conform to this proviso * * * then the property I have given and devised to him or them shall be sold by my executors hereinafter named, and the proceeds of the sale aforesaid shall be paid upon the land I have willed to those of my sons who fulfils this last provison:"

Held, that *James* took an estate in fee in one moiety of the land devised to him and his mother; that the widow took an estate during widowhood in the other moiety, with remainder to *James* in fee, the whole being charged with the maintenance of the

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testator's widow and such of the children as continued to live on it; and with the payment of the purchase money payable on the lands devised to the sons who remained on and worked the farm: both charges being on the annual profits, not on the *corpus; James*, however, being entitled to insist that the lands devised to any of the sons who abandoned the farm should be sold and the produce applied in payment of lands devised to those who remained, and that any surplus of the produce not required for maintenance, and to pay off purchase moneys, was divisible between *James* and his mother in equal moieties:

Held, also, that the legacies to the daughters were payable out of the *corpus* of the estate devised to *James*.

Statement.

The bill in this cause was filed by *Irvine Clark*, *Robert Clark*; and *John Clark* and *Richard Simpson Clark*, infants by their next friend, against *James Clark* and *Jane Clark*, setting forth that *John Clark*, deceased, by his will, dated 11th March, 1863, devised as follows:—"First, I give and devise to my wife, *Jane Clark*, and my son *James Clark*, jointly, and his heirs, all that certain parcel or tract of land situate, lying and being in the Township of St. Vincent * * better known and described as follows, namely: the west half of number one in the fifth concession of the Township of St. Vincent aforesaid, together with all the hereditaments and appurtenances thereto belonging, or in any way appertaining. My wife *Jane Clark* to have and to hold the aforesaid premises, as long as she remains my widow, for my wife's, *Jane Clark's*, support, and my small children's support, to be received and accepted by her in lieu of dower; and after her death, my wife's part will belong to my son *James Clark* aforesaid; to have and to hold the premises above described to the said *James Clark* and his heirs forever. My son *James Clark*, aforesaid, on the event of his mother's death during the minority of his brother and sisters, is to be their guardian until they become of the age of twenty-one years.

Second, I will and devise my son *James Clark*, aforesaid, will pay to my daughters *Eliza Ann Clark*, *Sarah*

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Jane, *Mary Ellen*, and *Martha Maria Clark*, the sum of two hundred dollars to each when they become of the age of twenty-one years; that is each as she becomes of the age of twenty-one years. My son *James Clark* is to pay the sum above named to each of my daughters aforesaid, because I have given him a more valuable property than any of my children.

Third, I give and devise to my sons *Irvine* and *Robert Clark*, and their heirs, all that certain parcel or tract of land situate, lying and being in the Township of St. Vincent, in the County of Grey, of the Province of Canada, aforesaid, which may be better known and described as follows, namely: the east half of lot number one, in the sixth concession of the Township of St. Vincent, one hundred acres of land be the same more or less; my son *Irvine Clark* is to have the east half of the aforesaid lot of land, and my son *Robert Clark* is to have the west half of the said lot, each fifty acres of land, be the same more or less, together with all the hereditaments and appurtenances thereto belonging, or in any wise appertaining, to have and to hold the premises above described to the said *Irvine* and *Robert Clark* and their heirs forever.

Statement.

Fourth, I give and devise to my sons *John* and *Richard Thompson Clark*, and their heirs, all that certain parcel or tract of land, situate, lying and being in the Township of St. Vincent, in the County of Grey, of the Province of Canada aforesaid, which may be better known and described as follows, namely: the east half of lot number one, in the seventh concession of the Township of St. Vincent, one hundred acres of land, be the same more or less. My son *John Clark* is to have the east half of the lot, and my son *Richard Thompson Clark* is to have the west half of the aforesaid lot, each fifty acres of land, be the same more or less, together with all the hereditaments and appurtenances; to have and

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to hold the premises above described to the said *John* and *Richard Thompson Clark* and their heirs forever.

Fifth, I give and devise to my daughter Mrs. *Margaret Anderson*, one cow, to be given by my executors hereinafter named, when the debt contracted to pay on the land already purchased is paid.

Sixth, I will and devise that my sons *James*, *Irvine*, *Robert*, *John*, and *Richard Thompson Clark*, are to work on the old farm, and work together, and the proceeds of their work, except what is necessary for the maintenance of the family, that is for board and clothing, is to pay for the land already purchased as aforesaid, until the whole debt contracted is liquidated; and, if any of my sons aforesaid, does not conform to this proviso in this my last will and testament, then the property or land I have given and devised to him or them, shall be sold by my executors hereinafter named, and the proceeds of the sale aforesaid shall be paid upon the land I have willed to those of my sons who fulfils this last proviso in this my last will and testament; and lastly, I do appoint and nominate *Robert Clark* and *Robert Mitchell* my executors of this my last will and testament, hereby revoking all former wills by me made."

Statement.

The bill further stated that the executors named by the testator had renounced probate, and letters of administration with the will annexed had been granted to the defendants; that the testator at his death was possessed of considerable personal estate, which was situate on the west half of number one, in the fifth concession called the old farm, which the defendants as administrators had taken possession of, who with the plaintiffs continued to reside on the old farm, as in the life of the testator; and that balances of the purchase money were at the time of the testator's death due upon the said lands respectively devised, with the exception of which the debts

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of the testator were inconsiderable, but the plaintiffs were unable to state whether or not they had been paid; —that the plaintiffs had assisted to work the old farm, according to the directions of the will, during which time crops had been raised thereon, the profits and proceeds of which ha' amounted to a large sum; that the defendants, until two years ago, had paid thereout the annual instalments, payable upon the premises respectively devised to the plaintiffs, but the defendant *James Clark* had refused to account for the profits and proceeds of such crops for the said two years; and arrears of principal and interest were due in respect of said premises, and plaintiffs were apprehensive that proceedings would be instituted to enforce payment thereof; that the defendant *James Clark* had appropriated to his own use the whole or nearly the whole of such profits and proceeds of the year before last, and also part of those of last year, and though frequently requested, refused to account therefor; and had by violence and threats endeavoured to prevent the plaintiffs from remaining upon or working the said farm, and had expressed his intention of neither working the same himself nor allowing the plaintiffs to do so; that he had advertised the remainder of the last year's crops, as also the remaining portion of the farming stock for sale by public auction, although such sale was in no way necessary for the administration of the estate, and that he intended immediately after such sale, to leave this province, and proceed to and remain in some part of the United States of America.

Statement.

The bill prayed an administration of the estate by the court; that the defendants might be ordered to account for the personal estate and the proceeds and profits of the old farm; an injunction restraining *James Clark* from selling the personal estate and crops, and for a receiver of the personal estate.

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The defendant *James Clark*, answered the bill, setting forth amongst other facts, that the plaintiffs other than *Richard Thompson Clark* had not remained on the farm and worked the same; that on several occasions he had endeavoured to sell portions of the personal estate and effects of the testator, but had been thwarted in his endeavours so to do by the defendant *Jane Clark*, who denied his authority to effect such sales; denied his intention to leave the province, and prayed the direction of the court as to the proper mode of dealing with such personal estate.

The defendant *Jane Clark*, alleging that her co-defendant had threatened to expel her from the old farm, gave notice of motion for an injunction to restrain him from doing so, and for an order directing him to pay the proceeds of the grain and other crops into court. On the motion coming on

Mr. *Moss* appeared in support of the application.

Mr. *S. Blake*, contra.

The parties asked that in disposing of the application the court would put a construction on the will of the testator. The defendant *James Clark*, by his counsel, undertook not to exclude any of the parties entitled from possession.

January 18. STRONG, V. C.—I am of opinion that, under the will of *John Clark*, the testator in this case, his son *James* takes a fee in an undivided moiety of the west half of Lot No. 1, in the 5th con. of St. Vincent, (called by the testator the old farm), and that the widow takes an estate for life *durante viduitate*, in the other moiety, with remainder to *James* in fee. That this farm is in the first place charged with the maintenance of the family, *i. e.*, of the testator's wife, of *James* himself,

Judgment.

and of such of the other children as continue to live on it; and that, secondly, it is charged with the payment of the purchase money payable on the land devised to the sons who remain on the farm and assist in working it: but, in exoneration of this last charge, *James* has a right to insist that the lands devised to any of the sons, who abandon the farm, shall be sold and the produce of the sale applied to pay off purchase money, due on lands devised to those sons who remain. Both these charges are on the annual profits and not on the *corpus*. Any surplus of the produce not required to keep down maintenance and pay off purchase moneys is divisible between *James* and the widow in equal moieties. The estates devised to *James* are charged with legacies of $200 each, to his four unmarried sisters. These legacies are payable on the legatees attaining 21, and are charged on the *corpus*. As to the personalty, with the exception of a legacy of a cow to his daughter, Mrs. *Anderson*, the testator seems to have died intestate.

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Clark v. Clark.

Judgment.

ABELL v. MCPHERSON.

Patent for invention—Novelty.

The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement: but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to threshing machines,—it was *held*, that the novelty was not sufficient under the statute to sustain the patent.

Hearing at Toronto Autumn Sittings, 1869.

The plaintiff in this [illegible] complained that the defendants had infringed a patent obtained by the plaintiff on

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the 6th April, 1859, for an improved gearing, which he claimed to have invented, for driving the cylinders of threshing machines. The defendants disputed the novelty of the plaintiff's alleged invention.

Mr. *Blake*, Q. C., and Mr. *James McLennan*, for the plaintiff.

Mr. *Strong*, Q. C., Mr. *Crooks*, Q. C., and Mr. *Hodgins*, for the defendants.

The principal cases cited are referred to in the judgment.

January 26.

MOWAT, V. C.—The plaintiff's improvement is thus described in the specification annexed to his patent: "Letter 'A' in the drawing is a new construction or gearing for driving the cylinder of the threshing machine, being different from all other gearing in use at present; having two wheels in one; or, by turning the hob of the spur plate wheel of the machine, the bevel wheel pinion may be keyed on—at the option of the manufacturer. The great advantage in this gearing—it assists the spur gearing to drive the cylinder. In the old method, the bevel wheels drove the cylinder, and the end of the cylinder was always cutting the bevel wheels and causing great and unnecessary expense thereby. Another advantage is, it has a cast iron frame with composition boxes, and bevel wheels where the slowest speed is, thereby giving greater durability to this portion of the gearing."

Judgment.

The evidence of prior user is contradictory, but I assume, as the fair result of the whole evidence, that gearing corresponding in all respects to the plaintiff's had not previously been applied to the purpose of driving the cylinder of threshing machines. It appears also, that the public demand for threshing machines with this

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gearing is increasing, and that the improvement which the plaintiff has adopted is valuable both to the manufacturer and to those who purchase and use such machines. But these considerations do not dispose of the case. A man who invents something useful which without his knowledge had been invented by another previously, and is already in limited use, may have all the merit of an original inventor of an entirely new thing; but the patent law does not protect him. The previous invention may have failed to receive much public attention, and the new inventor may, by his energy, have brought the invention into general use, to the great advantage of the community; but, however great the moral claim may be which these circumstances create, the statute does not give him a right to the exclusive use of his invention.

Judgment.

So, if his invention had never before been applied to the same class of machines, but had been applied to other machines, the cases establish that he can claim no property in the new application which he was the first to think of or adopt. On this last point I refer to *Boulton* v. *Bull* (*a*), *Brunton* v. *Hawkes* (*b*), *Lush* v. *Hague* (*c*), *Bush* v. *Cox* (*d*), *Brook* v. *Aston* (*e*), *Harwood* v. *Great Northern Railway Co.* (*f*) *Kay* v. *Marshall* (*g*), *Jordan* v. *Moore* (*h*), and other cases. If these principles are not sufficiently liberal towards ingenious inventors, it is for Parliament to alter them.

Now, the plaintiff claims in his specification that his use of spur wheels for driving the cylinder was better than the old method of using bevil wheels for that purpose; but it has been proved that spur wheels were employed in the same way in the Buffalo threshing

(*a*) 2 H. Bl. 487.
(*b*) 4 B. & Al. 540.
(*c*) 1 Webster's Pat. Cases, 207.
(*d*) 9 Exch. 651.
(*e*) 8 El. & Bl. 478, 32 L. T. 341.
(*f*) 11 H. L. 654.
(*g*) 8 C. & Fin. 245.
(*h*) L. R. 1 C. P. 624.

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machine and in machines of other kinds which were in use before the plaintiff's invention. The plaintiff also attaches importance to the juxta-position of his bevel wheel pinion and spur plate wheel, as an improvement on the plan of there being a shaft between the two, his plan making the gearing more compact, less expensive, and less liable to injury; and it appears that this construction has been shewn by experience not to be attended with any counterbalancing disadvantages, in the case of threshing machines. I assume that the plan had not been adopted in the case of any other threshing machines before the plaintiff's; but it is proved to have been no novelty, as applied to various machines other than threshing machines. Looking at the plaintiff's gearing as a whole, it is proved that, though it may not before have been applied as a whole to threshing machines, it had been used in this country in carding and other machines; and for raising iron shutters and door fronts; and that it had been shewn and described in a book entitled "Cyclopædia of Useful Arts," edited by *Charles Tomlinson*, published in England, and known in this country. It is thus an old and well known contrivance applied to an analogous purpose, and the settled rule is that such an application cannot be patented.

Judgment.

I must hold, therefore, that the plaintiff's invention is not protected by the patent law; and that his bill must be dismissed with costs.

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THE TOWN OF DUNDAS v. THE DESJARDINS CANAL CO.

Incorporated company—Charge on the property—Injunction to restrain sale of canal.

An incorporated company having executed a bond which, though it contained no direct words of charge, was evidently intended to give a lien on the property of the company, it was *held* that the lien was sufficiently created.

Injunction granted, at the suit of the creditors of a canal company who had a lien on the canal, against a sale thereof under a subsequent execution.

Examination of witnesses at the Autumn Sittings at Hamilton, 1869.

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

Mr. *Miles O'Reilly*, Q. C., for *The Attorney General.*

Mr. *Hoskin*, for the *Desjardins Canal Company*, submitted to a decree as prayed.

The bill was *pro confesso* against the defendant *E. C. Thomas* (sheriff.)

MOWAT, V. C.—This is a suit by the *Town of Dundas*, creditors of the *Desjardins Canal Company*, to restrain a sale of the canal under an execution which is in the sheriff's hands against the goods and lands of the company in favor of the crown, and to obtain a declaration of the plaintiffs rights, and a Receiver. No objection was suggested as to the jurisdiction of the court to grant the relief prayed (*a*). The plaintiffs claim to have a lien on the canal in priority to the execution. January 26. Judgment.

Previously to 1846, various statutes had been passed (*b*) authorizing the government to advance money to

(*a*) See 28 Vic. ch. 17, sec. 2.

(*b*) See 7 G. IV. ch. 18; 2 W. IV. ch. 24; 5 W. IV. ch. 34; 7 W. IV. ch. 65.

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the company, by way of loan, to enable them to complete the canal. The pleadings contain no allegations as to these advances, and raise no issues with respect to them. In 1846, an act was passed (*a*) authorizing the company to borrow £25,000; and providing, that, to secure re-payment of the same and interest, the company might make and execute to the lenders "any bond or bonds, mortgage or mortgages, on the said canal, and the tolls thereon and other property of the company;" and that all "such bonds or mortgages * * shall take precedence and have priority of lien on the said canal, and the tolls thereon, and other property of the said company, over all claims arising from loans heretofore granted to the said company out of the public funds of this province, or of that portion of this province formerly Upper Canada." Before any loan had been effected under this act, another act was passed (*b*), by which the Town of Dundas was authorized to become sureties to the Great Western Railway Company for £15,000, for work which, the act states, was then in progress by that company under an agreement with the canal company. In pursuance of this act, the plaintiffs, on the 31st December, 1852, by deed of that date, became security for £13,000, payable 1st January, 1854. Of this sum the plaintiffs afterwards paid £10,000 raised under the authority of a subsequent statute (*c*); and thereupon the canal company executed a bond, bearing date 5th March, 1860, under which the plaintiffs claim their lien. This bond recites the provisions of the act 9 Vic. ch. 85, giving the canal company power to borrow and to execute bonds or mortgages on the canal to secure the money borrowed, and declaring the same to have precedence and priority of lien on the canal, and the tolls thereon, and other property of the company, over all claims arising from the loans theretofore made to the company by the govern-

Judgment.

(*a*) 9 Vic. ch. 85. (*b*) 16 Vic. ch. 54.
(*c*) 18 Vic. ch. 150.

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ment; it further recites that the company "did under and in pursuance of the powers and provisions of the said recited act borrow from" the plaintiffs £10,000, for which the plaintiffs were "entitled to such security therefor as is mentioned in the said recited act;" that the plaintiffs were "desirous of more fully securing the re-payment of the said loan, and taking security therefor under the powers and provisions of the said recited act, and of taking precedence and having priority of lien on the said canal, and the tolls thereon, and other property of the said *Desjardins Canal Company*, over all claims arising from certain other loans mentioned in the said act; and the condition of the bond declares, that the same is to be void if the company shall repay to the plaintiffs the "sum of £10,000 so lent and advanced as aforesaid," and also shall "do no act, matter, or thing, which may in any wise prevent or interfere with the said corporation taking precedence and having priority of lien on the said canal, and the tolls thereon, and the other property of the said company over all claims as aforesaid, in respect of" the £10,000. Since this bond was executed, the plaintiffs have paid further sums to the railway company under their guarantee. The canal company was subsequently indicted for a nuisance, and sentenced by the Court of Queen's Bench to pay a fine of $8000. A writ of execution for that amount against the goods and lands of the company, has been placed in the hands of the sheriff, and the sheriff has seized the canal, and has advertised the same to be sold under the execution. I understand that the company has no property except the canal. The Attorney General, by his answer, does "not admit that the plaintiffs have a lien on the said company's lands and tenements as in said bill is claimed," and claims "such rights and interests in the premises for and on behalf of Her Majesty as this honourable court shall be of opinion that Her Majesty is justly entitled to."

Judgment.

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Town of Dundas v. Desjardins Canal Co.

On an interlocutory application, Vice Chancellor *Spragge*, now Chancellor, granted an injunction to restrain a sale of the canal under the execution, holding that it was not saleable; and the only point argued before me was, whether the plaintiffs had a lien under the bond in their favor. That they have a lien as against the company, I have no doubt. The bond shews beyond a question that the object of both parties was to give to the plaintiffs a lien; and the rule in equity is, that no formal instrument is necessary for that purpose, and that any writing from which the intent appears, is sufficient (*a*). No question of priority of lien has been raised, except as between the plaintiffs' debt and the execution.

The decree, therefore, will continue the injunction. It will declare, that the plaintiffs have a lien on the canal and tolls for the money secured by the bond of 5th March, 1860, and that such lien has priority to the execution. (The bill prays, that the plaintiffs may be declared to have a lien for the money which after that date was paid by the plaintiffs on their guarantee, and which was not secured by the bond; but I see no ground for such a declaration.) An account will be taken, if the parties desire, of the liens and incumbrances on the property which are subsequent to the plaintiffs', and of their respective priorities. An account will be taken of what is due to the plaintiffs in respect of their lien. A Receiver will be appointed of the tolls, &c., and revenues of the company; and, after deducting therefrom the costs, charges, and expenses of carrying on the business of the canal, the balances are to be paid into court at stated periods to be specified in the decree (*b*). For the

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(*a*) See the cases, Fisher on Mortgages, 2 ed. secs. 40 to 67, pp. 29 to 48.

(*b*) See Fripp v. The Chard Railway, 11 Hare, 265; Lord Crewe v. Edleston, 1 DeG. & J. 93; Seton on Decrees, 3rd ed. 1034; Kerr on Receivers, 47; Redfield on Railways, 2nd ed. 591, &c.

powers of the Receiver in such a case, I refer the parties to *Potts* v. *Warwick and Birmingham Canal Company* (*a*), and *Ames* v. *Trustees of Birkenhead Docks* (*b*). The costs of the plaintiffs and of other incumbrancers will be added to their debts.

THE TOWN OF DUNDAS v. THE HAMILTON AND MILTON ROAD COMPANY.

Intersection of canal and road—Mutual rights.

An Act of Parliament having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge over and across the canal; and the bridge having, after being erected, become unsafe through the default of the canal company, an incorporated road company which had acquired the road, was held to be entitled to build a bridge across the cut, though the navigation was thereby impeded; but that, on the restoration of the canal company's bridge, their right to the free navigation of the channel revived, and was enforcible in equity by mortgagees of the canal company, subject to such terms as justice to the road company required.

Examination of witnesses and hearing at Hamilton at the Autumn Sittings of 1869.

Mr. *Strong*, Q. C., and Mr. *Hoskin* for the plaintiffs and the *Desjardins Canal Company*.

Mr. *Miles O'Reilly*, Q. C., for *The Attorney General*.

Mr. *S. Blake*, for the defendants *The Road Company*.

Mr. *Bruce*, for the defendants *The City of Hamilton*.

(*a*) Kay 148. (*b*) 20 Beav. at 350.

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January 26.

MOWAT, V. C.—This is a bill (filed 14th September, 1869) to restrain *The Hamilton and Milton Road Company* from proceeding with the erection of a permanent bridge which some time before the filing of the bill they had commenced to build across the Desjardins Canal at Burlington Heights: and from doing any other act which would impede the navigation of the canal. The plaintiffs claim by their bill to be interested in the canal as equitable mortgagees; and I have held in another suit that that claim is well founded (*a*). It is on the sole ground of that interest or charge, that the bill rests the plaintiffs' right to maintain the suit; but at the hearing, counsel for the plaintiffs contended, that the plaintiffs had another and independent right to relief, by reason that the business of the town depended largely on the canal being kept open to masted vessels. But I have failed to find any authority which would warrant my holding, under any provision which the statutes in question contain, that an interest of that kind, if stated, would have enabled the plaintiffs to maintain the bill. If there is such authority it might be material to refer to it, as the terms on which alone relief could be granted to the canal company, or can be granted to the plaintiffs as mere mortgagees of the Canal Company, may be very different from those to which the plaintiffs, claiming independently of the Canal Company, could be called upon to submit. In the absence of such authority, I must hold the plaintiffs to be entitled to no more favorable terms as between them and the Road Company, than the Canal Company would be.

Judgment.

The state of things which has given rise to the suit took place under the statute 16 Vic. ch. 54, sec. 5, which provided that it should "be lawful for the said *Desjardins Canal Company*, or the Great Western Railway Company to permanently close, shut and fill up

(*a*) Town of Dundas v. Desjardins Canal Company, *ante* p. 27.

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the channel or course of the canal at its eastern extremity, and at the place where the line of the Great Western Railroad crosses or intersects the said channel or course of the said canal; and to erect, keep and maintain a safe and commodious bridge over and across the opening or cut through the said Burlington Heights, for all her Majesty's liege subjects, their horses and carriages, free of toll, at all times thereupon, and thereby to pass and repass." The power given by this statute to close the old channel was acted upon; a cut was made in lieu through Burlington Heights; and, under arrangements between the two Companies and the plaintiffs, a bridge was built over this new cut. Subsequently there were differences between the Canal Company and the Great Western Railway Company as to which of them was bound to repair and renew this bridge when necessary; and it was ultimately decided that the obligation lay with the Canal Company. The Canal Company, however, had not the means or credit necessary for performing the obligation; in 1866 an indictment for the non-repair was laid against them; the grand jury found a true bill; a trial took place in October, 1867; and the verdict was against the Canal Company. In July, 1868, the bridge being still unrepaired, the Court of Queen's Bench imposed on the defendants a fine of $8000, and on the 4th March, 1869, execution therefor was issued against the Company. The money has not been realised.

Judgment.

There was a public highway across the heights at and long before the incorporation of the Canal Company. The defendants, the Road Company, were incorporated many years ago under the statute then in force for the incorporation of road companies, and this road then passed into their hands. It continued to be a travelled road up to the time of the making of the new cut, which interrupted the road, and rendered a bridge over it necessary. The bridge erected was a fixed bridge high enough to

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allow masted vessels to pass under it, and has been used ever since. When it got out of repair, the Road Company were anxious to get it repaired, as its condition, they believed, was deterring many from using their road, and was thereby diminishing their tolls. Negotiations for the repair of the bridge in consequence took place with the representatives of the Canal Company and of the Town. The negotiations failing, the defendants some time before the 21st May, 1869, commenced the erection of a new fixed bridge too low for masted vessels to pass under it, such a bridge being less costly than the renewal of the old bridge, or than the erection of a new bridge of the same height. The Road Company justify their erection of this bridge on the ground that, by the effect of the statute, the right to keep open the cut was conditional on the Canal Company's maintaining a safe and commodious bridge over the cut; and that, when they ceased to do so, the cut became a nuisance, which any of her Majesty's subjects had a right to abate by the erection over it of a fixed bridge, or in any other way. The case of the *Queen* v. *The Inhabitants of Ely* (*a*), cited in *The Queen* v. *The Desjardins Canal Company* (*b*), was referred to in support of the defendants' contention. That case was similar to the present; and it was there laid down by the court, "that the condition which was necessary to legalise the first cutting of the drain was and is a continuing one; the instant it is broken, the indefeasible rights of the public revive, and the cut becomes a nuisance." That observation was not necessary for the decision of the case, but I cannot say that it is not a sound exposition of the law, or that it is inapplicable to the statute now in question (*c*). If applicable, it follows that the Road Company were but exercising a strict legal right when, after the long delay of the Canal Company to

Judgment.

(*a*) 15 Q. B. 827, and see cases there referred to.
(*b*) 27 U. C. Q. B. at 379.
(*c*) 16 Vic. ch. 54, sec. 5.

repair their bridge, the Road Company set about erecting a bridge of their own, and making the necessary approaches to it. The plaintiffs gave evidence of a conditional bargain with the Great Western Railway Company, that that company would pay a certain sum towards the cost of a fixed bridge and of the approaches thereto, if Parliament should pass an Act making such bridge permanent. The existence of that agreement does not affect the Road Company's rights as respects the plaintiffs.

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It was contended for the Road Company that, the default of the Canal Company having made the cut a nuisance, no subsequent act of the Canal Company, or of the plaintiffs as their mortgagees, could restore the right to keep the cut open. I do not concur in that view. The Act incorporating the Canal Company states as the reason for passing it the "public benefits" expected from the undertaking, and shews that the act was passed, "in order that those benefits may be more generally extended to the surrounding country." It is impossible to suppose that Parliament contemplated that the circumstance of a bridge once becoming insecure or insufficient should *ipso facto* put an end for ever to the right of the company or their creditors to keep the canal open. A suspension of the right may be necessary in the interest of Her Majesty's subjects who use the road; but a suspension only, and not a forfeiture for ever, is needed for that purpose; and the object of the Legislature will manifestly be served by holding that, on repairing or restoring the bridge, the rights of the Company revive, subject to any equities which others may have acquired meantime. I do not think that the delay which has occurred in repairing the bridge is sufficient, under all the circumstances, to prevent the plaintiffs, as mortgagees, from maintaining the present suit.

Judgment.

The question then is, as to the terms which the Road

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Company is entitled to demand as the condition of relief against the . I have already intimated that the terms must be in substance the same as if the bill had been by the Canal Company. The obligations of the Canal Company to the plaintiffs are matters between themselves, with which the Road Company has nothing to do, and which do not lessen the Road Company's rights. Looking only at the mutual rights of the plaintiffs and the Canal Company, it may be hard that the plaintiffs should have to submit to these terms; but, since they appear to have no right to file the bill, and do not by the bill claim any right, except as mortgagees of the Canal Company, the court can only give them relief on the same terms with respect to other parties as would have been imposed on their mortgagors.

Judgment.

The Road Company claim, as one condition of relief, that there should be made good to them the loss they have sustained by the non-repair of the old bridge; and the claim, as between them and the Canal Company, is reasonable. The evidence is contradictory as to whether there has been any loss from that cause. By many persons the bridge had never ceased to be used as before; loaded teams had continued to go over in large numbers without accident, before the plaintiffs repaired the bridge; and many persons appear all along to have considered the bridge perfectly secure. But the bridge was not in fact secure; and some persons were in consequence deterred from making as much use of it, and of the defendants' road, as previously. The diminution of travel last year was not wholly owing to that cause; but, so far as it was, the loss should be made good to the defendants. I shall direct a reference to the Master to ascertain the amount, if the defendants think it worth their while to have such a reference.

I think that the plaintiffs may be allowed to substitute a "secure, sufficient, and commodious" draw or swing

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bridge for the fixed bridge which the Road Company has erected, the plaintiffs paying the cost of the change. The estimated cost should be paid beforehand into court, or otherwise secured by the plaintiffs, if the work involves the preliminary removal of the defendant's bridge; and the new bridge should be built (if the parties agree to this) under the direction and subject to the approval of Mr. *Shanly*, or of some other civil engineer mutually chosen. Provision must also be made for attending to the opening and closing of the bridge, and for its being kept in repair, at the plaintiffs' expense. Mr. *Shanly* might report as to these; or there may be a reference for the purpose to the Master. There must also be an inquiry whether, having reference to the comparative advantages of the two roads, and to the late repair and present usefulness of the old bridge, any and what further compensation should be made to the Road Company for their expenditure on the new road and bridge. On making the necessary payments, and complying with the terms of the decree generally, the plaintiffs will be entitled to the removal of the bridge. Otherwise the bill must be dismissed.

Judgment.

I am not able to see my way to relieving the plaintiffs on less stringent terms than these. On the 22nd June, 1869, nearly three months before the filing of the bill, the Road Company entered into an agreement with the City of Hamilton, under the seals of both corporations, for the making of the new road and bridge; and I cannot say that the parties had not a right to enter into that agreement, or that the agreement was not entered into in good faith. But if the case were relieved from any difficulty on that account, I do not see that I could help the plaintiffs except on terms of their either substituting a new bridge for the fixed bridge built by the Road Company, or building a new bridge in place of the old one which they have repaired. Mr. *Shanly*, whom the

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plaintiffs called as a witness, said that the old bridge, with all the repairs then in progress (and since completed), will last for two years only, and that a new bridge to replace it should be begun at once so as to be ready in time for public use. Such a bridge, I presume from the evidence, would be far more costly than a new bridge in place of the fixed bridge built by the Road Company.

The costs of all parties will be payable by the plaintiffs.

McGregor v. Rapelje.

Marriage settlement—Collateral relations—Deed, sons to father.

A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage:

Held, that the provision could not be defeated by a sale for value by the settlor.

A father having obtained a conveyance of the interest of his sons under a marriage settlement, for an alleged consideration, which did not exceed one-fifth of the value of such interest, and which was never paid, the transaction was set aside after the death of the settlor and one of the sons, in a suit by the devisees of the deceased son.

Hearing at Hamilton, Autumn Sittings, 1869.

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

Mr. *Proudfoot*, for the surviving trustee of the marriage settlement.

Mr. *Strong*, Q.C., and Mr. *Atkinson*, for the other defendants.

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McGregor v. Rapelje.

January 26.

MOWAT, V. C.—The plaintiffs in this suit are the executors and devisees of *Duncan McGregor* the younger. The defendants are *Peter Wyckoff Rapelje* (the surviving trustee of a settlement executed by *Duncan McGregor* the elder on his marriage with *Helen Rapelje*, since deceased), *Abraham Rapelje McGregor*, *Charles J. S. Askin*, and *Francis W. Sandys*. The last named three defendants are executors of the will of *Duncan McGregor* the elder. It is stated in the bill that all the testator's real and personal estate is devised and bequeathed to them by the will. I do not find the will or a copy of it among the papers which have been left with me; *Abraham Rapelje McGregor* says in his answer, that all the testator's property was thereby given to him, subject to certain legacies and to the testator's debts. Either way, the testator's estate is sufficiently represented; and no question turns on the exact terms of the will.

Judgment.

At the time of his second marriage, *Duncan McGregor* the elder had three sons by his first marriage. Of these, the first died soon afterwards, intestate and without issue; the other two were *Duncan*, whom the plaintiffs represent, and *Abraham R. McGregor*, the defendant. Their ages appear to have been 10 and 12 respectively. The settlement made in contemplation of this marriage bears date 8th January, 1846; and thereby, in consideration of the marriage shortly to be solemnized between the said *Duncan McGregor* and *Helen Rapelje*, the said *Duncan McGregor* conveyed to *Abraham A. Rapelje*, since deceased, and the defendant *Peter Wyckoff Rapelje*, and their heirs, certain lands in Raleigh and Harwich, to have and to hold the same to them, their heirs and assigns; to the use of the said *Duncan McGregor* the elder until the solemnization of the marriage; and after the solemnization thereof, to the use of the said *Abraham A. Rapelje* and *Peter Wyckoff Rapelje*, and their heirs, in trust for the said *Helen Rapelje*, to the intent

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and purpose that she might have, receive, and take the rents, issues, and profits of the same, or might use, occupy, and enjoy the same for the term of her natural life, as and for a provision for herself, and as well the children of the said *Duncan McGregor* then living, as any children that should be born of the said intended marriage,—without impeachment of waste; such life estate to be in lieu of all dower; and from and after the decease of the said *Helen Rapelje*, in trust for the said children, then living or thereafter to be born, and their heirs and assigns, share and share alike, as tenants in common, and not as joint tenants. The trustees had power to sell, and were to invest the proceeds for the benefit of the same parties.

Judgment.

The intended marriage took place. The lands in Harwich being subject to incumbrances, the land in Raleigh was afterwards sold to pay these; and part of the Harwich land was sold to the Great Western Railway Company by *Duncan McGregor* the elder, acting under a power of attorney from the trustees. None of these sales is impeached. The settlor received the Company's purchase money, $3,000, in 1857 or 1858. On the 2nd November, 1861, Mrs. *McGregor* died. The trustees having been unable to get the settlor to pay over to them the money which he had received from the Great Western Railway Company, a suit was instituted in this court by the defendant *Peter W. Rapelje*, on the 16th November, 1861, to compel the payment. On the 13th December following, *Helen*, the only issue of the second marriage, died; and *Abraham* and *Duncan*, the surviving children of the former marriage, thereupon became entitled to the whole settled estate in possession. Three days after the death of *Helen* the daughter, viz., on 16th December, *Abraham* and *Duncan*, at the request of their father, executed a deed conveying to the father all their interest in the settled estate and funds, for the

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expressed consideration of $3,000. The father thereupon set up this release in answer to the bill which the trustee had filed against him; and the trustee abandoned the suit. The plaintiffs ask no relief against him. *Duncan* was at this time living with his father, as he had done for most of his life; and, except for a few months, he continued to reside with his father until he died. Both the father and son appear to have died in 1864. The bill is for the execution of the trusts of the marriage settlement, and for the payment of the money received by the settlor for the land sold to the Great Western Railway Company.

The question in the cause is, as to the validity of the release from the sons to the father. Courts of equity view with great jealousy transactions between a father and son, by which the father derives an advantage at the son's expense before the son has been emancipated from his father's influence; but it was argued on behalf of the defendants, that the settlement which the father had executed was voluntary as respects the sons of the former marriage; that the father might at any moment have defeated their interest by a sale for value; and that the validity of a release or transfer by the sons to him, therefore, did not depend on the principles applicable to the ordinary case of a gift or sale by a son to his father of an estate to which the son has an indefeasible right. The only case cited at the hearing was *Newstead* v. *Searles* (*a*). It was said for the defendants that that case was not in accordance with the modern doctrine on the subject. There, a widow, having children, and being about to marry again, executed, jointly with her intended husband, a settlement of her property, which provided for her existing issue, as well as for the issue, if any, of the contemplated marriage; and Lord *Hardwicke* held that the limitations in favour of

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(*a*) 1 Atk. 265.

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her existing issue were good as against a purchaser. In *Clayton* v. *The Earl of Winton* (*a*), the settlor was the husband, and a limitation to his issue by any subsequent marriage was held not to be voluntary. In the late case of *Dickinson* v. *Wright* (*b*) these cases were recognized as correct, both by the Court of Exchequer and afterwards in the Exchequer Chamber (*c*). The well settled rule is, that a settlement, so far as it is voluntary and without consideration, is void against a subsequent purchaser for value. Provisions for the benefit of children by another marriage may be introduced voluntarily by their parent, and not at the instance of the other party to the intended marriage, so that, if such provisions are sustained against purchasers, that may seem an exception to the rule; and, as Lord *Cockburn* observed (*d*) of the two decisions which I have mentioned: "it may be that these decisions would not stand the test of a very strict analysis or rigorous logic; but it must be borne in mind that the rule on which this exception was engrafted, was itself the result of a forced and arbitrary construction of the statute. It is not to be wondered at that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment," said his Lordship, "to overrule the cases to which I have referred."

Judgment

I must hold, therefore, that the settlement in question was not voluntary as respects the interest which the sons of the former marriage took under the settlement; that that interest would not afterwards be defeated by a sale of the property by the settlor; and that the two sons, at the time of the execution of the deed to

(*a*) 3 Madd. 392.
(*b*) 5 H. & N. 401.
(*c*) Clark v. Dickinson, 6 H. & N. 849.
(*d*) Ib. p. 874.

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their father, were absolutely entitled to the immediate payment of the £750 which the father had received from the Great Western Railway Company; and to the immediate possession of 281 acres of land in Harwich. The lowest valuation of this property is £2,810. By the impeached deed the sons gave up all the money and land to their father for a nominal consideration of £750, or one-fifth, and perhaps much less than one-fifth, of what they were parting with. But the sum named, or any part of it, was never paid; and though the father seems to have executed a bond for the amount, bearing even date with the deed, yet he never communicated the fact to *Abraham*, nor (so far as appears) to *Duncan* either. There is no proof of any bargain for any amount with *Duncan*; or even that *Duncan* knew anything of the settlement, or of his rights under it. *Abraham* in his deposition says that before the execution of the release, he himself had never read the marriage settlement or heard that he had any interest under it; and he does not know that he was even aware of the fact of a settlement having been executed. It further appears from his deposition, that the deed came to him enclosed in a letter from his father, giving him no information as to the object or purpose of the deed, and containing no promise of any consideration for it, but merely requesting him to execute the deed and to return it by mail; that this was the first he had heard of the matter; that he signed the deed without further inquiry or information, and without even reading the deed; that he returned it to his father as requested; and that he did not hear of the matter again until after his father's death. (The Vice Chancellor's written judgment here referred to other evidence given at the hearing, and consisting in part of admissions by the father that the deeds were not purchases, but were given to him to defeat the Chancery suit, the sons having confidence in him that they would not be prejudiced thereby. The sheets containing this part of the judgment were mislaid.)

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In connection with all this is to be considered the general evidence, that the father was a man of strong will; that *Duncan* was easy going, and without business habits, or a business turn of mind; that he was living with his father at the time of executing the deed; that he had lived with his father most of his life, and been supported by him, his only employment being to assist, as much or as little as he chose, in working the farm on which they lived, which was the unsold settled property, and which the father was in possession of at the time of executing the deed, as he had been since the execution of the settlement; that the father had always been an indulgent parent; and that he and *Duncan* had lived on terms of much mutual affection. It is manifest that the evidence is wholly insufficient to sustain a deed executed under these circumstances by the son to the father, of all the son had, for no consideration, or for an alleged consideration, promised but never paid, which did not exceed one-fifth the value of the estate. The authorities which bear on the point are too well known to need quotation.

Judgment.

It appears that the deed was executed by *Duncan* in the presence of Mr. *Elliott*, the father's solicitor, and of Mr. *Henry Waters*, both of whom are dead. *Duncan* had no independent solicitor in the matter; and it is impossible for me to presume that if Mr. *Elliott* or Mr. *Waters* were alive they could give such evidence as would defeat the plaintiffs' case.

I must declare the deed of release void as against the plaintiffs; and I think that I should declare it void as against *Abraham*, the other son, also. Each will therefore be entitled to half the settled estate, including the money received from the Railway Company. The plaintiffs should have the costs of the suit out of the unsettled estate of the settlor; and if assets of that estate, sufficient to pay what may be

coming from the estate, including these costs, are not admitted by the executors, the decree may contain the usual directions for administering the estate. *Abraham* should pay the costs of his co-executors, if there is a deficiency of assets. The costs of the trustee, *Peter Wyckoff Rapelje*, will come out of the settled estate. The parties will agree, I presume, on the details of the decree in other respects.

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SLATER v. SLATER.

Dower, subject to the equitable interests of others.

Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion:

Held, that the widow of the grantee had no right to dower out of this portion during the life of the grantor; and an action by her therefor was restrained.

Hearing at Cobourg, Autumn Sittings, 1869.

Mr. *Blake*, Q. C., and Mr. *J. D. Armour*, Q. C., for the plaintiff, cited *Heney* v. *Lowe* (*a*).

Mr. *Spencer* and Mr. *Kerr*, for the defendants, referred to *Potts* v. *Meyers* (*b*), *Norton* v. *Smith* (*c*), *De Hoghton* v. *Murray* (*d*), *Banks* v. *Sutton* (*e*), *Higgins* v. *Shaw* (*f*), *Reynolds* v. *Reynolds* (*g*).

MOWAT, V. C.—On and prior to 16th March, 1866, the plaintiff was owner of certain farm lots described

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Judgment.

(*a*) 9 Gr. 265.
(*b*) 14 U. C. Q. B. 499.
(*c*) 7 U. C. L. J. 263.
(*d*) L. R. 1 Eq. 159.
(*e*) 2 P. W. 716.
(*f*) 2 Dr. & Warr. 356.
(*g*) 29 U. C. Q. B. 225.

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in the bill. On that day two instruments were executed; by one of them the plaintiff conveyed the land in question to his son *Stephen* in fee, the consideration therein expressed being, natural love and affection, a life-lease executed by *Stephen* to the plaintiff and his wife of the same premises, and one dollar. By the other instrument, amongst other things, the deed of conveyance was recited; and *Stephen* covenanted to maintain the plaintiff and his wife during their natural lives; to furnish and provide for them the house and premises in which they were then residing; and to allow them to use, occupy, and enjoy the said house and premises during the term of their natural lives, and the life of the survivor. This instrument is that to which the other refers as a life-lease. The son *Stephen* afterwards died intestate and without issue, leaving the plaintiff his heir-at-law, and the defendant his widow, to whom the deceased had been married some years before 1866.

Judgment.

The plaintiff claiming the property as heir-at-law, the defendant brought an action of dower in respect of it, including the house and premises of which the plaintiff and his wife were to have the use for their lives; and the plaintiff's bill is to restrain this action.

For the plaintiff it was contended, that *Stephen* took subject in equity to the agreement for the possession by the plaintiff and his wife, for life, of the house and premises they resided in; that the plaintiff had an equitable estate for life therein; and that the defendant could not claim dower in the house and premises during the continuance of this estate. For the defendant it was contended, that the covenant did not give any equitable estate in the land; and that the defendant having a legal right to dower, this court would not interfere with it. I have looked at the authorities which were cited on each side, and am clear that the defendant is not entitled to dower in equity out of these premises.

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It was contended that the defendant should be allowed to proceed with her action subject to her paying one-third of a fair rental to the plaintiff, he, as heir of *Stephen*, representing the other two-thirds; or, that the Sheriff should be left to assign dower in respect of these premises by setting apart a proportionably larger part of the residue of the lots which were conveyed to *Stephen*, and which have now gone to the plaintiff as his heir. But I am satisfied that neither contention is well founded; and that the plaintiff is entitled to an absolute injunction against any action for dower in respect of the premises referred to, during the lives of the plaintiff and his wife, and the life of the survivor of them. The plaintiff is entitled to the costs of the suit.

The Royal Canadian Bank v. Kerr.

Insolvency—Mortgage to creditor—Illegal preference.

A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed $50,000, to advance them $15,000 more; and, in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $80,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors:

Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency.

Examination of witnesses and hearing at Hamilton, Autumn Sittings, 1869.

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R. C. Bank v. Kerr.

The pleadings and evidence in this case shewed, that on and before the 10th of December, 1868, *Walter Richard Brown* and *William Cameron Chewett*, carried on business in Toronto as bankers, under the firm of *Brown & Co.* On that day they, with *Jane Selina*, wife of *Brown*, and the trustees of a post nuptial settlement which *Brown* had theretofore executed, joined in a mortgage of certain lands, and the validity of this mortgage under the insolvent law, was the question in the cause. The mortgage recited the settlement; which was dated 23rd March, 1865, and conveyed the first of the parcels described in the mortgage to the trustees for the benefit of Mrs. *Brown*. The consideration of the mortgage was recited as $65,000, owing to the plaintiffs in respect of moneys from time to time theretofore lent and advanced by the plaintiffs to *Brown & Co.* in the course of their business; and the condition declared, that the mortgage was to be void on payment of $65,000 with such lawful interest as might be agreed upon between the parties in the course of renewals thereinafter mentioned as follows: that is to say (regard being had to the proviso lastly thereinafter contained), as, and at the respective times when, the bills of exchange and promissory notes discounted by the plaintiffs for the said firm, or to which the said firm were parties, representing the said debt of $65,000, and then held by the plaintiffs, or any renewals of the same, or of any of them, or of any part thereof, which might at any time thereafter be taken by the plaintiffs, became respectively due and payable. The last proviso referred to in this condition is, that the plaintiffs should carry on and continue the whole of the said debt upon or by renewals of the promissory notes of *Brown & Co.* therefor, or for such part thereof as remained unpaid, for the period of one year from the 1st of January, 1869; and in case *Brown & Co.* should pay the sum of $25,000 on or before the first of January, 1870, the plaintiffs should then carry on and continue the balance of the said debt in manner afore-

Judgment.

said, for the further term of one year from that date, and thereafter from time to time if both parties should agree, but not otherwise. 1870. R. C. Bank v. Kerr.

Brown & Co. became insolvent on the 25th of February, 1869, two months and a-half after executing this mortgage. The bill was filed against *John Kerr*, the assignee in insolvency, and the trustees of the marriage settlement; and it prayed that the plaintiffs might be paid the balance which might be found due to them after crediting what they might realize on their other securities, and that in default the mortgaged lands might be sold. That part of the mortgaged property which was not covered by the settlement was the private property of *Brown* at the time of giving the mortgage. *Kerr* by his answer alleged that the settlement was voluntary and fraudulent against *Brown's* creditors, and that the mortgage, as respected all the lands comprised therein, was an unlawful preference of the plaintiffs, and void as against the general creditors. Statement.

The mortgage was given at a time when *Brown & Co.* owed the plaintiffs about $50,000, and was given in consideration of the plaintiffs making a further advance of $15,000, these two sums constituting the debt of which the mortgage spoke. The evidence in the case was contradictory as to whether the proposal for security came first from the plaintiffs, or from the debtors. Mr. *Metcalfe*, the President of the bank, expressed the opinion that the proposal came from him, and that the mortgage was given in consequence of the pressure which, on behalf of the bank, and at the instance of the directors, he had put upon the debtors. The facts appeared from the testimony produced by the defendant to be, that *Brown & Co.* were in need of money at the time of the negotiation for the mortgage, and were anxious to obtain from the plaintiffs a further advance of $15,000, to enable the firm to carry on their business; that to

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induce the plaintiffs to make this advance, *Brown* offered to give a mortgage on the lands in question, to secure both the existing debt which his firm owed to the plaintiffs, and the further advance required; that he and *Chewett* had an interview with the President and Cashier of the bank; that in that interview the President declined to make the further advance; and pressed strongly for a mortgage to secure the existing debt; that *Brown* refused to give a mortgage unless the further advance were made; that the interview was in consequence a stormy one; that *Brown* left the bank in great anger; that *Chewett* continued the interview after *Brown* had gone; that *Chewett* at length induced the President to agree to make the further advance on condition of a mortgage being executed to secure both debts; that on this being communicated to *Brown*, he at first declined to carry out the proposal, but that after some days he withdrew his refusal; and that the mortgage was thereupon given and the further advance made.

Statement.

The settled property included in the mortgage was valued by *Brown* at $20,000, and there was no other evidence as to its value. The mortgage appeared to have covered all the other real estate which *Brown* had in Canada. The whole mortgaged property was said to have been valued by the plaintiffs at $30,000, and the defendant accepted this valuation as correct. The mortgage did not cover *Brown's* personal property, or any private property of *Chewett's*, or any property of the firm. The following extracts from *Brown's* evidence, which was taken and read on behalf of the defendant, give *Brown's* account of the position of the firm at the time of the mortgage being given, and of the way it came to be given:

"The firm of *Brown & Co.*, of which I was a member required more money in our business We had already received from the bank a large sum of money; and,

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requiring more, and as our chance of getting more from the bank by giving them this security would be more favorable, we offered them this security. The security was declined at first, I can hardly tell why. It seemed to be from feeling as much as any thing else. I cannot give the reason why. There seemed to be feeling on the part of Mr. *Metcalfe*, the President. I first suggested giving the security. It was suggested by me to the President and Cashier. I think it was between the 22nd and 25th November, 1868. * * I offered to give security to the bank to secure them for what I already owed them, and to get means to secure my position and property. I think the indebtedness must have been somewhere near $50,000 at the date of the mortgage. * * Our gross liabilities may have been from $80,000 to $100,000. This is as near an approximation as I can make. This includes all my joint or several debts. Our assets at same time were margins in other people's hands, that is to say, moneys deposited with bankers in New York to cover the rise and fall of our gold purchases,—the margins amounting to about $60,000; promissory notes falling due, and over due, and in suit; debts due by our customers in their accounts with us; current and uncurrent funds; gold, silver, copper and nickel coins as per cash book daily balanced. The books will shew correctly. I cannot state the amount. Besides this, I held property in my own right, consisting of real estate, horses, carriages, household furniture, in Canada, worth in cash $48,000, including my wife's property covered by that mortgage. Her property I valued at $20,000. I had property, real estase, in Maine, of the value of $2000. Had the bank (plaintiffs') kept us on our legs until May, 1869, (as they had partially committed themselves to do) the appreciation or advance in gold would have released the margins and enabled us to go on. The margins were sacrificed. This was the cause of the failure of the firm. At the time of offering the security to the bank, I explained our condition only as far as

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our gold transactions were concerned. I gave no explanation except relating to the gold. I said, unless we had more money in New York, we must lose our gold, and of course our standing as business men. I said this to Mr. *Metcalfe* and Mr. *Woodside*, the president and cashier. I told them that the $15,000 would, I expected, be sufficient. I based my expectation on the final appreciation, advance, in gold. The bank knew (I think) that our expectation of repaying them depended on the gold market. I think so. I think they knew it. * * I mean by position a frightful loss staring us in the face—embarrassment. The loss afterwards happened. I did not tell *Metcalfe* there was a frightful loss staring us in the face—I simply used the word "position." * * I consider we were not then insolvent, but merely in temporary difficulties. Mr. *Chewett* was then generally considered to have property independent of the business—I suppose he had

Statement.

* * At the interview, the further advance was refused, and I never personally renewed any negociation. The mortgage was not the result of the offer of security then made by me. If I had been willing to give the security then, the bank would have been very glad to take it; but, as they refused to give me any more money, I did not give the security. * * I did not communicate to the bank in November, at the conversation with Mr. *Metcalfe*, that we had, or had not, sufficient assets to pay all our liabilities in the event of our gold speculations resulting in loss. Our standing as business men was then good. At that time (November), my expectation was, that we would meet with no loss in our gold speculations—at least such was my hope. We expected to realise profits in our gold speculations. I gave no explanations to Mr. *Metcalfe* relative to our business matters except touching the gold. I told him I could get the money. I did not tell him that I could not get it except from the bank. I cannot state the exact words used in the conversation with Mr. *Metcalfe*; but the

substance was, that everything depended on our retaining the gold. I said that our available means were locked up in margins in gold, and it was absolutely necessary that we should have a further sum of money to preserve our position as business men. I used the words either "to preserve our position as business men," or that "our position would suffer." Being asked here whether he informed Mr. *Metcalfe* that they required the $15,000 for their Toronto business or for their gold speculations in New York, the witness answered "I certainly did not tell him it was for speculations in New York. I told him it was required for our business. * * Our business was crippled, as far as our Toronto business itself was concerned; I cannot say it suffered, except because funds were drawn from it for New York. I refer to the time of the period of the proposition as to security, November, 1868. Our affairs were the same at the 10th December, 1868, as in the month previous (November). They grew worse up to the time of the assignment. * * I did not make the mortgage to the bank with any idea or intention of defrauding our creditors, but with the view of preserving them. By preserving our creditors, I mean continuing our business and holding on to our gold, which, obtaining the $15,000, we expected would enable us to do."

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Brown was examined under a foreign commission. *Chewett* was called by the defendant as a witness at the hearing. Speaking of the time of giving the mortgage, he said: "I believed then that we were perfectly solvent, and that if we remained in Toronto all would be well. Even if the market did not rise, and we were closed up then, I thought we could have paid everybody. That belief was from my general knowledge of our affairs, and without any particular investigation. I was wrong in that belief, and I now know that we were then insolvent, though not, I think, to so large a sum as Mr. *Anderson* has mentioned. * * I told (Mr.

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Metcalfe) that our difficulty was temporary, that with time all would come right; and I thought so. * * The mortgage was not given with any view to give the bank a preference over other creditors. I did not think then that we were insolvent; and I am sure that Mr. *Brown* did not think so either. I represented to the bank that we were perfectly solvent; and I thought we were so." Mr. *Chewett*, as well as his partner, ascribed the insolvent condition of the firm to their gold operations in New York. These operations, it was shewn, were not known to the plaintiffs' officers until communicated by *Brown*, as described in his evidence; and when made aware of them, the officers of the bank were very angry at such operations having been gone into with the plaintiffs' money.

Judgment.

Mr. *Anderson*, whom Mr. *Chewett* referred to in his evidence, was a book-keeper in the employment of the assignee, and was called as a witness on his behalf before Mr. *Chewett* was examined. He stated that he had made up from the books of the firm and otherwise, the assets as they stood at the date of the mortgage; and that he had found the amount to be $54,694.11. This sum included the property mortgaged to the plaintiffs, estimating it at $30,000, and included the assets in Canada of the firm, and of each partner; but did not include *Brown's* property in Maine, which *Brown* stated to be worth $2000; nor the property (value not stated) covered by the postnuptial settlement which *Chewett* was said to have executed; nor the "margins" in the hands of the New York creditors. These margins were said by *Brown* to have amounted to $60,000; *Chewett* said they came to between $40,000 and $50,000. It was presumed by the Court that the amount, whatever it was, went to wipe off or diminish some of the liabilities of the firm in New York, and that the liabilities as made up by Mr. *Anderson* shewed the amounts as they stood after the creditors had given

credit for the margins in their hands. He stated the amount of the liabilities at the date of the mortgage to be $101,940.72, as made up by him from *Brown & Co's.* books, and statements received from the creditors since the insolvency. These figures, if correct, shewed a deficiency of $47,246.58. From that sum, however, the book-keeper deducted $5555.13, as "amount of stocks to market rates, if purchased on 10th December, 1868," leaving $41,691.45, as the true deficiency, according to this witness. Counsel for the plaintiffs, however, objected to his testimony as not being founded on personal knowledge; and the court, in giving judgment, expressed the opinion that the objection was a valid one, but that nothing turned on his statements.

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

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

MOWAT, V.C.—[After stating the facts]—The question is, whether under the circumstances appearing in this case the mortgage is void as respects the antecedent debt. This debt exceeds the value of the property, and no question was raised as to the contemporaneous advance of $15,000.

Judgment.

January 26.

The Insolvent Act of 1864 provides, with reference to mortgages (*a*), that "if any sale, deposit, pledge or transfer be made by any person, in contemplation of insolvency, by way of security for payment to any creditor * * * whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge or transfer shall be null and void," &c. It has been held that the expressions in this act as to "contemplation of bankruptcy" and "unjust preferences," are to receive the same construc-

(*a*) Sec. 8, sub-sec. 4.

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tion as similar expressions in the English Bankrupt Acts have received (*a*).

Judgment.

Now, I would observe first, that, under the English Bankrupt Acts, it is held that, in the absence of fraud, a mortgage by an insolvent person of even all his property, for a present advance, which may bear a small proportion to the property mortgaged, is sustainable. *Bittlestone* v. *Cook* (*b*) is one of the cases in which that has been held. The learned judges in giving judgment stated distinctly the rule and the principle on which it rests; and the case has ever since been referred to as containing an accurate view of the law and of the reasons for it. Lord *Campbell* said: "The property pledged was worth £6,000; and the limit of the advance stipulated for was only £1,800; and the sum actually obtained was far below the value of the goods. Now I agree that a conveyance of this sort is invalid, unless there be an equivalent; but I cannot say that the advantage obtained for the trader and his creditors by these advances was not a full equivalent for the pledge. In times of pressure, an advance in ready money of a very small amount may very often enable a trader to avoid stopping payment, and so enable him to pay all his creditors twenty shillings in the pound. I cannot, therefore, say that the inadequacy of the advance makes the deed fraudulent as a matter of law; and, drawing inferences of fact, I find it was not, in this case, fraudulent in fact. I do not think there was any intention to delay or defeat creditors; and, looking at the facts as they appeared at the time, I should think the transaction must have appeared to both parties likely rather to have benefited than to have defeated the creditors." *Erle*, J., said, in the same case: "The deed was an assignment of all the trader's stock, including what he

(*a*) Newton v. Ontario Bank, 13 Gr. 662; Tuer v. Harrison, 14 U. C. C. P. 449; McWhirter v. Thorne, 19 U. C. C. P. 302.

(*b*) 6 E. & B. 296.

might afterwards acquire; but such an assignment is not, in law, an act of bankruptcy, unless it be one the effect of which would be to defeat or delay the creditors. In fact, I think this assignment was perfectly *bona fide*, made in the sincere belief that, by the aid of the money thus obtained, the trader would be able to go on; and that it would assist the creditors. It is probable that in the result it has delayed them; and, if the trader had known that such must be the effect, it might have been fraudulent; but I think, on the facts stated, there are indications that the trader stood so that he hoped to be able to go on. It is true that the real state of his affairs was such that he could not possibly continue his trade; and perhaps he knew so much of them that it ought to have been clear to his mind that he could not go on. But it is plain to me that this was not clear to his mind, and that he raised this money intending, not to delay his creditors, but to meet them. It is then urged that the conveyance of the trader's goods puts them out of reach of process; that, being under pledge, they could not be taken under a *fi. fa.*, and so creditors must be delayed. That is in effect saying that an assignment of all a trader's goods, as a pledge for a sum less than their value, must, in point of law, be an act of bankruptcy. But to hold so seems to be inconsistent with the very salutary decision that a *bona fide* sale of goods, in a season of pressure, by a trader, for whatever ready money can be obtained, is valid, though the price may be small. The principle of that decision I take to be, that the power of raising a small sum of ready money on an emergency may often, in the exigencies of trade, be of immense value. It would be dangerous to lay down that an arrangement by which a trader, under such circumstances, raises money is, as a matter of law, void, because of any disproportion between the security and the sum raised. I think that the proportion which the sum raised bears to the value of the property in this case, about one-third, is a circumstance to be considered

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in determining whether the transaction is *bona fide* or not, but is not conclusive that it is fraudulent; and I think the same of the circumstance that the assignment embraced all the trader's stock, including what he might acquire afterwards. There often may be a very good reason for taking a security over the whole of a trader's stock, present and future, as then the stock may be used in the meantime, and made a source of profit, whilst, if a portion of the existing stock is separated and set aside as a security, it is tied up from use."

That was the case of a mortgage of all a debtor's property for a present advance; but it has also been held that a mortgage by an insolvent person of a considerable part of his property to secure an antecedent debt, and also a contemporaneous advance, may be valid (*a*). That is undoubtedly now the doctrine of the courts, though the contrary has sometimes been said or held to be the rule (*b*). *Bell* and another, assignees of *Fairbairn*, v. *Simpson* (*c*) was the case of a sale. There the debtor, being applied to by a creditor for payment of his debt, agreed ultimately to sell to the creditor all his property, except some bedding, for £120, of which £70 should be cash, and £50 the debt due to the purchaser. At the trial *Martin*, B., on these facts, nonsuited the plaintiffs, reserving to them leave to move to enter a verdict for £120, the court to be at liberty to draw inferences of fact. A rule *nisi* was moved for accordingly, but was refused by the Court of Exchequer, after taking time to consider. When refusing the rule, *Pollock*, C. B. said :

Judgment.

(*a*) Pennell v. Reynolds, 11 C. B. N. S. 709; Mercer v. Peterson, L. R. 3 Exch. 104; *Re* Gass, I. R. 2 Eq. 284. See also 16 W. R. 760; and other cases cited *infra*.

(*b*) Lindon v. Sharp, 6 M. & Gr. 895; Graham v. Chapman, 12 C. B. 85; Smith v. Cannan, 2 E. & B. 35; Lacon v. Liffen, 4 Giff. 83 (see the case on appeal, 9 Jur. N. S. 477); Hutton v. Crutwell, 1 E. & B. 15.

(*c*) 2 H. & N. 410.

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"In this case a bankrupt, immediately before his bankruptcy, had sold a considerable portion of his property, and the payment for it was in part by the extinction of an old debt. It was contended that this was *per se*, as a matter of law, an act of bankruptcy. But we think there is no foundation for that proposition. If a sale of the bulk of a trader's property is absolute and *bonâ fide*, and there is no intention on the part of the buyer to commit a fraud upon the bankrupt or his creditors,—if there is no fraudulent preference, or fraudulent sale or delivery, but the matter is perfectly honest, and not intended to contravene the bankrupt laws (which are questions not of law but of fact)—the sale is not an act of bankruptcy. In the present case it was left to us to draw conclusions of fact, and we are of opinion that the transaction was *bonâ fide*. Therefore there ought to be no rule."

Judgment.

In re Colemere (*a*) the law was thus stated: "The assignment to be fraudulent must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favoured creditor, or making some payments to all his creditors, otherwise than through the Court of Bankruptcy. In either of these cases, it is an act of bankruptcy. But if it is for the purpose of enabling him to raise money to go on with his trade, that cannot be called a fraudulent act, as tending to defeat and delay his creditors, for it probably is or may be, the wisest step he could take to promote the interests of his creditors." The Lord Chancellor observed, in the same case, that, "a person lending money upon an assignment of all, is just like a person lending money upon an assignment of half—it is a transaction which the party lending has a right *prima facie* to suppose is perfectly honest, and will, or at all events may, conduce to the interests of the creditors instead of defeating them."

(*a*) L. R. 1 Chan. App. 132.

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In re Foxley (*a*) the mortgage was held invalid because it conveyed, substantially, all the debtor's property to one of his creditors, "without receiving any money or other equivalent advantage which would enable him to carry on his business or pay his other creditors"; and it was held, that, to give validity to a mortgage of all for an antecedent debt, the debtor "must obtain something to enable him to maintain his business" (*b*).

What that "equivalent," that "something," should be, has been considered in several late cases. In *Woodhouse* v. *Murray* (*c*) I find the following observations on the point: "*Bittlestone* v. *Cooke* (*d*) shews that an equivalent need not be an actual equivalent in point of value. It may be that the trader gets less than the value of the property he parts with. It may be that under the pressure of some extraordinary exigencies, the trader, with an honest object of saving himself from bankruptcy and ruin, with a view to his own benefit and that of his creditors, and with an honest and *bonâ fide* desire to carry on his trade, pledges his effects, even the whole of them, to realize a sum of money which may fall very far short of their value, yet, looking at all the circumstances, it is so plain that the intention was an honest one, not to get a sum of money to put into his pocket, but in order to carry on his business, that such an assignment of all his effects would not be considered an act of bankruptcy. There must, however, be an equivalent in the transaction, or it would be void as being contrary to the policy of the bankrupt law, and amount to an act of bankruptcy. * * * I do not say that an equivalent must necessarily be of money's worth. If it could have been shewn in the present case that the circumstances of the bankrupt were

Judgment.

(*a*) L. R. 3 Ch. App. 517.
(*b*) P. 523.
(*c*) L. R. 2 Q. B. 634.
(*d*) *Ubi supra.*

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such as that, by his being left in the temporary possession of the effects, he would have been enabled to carry on his business, or could so have found capital to go on with, and if the arrangement between the parties had been entered into for the purpose of enabling the bankrupt to go on with his business and pay his creditors, there might have been an equivalent to the creditors that would have given validity to the transaction." But in that case the court considered that no equivalent was given, "either in money which might enable him to carry on his trade, or in a supply of articles, or in (any) other way" (*a*).

In *Mercer* v. *Peterson* (*b*) the debtor had assigned to a creditor all his stock and trade property, worth £115, to secure an antecedent debt of £107 8*s*. 11*d*. and a further advance of £64 11*s*. 8*d*. His other debts amounted to £300. Twelve months afterwards the debtor became bankrupt. It was held by the Court of Exchequer, and afterwards on appeal, that the transaction was valid against the assignee in bankruptcy. *Kelly*, C. B., said that the transaction was an honest one, and one which at the time it was made was beneficial to all the creditors. *Channell*, B., said, that at the time the debtor entered into the agreement there was no intention on his part, or on the part of the defendant, to defeat or delay creditors. "On the contrary" (the learned judge said), "the intention may well have been to keep the debtor afloat, and enable him to continue his business." In the Exchequer Chamber, C. J. *Cockburn* stated the rule to be, "that where a trader assigns his whole property, but receives in return a fair equivalent, the transfer is not void under the bankrupt laws. * * The simple question then is, whether the sum of £64 can be considered a fair equivalent for the transfer of the trader's

Judgment.

(*a*) See Whitmore v. Claridge, 8 Jur. N. S. 1059. See also 16 W. R. 76).

(*b*) L. R. 2 Ex. 304.

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property? The effects we may take to have been worth £115; and even if £64 were the sole consideration, I think we should be justified in holding it to have been a substantial consideration, sufficient to support the subsequent transaction."

If a mortgage of all a trader's effects for an antecedent debt, coupled with a present equivalent, is thus sustainable under the circumstances and upon the principles which these cases explain, much more, I need hardly say, is a mortgage sustainable if it includes part only of the debtor's property, and does not include his stock in trade, or the property used in carrying on his business. I shall mention a few of such cases which have passed into judgment.

Judgment.

Carr v. *Burdiss* (*a*) was the case of a mortgage to secure past and future advances. It covered part only of the debtor's property, but his stock in trade was included. The jury found that, as a matter of fact, the mortgage was not given in contemplation of bankruptcy. His bankruptcy took place six months after giving the mortgage. In refusing a rule for a new trial, Lord *Lyndhurst* pointed out that the debtor had other property equal in value to the amount of the debt to cover which the mortgage had been executed. *Parke*, B., said, that "in order to render an assignment of a trader's effects an act of bankruptcy, it must be shewn that the party assigned all, or nearly all, of his effects, so as to put it out of his power to carry on the trade. The plaintiffs in this case have failed in proving an assignment of all, or anything like all, the trader's property. In a case which occurred before my brother *Alderson*, at Winchester, a carter had assigned the whole of his stock in trade, consisting of a cart and horses, and it was contended that this amounted to an

(*a*) 1 C. M. & R. 443.

act of bankruptcy; but the court held that, to operate in that manner, it must be such an assignment as would produce insolvency." *Alderson*, B., said: "The debtor was left in possession of property to an equal amount with the advances made by the bank. That property was sufficient to enable him to buy other stock. He was not, therefore, prevented from carrying on his trade, and the assignment was not an act of bankruptcy" (*a*).

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In re Gass (*b*) there was an antecedent debt of £3317 11*s.* 6*d.* due to the mortgagee. The further advance was of £865 15*s.* 6*d.*, and was made in order to pay three other creditors. The value of the mortgaged property as compared with the residue of the debtor's assets is variously stated. The debtor's estimate of the former was £5070, and of the latter £8287 13*s.* Other evidence estimated the latter at considerably less than the debtor did. The mortgage was sustained. The facts bearing on the question of pressure, which was one of the points raised in the case, were very much the same as the facts here. The case was much considered, and the Lord Justice in appeal, in maintaining the impeached mortgage there, made the following observations as to pressure: "The counsel for the assignees relied upon a passage in *Orr's* (the mortgagee's) charge, in which it is stated that the first suggestion of the deed proceeded from *Gass* (the debtor), and they contended, or assumed, that, to constitute pressure within the meaning of the authorities, there must be a demand more or less stringent, made by the creditor preferred. But I do not consider the rule to be so narrow. Pressure may, in my opinion, be as well created by anything special in the relation of the particular creditor towards the trader, which is such as to impel the latter in the direction of the act that is

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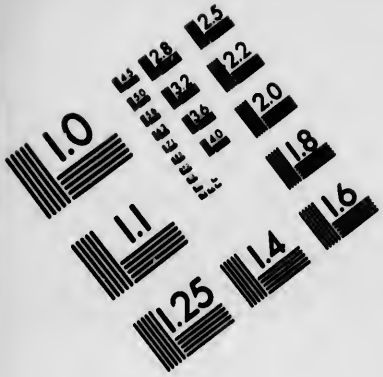
(*a*) See Abbott v. Burbage, 2 Bing. N. C. 444.
(*b*) I. R. 2 Eq. 284.



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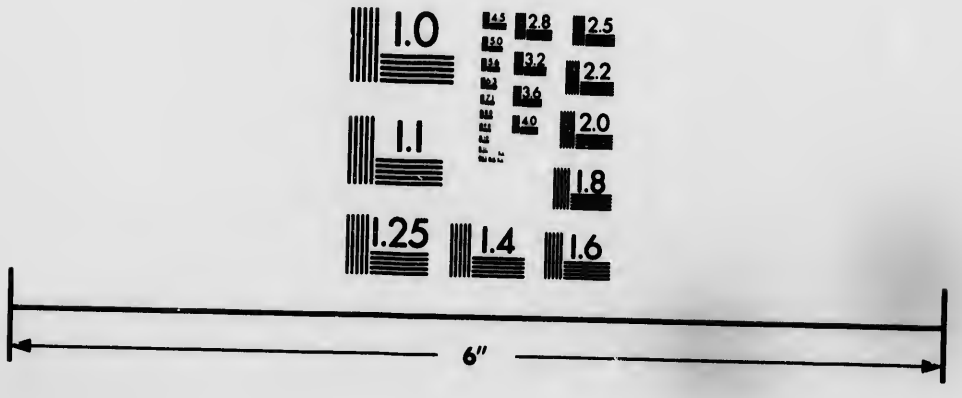

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impeached. If *Gass* had gone to *Orr* and said: 'Save me from ruin by becoming my surety for the instalments,' and *Orr* had replied, 'I will if you countersecure me by mortgage; otherwise I will not;" that would plainly have been a pressure for the mortgage, which would have taken from it the character of fraudulent preference. And it cannot, in my mind, make the smallest difference that *Gass* himself, in proffering his request, offered the condition which he knew must be imposed" (*a*). If, therefore, pressure is material to be made out in the present case, *Re Gass* is a direct authority in favor of the plaintiffs.

The learned counsel for the defendant contended that the law sanctioned the debtor doing under pressure only what the creditor had it in his power to compel. But that view is not supported by the authorities. In *Strachan* v. *Barton* (*b*), for example, it was held that a mortgage obtained by pressure from a bankrupt may be good though the debt secured was not payable at the time of the making of the mortgage.

Judgment.

There are authorities to the effect that an assignment obtained from an insolvent of a considerable part of his assets, to a creditor, to secure an antecedent debt, without any present advance may, under circumstances, be valid. *Young* v. *Waud* (*c*) was a case of that kind. The mortgage there was of the machinery with which the debtor carried on his business, and was given to secure bills already in the mortgagee's hands, amounting to £200, and bills which they should thereafter discount, but which they did not undertake to discount. The machinery was worth £1500. The debtor had at the time other effects

(*a*) See also Bills v. Smith, 11 Jur. N. S. 154.

(*b*) 11 Ex. 647; see cases there cited; and Edwards v. Glyn, 2 El. & El. 329.

(*c*) 8 Ex. 221.

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which (including the mortgaged property) amounted to £3000. His obligations, at the same time, including those secured by the mortgage, amounted to £2900. It was contended that, as the mortgage put it in the power of the mortgagee to stop the debtor's business at once, it was an act of bankruptcy. But Lord Chief Baron *Pollock* denied that; observing that, "in the case of an assignment of a man's whole stock, where he has the means of carrying on other business, the assignment is not an act of bankruptcy, although the instrument by being put in force stops the business; but the assignment must be such as puts a stop to the business by reason of the party's insolvency (*a*)." Baron *Parke* said: "It is to be assumed that the witness *Wormanton* (the bankrupt) speaks the truth; and he says he made the assignment in the hopes of obtaining a sale of his goods for cash, by means of getting the bills of Messrs. *Brooke & Co.* discounted." It was to secure these bills that the mortgage was given. "Now we are to take it on his statement that this property did not constitute half of his effects, for he says that he had capital to more than double the amount of that which he had assigned by the deed. I agree with my Lord Chief Justice as to the construction of the instrument, that it is not to secure future advances, but debts arising out of bills already discounted, which would thereafter become due. The question as to this being a fraudulent assignment to a particular creditor in contemplation of bankruptcy does not arise, for there is no evidence of that sort in the case; and, moreover, the testimony of the bankrupt himself is directly to the contrary. Then the facts as found by the jury are simply these: The trader assigns less than half of his property, consisting of the implements of his trade; and the effect of putting that assignment in force is to prevent him from carrying on his trade; and the question is, whether that constitutes

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(*a*) *Vide* 2 Bing. N. C. *supra*.

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an act of bankruptcy. There is no authority which goes the length of deciding that it is. I agree with what was said by one of the learned counsel for the defendant, that if, upon these facts, this were held to be an act of bankruptcy, the decision would do much to shake the law on this subject."

I refer also to *Johnson* v. *Fesenmeyer* (*a*), where the Master of the Rolls thus explained the law: "When a man, on the eve of bankruptcy, knowing he is about to become bankrupt, of his own mere motion and will, sends to a creditor, informs him of the fact, and gives him some property, in order that the creditor may obtain something for himself over and above that which he can get by proving under the bankruptcy; that is a fraudulent preference. But it must proceed voluntarily from the bankrupt himself; for, if the creditor comes and insists on being paid or having security, the fact of the debtor giving way and acceding to the request does not make it a fraudulent preference. * * * The amount of pressure is not a matter of very considerable importance, because, to make the transaction fraudulent, the preference must proceed voluntarily from the bankrupt himself, which it does not if he be induced to do it by the pressure of the creditor, whether it be much or little. * * If a man is insolvent, and disposes of a portion of his property in favor of a *bona fide* creditor, although upon the eve of bankruptcy, and although this fact be known and believed by both parties, it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favour that particular creditor; and this is generally shewn by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor, although he knows the debtor is insol-

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(*a*) 25 Beav. at 93.

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vent, presses and insists upon having a security for his debt, and the debtor yield to that pressure, and give the security, although it may be well known to both, at the same time, that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction, in my opinion, is perfectly good and valid. I wish to state it quite broadly, in order that, if this matter goes further, the grounds on which I proceed may be fully understood." The decree of the Master of the Rolls was affirmed by the Lord Chancellor; and, in disposing of the appeal, his Lordship made the following observations: (*a*) "The assignment is not of any portion of the trade effects, but of an equity of redemption. How did this assignment cripple the bankrupt in his trade? It may be said that, indirectly, it would have that effect, because he might have been enabled to raise money upon his equity of redemption, with which his trade might have been carried on. But this appears to me to be rather too remote an effect to come within the principle upon which alone the transaction can be rendered invalid as putting a stop to the bankrupt's trade. It is perhaps unnecessary, however, to decide the question upon this ground, as the assignment to the defendant still left the bankrupt in possession of all the materials for carrying on the limited trade to which he had reduced his business, and also of considerable property besides, some of which was dealt with by the subsequent deeds with Mrs. *Atkinson*,—dealings which of course cannot affect the deed in question." Again, the Lord Chancellor observed: "It may be assumed, the circumstances of the bankrupt at the time of the execution of the deed were such, that bankruptcy or insolvency were inevitable, which seems by the authorities to falsify the expression, 'in the contemplation of bankruptcy.' The only real question (as I thought at a very early period

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(*a*) 3 DeG. & J. 23, 24.

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of the argument) is, whether the deed was voluntary, or was induced by the demand of the creditor. I think that the recent cases have placed the law on this subject on a right footing. Formerly, it was supposed that in order to prevent a transaction being void as a fraudulent preference, it was necessary to shew something like coercion or pressure on the part of the creditor, and a reluctant yielding by the debtor. The term 'pressure' has been retained, although it is now only calculated to mislead, as it has been decided that the only question in cases of this description is, whether the act is voluntary on the part of the bankrupt; and as *Alderson*, B., explains the term in *Strachan* v. *Barton*: (*a*)— 'A voluntary payment (and this of course applies equally to a voluntary act of preference) is a payment simply by the act and will of the party making it, and if there is anything to interfere with or control this will, then it is not a voluntary payment.'"

Judgment.

In consequence of the large amount involved, and in deference to the learned arguments of counsel for the defendant, I have referred to the authorities with much greater fulness than I would otherwise have thought necessary. It is manifest that they shew conclusively that my decree must be for the mortgagees; for I find as facts, that the purpose of the transaction was not to give to the plaintiffs a preference in respect of the existing debt; that the sole motive of the debtors was to obtain the further advance to carry on their business; that they hoped and expected that it would enable them to carry on their business; and that, in order to obtain the further advance, the debtors offered to secure both the advance and the existing debt, believing that otherwise the further advance would not be given. It is reasonably clear that they were right in that supposition. I find also that the advance which they obtained was, according

(*a*) 11 Exchequer 650.

to the plaintiff's estimate accepted by the defendant, half the value of the mortgaged property. 1870.

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It was argued for the defendant that the speculative and otherwise objectionable character of the business in New York, on which the debtors based their expectations, made the further advance improper, and the whole transaction unsustainable. But I am clear that I cannot yield to that contention.

The plaintiffs will add their costs to their debt.

DAVIS v. REID.

Trade-mark—Injunction.

A cigar manufacturer, to distinguish his cigars from others, called them "Cable Cigars," and afterwards adopted a method of stamping on each cigar, in bronze, an elliptical figure, with the name "S DAVIS," and the word "CABLE" within the same. A rival firm, two years afterwards, adopted the same method, using for the purpose a trade-mark identical with this, except that they substituted their initials, "CP&C" for the other's name, and the word "CIGAR" for the word "CABLE." It was proved that persons had bought these cigars supposing them to be the cable stamped cigars:

Held, that the manufacturer of the cable cigars was entitled injunction to restrain the other parties from using the trade-m which they had so adopted.

This was a motion on behalf of the plaintiff for an injunction restraining the defendants, their servants, &c., from further using the mark or stamp used by them in imitation of that of the plaintiff in the bill of complaint described and referred to, and from stamping, or impressing, or causing to be stamped or impressed, on cigars manufactured or sold by them, the said mark or stamp; or any other mark or stamp identical with or

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Mr. *Bain*, for the plaintiff.

Mr. *Hillyard Cameron*, Q. C., Mr. *Blake*, Q. C., and Mr. *Morphy*, contra.

January 26. MOWAT, V. C.—The plaintiff is a cigar manufacturer in Montreal. In or before 1867, he adopted a device for distinguishing his cigars from others, by stamping on each cigar a trade-mark in bronze, or in some material resembling bronze. Previously to this, a paper label with the manufacturer's name or trade-mark thereon seems to have been sometimes slipped into the cigar, or wrapped round it, though this practice was uncommon. The plaintiff, and the persons whose affidavits he has filed, consider the plan of stamping the cigar itself with the maker's mark to have been quite new before the plaintiff adopted it. On the other hand, the defendants have filed affidavits of other persons which, if correct, shew that this method had been used occasionally before its adoption by the plaintiff. The latest date definitely mentioned in these affidavits is some years antecedent to 1867. The stamped cigars thus spoken of, if known elsewhere, do not appear to

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have ever reached Canada, or to have been much known anywhere. The defendants, whose adoption last summer of the same method of marking cigars has given rise to the present suit, do not allege that it was from the foreign use of the system that they took the idea; nor that they themselves were aware of that foreign use, when they began the practice. All the devices which their witnesses speak of having seen stamped in this way upon cigars, differ in form from the plaintiff's mark. The plaintiff's affidavits throw doubt on the accuracy of the statements on the other side as to the prior use of the same method of stamping cigars; but, giving on the present application full credit to the defendants' affidavits on the point, I think that the unavoidable inference to be drawn from the statements on both sides is, that the plan of stamping cigars, adopted by the plaintiff, if ever used before, had ceased to be practised anywhere long before 1867, the date of its adoption by the plaintiff.

Judgment.

The trade-mark which the plaintiff then began to stamp on his cigars, is a figure of elliptical form with a straight line passing through the centre and extending to not quite the sides of the figure. Within the upper half of the figure are the letters S DAVIS, being the plaintiff's name; and within the lower half of the figure is the word CABLE, which word he had previously in use to designate one quality of his cigars.

The plaintiff states that he registered the trade-mark in question (*a*); but that statement appears to be an error. He seems to have registered in 1866 the word "cable" only, as a trade-mark for his cigars, and to have subsequently registered another trade-mark, which somewhat resembles that in question, but is larger and more elaborate, and does not appear to have been much

(*a*) 24 Vic. ch. 21.

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used by him afterwards. But a trader may have more trade-marks than one; and, as the present Lord Chancellor said in *Braham* v. *Bustard* (*a*), it cannot be "any justification for a defendant to say 'the plaintiff has two ways of identifying his goods, and I have only stolen one of them.'" The non-registration of this trade-mark does not take away the plaintiff's common law right to protection. That was expressly held in *Davis* v. *Kennedy* (*b*), and I concur in the decision.

The plaintiff's cigars which were stamped with the trade-mark that I have described, had obtained considerable reputation and sale in Upper and Lower Canada before the defendants began to use a stamp for their cigars; and had become known (as I gather from the affidavits on both sides) by the name of "stamped cigars;" and of "metal cigars," or "metal stamped cigars," these two names being employed in allusion, I presume, to the material used, or supposed to be used, in the stamping. They were also known as "cable" cigars.

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The trade-mark which the defendants have adopted for stamping their cigars corresponds with the plaintiff's, in shape, size, and color; also, in the material employed; in the size, number, character, and arrangement of the letters; and in the general appearance of the whole. For "S DAVIS," the defendants substituted, not the name of their firm, but its initials only, "CPR&C"; and for "CABLE," they adopted the word "CIGAR."

Neither the plaintiff's stamp nor the defendants' always brings out the letters distinctly; and the impression must always be more or less blurred.

(*a*) 1 H. & M. 456.

(*b*) 13 Gr. 523.

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From the similarity of the two stamps, and from the other evidence before me, I have no doubt that the defendants copied their stamp from the plaintiff's; and that, whether they had or had not any intention of misleading purchasers—a point which is for the present purpose quite immaterial (*a*), their mark is well calculated to have that effect, notwithstanding the different words and letters employed; and there is express evidence of the defendants' stamped cigars having been offered for sale as the plaintiff's to smokers, though not by the defendants; and of persons having been actually misled into purchasing stamped cigars of the defendants' manufacture, when they wished to purchase, and supposed they were purchasing, the plaintiff's stamped cable cigars; and "that being so," as was said by the court in *Glenny* v. *Smith* (*b*), "it is in vain for witnesses to say that in their opinion persons could not be misled."

Judgment.

There can be no doubt that there is nothing in the simplicity or other characteristic of the plaintiff's trade-mark which disentitles him to the exclusive use of it. A party has been held entitled to adopt as his trade-mark even the name of the foreign province where the raw material of his manufacture was produced, and from which other persons might procure it (*c*). Or, he may adopt as his trade-mark a word which is in common use as applied to articles of a different kind (*d*). He may choose for the purpose the figure of an animal, as a lion (*e*), an ox (*f*), or an eagle (*g*); or the device of

(*a*) Millington v. Fox, 3 M. & C. 352; Edelsten v. Edelsten, 1 DeG. J. & S. 199; Kinahan v. Bolton, 15 Ir. Ch. 82; Harrison v. Taylor, 11 Jur. N. S. 408. (*b*) 2 Drew. & Sm. 476.

(*c*) McAndrew v. Bassat, 33 L. J. Chan. 561; see also Sezio v. Provezende, L. R. 1 Ch. App. 192.

(*d*) Braham v. Bustard, 1 H. & M. 447; Crawford v. Shuttock, 12 Gr. 149. (*e*) Ainsworth v. Walmsley, L. R. 1 Eq. at p. 524-5.

(*f*) Harrison v. Taylor, 11 Jur. N. S. 408.

(*g*) Standish v. Whitwell, 14 W. R. 512.

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It is also settled law that in such cases the protection of courts of equity is not confined to cases where another uses a mark precisely identical with that of the complaining party. Nor is it necessary that the resemblance should be so close as to deceive, notwithstanding careful examination. If even ordinary purchasers may be deceived, or "incautious purchasers," as Lord *Kingsdowne* mentioned in a case in the House of Lords (*f*), an injunction will be granted. "It is not the question," the Vice Chancellor said in *Glenny* v. *Smith* (*g*), "whether the public generally, or even a majority of the public, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled; and," the learned judge added, "I think it may be safely said that that is not a very inconsiderable portion of the public." The manufacturer cannot prevent want of caution in purchasers: and it is just that a rival should not be permitted to take advantage of their incautiousness, and by that means to appropriate to himself profits which should go to another (*h*).

Judgment.

Lord *Cranworth* referred in the *Leather Cloth* case to the greater chance of misleading where the devices are small than when they are large, and mentions, as an example of what he considered a small stamp, one of

(*a*) Edelsten v. Edelsten, 1 DeG. J. & S. 185.
(*b*) Kinahan v. Bolton, 15 Ir. Ch. 75.
(*c*) Cartier v. Carlile, 31 Beav. 292.
(*d*) L. R. 1 Eq. 518. (*e*) 15 Ir. Ch. 75.
(*f*) Leather Cloth Company v. American Leather Cloth Company, 11 H. L. 539. (*g*) 2 Drew. & Sm. 476.
(*h*) See Day v. Binning, Coop. C. C. 489; Knott v. Morgan, 2 Keen. 213; Croft v. Day, 7 Beav. 84; Shrimpton v. Laight, 18 B. 164; Whitney v. Hickling, 5 Gr. 605; and other cases *supra*.

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the size of sixpence or a shilling (*a*). The stamp here is considerably smaller than a five cent piece; and is impressed on a cigar, instead of on paper. The probability of a mistake by a purchaser, when the defendants adopted their mark, was further increased by the fact, that until then the plaintiff's cigars were the only stamped cigars made or sold in this country; and probably not one in 10,000 smokers had ever seen or heard of any stamped cigars except the plaintiff's. In such a case, fair dealing manifestly required, and the legal and equitable rights of the plaintiff demanded, that, if the defendants were entitled to adopt the same method of stamping their cigars as the plaintiff had in use, the defendants should have chosen a device differing entirely in general appearance and otherwise, from the plaintiff's mark, and should have thus reduced to a minimum the chance of deception. The only difference which the defendants did make was in the names or letters used, and with that exception the two marks are absolutely identical. It has been held in a multitude of cases, that the use of a party's own name, instead of that of the rival whose trade-mark is adopted in other respects, is not a sufficient distinction (*b*).

Judgment.

On the whole, I think that the plaintiff is clearly entitled to an injunction restraining the defendants as prayed. But the plaintiff should undertake to go to a hearing at the Spring sittings, if the defendants desire, unless he is relieved from the undertaking on a special application for the purpose in Chambers.

NOTE.—The defendants subsequently submitted to a decree being made in the terms of the injunction.

(*a*) P. 536.

(*b*) Davis v. Kennedy, 13 Gr. 523; Millington v. Fox, 3 M. & C. 338; Braham v. Bustard, 1 H. & M. 447; Cartier v. Carlile, 31 Beav. 292; Harrison v. Taylor, 11 Jur. N. S. 408.

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FLEMING v. DUNCAN.

Attorney and client, transactions between—Statute of Frauds.

An attorney took a conveyance of certain property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:

Held, that this agreement was binding on the attorney, though not in writing.

After the making of the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default:

Held, that the judgment was no bar to a suit by the client for specific performance of the agreement.

Hearing at Hamilton Sittings, November, 1869.

Mr. *Spencer*, for the plaintiff.

Mr. *Moss*, for the defendant.

January 26. MOWAT, V. C.—This is a suit for an injunction to restrain execution in an action brought by the defendant *Thomas B. McMahon*, in the name of his co-defendant, *John Duncan*, against the plaintiff; and for the specific Judgment. performance of a verbal agreement entered into between the plaintiff and *McMahon* for the satisfaction of the debt, or alleged debt, which is the subject of the action. That was the relief asked at the hearing. The bill prays for that relief or other alternative relief which it specifies.

The facts are these: On the 16th March, 1867, and for some time previously and afterwards, *McMahon* was the plaintiff's attorney and solicitor in divers matters. On the day specified, the plaintiff, at *McMahon's* request, gave *McMahon* a promissory note for $94.43, for costs claimed in respect of professional services up to that time. No bill of the costs had been rendered to the plaintiff; *McMahon* says, that he shewed the account of particulars to the plaintiff, but he has given no evidence to that effect. Shortly after the giving of this note, and while the same professional relation existed on the part of *McMahon* towards the plaintiff, the plaintiff applied to *McMahon* to purchase, as his agent, certain property in the village of Middleport, which was to be sold under a power of sale contained in a mortgage held by one

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Watts. The mortgage was for $120; the amount due on it, including interest, is said to have been $190; and one *Smith* was entitled to the surplus which the sale of the property should produce. *McMahon* made the purchase accordingly, for $250, and took the conveyance (19th January, 1868,) in his own name, the conveyance mentioning no trust, but being intended to be in trust for the plaintiff. *McMahon* at the same time took from the plaintiff a promissory note for $350. There is no evidence as to the consideration for this note. *McMahon* says it was made up of three items: the purchase money to be paid, $250; *McMahon's* professional charges in the matter, $50; and his commission, $50. No writing was drawn up stating either the trust on which the conveyance was made, or the consideration for which the promissory note was given. No part of the $250 has been paid, nor was any agreement to pay it taken from *McMahon* or the plaintiff. *Watts* and *Smith* were clients of *McMahon.*

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Some time after this transaction, the plaintiff purchased a supposed patent right from one *Husk;* and part of the consideration to be paid for it was this property, which, *McMahon* states, was valued in the bargain at $800 or $1000. The true value does not appear. *McMahon* thereupon, at the plaintiff's request, conveyed the property to *Husk*, and took an assignment of the patent right to *McMahon* himself. On a question afterwards arising as to the validity of the patent, *Husk* re-conveyed the property to *McMahon* on an agreement that *McMahon* should afterwards convey to *Husk* or to the plaintiff, according as the patent should appear to be good or not. A few months afterwards (22nd May, 1868), a new agreement was made between *Husk* and the plaintiff, the latter acting therein under *McMahon's* advice, by which *Husk* abandoned his right to this property, and authorized *McMahon* to convey it to the plaintiff. At or about the time of the transaction of

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February, as the defendant says, or at or about the time of the transaction of May, as the plaintiff with greater probability alleges, tho plaintiff and, *McMahon* entered into the verbal agreement of which the bill asks specific performance. By this agreement *McMahon* was to keep the property as his own, but the parties differ somewhat as to the terms. *McMahon* says the terms were that he should take the property in payment of the $350 note, on condition that the plaintiff should pay $60 in cash and procure a release of the dower, if any, of *Husk's* wife. He does not negativo the statement in the bill that the property was taken in satisfaction of the two notes; and I am satisfied that the bargain in fact embraced both notes. The plaintiff alleges that the further sum which he promised to pay was $50 only, not $60; and that his promise to pay that sum and to get the release, was made at a later date, and after *McMahon* had wrongfully got an execution against him and placed it in the sheriff's hands. The plaintiff insists that he should not be held to be bound by these promises; but he has procured the release and has paid part at least of the $50; and, on the whole, I think that there is not enough on the pleadings and evidence to entitle the plaintiff to relief without paying whatever small balance remains of the $60 named by *McMahon*.

Judgment.

McMahon claims that time was of the essence of this agreement, but there is nothing to entitle me so to hold; nor can I say that the plaintiff has been guilty of laches in complying with the terms of the agreement. The plaintiff appears to have paid part of the money, as I have already intimated; and he did not receive from *McMahon* the release for Mrs. *Husk* to execute, until a few weeks, or perhaps a few days, before the filing of the bill. *McMahon* was the plaintiff's only legal adviser up to this time; and I have no doubt that the intention of both parties from the first was, that the release should be prepared by *McMahon*. Up to a few days before the filing of the bill, *McMahon* admitted the

continued existence of the agreement for discharge of the execution debt.

On the 31st August, 1869, *McMahon* brought an action on the two notes in the name of his co-defendant *John Duncan*, who had no interest therein; obtained judgment by default; and placed an execution in the sheriff's hands. The plaintiff says, that he refrained from defending the action, at the instance of *McMahon*, and on his agreement not to proceed therewith. Of this there is no evidence; but I think it clear that, under the circumstances already set forth, the judgment is no bar to the relief which the plaintiff seeks.

McMahon pressing his execution, and the plaintiff apprehending (and, I think, not without reason) that *McMahon* did not mean to carry out his agreement, though he did not in words repudiate it, the bill in this court was filed on the 17th September, 1869; and an injunction against the execution obtained on terms. Mrs. *Husk* resided somewhere in the United States; and there appears to have been no difficulty about her executing a release. On the 3rd November, 1869, she and her husband jointly executed the proper document; and it was produced at the hearing of the cause.

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The defendant sets up the Statute of Frauds; but I think that it has no application to such a case. From the professional and fiduciary relations which *McMahon* occupied towards the plaintiff, it was *McMahon's* duty to see that the trusts and agreements in the plaintiff's favor were put into writing; and he cannot claim any advantage from having neglected that duty.

The plaintiff is entitled to have the injunction made perpetual. Satisfaction is to be entered on the judgment roll, and the two notes are to be delivered up to the plaintiff to be cancelled. Refer it to the Master to take an account of what is due to *McMahon* in respect of the $60; and to tax the plaintiff's costs of the suit, including his costs, if any, of proving on the reference unadmitted payments made on account of the $60.

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McMahon to be allowed his costs, if any, of resisting any alleged payments which the plaintiff shall fail in sustaining. The balance *McMahon* is to pay to the plaintiff.

CAMPBELL v. DURKIN.

Absolute deed—Parol evidence of trust.

A deed was made by one joint owner of property at the instance of the other joint owner, to a third person, under a parol agreement that the grantee should hold the property to secure a sum of money which it was intended that he should advance to pay interest on a mortgage which was on the property, and that, subject thereto, the grantee should hold the property in trust for the wife of such other joint owner, who remained in possession of the property.

Held, that parol evidence to establish the agreement was admissible.

Hearing at Hamilton, Autumn Sittings, 1869.

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

Mr. *Strong*, Q.C., and Mr. *Burton*, Q.C., for defendant *Hall*.

The bill was *pro confesso* against the defendants, *Durkin* and *Smith*.

January 26. MOWAT, V. C.—The plaintiff, *James S. Campbell*, and *John Smith*, one of the defendants, had purchased from *William Hall*, another defendant, the Cayuga Mills; and on the 10th August, 1868, *Hall* executed a conveyance of the property to *Campbell* and *Smith*, subject to certain payments which were to be made to *Hall*, and which are not yet due, and to certain other payments to be made to one *Sayers*, in trust for *Hall's* wife. A large sum was paid to *Hall* in cash at the time of the execution of the conveyance; and the money so paid appears to have been wholly *Campbell's*. *Smith's* conduct at the mills was disliked by customers, and was unsatisfactory to *Campbell* and *Hall*; and *Campbell*, in consequence, became desirous of getting rid of *Smith's* interest in the property. A plan was adopted for this purpose, under the advice of *Hall* and others, namely,

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to get *Smith* to release his interest to a trustee for the benefit of *Campbell's* wife (who is a co-plaintiff), she being *Smith's* daughter. The defendant *Michael Durkin* consented to accept a conveyance as trustee for this purpose, and to re-convey the property to her; and, *Smith* having consented, a deed was prepared, purporting to convey the property absolutely to *Durkin*. *Smith* executed this deed on the 13th October, 1868. On the 29th January, 1869, *Durkin*, without the knowledge of *Campbell* or his wife, conveyed the property to *Hall;* and *Hall*, on the same day, executed an instrument reciting the conveyance, and mentioning $600 as the consideration therefor, and thereby *Hall* agreed that on repayment of the said sum, and any further sum which *Hall* might expend on the property, and reasonable compensation for his loss of time and labour expended in looking after the property, over and above the value of the rents and profits of the same actually received by him, he the said *Hall* would re-convey the premises to *Durkin* or his assigns at any time within one month; and it was thereby further declared that after that time *Hall* was to be at liberty to dispose of the property as he saw fit, without notice to *Durkin* or any other person. Immediately after this transaction, *Durkin* absconded. The plaintiffs' bill prays that the conveyance to *Hall* may be declared fraudulent and void as against the plaintiffs; that *Hall* may be declared a trustee for them, and may be ordered to execute a conveyance to be settled by the Master, and to account for the rents he has received. The bill has been taken *pro confesso* against *Smith* and *Durkin*. *Hall* answered, not admitting the alleged trust; claiming the benefit of the Statute of Frauds; denying notice of the trust, if there was a trust; and setting up the deed to him as a purchase; but consenting to be redeemed on payment of his advances.

Judgment.

The plaintiffs have established beyond controversy,

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if the evidence is admissible, that the conveyance to *Durkin*, was executed on a trust in favor of *Campbell's* wife; that not only had *Hall* notice of the trust before the transaction between him and *Durkin*, but that he had actually been *Campbell's* adviser in the matter throughout; that *Campbell* continued in possession, notwithstanding the deed to *Durkin*, until just before the so-called sale to *Hall*, when, to facilitate that transaction, *Durkin* took forcible possession of the mill and part of the driving house, in *Campbell's* absence from home; and that until then *Durkin* had on various occasions disclaimed the ownership of the property and referred parties to *Campbell* as the owner.

Judgment.

As to the exact terms of the agreement between *Campbell* and *Durkin*, no one appears to have been present when *Campbell* made his proposal to *Durkin*, or when *Durkin* accepted it. There is parol evidence that at the time *Durkin* executed the deed, he said that he would hold the property and deed it to Mrs. *Campbell* (who was present). The solicitor who drew up the deed was not present at the execution. He had previously understood from *Campbell* and *Hall*, that the contemplated arrangement was that the property should be conveyed to *Durkin* to secure $150, which *Durkin* was to advance to pay interest due on the mortgage to *Sayers*; and, the solicitor being applied to by *Campbell* and *Durkin* on the morning after the deed was executed, to prepare a memorial for registration, he remarked that it was strange that they should register the deed without there being some security for a re-conveyance. To this *Campbell* replied, that he had confidence in *Durkin* that he would do as he said, and would re-convey on the repayment of the $150. *Campbell* and *Durkin* told the witness on the same occassion that the re-conveyance was to be made to Mrs. *Campbell*. There is other evidence which makes it doubtful whether *Durkin* in fact advanced the

sum mentioned; and there is some evidence from which it may be argued that, if advanced, the money was soon afterwards repaid; but this is not the time for deciding either of those points.

I think that *Lincoln* v. *Wright* (*a*) is a sufficient authority for admitting the parol evidence of the agreement and trust. There, one *Joseph Wright* had agreed by parol with the plaintiff to buy on the plaintiff's behalf, for £230, certain property of which the plaintiff was in possession as mortgagor; and to advance the purchase money, which was to be repaid by the plaintiff on certain specified terms. The property was accordingly bought, the money paid; and an absolute deed taken in the name of *Wright's* daughter. The plaintiff remained in possession of part of the property, and *Wright* went into receipt of the rents of another part. Under these circumstances it was held, that parol evidence of the agreement was admissible. I refer also to *Childers* v. *Childers* (*b*) there cited. Judgment.

The decree will therefore declare that the deed to *Durkin* was made to secure any advances made or to be made by him to pay *Sayers*, and subject thereto in trust for Mrs. *Campbell*; and will refer it to the Master to take an account of such advances, if any, and of *Hall's* receipts and expenses in respect of the property since he took possession. The plaintiffs should have the costs to the hearing, and should get credit therefor in the account. Reserve further directions, and subsequent costs.

(*a*) 4 De G. & J. (*b*) 1 De G. & J 482.

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Deed—Parol agreement as to consideration—Proof of.

The plaintiff having occasion to raise $3100 to pay the Church Society for a lot which he had leased and improved and which was worth $4200 cash, procured the defendant to raise the money and to pay it to the Society; whereupon the Society conveyed the land to the plaintiff, and the plaintiff conveyed it to the defendant. The defendant a few days afterwards sold the lot for $4200 cash, to a person with whom the plaintiff had been previously negociating. The defendant admitted that after the sale he intended to give plaintiff the difference, less his own expenses and $200 for his trouble. There was great inequality between the parties, and some evidence of confidence between them, and the negociations between the two were private. The court inferred from the whole evidence that the intention had been expressed during the negociations between the plaintiff and defendant, and that the plaintiff had conveyed on the strength of it; and *held*, that it constituted an agreement which the court would enforce.

Examination of witnesses and hearing at Guelph, at the Autumn Sittings, 1869.

Mr. *Drew*, for the plaintiff.

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

January 26. Mowat, V. C.—In 1846, the plaintiff leased lot No. 16, in the 1st concession of Garafraxa from the Church Society, for a term of twenty-one years, with a covenant on the part of the Society, that the plaintiff "should have the first offer to purchase the" lot. The bill alleges and the answer admits, that at the time of taking the lease the lot was in a state of nature, no improvement whatever having been made upon it; that the surrounding country was, at the time, in the same condition; that there was not even a road to the lot until the plaintiff made one; that the plaintiff went into possession under the lease, and continued in possession during the whole term; that he cleared and

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fenced from eighty to ninety acres; and that he erected on the lot a log dwelling house 24 by 18, a frame barn 54 by 36, and various log outbuildings. At the end of the term his rent was in arrear, and the Society took proceedings for recovering the arrears and for obtaining possession of the farm. The plaintiff, being without means to relieve himself, endeavoured to find a purchaser for the property. One Mr. *Tobin*, who had money, wished to buy the property, and was willing to give $4200 cash for it, if the plaintiff should buy it from the Society. The negociations with Mr. *Tobin* took place in the latter part of March, and the beginning of April, and were at first conducted partly by the plaintiff, personally, and partly by means of letters which were written in his name, and the answers to which came to him addressed to the defendant's care. The plaintiff had, in February, communicated to the defendant the plaintiff's intention of buying the property. In April, the plaintiff went to Toronto respecting the purchase, and made there a verbal agreement with the officers of the Society that, for $3000, he should have a conveyance of the lot, and be discharged from his liability for arrears of rent, provided the money was paid within a time named. That sum was, I presume, based on a valuation of the lot without the improvements. On the plaintiff's return home, the defendant, at his request, wrote the following letter to Mr. *Tobin*:

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"FERGUS, April 14th, 1868.

"DEAR TOBIN,—Mr. *McLeod* desires me to write you that he has been to Toronto, and made all arrangements. He is to get the place for $3000, to be paid within two weeks, or else seven per cent. interest charged. The deed from the Church Society to *McLeod* will be ready for execution at any time. The plan is for you to go down with h and he will give you a deed from him to you on receipt of the money.

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On the 15th, and before receiving the defendant's letter, Mr. *Tobin* wrote a letter to the plaintiff saying that he could not go to Garafraxa until the following week, and could not get in his money for a fortnight or so. This letter was addressed to the defendant's care. After the plaintiff received this letter, the defendant wrote to Mr. *Tobin* as follows:

"FERGUS, April 18th, 1868.

"DEAR TOBIN,—*McLeod* has just come in and got your last letter. He is greatly disappointed, as he expected that you would have been able to be on hand with the dimes as soon as he had made the arrangements in Toronto. He is not prepared to go on working the place, and got it ready for crop. His hay has been out, and he had calculated on your taking the place this spring. He desires me to say that if you are really going to take the place, and want work doing, you will have to give him the necessary amount to buy hay, &c., to work the place. He would like you to come right away to give him a definite understanding. It is certainly hard for him to be placed in the position he is in. I tell him, however, that I am sure it is not your fault; and if you could hasten matters you would. He will wait till next Tuesday or Wednesday for you. If you want to come on and work the place yourself, he will board you, and do what he can to make you comfortable, and assist you."

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Mr. *Tobin* not being ready with his money in time, it appears from the defendant's answer, that an agree-

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ment was entered into between the plaintiff and one *Chalmers* for the sale of the lot to the latter for $4000, on certain conditions which the answer does not specify; that *Chalmers* deposited $100 with the defendant as earnest for the performance of the bargain; but that the agreement was not performed in time. On the 29th May, the solicitor for the Society went up to Fergus, taking with him executions in his suits against the plaintiff; and also a conveyance executed by the Society, and ready for delivery in case the plaintiff was ready with the $3000. The sheriff, on the same day, levied on the plaintiff's chattels for $329.31; costs, $17.50; interest from 5th December, 1867; writs, $5; besides sheriff's fees. The solicitor intimated his willingness, notwithstanding this seisure, to accept the money any time that day before he should leave Fergus. Thereupon, the plaintiff, in his distress, went to the defendant, who appears to be a gentleman of good credit and means; and the transaction took place between them which is in question in this suit. Through this transaction, the money to pay the Society was raised by means of a promissory note made by the defendant and plaintiff jointly, indorsed by a friend of both, and discounted at the agency of the Royal Canadian Bank in Fergus. The discount was negociated by the defendant; and the bank agent swears, that the plaintiff's name was added to the note at the agent's suggestion; and that, in discounting the note, he relied on the credit of the defendant and the indorser only. The money was paid to the solicitor, viz.: $3000 as agreed, and $100 in addition for costs and expenses, &c.; the deed of the Society was delivered to the plaintiff; and he executed a conveyance to the defendant.

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The defendant states that on the day after the execution of the deed to him, he returned to *Chalmers* his deposit of $100. On the 19th June, *Tobin* completed with the defendant the purchase for which *Tobin* had

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negociated with the plaintiff; and he paid to the defendant a sufficient sum in cash to cover the note which had been discounted. The plaintiff remained in possession of part of the property until after he had harvested his crops.

So far there is no dispute as to the facts. But the terms of the bargain between the plaintiff and defendant on the 29th May are disputed. The plaintiff insists, that the note discounted was made and negotiated for his accommodation; that the conveyance was made to the defendant on the distinct understanding and agreement that the same should stand as a security only to the defendant, against his liability upon and in respect of the note; that there was no other consideration for the note; that the defendant should pay over to him the proceeds of the sale, after deducting therefrom the amount of the promissory note, together with the defendant's reasonable costs and charges in effecting the sale. The defendant, on the other hand, alleges, that the transaction between him and the plaintiff was an absolute sale to the defendant, in consideration of the amount to be paid to the Church Society; and that the plaintiff's advantage from the transaction was, in being thereby relieved from the arrears which he owed for rent, and in saving his growing crops.

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There was no writing between the plaintiff and defendant except the deed of conveyance; and the deed did not contain all the terms of their bargain, as set up by either party. It contained no reservation of the growing crops, and no provision as to the payment by the defendant of the promissory note of which he and the plaintiff were the joint makers; and the plaintiff's rights in those respects, as stated by the defendant himself, rested in parol.

Then, again, no one took part in the negotiations

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between the plaintiff and the defendant, or was present at any of them. No independent witness can tell us anything which passed on either side (with a slight exception, which I shall state, though it is perhaps hardly worth referring to) until after the parties had come to an understanding; at which time they went together to a solicitor in Fergus to have the deed drawn. This gentleman is now the defendant's solicitor in this suit. His evidence as to the statements of both parties to him is, that the transaction was an absolute sale to the defendant, with a reservation of the growing crops. One witness was called by the defendant who casually overheard something which the defendant said to the plaintiff in a bar-room, but who did not hear the plaintiff's reply. His evidence was this: "I was passing *R's* tavern in Fergus: and Dr. *Orton* came to the door and called me. I went in; and *Orton* then read a letter to me, purporting to be from the Church Society; and he asked me whether I thought it was *Tobin* had made the offer for the place. The letter mentioned some offer having been made. I told him I thought not. *McLeod* was standing at the bar. The Doctor went to him, and said he would purchase the place; that if he lost by it, it would be out of his own pocket; if he gained by it, it would be so much in his pocket. *McLeod* seemed perfectly satisfied. I did not hear what he said, as there was fifteen or twenty feet between us."

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On the other hand, there was the evidence of Mr. *White*, who indorsed the note. His evidence was, that when the defendant applied to him to indorse the note the defendant gave this account of the object of it: "He said he wanted to raise $3000; he said that *McLeod's* horses were seised; and by raising the $3000 it would save the horses being sold, and also be a thousand dollars good to *McLeod*." It is not pretended that the crops were expected to yield any such sum as $1000. The transaction was thus represented by the defendant to *White*

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as one by which the plaintiff's horses would be saved to him, and $1000 besides. On this statement Mr. *White* indorsed the note as requested.

Another witness for the plaintiff is Mr. *Barron*, a respectable magistrate, and an intelligent man, who gave this evidence as to an occurrence which took place five months later: "I remember the Doctor being before me on two occasions in October last (1868). On one occasion, the second night of the court, I came and there was some talk between Mr. *Jacobs* and Dr. *Orton*. He said Dr. *Orton* agreed to give *McLeod* the difference between the $3000 he had given the Church Society and $4200 which he received from *Tobin*, keeping $200 for his trouble and expense, Mr. *Drew*, who was then present, said, 'then why dont you give us the money—that is all we want?'"

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The recollection of defendant's solicitor of what took place on that occasion varies somewhat from that of the magistrate. The solicitor said in his evidence: "I heard Mr. *Barron's* evidence. I was acting at the time he spoke of as counsel for *Orton*. The Doctor felt annoyed at being arrested. He felt agitated. There was a conversation between Mr. *Jacob*, Mr. *Drew* and the Doctor. He desired to explain himself to them. I reproved him for saying anything, and told him he should speak through his counsel only. I heard what the Doctor said. He said there was no such thing as any agreement or understanding that he should give *McLeod* anything out of the proceeds of the sale; but that he spoke of making him a present, after deducting this amount for his trouble and expense. I think the sum he spoke of retaining for his trouble, apart from expense, was $200. He said that he had never become bound to do this, but that he would make him a present. Mr. *Barron* is wrong when he says the Doctor stated he had agreed to give him the difference." Mr. *Winstanley* was present

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on the same occasion, watching the case on behalf of Mr. *Tobin*. He said: "I was watching the magistrate's case on behalf of Mr. *Tobin*. He was one of the parties connected with it. I remember a statement made by *Orton*. He said he had intended to give *McLeod* the difference between his expenses and loss, and $200 for his trouble, and what he got for the farm. I think he said, as *McLeod* had turned out so badly, he did not know if he would do it now. He did not say he had agreed to do this. He said he was not bound to give him anything." After these gentlemen were examined the plaintiff's counsel desired to call the plaintiff's solicitor to confirm the magistrate's evidence which, had been given previously; but I declined giving him permission to do so.

All three witnesses agree that the defendant stated an intention to give to the plaintiff the benefit of the sale to *Tobin*, after deducting the defendant's disbursements and $200 for his trouble. Now, when was the intention for which the defendant thus claimed credit, first formed and expressed to the plaintiff? The defendant did not on the occasion of which the three witnesses speak; mention the time, and he has not stated the time in his answer (where he admits having formed and expressed the intention referred to). All that his answer amounts to is, that the intention existed after his sale to *Tobin*. Existing then, is not the plaintiff entitled to call on me to presume that it was formed and communicated before the conveyance to the defendant was executed? It certainly was far more likely to be firstly formed and expressed then, than at a subsequent period. The sale to *Tobin* in connexion with which the defendant refers to this intention, was in the contemplation of both parties on the 29th May; it took place on the 19th June following, I believe; was not finally abandoned, by the defendant, according to his own statement, in the month of October following. Having reference to these considerations, and

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to the testimony of Mr. *White*, in connection with the other evidence in the cause, I think the proper conclusion is, that the intention was formed and expressed at the time of the original transaction between the plaintiff and defendant; that the plaintiff signed the note, and executed the deed, in reliance on such expressed intention; that a binding agreement in equity was thereby constituted to the effect of such intention; and that the deed, though in form an absolute sale to the defendant for $3100, was really made in consideration of that sum and of the further agreement which I have mentioned. That agreement made the conveyance in effect a security for the promissory note and the defendant's advances and expenses, if any. No express provision was made for the contingency of the property not being sold, as might perhaps have been done if the relative position of the parties had not been what it was, or if the plaintiff had had an independent professional adviser in the transaction. But, that contingency not having occurred, it is unnecessary to refer to it further.

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The defendant in his answer represents his intention as a voluntary piece of benevolence on his part, and not an agreement or a bargain. If he had proved that the matter was put in that way to the plaintiff from the first, would the form have affected its obligatory character in the eye of a court of equity? The proof that the vendor understood the matter in that way would certainly have to be very clear to entitle the vendee to abandon and repudiate such professed intention after he had got the property, in part, on the strength of it. If in such case it appeared that the defendant had falsely professed an intention which he did not at the time entertain, such conduct would be a fraud; and if he had honestly professed the intention, would the honesty necessarily entitle him in equity to escape from the obligation afterwards? In case, for example, it were clearly proved that *A* had agreed to make to *B* a deed of gift (so

called) of a valuable property worth £1000; that *B* at the same time had said he would in that case make *A* a present so called of £1000 in money and that *A* had executed a deed of gift accordingly; could *B* escape paying the £1000? It would obviously be most unjust and fraudulent in him not to pay; and, to prevent the wrong, would not equity regard, as mere matter of form, the having called the land a gift, and the money a present? In such a case would I not be bound to hold that the substance was a sale for £1000, and that *B* was bound in equity to pay the money? Considering the analogy of the numerous cases in which equity has always disregarded forms in order to do justice, would there not be ample authority for such a decree? The case of an agreement to make mutual wills comes very near to such a case: and the doctrines of courts of equity as to mortgages; as to relieving against penalties and forfeitures, generally; and as to precatory trusts under wills, (amongst other doctrines) bear in the same direction.

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But, however that might be in a case between equals, and parties between whom no relation of confidence or influence existed, I think that in the circumstances of the present case, and considering the relative position of the parties to it, the defendant is not entitled to abandon and repudiate the intention he expressed, and to retain for himself the whole benefit of the transaction.

On this point I would observe 1st, that the admitted existence and profession of this intention a few weeks after the alleged sale, and for months thenceforward, constitute a remarkable peculiarity in the case, and demand that it should be regarded with the greatest jealousy; for these facts of themselves show that the transaction was not an ordinary transaction of sale and purchase, and that the parties were not dealing with one another as ordinary vendor and vendee.

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Then, it is further to be observed that the plaintiff had no independent adviser in the matter; that he was an illiterate tenant-farmer; that he was in great distress at the time of the transaction, and was in imminent danger, for want of a few weeks' delay, of losing the whole result of twenty-one years labour on a farm upon which he had settled twenty-one years before, in the midst of the forest, where no road had been opened or clearing ever made; that in his strait it was to the defendant he had applied to find relief; that the defendant had previously received for him his letters from Mr. *Tobin*, and had written the later letters which the negotiations with Mr. *Tobin* required; that it was the defendant who had received the earnest money which had been paid on the agreement for purchase by *Chalmers;* that the defendant is a man of education, of business capacity, and in good circumstances and credit; that for seven years he had been the medical man whom the plaintiff confided in above all others; that it was he whom, during that period, the plaintiff had called in to attend any members of his household who were in need of medical services, though the need had happily been seldom; and that it was the defendant to whom on other occasions the plaintiff's family used to resort for medicines at his office. I may say here that every politician in this country has had abundant reasons at elections to know the great influence which a doctor, who is respected, possesses with persons of the class to which the plaintiff belongs. It is further to be remembered that the negociations which terminated in the transaction in question, took place wholly between the parties personally, that no one else heard or can tell us in what exact terms the defendant expressed himself at these private interviews, in regard to the expected sale or re-sale of the property; and that for part of the admitted bargain—for example, the stipulation as to the crops—the plaintiff was trusting to the defendant's word.

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I think that these circumstances shew sufficient of inequality between the parties, sufficient of a confidential relation between them, to require me, upon the authorities, to hold that the plaintiff has established all that is necessary, in view of the whole case, to make out the plaintiff's right to the performance of the defendant's promise, and for his right to the profit made by the sale to Mr. *Tobin*, after deducting the defendant's payments and expenses, and $200 for his commission. That sum was the defendant's own estimate of his services, and I think the allowance reasonable.

The defendant excuses himself for not carrying out his intention, on the ground of the plaintiff's having, as the defendant says, refused to give up the possession of the property. But there is no evidence that the plaintiff ever asked more than the defendant had professed an intention to give, or that the defendant offered him any thing at all. I rather infer that the occasion for the plaintiff's struggling to retain possession was his discovery that the defendant was changing his mind, and becoming inclined to retain the whole profit of the sale to *Tobin*. I think the decree must be with costs.

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I may add that the greater part of the second examination in chief of the defendant was inadmissible, as it goes far beyond an explanation of the matter brought out in the examination in chief; but my judgment for the plaintiff does not depend on the examination of the defendant.

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Mortgagor and Mortgagee—Costs of action.

A mortgagor who desires to stay an action brought against him by the mortgagee, cannot insist on the mortgagee's taxing his costs and staying the suit meanwhile, on the promise of the mortgagor to pay the amount when taxed.

Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the Master should tax, it was *held* that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer.

Motion for injunction to stay proceedings at law.

Mr. *McCarthy*, for the motion, referred to *Herrics* v. *Griffiths* (*a*); *Jenkins* v. *Jones* (*b*); *Hodges* v. *The Croydon Canal Co.* (*c*); *Fisher* on Mortgages, 773.

Mr. *Moss*, contra, cited *Broad* v. *Selfe* (*d*), *Loftus* v. *Swift* (*e*).

January 26. MOWAT, V. C.—The plaintiff contracted for the purchase of a lot of land from the defendant for $1000. Of this sum the plaintiff paid $25 down, and was to pay $275 on 1st December, 1868, when a conveyance was to be made to him; the balance was to be paid by annual instalments, with interest, half yearly, on the 1st June and 1st December in every year, the same to be secured by mortgage. In consequence of a difference about a large arrear of taxes, which was claimed against the lot, the transaction was not completed until the 28th or

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(*a*) 2 W. R. 72. (*b*) 2 Giff. 99.
(*c*) 3 Beav. 86. (*d*) 9 Jur. N. S. 885.
(*e*) 2 Sch. & L. 642.

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29th June, 1869. The deed and mortgage had been executed in May, 1869, but not formally delivered. The defendant, in his affidavit, charges the plaintiff's solicitor with unreasonable conduct in the negotiations which the claim for arrears occasioned; but I do not perceive from the evidence before me, that the solicitor exacted more than was quite just and proper, and in the interest of his client. The defendant received the mortgage from the plaintiff's solicitor on the 29th June. Half a year's interest was then overdue, $21; and the plaintiff's solicitor, unfortunately, omitted to stipulate for a few days' time to pay it, and omitted also to give immediate notice to the plaintiff that the transaction had been completed, and that the half year's interest on the mortgage money must be paid at once. By the mortgage, the whole principal would become due on any default; and three days after receiving the mortgage, viz., on the 2nd July, the defendant, without any demand of this interest, or any intimation of his intention to sue for it, caused a writ of ejectment and a writ of summons for the whole mortgage money and interest to be issued against the mortgagor. This was sharp, and seems to have been occasioned by irritation, and (so far as I see) not very reasonable irritation, on the part of the mortgagee, which had arisen during the previous negociations. But counsel for the plaintiff did not contest the strict right of the mortgagee to bring these suits, or the mortgagor's liability to the costs incurred in them. I assume that, on the 6th July, a tender was made to the mortgagee of the $21; for, though there is no legal evidence of this tender, such as at the hearing of a cause would be necessary, the fact sufficiently appears for the purposes of the present motion. The mortgagee refused the sum tendered, alleging that he was entitled to the costs, in addition. Some negociations appear to have taken place on the subject between that time and the 20th August, the particulars of which are not given in the affidavits. On the 20th August, the mortgagor's

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attorney wrote to the mortgagee's attorney offering to pay the interest and "the costs properly payable in the said suits; making such offer to avoid further litigation about the matter;" and intimating that "unless the offer was accepted, another course would be adopted." That is the statement of the letter, as contained in the affidavit of the attorney. Shortly afterwards, the mortgagee's attorney enclosed to the attorney for the mortgagor bills of the costs, as he claimed to be paid; whereupon the latter, "thinking them exorbitant, and more than the plaintiff should pay, refused to pay the amount claimed; but offered and insisted that the said bills of costs should be taxed, and that whatever was taxed would be paid. This, however, the defendant refused to do." These statements I take from the same affidavit. The bills are not produced by either party; nor is the amount of them stated; nor is the sum mentioned by which the mortgagor's attorney considered that the bills exceeded what the mortgagee's attorney was entitled to. No step was taken on behalf of the mortgagor or of his attorney to have the costs taxed, and no tender was made for costs. The action on the covenant was proceeded with, and was entered for trial, at Cobourg, on the 25th October last. The action of ejectment seems very properly to have been abandoned. On the 21st October, four days before the assizes, the present bill was filed by the mortgagor; and a notice of motion therein for an injunction was served for the 2nd November. The motion, after two or more adjournments, was argued on the 30th November. These suits at law were brought with oppressive haste; and two suits are now in progress, one at law and one in this Court, for no better reason than a difference between the two solicitors as to the proper amount of law costs incurred between the 2nd July and 20th August, in actions the only useful purpose of which was to enforce payment of $21. I take for granted that the attorneys do not mean that their clients shall suffer, whichever of them shall be

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unsuccessful in the contest; but I cannot help expressing my regret that the gentlemen engaged in this matter have suffered themselves to be carried away by angry feelings, instead of being guided by the calm prudence and mutual consideration which govern their ordinary practice. 1870. Nixon v. Hunter.

The mortgagor's attorney bases his position on the ground, that it was the duty of the mortgagee's attorney, under the circumstances, to get the costs taxed, and that the mortgagor was not bound to pay or tender any amount until such taxation should be had. But there is no such rule. The mortgagor's attorney having received the bills of costs, his course was to tender such sum for the costs as he thought sufficient, if he was not able to get the bills taxed under the Consolidated Statute respecting Attorneys at Law (*a*), or in some other way. He must make the tender at his own peril as to the sufficiency of the sum tendered; and if the tender is refused, the refusal is at the peril of the mortgagee. If insufficient is tendered, the mortgagee may, as a matter of strict right, proceed with his suit as if no tender had been made. That I understand to be the rule. Judgment.

Jenkins v. *Jones* (*b*) was cited as establishing a different rule; but that was the case of a sale by the mortgagee under a power, and not of a mere suit for the mortgage money; no bills of the costs had been rendered; and the Court considered the whole conduct of the mortgagee in making the sale to be opposed to his duty. I think that the case has no application to the present.

The dry point of law on which I have thus expressed my opinion against the mortgagor, is decisive of the

(*a*) Secs. 38 to 40. (*b*) 2 Giff. 99.

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present motion. The defendant swears that he has always been ready and willing, and that he is still ready and willing, to discontinue his action on the covenant upon being paid the interest overdue, with such costs as he is entitled to receive. Should he not carry out that intention, the plaintiff may make such application to the court as he shall be advised; but I hope that the litigation which has already taken place will prove to have been sufficient to exhaust the irritability of all parties, without further expense to any of them.

LANE v. YOUNG.

Pleading—Parties.

A party entitled, as a residuary devisee, filed a bill, against one of three persons named as executors and trustees, praying to have the trusts of the will carried out; alleging that the other two persons named as executors and trustees had renounced probate of the will and had never acted in the matter of the trusts thereof. The defendant's residence was unknown to the plaintiff, and service had been effected by advertisement, under the General Orders; the bill was taken against him *pro confesso*, and there was no evidence, other than such admission of the defendant, as to the other parties having renounced or refused to act. The Court, on this state of facts, refused to make any decree in the absence of the co-executors.

Hearing *pro confesso*.

Mr. *Spencer*, for the plaintiff, referred to *Stewart* v. *Hunter* (*a*).

February 2. Judgment.

SPRAGGE, C.—Upon reading the bill and the will of the testator which has been put in with it, it appears to me that the cause is not in a state in which I can make a decree.

(*a*) 14 Gr. 132.

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The testator by his will directs that his real estate, not specifically devised, shall be sold by his executors, after selling his chattels to be divided among his children; and he empowers "his executors, or a majority of them or the survivors of them, to give titles in fee simple for all they may sell." The will names three persons as executors. The bill is filed by one of several of the residuary devisees, and alleges that two of the three named as executors, *Willet Dorland* and *John Dorland*, renounced probate and never acted as executors or trustees; and that the third, *David S. Young*, proved the will and became sole executor thereof. The bill is filed against *Young* only, and is taken *pro confesso* against him, and upon that the cause is brought to a hearing.

We have only the allegation of the plaintiff and the confession of one of three executors and trustees that the other two executors and trustees renounced probate and did not act. The bill alleges too that *Young* left the Province about two years ago and went to the United States, where he has since resided at some place unknown to the plaintiff. I infer from this that he has not been served with the bill, and that it is at least uncertain whether it has ever come to his knowledge. At most, it is only his own confession, and in this case probably is only so technically; and is really only the allegation of the plaintiff.

Judgment.

But taking it as a confession by *Young* of the facts alleged, it is no proof, except as against *Young* himself, of their truth. The two other executors and trustees may have proved the will and may have acted as executors and trustees, and may have executed the trusts of the will which the bill asks this Court to execute.

Apart from the question of proof of what is alleged, the allegations themselves are very defective. As to the trusteeship, it is only alleged that the *Dorlands*

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never acted. It is not alleged that they have disclaimed. If they were made parties they might shew that they have acted, or shew some good reasons why they have not as yet made sale of the residuary real estate.

It may be sufficient now if the two trustees not made parties appear by counsel upon the cause being again set down, and consent to be made parties, and thereupon disclaim at the bar. I am not sure that they ought not also to make affidavit that they have not acted in the trust. I refer to *Ladbroke* v. *Bleaden* (*a*), *In re Ellison's Trust* (*b*), *Foster* v. *Dawber* (*c*).

THE BANK OF BRITISH NORTH AMERICA v. MALLORY.

Construction of the Act 29 *Victoria, chapter* 28, *section* 28.

Where certain creditors of a deceased insolvent sued his executor, recovered judgments, and sold his real estate, and got paid in full: *Held*, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed *pro rata*, under the Act 29 Victoria, chapter 28.

Statement.

Edward Howard died insolvent, appointing the defendant *Mallory* his executor. Several creditors of the deceased afterwards sued the executor, recovered judgments, and issued writs of execution against the insolvent's lands. Under these, the Sheriff of the County of Lennox and Addington sold lands of the insolvent, and paid over the proceeds to the judgment creditors, according to the order of their priorities, in consequence of which some of the creditors were paid in full; one received a portion of his debt, and the plaintiffs in this suit, who were the largest creditors, received nothing on their execution.

(*a*) 16 Jur., 630. (*b*) 2 Jur., N. S. 62. (*c*) 8 W. R., 646.

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Bank of B N.A. v. Mallory.

The plaintiffs then filed their bill against the creditors who received any part of the proceeds of sale, the Sheriff and the executor, claiming that, under the Act of the late Province of Canada, to amend the law of real property and trusts in Upper Canada (29 Victoria, chapter 28, section 28), they were entitled to have all the real and personal estate of the insolvent distributed *pro rata* among all his creditors, and praying that the execution creditors, defendants, might be ordered to account, and refund what they had been paid over and above their due share, and that the deceased's estate might be administered in a due course of administration.

To this bill such of the defendants as were paid in full demurred.

Statement.

Mr. *James McLennan* and Mr. *S. J. VanKoughnet*, for the demurrer, contended that the Act merely abolished the distinction between different classes of debts in the case of insolvents' estates, allowing to creditors who had obtained judgment and execution the priority which they had before the passing of the Act. They contended that any other construction of the Act would lead to serious difficulties in administering the estates of deceased insolvents; certain creditors might, as here, have to refund after they had been paid in full; the executor might have no control of the real estate which required to be distributed; and he would not know how to act, in many cases, as the estate might be insolvent without his being aware of it.

Mr. *McGregor*, contra, contended that the language of the Act was very comprehensive, and wholly inconsistent with the contention raised by the demurrer. If that were upheld, instead of all creditors being paid *pari passu*, one, by being a day sooner with his writ, might be paid in full while the rest received nothing. He contended that the object of the Act was to make

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estates of deceased insolvents generally distributable on the principles on which Courts of Equity always acted in the absence of any legal priority, and on the principles applied to the estates of living insolvents by the Bankruptcy Act passed the previous year. He further contended that the difficulties supposed by the defendants were imaginary, as any of the parties interested could have an order for administration in this Court whenever they chose to apply for it.

February 2.

SPRAGGE, C.—This bill and the demurrer thereto, raise this question: whether section 28 of the Property and Trusts Act, 29 Victoria, chapter 28, has only the effect of abolishing the distinction between different classes of debts, in the case of a deceased person, where there is a deficiency of assets; leaving to parties obtaining judgment and execution the priority which they had under the law before the passing of the Act; or whether it extends also to abolish such priority.

Judgment.

The language of the Act is comprehensive. It places upon the same footing debts due to the Crown, to the personal representative, and to others, including debts by judgment, decree or order, and other debts of record, debts by specialty, and simple contract debts; and enacts that in the administration of the estate they "shall be paid *pari passu*, and without any preference or priority of debts of one rank or nature over another," and then provides that "nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate." Such lien is the only thing saved, in terms, from the operation of the Act.

This bill is by judgment creditors who obtained judgment subsequently to other creditors, whose judgments have been satisfied in whole or in part by sale by the Sheriff of real estate of the debtor. The demurrer is by the earlier judgment creditors.

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For the demurrer it is contended that the administration spoken of in section 28 is an administration in this Court. I do not think so. I have no doubt that an administration in this Court is comprehended in the term, but I am also clear that an administration by the personal representative himself is also meant. The same term is used in sections 25 and 26; and it is plain from the context in those sections that an administration by the personal representative is meant. Sections 27 and 29 also point to an administration of the estate by the personal representative. But what, above all things, makes it clear that the word is used in no limited sense, is, that it is used in the clause which abolishes the distinction between different classes of debts; and it is clearly meant that that distinction should not continue to exist where the personal representative was distributing the estate any more than where it is administered in this Court.

Judgment.

It is contended further that priority obtained by execution is not in terms abolished, while the distinction between classes of debts is, and therefore that the former is left as it was; and that priority, obtained as the fruit of diligence, has always been respected. I think the words used are large enough to comprehend all priority, in point of time, as well as preference or priority in order of class. Debts of all classes are to be paid *pari passu, and* without any preference or priority by reason of class. The words *pari passu* mean "equally, without preference;" then follow words applying to *classes* of debts; and the two are coupled by the word "and," indicating, *prima facie*, that the two do not mean the same thing. The last applies to classes of debts: the former, to what, unless to priority of time? Verbal criticism of Acts of Parliament is, however, often unsatisfactory, and there is enough, without it, to shew that priority obtained by execution is not preserved. Priority by judgment is taken away.

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When there is judgment, there is, as a rule, ability to have execution, and generally, also, the fact of execution; but there is no exception made where there is execution. There is an exception, and one only, to the sweeping provisions of section 28, and that is, liens existing in the lifetime of the debtor. Further, it would place the personal representative himself, in cases where he is a creditor of the debtor, in an unequal and unfair position, as he cannot at law sue himself; and as the Act abolishes his right of retainer, he would be postponed to all creditors who chose to sue. The Act prevents his placing himself before others; it is evident that it is not intended that he should be placed after others. I think there is nothing in the argument that priority, the fruit of diligence, is respected. The diligence of bringing and prosecuting actions promptly is certainly not respected by the Act. It contemplates, as far as possible, an administration by the personal representative *without suit;* and points out, in section 27, how a personal representative may, out of Court, adopt the practice of this Court in administration suits, and thereupon distribute the assets of the debtor with safety to himself. In short, it would be against the whole scope and spirit of the Act, so far as it relates to the "distribution of assets," to give priority to a creditor, on account of his obtaining execution at law.

Judgment.

It is suggested that practical difficulties will arise if the construction of the Act contended for by the demurring defendants be not adopted. It may be so, though I think that the difficulties are somewhat overdrawn. But if it be so, it may be only that the machinery provided by the Act is not perfect. The Courts, at any rate, must first construe the Act, and then work it out as best they may. The difficulties, in working out an Act of Parliament, can only assist in its construction, where they are of such a nature as to convince the judgment of those who are expounding it, that a certain inter-

pretation would lead to such consequences that that interpretation could not have been intended by the legislature. The difficulties suggested here are not of so grave a character. The assets referred to in the Act are, it is suggested, real as well as personal assets, and no doubt they are so; then it is suggested, correctly, of course, that a personal representative can administer personal assets only. So far as that may be an argument for the administration spoken of in section 28 being confined to an administration in this Court, I have given my reasons for holding such a construction wrong; and it cannot, of course, be contended that one rule is to be applied to personal assets and another to real assets. My construction of section 28 is, that it applies to any administration, of any assets, real or personal.

What is contemplated *prima facie* by the Act is an administration by the personal representative, and so personal assets as the subject of administration. It would be the duty of the personal representative—it would, at any rate, be prudent in him for his own protection,—except in a very simple case, to act under section 27, and in any event to distribute the assets as directed by the Act, from time to time as they come to his hands.

Judgment.

If there be no real estate, no difficulty arises. Suppose the assets all personal how would the contention of the defendants apply? An action at law is evidently not contemplated, but a distribution of assets without suit. In view of the several provisions of the Act to which I have referred, and its whole scope and spirit, can it be contended that priority can still be given to an execution creditor?

The real estate, however, cannot be dealt with by the personal representative. Creditors can only get at it through the intervention of a Court of Law or

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Equity, but that does not appear to me to furnish any good reason for giving an execution creditor priority. It would be an anomaly to give him priority as to real assets when he has it not, as to personal assets. Closely connected with this is the difficulty suggested as to how a sheriff is to deal with money levied by him by sale of real estate. The same difficulty may indeed arise in regard to moneys levied by sale of personalty. He, of course, cannot administer under the Act. It is not necessary, nor would it be proper, to say what he should do. The law affords him protection where there are rival claimants to a fund. It is sufficient to say now that if all creditors are entitled *pari passu* with execution creditors, there is no serious difficulty in working out the distribution of the sale of real estate, any more than there is of personal estate. In the case of personal estate, with a diligent business-like personal representative, there ought only in rare instances to be occasion for a resort to the Courts at all. In the case of real assets, there being as to them no functionary answering to the representative of personal estate, the effect of placing the execution creditor upon the same footing as other creditors, may be to induce creditors to obtain administration in this Court, where the heirs or devisees of the deceased debtor are necessary parties, instead of proceeding by action at law where the real estate is got at by the anomalous proceeding of an action against the personal representative; and where it is often a race for priority between different creditors in which the personal representative can give indirect, but still effectual, aid to such creditor or creditors as he may prefer by contesting, or leaving uncontested the actions.

The language of section 28, the provisions of sections 26, 27 and 29, and the whole scope of the Act are all, in my judgment, against the construction contended for by the demurring defendants. The demurrer is therefore over-ruled with costs.

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LASSERT v. SALYERDS.

Injunction—Waste—Joint Tenant.

Although the general principle is that one joint-tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate.

Isaac Salyerds, late of the township of Waterloo, died intestate on the 29th December, 1856, leaving a widow and eight children him surviving. His eldest son *John* filed a petition in the County Court of the County of Waterloo, (under Con. Stat. U. C., chap. 86, page 857), for a partition or sale of the real estate of the father. The father left several farms, among the number those subsequently mentioned. A sale was ordered in the County Court proceedings, and at the sale *John* bought one farm, and *Abel*, another son, bought another farm. Both gave mortgages on the respective parcels purchased by them to the real representative of the county to secure the greater part of their purchase moneys. Subsequently the lot *Abel* purchased became vested in *John*, subject to the mortgage thereon. *John* died in November, 1864. intestate, leaving a widow and several children, who were all young. *Isaac Salyerds* was also entitled, at the time of his death, to a conveyance of another farm, and the County Court not having jurisdiction under the above proceedings to sell the same, (see section 2, of above act), the bill in this cause was filed for the sale or partition thereof, and in case of sale, for a division of the proceeds. To this suit the survivors of *Isaac's* family and *John's* family were parties. On the 2nd April, 1867, a decree was made in this cause under which the above parcel of land was sold; and the decree contained directions for an inquiry as to who was entitled to the proceeds, and as to what (if any thing) any of the parties had received on account

Statement.

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of their shares of *Isaac's* estate. In proceeding, with the reference under the decree, it was found necessary, in order to work out the directions thereof, to take into consideration the proceedings in the County Court, and by an order made in the cause the proceedings in the County Court were removed into this Court and were consolidated with this cause. Subsequently, the above two mortgages were assigned to the officers of the Court, and proceedings directed to be taken in this Court to collect the same, nothing having been paid on account of the sum secured. A bill was thereupon filed against the widow and children of *John*, and a decree and report, as to the amount due, had been made, and a time appointed for payment. The amount found due was $4,845.12. Early in 1868, *Elias Salyerds*, another son of *Isaac*, entered into possession of one of the above parcels of land, *Elias* being entitled to share in the proceeds of the several mortgages as one of the children of *Isaac*. For some time he had been cutting down and disposing of the timber and wood on the lot he was in the occupation of, and, as appeared by the affidavits, was causing great damage to the same. The affidavits also shewed that the lots were not worth more than $2,000 each, and that there was no more wood on the lot than was necessary for the farm.

Mr. *A. Hoskins*, on behalf of plaintiff, a daughter of *Isaac*, applied, on notice, for an injunction to restrain *Elias* from cutting or disposing of the timber and wood on the lot; and from selling or removing the timber and wood already cut down; and also for an order that he should account for the damage done to the lot and for the costs of the application.

Judgment.

STRONG, V. C., suggested, in case of a co-tenant being in possession committing waste, whether it was not necessary to shew a stronger case than mere waste against him to restrain him; but after referring

to the case of *Hawley* v. *Clowes* (*a*), cited in *Kerr* on injunctions, at page 258, he directed to order to go as moved for. 1870. Lassert v. Salyerds.

GLOVER v. WILSON.

Will, construction of—Power of sale.

A testator by his will devised as follows: "Also it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children, and to the support of my wife, so long as she remains my widow"; and by a subsequent clause named certain persons executors of his will; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will."

Held, that under these provisions the executors had full power to sell and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary party to the conveyance.

This was an appeal by the plaintiff from the ruling of the Master at Toronto.

Mr. *James McLennan*, for the appeal.

Mr. *Palmer*, contra.

STRONG, V. C.—The decree in this case directs the trusts contained in the will of *William Glover* to be carried into execution, the plaintiffs being the testator's widow and his children, born at the date of his will, and the defendants, his executors. By a subsequent order certain freehold lands of the testator's were directed to be sold and were sold accordingly, and purchased by Mr. *James Allen*, who accepted the title, and carried his conveyance into the Master's office to be settled. The Master, at the instance of the purchaser, determined February 8. Judgment.

(*a*) 2 John, C. R. 127.

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that *Eliza Glover*, a daughter of the testator, born in his lifetime, but after the making of his will, and who is not a party to the suit, ought to join in the conveyance; and from this order of the Master the plaintiffs now appeal. If the question is not concluded by the decree which declared the plaintiffs to be the persons entitled to the benefit of the trusts of the testator's will, I think, on the authority of *Moffatt* v. *Burnie* (*a*), quoted by Mr. *Palmer*, that *Eliza Glover* is entitled to the benefit of the provision for maintenance. But as I am of opinion that the will gave the executors a legal power of sale, and that they can consequently convey the fee, this question as to the proper construction of the word "children" in the maintenance clause becomes immaterial. It is clearly established by many authorities,—amongst which may be cited the following, *Forbes* v. *Peacock* (*b*); *Ward* v. *Devon* (*c*); *Tylden* v. *Hyde* (*d*); *Curtis* v. *Fulbrook* (*e*); *Williams's* Real Assets, 84;

Judgment.

Dart, Vendors, &c., 3rd ed. p. 400; *Sugden* on Powers, 8th ed. pp. 118, 119,—that where a testator by his will directs real property to be sold, without saying by whom, and the proceeds to be distributed or applied by his executors, they take a power to sell and convey the fee. Now in this informal will, we find a clear though clumsily expressed power to sell in the following words: "Also, it is my will that, when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children and to the support of my wife, so long as she remains my widow," and the proceeds being directed to be applied to maintenance indicates that an immediate and not a postponed sale was intended. Then, that the produce of this sale is to be applied by the executors is made apparent by this passage in the will: "And I do hereby lawfully appoint and authorize *William Wilson*

(*a*) 18 B. 214.
(*b*) 11 Sim. 152, and 11 M. & W. 637.
(*c*) 11 Sim. 160.
(*d*) 2 S. & S. 238.
(*e*) 8 Hare, 25.

and *John McLoughlin*, both of the township of Eramosa, county of Wellington, and province of Canada, executors of this my last will and testament, and of the aforesaid estate and effects, and to apply the same according to the directions in the said will."

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I think, therefore, that *Eliza Glover*, the testator's daughter, born after the making of his will, is not, either as one of the co-heirs at law, or as entitled to the benefit of the trust for maintenance, a necessary party to the conveyance, inasmuch as the executors take a legal power of sale, and I must, therefore, allow the appeal with costs (*a*).

GRACEY V. GRACEY.

Alimony—Public policy.

In a suit for alimony the wife must prove herself aggrieved, otherwise there is no foundation upon which the Court can proceed to pronounce a decree for alimony. The defendant, in his answer to an alimony suit, denied the acts of cruelty charged against him by the bill, and no evidence was given to establish the charges of cruelty, but at the hearing the defendant consented to a decree being made for alimony; the Court, on the grounds of public policy, refused to interfere.

In such a case the parties could attain the object they had in view, of effecting a separation, by arrangement out of Court; the objection to pronouncing the decree sought was, the Court doing that without proof of necessity for its intervention, which it can only properly do upon proof of such necessity.

Hearing of motion for decree.

Mr. *Moss*, for plaintiff.

Mr. *A. Hoskin*, for defendant.

(*a*) See Statutes of Ontario, 33 Vic. ch. 1, secs. 2, 3, 4.

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Gracey v. Gracey.

February 9.

SPRAGGE, C.—Since this suit was mentioned last week I have read the pleadings, and I feel great difficulty as to the propriety of making a decree. The bill alleges great cruelty on the part of the husband, extending over a series of years, and specifies some particular instances. By his answer the husband makes a general denial of the habitual cruelty alleged against him, and denies explicitly the particular instances charged, and he retorts upon the wife that she has been guilty of gross misconduct; that of frequent, open, and scandalous intemperance. It is alleged and admitted that the parties agreed very ill; that they occupied separate apartments, and were habitually upon such bad terms that they agreed to separate; the husband to make an allowance to the wife for her separate support. According to the answer they disagreed as to the amount, and the wife thereupon filed her bill for alimony. The bill was filed on the 22nd of December last, and the answer on the

Judgment.

31st of the same month. There is no evidence, and on the 1st of February, I was asked to make a decree by consent.

If a decree is made by the Court, it must be upon the ground that the plaintiff has cause of suit. The living apart of husband and wife is against the policy of the law, and the Court will only lend its aid to the wife to give her separate maintenance when she proves misconduct on the part of the husband, in one of the particulars specified in the statute. She must *prove* herself aggrieved, otherwise there is no foundation for a decree of this Court. In ordinary cases, where parties are *sui juris*, the Court will make a decree by consent; but a decree which assumes a future relation, which, as a rule, is against the policy of the law, and which can only be warranted by a proved necessity, taking it out of the general rule, stands upon a wholly different footing, and the Court must see that it does not lend its aid to that, which, in the eye of the law, is impolitic and wrong.

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Oracey v. Oracey.

It may be that the relations of these parties are so unhappy that it is better that they should part, and they appear to have come to that conclusion. There is nothing to prevent their carrying out their wishes in that respect out of Court. My objection is, to this Court being the instrument of doing that, without proof of necessity for its intervention, which it can only properly do upon proof of such necessity.

Lindsay Petroleum Oil Company v. Hurd. [In Appeal.]*

Vendor and Purchaser—Agency—Repayment of profits.

A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and he was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters parties would be likely to rely on, was not to appear and, he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market. The Court of Appeal (reversing the decree of the Court below in this respect) held that it was too late to rescind the purchase; but, that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties.—[Spragge, C., and Mowat, V. C., dissenting.]

This was an appeal by the defendant *Farewell* from the decree made herein as reported, ante volume xvi. page 147; for the following amongst other reasons:—

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*Present.—Draper, C. J., Spragge, C., Hagarty, C. J. C. P., Morrison, J., Mowat, V. C., and Gwynne, J.

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That there was no evidence of misrepresentation and concealment sufficient to warrant a decree rescinding the contract, and if any, such were proved, it was not relied on by the respondents; and they were not thereby induced to enter into the contract; that if any misrepresentation had been proved, it related to value and price only, and the respondents ought not to have relied upon it, but should have made inquiry before purchasing; that it was not proved that the respondents were damnified by any misstatement or concealment, inasmuch that it did not appear that the price paid was in excess of the real value of the property at the time of the purchase; that the decree was erroneous in directing the appellant to pay the amount of the purchase money received by *Kemp*: that the respondents were guilty of laches and did not seek relief until after the land had so fallen in value, and that the appellant could not be placed in his original position.

Statement.

The plaintiffs contested these positions, and insisted that the evidence of misrepresentation and concealment was sufficient to warrant the decree; that the misrepresentation and concealment proved were material to the contract, and influenced and induced the respondents to enter into it; that the misrepresentation and concealment proved related to ownership and other material circumstances, as well as to price and value, and they were used in order that the plaintiffs might be led to buy, and they were justified in relying on the statements, and the appellant was not in a position to assert the contrary; that it was proved that the plaintiffs were damnified by such misstatements and concealment, and that the price paid was in excess of the real value of the property at the time of purchase, and of the price really accepted for it by the true owners, and the question of value could not be relied on by the appellant, under the pleadings and the evidence in the case; that the decree rightly directed *Farewell*

to pay the amount of purchase money obtained from the respondents through his misconduct; and that there was no laches on the part of the plaintiffs, and no prejudice to the appellant which could disentitle the plaintiffs to relief, nor was any such laches or prejudice properly set up.

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Mr. *Crooks*, Q. C., and Mr. *Moss*, for *Farewell*.

The facts proved in evidence do not establish any relation of trust and confidence as between the plaintiffs on the one hand, and *Farewell* and *Kemp* on the other; they stood, in fact, in the simple position of vendor and vendee. *Kemp* clearly was not bound to disclose *Farewell's* ownership or interest; neither was he bound to state the amount at which he was really selling the lands: in fact, the principle of "*caveat emptor*" clearly applies to this case.

Argument.

As vendors, nothing was concealed by the defendants which good faith and fair dealing required them to communicate to the purchasers; this being so, clearly there was nothing rendering it incumbent on *Kemp* to disclose that *Hurd* had a right to a considerable portion of the money, as his discount on the price at which the lands were nominally sold: here, however, the bill does not even allege that the representation as to the value of the property was untrue. One, if not the leading question, in this view of the case, is, was there anything in the representations and statements of *Farewell* so false or fraudulent as would be sufficient to avoid the contract. The facts which would entitle a plaintiff to relief in equity, on the ground of misrepresentation, must be such as would sustain an action at law for deceit. Here, the material statement made by *Farewell* was twofold, one, the value of the lands; the other, that he would have been the purchaser had he been aware that they were for sale at the price named. Now,

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the evidence sustains his statement, and the plaintiffs do not attempt to give even *primâ facie* proof of any untruthfulness in his representations; besides, we insist that the plaintiffs sent a committee of two, Messrs. *Brown* and *Sadler*, to examine the lands and report their opinion as to their value, before completing the contract. Counsel objected also that, even if plaintiffs were entitled to recover, the relief given them was too extensive: the utmost that they were entitled to being, an order for a return of the amount paid to *Hurd* by way of discount. They also contended that the plaintiffs had been guilty of such delay in filing their bill as disentitled them to relief on the ground of laches. The purchase was effected, and the whole transaction closed as early as June, 1866, and the bill was not filed until January, 1868.

As to the principlo of *caveat emptor*, they referred to *Lowndes* v. *Lane* (*a*).

Argument.

Under the facts of this case it should be assumed that plaintiffs had acted in their own judgment: see *Attwood* v. *Small* (*b*), *Jennings* v. *Broughton* (*c*), *Harrison* v. *Guest* (*d*). Counsel also referred, amongst other cases, to *Dolman* v. *Nokes* (*e*), *Abbott* v. *Sworder* (*f*), *Fenton* v. *Browne* (*g*), *Henderson* v. *Lacon* (*h*), *Berry* v. *Armistead* (*i*), *New Brunswick Land Company* v. *Conybeare* (*j*), *Ingram* v. *Thorp* (*k*), *Madrid Bank* v. *Pelly* (*l*). *Pelley* (*l*).

Mr. *Blake*, Q. C., and Mr. *Hector Cameron*, for the respondents.

(*a*) 2 Cox. 363.
(*b*) 6 C. & F. at 330.
(*c*) 5 D. M. & G. 126.
(*d*) 6 D. M. & G. 424.
(*e*) 22 Beav. 402.
(*f*) 4 DeG. & Sin. 448.
(*g*) 14 Ves. 144.
(*h*) L. R. 5 Eq. 249.
(*i*) 2 Keen. 221.
(*j*) 9 H. L. 711.
(*k*) 7 Hare. 67.
(*l*) L. R. 7 Eq. 442.

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As to the point of laches relied on by the appellant, there is really no proof that the plaintiffs had become aware of their right to file a bill by reason of the fraud practised on them, by means of the false representation in *Kemp's* contract, or offer to *Hurd*, until just before they did file it; in the absence of any evidence to the contrary, they must be taken to have become aware of it then for the first time.

Then as to the question of value and the principle invoked of *caveat emptor*. *Farewell* had acquired a reputation for knowledge and character, and in consequence, his representations and opinions carried weight in the minds of parties to whom he was known; and it having been shewn that he had become a party to a scheme to conceal that he was a vendor in order that his views might have weight with intending purchasers, he cannot be heard to assert, the admitted right of every vendor to puff the commodity in which he is dealing, and obtain thereby the highest price he can.

Argument.

The appellant was guilty not only of *suppressio veri*, but also of *suggestio falsi;* in his letter he refers to what *Kemp* was offering to sell, namely, all the lands contained in the contract at a lump sum; and in this letter he expresses his willingness to buy them at that sum; while at the same time he was the actual owner of a certain portion of those very lands, and had previously entered into an arrangement, whereby he had agreed, to sell his portion at a rate, per acre, much below that mentioned in *Kemp's* agreement.

The substance of the transaction here is, that *Hurd*, who professed to be acting in concert with the plaintiffs, and as having a joint interest with them, was in reality the agent of *Kemp* and *Farewell* to obtain for them the price stipulated for between the parties; while they, at the same time, gave him a contract, shewing on the face

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of it, that the price stipulated for was much higher, in order that *Hurd* might effect a sale at that price for his own benefit as well as that of *Kemp* and *Farewell*. Then the principle of *caveat emptor* is invoked as an objection to the relief given, on the ground that the Company so far from relying on the statements of *Farewell*, had actually sent two of their number—*Brown* and *Sadler*—to the lands, in order to judge as to the value of the lands. But admitting that these gentlemen were a duly appointed committee of the plaintiffs, *Farewell*, on their visiting the property, was still the apparently disinterested witness who was referred to as to the question of value. It is clear that all these parties were joined in a fraudulent scheme to defraud the plaintiffs, and therefore all participators in that fraud must refund: *Gray* v. *Lewis* (*a*), *Cullen* v. *Thomson* (*b*), *Blake* v. *Mowatt* (*c*), *Venezuela* v. *Kisch* (*d*).

Judgment.

DRAPER, C. J.—The first step in the transactions brought before us by this suit, seems to have been an arrangement between the appellant and *Hurd*, by which the former agreed to authorize the defendant *Kemp* to contract for the sale of the appellant's interest in certain lands. A selling price was put upon these lands—being, apparently, the price which the appellant demanded—but which, in reality, included a considerable sum for the profit of *Hurd* who was to find a purchaser. Then *Kemp*, on *Hurd's* application, offered to sell to him the three parcels of land mentioned in the bill, in two of which only the appellant was interested. The price which *Kemp* put upon the three parcels was arrived at by taking the price agreed upon between the appellant and *Hurd*, and adding thereto a price for the additional quantity—arrived at in the same manner—that is, by adding to the sum which *Kemp* was willing to

(*a*) L. R. 8 Eq. 526.
(*b*) 6 L. T. N. S. 670.
(*c*) 21 Beav. 608.
(*d*) 2 E. & I. App. 99.

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accept on his own account, a sum for *Hurd*, which, between themselves, they termed discount. There was so far a combination and agreement between the three defendants to represent *Kemp* as the person who was selling all the land, and was fixing, for his own benefit, the price named in his offer to *Hurd*.

The appellant and *Kemp* knew that *Hurd* did not contemplate buying for himself; that he wanted to find a third party who would buy on the terms mentioned in the offer. He says himself "I had not the purchase money at my command." They also knew that he contemplated bringing about the formation of a company which would complete the purchase and pay the whole price $13,750, within the time limited in *Kemp's* offer.

Hurd was thus placed in a position by which he could offer to sell what *Kemp's* offer contained. The appellant's name did not appear, though he was interested in the sale, and was aware that the price was not confined to the sum which he and *Kemp*, as actual vendors, were to receive for their respective interests in the lands. They enabled *Hurd* to present as true a statement which suppressed the fact of the appellant's interest, and asserted, untruly, the actual power to sell of the apparent owner. And it was not true for a single moment that $13,750 was the selling price to *Hurd*.

Judgment.

I think we are warranted in concluding that these facts are sufficient to constitute *Hurd* the agent of the appellant, to make the representations contained in *Kemp's* offer to him, or reasonably deducible from its terms.

Hurd was further desirous of obtaining some influential opinion or representation from an apparently disinterested party. He probably knew the value that would be

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attached to the opinion of the appellant, and he consequently obtained from him the letter which has been spoken of in the cause. The appellant wrote it in order that *Hurd* might shew it to parties willing to purchase, and in order that they might be influenced by its contents, as he was "pretty generally known through that part of the country, and also known to have acquired knowledge respecting oil lands." In this letter he stated, among other things, that the three parcels of land, as a whole, "was a good investment at the price," which every one who saw the letter and *Kemp's* offer to sell, must understand to mean $13,750. There was not a word in the letter to indicate, or even to give rise to a suspicion that the writer was not perfectly disinterested.

Judgment.

Under the united influence of *Hurd's* statements and of this letter, a meeting was held at Lindsay, and the first steps towards the formation of a company were taken. Several persons then subscribed for shares, among whom *Hurd* was conspicuous, putting his name at the head of the list for $1000 stock, and being nominated to be the president of the company, as well as agent to complete the purchase according to the offer from *Kemp*. Two of the subscribers, however, determined to go to Oil Springs and judge for themselves. An attempt is made to fasten upon them the character of a committee to examine on behalf of their fellow subscribers. I think the evidence does not establish this, though, if they had been so appointed, I do not see that it would have affected the transaction. They, with *Hurd*, arrived at Oil Springs, and the appellant and *Kemp* saw them without delay. The appellant says he went because he was interested in *Kemp's* success in selling, though he said nothing to *Brown* and *Sadler* about this interest. On the following morning *Hurd* told him that *Brown* and *Sadler* had examined the lands and were satisfied, and he says, in

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his evidence "It is probable he" (*Hurd*) "told me that morning he had succeeded in forming a company, provided *Brown* and *Sadler* were satisfied." At *Hurd's* request, the appellant indorsed *Hurd's* draft at sight for $1884 on *Smith*, who was made treasurer at the meeting at Lindsay, in order to get it negotiated by the bank agent at Oil Springs, and thus raise the amount necessary to pay the first instalment to *Kemp*. The appellant also indorsed a second draft at ten days after date, drawn by *Hurd* in favour of *Brown*, for $1825. Both of these drafts were immediately negotiated. *Hurd* paid $1000, *Brown* and *Sadler* $500 each, for the stock they had agreed to take in the company; and *Kemp*, out of these sources, was paid the first instalment of the purchase money, while the appellant was writing the agreement between *Kemp* and *Hurd*. As I understand *Sadler's* evidence, (he was called for the defence) the agreement was written as if *Hurd* was purchasing on his own behalf, but *Sadler* says "I objected, and it was then expressed that *Hurd* was to be a trustee for the company. *Kemp* must have so understood it,—it was so talked over in his and *Farewell's* presence." I think it probable the writing was not altered. *Sadler* may have thought it enough to have a full understanding on the part of *Kemp* and *Hurd*; but such a discussion in the presence of the appellant, supplements his admission of the probability that *Hurd* had told him of his success in forming a company. The agreement is not before us, and the deed from *Kemp* to *Hurd*, dated 30th June, 1866, does not refer to, or mention *Hurd* in the character of trustee. It is to him individually. The money, thus received, was soon afterwards divided, *Kemp* paying the appellant his share, as owner of part of the lands, paying *Hurd* his "discount," and retaining the balance as his own. The remainder of the purchase money was duly paid, and *Kemp* conveyed, as already stated, to *Hurd*, and *Hurd* conveyed to the company. The appellant and *Kemp* got the money for

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which, as between themselves and *Hurd*, they agreed to sell, and he got (as it appears by the figures) $2750 in cash, and his stock in the company $1000 paid up in full.

As both *Hurd* and *Kemp* submit to the decree, their position calls for no further observation.

For the appellant it was urged that the case against him rested on an untrue representation of the value of the lands, and upon the assertion, in his letter, that he would have purchased some part of what *Kemp* was disposing of, had he known the price at which it was offered. I dissent from this in both respects. The untrue representation was, that the price fixed upon between him and *Hurd* was really the vendor's price, the value he set upon the land, and which *Hurd* had to pay in order to get it, and thus enabling *Hurd* untruly to make it appear to any one to whom he offered to sell, that such was the actual cost to himself. It is, I think, abundantly shewn by the evidence, that the appellant knew that *Hurd* intended to use, and that he subsequently did use this untrue representation to effect the sale to these plaintiffs, and to cause them to believe that they were standing in precisely the same position that *Hurd* stood as a purchaser from *Kemp*. He absolutely stood by while *Hurd* was completing the sale on the *faith* of that untrue representation, and wrote the very agreement between *Kemp* and *Hurd*, which so represented the transaction. Unless a very substantial distinction can be drawn between the putting afloat, and actively sustaining untrue representations made to mislead purchasers of land, whoever they might happen to be, and the spreading false rumours to raise the price of public stocks, a large part of the observations made by the Judges in the well known case of *Rex* v. *De-Berenger* (*a*), become applicable, and confirm the

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(*a*) 3 M. & S. 67.

conclusion that (admitting that the combination in the present case did not amount to a misdemeanour) it was a contemplated fraud by the appellant and his associates on any one who should be induced, by these representations, to purchase these lands at what the real vendors called "nominal prices." And in the assertion of the appellant that he would have bought had he known that the parcel of land to which he alluded, would have been sold so cheap, the language used would have made any one, who saw *Kemp's* offer to *Hurd*, believe that the nominal price therein mentioned, was what the appellant alluded to, as so cheap, whereas *Kemp's* evidence shews that the real price, which *Kemp* was to get, was what the appellant's letter alluded to, and the double interpretation, of which the letter is susceptible, has the appearance of being designed to mislead. Any attempt to bring the case under the actual facts within the maxim *caveat emptor* appears to me utterly hopeless.

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It was argued that *Brown* and *Sadler* were sent on behalf of the plaintiffs to examine the lands, that they did examine and were satisfied that they were worth the price which *Hurd* demanded, and that, on the faith of their representations, the purchase was made, and not upon any of *Hurd's* representations, nor yet on those contained in the appellant's letter. But the evidence, so far from sustaining, contradicts the assertion that *Brown* and *Sadler* went up with any commission whatever from the plaintiffs, and so the argument fails for want of foundation in fact.

Judgment.

Upon the whole case, my first conclusion was that the appeal should be dismissed. I think that the fraud, charged in the sixth paragraph, is proved, namely, that there was a fraudulent combination between the defendants in reference to this sale, that part of the lands belonged to the appellant, and the title was vested in him, and that, while he pretended in his letter to be

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giving disinterested advice and to express a disinterested opinion, he really wrote to induce any one to whom the letter might be shewn, to make a purchase, by which he (the appellant) might profit. In his conduct throughout, there was both *suggestio falsi* as well as *suppressio veri*. The one in representing the price as that at which he was willing to sell, whereas it included a profit to *Hurd*, and thus so far enabled him to make a false representation; the other, in withholding throughout, the fact that he was an interested party, while his letter would lead to an opposite conclusion; his concealment from *Brown* and *Sadler* that the price at which the lands were offered was a sham price, as *Kemp*, in his evidence, called it, when, as *Kemp* also wears, if the real price had been mentioned, it would likely have defeated the object with which the offer was made; and the preparation of the agreement between *Kemp* and *Hurd*, in which the former is represented as sole vendor, and the sham price is mentioned as the real price, and this at the time that there is the strongest reason for believing that he knew *Hurd* was purchasing for the projected company.

Judgment.

I have found no authority nor heard any argument to bring me to the conclusion that, where two or more parties combine for the individual and several profit of each, and even in different proportions, in fraudulent statements and untrue representations to attain their object, they are not each liable to the full extent, to make good to the injured party the loss their conduct has occasioned to him.

It has, however, been suggestod that, considering the delay of the plaintiffs in filing their bill, and that they had entered into possession of the lands or some part thereof, and had commenced to sink a well, or wells, in search of oil, they could not justly be held to have the sale of the lands, by the appellant and *Kemp* set aside,

and to have the price which these parties respectively demanded and received for their interests, returned to them, and that all which they had really lost was the amount which is called *Hurd's* discount, amounting to $3,750.

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I have, upon further reflection, but not without much hesitation, adopted this view, and am of opinion that, to this extent, the decree should be varied, by omitting so much as relates to the cancellation of the sale and by reducing the sum to be repaid by the defendants to the plaintiffs to such sum as may be found by the Master, as the difference between the real and nominal price of the land, with interest from the date of the payment of the purchase money, and no costs to either party.

SPRAGGE, C.—There is much in the judgment of the learned Chief Justice of this Court in which I concur, but I feel obliged to dissent from the conclusion at which he has arrived.

Judgment.

There is this unquestioned fact to start from in this case: that there was gross fraud; a conspiracy in which all the defendants joined to enable one of themselves to represent the land owned by the other two as purchased by him at a larger price than its true price, and there was *Farewell's* letter, and the other circumstances to which I adverted when the case was before me in the Court below, and there is the rule, that a transaction tainted with fraud, as this is, cannot stand. The decree in the Court below proceeded upon that rule. Then what is there in the circumstances of this case to take it out of the rule?

It is assumed that the purchase money agreed upon by *Hurd* to be paid by him to *Farewell* and to *Kemp* was the true value of the land; and that under the circumstances, the justice of the case will be satisfied by compelling the defendants to refund to the plaintiffs

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the difference between that assumed true value and the nominal price, which *Hurd* was enabled to impose upon the plaintiffs as the true price. But it is only an assumption that this was the true value; and there is this against its being so, that the vendors consented to become parties to a fraud, in order to get the land off their hands, at the price they were to receive. Is it to be assumed that the price was the market value? or is it not rather a proper inference that part of it was the price to be paid for assisting *Hurd* in the fraud. I do not mean that it was agreed that so many dollars were to stand for the value of the land; and so many for the price of their assistance in a fraud: but, there being an assistance in a fraud, it is not to be assumed that it was gratuitious, and it is a circumstance that tends to negative the presumption that the price paid to the vendors was the value of the land, assuming that, but for that circumstance, the price paid should be taken to be the value of the land.

Judgment.

It is further assumed that those who formed the company would have purchased at the sum really paid by *Hurd* to *Farewell* and *Kemp*. I do not see how this can be assumed. If the fraudulent means by which their judgment was influenced are put out of the case, how are we to say that they would have purchased at all? or at any rate, that they would have purchased without inquiries, and judging for themselves?

There is not, in my humble judgment, anything in the case in support of either of these assumptions; that, excluding the frauduleut practices, the company would have purchased at all; that they would have purchased at the price paid to the vendors; or that that price was the true value. I think there is no ground upon which to fix them as purchasers at that price, or, indeed, at any price; and I think that there is no ground upon which to take the case out of the general rule; and that

the bargain being obtained by fraud, should be set aside. 1870.

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With regard to the delay in filing the bill: laches can only count from the discovery of the fraud, and there is nothing to shew that in this case the bill was not filed promptly after its discovery. If, indeed, it were made to appear that these purchasers had been lying by, after discovery of the fraud, to see whether their purchase would turn out a profitable one or not, it would be a ground for refusing them relief altogether. But nothing of this kind appears. The scheme of these defendants was intended to be kept secret. They cannot say that it was kept secret so long that the plaintiffs ought not to be relieved against it. It lies upon them to shew that it became known to the plaintiffs so long before they filed their bill, that they should be taken to have acquiesced in the purchase, with knowledge of the means by which it was brought about; or to have lain by advisedly to see how it would turn out.

Judgment.

With all respect for the opinion of the majority of the Court, I must say I fail to see anything in the case, since the argument of the appeal, that should have the effect of changing the views expressed by me in the Court below.

I think the decree should be affirmed.

HAGARTY, C. J.—On the best consideration that I can give the case, it seems to me that the plaintiffs, by their unexplained delay, from October, 1866, to February, 1868, and their dealing with the land purchased, together with the other circumstances, are not entitled to a cancellation of the sale. Even before the execution of the deed they had quite sufficient information to have put them upon inquiry as to value.

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The whole dealing was of a highly speculative character; when plaintiffs completed the purchase, the evidence shews there was no wrong done as to the then value; they commenced operations, and tried their fortune like other oil adventurers. But for the general decline of this kind of property, no complaint would have been heard. I think it was incumbent on them to shew a very satisfactory reason for their very long delay, after dealing with this property as their own. I cannot accept as sufficient their assertion in the bill, that they only recently knew of the fraud practised.

But I think they are entitled to call upon defendant *Hurd*, to refund to them all the moneys received by him, over and above the actual price paid to *Kemp* and *Farewell* with interest, which must be considered as still the company's money, and that in default of his so paying, the other defendants, by whose instrumentality he was enabled to commit the fraud upon his co-adventurers in the company, must be held liable to make good the amount.

Judgment.

The nearest case seems to me that of the *Bank of London* v. *Tyrell* and *Read* (*a*). The doctrines there enunciated so emphatically must govern this case. *Tyrell* and *Read* were jointly interested in selling the land to the bank, at a high price. *Tyrell*, being the bank's solicitor, concealed his interest, and acted throughout as the bank's agent. *Read* and he thus obtained a large sum over and above what they had to pay for the property. The bank had built on the premises, and did not ask to have the sale cancelled. The fraud had only been discovered after several years, in consequence of the evidence given in an equity suit between *Read* and some others. The Master of the Rolls, while compelling *Tyrell* to refund all his gains,

(*a*) 27 Beav. 273.

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dismissed the bill without costs as to *Read*, thinking he he had no power over him. *Tyrell* appealed to the House of Lords (*a*). Lord *Westbury*, C. says: "As *Read* was a party implicated in this violation of trust committed by *Tyrell*, I should have been better pleased if *Read* had been retained in the character of a surety for fulfilment of *Tyrell's* obligation." The authority for making *Read* liable in the event of *Tyrell* not being able to pay seems clear. In *The East India Company* v. *Henchman* (*b*), Lord *Turlow* says: "If a stranger enters into a fraudulent bargain with a servant, acting on behalf of his master, to obtain a power only gained by betraying his master, an account upon that ground could not be resisted." In *Massey* v. *Davies* (*c*), Lord *Alvanley* says: "Not only the servant acting contrary to his trust, but a man, who knowing the servant was guilty of a breach of trust, entered into the transaction with him, would be answerable."

Judgment.

In Lord *Abingdon* v. *Butler* and *Benson* (*d*), a bill was filed to set aside a lease made by plaintiff to *Butler*, at an undervalue, by colluding with defendant *Benson*, who was plaintiff's steward. The decree was for *Butler*, the lessee, to pay the difference between the sum paid as a fine, and the true amount that ought to have been paid, thus confirming the lease. Lord *Turlow* said: "As to *Benson*, I am so far from dismissing the bill against him, that he shall pay if the other does not; he is a party to the fraud. *Butler* must pay, and failing him the other."

In this last the lease was confirmed; the lessee ordered to pay the right sum, besides what he had paid, and the unfaithful servant was made as it were his surety for

(*a*) 10 H. L. 47.
(*b*) 1 Ves. Jr. 289.
(*c*) 2 Ves. Jr. 322.
(*d*) 1 Ves. p. 210.

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payment (*a*). I take the case against *Farewell* just as he states it on oath. He seems to have no idea of any impropriety in the course he adopted; yet he directly aided *Hurd* in his violation of duty.

The arm of equity would be indeed powerless if it could not reach the actors in such a studied deception on purchasers. I think the decree must be varied.

No costs of appeal to either party. *Hurd* to pay in the first instance; on his failing, *Farewell* and *Kemp* to pay

I hesitated before arriving at the conclusion that the decree appealed from went too far in cancelling the sale: under all the facts, I think the proposed variation will do the most complete justice.

Judgment.

MOWAT, V. C., remained of the opinion expressed by him in the Court below.

GWYNNE, J.—The bill states that the plaintiffs are a corporation duly incorporated under chapter 63 of the Consolidated Statutes of Canada, and 29 Victoria, chapter 21, "for the purpose of acquiring *certain* lands in the Townships of Enniskillen and Dawn, and other lands in the County of Lambton; sinking wells thereon for the discovery of oil, and working the same; selling, leasing, or otherwise disposing of the said lands and wells, and for other purposes connected therewith, *as more* fully set forth in the statement and declaration made in pursuance of the said Statutes." That "the defendant *Hurd* was the first president of the company, *and was mainly instrumental in* getting it up, and organizing it, *and he continued such president* during the whole of the transactions herein stated. The bill

(*a*) See also, 1 White and Tudor, 110, notes to Fox v. Mackreth.

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then proceeds to state the circumstances under which the plaintiffs claim the relief prayed for, as follows:

About the time the company was organized, the defendant *Hurd* had procured from the defendant *Kemp* a written offer to sell him the lands following, namely—a block of 25 acres, being the north-east part of the west half of lot 15 in the 4th concession of Enniskillen, as more particularly described in the said agreement; and also the north-east quarter of the east half of lot 30 in the 14th concession of the Township of Dawn, containing 25 acres, and also 12½ acres, being composed of subdivision lot 107, and 212 of a survey and subdivision of lot 20 in the 2nd concession of Enniskillen, at the price of $13,750, provided the offer was accepted at a day named therein, and he brought the same to the Town of Lindsay, where the majority of the stockholders in the said company reside, and then represented to the stockholders, *that the proposed purchase was a very advantageous one*, and, in order to induce the company to enter into the purchase, he produced, and shewed a letter written by the defendant *Farewell, who was well known to the said stockholders, and who had great knowledge and experience in oil lands*, and *in whose integrity* and experience in such matters, they then *had great confidence*, in which letter the said *Farewell* states that the purchase of the said land at the *price* named, would be a great bargain, and that he would have taken it himself at the price if he had known it could have been procured, and, by such representations and the influence exerted by the said letter, the said *Hurd* induced the directors of the said company, with the sanction of the stockholders, to agree that the company should accept the proposal of the defendant *Kemp*, and the said *defendant Hurd, as president of the company, was then authorized to make* the purchase on behalf of the company, on the said terms.

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That, in pursuance of such instructions, *Hurd*, on the 3rd of May, 1866, procured from *Kemp* an agreement in writing, whereby he agreed to sell to *Hurd* for $13,750.00, one-half paid in cash, and the balance in two instalments on the 18th of May, and 3rd of June. *Hurd* acting as trustee of the plaintiffs in entering into said agreement, and the money paid thereunder, being the money of the plaintiffs. That plaintiffs having paid in full for the lands, they were conveyed to them by indenture bearing date the 31st October, 1866. The bill then in paragraph 6, states that "the plaintiffs, as the defendants well knew at the time of making the said purchase and until recently, believed, *as the defendants represented to them*, that the said defendant *Farewell* had *no* interest *in the* said lands or any of them at the time of the purchase thereof, by the plaintiffs, and that the defendant *Hurd* gave to the plaintiffs all the benefit and advantage derived by him from his bargain with the defendant *Kemp*, and that the plaintiffs had, in coming to their conclusion as to the said proposed purchase, the benefit of the unbiassed judgment and disinterested advice of the said defendants *Hurd* and *Farewell*, and it was on *the faith of these suppositions that* the plaintiffs so acted, as they did act in the premises, *the value* of the said lands being highly speculative; and the *plaintiffs* being obliged to rely on the judgment and advice of those in whom they had confidence in the matter. But the plaintiffs have recently discovered that, *as the fact is*, there was a *fraudulent* combination between the said defendants in reference to the said sale; that the lands, *secondly and thirdly described* in the said agreement, in fact and in truth belonged to the defendant *Farewell*, and the title thereto was then vested in him, and that the said defendant *Farewell*, while he pretended, in writing the said letter, to be giving his disinterested opinion, *really wrote* the same in order to induce the plaintiffs to make a purchase, by which he might profit, and that the defendant *Hurd*,

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while he pretended to be advising the plaintiffs as one in a position common to himself and the other stockholders, and having no independent interest, really had an independent and adverse interest, which made it the more profitable to him the higher the plaintiffs paid for the land, and that the said defendants were all interested in effecting the said sale to the plaintiffs, and divided between them the profits arising therefrom.

The bill then charges that the defendant *Hurd*, with the knowledge of, and by an arrangement with, the other defendants derived a profit and advantage in the said transaction in fraud of his duty as president of the company and trustee for it, and the plaintiffs therefore pray:

1. "That the conveyance of the lands may be cancelled and rescinded, your complainants hereby offering to reconvey the same, and that the defendants may be ordered to repay to your complainants the purchase money thereof," or

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2. "That the defendants may be ordered to account to your complainants for all benefit, profit, and advantage derived by the defendant *Hurd* in fraud of his duty as trustee for the complainants."

The defendants *Farewell* and *Kemp* put in a joint and several answer distinct from the defendant *Hurd*. In it they deny that *Hurd* was a trustee of the said company, or that the company had any existence when the agreement for sale of the lands to *Hurd* was entered into; and they say, "We are informed and believe that the said Lindsay Petroleum Company did not make the purchase which they afterwards did make relying upon the representations of the defendant *Hurd* and the allegations contained in the said letter of the defendant *Farewell*; but on the contrary, the so-called stock-

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holders refused to combine and organise any company, or purchase the said lands from the defendant *Hurd* until they had selected two of their number, who subsequently became stockholders therein, to visit the said lands and inspect each parcel thereof, and to inquire as to the fitness of the same for the plaintiffs purposes and to ascertain what the value of the same was as compared with the prices at which other lands in the neighborhood of each of the said parcels were held and estimated, and we are further informed and believe that two such persons, Brown and Sadler by name, men of great business experience and reputed good judgment, were so appointed, and did visit the said lands, and made diligent, faithful and careful inquiry as to the said lands, *and* were so satisfied as to the situation and price of the same [that they reported very favorably thereon, and so the plaintiffs agreed to combine and organize the said company and purchase the said lands from the defendant *Hurd*.

Judgment.

"We are further informed and *believe* that the said company was duly formed for the purpose of purchasing, from the defendant *Hurd*, and developing the said lands, and that it was expressly understood that, if the said *Brown* and *Sadler* would report unfavourably, the formation of the said company should not be proceeded with, and, if they had so reported, the said lands would not have been purchased from defendant *Hurd*. We say we believe that the conveyance by *Kemp* was made to *Hurd*, but we say that after the execution of the same, the plaintiffs did accept a conveyance, and did enter upon the said lands and use and work the same for the purposes for which they had ostensibly purchased them, by sinking and procuring a good well thereon. We admit that the defendant *Farewell* was interested *with divers other persons* in the parcels of land secondly and thirdly mentioned, but we say that the deed shewing the ownership of the thirdly

described premises, was registered in the registry office of the county of Lambton, where the lands lie, and, as to the first parcel, we say that the defendant *Farewell* was not in any wise interested therein, but the same belonged exclusively to the defendant *Kemp*."

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Farewell admits in his answer that he gave defendant *Hurd* a letter containing an expression of opinion as to the merits of his proposed purchase; but he says that the statement alleged to be contained in a letter written by him, and exhibited to the stockholders, that "I would have taken the said land had I known it could have been obtained at that price, related only to the lands firstly mentioned in the said agreement, and in which I had no interest whatever. And I say that the allegations contained in the said letter were, as I believe, strictly true." The answer closes insisting that the matters complained of in the bill are after-thoughts on the part of the plaintiffs, and would not have been set up were it not for disagreement among themselves, and had there not been a great decline in the price of petroleum, and consequent depreciation in the price and value of oil lands, since the date of their purchase; and the defendants submit that the plaintiffs, by delay and laches, have precluded themselves from any relief in this cause.

Judgment.

Upon these pleadings, and upon hearing the evidence which was given, the Court of Chancery has made a decree that the sale and conveyance of the lands in the pleadings mentioned, be cancelled and rescinded, and that the *defendants* do repay to the plaintiffs the sum of $16,007.76 into the Canadian Bank of Commerce to the credit of the cause on or before the 15th of February, 1869, being the amount of purchase money paid by the plaintiffs for the land, with interest thereon; and that upon such repayment being duly made, a reconveyance of the said lands be executed from the plaintiffs to the

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defendants, free from all incumbrances created by plaintiffs, and that the defendants do pay to the plaintiffs their costs of suit forthwith after taxation. The defendant *Farewell* having paid the whole sum into Court was permitted to appeal, and he does appeal from the decree for the following reasons:

[His Lordship here stated the reasons of appeal as above set forth.]

The evidence upon which the decree has been made may briefly be said to be in substance, that *Hurd* being desirous of entering into a speculation in the purchase of oil lands in the petroleum producing region, and the defendants *Kemp* and *Farewell* being dealers in such lands, and *Hurd* being desirous of purchasing the lands in the pleadings mentioned, twenty-five acres of which situate upon lot No. 15, in the 4th concession of the Township of Enniskillen, belonged to the defendant *Kemp*, and the residue belonged to *Farewell and other persons* in different proportions, *Farewell's* interest in one portion of which was one-seventh, and in the other three-eighths, applied to *Farewell* and *Kemp* for that purpose; and that *Hurd* being anxious to have an agreement for the purchase made with but one person, it was agreed that *Farewell* should procure his co-proprietor's estate in the lands 2ndly and 3rdly mentioned to be conveyed to *Kemp* for the purpose of enabling him to enter into an agreement at a fixed price with *Hurd* for the whole including his own; the lands 2ndly and 3rdly mentioned were accordingly conveyed to *Kemp*, who thereupon entered into an agreement to sell all these parcels to *Hurd* for the sum of $13,750, if he should pay that sum within a given time: this sum was fixed at a price exceeding the actual price which the proprietors of the land were to receive by $3750, for the purpose of giving to *Hurd*, who contemplated getting the lands off by forming a company to work them, a margin of profit, and to make it appear as if the sum of $13,750 was

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the actual price he was himself to pay for the lands. *Farewell* at the time gave to *Hurd* a letter, in order that he might shew it to parties wishing to purchase and in order that they might be influenced by his opinion as to the value of the land as a speculation, expressed therein; his reason being that he was well known in the neighbourhood where *Hurd* contemplated forming the company, and was also well known to have acquired knowledge respecting oil lands.

This letter is not now produced, and what has become of it does not appear—there is a contrariety in the evidence as to what its purport upon one point was. *Farewell* and *Kemp* both testifying that a particular portion of it wherein *Farewell* expressed himself that if he had known that parcel of the land was for sale at the price, he would have bought it himself, applied to that parcel which *Kemp* owned, while others who read the letter testify that the expression in the letter applied *to all the lands* mentioned in the *agreement*. With this letter, and the agreement signed by *Kemp*, *Hurd* proceeded to form a company for the purpose of purchasing the lands and sinking wells for oil. He got some gentlemen who, upon the 30th April, 1865, met together and agreed to form themselves into a company for the purpose conditionally, as I think the reasonable conclusion from the evidence to be, that certain of their number who should go up and inspect the lands should approve of the contemplated purchase. At this meeting it was agreed who should be directors of the company in the event of its being formed, two of those directors were Messieurs *Brown* and *Sadler* who had not as yet agreed to take any stock in the company, but who reserved to themselves the right of determining whether they should or not take stock when they should see the lands. *Hurd* was to be a director and president of the company. Accordingly, *Hurd*, *Brown*, and *Sadler*, went up to the oil region where the lands were situate, *Brown*

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and *Sadler* saw the lands, had an opportunity of inquiring whether the prospects held out by *Farewell's* letter were reasonable or not, and being satisfied that the purchase should be completed, they then, on the 3rd of May, 1866, paid *out of their own moneys* $500 cash each *to Kemp in part of the purchase money for the land;* at the same time, two bills of exchange were drawn, the one by *Hurd* upon *Sadler* addressed to himself at Lindsay, for $1825, payable ten days after date to *Brown's* order, and indorsed by *Brown*, and the other drawn by *Hurd* at sight, upon *John D. Smith*, manager of the Ontario Bank, Lindsay, payable to *Hurd's* own order, and indorsed by *Hurd*, *Sadler*, and *Brown;* these drafts, together with the $1000 cash paid by *Brown* and *Sadler*, and other cash provided by *Hurd*, *Sadler*, and *Brown*, to the amount of half the purchase money, or, $6875, was then paid to *Kemp* upon his contract, and an agreement, at the instance of *Sadler* was, as is said, then procured to be signed by *Kemp* to *Hurd* as a trustee for the company, agreeing to convey the lands when the residue of the $13,750, should be paid as therein provided. The residue of the purchase money was paid chiefly by drafts drawn by *Hurd* on *Smith* on 23rd May, and July 2nd. At the time of the last payment a deed, dated the 30th day of June, was executed to *Hurd*, who, as I understand it, shortly after, I suppose as soon as the company was formed by complete registration, conveyed to the company, and afterwards, at the request of the company, *Hurd* executed another deed, dated the 31st October, 1866, which, with the deed of the 30th day of June, is rescinded by the decree.

Judgment.

In so far as this letter of *Farewell's* is concerned, the plaintiffs found their claim to rescind and cancel these deeds by reason of that letter upon these grounds; that *Farewell* was well known to the stockholders to be a person of great knowledge and experience in oil lands, and in whose integrity and experience they had great

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confidence, and that he stated in the letter that the purchase of the land at the price named would be a bargain; and that he would have taken it himself at that price if he had known it could be procured, and that influenced by this letter, which at the time the stockholders believed to be the letter of a person having no personal interest in the matter, they entered into the purchase, whereas, in truth, *Farewell* had a personal interest in bringing about the sale which he was so recommending.

Now, as I have said, I think the fair conclusion to draw from the evidence is, that the purchase was not agreed upon until the property had been personally inspected by *Brown* and *Sadler*, whose opinion upon such inspection was what led to the conclusion of the contract. I do not think that the plaintiffs have established the allegation that the purchase was entered upon under the influence of *Farewell's* letter. That letter, no doubt, induced the parties to contemplate the purchase, but they did not rest upon such letter to conclude the purchase. Moreover, it is not asserted in the bill, nor has any evidence been offered for the purpose of establishing that there was any false hopes as to the value of the speculation held out by *Farewell* or any *suggestio falsa* or *suppressio veri* in any particular, save only as affects the true consideration which was to be paid by *Hurd*, and the suppression of the fact that *Farewell* was interested, while his letter implied that he had no interest. The right then, as arising *from this letter*, of rescinding and cancelling these deeds, is not based upon the allegation or pretence that the plaintiffs have suffered any loss, by reason of anything contained in the letter, beyond the amount realised by *Hurd* in excess of the real contract price; but upon this ground simply that it is alleged that if the plaintiffs had known that *Farewell* was interested, they would not have entered into the contract at all.

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Now, if *Farewell* had written no letter at all, his interest not being disclosed, could have afforded no ground for rescinding the contract; if the contract could then be rescinded *because of the letter*, it must be upon the ground that it was entered into by the plaintiffs upon the faith of *Farewell's* recommendation alone. To annul and rescind a completely executed contract upon the ground of misrepresentation, the misrepresentation must be made by a person who is a party to the contract, and it must involve the assertion of a fact, upon which the party entering into the contract and asking to annul it relied; and, in the absence of which, it is reasonable to infer, he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether: *Pulsford* v. *Richards* (*a*).

Judgment.

That *Farewell* was a dealer in oil lands, was well known. It is said that the plaintiffs had great confidence in his integrity and experience, yet, as I have said, the fair conclusion to be drawn from the evidence is, that they did not act solely upon his recommendation. Now, if *Farewell's* letter had not had in it the sentence which, it is alleged, it had, to the effect that he would have taken the land himself at the price if he had known it could have been procured, and, if he had professed in the letter to be the owner of that portion of the land which he, in fact, did own, I cannot say that it is reasonable to infer that the plaintiffs would not have entered into the contract at all. Possibly they would not, in such case, have relied upon his recommendation, but I do not think that they did so as it is, and it is not pretended that he misled the plaintiffs as to the value and prospects of the speculation, except to the extent of his being a party enabling *Hurd* to realise a

(*a*) 17 Bea. 96.

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profit from the sale, which, under the circumstances, was a breach of trust in *Hurd*, and so that he contributed to causing the plaintiffs to pay $3,750.00 more for the lands than the vendors had agreed to take and did, in fact, receive; indeed, in the investigation of the title which we must assume the intending purchasers to have made before the completion of the contract, they must, it would seem, have become aware that not only *Farewell*, but others with him, were interested in the lands secondly and thirdly mentioned. Moreover it is a noticeable fact that all the bills drawn in payment of the purchase money pass through *Farewell's* hands, and are indorsed by him before they reach *Kemp*, or for the purpose of getting the drafts discounted in order that the money should be handed to *Kemp*. This was a matter calculated to attract the notice of the purchasers and to lead them to the knowledge of the fact, if they were, indeed, ignorant of it, that *Farewell* had some interest in the lands sold. I arrive at the conclusion that I cannot say that the purchase would not have been made at all if the purchasers had known or believed that *Farewell* had any such interest.

Judgment.

That the contract was voidable at the suit of the plaintiffs, upon the ground of the profit realised by *Hurd*, under the circumstances appearing in evidence in this case, I entertain no doubt, and that it could have been rescinded at any time before the execution of the deed of the 31st of October, 1866; and that deed may even now be cancelled, if the plaintiffs have promptly come forward after they became aware of, or after they reasonably can be held to have had sufficient notice of, the existence of the reasons for cancellation, now insisted upon, or such notice as to require them to have made such inquiries as would have led them to a knowledge of these circumstances; but, in such case, the decree goes further than I think it ought, and than can be supported, in making all the defendants, jointly

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and severally, liable to the plaintiffs for the amount which, it is shewn by the bill, was paid to *Kemp* as consideration for the execution by him of the deed, the cancellation of which is decreed, and which passed to the plaintiffs, the legal estate in the lands. The general rule, no doubt, is that all persons, directly concerned in the commission of a fraud, whereby another is prejudiced or suffers loss, are jointly and severally liable to reinstate that loss; but that principle applies, as it appears to me, to the case of a decree for *the reinstatement of a loss suffered*, and not to the case of a recission of a contract which, being rescinded, may place the parties thereto *statu quo ante*, without any loss being sustained.

Judgment.

For the purpose of cancelling a deed of property and rescission of the contract, the *only parties* necessary to be before the Court are the *actual parties to the contract*, who receive the consideration for which the deed was executed on the one hand, and who receive the property the subject of the conveyance on the other; other persons, by reason of some fraud upon their part, although not actual parties to the contract, may be brought before the Court, as in *Aberaman Iron Works* v. *Wickens* (*a*), in order that they may be present at the rescission, and may be charged if proper with costs, and also with a direction to make good any loss which the plaintiffs, the grantees on the cancellation of the deed, might suffer in the event of the defendant, the grantor, being unable to repay the consideration money paid to him for the conveyance.

Now in such a case of a bill for cancellation of a deed and rescission of a contract (the only necessary parties *for that purpose* being the actual parties to the contract) and where other parties are joined as defendants, by

(*a*) L. R. 4, Ch. 102.

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reason of any fraud of theirs having conduced to the contract, there must be a primary, and a secondary *object;* the primary object is the cancellation of the deed conveying the land: for this object the actual parties to the contract are alone necessary; that object is effected by a decree, ordering the vendor in the deed, which is to be cancelled, to repay the consideration money which he received, with interest, and ordering the vendee thereupon to re-convey the property to the vendor; that being done the parties are placed *statu quo ante*, except as to costs, or as to any loss, if any, which the vendor might in a particular case be entitled to be reimbursed over and above the purchase money, with interest; but in case the vendor should be unable to repay the consideration money, then the secondary object of the bill comes in view: namely, to provide by the decree that the other parties to the bill, who were not *necessary* parties to the cancellation of the deed, should make good any deficiency, if the circumstances of the case should warrant it, so that the vendee on the cancellation *should not suffer loss* by reason of any fraud of theirs which conduced to the contract.

Judgment.

This case is quite distinguishable from *Walsham* v. *Stanton*, where both parties to the acts complained of were in the same fiduciary relation to the party wronged, and by the same breach of trust derived benefit, the one out of one set of shares, the other out of another set: as it is also from *Henderson* v. *Lacon*, where the directors being all in the same fiduciary position to the plaintiff, who was defrauded by the one act of fraud committed by all the directors: namely, the issuing of a false prospectus, were jointly and severally made liable for the money which they had all in their capacity of directors, received as the fruit of their joint act; all were there *in pari delicto* precisely: that is not so here, the principle which governs this case appears to me as I have stated it, and to be that to be collected from the

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observations of Lord *Westbury*, in *Tyrell* v. *Bank of London* (*a*), and from *Aberaman Iron Works* v. *Wickens* (*b*), before Lord *Cairns* in Appeal; *Ross* v. *Estates Investment Co.* (*c*); and *The Madrid Bank* v. *Pelley* (*d*). But it remains to be considered whether the plaintiffs have by delay and laches lost their right to cancel the deed, and rescind the contract. In the Marquis of *Clanricarde* v. *Henning* (*e*), it is said that where a trust is created by the act of the parties, no time shall be a bar against the *cestui qui trust*, but where one is not a trustee in the ordinary sense, but only *becomes* so by the decree of the Court on setting aside the transaction; there time runs from the period at which the fraud was discovered, or the period when the party complainiug of injury has had reasonable notice of what has happened, so as to make it his duty, if he intends to seek redress, *to make inquiry and ascertain the* circumstances of the case.

Judgment.

Jennings v. *Broughton* (*f*) is a case more in point upon a question of delay in cases of fraud of the nature complained of here; there, at page 139, Lord Justice *Turner* says "In cases of alleged fraud, and particularly in cases of fraud affecting property of this nature, it is the duty of any one complaining of the fraud, to put forward his complaint *at the earliest possible period.*" The plaintiffs, in their bill, allege that they have but *recently* discovered the facts constituting their grounds for relief; they give no evidence whatever, as to the time when, or as to the manner in which, the discovery was made, so as to enable the Court to determine whether the discovery has been recent or not, or whether it was not before the execution of the deed of the 31st October, 1866, unless it be the evidence of Mr. *Orde*,

(*a*) 10 H. L. 18 Jr. N. S. 850.
(*b*) L. R. 4 ch. 106.
(*c*) L. R. 3 Ch. App. at p. 690.
(*d*) L. Rep. 7 Eq. 245.
(*e*) 30 Beav. 180.
(*f*) 5 De.G. M. & G. 126.

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who was one of the largest shareholders and original purchasers, and whose evidence would lead one to the conclusion that the purchasers of the land, the intended members of the company then about to be formed, knew or might have known all that the plaintiffs now know, as early as July, 1866. I see no evidence to shew when the parties to be affected, did, in fact, discover, or might by reasonable inquiry have discovered the facts of which the plaintiffs now complain, unless it be in the evidence of Mr. *Orde*, a witness called by the plaintiffs themselves. This gentleman was one of the original parties who, at the meeting of the 30th April, contemplated making the purchase and forming the company; he subscribed for stock to the amount of $2,000. He went up about the beginning of June to see the lands: this was before the company was formed. He bought while there two and a-half acres adjoining part of the lands sold, at $1000 per acre; from the information he then acquired, he thought the price of land was going down; "there was" he says "a well sunk about a-half a mile, and another about a mile, from the twelve and a-half acres, they were not producing wells: the parties owning one of them said they were only making $5 per day; a lot adjoining was shortly afterwards offered to me at $75 per acre. Lot 15, in the 4th concession, seemed out of the way of oil." Notwithstanding this information, the proceedings for forming the company are continued, and, on the 2nd July, the last instalment is paid; before the last instalment then was paid, the intending purchasers had two months during which they not only might have made, but appear to have made independent inquiries to guide them in the completion or rescission of the contract. In July Mr. *Orde* and Mr. *Martin* were sent up by the company to register the company's agreement, forming the company in the county where the lands lie: while there, upon that occasion, the witness says "Mr. *Martin* and I went up to Sarnia to make the declaration

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as to the company: this was in July. I then began to lose faith in *the oil wells* and *in this company*. Mr. *Melville Parker* told me the transaction *was a swindle, and that the twelve and a-half acres could have been got for one-third of the money*. *Parker* told me this in July. The lot adjoining the twelve and a-half acres was offered to me while at Oil Springs at $75 an acre." Now this was certainly information calling upon the parties interested to make inquiries which, if made, would have been calculated to elicit a knowledge of the facts which are now complained of: it seems reasonable to assume that they did make inquiries, and as the plaintiffs who must know when the original purchasers first heard of the matter of which, as a company, they now complain, offer no other evidence than *Orde's* upon the point, although their attention is drawn by the answers of defendants, to the fact that they rely upon the plaintiffs' laches, it is not unreasonable to conclude that *Orde* is the medium through whom the knowledge of the facts, of which they now complain, was acquired, and that the time of its being acquired was in the month of July, four months before they took the deed of the 31st October, 1866; and that they have called him as a witness, to establish by him this point.

Judgment.

I see nothing in the evidence to shew that after the execution of that deed, the plaintiffs acquired any knowledge upon the points complained of, which they had not then, or might not then have had, if they had made such inquiries, as I think they were bound to do, upon the information which they have shewn they possessed through *Orde* in July; if they intended to keep alive any right to seek redress by rescission of the contract. They, however, proceeded with the contemplated works; sank a well or wells, whether successfully or not, does not appear, and took no measures to avoid this contract until they had for eighteen months proceeded with the works, enjoyed the benefit of the purchase, and sought

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to obtain to their own use the profit of a speculation which, from its very nature, must have been known to all the parties engaged in it to be highly risky and speculative, but enormously remunerative, if successful. Under such circumstances, I do not think that the plaintiffs have made out such a case as entitles them now to a cancellation of the deed and a rescission of the contract; but they are still entitled to a decree against *Hurd* to make good to the company the $3,750, which he, in breach of trust, made out of the plaintiffs, with interest, from the third of May, 1866, and the other defendants should be decreed to reinstate that amount in default of the plaintiffs being able to collect it of *Hurd*: this is the utmost extent to which the decree should, in my opinion, go, and this is the decree which *Tyrell* v. *The Bank of London* in appeal, warrants. The decree should be primarily against *Hurd, who was alone guilty of a breach of trust*, which is a fraud different in its character from that committed by the other defendants. All the purposes of justice are, as it appears to me, obtained by decreeing the party guilty of that breach of trust to restore the fruits of his fraud, and in case he should be unable, by decreeing the other defendants to do so for him.

Judgment.

Per Curiam.—Decree to be varied, by directing defendant *Hurd* to refund the amount, which it shall appear was the difference between the price actually paid for the lands by the defendant *Hurd* to the defendants *Kemp* and *Farewell*, and the price at which the same were nominally sold to *Hurd*, with interest thereon. In the event of *Hurd* being unable to pay, order *Kemp* and *Farewell* to pay the amount. [Spragge, C., and Mowat, V. C., dissenting].

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STEWART v. RICHARDSON.

Injunction—Service—Contempt.

A defendant is bound to obey an injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service.

Where a breach of an injunction was sworn to by a single deponent, and was denied by the defendant, and there was no corroborative evidence, the court refused a motion to commit.

This was a motion to commit the defendant for breach of an injunction.

The injunction was issued on the 30th June, 1869. It restrained the defendant from further cutting any timber or trees standing or being on the land described in the bill, and from removing any timber or trees from the land. The affidavit of service stated the service of the injunction to have been effected on the 6th July, 1869, by giving the defendant a copy and leaving it with him—not saying that the original writ was shewn to the defendant. Counsel for the defendant objected that on this account the service was irregular, or was not shewn to have been regular.

Mr. *J. A. Boyd*, in support of the application, cited *Heywood* v. *Wait* (*a*).

Mr. *Blevins*, contra, referred to *Campbell* v. *Gorham* (*b*), *Smith's* Practice (*c*).

February 18. Judgment. MOWAT, V. C.—That the original writ or restraining order must be shewn as well as a copy delivered, is distinctly stated in the books of practice (*d*); and the

(*a*) 18 W.R. 205. (*b*) 2 Gr. 403. (*c*) Vol. 2, p. 829.
(*d*) See 2 Daniel's Pr., 4 ed. 1514; 1 Smith's Pr. 7th ed. 829.

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reason of the rule is, that the defendant should have that means of seeing that the alleged injunction or order is really the injunction or order of the court. After the application for an injunction is granted, some time is required for issuing and serving the order or writ; and, to prevent the wrongful acts from being committed in the meantime, the courts hold the defendant bound to refrain during this interval, provided he is aware of the application having been granted, and not merely to refrain from the time he is served with the injunction (*a*); and it has been held to be sufficient notice for this purpose if the defendant was in court when the judgment was pronounced; or if, being in court at the making of the application, he went out before the judgment was pronounced; or if a copy of the minutes of the order was served on him; or if he received a notice of the order even by telegraph (*b*); or if by any other means he became aware of the order having been made (*c*). To the practice of holding an informal notice temporarily sufficient, there is a theoretical objection, to which Lord *Eldon* referred in *Kimpton* v. *Eve* (*d*), and in *Van Sandau* v. *Rose* (*e*), namely, that a solicitor might falsely say that the order had been granted; but his Lordship pointed out that there was a protection against such a fraud in the punishment with which it would be visited; and he intimated that if a defendant swore that, notwithstanding such notice, he did not, at the time of doing the act complained of, believe that the order had been made, the court on a motion to commit would not act upon the practice referred to. It is obvious that the danger of an improper use being made of the practice is less than the evil of leaving a defendant to do the wrong after being

Judgment.

(*a*) McNeil *v.* Garratt, Cr. & Ph. 98.

(*b*) Heywood *v.* Wait, 18 W.R., 205.

(*c*) See Lewis *v.* Morgan, 5 Pri. 518; Lord Wellesley *v.* Earl of Mornington, 11 Beav. 180.

(*d*) 2 V. & B. at 352.

(*e*) 2 J. & W. 264.

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aware that the court has forbidden it, and before there has been time or opportunity to issue and serve the writ. I find nothing in the books that justifies the supposition that the plaintiff may content himself with the informal intimation of what the court has done, and may neglect or unnecessarily delay issuing the writ and effecting a formal service of it. The contrary is stated in the books of practice, and on sufficient authority. In *James* v. *Downes* (*a*), a motion to commit was refused with costs, because the plaintiff had omitted for four months to get the order drawn up, though the defendant was present in court when the order was made; and in *Van Sandau* v. *Rose*, where the order to commit was granted without service of the order for the injunction, the Lord Chancellor expressly limited the cases in which such service is dispensed with to cases in which "there has been no delay in endeavouring to get the order drawn up, and the injunction under seal; and serving it when obtained."

Judgment.

The present is not a case in which there has been delay in issuing or serving the injunction, but it is merely a case in which a sufficient service does not expressly appear by the affidavit filed in support of the motion. The objection to the sufficiency of the affidavit was not taken when the motion came on originally; and the motion was postponed several times at the instance of the defendant, to enable him to file an affidavit. In the affidavit he has now filed he does not say that the writ under seal was not shewn to him, or that he had acted under any doubt of its having been duly granted, or of its being obligatory on him. On the contrary, he recognises the service of the injunction, and puts his defence on the ground that he has committed no breach:—"From the time I was served with the injunction issued in this cause until the present, I did not cut down or

(*a*) 18 Ves. 522.

remove from the said land any of the timber thereon." If under these circumstances the objection is open to the defendant, it would be proper to allow the motion to stand over, that the defect in the affidavit of service might be supplied (*a*).

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But, independently of these questions, I think that the motion must be refused. The alleged breach of the injunction is asserted by one witness only, the plaintiff's agent. He says that on the 10th December, he was at the land, and that he found the defendant cutting and chopping timber thereon; and he relates the conversation which occurred between them. He does not say how much the defendant had then cut or chopped; and it does not appear that he cut or chopped any afterwards. He says that the defendant is in insolvent circumstances, and that the plaintiff has been unable to recover from him the costs which by the decree the defendant had been ordered to pay. The defendant denies the conversation sworn to by the agent; or rather he gives a different version of it; he asserts that what he was cutting on the occasion referred to "consisted of small lying branches of trees, and fallen or lying saplings;" and that they "were all dead wood;" that they were not lying on the land in question, but were on a public road which runs across it; that they had not been cut down by the defendant, nor had they been removed by him to the road; nor is he aware that they were taken from the land in question; that finding these branches and saplings on the road he had cut them up for his own private domestic purposes and no other. The two affidavits thus conflict. I have not had the advantage of seeing either deponent; neither of them has been cross-examined; and no attempt has been made to corroborate the affidavit of either by means of the affidavits of other persons. No one was present

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(*a*) Gocoh v. Marshall, 8 W. R. 410.

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on the occasion of which the two deponents speak. I do not doubt the good faith with which the affidavit filed by the plaintiff has been made; and the affidavit of a third person receives for many purposes more weight from a court, than the affidavit of a party who has a strong interest in the statement to which he swears; but such considerations are insufficient to justify an order for a defendant's incarceration for an alleged wrong which, for all that appears, may have been of very trifling amount, and the proof of which rests on the affidavit of a single witness, the plaintiff's agent, against the defendant's oath, and without any circumstances of corroboration. I, therefore, refuse the motion, without costs.

BALD v. THOMPSON.

Trustees and Executors—Compensation—Costs.

A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default.

The rule of the court is to allow compensation to trustees of real estate under a will, as well as to executors.

Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver, on the ground of the executor having become embarrassed, and having lately sold a valuable farm belonging to the estate to his own son at an undervalue, without advertising the same, or communicating with the *cestuis que* trust under the will, and of his having taken a mortgage for the payment of the purchase money, in his own name individually and not as trustee; and the circumstances were such as to justify alarm on the part of the *cestuis que* trust: the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver.

This was a suit for the administration of the estate of *James Thompson*, the plaintiff's grandfather, who died in the year 1852. The decree was made on the

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20th of March, 1869; and it directed the appointment of a receiver, the making of the usual inquiries, and the taking of the usual accounts; reserving further directions and costs. The Master, at St. Catharines, made his report on the 2nd of December, 1869; and the cause came before Vice Chancellor *Mowat*, on the executor's appeal from the report, and for further directions, on the 26th of January, 1870.

The question on the appeal was, as to the executor's charges for commission. The report stated that the amount which the executor had received, or but for his wilful default might have received, was $17,063.79. Of this amount, the sum of $3,518.75 appeared to be in respect of the testator's personal estate; the sum of $10,283.76, the proceeds of real estate sold under powers contained in the will; and the remaining sum of $3,261.28, the rents of such real estate before it was sold. The Master allowed the executor a commission of five per cent. on $11,227.48; and disallowed commission on the balance, viz., $5,836.31. Statement.

Mr. *Morphy*, for the plaintiff, asked that decree might order defendant to pay into Court the amount of money, found by the report to be in his hands, less such sum as he was entitled to receive as the personal representative of *James Thompson*, deceased.

Mr. *S. Blake*, contra, asked that the executor should be allowed commission of certain moneys coming into his hands the proceeds of sales of real estate. *White* v. *Jackson* (*a*). The executor was not bound to furnish accounts to the plaintiff; all the law requires him to do is to have the books, containing the accounts of the estate ready for the inspection of those interested—*Smith* v. *Roe* (*b*).

(*a*) 15 Beav. 191. (*b*) 11 Gr. 311. See Kemp v. Burn, 4 Giff. 348.

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Here unnecessary expense has been incurred by filing a bill, when the less expensive proceedings of an administration order would have answered the same purpose; under these circumstances he contended the plaintiff should not receive his costs—*Sovereign* v. *Sovereign* (*a*), *Gould* v. *Barritt* (*b*), *Wiard* v. *Gable* (*c*), *McLennan* v. *Heward* (*d*), and *Williams* v. *Powel* (*e*), shew that under the circumstances, here appearing, the executor will not be deprived of his costs.

Mr. *Morphy*, in reply, referred to *Erskine* v. *Campbell* (*f*), *Harper* v. *Hayes* (*g*).

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Judgment.

MOWAT, V. C.—I concur with the Master in thinking that, as a general rule, an executor should not be allowed commission on sums which he has not realized, and which he is chargeable with in consequence of his neglect, or other misconduct (*h*). The statute (*i*) gives "the executor or trustee, or administrator, acting under will, or letters of administration, a fair and reasonable allowance for his care, pains, and trouble, and his time expended in or about the executorship, trusteeship, or administration," &c. In respect of two of the items comprised in the $5,836.31, and amounting to $2,785.16, the executor is charged with them for want of "care," and because he did not take the "pains or trouble" which his duty imposed upon him; nor does it appear that they occupied any "time" worth compensation. I gather from the defendant's examination that the amount will not be wholly lost to him; but meanwhile, by reason of his neglect or default, the plaintiff and the other parties interested in the estate have to be content with the

(*a*) 15 Gr. 559. (*b*) 11 Gr. 523. (*c*) 8 Gr. 458.
(*d*) 9 Gr. 178, 279. (*e*) 15 Beav. 461. (*f*) 1 Gr. 570.
(*g*) 2 Giff. 210. (*h*) See Bristowe v. Needham, 9 Jur. N.S. 1168; and cases there cited.
(*i*) Consol. Surrogate Act, U.C., ch. 16, sec. 66, p. 109.

personal security of the executor for a considerable part of the amount, and he confesses to having put his property out of his hands that it might not be within the reach of persons having claims against him. The Master reports that the executor has disbursed $11,79[illegible]8, being $581 more than the Master allowed a commission upon. To the extent of this sum I think that a commission might have been allowed at the same rate as was proper with reference to the $11,227.48, and I shall, therefore, vary the report to that extent.

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The remaining item on which the Master refused commission is the sum of $3,051.15. This sum is included in the amount which the Master finds that the executor received, or but for his wilful default might have received; but he has not charged the executor with it; and the plaintiff has made no objection to the report on that ground. The item consists of the unpaid mortgages and promissory notes delivered by the executor to the receiver, being (with the exception of a note representing $43.80) mortgages and notes which had been given by the executor's son for the unpaid purchase money of lands of the estate sold to him by the executor. The receiver will be entitled to a commission for collecting these securities; and to charge the estate with a double commission is out of the question. The executor has been allowed a commission of five per cent. on so much of the purchase moneys as he collected,—say of principal $2,465, besides interest,—and he has laid before me no papers which indicate that this does not cover a sufficient compensation for effecting the sales. On the whole, I think that no case has been made out for disturbing the Master's finding as to commission on the $3,051.15. I may observe that the Chancellor informs me that soon after the Surrogate Act was passed, it was held by his predecessor, in an unreported case, that the Act authorized compensation to be allowed to trustees and other persons acting under wills, in respect of real

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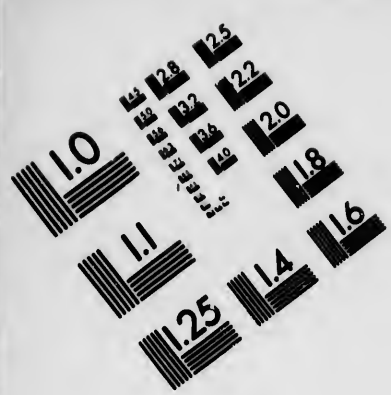

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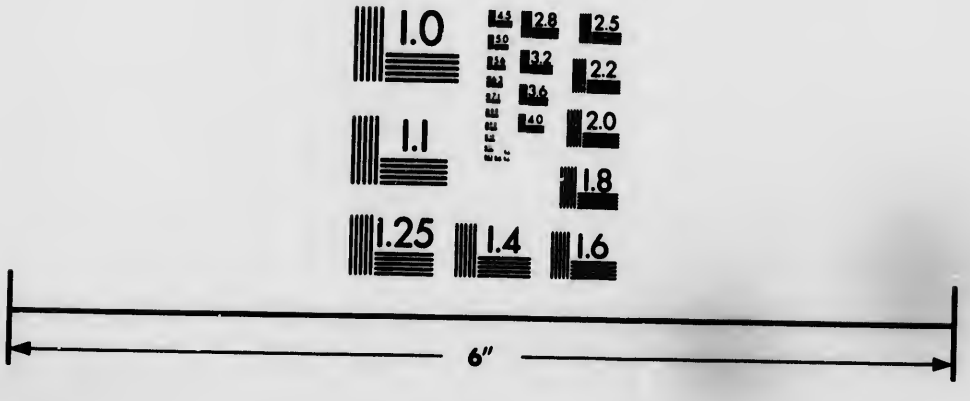

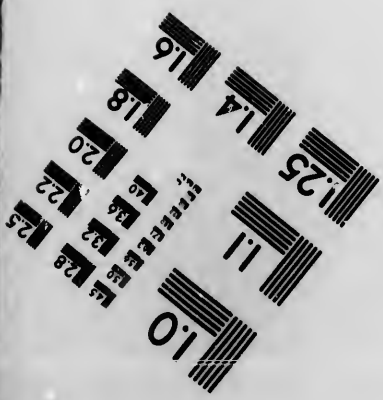

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estate, as well as to executors in respect of personal estate. The present Chancellor followed this decision while Vice Chancellor; and it does not appear to have been ever questioned on re-hearing or otherwise. It may, therefore, be regarded as settling the rule of the Court on the subject; though, had the point been *res integra*, arguments of considerable force in support of a different construction of the statute might be urged, and would require attention. Looking, however, at the reason of the thing, it seems as proper that trustees of real estate under a will should be compensated for their services, as that executors should receive compensation in respect of personal estate.

Judgment.

The only remaining matter argued was as to the costs of the suit. I think that the executor should be charged with so much of the plaintiff's costs, up to the decree, as was occasioned by the suit being for a receiver, and not being for an administration of the estate only. I think the executor chargeable with these costs, because he had so acted as to entitle the plaintiff to a receiver, and as to make her bill for a receiver a very reasonable proceeding on her part. The bill was filed on the 9th of September, 1868, and charged that the executor had become embarrassed, and was then possessed of no property. These charges alone, if substantiated, would have entitled the plaintiff to a receiver, but not to costs against the executor. I cannot assume, however, that the bill would in that case have been filed; for, in addition to these charges, the bill set forth that the executor had lately sold the testator's home-farm for much less than its value, to his own son, without first advertising it, or communicating with the plaintiff, or with any one else interested in the estate; that the executor had received part of the purchase money on this sale; and had taken for the residue a mortgage, in his own name, not describing himself therein as executor or trustee. The executor, in his examination before the hearing, ad-

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mitted his embarrassed circumstances; and admitted also in effect that, on account of the liabilities he was under, he had no property in his own name, though he had property of which others were ostensible owners; he admitted likewise the plaintiff's allegations as to the home farm—except as to the insufficiency of the price at which he had sold it to his son; and the Master has found that point against him, charging the executor on that account with $760 beyond the price he had agreed to take. The sale took place on the 1st of April, 1868, being thirty-two years after the testator's death. I think the facts thus appearing justified alarm on the part of those interested in the estate, and constitute ample ground for holding the executor chargeable with the costs incurred in getting the decree for a receiver. He must also be charged with the party and party costs incurred by the plaintiff in respect of the $2,785.16, charged against him by the Master as already mentioned; and also in respect of the appeal from the Master's report. With the exception of the costs relating to these particulars, the executor should have credit for his costs of the suit as between solicitor and client. The plaintiff is entitled to her costs out of the estate as between solicitor and client. I presume a reference back to the Master will be unnecessary.

Judgment.

1870.

In the matter of the Ætna Insurance Company of Dublin.

Foreign Fire Insurance Co.—Insolvency—Distribution of deposit—Costs.

The deposit required to be made by foreign Fire Insurance Companies is intended for the security of Canadian policy-holders; and on the insolvency of any such Company the general creditors of the Company are not entitled to share the deposit with the policy-holders.

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts.

Statement.

This was a matter under the Statute 23 Victoria, chapter 33, "in relation to Fire Insurance Companies not incorporated within the limits of this Province." That Statute provided for every such Company making a certain deposit or investment before receiving a license to carry on business in the Province; and it directed (*a*) that "in case of the insolvency of any such Company, the sum so deposited as aforesaid shall be applied *pro ratâ* towards the payment of all claims duly authenticated against such Company, alike as to losses and premiums on risks unexpired, or on policies issued, in this Province;" and it was declared that such Company should be "deemed insolvent upon failure to pay undisputed losses insured against within this province, for the space of 90 days after being due, or for 90 days after final judgment;" and it provided that the distribution in Upper Canada should be made by order of the Court of Chancery.

Under the authority of this Statute, his Lordship, when Vice Chancellor, viz., on the 11th February, 1869, made an order declaring the Ætna Company insolvent, and directing the Master to take proof of claims. This was preparatory to the distribution of the fund, which,

(*a*) Sec. 4.

in anticipation of such an order, had been paid by the government into this Court, under an order dated 23rd August, 1869, made by consent. 1870. In re Ætna Ins. Co.

The Master made his report on the 12th January, 1870, finding certain claims to be proved, which he considered were entitled to rank on the fund; and certain other claims which were not for losses by fire under any policy of insurance, and which the Master considered not to be chargeable on the fund. The fund was insufficient to pay the first class of creditors in full. The claims of the second class amounted, with costs, to $903.88, and consisted of one small judgment, and of simple contract debts for which judgments had not been recovered. It did not appear that any execution on the judgment was levied on the deposit. No further information appeared on the report as to the nature of these debts, but they were stated at the bar to be debts which were contracted by the Company in carrying on their business in this country and not for losses or premiums on unexpired risks. Statement.

The 7th section of the Act provided that, "on any judgment recovered against any such Insurance Company, execution may be levied upon such deposit or investment made by such Insurance Company as aforesaid; and if the amount of such judgment be not paid within thirty days after such deposit or investment is seized on execution, or the amount of such deposit or investment shall be reduced by the sale of any portion thereof on execution, such Insurance Company shall cease to transact any business of insurance, and the license therefor shall be withdrawn and returned to the Minister of Finance, until such judgment be paid, or such deposit or investment restored to the amount of fifty thousand dollars; and such affidavit and certificate shall be required for the renewal of such license as are required for obtaining an original license."

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In re Ætna Ins. Co.

Mr. *Spencer*, for the petitioner and several policy holders.

Mr. *S. H. Blake*, Mr. *G. M. Rae*, and Mr. *Kennedy*, for sundry creditors in the first and second schedules.

February 18.

Judgment.

MOWAT, V. C.—There was no appeal from the Master's report; but, in opposition to the Master's finding, it was argued, from the 7th section of the statute, that, on the insolvency of the Company, all Canadian creditors were entitled to share in the distribution of the fund. I am clear that no such construction can be put upon that clause. The object of the Legislature evidently was, that the deposit should be a security to Canadian policy-holders, and not to the general creditors of the Company.

It was then argued that the creditors' costs of proving their claims should be paid in full, in priority to the debts; and reference was made to the practice of the court as to such costs in the administration of the assets of deceased persons. But that practice is against the claim. Where there is a sufficiency of assets, the costs are paid in full; and in such cases the priority is immaterial; but where the assets are deficient, the costs are merely added to the claim, and are proved and paid as part of it. I refer to the form given in *Seton* on Decrees, 3rd ed. p. 882, and to the authorities collected in the notes on the two following pages; to *Morshead* v. *Reynolds* (*a*); *Canham* v. *Male* (*b*); *Taylor's* Orders, 3rd ed. p. 245; Consol. Or. No. 225; and to other cases referred to in *Morgan* and *Davey* on Costs, pp. 130 and 131. If any decree in this court has been expressed differently, it must have been by the acquiescence of the parties, or through oversight.

(*a*) 21 B. 638.

(*b*) 26 Beav. 266.

Under the Insolvent Acts, the creditor gets no costs of proving his claim. 1870.

In re Ætna Ins. Co.

It was agreed by all parties that the petitioner should have his costs as between solicitor and client. Mr. *Rae*, who was appointed by the Master to appear for the creditors generally, will have his costs. By the 218th of the Consolidated Orders there can be no costs to the other creditors beyond the costs already allowed by the Master for proving their claims, and their dividend in respect of their costs at law. After paying the petitioner's costs and Mr. *Rae's*, the balance in court (with the interest) will be distributed *pro rata* amongst the creditors named in the first schedule to the report, according to the amount of their respective claims, including therein the costs which the Master has allowed. No reference back to the Master will, I presume, be necessary.

Arran v. Amabel.

Municipal Law—Rectifying deed.

On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain non-resident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available; its supposed existence had been an element in determining the amount to be paid:

Held, that the corporation to which the money was to be paid, was not entitled to have the agreement altered so as to make the money payable by the other absolutely.

This was a re-hearing, at the instance of the defendants, of the decree pronounced as reported ante, volume XV., page 701, and came on before *VanKoughnet*, C., and *Spragge* and *Mowat*, V.CC.

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The leading facts of the case were these: After the separation of the townships of Amabel and Albemarle from the township of Arran, the two corporations executed a deed (which the Court, at the argument, pronounced to be very inartistically expressed), bearing date the 14th March, 1861, whereby, amongst other things, the corporation of Amabel and Albemarle agreed to pay to the corporation of Arran, $2832.9½, "for and in consideration of various amounts of taxes, rates, and other expenses paid by the township of Arran while existing as (one of) the united townships of Arran, Amabel, and Albemarle, * * as soon as the non-resident rates of the said united townships of Amabel and Albemarle, now remaining in the county treasurer's office of the said united counties of Huron and Bruce, are available." The deed further provided, that the same two townships should pay certain debentures therein stated to have been negotiated in 1859, "on the non-resident roll of the said township of Amabel," and amounting with interest to $1850.82. The deed declared, that the township of Arran thereby "agreed to the said terms and conditions," and agreed to pay all debts of the union except the said debentures. The bill alleged that there was at this time a large sum "exceeding $5000 of non-resident taxes in respect of lands within the townships of Amabel and Albemarle, in the hands of the county treasurer for collection; the several sums composing which sum all the parties believed to be legally a charge upon the several lots of land in respect of which they were charged, in which event the same would have been very shortly recoverable by the defendants' corporation through the sale of the said lands pursuant to the statute." The bill further alleged, that it was under this common belief that the clause as to the time of paying the $2832.9½ was agreed to; that it had since been discovered that, with the exception of one or two lots in respect of which $250 had since been paid to the county treasurer, the lands in respect of which the non-resi-

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dent taxes had accrued were unpatented; and, as the law then stood, were not liable to taxation. The bill claimed that, in consequence of the common error as to these lands, the plaintiffs were entitled to have the agreement rescinded, or to have it reformed by making the money payable absolutely. The defendants did not object to the agreement being rescinded, but they objected to the making of the alteration in it which the plaintiffs sought; and they alleged, that the whole agreement, and not merely the time appointed for payment, was based on the supposition that the taxes referred to were collectable and available; that in that belief the defendants' council had made larger allowances to the plaintiffs than they would otherwise have done; and that had they known or suspected the truth as to the said taxes, the agreement would not have been entered into by the defendants.

Mr. *Moss*, for the defendants.

Mr. *Blake*, Q. C., for the plaintiffs: *McAlpine* v. *Swift* (*a*), *Scholefield* v. *Templer* (*b*), *Meadows* v. *Meadows* (*c*), were referred to.

After the argument, and before judgment was pronounced, the learned Chancellor died.

February 18.

MOWAT, V. C., [After stating the facts as above set forth]—I think that upon the pleadings every material point in the case is open for our consideration.

Judgment.

Where one promises in writing to pay a certain sum when he receives from a third person certain payments which both parties to the promise expect to be made, it obviously does not follow as of course, that proof of their

(*a*) 1 B. & B. 285 (*b*) Johns. 155.
(*c*) 16 Beav. at 404.

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being mistaken in that expectation entitles the promisee to payment absolutely, and to have the instrument altered to that effect by this court. The promisor may be a trustee or executor who had no idea of assuming a greater responsibility than his promise expressed, or of paying otherwise than out of the trust funds; and there may be a thousand other cases in which a man may make such a contingent promise under a common belief that the expected fund will come to hand, but in which there would be no justice in the court compelling the promisor to pay at all events. The propriety of that would depend on, amongst other things, its being made to appear by the promisee, that the sum to be paid was one for which the promisor was absolutely liable, and the payment of which there was no intention of making contingent on the receipt of the expected fund. And the onus of proof would rest on the party seeking to vary the instrument. All the cases for reforming written instruments go upon

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that principle. The court, it is said, "must be certain there has been a mistake, and that the mistake is such as ought to be corrected (*a*)." In cases of this nature the court cannot act except upon the very clearest evidence (*b*). Lord Eldon said that the proof must be "irrefragable," and that those producing evidence to rectify an agreement undertake a task of great difficulty (*c*).

I understood the learned counsel for the plaintiffs to argue, that the court should presume that the sum was a debt payable at all events; and that the onus was on the defendants of proving it not to have been so. But I apprehend that we cannot so hold. In the absence of fraud, each party had a right to rest on the deed; and was under no obligation, in law or reason, to provide themselves with evidence, and preserve for seven years

(*a*) Mortimer v Shortall, 2 D. & War. 371. (*b*) *Ib.* 373.
(*c*) The Margins of Townsend v. Stangroom, 6 Ves. 338, 339. See Fowler v. Fowler, 4 DeG. & J. at 265.

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evidence, of the particulars of the sum mentioned in the deed. It would be unjust, and contrary to the course of the court in such matters, to cast the burden of producing such evidence so many years afterwards on the party standing by the deed, in case of the party desiring a material change in its terms. For the purpose of getting an absolute decree against the defendants for payment, it seems to me to be as necessary for the plaintiffs to establish that a debt of the amount named was due from the defendants, as to shew the common error with respect to the fund to which the deed confined the obligation to pay.

But, though that duty is on the plaintiffs, I think that the defendants have shewn that there was no debt of $2832.9½ which, independently of this fund, the defendants owed and were liable to pay to the plaintiffs; that, if that fund had not been supposed to exist, and to have been in due course available, a small part only, if any part, of that sum would have been payable by the defendants to the plaintiffs; and that, if the agreement is to be varied in consequence of the fund having since been ascertained to be uncollectable, the variation must extend to the sum to be paid, and not merely to the time of payment. Judgment.

As to the state of the proofs on this point, I may observe, first, that the deed does not call the amount a debt, or say that it was due to the plaintiffs by the defendants. It merely provides that the defendants are to pay to the plaintiffs so much, as soon as the non-resident rates of Albemarle and Amabel are available.

Then, the parol evidence is clear and uncontradicted, that the defendants' representatives did not mean to assume an absolute responsibility on the part of the defendants for the amount; that they posi-

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tively objected to assume such a responsibility; and that their consent to the settlement was obtained by the plaintiffs' representatives proposing and agreeing that the amount should be paid out of the supposed fund only, and as that fund became available. It seems contrary to good faith for the plaintiffs now to demand the whole sum as payable absolutely under the agreement; and, certainly, a very strong case of right would have to be established by the plaintiffs before a Court could sanction such a demand.

Judgment.

It is further to be noted, that, up to the dissolution of the union, there could not be any debt due by one of the townships to another of them. Until the dissolution, they constituted one municipality, as much as the various wards of a city constitute one municipality; and they could not separately contract a debt, or come under a legal obligation to any one. The county council did not, and could not, deal with them as individual townships. The three townships were of necessity dealt with by the council, and by every other body or individual, as a unit. The county council apportioned one sum to be paid by the union as a whole, and not separate sums by the respective townships; and whatever had to be paid to the county was, year by year, raised equally by the ratepayers of the whole union, according to the amount of their ratable property respectively. This is the construction which the statute has always received from those familiar with its working, and I have no doubt that it is the correct construction. The 75th section of the Consolidated Assessment Act provides that the county council should direct what sum shall be levied for county purposes in each township; but that word 'township' means 'union of townships,' where several townships constitute one corporation. This 75th section shews that; and the 76th section implies it also, as it directs the county clerk to certify before the 1st of August in each year, to the clerk of each township,

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the total amount to be levied therein for county purposes during the year—each township of a union has no clerk. The same view is further shewn by other clauses; and, indeed, by the whole scope of the Act; the policy of the municipal law having always been, that every local municipality, whether it consists of one township or of a union of townships having one local council, should be subject to the same rate, the same percentage, of taxation on their ratable property. A bridge, or road, or other improvement may affect but one concession, ward, or township, but the concession, ward, or township cannot be assessed for it separately; the work must be built out of the common funds. No matter what the object of an expenditure may be, it must be defrayed at the joint charge of all the ratepayers of the corporation according to the amount of their ratable property. There is no machinery provided for a different mode. The council of this union could no more have imposed on the Arran ratepayers a higher rate than on those of Albemarle and Amabel, than they could have imposed a higher rate on the ratepayers in one concession than on those in another; and Arran could not possibly, by any legal means, have contributed more than its proportion to any sum required for the common treasury, or have made the other townships in that way its debtor. All municipal, local, or direct taxes must "be levied equally upon the whole ratable property, real and personal, of the municipality or other locality, according to the assessed value of such property, and not upon any one or more kinds of property in particular or in different proportions." The county rate not being at the risk of the county so far as regards that portion of the rate which falls on land, the law (*a*) provided that the local municipal council, in paying over its share of the county rate, should "supply out of the general funds of the municipality, any deficiency arising from nonpayment of the tax on

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(*a*) Sec. 158.

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land." Accordingly, the course is, for the local municipality, in imposing its rates for the year, to estimate what that deficiency may probably amount to, and to increase the rate on the whole ratable property of the municipality so that sufficient may be received during the year to meet the deficiency (*a*), as well as to provide for the other needs of the municipality.

But when united townships separate, there are matters which require adjustment, according to what is right and fair between the parties; for there is property which belongs to them in common, and there may be debts due to the union; and it is in the division and disposal of the property, and in the provisions which the liabilities of the union require, that on the dissolution one may have to pay money to the other. Accordingly, Parliament has enacted that, on a separation, each township shall take the arrears of the taxes on the lands within it (*b*); and that the following shall be the disposition of the other assets of the union: "1. The real property of the union situate in the junior township shall become the property of the junior township; 2. The real property of the union situate in the remaining township or townships shall be the property of the remaining township or townships; 3. The two corporations shall be jointly interested in the other assets of the union, and the same shall be retained by the one, or shall be divided between both, or shall be otherwise disposed of, as they may agree; 4. The one shall pay or allow to the other, in respect of the said disposition of the real and personal property of the union, and in respect to the debts of the union, such sum or sums of money as may be just." That is the extent of the obligation which the law imposes on either township at the separation; and the statute goes on to direct that

Judgment.

(*a*) See Grier v. St. Vincent, 18 Gr. 512, 518, *et seq.*
(*b*) Con. Ass. Act., sec. 156.

the amount to be paid is to be settled by agreement or arbitration.

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I may observe here, that looking at these enactments, and at the whole scope of the Municipal Act, I am not prepared at present to say that, even had the plaintiffs clearly proved that the sum named was justly payable to them without any reference to this fund, this court could give to the plaintiffs any other relief than a rescission of the agreement; thus leaving the parties to come to a new agreement, or to have their differences determined by arbitration as provided by the Act. It is, I presume, quite certain that if there had been no agreement, this court could not have undertaken the task of settling between the two corporations as to the division of the personal property, or as to the sum to be paid by the one to the other; and that an arbitration for that purpose would be the sole remedy. If the agreement which they have made is not binding by reason of the common error, I am not able at present to see that that circumstance gives the court jurisdiction to make an agreement for them, or to substitute itself for arbitrators. It is proved that the defendants never agreed or meant to agree, to pay the amount absolutely; and the case is different from a case where a plaintiff merely seeks to rectify a writing by making it conform to what the parties had actually agreed. But rescission may be proper where rectification would be beyond our jurisdiction; we may restore the parties to their former position, though we may be unable to settle otherwise their mutual rights. I will assume, however, that the rectification asked might be granted if a sufficient case for it were proved.

Judgment.

The only asset of the union to which the agreement refers is these arrears of taxes—whether the union had no other property, real or personal, or whether the defendants' legal rights in respect thereof were unknown, does not

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appear. The agreement provided, that the defendants should pay certain debentures issued on the credit of the non-resident land fund; and that the plaintiffs should pay all the other debts of the union—the amount of which, or whether there were any, does not appear. There were further to be considered the unpaid land taxes which had belonged to the union, but which each separated township was to receive so far as they had accrued from lands therein. There was a larger amount of these supposed arrears in Albemarle and Amabel than in Arran; and, assuming that they were collectable, it is manifest that, if the two townships Albemarle and Amabel were to give an absolute undertaking to pay Arran's share of this supposed excess at a fixed time, the amount which they would have agreed to give might by no means be the same as if the payment were to depend on the actual receipt of the arrears; and but for the contingency to which the payment was to be subject, the councils might have failed to come to an agreement, and have been obliged to call in arbitrators.

Judgment.

The terms of the deed and the nature of the case thus afford strong reason for holding that this sum of $2832.9½ cannot be regarded by the court as an absolute debt which the defendants were liable to pay from other sources, if the fund out of which they had agreed to make the payment should fail. The deed says that the agreement to pay the amount was "in consideration of various amounts of taxes, rates and other expenses paid by the township of Arran" during the union. The non-payment by absentees and others, of taxes on land, increases the amount of the yearly rate or tax which has to be imposed. The ratepayers may have thus to provide every year for "taxes and expenses" which they look to the non-resident taxes when collected to compensate them for, by relieving them *pro tanto* in subsequent years. And, in the present case, as the principal part of the supposed arrears was by law to go on the separation

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to Albermarle and Amabel, Arran should be compensated, and that is the ground on which the representatives of Arran made their claim at the time of the settlement. "They stated," as the evidence shows, "that they had created a fund, and that the (defendants) should pay the amount in respect of their non-resident land during the union; * * that they could not draw the fund without some authority from the (defendants) to authorize the treasurer to pay the money." Accordingly, the agreement which the councils made was, in effect, that Arran should receive part of the arrears, or should be paid so much as soon as these arrears were available to Albemarle and Amabel. If the defendants' representatives at the settlement allowed the defendants to be charged with past "rates, taxes, and expenses," on any other ground than this, they allowed them illegally and ignorantly. It appears that they were entirely new to and inexperienced in such matters: no resident of these townships having before been a member of the council of the union.

Judgment.

Reliance was placed on what is proved to have passed at the settlement between the two councils, as sufficient to shew an absolute liability on the part of the defendants. I think that no such inference can fairly be drawn from it, and I shall extract what seems to me the material passages of the depositions bearing on this point. With reference to these passages, it is to be borne in mind, that the defendants' councillors were, as I have already said, not persons familiar with such matters; that they had no legal adviser on the occasion; that any opinions which they then expressed, or any statements which they made, cannot be dealt with, against the corporation which they represented, as admissions of an individual acting for himself would be; and that if they supposed that the defendants were under a legal liability, apart from the fund in question, to make good any sums theretofore paid

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by the plaintiffs, the supposition was erroneous in law and was not binding on the defendants. But what did pass on the occasion? Mr. *Bull* was clerk of the defendants' corporation at the time of the settlement, and was present at the meeting of the two councils at which the settlement was come to, and the agreement signed. He says: "There was a great deal of discussion about the county rates, and it was decided that it should be decided according to the assessed rates of lands as appearing upon the roll, including unpatented as well as patented lands. Mr. *Gould* and I were then instructed to find out the proportion payable by each. We went over the rolls, and did so. In the evening, some objection was made by the council to undertaking the responsibility of paying any of the county rate. Mr. *Gould*, I think, spoke of it as mere form. It was said that a large sum stood to our credit in the County Treasurer's Office, and that they could not ask for payment of their demand until

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that money was paid to us. Our councillors said that they were quite willing to give the Arran Council the necessary authority to draw the proper amount from the County Treasurer, but were unwilling to take the responsibility of paying the amount themselves. Mr. *Gould* then said, 'Draw up the agreement in a shape that will answer that purpose,' or words to that effect. * * It was not admitted that the whole sum was due, that it was a debt of theirs. They did not acknowledge that they were bound to pay it. They agreed upon the basis on which the accounts were to be taken, and Mr. *Gould* and I were deputed to ascertain the amount. It was objected that Arran had levied the amount, and should collect it; I mean that Arran had assessed it and should be put to collect it. Practically Arran had assessed it, because Arran was strong enough to elect all the Reeves" (*qu.* councillors).

Mr. *Allen*, the present reeve for the defendants' townships, was a councillor at the time of the settlement.

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He makes these statements: "It was stated by the Reeve of Arran that a large amount of county rate was now standing to the credit of the townships (defendants) in the County Treasurer's Office in Goderich; we accepted the statement made by them, as stated, between $14,000 and $16,000." What the amount really was does not appear. "They stated that they had created a fund, and that we should pay the amount that they had paid in respect of their non-resident land during the union. They stated that this fund was to our credit from the proceeds of non-resident lands returned from year to year to the Treasurer. There was no voucher produced; we had to take their statement. The amount agreed upon was to be drawn by the plaintiffs upon the fund which they had created, and the agreement was drawn up for the purpose of shewing that we were to pay them that sum out of that fund. Some of the members on the part of the plaintiffs, said they could not draw the fund without some authority from us to authorize the Treasurer to pay the money to us."

Judgment.

Mr. *Kribbs*, who was the first reeve of the defendants' townships after the separation, makes these statements as to the same meeting: "Something was said of an amount in the hands of the treasurer of the county to the credit of the different townships to an amount exceeding $14,000. We were startled at the amount that Arran claimed against us; when the Arran councillors referred to the amount, and said they could take payment out of that amount after the debentures were paid off. They were debentures that had been issued upon the credit of the nonresident taxes of the united municipality, they said, for the purpose of paying the defendants' share of the county rates. They laid their county rates the same as our own, the same percentage on the expressed value. That included patented and unpatented lands. That was the part we did not understand and on which we were divided. * * We thought

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that the assessed taxes of our township should be sufficient to pay our proportion of the expenses. The agreements were drawn up for the purpose of securing to the plaintiffs that, when we received, or if we recevied, our proportion of the non-resident fund, we should pay the plaintiffs. * * I was not startled at the amount claimed against us as we went through the items, but at the sum total when it was summed up."

There is no contradictory evidence on the points embraced in these extracts, and they demonstrate that, not merely the clause which the plaintiffs desire to cancel, but the rest of the agreement also, was based on the supposition that these arrears were collectable; and demonstrate also that a large part of the sum named in the agreement was, in no sense, due as a debt if those arrears were not collectable. The nature and particulars of the other items which were embraced in the settlement do not appear sufficiently to enable a court to see whether they were payable absolutely or not; on the supposition on which the parties proceeded, it was immaterial whether they constituted an absolute debt, or merely an allowance which it was proper to make out of the supposed arrears that, by the separation, the defendants had become entitled to receive. I think that the plaintiffs are not entitled to a rectification of the agreement; and that they must accept either the agreement as a whole, or a rescission of the whole deed as submitted to by the defendants.

Judgment.

SPRAGGE, C.—Having had the advantage of the argument on the rehearing, and of reconsidering the case with my brother *Mowat*, who has had considerable experience in regard to the practical working of the Municipal Acts, I have come to the conclusion that the proper decree was that which he has stated.

Townships are assessed by the county according to their

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assumed wealth in assessable property. Thus the county requires, say $20,000 for its own purposes; it assesses these three townships together at $1000; it assesses them at this amount assuming, as they themselves have assumed, that unpatented lands were assessable. But for that the county would have assessed the townships at a smaller sum, say $800; and if in making the assessment the unpatented land had not been taken into the account, a larger proportion of the burthen would have been thrown upon the township that had the largest assessable acreage, &c., of patented land. But the unpatented land having been taken into account erroneously, a larger burthen than was proper was thrown by the county upon the whole three townships; and as between the townships a larger burthen than was proper was thrown upon the townships having the largest quantity of unpatented land; and it is to be observed that the mistake which led to this is not chargeable upon any particular township nor upon the county.

Judgment.

In settling the accounts between the townships no allowance was made for these mistakes. It was assumed that all the charges were correct, and the accounts were adjusted upon that assumption; and the question is, if the error had been discovered before the adjusting of the accounts, would they have been adjusted in the same way? Would the two townships have been charged and Arran have been credited as they have been? Did the assumption that all was correct affect the amount which was agreed to be payable? Would it not be a proper footing upon which to adjust the accounts, that the overcharges should be borne in proportion to the property really assessable in each township, it appearing that the assessable property of the two townships Albemarle and Amabel, by reason of unpatented lands being not taxable, was very small, while that of Arran was comparatively large?

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Upon a dissolution of a union of townships there is necessarily an apportionment between them of what each should pay to, or be credited by, the other. The apportionment, I take it, would be according to the relative wealth of the townships, taking the assessed value of ratable property in each as the basis of the apportionment, as is done by counties in assessing townships under section 72. If this be so, the two townships Albemarle and Amabel were charged too large a sum, inasmuch as they were taken to be assessable in respect of unpatented lands; and it follows that in that respect the adjustment of accounts between the townships would have been different—if it had been known that unpatented lands were not assessable—the difference being in favor of the two townships.

It is not necessary, however, as I stated in my judgment at the original hearing, to go so far as to say that the adjustment of the accounts would necessarily have been different. It is sufficient that, through a mistake common to all, some elements of consideration which might justly and properly have been taken into account were not taken into account; and those elements of consideration were closely connected with the fund out of which the assumed indebtedness of the two townships was agreed to be paid.

Judgment.

Per Cur.—Bill dismissed with costs.

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NORTH v. WILLIAMS.

Patent of invention—Novelty of principle.

The plaintiff introduced into a drum stove in addition to a spiral flue, which had been previously in use, a centre pipe closed at the sides and open at both bottom and top as a means of producing a greater amount of heat, and obtained a patent for "the spiral flue in connection with the pipe in the centre."

Held, that the plaintiff's improvement did not involve any new principle or new combination, and that the patent was void.

Examination and hearing at Woodstock.

Mr. *Strong*, *Q. C.*, and Mr. *R. Martin*, for the plaintiff.

Mr. *Roaf*, *Q.C.*, and Mr. *Fletcher*, for the defendant.

SPRAGGE, C.—In the "specification and description" annexed to the plaintiff's patent, of what he therein styles "Michael North's Economical Drum Heater," he gives what he therein describes to be a full and exact description thereof, as follows: "The drum heater is of cylindrical shape, close at the sides; extending through the centre, and projecting through both bottom and top, is an air pipe close at the sides and open at the top and bottom—inside the drum and between the inner side of the outer wall, and the air pipe is a spiral flue extending from the bottom to the top of the drum—an opening at the top and bottom connecting with the flue, the fire and heat enters the drum at the bottom, and after passing along through the spiral flue is carried off through the opening at the top by means of a stovepipe or other smoke conductor; in its passage through the spiral flue the fire and heat passes several times around the air-pipe and is exhausted, and at the same time heats the air or other substance passing through the air-pipe. The air-pipe is intended for the admission of cold air at the bottom

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which is heated and escapes at the top when applied to heating air. The drum heater is, however, intended for various heating purposes, such as drying grain, heating houses and rooms, and can be applied in various ways. It may be attached to stoves as in letter A of the drawing, or to any other heating apparatus;" and he then defines what he claims as his invention. "What I claim as my invention is the spiral flue in connection with the pipe in the centre, whereby air or water or other substances can be heated by the economical use of escaping heat which would otherwise be lost," and he then proceeds to set forth its uses and advantages.

It is not very clear what it is exactly that the plaintiff does claim. For the sake of convenience I will designate what are called drums, heaters, drum heaters, and the like by the name of drums. The purpose of all of them is of course to retard the escape of heat and heated smoke.

Judgment.

The plaintiff can claim only that he does this in a new and useful way, invented by himself. There were some things spoken of in the evidence which he does not claim to have invented. The bringing of cold air by a duct from the floor to the drum he does not claim as his invention, and the evidence shews that it was not his invention. Nor does he claim as his invention the giving heated air and smoke a rotatory direction; nor could he justly claim it, for the evidence of *Farmer* shews that he accomplished that by his series of metal boxes some years before plaintiff's patent. Whether *Farmer* did so as effectually and economically as the plaintiff is not now the question. Whether the plaintiff means to claim as his invention the "spiral flue" is uncertain; he claims it "in connection with the pipe in the centre." I incline to think that he cannot be taken as claiming the spiral flue by itself, as his invention. If he had done so in plain terms, or in any terms that by proper construction would involve such a claim, and it were shewn not to be his invention, his patent would be void. He has so worded his claim

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as to be able to say that he only claimed as his invention the spiral flue in connection with the centre pipe, not the spiral flue itself, and so might be able to escape the penalty of claiming as his, that which in truth was not his invention. The proper mode of claim is for the applicant to state what part of that for which he asks a patent he claims to have invented; and what part he does not claim to have invented. This indeed is not absolutely necessary; still, as is well put by Mr. *Curtis* in his treatise on the Law of Patents (*a*), "it must appear with reasonable certainty what the party intends to claim; for it is not to be left to minute references and conjectures as to what was previously known or unknown; since the question is, not what was before known; but, what the patentee claims as new." If this is left altogether ambiguous the patent is void. As a fact, upon the evidence, I think the proper conclusion is that the plaintiff (or rather *Michael North* the patentee) was not the inventor of the spiral flue for retarding the escape of heat; and that, if upon a proper construction of his claim, he is to be taken as claiming to be such inventor, his patent would be void; but, claiming it as he does in connection with the centre pipe, he may be taken as claiming *the combination of the two* as his invention.

Judgment.

The patentee then was not the inventor of any new principle. It is material to bear this in mind. Drums to retard the escape of heat; the giving to the escaping heat a rotatory motion; the introduction of cold air from near the floor by a duct to the drum; and even the spiral flue, were none of them new; and were none of them, as I think, upon a proper construction of the specification and claim, claimed to be new by the patentee. He was not the discoverer of a principle. He was only the inventor of an apparatus which accom-

(*a*) Sec. 229.

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plished usefully, and to a certain extent effectually, and in a somewhat different mode, what others had accomplished more or less effectually.

From the course taken upon the examination of witnesses, I am satisfied that those called for the plaintiff, at any rate, gave the patentee credit for more than he was entitled to. It was assumed not only that he was the inventor of the spiral flue, but that the giving the heated air and smoke a rotatory direction inside the drum, was also his invention. This is apparent from their verdict upon the defendant's drum, and the apparatus by which he gave the rotatory direction which they pronounced the same in principle and only put into another shape so as to avoid the appearance of imitation: in more technical language that it was a mechanical equivalent. In this the witnesses would probably have been right if the giving of the heated air and smoke a rotatory direction had really been the invention of the patentee.

Judgment.

If the giving the heated air a rotatory direction was not new, the question is narrowed to this, whether the defendant's apparatus for effecting this, and for introducing cold air from the bottom of the drum through it to the top where it emerges, is a mechanical equivalent for the plaintiff's apparatus for doing the same thing. The two modes do not produce precisely the same results. Each has qualities of its own in which it differs from the other. There is for example greater radiation of heat from the surface of the plaintiff's drum, but which, under some conditions, is attended with disadvantages, which disadvantages, in the opinion of some witnesses, do not exist in the defendant's drum. Other witnesses again are of opinion that the plaintiff's drum is in every respect the better of the two. I have not the least intention of expressing any opinion upon the relative merits of the two drums. I only refer to the evidence

upon this point to shew, that the different modes of construction produce somewhat different effects; and that, in the opinion of some persons, faults existing in the plaintiff's drum do not exist in the defendants. I think it is a fair result of the evidence that for some purposes and in some situations the defendant's drum is more suitable than the plaintiff's. I by no means mean to say that upon the whole it is better: and I only touch this point in one view. It is said that the defendant copied the plaintiff's apparatus with colorable variations which he felt obliged to make, though for the worse, in order to conceal the imitation.

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There is perhaps another construction of which the plaintiff's specification and claim may be susceptible, viz.: that in claiming as his invention, the spiral flue in connection with the pipe in the centre, he claimed as his invention all the effects that would be thereby produced. But that, it appears to me, would be too indefinite. It would be difficult to set limits to such a claim. But suppose it to be confined to the immediate effect, the giving of the rotatory direction to heated air, and thereby causing heat to radiate from the outer surface of the drum and heating the air in the centre tube. Is that a necessary or proper construction? Can that be a proper construction which leaves it uncertain what the patentee meant to claim, and which would leave it open to him to put his own gloss upon his own claim, and to interpret it as claiming more or less, according to circumstances? in its wider sense if he could do so successfully: in a narrower sense if he found the wider not sustainable. Such an elastic interpretation might be very convenient for the patentee, but would be very embarrassing to other inventors, and mischievous to the community.

Judgment.

But, assuming that the proper reading of the claim is that the giving of heated air a rotatory direction was

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the invention of the patentee; he is met by this, that what he thus claims as his invention was not a novelty, and so his patent would fail in one of the essentials to its validity. For *Farmer* proves that he did this in 1856 or 1857, whether known to the patentee or unknown to him is immaterial, for which I refer to the cases cited by my brother *Mowat* in *Abell* v. *McPherson* (*a*), and there is also the printed book produced in Court from the possession of *Hugh Cant*. The evidence of *Farmer*, however, without the printed book is sufficient.

There is another aspect of the case in connection with *Farmer's* apparatus. His apparatus gave a rotatory direction to heated air by means of a series of metal chambers placed one above another. The defendant in this case attains the same object by means that may be described in the same terms. The plaintiff's case is that the defendant's series of metal chambers is the same in principle and effect as his invention; that it is a mechanical equivalent for it. If it is so, and if the defendant's apparatus is the same in principle and operation as *Farmer's* apparatus, plaintiff's spiral flue must be a mechanical equivalent for *Farmer's* apparatus. Still, two questions will remain: one, whether *Farmer's* and the defendant's apparatus are alike in principle and operation; the other, whether the defendant has pirated the plaintiff's centre pipe. As to the first, the defendant has placed his metal chambers apart, *Farmer's* being together, connecting them by metal tubes and enabling him to introduce air between as well as around them, to be heated in its passage from the lower to the upper aperture of the drum. Defendant's mode of circulating the heated air, if borrowed at all, is borrowed from *Farmer's* apparatus, not from the plaintiff's, at any rate it more nearly resembles the former than the latter. If

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(*a*) 17 Gr. 23.

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an inspection will shew the defendant's to be borrowed from the plaintiff's, an inspection will also shew the plaintiff's to be borrowed from *Farmer's*. The defendant's apparatus and *Farmer's* appear to me to be alike in principle and mode of operation so far as giving to heated air a rotatory direction is concerned, and in this I am borne out by the evidence of *Robinson*, a witness for the plaintiff, and certainly the most scientific witness produced by either side. Speaking of the model of *Farmer's* apparatus which was shewn to him, he says "it is the same as plaintiff's and defendant's apparatus in this, that the smoke passes round and round to the top. It differs from the plaintiff's in passing round horizontally in each chamber on the same level;" and he adds, that it "is faulty in principle as compared with *North's* patent in the same respect as defendant's." The next question is whether the defendant has pirated the centre pipe. It appears to me to be clear that the plaintiff can sustain his patent only as an invention of the combination of the spiral flue and centre pipe, and that his specification should be read as claiming only that. The plaintiff's first difficulty here is, that the two are claimed together, the one in connection with the other; and, conceding that he claims for the pipe in connection with the spiral flue, as well as for the flue in connection with the pipe, it is only in connection with that particular thing a spiral flue, that he does claim for the centre pipe. Does that exclude the use of a centre pipe where heated air is made to revolve around it by some mechanical contrivance other than that of a spiral flue? If not, there is an end of his case. But it is not necessary to go so far, for the defendant does not use any centre pipe, nor, as I think, any mechanical equivalent for it. In his drum the air does not pass directly from the aperture at the bottom of the drum to that at the top; but, entering at the bottom it impinges upon the under surface of the lowest of the metal chambers, by this its direction is necessarily somewhat changed; it finds its

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way to the upper aperture after impinging in some way upon the surface of various chambers, probably of all more or less, for though it would find its way upward by the most direct route that the disposition of the chambers would admit of, they may be so disposed as to retard and change its course. It is claimed that in this way the air is brought in contact with a larger surface of heated metal than is the case in the plaintiff's pipe; and that it emerges at a higher temperature than does the air from the pipe of the plaintiff's drum. This may not be the case. The defendant's mode of carrying air through his drum may be faulty in principle. It may be altogether inferior to the plaintiff's mode, but that is not the question. He had a right, not affected by the plaintiff's patent, to convey air through his drum. He has done it in a mode, the question is whether it is a different mode substantially or only colorably. I think the defendant's mode, be it better or worse than the plaintiff's mode, is absolutely different.

Judgment.

In disposing of this case I have not thought it necessary to refer by name to any of the numerous cases which are to be found in the books on the subject of the Law of Patents. The case before me has not appeared to me to turn upon any nice points for which it was necessary to refer to the authorities, but upon plain and well settled principles which I have endeavoured to apply to the facts of the case. In my view of the plaintiff's case he has interpreted his patent too broadly, and has sought to prevent rivalry when he should have been content with the merits of his own invention and manufacture. The bill must be dismissed and with costs.

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DUFF v. BARRETT.

Principal and surety.

On the rehearing of this cause, it was held by Spragge, C., [Mowat, V.C., *dubitante*] that time given by a creditor to his principal debtor after judgment recovered against the surety, did not discharge the surety; and also that, independently of that ground, the debtor having stipulated to obtain the surety's consent for time, the agreement for time was thereby made conditional on such consent being given, and that the surety was not discharged.

The judgment of Vice Chancellor *Spragge* on the original hearing of this case is reported *ante* Vol. XV. page 632. The case was reheard at the instance of the plaintiff before *VanKoughnet*, C., and *Spragge* and *Mowat*, V. CC. Chancellor *VanKoughnet* died before judgment was pronounced.

Mr. *McCarthy*, for the plaintiff.

Mr. *Blake*, for the defendant.

Bailey v. *Edwards* (*a*), *Jenkins* v. *Robertson* (*b*), *VanKoughnet* v. *Mills* (*c*), *Re Brown* (*d*), *Mellish* v. *Brown* (*e*), *Hodgson* v. *Shaw* (*f*), *Buchanan* v. *Kerby* (*g*), *Capel* v. *Butler* (*h*), *Law* v. *The East India Co.* (*i*), *Boultbee* v. *Stubbs* (*j*), were cited.

SPRAGGE, C., remained of the opinion expressed by him at the original hearing. February 18.

MOWAT, V.C.—I have considerable doubt in this case; but as the Chancellor retains the opinions expressed in Judgment.

(*a*) 4 B. & Sm. 761.
(*b*) 2 Drew. 351.
(*c*) 5 Gr. 653.
(*d*) 2 Gr. 590.
(*e*) *Ib.* 655.
(*f*) 3 M. & K. 183.
(*g*) *Ib.* 332.
(*h*) 2 S. & S. 457.
(*i*) 4 Ves. 824.
(*j*) 18 Ves. 20.

1870. his judgment as reported (*a*), the decree will be affirmed.

Duff v. Barrett.

In *VanKoughnet* v. *Mills* (*b*) it was held by this court, consisting of Vice Chancellor *Esten*, and the present Chancellor, then a Vice Chancellor, that time given to the principal debtor after judgment against the surety, discharged the surety. The bill was by the surety, and a decree was made for the plaintiff with costs. The point referred to is assumed in the reported judgment of the court; but my brother *Strong* informs me that the point was distinctly raised on the argument, and expressly pronounced upon by the court. I am not prepared to say that we should follow the subsequent case of *Jenkins* v. *Robertson* before Vice Chancellor *Kindersly* (*c*), and should hold *Van-Koughnet* v. *Mills* to have been wrongly decided.

Judgment.

Then, as to the construction of the documents: The debt of $1500 was secured, not only by the promissory note on which the plaintiff was indorser, but also by a contemporaneous mortgage executed to the creditor *Jones* by *Thornbury*, the principal debtor. The new mortgage given to the defendant *Barrett* comprised the same land as the mortgage to *Jones*, as well as other land. The new mortgage makes no reference to the plaintiff or to his suretyship. It is conditioned for the payment of $3300, with interest at 15 per cent., at certain future dates therein specified; and it provides for the debtor's retaining possession of the mortgaged property until he makes default in paying the money as stipulated. The agreement between the debtor and creditor, in pursuance of which this mortgage was executed, had been entered into ten months previously. The agreement had stipulated that *Thornbury*, the debtor, should procure from the plaintiff his consent to the extension

(*a*) 15 Gr. 632 (*b*) 5 Gr. 653. (*c*) 2 Drew 351.

1870.

Duff v. Barrett.

of time thereby given for the payment of the judgment recovered against *Thornbury* and the plaintiff; and that no advantage should be taken by reason of such extension of time for the payment of the same; but that the judgment should be in full force. The judgment was intended to be in full force, whether the plaintiff agreed to the extension of time or not, in case of subsequent judgments being recovered against *Thornbury*. But the agreement contains no provision that the mortgage to *Jones* should be enforcible notwithstanding the extension of time; and I am not able to say, from the instrument as set out in the pleadings (I have not seen the document itself), that that had been agreed to or contemplated between the parties.

If the consent was intended to be a condition precedent with respect to the whole agreement, the defendant *Barrett* afterwards chose to abandon his stipulation to a certain extent at all events, for, without first obtaining the consent, he carried out the agreement, paid the money, accepted the mortgage, and acted under the power of sale contained in the mortgage.

Judgment.

It was contended on the part of the plaintiff, that, from the manner of the sale, and from the application made by *Barrett* of the purchase money, the debt is at an end; but these matters not having been very distinctly put in issue by the bill, and being under the decree open to the consideration of the Master, it would not be proper, I think, to dispose of them now.

1870.

See Duffy. Graham. xv Grant 547

LONGEWAY v. MITCHELL.

Fraudulent Conveyance, Setting aside—Simple contract creditor—Pleadings.

Where a creditor simply seeks to have a deed made by his debtor declared fraudulent and void, it is not necessary to allege that the creditor had carried his claim to judgment.

In such a case, however, the creditor must sue on behalf of himself and all the other creditors.

Statement.

The bill in this case was filed by *John Longeway* and *Henry Longeway* against *Alexander Mitchell* and *Andrew Watson* alleging that the plaintiffs were simple contract creditors of *Watson*, who, subsequently to the bringing of an action by the plaintiffs for the recovery of their claim, absconded to the United States to avoid his creditors; that before leaving the country *Watson* had made a voluntary conveyance of certain lands to the defendant *Mitchell*, which conveyance, it was alleged, was made with an intent, on the part of both defendants, thereby "to defeat, delay, and defraud," the plaintiffs and other creditors of *Watson*.

The prayer of the bill was that this conveyance might be declared void against the plaintiffs and the other creditors and delivered up to be cancelled; that *Mitchell* might be restrained from alienating or incumbering the estate; that the defendants might be ordered to pay the costs of the suit, and for further relief.

The defendant *Mitchell* demurred for want of equity.

Mr. *Hodgins*, for the demurrer—It is only necessary to state to the Court the nature of this case in order to the demurrer being allowed in accordance with the numerous cases already decided in this Court. The bill is by a simple contract creditor, who has not sued out execution for his claim or even recovered judgment in the action

1870.

Longeway v. Mitchell.

instituted by him to recover his debt; and according to the well-established rule in the Court, such a person cannot maintain a suit of this nature—*McMaster* v. *Clare* (*a*), *Whiting* v. *Lawrason* (*b*), *Ferguson* v. *Kilty* (*c*), *Duffy* v. *Graham* (*d*), *Smith* v. *Hurst* (*e*), and the unreported case of *Crawford* v. *Knapman* in this Court, all shew that the bill in the present case is not sustainable.

[STRONG, V. C.—The recent case of the *Reese River Mining Co.* v. *Atwell* (*f*) runs counter to the authorities in this Court.]

The defendant also objects, at the bar, to the form of the bill, the suit being by one creditor, not saying that it is on behalf of himself and all other creditors.

Mr. *Mulock*, contra—The bill in this case was framed upon the decision of the *Reese River* case, and on which we rely to sustain the present suit. The objection as to parties is one that can be easily removed by amendment which the Court will readily grant.

March 1.

Judgment.

STRONG, V. C. [After stating the pleadings as above] —The cases in this Court which were referred to are all founded on the decision of Sir *George Turner*, V.C., in the case of *Smith* v. *Hurst*, in which it was distinctly determined that the Court will not assist a judgment creditor, by setting aside a conveyance, made in fraud of his rights, by the debtor, unless he has sued out execution on his judgment. It is also to be observed that the bill in that case claimed more extensive relief than is asked here, inasmuch as it not only prayed the interposition of the Court to remove the fraudulent deed out of the way, but also in procuring satisfaction of the judgment. But the bill in the present case merely asks that the impeached conveyance may be set aside, and

(*a*) 7 Gr. 550. (*b*) 7 Gr. 602. (*c*) 10 Gr. 102.
(*d*) 15Gr. 547. (*e*) 10 Hare 30. (*f*) L.R. 7, Eq. 347.

1870.

Longeway v. Mitchell.

that the grantee may be restrained from embarrassing the plaintiff by alienating the land. It is, however, but fair to say that it appears in *Smith* v. *Hurst* to have been contended for the plaintiff that without any *elegit* he was entitled to relief confined to the setting aside of the deed, on the ground of fraud, but that even this restricted decree was refused; for in his judgment the Vice-Chancellor says, "it was attempted on the argument to answer this objection by putting the case upon the ground of the jurisdiction of the Court to relieve against fraud, but the objection rests upon the plaintiff's title being incomplete without the *elegit*, and the answer, therefore, does not meet the objection." In the case of *Coleman* v. *Crocker* (*a*), there is a dictum of Lord *Thurlow*, to the effect that a creditor must at least recover a judgment before he can maintain a bill to avoid a deed as fraudulent under the statute 13 Elizabeth, chapter 5; but this is a mere dictum, the case not calling for any determination on that point. And in *Lister* v. *Turner* (*b*), a judge so experienced in questions of pleading as Sir *James Wigram*, treats the question as an open one. It seems that after the debtor's death, when all his property becomes assets, there is no objection to a simple contract creditor maintaining a bill to set aside a conveyance as a fraud upon creditors, for such a bill has been sustained without objection in cases occurring both before and after *Smith* v. *Hurst*: See *Skarfe* v. *Soulby* (*c*), *Jenkyn* v. *Vaughan* (*d*), *Adames* v. *Hallett* (*e*): and counsel for the defendant in *Reese River Mining Company* v. *Atwell* conceded, that the law was so. In the case of *Reese River Mining Company* v. *Atwell* the bill was by a creditor, who had not obtained execution, at law to impeach a conveyance of land as fraudulent against creditors under the statute 13 Eliza-

Judgment.

(*a*) 1 Ves. Jr. 161.
(*b*) 5 Hare. 292.
(*c*) 1 McN. & G. 864.
(*d*) 3 Drew, 419.
(*e*) L. R. 6 Eq. 468.

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both, and it prayed that the deed might be set aside and that the lands might be sold, and for other consequential relief by way of equitable execution. On the part of the defendant it was urged that by reason of there being no legal execution the plaintiff had no title to sue; and as to the argument that the court could set aside the deed and then stop, and that this was relief which any creditor could claim, without having taken out execution at law, it was said:—"A plaintiff is not entitled to a decree where he is in a position only to obtain a declaration which might be barren; he must be in a position to obtain the fruit of it." But Lord *Romilly*, drawing the line between merely setting aside the deed as fraudulent against creditors and the consequential relief of equitable execution decreed the former but refused the latter relief, thus determining that whilst any creditor is entitled to have a deed which an Act of Parliament has enacted, shall be deemed fraudulent as to all creditors, without distinction of priority, set aside, no creditor is entitled to resort to a court of equity to have execution for his debt, unless he has first perfected his title at law; a distinction which is very obvious and one which certainly commends itself to common sense. In this state of the authorities I am called upon to determine whether I will follow *Smith* v. *Hurst* and the other cases in this court founded on that case, and which, but for it, would probably never have been decided as they were, or the later decision of the Master of the Rolls, and, I think, I am bound to adopt the latter course. The two opposing English authorities are both judgments of courts of first instance of co-ordinate jurisdiction, and no decision of an Appellate Court is produced upon the point. If the case is considered on principle without reference to authority, I think the arguments are strongly in favour of the plaintiffs, and the distinction pointed out in the judgment of the Master of the Rolls deserves the favourable consideration of a court, one of whose most useful

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branches of jurisdiction it is to relieve against fraud. If a creditor could not maintain such a bill as the present, he might, although chargeable with no want of diligence, be entirely defeated by a conveyance by the fraudulent grantee to a *bona fide* purchaser, whilst the action, in which he seeks to recover his judgment, is actually in progress. Such a contingency affords a very strong argument against the existence of a rule founded on purely technical reasoning—for such it is, as regards the creditor's right to set aside the deed though conclusive against the consequential relief of equitable execution. The statute 13 Elizabeth chapter 5, declares, it is true, that such a deed as the present shall be void as against creditors, but it expressly protects *bona fide* purchasers for value.

Judgment.

Now, as to the argument advanced in *Reese River Mining Co.* v. *Atwell*, that a decree setting aside the deed would be a barren decree, a mere echo of the statute, which itself avoided the deed, it may well be added to the answer given by the Master of the Rolls to that objection, that a decree in such a case is of the greatest possible utility, inasmuch as, by setting aside the deed, and, if necessary, by means of an injunction restraining alienation, the decree interposes an effectual obstacle to any dealing with the property by the grantee under the fraudulent conveyance. If this relief was not attainable, then, during the pendency of the proceedings at law, the lands might get into the hands of a *bona fide* purchaser for value, to the entire discomfiture of a creditor who had pursued all his remedies with the utmost possible diligence. Moreover, even if the decree were a simple declaration that the deed was void, it could, under our laws, by means of registration, be made available as notice to purchasers, and, in this way, the objection of its inutility would be answered. I may mention, though it is of no importance in the present case, that the plaintiff is not entitled to

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have the deed delivered up to be cancelled, as, though void, it is binding between the parties. On the whole I think I ought to overrule the demurrer on the record —that for want of equity. As to the demurrer *ore tenus*, a similar objection was upheld in the case before the Master of the Rolls, and I must, therefore, allow it, with leave to plaintiffs to amend by converting the bill into one on behalf of themselves, and all other creditors I give no costs.

Baker v. Casey.

Part-owners—Exclusion—Injunction.

Where the defendants, being part-owners of a schooner and in sole possession, excluded therefrom the plaintiff, who was the other part-owner, and the plaintiff did not allege that there had been any dispute as to the employment of the vessel, an injunction to restrain the defendant's proceedings was refused.

This was a motion for injunction to restrain the defendant from preventing the plaintiff participating in the management of the schooner *Alma*, and for a receiver of the earnings of the vessel. The bill set forth that the plaintiff and defendant were joint owners in equal proportions of the vessel which had been duly registered in the port of Montreal. Statement.

The bill then alleged that the defendant had for some time past had the possession and control of the said schooner, had caused her to be used and navigated for his own benefit within the jurisdiction of this court, and had collected freight and other profit on account of the same, but he refused to account to the plaintiff for the profit or freight accruing from said use and navigation of the said schooner; that the plaintiff had applied to the said defendant to account for the said

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profit or freight; and on or about the 2nd day of November, 1869, caused the following notice and demand to be served upon the said defendant:

"To Mr. Thomas Casey,—Sir,—I hereby demand from you an account of the receipts, or the earnings, of the vessel *Alma*, and of the expenditure incurred in and about the sailing, working, and management of the said vessel; and also payment over to me of one-half of the said earnings from the time of your taking possession thereof to this day; also, I demand to be admitted to the possession of one-half of the said vessel and of the management and direction thereof."

But that the said defendant had in no way complied with the said notice or demand, and refused to account to the plaintiff in regard to his said one-half interest in the said ship.

Mr. *Hodgins*, in support of the application, referred to *Brenan* v. *Preston* (*a*), *Lacon* v. *Lippen* (*b*), *Marriott* v. *Anchor, &c., Co.* (*c*), *Orr* v. *Dickinson* (*d*), *Abbott* on Shipping, p. 76; *Kerr* on Injunctions, 150, 600.

Mr. *Moss*, contra, cited *Green* v. *Briggs* (*e*), *In re Blanchard* (*f*), *Castelli* v. *Cook* (*g*).

March 3.

Judgment.

Spragge, C.—The plaintiff and defendant are owners, each of 32–64th parts of the schooner *Alma*. The plaintiff alleges his grievance as follows: [Here his Lordship read the clauses of the bill above set forth].

They may be summed up in this; that the defendant has navigated the vessel for his own benefit, and refuses to account for its earnings: and has not admitted the plaintiff to the possession of one-half of the vessel. The

(*a*) 10 Hare, 331. (*b*) 4 Giff. 75. (*c*) 3 D. F. & J. 177.
(*d*) Johns, 1. (*e*) 6 Hare, 395. (*f*) 2 B. & C. 244.
(*g*) 7 Hare, 89.

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injunction asked for is to restrain the defendant from interfering with, or in any way incumbering the plaintiff's shares in the schooner; a thing that it is not shewn that he has done, or that he can do, and to restrain him from in any way dealing with the schooner so as to prejudice the plaintiff's rights in the vessel: and the plaintiff also asks for the appointment of a receiver of the earnings and freight of the vessel.

The plaintiff's affidavit is less explicit as to the refusal to account, and more explicit as to the exclusion from possession, than the bill. Upon the latter point the affidavit states that the defendant is in possession of the vessel, and has kept the plaintiff out of possession for the last six months and upwards; and has refused, upon demand made by the plaintiff, to permit him to have possession of the vessel, "or any part thereof or interest therein."

Judgment.

The affidavit of the defendant is wholly silent upon this point and upon the alleged refusal to account. After setting up the defendant's title to 32-64th parts by purchase from one *Chalmers*, it sets up the plaintiff's contract of sale to persons named *Dewey*, and the proceedings that ensued thereupon; which appear in the report of the case of *Baker* v. *Dewey* (*a*).

It is not alleged by the plaintiff that he has made any objection to the management of the vessel by the defendant in regard to voyages or freight, or otherwise; or that any fault is to be found with such management: nor does he prove any refusal to account. Upon that point he merely says that he gave the defendant the written demand set out in the bill, and that the defendant said by way of answer that the plaintiff's share would be but a small amount; as he, the defendant, had not got sufficient yet to pay the insurance.

(*a*) 15 Grant, 668.

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The position of the parties is well settled. They are *part* owners, tenants in common, of the vessel; and partners in the earnings of the vessel. The right of the plaintiff to an account seems clear; and is only material to that part of the application in which the appointment of a receiver is asked.

The second branch of the application for injunction is the only one giving rise to any question. It is asked that the defendant should be enjoined from in any way dealing with the schooner, so as to prejudice the plaintiff's rights in her. This is very indefinite. If an injunction were granted in the same terms, which I apprehend would be wrong, it would be difficult for the defendant to know what would be a breach of it. The only thing complained of is an alleged exclusion of the plaintiff from possession: but if he were to continue to do this, it would not prejudice the plaintiff's rights in the vessel: and no other thing is said to have been done; or is said to be threatened to be done in regard to the vessel, by the defendant.

Judgment.

But suppose the plaintiff had put his notice in a more definite shape, for instance in the same form as the written demand made by him upon the defendant, *i. e.*, to enjoin the defendant from refusing to the plaintiff possession of one-half of the vessel. Those words taken literally would be absurd when applied to a ship. But suppose a joint possession meant, a *corporeal* joint possession would be equally as absurd.

It has often been said, and should always be borne in mind, that this court ought not to interfere by injunction unless it can interfere usefully. The thing with which this court is asked to deal, is an indivisible *chattel* of a peculiar nature; and which in nearly all *maritime* countries has been the subject of a peculiar jurisdiction. Assume that the plaintiff has asked to be admitted to the joint possession

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and control of this vessel; and that he has made out a case of exclusion. How can the court *accomplish* any practical *good* by an injunction: it cannot make the partners agree. An actual corporeal possession is not what is contemplated in such a case, and the possession and use of the vessel by the defendant have not been wrong. As put by Lord *Tenterden* in the matter of *Blanchard* (*a*), "as part owners of a vessel have a distinct although undivided interest in the *whole* vessel, they cannot be considered as absolute wrongdoers by the act of using a vessel of which they are proprietors." In this case the possession and control of the vessel are not *charged* to have been wrongful. How is this court to enforce by injunction the abstract right of the plaintiff to share in the possession and management of this vessel. In *Abbott* on Shipping it is said, "a personal chattel vested in several distinct proprietors cannot *possibly* be enjoyed advantageously by all, without a common *consent* and agreement among them," and this is *peculiarly* the case in regard to ships. An injunction in accordance with the written demand of the plaintiffs would *practically* be no more than a direction to the defendant to acknowledge the plaintiff's abstract right. A change of possession and a joint *corporeal* possession are equally out of the question. So, if the defendant continued in possession and continued to use and employ the vessel, there would be no breach of such an injunction. Lord *Tenterden* in the case to which I have referred describes the way in which such a case is dealt with by the Court of Admiralty in England (*b*). "It has been the constant practice in disputes between part owners as to the employment of the vessel, where the majority in *value* of the shareholders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in

Judgment.

(*a*) 2 B. & C. p, 249.

(*b*) 2 B. & C. 248.

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a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares." And the same learned judge in another capacity, that of a legal writer, says that in cases of equality of partnership the same practice is followed in the Court of Admiralty (*a*).

Assuming that this court has the like power either in virtue of its inherent jurisdiction, where it could only act *in personam*, or of the Imperial Act to which the learned counsel for the plaintiff refers (*b*), the plaintiff does not ask for the interposition of the court on any such ground, for he does not say that there is any dispute as to the employment of the vessel: nor does he ask that the court should interpose in that way. He asks for an injunction in regard to the vessel itself against a part owner, who in regard to the vessel itself has been guilty of no wrong, and he asks for an injunction of a nature which would be practically useless.

Judgment.

With regard to the appointment of a receiver: the bill contains no substantive allegation that there are any outstanding debts to be received, nor is it alleged that there is any danger to be feared.

I must refuse both an injunction and a receiver.

It is unfortunate that the litigation between these parties should be prolonged. The plaintiff in his affidavit treats the sale to the *Deweys* as still subsisting and claims only the balance of purchase money. That, he ought to be paid, and it is the interest of all parties, I apprehend, that he should be paid rather than that litigation shall continue.

(*a*) Abbott on Shiping, 76 (*b*) 17 & 18 Vic. ch. 104, sec. 65.

1870.

BLAKE V. JARVIS.

Judgment creditor—Attachment of debts in equity.

A judgment creditor cannot attach or garnish by means of a suit in equity any debt for which he has not obtained an attaching order at law.

After judgment was given allowing the demurrer, as reported *ante* volume xvi., page 295, the plaintiff amended his bill by setting forth in full the will of *Samuel P. Jarvis*, also the decree of the 25th of June, 1869, in *Gilbert* v. *Jarvis*, whereby it was declared that the annuity of the defendant *Mary B. Jarvis*, was applicable to the debts due to the plaintiff and the creditors of the said *Mary B. Jarvis*, and that the amount (if any) due to her from the estate of the testator on any account whatever was applicable to the same object; and such decree directed a general administration of the estate of the testator; an inquiry as to the amount due to the defendant *Mary Boyles Jarvis*. Also the decree on further directions, dated 3rd of March, 1868, and the order of the 12th of June, 1868, permitting the defendant *Samuel P. Jarvis*, to appeal against the decree upon payment of costs of the application, and giving the necessary security, and undertaking to bring on the cause at the then next sittings of the Court of Appeal, and that in default of setting down the cause for appeal, the application for leave to appeal should be refused with costs; that subsequently *Samuel P. Jarvis* did appeal, and upon such appeal it was determined that, in consequence of the appellant having undertaken that proceedings in the accountant's office should stand as if an administration of the estate of *Samuel Peters Jarvis*, deceased, had been had in an ordinary administration suit, the court would not dismiss the plaintiffs' bill, but ordered and declared that the plaintiffs were not entitled to any relief against the appellant. The bill, in addition to the relief originally asked, prayed that the said *Mary Boyles Jarvis* might

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be ordered and decreed to prosecute the said suit for the benefit of the plaintiff, and that she might be ordered and decreed to take the proceedings in the said suit to enforce, by means of a sale of the lands set forth in the bill, the payment of the amount found due to her in that suit, and that she might be ordered and decreed to pay over the said sum of money, when the same should be so raised by the sale of the lands, to the plaintiff; that the said *Mary Boyles Jarvis* might be declared to be a trustee for the plaintiff of the debt found due to him from the estate of the testator, and of the sum of money so to be raised by a sale of the said lands, and that the plaintiff might be declared to be entitled to a lien or charge in respect of his said judgment debts upon the said sum so found due to Mrs. *Jarvis*, and on the sum so to be raised by sale of the lands, and that the last mentioned moneys might be applied in satisfaction of such lien and charge.

Statement.

To the bill so amended both the defendants demurred for want of equity. On the same coming on to be argued.

Mr. *Hector*, Q.C., and Mr. *Moss*, for *S. P. Jarvis*.

Mr. *Fitzgerald* and Mr. *A. Hoskin*, for Mrs. *Jarvis*.

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

The plaintiffs submitted to the demurrer put in by *Samuel Peters Jarvis*.

In support of the demurrer put in by Mrs. *Jarvis*, it was argued that the plaintiff had been already declared by the judgment in *Gilbert* v. *Jarvis* to be not entitled to garnish the claims, but in that same suit having established the indebtedness of the estate to Mrs. *Jarvis*, the plaintiff now seeks to garnish it in this suit; in fact, to

obtain, by two distinct bills, that which the Court of Appeal had decided he clearly was not entitled to. 1870. Blake v. Jarvis.

In support of the bill, it was contended that Mrs. *Jarvis* had clearly a right to compel payment into Court of her share of the estate, and when paid in it is not pretended that she would not be entitled to an order for payment out, or she might assign her claim to the plaintiff. Under these circumstances, it was submitted that in justice and good conscience this defendant could not be heard to object that the plaintiff had not shewn sufficient equity to entitle him to the relief prayed.

SPRAGGE, C.—The judgment already given, adversely to the contention of the plaintiff, seems to me to leave no question open upon which I can decide in his favor, without controverting the spirit, if not the letter, of those decisions. I have read carefully the judgment of the Court of Appeal in *Gilbert* v. *Jarvis* (*a*), and of my brother *Mowat*, upon the former demurrer in this case, and the leading English authority *Horsley* v. *Cox* (*b*), upon which those decisions proceeded. Before the decision of that case I confess I agreed with the reasoning of the late Vice-Chancellor Mr. *Esten*, in the *Bank of British North America* v. *Mat[illegible]s* (*c*). But *Horsley* v. *Cox* placed a more restricted construction upon the Common Law Procedure Act, and the effect of garnishee proceedings under it, and this has been followed by the decisions in this province to which I have referred. March 3. Judgment.

My brother *Mowat* observed (and I agree with him) that as the law stood independently of the Common Law Procedure Act the plaintiff could not have laid hold of the judgment debts of which the plaintiff is assignee; and he expressed the opinion that an order under the statute

(*a*) 16 Grant, 265., Ib. 295. (*b*) L. R. 4 Ch. App. 92.
(*c*) 8 Grant, 492.

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for attaching debts due to the judgment debtor obtained from a judge of one of the common law courts, or a notice under the direction of such judge is the only way of attaching or binding debts that is given by the statute, and that it is necessary for the court of law to make the order for the purpose of creating the charge before coming to the court of equity to give effect to it. And I do not see how my learned brother could come to any other conclusion consistently with the judgment of the Lord Chancellor in *Horsley* v. *Cox*.

The plaintiff contends that the proceedings in *Gilbert* v. *Jarvis* constitute the debt due by the estate of the testator to the personal representative a legal debt. I do not see this, if by "legal debt" is meant a debt recoverable at law. But supposing him right, there may be the less difficulty in obtaining the order of a common law judge. I do not say that a judgment creditor may not be entitled to such order when the debt due to his debtor is an equitable debt. I do not wish to prejudge that question, but my opinion is that the statute, as interpreted, makes such order necessary before the judgment creditor can have any relief in this Court.

Judgment.

It is put in argument by plaintiff's counsel that this is a bill to carry a decree into operation. I agree that it is so; but that does not better the plaintiff's case. It does not remove the difficulty that the debt cannot be got at independently of the Common Law Procedure Act. And it is open to this further difficulty that a bill of this nature is one of those abolished by the general orders of 1853.

It is unfortunate, in the interest of justice, that the remedy given by the Common Law Procedure Act in the case of garnishee proceedings should not in terms apply to an equitable debt. The principle upon which the Act proceeds applies to an equitable debt as much as to a

legal debt; and I can see no reason why the creditor should not have a remedy, in the one case as well in the other. As the law stands it is an anomaly—but the remedy, the act being interpreted as it is—is with the Legislature not with the Court. 1870. Blake v. Jarvis.

The authorities being what they are, I cannot do otherwise than allow the demurrer.

MUNRO v. MUNRO.

Pleading—Parties—Practice.

The fact that a person, interested in the subject matter of a suit, is resident out of the jurisdiction of the court, is not a sufficient reason for not making such absent person a party.

This was a suit to have it declared that the defendants held certain land in trust for the plaintiff and a sister of the plaintiff, not made a party to the suit, but who was in the same interest as the plaintiff. The bill alleged as a reason for not making her a party that the plaintiff's remaining sister *Mary* and her husband "are resident out of the jurisdiction of this honorable court, to wit, in the village of Furness, in the County of Argyleshire, in that part of Great Britain called Scotland," and could only be made parties thereto at great expense, and the doing so would necessarily cause great delay. Statement.

The defendants demurred for want of parties.

Mr. *D. McCarthy*, in support of the bill, contended that the absence from the jurisdiction was sufficient ground for proceeding without making the absent persons defendants, especially where, as here, the absent party is interested in precisely the same manner as the

1870. Munro v. Munro. plaintiff, citing *Fell* v. *Brown* (*a*), *Williamson* v. *Whinyates* (*b*), *Smith* v. *The Hibernian Mine Co.* (c), *Darwent* v. *Walton* (*d*), *Calvert* on Parties 64, 66, 67, 70, *Mitford* 190, 191.

Mr. *S. Blake* contra, was not called on.

March 8. SPRAGGE, C.—The plaintiffs have an interest in the subject matter of the suit in common with other parties named in the bill who are not made parties. Clearly, as a general rule, they should be made parties upon the plain principle that they have the same right of suit as the plaintiff, and, in the event of the plaintiff failing in this suit, there could be nothing to prevent these other parties bringing their suit. The bill contains an allegation intended, as I understand it, to take this case out of the general rule. It is that the persons, not made parties, reside out of the jurisdiction; and the bill names a county in Scotland and a village in that county in which these persons reside.

Judgment.

Counsel for the plaintiff contend that the residence out of the jurisdiction is a sufficient excuse for not making these persons parties; and, no doubt, according to the former practice of this court, that was a good reason for a plaintiff not making parties to a bill, persons interested in the subject matter of litigation. By the General Orders, however, a plaintiff is entitled to serve a party interested, out of the jurisdiction, and, if the excuse offered here for not making these persons parties were sufficient, a residence in Buffalo, or in any of the neighbouring provinces, would be equally good.

The plaintiffs allege, as an excuse for not having made these persons parties, that effecting service on

(*a*) 2 Br. C. C. 276. (*b*) 2 Br. C. C. 399.
(*c*) 1 Sch. & Lef. 240. (*d*) 2 Atk. 510.

them would be attended with much expense, delay and inconvenience. Admitting that this would be a sufficient ground for dispensing with these parties, the court, I presume, would be called upon to balance the expense and inconvenience that would result from their not being made parties, by the defendants remaining liable to have another suit or suits instituted against them by such absent parties: and it is impossible to imagine that to effect service upon persons in any part of Scotland, whose residence is known, can be attended with either any great expense or inconvenience. 1870. Munro v. Munro.

The old rule, as to not making persons resident out of the jurisdiction, parties, arose from the fact that it was impracticable to serve them, now that reason no longer exists, and according to the well known maxim *cessante ratione legis cessat ipsa lex.*

Under these circumstances, I think, the court cannot accept the reasons assigned by the plaintiffs as sufficient for dispensing with these parties as defendants Judgment.

I must, therefore, allow the demurrer with costs.

1870.

BUCHANAN V. SMITH.

Insolvent Act—Priority of subsequent creditors.

An insolvent compounded with his creditors, and had his goods restored to him; he thereupon resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors:

Held that they were entitled to be paid out of his assets in priority to the former creditors.

Statement.

On the 9th of December, 1867, *James I. McClennan* made a voluntary assignment, under the Insolvent Acts, to the defendant *Augustus William Smith*, an official assignee in the county of Brant. Very shortly afterwards a deed of composition and discharge was executed by the majority in number and value of the insolvent's creditors, and was subsequently confirmed by the Judge. Under this deed the creditors accepted fifty cents in the dollar in satisfaction of their debts, and left to the insolvent all his property. The insolvent thereupon resumed his business and contracted new debts. Two years afterwards it was discovered that the insolvent had committed a fraud on the creditors whom he had induced to join in his discharge; that before making the assignment he had secretly removed from his shop a large quantity of goods; and he represented to the creditors that what remained constituted his whole stock. A suit having been instituted against him by one of these creditors, and the insolvent having pleaded the discharge, the plaintiff replied that it had been obtained by fraud. The cause was tried on this issue in November, 1869, and a verdict was rendered for the plaintiff. The defendant *Smith* thereupon took possession of *McClennan's* stock; and *McClennan* absconded. The plaintiffs in this suit, who were creditors to whom the insolvent had become indebted after his discharge, immediately sued out a writ of attachment against

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McClennan under the Insolvent Act of 1869, and delivered it the Sheriff for execution. The Sheriff seized and took possession of the effects of which *Smith*, the assignee, had gone into possession. *Smith* then commenced an action against the Sheriff, claiming damages for the seizure; and the plaintiffs gave the Sheriff a bond of indemnity. Being advised that their title to the goods was an equitable one, and the time for getting an assignee appointed under their attachment not having arrived, they filed the present bill, on behalf of themselves and all other creditors of *McClennan* who had become such after his discharge. The bill prayed for an injunction to restrain the action; and for the application of the property in question to the payment of creditors under the second attachment, in priority to the creditors under the first. On the 1st of December the plaintiffs gave notice of motion for an interlocutory injunction; the motion was heard on the 21st of December, 1869: and an order was thereupon made, partly by consent, to the following effect—(both parties being desirous of avoiding unnecessary expense):—the defendant *Smith* undertaking by his counsel to pay into Court to the credit of the cause, subject to the further order of the Court, the proceeds of the property as realized, and to collect and to pay into Court the debts accrued to the insolvent since his discharge in insolvency, less his expenses incidental thereto, and his fees as assignee; and the plaintiffs agreeing to the said *Smith* receiving and selling the property, and collecting the debts on the said terms; and the said defendant further offering that the rights of the plaintiffs and other subsequent creditors of *McClennan* should be determined and adjusted in this suit without the appointment of an assignee under the second attachment—the injunction applied for was granted, and the costs of the motion were reserved. The cause came on for hearing, by way of motion for decree, on the 23rd of February; the defendant by his answer admitting all the material facts, except one which is mentioned in the judgment.

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Mr. *Proudfoot*, for the plaintiffs.

Mr. *Lash* and Mr. *W. M. Miller*, for the defendant.

March 9.

MOWAT, V.C.—The plaintiffs' counsel relied on the case of *Tucker* v. *Hernaman* (*a*), as establishing the rights of the subsequent creditors; and I concur as to its sufficiency for that purpose. There the case was that an uncertificated bankrupt had carried on business for several years after his bankruptcy, with the knowledge of his assignees, and of some at least of the persons who were creditors at the time of the bankruptcy. After his death it was held, that the creditors subsequent to the bankruptcy were entitled to priority over the previous creditors. That case followed *Troughton* v. *Gitley* (*b*); and both cases proceeded on the familiar equitable doctrine that "if a man having a lien stands by and lets another make a new security he shall be postponed." In *Kerakoose* v. *Brooks* (*c*) the same rule was laid down by the Privy Council. The assignee's right to the subsequently acquired property of the bankrupt was there stated to be subject to the qualification that, "if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject, in equity, to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency." Other cases to the same effect are collected in *Deacon's* Bankruptcy (*d*), and in the note to *Troughton* v. *Gitley* (*e*).

Judgment.

The defendant's principal argument on the motion for the decree was that by the statute (*f*), the discharge or

(*a*) 1 Sm. & Giff., 394 : 4 De G. M. & G. 395.
(*b*) Amb. 630.
(*c*) 14 Moo. P.C. 469.
(*d*) 3rd ed., 153, 154
(*e*) 2nd ed. by Blunt, p. 630.
(*f*) Insolvent Act, 1864, sec. 9, sub-s. 10. See Thompson v. Rutherford, 27 U. C. Q. B. 205; McWhinnie v. Learmouth, 18 U. C. P. 136.

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composition, having been obtained by fraud, was null and void. In the two cases cited, the subsequent creditors were held entitled to priority, though there had been no discharge of the bankrupt under the commission, but merely an acquiescence by the prior creditors in his resuming business. But the statute did not mean that the discharge or composition should be void absolutely, or otherwise than at the election of the creditors affected by it; the fraudulent insolvent cannot set up the invalidity; and it may sometimes be for the interest of the creditors to take the composition notwithstanding the fraud. That being so, their election to treat the transaction as void cannot be permitted to affect subsequent creditors, who are at least equally innocent with themselves, and have by their act been led to deal with their common debtor on the faith of his having been discharged by his former creditors (*a*).

Judgment.

The answer does not distinctly admit that the assignee and the creditors whom he represents were aware that the insolvent had resumed business. But there is no doubt of the fact; and counsel for the defendant desired that it should be deemed to be conceded, in case my opinion were against him on the points of law which were argued. Had this admission not been made, I am not prepared to say that I could have held that, after having given a release, the knowledge of the creditors that the insolvent had resumed business was necessary to be established by the plaintiffs.

The decree may be as prayed by the bill. I do not see that I can except from its operation the goods which were in hand at the time of the discharge.

The defendant's counsel submitted that the claim set up by the defendant was one which, in the interest of the

(*a*) See White v. Garden, 10 C.B. 919; Stevenson v. Newnham, 13 *ib.* 285; Pease v. Gloahec, L. R. 1, P. C. 216.

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creditors on whose behalf it was advanced, it was proper for him to make; and that his costs should therefore be paid out of the assets in question. The propriety of his conduct in raising the question may be a reason for his costs being paid out of the assets belonging to the creditors on whose behalf he was acting, but is no reason for paying them out of the property of the adverse claimants. The rule is, that, in suits between an assignee in insolvency, a trustee, or an executor—and persons claiming adversely to those whom such a one represents, he is not exempt from the ordinary rules on the subject of costs (*a*). Here the defendant has set up an unfounded claim against the plaintiffs, and must go for indemnity to the estate, or to those interested in the estate, for which he was acting. I think that he must pay the costs of the action at law, but that I may relieve him from paying the plaintiffs' costs of this suit.

(*a*) See the cases Morgan & Davey, 232; Daniel, 4th ed., 1262.

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GOLDSMITH V. GOLDSMITH.

Interest on annuity—Set off—Parties—Costs.

No interest is allowable in respect of arrears of an annuity.

A testator who owed debts to an amount exceeding his personal estate devised his land to one of his sons, whom he also appointed an executor; the devisee paid debts to an amount exceeding the personal estate, and left but one debt unpaid; for the creditor to whom that debt was due, the devisee became surety for an amount exceeding the debt so due by the testator; and the devisee subsequently gave a mortgage on the land devised to secure the amount he was surety for:

Held, that the debt due by the testator was to be applied towards the discharge of the sum for which the devisee had become surety.

Where a devisee of land subject to a charge, mortgaged the devised property, the mortgagees were held to be proper parties to a suit for the realization of the charge.

Where a plaintiff claiming under a will, insisted on a construction which was decided against her, whereby her claim was considerably reduced, she was, nevertheless, under the circumstances of the case *held* entitled to the costs of the suit.

An administration suit by a person interested to an amount less than $200 in an estate which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, was *held* not to be within the equity jurisdiction of the County Court.

Statement.

This was an administration suit. The bill was filed by the testator's widow against *David Goldsmith*, his devisee and one of his executors, his other executors, and certain persons to whom *David Goldsmith* gave mortgages on the property devised to him. The testator died on the 14th February, 1858. By his will he devised his farm on which he lived to *David Goldsmith*, who was one of his sons, "subject to the legacies, reservations and incumbrances in the will mentioned;" and he directed that his wife, the plaintiff, should receive a good, sufficient, and comfortable support from *David* (who was her step-son), or from the profits of the farm,

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and the sum of £3 in cash annually, so long as she should remain a widow. He further directed, amongst other things, that the house in which he resided should be at the sole disposal of his wife, so long as she remained his widow; and that his three daughters should have a home with her in it; and that if at any time his widow should have just cause for leaving the homestead and living with any of the children, she should receive from *David* 5*s*. a week in lieu of the provision for her support thereinbefore mentioned. The bill alleged, that she had remained on the homestead for about a year; that having just cause for leaving the homestead she had done so then, and had ever since lived with a married daughter; that she had received from *David* part only of what was payable to her in respect of the £3 a year, and nothing in respect of the $1 a week. She claimed to be entitled to dower in addition to these provisions; and the bill stated that dower had been assigned to her accordingly in August, 1862; and had ever since been enjoyed by her. The bill further alleged that there was due to her under the will at least $340; and she claimed a lien therefor on the estate devised to *David* as against him and all claiming under him. The bill stated that since the testator's death *David* had executed mortgages on the land to *Daniel Moran* and *Clara Maria Louisa Ross*, wife of *Walter Ross*, and these three persons were made defendants to the bill. The bill claimed for the plaintiff's charge priority over these mortgages: and alleged that the plaintiff had applied on notice for an administration order; that *David* had set up the mortgage to *Moran* as a bar to the proceeding by notice under the General Orders; and that the application had in consequence been refused. The bill prayed for, amongst other things, an administration of the estate; a declaration of the plaintiff's rights under the will; that the sums due or payable to her should be declared to be a lien or charge on the land in priority to the claims of the defendants; and that, if necessary, the land, or part

Statement.

thereof, should be sold for the satisfaction of the sums due to the plaintiff. 1870. Goldsmith v. Goldsmith.

The defendant *David Goldsmith* put in an answer setting up, among other things, that the plaintiff was not entitled to dower in addition to the provision made for her by the will; that she had sued for her dower and obtained an assignment thereof as the bill stated, and had, as the defendant insisted, thereby elected to take her dower, and was not entitled to the provision made for her by the testator. The mortgagees did not by answer claim priority to the plaintiff in respect of anything she was entitled to under the will.

The case came on for hearing before Chancellor *VanKoughnet* on the 23rd October, 1866; and by the decree then made it was declared that the plaintiff's claims under the will had priority over the mortgages; the usual accounts and inquiries were ordered; and the Master was directed to inquire whether the plaintiff had elected to take her dower; and what the rights of the plaintiff were in respect of the said dower and of her annuity under the will, regard being had to the terms of the will, and otherwise. An inquiry was also directed as to the purposes for which the mortgages were executed. Statement.

The Master made his report on 19th January, 1870, and thereby found that the personal estate which came to the hands of *David*, the acting executor, did not exceed $100; and of that sum $70 worth was specifically bequeathed, and $30 only chargeable against *David* in account; that *David* had paid for funeral expenses, expenses of administration, and debts of testator, $480.09; that the only creditor of the deceased whose debt was out standing, was one of the executors, *Roger Bates Conger*, to whom the estate was indebted in the sum of $809; that the only real estate of the testator was the farm devised

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to *David;* that on the 18th February, 1865, *David* executed a mortgage thereon to the defendant Mrs. *Ross*, on which there was due at the date of the report $1943.23; and another mortgage to the defendant *Moran;* that of the legacies given by the will, the sum of $208 remained unpaid, in addition to what was due the plaintiff. The Master found that the plaintiff was entitled to the annuity of $12 up to the time of her leaving the homestead and no longer; that she left with just cause, and was thenceforward entitled to $1 a week until dower was assigned to her in August, 1862; that the amount then due the plaintiff in respect of both sums was $126.45; that the interest on that sum to the date of the report was $74.78, making together $201.23; that that sum was due to the plaintiff from *David Goldsmith*, in priority to the claims of the mortgagees. The Master found that, by claiming and accepting dower, the plaintiff, from the time of electing so to take dower, ceased to have any right to the annuity or provision given to her by the will. He further found that the mortgage to Mrs. *Ross* was given to secure a debt of the defendant *Conger*, for which *David Goldsmith* was surety.

The cause came on before Vice Chancellor *Mowat*, on the 23rd February, 1870, for further directions, and on the question of costs.

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

Mr. *Hector*, Q. C., for the defendant *Ross*.

Mr. *Moss*, for the defendant *David Goldsmith*.

March 9.

MOWAT, V. C.—The defendant *David Goldsmith*, objects that the Master has improperly allowed interest to the plaintiff, the settled rule of the Court being against allowing to annuitants interest on arrears due

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to them. *Booth* v. *Coulton* (*a*), and other cases (*b*), shew that to be so.

Another point urged on behalf of the same defendant was, that the debt of $809 due by the estate to *Conger* should be set-off against the debt due to Mrs. *Ross*, for which *David* was surety, and had given the mortgage on the estate devised to him; or, that the former sum should be applied towards the discharge of the mortgage. I think that contention well founded also. The cases of *Jones* v. *Mossop* (*c*) and *Bousfield* v. *Lawford* (*d*) seem quite sufficient to sustain it. In this point the plaintiff has no concern.

The only other question argued was as to costs. It was contended on the part of the defendant *David*, that the mortgagees were unnecessary parties, and that the plaintiff should pay their costs. But they seem to have been properly made parties. They did not demur to the bill, and it was not dismissed against them at the hearing. The devised property was conveyed to them by *David* after his father's death; they had charges on it subsequent to the plaintiff's charge; they were interested in the controversy as to the extent of the plaintiff's charge; and a sale could not have taken place in their absence.

Judgment.

As to the plaintiff's costs of the suit, it was contended, that she is not entitled to them against the defendants, or out of the estate. One ground was, that the decision has been against her right to the provision in her favor in the will, from the time that she elected to take her dower. I gather from the decree that the Chancellor thought the case one for

(*a*) 2 Giff. 514.

(*b*) Tew v. Earl of Winterton, 2 B. C.C. 489, and 1 Ves Jr. 451; Booth v. Leycester, 1 Keen. 247; 3 M. & C. 459.

(*c*) 3 H. 568.

(*d*) 1 DeG. J. & Sm. 459.

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election; the Master has expressly found that the case was of that character; and the plaintiff now acquiesces in the view. But I cannot say that the point was not free from doubt (*a*); and that being so, and the estate having been administered in the suit; the rights of the defendants *inter se* having been determined therein; and the plaintiff having established her right to part of her demand, I think that the adverse decision on the construction of the will should not disentitle her to any costs which she could otherwise claim.

Judgment.

It was further argued that, the amount due to her being under $200, the suit should have been brought in the County Court. The 34th section of the Consolidated Act respecting the County Courts (*b*) is that which regulated the equity jurisdiction of those Courts. The 3rd sub-section appears to refer to relief to a legatee out of personal assets only, and is confined to cases where the assets do not exceed $800; here the relief sought is against land, there being no personal assets applicable to the purpose; and the land is not pretended to be worth no more than $800. The debt proved by *Conger* exceeds $800. The 8th sub-section gives jurisdiction in the case of, "Any person seeking equitable relief for or by reason of any matter whatsoever where the subject matter involved does not exceed the sum of $200." But the construction put upon the 6th and 7th sub-sections in *Hyman* v. *Roots* (*c*), and in *Seath* v. *McIlroy* (*d*), and other cases (*e*), must be put on this clause also; and they shew that, under the facts found by the report of the Master, the County Court had not jurisdiction to entertain the case.

It was further contended that the plaintiff should have taken an administration order without pleadings,

(*a*) See Baker v. Baker, 25 U. C. Q. B. 448; McLennan v. Grant, 15 Grant, 65.

(*b*) Con. U. C. ch. 15. p. 83.

(*c*) 11 Gr. 202.

(*d*) 2 Chamb. Rep. 93.

(*e*) See 11 Gr. 202.

under the General Orders. But as the plaintiff applied for such an order before filing her bill, and as the defendant satisfied the Court that a bill was necessary, and the order applied for was therefore refused, the point cannot be regarded as open for consideration now.

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Goldsmith v. Goldsmith.

Denison v. Denison.

Will, construction of—Double maintenance.

A testator (amongst other things) devised certain lands to each of his two younger children, and directed that the rents should be and remain to his widow or executors for the education and up-bringing of the devisees respectively until they were twenty-one, &c.; and he also left all the dividends and profits of his bank stock, &c., to his widow and executors for the same purpose. The residue of his estate was to be divided equally amongst all his children. The rents of the lands devised to one of the younger children were alone more than sufficient for his education and maintenance:

Held, notwithstanding, that he was entitled to a share of the dividends bequeathed; that, the whole income derived from the stocks being given, the gift could not, in favour of the residuary legatees, be construed as conditional on being needed for the purpose specified.

Statement.

This case came on before Vice-Chancellor *Mowat*, by way of supplementary appeal by *Richard Lippincott Denison*, one of the defendants, against the report of the Accountant, the objection taken on this appeal having been omitted in the former notice of appeal, and being made the ground of a new appeal under leave for that purpose granted in chambers.

The question argued was as to the right of the respondent *Charles Leslie Denison*, one of the plaintiffs, to certain dividends on bank stock and railway stock, received by the executors of the estate of *George Taylor Denison*, during the minority of *Charles L. Denison*.

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The testator, by his will, gave to his wife all his household goods and furniture, plate, linen, and china, for the term of her natural life, or so long as she should remain his widow; and the same were then to be divided equally between his two youngest children *Georgina* and the respondent *Charles*; and the testator's wife was to have power to reside in and occupy his dwelling house, or homestead, called "Bellevue;" and was to have the full use of all buildings and erections upon the said land during her natural life. He likewise gave to her all his stock, crop, and farming utensils, to be kept and disposed of as his executors and his widow might think best, for the bringing up of his said two young children. He also gave to his widow an annuity in lieu of dower. To each of his children he devised lands in fee; and he declared his will to be that his younger children were not to come into possession of their property until they should respectively attain the age of twenty-one years, or, in case of his daughter, until her marriage, if that event should happen before she should have attained that age; and that the lands, with all the improvements thereon, devised to his young children, were to be and remain, and all rents and profits arising therefrom, to his widow or his executors, for the education and bringing up of his young children "till they shall attain the age of twenty-one years; or, in case of my daughter's marriage, as aforesaid." Then followed the clause on which the present question arose, and which was as follows: "And my will further is, that all the rents, dividends, interest, and profits of my bank stock, fire insurance stock, rail-road stock, and canal stock, I also leave to my said widow and executors, for the education and bringing up of my two young children till they shall attain the full age of twenty-one years; or, in case of my daughter, being married, and no longer."

Statement.

The rents of the real estate specifically devised to *Charles* were found by the Accountant to be more

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than sufficient for his education and maintenance; and this finding was concurred in by all parties. The income of the stocks specified in the will amounted during the minority of *Georgina* and *Charles* to several thousand dollars. The appellant claimed, that as these rents were unnecessary for the education and maintenance of *Charles*, his portion thereof passed under the residuary clause in the will. The widow of the testator made no claim to this money, or to the surplus rents which had accumulated during the minority of *Charles* from the lands devised to him.

Mr. *Crooks*, Q.C., for appellant, cited *Brown* v. *Paull* (*a*), *Ransome* v. *Burgess* (*b*), *Thorp* v. *Owen* (*c*), *Raikes* v. *Ward* (*d*), *Connolly* v. *Earrell* (*e*), *Berkeley* v. *Swinburne* (*f*).

Mr. *McLennan*, contra, cited *Clive* v, *Walsh* (*g*), *Barton* v. *Cooke* (*h*), *Foljambe* v. *Willoughby* (*i*), *Williams* v. *Executors* (*j*), *McPherson* on Infants (*k*).

March 9.

MOWAT, V. C.—Counsel for the appellant relied principally on *Brown* v. *Paull*, in support of his appeal. In that case the testator gave all his property to trustees, in trust to pay an annuity to his wife; and, subject to that payment, to convey, assign, or transfer all his property unto and equally between his children, when and as they severally attain twenty-one years; and in the meantime to pay to his wife, or otherwise apply, the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. The income was more than sufficient

Judgment.

(*a*) 1 Sim. N.S. 92.
(*b*) L.R.. 3 Eq. 773.
(*c*) 2 Hare. 607.
(*d*) 1 Hare, 445,
(*e*) 8 Beav., 347.
(*f*) 6 Sim., 613.
(*g*) 1 Br., Ch. C., 146.
(*h*) 5 Ves. 461
(*i*) 2 S. & S. 165.
(*j*) 1195.
(*k*) See 242, 245, 331, *et seq.*

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for this purpose; and the question was, whether the surplus belonged to the widow or to the children, who were also the devisees of the "accumulations if any." Lord *Cranworth* decided in favour of the widow, upon grounds which it might be material to consider if the widow here was claiming the surplus rents, but which have no application where the legatee who was to be maintained is not entitled to the residue of the testator's estate; and his contest, is, not with the widow, but with another son, who claims an interest in the surplus under the residuary clause.

The widow was not an executrix, but it was admitted or assumed by all parties that, if she had received the dividends, she would have been a mere trustee of them; and for the purposes of this appeal I make the same assumption.

Judgment.

I have read the other cases cited in argument for the appellant, but I do not perceive that they sustain his claim. I have examined also the cases of which the appellant's solicitor handed me a memorandum after the argument (*a*); but none of them helps the appellant's case. Most of them, like the cases cited on the argument, would only be applicable in favour of the widow, if she were claiming the surplus; and in one of them, which is not of that class, the judgment against the children expressly rested on the distinction that exists between, on the one hand, the gift of the whole or part as might be necessary; and, on the other hand, the gift of the entire fund, or the entire interest of a fund, for the particular purpose assigned—which is the present case. (I refer to *In Re Sanderson's Trusts* (*b*),

(*a*) Byne v. Blackburn, 26 Beav. 43; Scott v. Kay, 35 Beav. 291; Leach v. Leach, 13 Sim. 304; In re Sanderson's Trusts, 3 K. & J. 497; Andrews v. Partington, 2 Cox. 223.

(*b*) 3 K. & J. 497.

which I did not see until after I had prepared my judgment with the exception of the paragraph I am now reading. I find that that case supports very distinctly the views which I am about to expre...) 1870. Denison v. Denison.

Counsel for the respondent relied on the case of *Clive* v. *Walsh* (*a*). There the testator devised certain real estates to trustees for a term of years, with remainder to his son *Robert*. The principal trust of the term was to raise a maintenance for *Robert* till he was twenty-one years of age. The personal estate was also given to trustees for the purpose, amongst other things, of raising a maintenance for each of his children, including *Robert*, until the same age. Lord *Thurlow* held that the son was entitled to two maintenances, referred it to the Master to inquire what allowance should be made, and directed the rest to accumulate for the use of *Robert*. The will in that case did not fix in any way the amount which was to go to *Robert's* maintenance under either provision; and the improbability of the testator's intending a double allowance was, therefore, considerable; while, in the present case, the whole rents and income are expressly given for the purpose specified; and there is on that account less difficulty in the way of the Accountant's construction of the will than presented itself in *Clive* v. *Walsh*. That case is cited and stated in Mr. *McPherson's* book on Infants (*b*); but I have not observed a reference to it in any subsequent case which I have looked at; and it does not appear to be mentioned in the last edition of *Jarman* on Wills or of *Williams* on Executors. Other decided cases, however, seem to me abundantly sufficient to defeat the appellant's contention. Judgment.

Where a gift is made for a specified purpose, the general rule laid down is, that, if that purpose is

(*a*) 1 B. C. C. 146. (*b*) p. 242.

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the benefit of the legatee himself, he or his representative is entitled to the gift though the specified purpose should fail (*a*). Thus a gift to place the legatee out as an apprentice was held to go to the legatee absolutely, though he had not been and was not to be placed out as an apprentice (*b*). A gift made for the purpose of purchasing for the donee promotion in the Army was held to belong to the donee absolutely, though his state of health compelled him to abandon the service (*c*). The Master of Rolls in *Barton* v. *Cooke* (*d*) said that a bequest to enable the legatee to take holy orders, which his subsequent lunacy made impossible, would go to the legatee absolutely. So, in *Cowper* v. *Mantel* (*e*) it was said that a gift of a specified sum to a person already in holy orders, to purchase church preferment, would go to his representative, in case of the donee's death before the purchase was made. A gift to the testator's son for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial for the son, was held to go to the son's representative, the son having died without having gone into business, and without the widow having exercised any discretion (*f*). Even where the bequest was for the purchase of an annuity for the legatee after the tenant for life of the fund should die, the intended annuitant having died before the tenant for life, the money was held to belong to the legatee's representative (*g*).

Judgment.

In *Noel* v. *Jones* (*h*) a testatrix bequeathed her personal estate in trust, among other things, to pay and apply £800 in and upon the education of her god-son, an infant;

(*a*) See Lassence v. Tierney, 1 McN. & G., 561.
(*b*) Barton v. Cooke, 5 Ves., 461.
(*c*) Lecke v. Lord Kilmorey, T. & R. 207.
(*d*) 5 Ves. 463.
(*e*) 22 Bea. at 236.
(*f*) Gough v. Buet, 16 Sim. 45, 53.
(*g*) 1 Drew. 569.
(*h*) 16 Sim. 309.

and the residue, after satisfying the purposes of the will, was to go to another person. It was contended by the executors, that the plaintiff was not absolutely entitled to the £800; or to have the interest and dividends thereof applied for his maintenance and education during his minority; but that, according to the true construction of the will, that sum ought to be invested, and so much thereof as from time to time should be required for his education, ought to be sold out and applied for that purpose, until the principal should be exhausted, or the plaintiff should die; that, in the meantime, the interest and dividends to arise from the principal, or from so much thereof as should from time to time remain invested, belonged to the testatrix's residuary estate; and that in the event of the plaintiff's dying before the principal should be exhausted, the residue thereof then remaining unapplied would also belong to the residuary estate of the testatrix. But that view was not concurred in by the Court, and the infant was held to be entitled to the whole legacy as a general legacy. Judgment.

Many other cases have arisen on bequests for maintenance. Thus in *Webb* v. *Kelly* (*a*), the testator directed the rents of his estates to be applied during the life-time of the widow to the maintenance and education of his two great-nieces in equal shares; and he further directed that after the death of his wife, the estates should be sold, and the proceeds go to the two nieces equally, if both survived the wife, but that if only one survived, the whole should go to the survivor. One of the nieces died before the widow; and it was held, that her half of the rents accruing from the time of her death until the death of the wife, belonged to the representative of the deceased niece.

So, where maintenance is bequeathed to an infant

(*a*) 9 Sim. 471.

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whose father is living and able to maintain him, the legacy is not construed as being in ease of the father (*a*); and the allowance for maintenance, if not needed, accumulates for the infant's benefit; or on his death goes to his representative (*b*).

In *Foljambe* v. *Willoughby* (*c*) infants had been entitled to maintenance under their father's marriage settlement and will; their grandfather, after their father's death, made a will devising certain estates to trustees for a term, upon trust to apply a sufficient part of the rents and profits, at their discretion, for and towards the maintenance and education of the same children during their minorities, and (subject thereto, and to certain legacies in favour of the plaintiffs, and to other charges) to permit the person entitled to the estate in remainder immediately expectant on the term, to receive the rents: it was held that the infants were entitled to an independent allowance for maintenance under each will; and that the provision made by the grandfather was not to be considered as in aid only of the like provision which had been previously made by the father (*d*).

Judgment.

So, in *Bayne* v. *Crowther* (*e*), the testatrix bequeathed a certain leasehold to her executor upon the following trusts: one moiety of the rents to be paid to her niece for her life, and the other moiety to her nephew for his life; and on the death of either, his or her share of the rents was to be paid or applied to the maintenance of his or her children, until the decease of the survivor of the said nephew or niece; and, in that event, the property was to be sold, and the proceeds were to be divided amongst their children equally. The nephew died first, leaving

(*a*) See McPherson on Infants, p. 246; Thompson v. Griffin, Cr. & Ph. 317; &c.

(*b*) Harris v. Finch, McClel. 141; &c. (*c*) 2 S. & S. 165.

(*d*) See also Poulet v. Poulet, 6 Madd. 167.

(*e*) 20 Beav. 400.

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a son surviving him, and having had a daughter who had died before her father. It was held, that the daughter's share of her father's moiety, though bequeathed for maintenance, went to her personal representative.

These authorities appear to me to demonstrate that I cannot construe that clause in the will in question, which gives all the income of the testator's stocks for the education and maintenance of his two young children, as giving it in case only of its being needed for that purpose, or as giving so much thereof only as might be necessary for the purpose specified. The appeal motion must be refused, with costs.

BATEMAN v. BATEMAN.

Will, construction of—Trust—Executory devise over—"Heirs."

A testator gave to his wife $50 a year in lieu of dower, and directed that, if she should have a child to the testator, the annuity should be increased to $100 so long as both lived and as the annuitant remained the testator's widow. In a subsequent part of the will he directed that if such child should live till fourteen he should be put to trade "and pay stopped when of age, shall $100":

Held, that the widow was entitled to the annuity of $100 absolutely until the child was twenty-one, provided the child lived so long and the widow remained unmarried; and that in case the child should die before twenty-one, or in case the widow should marry, the amount was thenceforward to be reduced to $50 a year for the remainder of her life.

The testator devised his farm to *G*, and directed that if *G* should die without heirs, the land should be sold and legacy paid; and if the testator's widow should die or marry before *G* should have paid $2,000, the balance should be equally divided amongst the testator's heirs. In a subsequent part of the will the testator directed that *G* should pay $2,500:

Held, that the estate intended for *G* was the fee simple, with an executory devise over in case he should die without issue living at his death.

Held, also, that the word 'heirs' in the bequest of the balance, did not include the widow; and the same construction was put upon the word 'heirs' in a residuary clause contained in the subsequent part of the will.

1870.

Bateman v. Bateman.

This was a suit by *Florence Bateman*, an infant suing by her next friend, to obtain a declaration as to the construction of the will of her father, and for the administration of his estate. The defendants were the widow, the devisees, and the executors of the testator.

The will was as follows: "I, George Bateman, of the township of Maryposa, County of Victoria, Province of Canada Esq the adge of 56 years, and being in sound mind and memery do Make publich and decare this my will And testement in maner following, To wit that funerl charges and all lusts depth shall be payd by my executors and hereindfter named the residue of my Estate and property Which shall not be required for the payment of my first depths of funeral expenses and the charges attending the Execution of my will And the adminstrion of My Estate I Give and Devise and dispose therof that is to say first I give and bequith to my Wife Eealnor Bateman

Statement.

The sum of Fiftey dolars per year this sum is to Be in lieu of dower and If Eealnor Bateman should bare a child to me the sum shall increased to one hundred dolars per yeare so long as both shall live or as long as Eealnor Bateman is my widow this with her 400 hundred dolars at intrest will be a good living. William Bateman A John Bateman David Bateman ass receved thare poretieon one thousand dolars each francis is to have seven hundred dolars when of adge frances shall have the old farm to rent at A resanable rate till George A Bateman is of adge Second i give and devise to George Arthur Bateman that serten tract of land lot number 20 in the 8 Con s $\frac{1}{2}$ if George A Bateman should die it without Hars it shall be sold and legesey paid and if my wife should die or get mared before George A. Bateman shall of paid two thousand dolars the balance equell devided with my ares Third i give to my daughter Mary Bateman 400 hundred dolars also to rachel Bucher 400 hundred dolars also to lyda Biglow 400 dolars Also to Eliasabath reeder's 4

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children 50 dolars each as they become of adge Barbar Silver is to have 400 dolars the above legesseys is to be paid out of the chattles as they become due equaliy the house in Oakwood rented if my wife doas not chuse to live in it if thay shuld bo A overplush it shall be equally devided to all my Aares also if defichency as above also that Mary shall have the beurow and chares, brabra the carpet senter table Rachel the cubberds George A the horse arnish A cutter and bed my bed close to be divid between John francis and George John is to have the bugey and stoves Barbara is to have the Cow if eney Eather intrest be sold | if the child above shall live till 14 shall be put to trade and pay stopt when of age shall one hundred dolars George A shall pay 2500 dolars the above instrement Consists of one sheet was at the time and date signed seled published and Declared by the said George Bateman for his last will and testament in the presence of us who at his request and in is presence And in the presence of each other have subscribed our names ass attesting witness thereof the 2 of feb in the yeare of our Lord 1867 "

The plaintiff was the child of the testator's wife *Eleanor*, and was born after the making of the will. The other devisees named in the will were the testator's children by a former marriage.

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

Mr. *Moss*, for the widow.

Mr. *McMichael*, for the other children and the executors.

March 9.

MOWAT, V. C.—I have done my best to ascertain the proper construction of the very loosely and incorrectly expressed will which is in question in this case.

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Bateman v. Bateman.

(1). I think that the widow is entitled to $100 a year absolutely (*a*), until the plaintiff is twenty-one, provided the widow lives so long and remains unmarried. In case the plaintiff should die before she reaches twenty-one, or in case the widow marry, the amount is to be reduced to $50 a year for the remainder of the widow's life. Should she marry before *George* is twenty-one, I feel great difficulty in acceding to the argument of plaintiff's counsel, that a gift to *George* of the remaining $50 a year is to be implied. No authority for such a construction was cited; and if a present decision is necessary, it will be against the allowance. The widow is bound to elect between her dower and the provision made for her by the will.

(2). If the widow elects to take her dower, I think that she forfeits the whole $100. The testator considered that sum sufficient for the maintenance of herself and her child; and if her dower is worth more, the child will not suffer by the election to take dower.

Judgment.

(3). The direction, that if *George* should die without heirs the land was to be sold, is curious, as it is the only event in which the testator provided for a sale. The effect of it is, to restrict the interest which *George* will have in the farm, and to give him, in consideration of the $2,500 he has to pay, not an absolute fee simple, but a fee simple with an executory devise over in case he shall die without issue living at his death. *Blinston* v. *Warburton* (*b*) appears to establish that as the proper construction.

The testator's intention was, that *George* should have the land free from dower, and in case the widow elect to take dower, *George*, if he takes the

(*a*) See Jarman on Wills, 3rd ed. 372; Byne v. Blackburn, 26 Beav. 41.

(*b*) 2 K. & J. 400.

land for the $2,500, will be entitled to the annuity of $100, or $50 as the case may be, which the widow would otherwise have received. When *George* is twenty-one, he will make his election whether to take the devise on the terms specified. Until then *Francis* is entitled to have the farm at a reasonable rent. 1870. Bateman v. Bateman.

(4). In the event of *George* dying without leaving issue, or in the event of his not accepting the devise, the property is to be sold.

(5). It was argued that the legacy of $700 to *Francis* is a charge on this land in priority to all other legacies, except perhaps the annuity to the widow. But that question is only material if there is not enough to pay all, and it was stated in argument that the estate is ample to pay all. The Master's report will shew.

(6). Another question argued was as to the meaning of the word 'heirs,' as employed in the will. The word first occurs in the testator's direction that, if his widow should die or marry before *George* has paid the money, the balance is to be equally divided among his heirs—"with my heirs." Now the word 'heirs' used in a gift of this sort is sometimes construed as meaning children (*a*), and sometimes as meaning the next of kin, including the widow, under the Statute of Distributions (*b*). The latter is the construction adopted where the will contains nothing which leads to the other construction. But in the present case, since the division was not to take place until the death or marriage of the widow; and was to take place on the marriage, should that event occur; and as the testator had in the previous part of the will manifested an intention to diminish, rather than increase, the provision in favour of his widow in the event of her Judgment.

(*a*) See Jarman on Wills, 3rd ed., p. 76.
(*b*) Re Porter's Trusts, 4 K. & J. 197.

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marrying, I think that enough appears to shew that the word 'heirs' in this clause is to be construed as if the testator had said 'other heirs,' or 'heirs other than his widow.' When a man of the class to which the testator belonged speaks of his 'heirs' he does not, ordinarily, think of his wife as one of them.

(7). If the word 'heirs' in the clause just referred to does not include the widow, I think that the same word in the subsequent residuary clause should receive the same construction, namely: "If there should be an overplus, it shall be equally divided to all my heirs; also, if deficiency, as above." I have no doubt that the meaning which I thus assign to the word heirs in the two clauses, was the meaning intended by the testator; and I think that there appears on the face of the will judicial grounds sufficient to enable me to give effect to the intention.

Judgment.

(8). I think that the plaintiff is entitled to be put to a suitable trade at the age of fourteen, at the expense of the estate:—"If the child above shall live until 14, shall be put to trade, and pay stopped when of age, shall $100." I read the latter part of this clause as meaning that the increased annuity of $100 should be payable to the mother until the child became twenty-one, and no longer; thus limiting the direction given in the prior part of the will, for the continuance of the increased annuity as long as the mother and child should both live, and leaving the $50 only to be the annuity from the time the child should attain twenty-one.

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TOTTEN v. WATSON.

Mortgages—Parol evidence.

A parol agreement to add two per cent to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment, was held insufficient to charge the extra interest upon the land.

Examination of witnesses, and hearing at the sittings in Woodstock.

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

Mr. *Moss*, for the defendant.

SPRAGGE, C.—Upon reading the examination of the defendant, which is the only evidence given on behalf of the plaintiff, I find nothing on which to base a decree. The plaintiff is a mortgagee of certain lands, and the whole mortgage debt secured by the mortgage deed has been paid. The interest reserved by the mortgage was eight per cent. and the plaintiff's case is, that on the 1st of September, 1867, there being then $4000 due the plaintiff, the mortgagor, one *Manley*, in consideration of the extension of time for payment, agreed to add two per cent. to the rate of interest; and that it should be a charge upon the land. March 14. Judgment.

It may be conceded that the defendant, who was a purchaser, upon proceedings in insolvency against the mortgagor, of the mortgaged premises subject to the mortgage, knew of the promise by the mortgagor to pay the additional two per cent., and that he knew also that a promissory note for the amount had been given by the mortgagor to the mortgagee; but the alleged fact that it was agreed that it should be a charge upon the land is not proved. And if it had been proved, there would still remain the difficulty, under the Statute of Frauds,

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that it was not in writing. The law upon this point is quite clear. It is hardly necessary to refer to cases. I will refer to only one, *Ex parte Harper* which is reported in 19 Ves. (*a*), and in 1 *Merivale* (*b*). Lord *Eldon*, referring to a decision of his own in relation to further advances upon equitable mortgage, that they might be proved by parol, and which decision he came to doubt upon reflection, said " I speak with doubt upon this ; as the practice of conveyancers has always been, and the law is, that an original mortgage vesting the legal estate by a contract in writing cannot be added to by parol." In that case there had been a mortgage for £400, then further advances and, as appears in *Merivale*, an account stated between the parties in writing, stating the further sum due ; and a parol engagement that this further sum should be tacked to the original mortgage, and a further mortgage executed. The case of *Inglis* v. *Gilchrist* (*c*), cited for the plaintiff, proceeded expressly upon the ground of estoppel.

Judgment.

The bill will be dismissed with costs.

The Bank of Montreal v. McFaul.

Principal and surety—Release of principal debtor by mistake.

A creditor by mistake executed an absolute release to his debtor, but the agreement was that the creditor's right against a surety should be reserved ;

Held, that the surety was not discharged, and that the creditor was entitled to a decree in equity to that effect.—[Spragge, C., dissenting.]

Hearing at Belleville before Vice Chancellor *Mowat*.

(*a*) p. 47. (*b*) p. 7. (*c*) 10 Gr. 301.

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This was a bill to reform the release which was the subject of the suit in *Cumming* v. *The Bank of Montreal* (*a*). The present suit was not ripe for hearing when the suit of *Cumming* v. *The Bank of Montreal* was heard before Vice Chancellor *Spragge*, and the drawing up of the decree in that case was stayed until the present suit should be heard. The evidence taken in the first suit was read, by consent, in this suit and further evidence was also given.

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

Mr. *Wallbridge*, Q. C., and Mr. *Hodgins*, for the defendant.

March 14.

MOWAT, V. C.—On reflection and carefully reading my brother *Spragge's* opinion, in the other suit between the parties, which is manifestly against the bank's right to reform the release, I have come to the conclusion that under all the circumstances the proper course will be for me to carry out that view without at present intimating any independent opinion of my own, and to leave the bank, if so advised, to have the cause re-heard before the full Court. The decree to be drawn up is, therefore, dismissing the bill with costs.

Judgment.

The cause was thereupon re-heard before *Spragge*, C., and *Mowat* and *Strong*, V.CC.

Mr. *C. S. Patterson*, and Mr. *J. C. Hamilton*, for the plaintiffs.

Mr. *Hodgins*, for the defendant.

March 14.

SPRAGGE, C.—Upon the question of rectifying the instrument, Mr. *Patterson's* position is, that the plaintiff

(*a*) 15 Gr. 688, 686

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is entitled to it, unless it be shewn that the party against whom the relief is sought has changed his position upon the faith of the instrument, being, as it is, or had paid valuable consideration. Assuming this to be the general rule it would apply as between the bank and *McFaul;* but the principal and substantial question is whether it would apply to a third person not a party to the instrument, and whose position is that of a surety. If the necessary effect of its rectification would be to prejudice the position of the surety, (unless guarded by some provision restricting its operation to the immediate parties to it) he has a right to urge that its having such effect, takes it out of the general rule.

Judgment.

It is perfectly well settled that any dealing between the creditor and the principal debtor, the effect of which may be to prejudice the position of the surety, operates to the discharge of the surety, and it is not necessary for the surety to shew that he is actually damnified: as was said by Lord *Truro* in *Owen* v. *Homer* (*a*), "The general law as administered in this Court is not disputed, that a creditor discharges a surety by any dealing or arrangement with the principal debtor, without the surety's assent, which at all varies the situation, rights, or remedies of the surety."

I feel still pressed with the difficulty which I suggested in *Cumming* v. *The Montreal Bank*, that during the interval between the execution of the release and its rectification, (supposing it to be rectified) the surety has been debarred from one of the rights incident to his position, that of setting the creditor in motion against the principal debtor, and debarred also from the right of filing a bill against the debtor to compel him to pay the creditor. The answer to such a bill would be the release of the debt by the creditor. The general rule

(*a*) 4 McN. & G. 499.

invoked by Mr. *Patterson* does not, as far as I can see, meet this difficulty. It matters not to the surety in what mode or by what kind of dealing his situation or rights or remedies are varied, so as they are varied by or through the creditor; nor can I see that it makes any difference that it was through mistake that they were ever varied at all, or that they were varied only for a time and not permanently; yet, unless these things make a difference, the rule resulting from the varying of the situation, rights, or remedies of the surety must prevail in this case.

It is indeed contended that the situation, rights, and remedies of the surety remained the same after the execution of the release as they were before: that if the surety had desired the bank to sue *McFaul* at law, it might have been done; and if *McFaul* had set up the release the right of the bank in equity to reform the instrument might have been replied by equitable replication. But, assuming such an equitable replication to be good, it would surely be varying, and that substantially, the remedies of the surety. Instead of the direct remedy which an action at law would have given him if there had been no release, or if there had been only a covenant not to sue with a reservation of the creditor's rights against the surety, he is put to what is tantamount to a suit in equity to be adjudged upon by a Court of common law, with the delay and uncertainty incident to such a proceeding. It does appear to me that this would be varying materially the rights, and still more, the remedies of the sureties. I have assumed for the bank, that there would be no difficulty at law upon such a covenant not to sue, as I have supposed. It is not necessary to say how that would be.

Judgment.

I should have been very well pleased if I could see my way to reforming the instrument in this case without infringing the well settled doctrines of the law as to the discharge of sureties.

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The case of *Scholefield* v. *Templer* (*a*), read with *Ex parte Wilson* (*b*), which is referred to in it, is against the bank. In *Scholefield* v. *Templer*, there was a release given upon the faith of a representation fraudulently made by the debtor, in which the surety, though innocently, concurred. The release was given under mistake and the surety was held still liable because he had contributed to the mistake. This was the ground of decision by Lord *Hatherley* (*c*), then Vice Chancellor, and also upon appeal. Lord *Hatherley* referring to the judgment of Lord *Eldon* in *Ex parte Wilson*, says, "there is no doubt of the accuracy of the judgment;" and Lord *Campbell*, without questioning it, distinguishes it from the case in appeal on the ground that in the case before Lord *Eldon* the creditor acted voluntarily. In that case there was a mistake, but as the surety had not contributed to it, he was held discharged.

Judgment.

Wyke v. *Rogers* (*d*), is not an authority in favor of the bank. There was in that case no suspension of the remedies against the principal debtor. A bond had been entered into in which the debtor and the surety were joint obligors. Part of the debt had been paid and a note at two months had been given by the principal debtor to the creditor for the balance. The question was whether parol evidence was admissible for that purpose. There was nothing to prevent the creditor being put in motion by the surety. Lord *St. Leonards* observed that the effect of giving the note was at law in no manner to impeach the bond; and that the "understanding" between the parties, which in law amounted to a stipulation, prevented the promissory note in equity from having the effect of discharging the surety. His lordship distinguished the case before him, from cases where the principal debtor was discharged by release or

(*a*) Johnson, 155; 4 DeG. & J. 429.
(*b*) 11 Ves, 410.
(*c*) Johnson, 155.
(*d*) 1 D. M. & G. 408.

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by time given to him by "regular deeds or written instruments" conceding that in such cases it had been held that "their effect could not be taken away by a mere parol agreement." Among the cases cited upon that point was *Ex parte Glendinning*, from which I extract two passages from the judgment of Lord *Eldon*: "If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable * * Ever since Mr. *Richard Burke's* case the law has been clearly settled, and it is now perfectly understood that unless the creditor reserve his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise, for evidence cannot be admitted to explain or vary the effect of the instrument." The result is that, while in *Wyke* v. *Rogers* there was no answer to a suit at law; the release given by the bank in this case would be a clear answer to a suit at law.

Judgment.

Upon another branch of the case, whether the giving of the mortgage has the effect of a novation; I gave my views in the case of *Cumming* against the bank, reported at 15 *Grant*, p. 638, and distinguished the case from that of *Reade* v. *Lowndes* (*a*) at the Rolls.

There is another case *Defries* v. *Smith* (*b*), before Sir *John Stuart*. It is reported in the Weekly Reporter, and I believe no where else. Sir *John Stuart* held a surety not discharged by an acquittance given by creditors in which the plaintiff had joined, the surety having assigned to the principal creditor a policy of insurance by way of security for the debt for which he was surety, and a private debt of his own in consideration of time for

(*a*) 23 Beav. 361.

(*b*) 10 W. R. 189.

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payment given by the creditor. Sir *John Stuart* seems to have laid some stress upon the circumstance of the surety having entered into this agreement without the concurrence of the principal debtor. The case is not reported in the authorized reports of Sir *John Stuart's* Court, though another case heard on the same day is reported (*a*). It is perhaps fair to presume that the learned Vice Chancellor, upon consideration, thought his decision a doubtful one; and advisedly withheld it from the authorized report. It is, at any rate, unsupported, as I believe, by any other authority, and his reason that the arrangement was without the concurrence of the principal, is, I venture to think, an unsound one, for the principal debtor was in no way prejudiced, and indeed, could not be, for there was nothing to prevent his paying the debt at any time, that he was prepared to do so.

Judgment.

I confess I find it difficult to understand by what process of reasoning it is made out, that the giving of time by the creditor to the surety, the surety giving to the creditor a security for the payment of the debt, should affect the relative position of the parties. It is not a "novation" because there is not, generally at least, a *substitution* of a new debt for an old one; but the old debt continues to subsist: what is done is that a further security is given for its payment, the old debt and the remedies upon it against the principal debtor remaining unaffected, and for the same reason there is no merger. What is there then to abrogate the ordinary principle which governs the law of principal and surety. In the case before us it is true the surety became directly liable to pay the debt, for which he had been before only conditionally liable, but that seems to me no sound reason. The conditional liability is only before default by the principal debtor. After default the surety

(*a*) 3 Giff. 434.

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becomes directly liable, yet the relative position of the parties continues. Upon what principle is it that it is destroyed by the surety giving security for that for which he has become directly liable, and in consideration of which security the creditor agrees not to call upon him for a certain time for payment? There is no implied undertaking in such an arrangement that the principal debtor is to have the same time for payment. There is nothing in it, I apprehend, to prevent the creditor from proceeding at once against the principal debtor for the recovery of the debt. If there is not, it is still the right of the surety to put him in motion against the debtor; and if he does any act to impair that right, I see no reason why the ordinary rules applying to the case of principal and surety should not apply.

If, indeed, there was a novation, in the proper sense of the term, the old debt would be gone, and there would be nothing in respect of which the surety could put the creditor in motion; but, while the old debt continues, the relative position and relative rights of the parties ought, in my judgment, to continue with it, and in my judgment they do continue with it, unless *Defries* v. *Smith* is to be considered an authority to the contrary.

Judgment.

But, however that may be where the agreement between the creditor and the surety is silent as to the old debt, it is clear that in this case there was no novation, for the old debt was kept alive by the express terms of the instrument between the creditor and the surety, and it was contemplated that it would be paid, or at least that payments would be made upon it, by the principal debtors. It contains this provision, "These presents being given as additional security for the payment of said note, and of the renewal or renewals of the same which have been, or which may hereafter be made. And it is agreed between the parties hereto, that whatever sum or sums of money may be paid to the parties

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hereto of the third part, or may by them be realized from the said *Edward Dudley McMahon*, and from the said *Thomas McFaul*, or either of them, or from the heirs, executors, administrators, or assigns of either of them on account of their indebtedness on the note above mentioned, shall be applied as payment or part payment of this mortgage, and that the party hereto of the first part shall receive credit on this mortgage for the same." This provision negatives the idea of the substitution of a new debt for an old one. There is no new debt but an "additional" security for the old debt, the debt for the payment of which *Cumming* was, and in my judgment continued to be, surety.

Judgment.

MOWAT, V.C.—I am not prepared to dissent from the Chancellor on the last point referred to in his judgment; though I have given to it less attention than to the other branch of the case, as the bill expressly treats the suretyship as still continuing. On the other part of the case, I think that the plaintiffs have made out a title to relief, with costs. I have had an opportunity of reading the judgment which has been prepared by my brother *Strong*, and I concur in it except as to the novation. It is the view which I formed on the argument, but as the Chancellor (then Vice Chancellor) had come to a different conclusion in *Cumming* v. *Bank of Montreal*, I followed his opinion, leaving the bank to have the cause re-heard before the three Judges.

STRONG, V.C.—The bill in this case is filed by the Bank of Montreal against *Thomas McFaul* and *Joseph Cumming*. *McFaul* had been a debtor to the bank in respect of a debt for which *Cumming* was surety, and the bill seeks to have a release given by the bank to *McFaul* cancelled and a new release reserving the remedies against sureties executed, and "that it may be declared that the liability of the said *Joseph Cumming* is not in any way impaired or lessened by reason of the

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defect in the form of the said indenture of release." In a suit of *Cumming* v. *The Bank of Montreal, Cumming* had sought to be discharged on the ground that the release in question was an absolute discharge containing no reservation of remedies as against sureties; and in that suit his Lordship the Chancellor made a decree in favour of the plaintiff, which has, however, never been drawn up, having been stayed by an order made in Chambers on an application made in pursuance of leave given by the Chancellor. This cause came on to be heard before my brother *Mowat* in May last, when by consent the depositions taken in the case of *Cumming* v. *The Bank of Montreal* were read as evidence in this suit, and in addition two witnesses, Mr. *Walter Ross* and Mr. *Despard* were examined on behalf of the bank. The effect of this additional evidence was beyond all controversy to strengthen the case the bank had made out in the former cause. The Vice Chancellor, though dissenting from the opinion which had been expressed by the Chancellor, thought himself bound by it, and accordingly dismissed the bill, and that decree has now been re-heard. The facts in evidence, and the questions of law involved in both suits, are fully stated in the judgment.

Judgment.

After considering the authorities, as well those which were as those which were not cited in *Cumming* v. *The Bank of Montreal*, which was argued on the circuit, I have come to a conclusion differing from the judgment of his Lordship the Chancellor.

Upon the first point which was raised, that as to the effect of the mortgage deed of the 9th of July, 1864, given by *Cumming* to the bank, I am of opinion that upon the execution of that instrument *Cumming* became a principal debtor to the bank for the amount secured by it. I think it immaterial to consider whether there was or was not a technical legal merger of the liability

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on the promissory note in the higher contract created by the covenant in the deed, for had the original liability arisen on a specialty, and the latter on simple contract, I think the same consequences would have followed. The rule which I extract from the authorities on this question, I venture to state as follows: When the surety without the privity of the principal debtor, for a valuable consideration moving from the creditor, enters into a new contract with the creditor, differing in its terms from the original contract, and by which the surety in form contracts as a principal, he relinquishes, as regards the creditor, his rights as a surety, and converts himself into a primary debtor. The authorities which I think warrant this deduction are *Hall* v. *Hutchons* (*a*), *Reade* v. *Lowndes* (*b*), and *Defries* v. *Smith* (*c*). If I correctly state the rule, it is clear that in the present case *Cumming* did all that was essential to make himself primarily liable; then there was no privity of the principal debtor, there was a new and valuable consideration moving from the creditor, namely, the forbearance for five years of a debt then presently due, and a new legal obligation undertaken by which *Cumming* covenanted to pay absolutely. This, I think, constitutes what in the civil law is known as "novation," a term which of late has been brought into use, both by judges and text writers, as equally applicable in our own system. Mr. *Burge*, in his book on Suretyship, at p. 166, at the commencement of a chapter in which he discusses the whole subject, points out that by novation this conversion of a surety's liability into that of a principal is worked; and at p. 170 he shews that by the giving of a security, such as this mortgage, a novation would be effected. There can be no doubt but that this consequence may be controlled by contract, if upon undertaking the new liability the surety stipulates for

Judgment.

(*a*) 3 M. & K. 426. (*b*) 23 Beav. 361.
(*c*) 10 W. R. 189.

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the reservation of his rights as such, but in the absence of express stipulation I think it must be taken that the creditor has purchased the right of thenceforward treating the surety as a principal debtor. I think the provision for the renewal of the note rather favours the argument that the debt was to be so treated. Whilst, however, I am of this opinion I do not see how it could be possible even if my view was that of a majority of the court, which it is not, to give the plaintiffs the benefit of it in this suit in which they elect to treat *Cumming* as a surety.

The second question which arises is, as to the effect of a reservation of remedies against the surety in an instrument not merely giving time to, but absolutely releasing the principal debtor. I think the late case of *Green* v. *Wynn* (*a*), and the case of *The City Bank* v. *McConkey* in this Court conclusively establish that the effect of such a reservation is to preserve intact all the creditor's rights and remedies against the surety.

Judgment.

Taking it then to be established that a reservation of the remedies against the sureties, would, if it had been expressed in the instrument, have neutralised the effect of the release as an absolute discharge to the principal debtor, the next question which arises is, what is the effect of proof of a contemporaneous *parol* agreement that the creditor shall retain his remedies? a question which I think must be answered in favour of the bank. The case of *Wyke* v. *Rogers* (*b*) establishes that where the evidence of a verbal agreement is much less distinct than we have it in the present case, there is, without any rectification of the instrument of discharge, an equity in favour of the creditor to have the surety restrained from setting up the release to his prejudice. That the proof abundantly establishes that there was such a parol agreement

(*a*) L. R. 7 Eq. 28. (*b*) 1 D. M. & G. 408.

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in the present case can scarcely be disputed, and the contrary was but faintly argued at the bar. Without discussing the evidence it is enough to say that his Lordship the Chancellor finds "that the weight of evidence upon the question of fact, even taking into account as admissible the evidence of *McFaul*, is that it was intended and agreed between him and the bank agent that his sureties should not be discharged," a conclusion of fact in which I entirely agree. I may say that the case of *Wyke* v. *Rogers* was followed in the Court of Queen's Bench in the unreported case of *The Great Western Railway Co.* v. *The Town of Dundas*, which was afterwards affirmed in Appeal.

Judgment.

If the opinions I have expressed are correct, the bank would have been entitled to have had *Cumming's* bill dismissed, but with that we are not now dealing. The prayer of the plaintiffs' bill in this case is not well adapted to the relief they are entitled to. It asks in the first place that the release may be delivered up to be cancelled, this the plaintiffs are clearly not entitled to. Then in the alternative it prays that a proper release in accordance with the true meaning and intention of the parties may be executed. If by this a rectification is meant, it is a very inartificial way of praying it; but there is no necessity for rectifying the instrument, and indeed, in the view which I take, a case for that relief is not made by the evidence. The bill next asks that it may be declared that the liability of *Cummings* is not impaired or lessened by the defect in the form of the release, and to this declaration I think the plaintiffs are entitled; but I think they should also be at liberty to amend their bill by inserting a prayer for a perpetual injunction restraining *Cumming* from setting up or insisting on the release, the proper direction consequential on the declaration asked, and this injunction the decree should order. I think the plaintiffs are entitled to all the costs of the cause, including those of the original hearing and of this re-hearing.

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ARCHER v. SCOTT.

Acknowledgement of bargain by a will.

E., the agent of a testatrix, introduced into her will a clause declaring that she had sold to one *S.*, two properties therein described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially,) to convey these properties to *S.* The testatrix contracted with *S.* for the sale to him of one only of these lots; but *E.* alleged a verbal bargain by the testatrix to sell the lot to him; there was no writing as to such bargain and no part performance. After the death of the testatrix, *E.* induced the plaintiff, who was not of age, to execute a conveyance to *S.* of the two lots: *Held*, that the alleged bargain with *E.* was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by *E.*

The defendants *Scott* and *Erritt* had acted as solicitor and agent respectively to one Mrs. *Hill*. *Erritt* was employed by her to get her will drawn. She was on her death bed at the time, and was anxious to leave whatever she had to her niece, the plaintiff. He procured a will to be prepared by a solicitor (not Mr. *Scott*), and left it with her for execution, expressing a wish not to be a witness. She was an intelligent person, and competent to make a will; and having read the instrument, she executed it in the presence of two female friends. The will was short. By the first clause, all her real and personal property were given to the plaintiff. The second clause was as follows: Statement.

"Having sold and agreed to convey unto *W. H. Scott*, Esquire, of Peterborough aforesaid, barrister, the following parcels of real estate, namely, the south half of lot number nine, in the fourth concession of the township of Ennismore, in the county of Peterborough, containing one hundred acres more or less; also, the residence and one acre of land in the township of Monaghan, adjoining the said town of Peterborough: I hereby devise the said two parcels, sold to Mr. *Scott*,

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unto the said *Sophia Archer* in fee simple; and I hereby direct her to convey the same to said *Scott;* and I hereby give and bequeath unto the said *Sophia Archer* along with all my other property, the purchase money to be paid in respect of said parcels to be her own property for her own use and benefit absolutely."

The plaintiff was appointed sole executrix.

A few days after executing the will, the testatrix died; and *Erritt* induced the plaintiff, who was under age, to execute to the defendant *Scott*, a conveyance of the property mentioned in the will, without his paying or providing for the consideration.

The bill was for relief against the second clause in the will; and against the conveyance which the plaintiff had been induced to execute.

Statement.

There was no evidence whatever of any bargain with *Scott* for the two lots, as stated in the will. There was a written bargain with *Scott* as to one of the lots, and *Erritt* said there was a verbal bargain to sell to *Erritt* the other lot mentioned in the will; but he did not set up any writing to that effect or any part performance of the alleged bargain. The bill did not admit any bargain whatever with him.

The cause was heard before Vice Chancellor *Mowat*, at Peterborough, when his Honour exonerated the defendant *Scott* from all the charges of misconduct contained in the bill, and gave him his costs thereof; held that the written agreement with *Scott* was not binding, by reason of the professional relation between him and Mrs. *Hill;* doubted whether it was not for the plaintiff's interest, however, to adopt it and carry it out: and directed an inquiry on the point. As to *Erritt*, the decree was for a release with costs.

Scott acquiesced in the decree so far as it related to him; but *Erritt* set it down to be reheard before the three judges. 1870. Archer v. Scott.

Mr. *Spencer*, for *Erritt*.

Mr. *Crooks*, Q. C., and Mr. *S. Blake*, contra.

The judgment of the Court was delivered by

SPRAGGE, C.—I do not see how the Statute of Frauds is to be got over. There was no contract in writing between Mrs. *Hill* and *Erritt*, and assuming her will to be a sufficient note in writing within the statute, as I think it would be if it contained all that is necessary to constitute a contract, there is this difficulty, that it does not contain all that is necessary in a contract for the sale of land; the price is an essential element. The will speaks of the purchase money, and I suppose it is to be inferred that the amount of purchase money had been agreed upon, but the difficulty remains that there is no note or memorandum in writing of the person to be charged upon the contract, of that essential element of a contract. March 14. Judgment.

I concede that the statute only requires a note or memorandum of the contract to be in writing; and that as an essential to a remedy, not as an essential to the contract itself: *Leroux* v. *Brown* (*a*). But assuming this, what is the position of the defendant *Erritt?* There is a note in writing stating the sale of two parcels of land to a third person; of one of these *Erritt* claims that he was the purchaser; there is no note in writing that he was, and circumstances are disclosed in the evidence which might prevent Mrs. *Hill* selling to *Erritt* —he was her agent for sale. But supposing that diffi-

(*a*) 12 C. B. 819-20-7.

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culty got over, could *Erritt* have shewn enough to entitle him to specific performance? Clearly he could not; then is his position bettered by the conveyance from the infant devisee? It passes no estate. It may be, it is true, an admission by her of what was the agreed purchase money, but it is only an admission by an infant and not binding upon her. It could not be used upon a bill for specific performance as supplementing the imperfect note or memorandum contained in the will of Mrs. *Hill*.

If it be urged that *Erritt's* position is not that of a person seeking a remedy by specific performance or otherwise, the answer is that he has obtained an improper advantage which he ought not to be allowed to retain. The obtaining a conveyance from an infant is itself improper. It would have been improper even if the will had expressed a perfect contract. At the least the onus must be upon the defendants to shew that what was done was no more than they had a strict right to call upon the plaintiff to do when of age, and even then it could only be offered as an excuse; a putting it to the Court to allow what was done to stand, because *cui bono* set it aside. Whether such an argument could be allowed to prevail may be doubtful; but I feel quite clear that when such conveyance gives that which the grantees were not entitled to, it will be set aside, and the parties be placed in *statu quo*.

Judgment.

I think this point is sufficiently raised by the bill, though not put forward so prominently as some other points. It is alleged that the will of Mrs. *Hill* was made "not in pursuance of any legal or binding agreement made by her (the testatrix) with the said *W. H. Scott* to sell the said parcels of land and premises to him for any valuable consideration." It is a case in which the Court would not hesitate to allow an amendment introducing a substantive allegation that there was

no binding contract in respect of the sale of the *Monaghan* property either with *Scott* or *Erritt*. 1870. Archer

Taking the case to be clear under the Statute of Frauds, I have not thought it necessary to go into the other questions affecting *Erritt*.

LONG V. LONG.

Mortgage—Redemption—General prayer—Gift by parol—Tender.

The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:

Held, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage.

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them: the attempt to recall the gift not having been made until after the marriage and death of the son. [*Per* MOWAT and STRONG, V. C C. SPRAGGE, C, *dissenting*.]

A person having a second charge on land, filed a bill against the holder of a prior mortgage, and the owners of the equity of redemption, praying redemption and general relief:

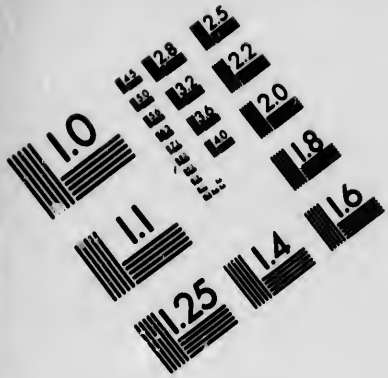
Held, that the absence of a specific prayer as to the latter defendants did not disentitle the plaintiff to relief against them.

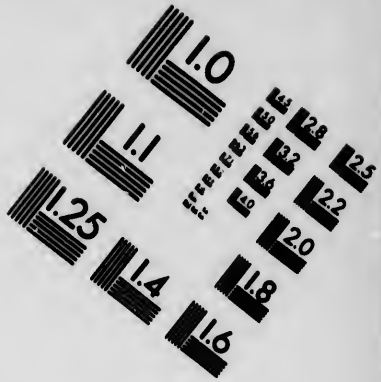
Tender held sufficient, though money not actually produced.

Rehearing of cause by plaintiff. Original hearing reported *ante* volume 16, page 239. Statement.

Mr. *D. McCarthy*, for the plaintiff.

Mr. *Boyd*, for the defendant,





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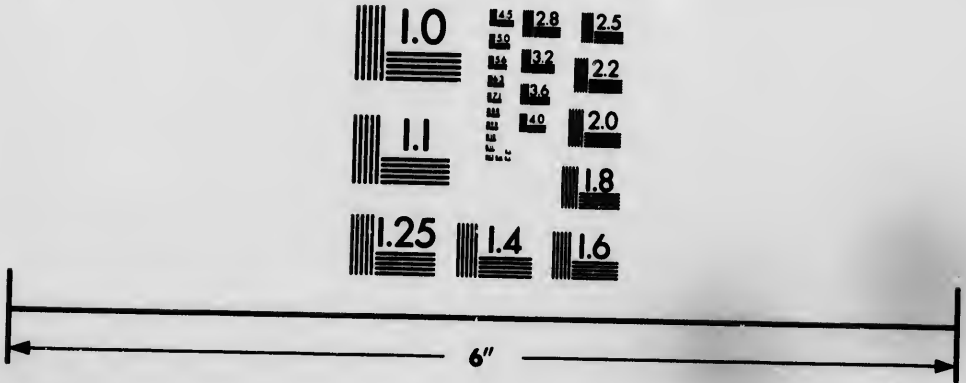

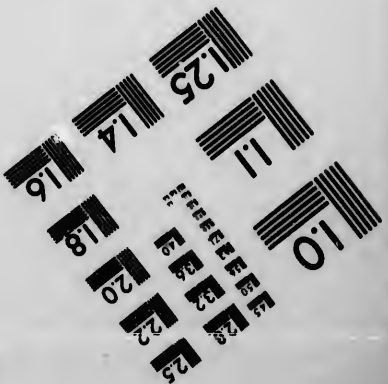

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March 14.

Judgment.

SPRAGGE, C.—The first question is as to the frame of the bill and the prayer. The plaintiff prays to be let in to redeem, and does not pray foreclosure against the owner of the equity of redemption. The first incumbrancer is *Martha Long*. The owners of the equity of redemption are the infant and *George Long* his uncle, and *Martha Long*, as dowress, is also entitled to redeem. Plaintiff comes as annuitant. There is the prayer for general relief. Is that sufficient to entitle plaintiff to ask for foreclosure, and if not, is there a proper case to allow amendment? Under the cases I think the prayer sufficient: *Cook* v. *Martyn* (*a*), *Cholmley* v. *Countess of Oxford* (*b*), *Wilkinson* v. *Beal* (*c*), *Hiern* v. *Mill* (*d*), *Mitford* on Pleadings, p. 35, and *Story* on Equity Pleadings, p. 42. Has plaintiff a *locus standi* without there being any arrears of annuity? There was an arrear if the gift set up by defendant was ineffectual. If effectual, there was no arrear beyond the sum tendered. The tender was sufficient as to amount, and I incline to think sufficiently made. I infer from *Morrison's* evidence that plaintiff knew that the tender was made on behalf of *Martha Long*. *Semble*, an arrear is necessary to entitle annuitant to file bill. She comes into Court not to protect herself from being called upon suddenly to pay off the first mortgage, but in order to making out her rights and remedies against the owner of the equity of redemption; in order to this there must, I should think, be default on his part, or rather their part, but there is no question as to arrears on the part of *George Long*, none are alleged.

In that view the question of this alleged gift lies at the very threshhold of the plaintiff's position in Court.

I doubt if there was a perfected gift—a forgiving of a debt is a gift; and I do not think there was any acting upon a representation.

(*a*) 2 Atk. 2.
(*b*) 2 Atk. 357.
(*c*) 4 Mad. 408.
(*d*) 13 Ves. 114.

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Taking it that there was an arrear of annuity, the plaintiff has a *locus standi* in Court, but then what are the position and rights of the parties, assuming the bill sufficient. The plaintiff is a puisne incumbrancer in virtue of her annuity. *Martha Long* has a twofold character. She is first incumbrancer, and as dowress is, with her son and *George Long*, interested in the equity of redemption. Apart from any offers or propositions made by *Martha* or on her behalf, plaintiff comes into Court to enforce the arrears of her annuity; and in order to that, and only in order to that, is entitled to redeem the mortgage. If she redeems it, she will be entitled to an assignment of the land, but not of the mortgage debt, and will be entitled against all the defendants to an order in the suit for payment of arrears, and in default, foreclosure or sale—the general orders will apply, I think, to the annuity accruing due from time to time, and I apprehend she is entitled to an order in the same suit against the same defendants for repayment of the sum paid by her to redeem the mortgage. That, I think, would be the proper decree, so that the rights of all parties may be worked out in the one suit as far as possible.

Judgment.

But it is said *cui bono* this, where the dowress is willing to pay the annuity. If the plaintiff's position would be the same if she redeemed the mortgage, and were again redeemed, as it is with the mortgage outstanding in the hands of *Martha*, the Court might probably deny her equity; but, if her position would be materially different she has, I think, a right to it. It would be different in this, that the mortgage would pass into her hands, and again out of her hands into those of the party redeeming, divested of the power of sale: that is one thing; another is the having a right to foreclosure or sale without further suit upon any future default in payment of annuity. This right obtained by the past default and the decree founded upon it.

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So far, apart from *Martha's* offers and propositions, *Martha's* conduct appears to have been reasonable, but whether what she has proposed ought to intercept plaintiff's equity is the next question.

If *Martha* is now willing to submit to a decree making the plaintiff's annuity a first charge as she states she has already offered to do, it will give to the plaintiff all that she can possibly claim, and something beyond. It will free her from the burthen of redeeming *Martha*, and from the apprehension of which she complains of the power of sale being used against her. If such a decree is submitted to by *Martha*, I do not think that this Court is bound to give to the plaintiff what would *otherwise* be her rights, putting the parties through the process of a payment and repayment of mortgage money; and aiming at a result not more favorable, but less favorable to the plaintiff, than what this Court is prepared, with the assent of *Martha*, to give her without such process.

Judgment.

As to the gift of the two years arrears of annuity. I cannot help feeling at least a very strong doubt whether there was any perfected gift so as to disable the plaintiff from calling for payment, and if I were sitting alone I think I should, upon this point, decide for the plaintiff. The cases relied upon in favor of *Martha Long* proceeded generally upon its being a fraud upon the intention of a testator for executors to exact that which the testator had manifested a clear intention not to exact; and even upon that the authorities are by no means uniform. *Reeves* v. *Brymer* (*a*) is a strong case the other way. In *Cross* v. *Sprigg* (*b*) Sir *James Wigram* reviewed the previous cases, *Reeves* v. *Brymer* among them. It was a stronger case than this for establishing a gift but his judgment was against it. The recent case of *Taylor* v.

(*a*) 6 Ves. 516. (*b*) 6 Hare 552.

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Manners (*a*) before the late Lords Justices *Knight Bruce* and *Turner*, is also against this being a gift. The Lords Justices differed as to whether there was or not valuable consideration, they agreed that without it what passed was a mere gift and could not be supported. Lord Justice *Turner* stated the question to be whether the transaction between the parties was one of pure and simple gift, or of agreement for valuable consideration, and he proceeds to say "That the transaction in its inception was one of pure and simple gift merely, does not, I think, admit of any doubt. It was plainly so in January, 1863. Upon the case, as it then stood, there was no more than an intention to give communicated indeed to the testator, but in no way carried into effect. At law there was certainly no perfect gift, and a Court of Equity as certainly will not enforce a mere intention to give." The late case at the Rolls, *Yeomans* v. *Williams* (*b*) is not, as I read it, an authority against the same position. Lord *Romilly* assumes that Sir *James Wigram* would not have decided the case at the ... different from what he, Lord *Romilly*, was doing, though he differs from Sir *James Wigram* in thinking that though what passed would not be a release at law, it might be a release in equity. His judgment however proceeded mainly upon another ground, upon representation which, the party making it was bound to make good; and his decision is, I apprehend, sustainable upon that ground.

Judgment.

Kekewich v. *Manning* (*c*) only established that valuable consideration is not necessary in order to constitute the donor a trustee for the donee, the gift in that case was contained in a formal settlement. In the late case of *Jones* v. *Lock* (*d*), the intention to give was unquestionable, and there was besides a symbolical delivery, but the Court held it an imperfect gift.

(*a*) L. R. 1 Ch. App. 48.
(*b*) L. R. 1 Eq. 184.
(*c*) 1 D. M. & G. 176.
(*d*) 1 Chy. App. 25.

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I think the weight of authority is against there being a perfected gift binding upon the donor in this case, and there is no evidence of representation, or anything in the nature of representation, as there was in *Yeomans* v. *Williams*.

MOWAT, V. C.—I apprehend that Mr. *Lewis*, in his little treatise on Equity Pleading, states correctly the result of the authorities as to the general prayer, when he says that, unless the bill so states a plaintiff's case that the defendant has notice of what will be asked, no further or other relief will be granted (*a*); and I was satisfied that the defendants in the present case were not aware when the case came on at the last sittings, that the plaintiff, after redeeming the mortgage, meant to submit to redemption in her turn by the defendants. The bill was originally against *Martha Long* alone, as holder of the mortgage; and her answer stated that *Morrow*, who had assigned the mortgage to her, had, before the assignment, offered to pay the arrears due to the plaintiff, and to make the annuity the first charge on the property; that she had been always since willing to do so; and that the plaintiff had always refused to accept such offers; and the defendant submitted that the plaintiff was not entitled to redeem the mortgage without submitting in her turn to be redeemed. But the plaintiff took a different view of her rights; brought the case to a hearing at the spring sittings, 1869, without making the testator's heir a party; and argued that he was not a necessary party. I held that he was a necessary party, and the case stood over to have the defect supplied. The plaintiff thereupon amended the bill, making the heir a party, but praying no relief against him, thus leaving herself to renew her former contention; and, with the bill in this state, she brought the case on for hearing at the autumn sittings. I refused

Judgment.

(*a*) P. 163.

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to treat the bill as submitting to redemption by the heir, or as entitling the plaintiff to foreclose him on default, because I was satisfied from the pleadings and evidence, as I intimated in my judgment, that the object of the suit was, to compel an assignment of the mortgage, and not a foreclosure or payment of the arrears of the annuity; and that, but for the claim of the plaintiff that she had an absolute right to an assignment, and not merely a right to redemption as ancillary to her right to work out her remedy against the mortgaged estate by foreclosure, no suit would have been necessary, or would have been brought. I think that the plaintiff could not claim such a decree as of right under the general prayer; and that, as a matter of discretion, it was not a case for overlooking at the hearing the want of the usual specific prayer, or for allowing it to be added by amendment.

I adhere to my former opinion as to the gift of arrears. Judgment.

I had no occasion in my former judgment to express or to form an opinion as to the tender; but as the other Judges are of opinion that the plaintiff had a right to the proper decree under the prayer for general relief, the tender becomes material on the question of costs. The amount said to be tendered was sufficient if the gift of the two years' arrears was binding. Was it sufficient in point of form? *Morrow* appears to have made the alleged tender on the day after he had assigned the mortgage to the defendant *Martha Long*; and I think that it sufficiently appears that he made the tender on behalf of *Martha Long*, and that the plaintiff so understood at the time, if that were necessary—as to which I refer to *Cheminant* v. *Thornton* (*a*), *Harding* v. *Davies* (*b*), and *Read* v. *Golding* (*c*). *Morrow* did

(*a*) 2 Car. & P. 50. (*b*) 2 Car. & P. 77, (*c*) 2 M. & Sel. 86.

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not produce the money to the plaintiff, but he had it with him; offered to pay it then and there; and did not pay or produce it for the evident reason that the plaintiff positively declined receiving the amount. *Re Danks* (*a*) seems to shew that the production of the money in such a case is not necessary to make the tender valid.

STRONG, V. C.—I agree with his Lordship the Chancellor that under the prayer for general relief the plaintiff, if entitled to insist on redemption, can ask for a decree for foreclosure over against the owners of the equity of redemption, and I also think that if the plaintiff is entitled to such relief a decree establishing her priority in respect of her annuity over the mortgage will give her all she can claim.

Judgment.

If there was no arrear of the annuity at the time the bill was filed it should in my opinion be dismissed, as in that case the plaintiff was not in a position to ask redemption, inasmuch as she could have no decree in respect to the annuity as ancillary to which alone she could be entitled to redeem: *Ramsbottom* v. *Wallace* (*b*) is conclusive as to this. It appears to me, however, that there were arrears of the annuity which entitled the plaintiff to file the bill, for, although I agree with my brother *Mowat* in the view that there was a good equitable release of the annuity for the first two years after the testator's death, upon grounds which I shall state hereafter; and also that the tender made by *Morrow* was a good legal tender, such as a mortgagee or chargee is entitled to; yet, the money never having been actually received by the plaintiff or paid into Court, I think, subject to the effect it ought to have upon the costs, it does not affect the right of the plaintiff to a decree directing her charge to be raised, and that she consequently has a *locus standi* to redeem.

(*a*) 2 DeG. McN. & G. 936. (*b*) 5 L. J. Ch. 92.

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Mr. *McCarthy* argued, however, that *Morrow* must be regarded as a stranger, from whom the plaintiff was not bound to accept the arrears. The only persons who could make a legal tender, such as would in any way affect the plaintiff's charge, were those who were interested in the equity of redemption, which *Morrow* was not; and it is contended that he ostensibly made the tender on his own behalf. I think, however, that the evidence establishes that he made the tender as an agent of the widow, to whom the mortgage had then been transferred. I am of opinion that the relinquishment of the two years' annuity by the plaintiff, by way of gift or bounty to her sons, is established in point of fact; the evidence shewing, I think, that what the plaintiff said was not merely by way of announcing an intention to give at some future time, but was intended to constitute a present actual gift. The case of *Cross* v. *Sprigg* (*b*), which has been referred to by His Lordship, is certainly an authority against the sufficiency of such a transaction to work an equitable release, but I apprehend the law of this Court on the subject of assignments and releases of choses in action has undergone much change since Sir *James Wigram* decided that case. At that time the doctrine promulgated in *Meek* v. *Kettlewell* (*a*), decided by the same Judge, had not, as it since has, been overruled, and that case determined that it was impossible to make any valid gift or gratuitous assignment of a chose in action, however complete the instrument of transfer might be; for this I take to be the necessary consequence of the rule there enunciated that "an assignment under seal, of that which does not pass at law by the operation of the assignment itself, stands upon no better ground than a covenant or agreement to assign." The later case of *Kekewich* v. *Manning* (*b*) distinctly overrules

Judgment.

(*a*) 6 Hare, 552. (*b*) 1 Hare, 464.
(*c*) 1 DeG. McN. & G. 176.

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this proposition, and establishes that a present transfer of a chose in action, as distinguished from a mere declaration of intention to transfer is good without valuable consideration; and of course a transfer of a chose in action can be made by word of mouth, there being no statute requiring a writing in such a case. This being the state of the law as to assignments of choses in action by way of gift to strangers, I think it follows that what would constitute a good gift in the case of a stranger ought also to be sufficient in the case of the debtor, and I think both the judgment of the Master of the Rolls in *Yeomans* v. *Williams* (*a*), and that of Sir *George Turner* in *Taylor* v. *Manners* (*b*), support this view. There was no instrument here which could have been delivered up, and if this was not a good equitable discharge, it is equivalent to saying that there can in no case be a release short of an instrument under seal effectual for that purpose at law, for I do not understand what is said in some of the cases as countenancing the notion that anything like conduct, anything short of an instrument under seal, can have the effect of a release at law. This waiver of a debt without satisfaction or release by mere word of mouth is recognized in the law merchant in the case of bills and notes: *Foster* v. *Dawber* (*c*).

Judgment.

The conclusion I arrive at is, that in order to avoid circuity—the adult defendants consenting, and the Court directing it as beneficial to the infants—the decree should declare the plaintiff's priority in respect of her annuity over the mortgage, and should direct that the accrued arrears less that for the two first years, should, if necessary, be raised by a sale. I think the plaintiff having unnecessarily resorted to litigation must pay all the costs, and that my brother *Mowat's* decree in this respect should be affirmed. There should be no costs of the rehearing.

(*a*) L. R. 1 Eq. 184. (*b*) L. R. 1 Ch. App. 56. (*c*) 6 Exch. 839.

DICKSON v. BURNHAM. 1870.

Riparian proprietors.

Where it appeared that the defendants had backed water on the mills of the plaintiffs, and overflowed their land; but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants:

Held, that it was sufficient for the Court to declare the rights of the parties, and to enjoin any further backing or overflowing by the defendants; and that the Court should not proceed to define the alterations in their works which the defendants should make.

The judgment of Vice-Chancellor *Mowat*, on the original hearing, is reported *ante* volume xiv. page 294.

The decree then drawn up was as follows: "This cause coming on to be heard at Peterborough * * * and standing for judgment on the 4th of March, 1868, the Court did desire the assistance of a Civil Engineer on certain matters the better to enable the Court to determine the controversy between the parties, and did name and appoint for this purpose *John Stoughton Dennis*, Esquire, Civil Engineer, and did adjourn the further consideration of the cause until after the said engineer should make his certificate; and the said engineer having made his certificate, bearing date the 18th of October last, and his supplemental certificate, bearing date the 5th of November last; this cause did come on for further hearing on the 22nd day of December last, in the presence of counsel learned for both parties; and upon debate of the matter and hearing read the said certificates and hearing what was alleged on both sides, the Court did order that the cause should further stand for judgment; and, the cause standing for judgment this day, in the presence of counsel learned for both parties, this Court doth declare that the works of the defendant in the Statement.

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pleadings mentioned do back the water on the land and property of the plaintiff *Samuel Dickson*, and injuriously affects the same. And this Court doth order and decree that the said *Mark Burnham*, *Elizabeth Rogers*, and *Robert David Rogers*, their servants, agents, and workmen, do refrain at all times hereafter from backing the water of the said river beyond the point opposite to the iron bolt planted and drilled into the rock on the margin of the said river, as mentioned in the evidence; and from causing or permitting the waters of the said river to flow over or through the wing dam of the said defendant in the pleadings and evidence mentioned upon and over the land of the said plaintiff *Samuel Dickson*.

"And this Court doth further order that the said defendants *Mark Burnham*, *Elizabeth Rogers*, and *Robert David Rogers*, do pay to the plaintiffs their costs of this suit, including the fees of the said engineer, and do pay to the defendant *Mary Elizabeth Jones* her costs of this suit; such costs respectively to be taxed by the Master of this Court at Peterborough.

Statement.

"And the plaintiffs waiving all claim for damages as to the past injuries in respect of the several matters complained of in the plaintiffs' bill, and the defendants * * * undertaking, without prejudice to their right of appealing from the decree, to execute and finish with all convenient speed the works suggested by the certificate of the said engineer, bearing date the 13th of October last, and to comply with the several recommendations of the said engineer made and contained in his said two certificates, this Court doth not think fit to make any further decree in the said cause."

The defendant *Robert David Rogers* reheard the cause for the purpose of being relieved from his undertaking as set forth in this decree, the propriety of exacting which was the only point argued.

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

Mr. *S. Blake*, and Mr. *Fairbairn*, contra.

SPRAGGE, C.—What *Hall* sold to *Burnham* was a certain land upon the river Otonabee. March 14.

There was a sufficient fall of water to constitute what is called a mill privilege.

There was, however, this drawback that upon one side of the river the natural bank of the stream was low, so that if the waters of the river were raised by a dam of proper height to give the mill privilege, it would overflow the adjoining land. The vendor thereupon, in addition to the sale of the land, sold and granted an easement to the purchaser to build a wall upon his, the vendee's, land to retain the waters of the river within their natural channel when raised by the purchaser's dam, and this wall was built in what is called the wing dam. This made the land sold available as a mill privilege. Judgment.

While this wing dam was kept in repair so as to retain the waters of the river, when raised by the dam, and prevent their overflowing the vendor's land laterally; and while the purchaser did not raise his dam to such a height as to back water up the stream upon the vendor's land, he kept within the limits of his right.

The complaint of the bill is, that he did the vendor a wrong in both points, and the finding of my brother *Mowat* upon both is with the plaintiff. This finding upon the facts is not disputable upon this rehearing.

It is not contended that the grantee could have put up a dam—building no retaining wall—and so leaving the raised waters to overflow the vendor's land. The

1870. Dickson v. Burnham. Vice Chancellor finding the grantee wrong in both points called in the assistance of an expert under the general orders. Was this wrong?

This must depend, I think, *upon the purpose* for which the expert was appointed. It is contended for the defendant that it was for the purpose of fixing *the mode* in which the defendant should be required to construct or to keep his works, so as not to do injury to the plaintiff's land above him; and the defendant's contention is that, so as he removed the cause of the injury he was entitled to do it in such mode as he chose.

The defendant complains of the decree in two points. The appointment of an expert for a purpose not proper; and the directing upon his report, the mode in which the defendant should abate the injury; and a third may be added, the fixing the defendant with the costs of the inquiry. He says that the decree should have stopped with defining the rights of the plaintiff and enjoining the defendant from infringing them; that the undertaking to do certain works specified in the engineer's certificate was exacted from him upon peril of some further decree which otherwise the court would have made, and that being content with this undertaking, without prejudice to his right of appealing from the decree, it is still open to him to contend that he ought to be released from it.

Judgment.

If in decreeing an injunction the Court did all that it properly could do, it follows, I think, that the exacting an undertaking was wrong. I do not read this undertaking as limiting the effect of the enjoining part of the decree. That is left; and there is an intimation that the Court would or might make some *further* decree, the nature of which is not disclosed, but for the undertaking. The undertaking is made the reason for the Court abstaining from making this further decree. If no

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further decree could properly be made, the defendant is, I think, right in his contention.

My brother *Mowat* in his first judgment defined rightly the limits, up the river, beyond which the defendant was to be enjoined from backing the waters of the river; and he rightly enjoined him also from allowing the waters of the river to overflow the plaintiff's land at the side of the river. It may be that there was no way of preventing this lateral overflowing except by building a wall: but the defendant was, I think, at liberty to prevent it in any way that he could. He might possibly manage with a lower dam; and so require a wall of less height. Or he might choose to abandon a mill privilege which could only be made available by such means. All these things I think he was entitled to have left to his judgment and discretion. So long as he discontinued that which the Court enjoined him not to do, the mode should, I think, have been left to himself.

Judgment.

This was not done. My brother *Mowat* appointed an expert because, as he says in his judgment, he was "unable to say with confidence in view of the contradictory evidence of the professional and other witnesses, and in the absence of any argument as to the directions which would be proper." The expert therefore was appointed to inform the Court what directions it would be proper to give in respect to the defendant's erections so as to remedy the evil. And this is quite clear from the language of the Court in speaking of those erections. Upon the employment of an expert for such a purpose I am obliged with great deference to differ from my brother *Mowat*. If it is the right of the defendant to redress the wrong in his own way, it is not for the Court to direct him how he shall do it; and it follows that the Court cannot call in an expert to assist the Court to do that, which it was not proper for the Court itself to do.

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I think the decree should have been drawn up upon the first judgment of my brother *Mowat;* and that the decree should now be varied by stopping at that part of it which awards an injunction, adding the usual directions as to costs; except that no subsequent costs other than the costs of drawing up a proper decree should be charged against the defendant. And I think that the deposit upon rehearing should be returned to him.

STRONG, V. C.—I am of opinion that the decree should be varied by striking out the last clause, for, whilst I think it much more beneficial for the defendant, in a case like the present, that the decree should define what he has to do in order to comply with the injunction, than that he should be left to remedy the injury complained of at his peril, subject to being called upon, on a motion to commit, to shew the Court that he has complied with the decree (a much less convenient course than that adopted here), I do not think such a decree is warranted by precedent.

Judgment.

As to the calling in an engineer as an assessor under the general orders, I am strongly of opinion that this was a proceeding entirely in the discretion of the Judge, and one which cannot be objected to on the hearing on appeal. The order or decree made with the assistance of such an expert is to be considered as that of the Judge alone, and can be appealed from or reheard as such; but a Judge has it in his power in any case to avail himself of assistance of this kind; and his doing so, if the order or decree he pronounces is in other respects unobjectionable, cannot alone be made a ground of appeal.

I have had some doubt as to whether the defendant has not precluded himself by his undertaking from objecting to this portion of the decree, but on the whole I think the right to rehear and appeal is

saved; but, as the decree in its present shape is certainly not more beneficial to the plaintiff than a decree in the usual form, simply directing a perpetual injunction would have been better, whilst it was of much consequence to the defendant to know what he ought to do to comply with the requirements of the Court, I cannot, without looking beyond the decree, avoid the conclusion, that this last clause must have been added without objection by the defendant, and I think there ought at least to be no costs of the rehearing.

ROMANES V. FRASER.

Married woman's deeds—Magistrates interested—Evidence against certificate.

The solicitor of the husband being City Recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land. [SPRAGGE, C., *dubitante.*]

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified.

Where, after the decease of one of the Justices of the Peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the Court gave credit to the certificate notwithstanding the evidence.

This was a re-hearing at the instance of the defendants. The decree on the original hearing is reported *ante* volume 16, page 97.

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

Mr. *McLennan*, for the plaintiff.

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March 14.

SPRAGGE, C.—I entirely agree with my brother *Mowat* as to the weight to be given to the solemn certificate signed by the two magistrates, whereby they declared that the married woman had been examined before them touching her consent to part with her real estate, and that it must outweigh the mere recollection of one of them, the other being dead, as to what passed upon the occasion.

I confess I do not feel equally clear upon the other point. It was the manifest intention of the Legislature to afford to married women protection against the alienation of their real estate except with their free and voluntary consent. An examination before certain public functionaries is the machinery provided for that purpose. The examination is to be apart from the husband, so as to provide for the absence of any constraining influence, and the examiners are to ascertain her own will in the matter, and to certify their own opinion.

Judgment.

It is evident that to carry out the intention of the Legislature in its spirit, these public functionaries should stand perfectly indifferent between the parties. Does the solicitor of the husband stand in that position? Where, even the presence of the husband is not tolerated should his solicitor be allowed to act in a judicial capacity? Consider the position of the woman. The law presumes that there may have been coercion, or that the woman may be acting from fear of coercion even though she gives her consent. Can she feel as free to disclose her real feelings and wishes when one of those to whom she makes answer upon these points is her husband's professional agent? Whether justly or not, she will almost certainly apprehend that any appearance of disinclination on her part would be reported to her husband.

Further, a person standing in that relation to the husband would have a leaning in favor of his client, at

least most men would, and might so conduct the examination as to make it less a reality than it ought to be. He would practically, as well as theoretically, be in a false position, exercising a judicial function with one party for his own client.

There seem to me therefore to be very grave objections to such a practice, and I must confess that I am not convinced of its propriety by what has been done in England, and I hope that solicitors will not in future place themselves in so anomalous a position. On the other hand there is force in the consideration, that I believe weighs with my learned brothers, that the security of titles might be endangered by holding conveyances so executed, not duly executed—solicitors conceiving probably that they were free to act as examiners if magistrates; and, if aware of the practice in England, holding that they were warranted in adopting the like practice here. I am not sorry, therefore, that my learned brothers have been able to come to the conclusion at which they have arrived. Judgment.

STRONG, V. C.—As to the evidence of Mr. *Donald Æneas Macdonell*, I entirely agree that my brother *Mowat's* judgment ought to be conclusive, and that it must be taken that the *primâ facie* evidence afforded by the certificate is not displaced. With reference to the other question I think it established by the evidence that Mr. *Archibald John Macdonell*, one of the examining justices, was the solicitor in the mortgage transaction of Mrs. *Fraser's* husband the mortgagor; and upon this the defendant contends that the taking the examination is a judicial act which the solicitor of the husband is disqualified from performing. The Statute (*a*) which regulates this examination of a married woman contains no provision for any disqualification on the

(*a*) Con. Stat. U. C. ch. 85.

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ground of interest, but it is said that the general rule of law that a man cannot act judicially in a matter in which he is interested must be taken to overrule the act, and that a solicitor of a party comes within it. So far as the party himself is concerned it is clear that this must be so, but his solicitor is in an entirely different position, and as I gather from the cases of *Bancks* v. *Ollerton* (*a*), and *Re Ollerton* (*b*), it was considered by the Court of Common Pleas that a solicitor was competent under the English Act; and the rule of the Court of Common Pleas of Michaelmas Term, 4 Wm. IV., was passed for the purpose of disqualifying one of the commissioners, where both were solicitors for parties interested. The law of England does not recognize any incompetency in a judge on the ground of interest except that involved in the rule that no one shall be a judge in his own cause. If such a ground of objection to the solicitor of a party did exist it is manifest that the law to be consistent should also invaliddate the judicial acts of persons between whom and a party there might be the relationship of blood, but no rule of the kind exists.

Judgment.

I think the decree should be affirmed with costs.

(*a*) 10 Exchq. 168. (*b*) 15 C. B. 796.

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McGILL v. COURTICE.

Administration suit—Costs.

Executors in this province have no right to leave the administration of the estate to this Court without some special necessity, where the expense of the suit would be disproportionate to the amount of costs.

In such a case, where the only important difficulties in the administration of an estate were created by a large claim of the executors which they failed to make good, and a claim of their father's which he had made by their persuasion and against his own wish; and the executors had more money in their hands than was required to pay all other claims against the estate, they were charged with the costs of an administration suit brought by a creditor.

This was an administration suit brought by a creditor of *Christopher Courtice*, junior, deceased, who died on the 17th March, 1866. The Master made his report in pursuance of the usual order of reference on the 6th November, 1869; and the case was brought on for further directions before Vice Chancellor *Mowat* on the 26th January, 1870. Besides the questions strictly arising on further directions, some questions were discussed, by consent, by way of appeal from the Master's report, though no notice of appeal had been given. Statement.

The Master had found due to the plaintiff the sum of $93.17 only, and to five other creditors still smaller sums; the six amounting to $271.24. He also found one other debt to be due by the estate, viz., to *Christopher Courtice* senior, the father of the deceased and of the defendants (his executors) a debt of $600, and for interest and costs, $845 more. The Master also found, that the executrix and widow of the deceased, who had had the chief management of his estate, had expended $156.73 more than she had received; and on the other hand that the executors had received $791.06 beyond their disbursements; but the executors claimed to reduce that amount by about $700 which they sought to charge

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against the estate as having been paid by them to the representatives of one *Robson* in case of their father and of *William Courtice*, one of themselves; and this charge (which was disallowed) was the principal matter discussed on the present hearing.

The question turned on the evidence. Other questions were discussed which turned either on the evidence or on special circumstances.

Mr. *James McLennan*, for the plaintiff.

Mr. *Hoskin*, for the executrix.

Mr. *S. Blake* and Mr. *Farewell*, for the executors.

Mr. *L. English*, for the infant defendants.

Judgment. March 23.

MOWAT, V. C. [After discussing at length various questions argued which do not appear to involve any point necessary to be reported, made the following observations in disposing of the costs of the suit].—I have now to consider the question of the costs of the suit. The executors should certainly pay so much of the costs as has been incurred by the other parties in consequence of the payment to *Robson's* representatives; but I think that I cannot confine their liability to those costs. I have considered the question with the light of the evidence which was before the Master, and which was necessarily brought before me on further directions in consequence of its being agreed to argue then the propriety of the various findings of the Master. It has sometimes been held that the evidence before the Master may without any agreement be looked at on further directions (*a*); but, in the later case of *Curling* v. *Austin* (*b*) the contrary was held; and I took the same

(*a*) Dymock v. Ashton, 7 L. J. O. S. 120; Nedby v. Nedby, 21 L. J. N. S. Ch. 446.

(*b*) 2 Dr. & Sm. 129.

view in *Gould* v. *Burritt* (*a*), a decision which I believe has been acted on ever since. It would be imposing a great hardship on parties if all the documents before the Master were ordinarily to be considered as part of the materials for the hearing on further directions; such a practice would, in copies for counsel, counsel fees, and otherwise, add greatly to the expense of further directions. Where the solicitors for the parties live in an outer county, and have conducted the reference before the local Master, but employ counsel here for the argument before the Court, the inconvenience and increased expense would, or might, be very great. But this consideration has no application where, for the very purpose of saving costs, the materials before the Master are by mutual consent brought before the Court on further directions.

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It is plain that the only important difficulties which occurred in the administration of this estate have been occasioned by the executors themselves. The executrix had paid out all which she had received, and more. The executors got into their hands far more than sufficient to pay the plaintiff, and to pay the few remaining creditors of the estate, except the doubtful claim of their father; and it appears from the evidence, that the executors themselves stirred up that claim; that their father repeatedly said, before any suit was brought, that the debt was paid; that he had no claim against the testator; that he did not wish to bring the suit; and that *William* and *Thomas* (the executors) would not let him settle it; and *William* is proved to have spoken of the suit at law brought in the father's name as his (*William's*). From the whole evidence I have no doubt, that the action at law was brought at the instance of *William*, and with the concurrence of *Thomas*; and that but for their active interference in setting up the claim, the father would

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(*a*) 11 Gr. 234.

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not have made the claim. I do not say that the debt had been paid, or legally discharged; or that the Master should not have reported it to be due; but if it was unpaid, and was in point of law recoverable, the father was willing, for the sake of his deceased son's family, to treat the debt as paid; and the executors, being in their individual capacity naturally desirous of increasing their father's estate, in which at his death they might share, would not let him forego the amount. One of the illustrations which Mr. *Lewin* gives of the rule that trustees are not justified in doing any act at variance with their trust is this: "If, for instance, they honestly believe that property accepted by them in trust for one, belonged of right to another, they would not be justified in communicating to such other that he could successfully claim the estate (*a*);" and that the example so put is correct, I apprehend that there can be no doubt. But these executors did more than communicate such information to the alleged creditor, unasked. They told him of the entry which they had found in their testator's books of a date nearly six years old: and they thus voluntarily supplied the evidence, which he did not desire, of a debt which he had not considered, and did not even then claim, to be due to him. But they not only did that; they also pressed him to sue for the supposed debt, contrary to his own wish. They thus put themselves in a position of active antagonism to the estate which as executors they represented, and whose interests they were bound to consult and promote as if these interests were their own. They intercepted their father's good will towards his orphan grandchildren; prevailed on him to set up a claim which he desired to abandon; and enabled him to establish against the estate of their testator an amount which, with the costs of the suit (if the estate is charged with the costs), would sweep away from their testator's

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(*a*) Lewin on Trusts, 5th ed. 234, 235.

family all the personal assets which he had left for their support, and would require in addition the sale of his land.

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The executors have been found to be debtors to the estate in a considerable sum, which they disputed; and they are to be charged with interest. Lord *Eldon* held in *Mosley* v. *Ward* (*a*) that in such a case the same principle as required executors to be charged with interest called upon the Court to charge them with the costs of the suit (*b*); but something more is necessary according to the rule now recognized in England. I agree with the opinion, which, I understand, has been expressed by the present Chancellor of Ontario, that in administration suits the fact that executors now receive a commission where their conduct entitles them to it, is to be taken into account in considering their right to costs according to preceding cases; and where an estate is small, so that the costs of an administration suit would bear a considerable proportion to the amount, it would be most reasonable and just to hold that executors in this province have no absolute right to have the accounts taken at the expense of the estate; and that if executors, by their unfounded claims, or by their supineness, negligence, or other misconduct, occasion an administration suit to be brought, they *primâ facie* subject themselves to liability for the general costs of it. The circumstance of other questions being raised in the course of the cause should not, as of course, relieve the executors from this liability; for if a suit is brought, questions are apt to arise which but for the suit would never have arisen; or, if suggested, would have been settled without litigation.

Judgment.

In the English case of *Elgin* v. *Sanderson* (*c*) before

(*a*) 11 Ves. 581.

(*b*) See also Seers v. Hind, 1 Ves. Junr. 294.

(*c*) 3 Giff. 434.

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the present Lord Chancellor, while he was Vice Chancellor, the executors had been found debtors and had been charged with interest; and were made to pay the costs, though not on the ground of those circumstances alone, the learned judge observing, that on the question of costs, even where interest is chargeable, the Court looks at the general conduct of the executors in their management of the assets of the testator; and he charged the defendants there with the costs, because their conduct before and subsequent to the litigation was unsatisfactory. That language is applicable to the present case; and I think that the result must be the same—that the executors should pay the costs of the suit (as between party and party). These costs are not to include the costs of any proceedings in which the other parties were unsuccessful.

Judgment.

I think that the widow was justified in not employing the solicitor of the executors in the suit. She was no party to their wrongful proceedings; and the position which they took in regard to the principal matters in controversy was hostile to her interest. So much of her costs, and of the costs of the plaintiff and of the infants, as are not to be paid by the executors, and as were properly and necessarily incurred, must come out of the estate.

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BARKER V. ECCLES.

Mortgages—Equity of redemption in parts afterwards sold—Proper decree in mortgagee's suit.

The owner of lots A and B sold A, but the conveyance was not registered; he afterwards mortgaged A and B, and the mortgagee registered the mortgage without notice of the prior deed; the mortgagor subsequently sold B in portions by three successive sales:

Held, in a suit by the assignees of the mortgage for a sale, that the decree should be for the sale first of B; and that, if a sale of part of B produced enough, the portion last parted with by the mortgagor should be first sold.

On the 10th of February, 1852, *John H. Conolly* sold and conveyed the south half of lot 4, in the 7th concession of Dereham, to *John McSloy*, who did not register his deed until the 16th of October, 1857. On the 1st of May, 1854, *Conolly* mortgaged the same half lot together with lot 15, in the 8th concession of the same township, to *Woodruff & Hector* who had no notice of *McSloy's* title. They registered their mortgage on the 30th of August, 1854, and it was subsequently assigned to the plaintiffs. On the 21st January, 1857, *Conolly* sold and conveyed forty acres of lot 15 to the defendant *Westbrooke*, who subsequently conveyed to the defendant *Gerrard*. *Conolly* also conveyed forty acres of lot 15, to one *McIntyre*, whose heirs-at-law were defendants, and finally, he executed a quit claim of the whole of 15 to *Eccles*. The title of *McSloy* to the south half of 4, became vested in the defendants *Ostrander*, and default having been made on the mortgage, the plaintiffs filed the present bill for foreclosure. Statement.

The plaintiffs proved that a patent had issued for lot 4; the payment of the mortgage money to *Conolly*, and the registration of their mortgage. The defendants *Ostrander* proved that at the time of *McSloy's* purchase he lived on the lot adjoining 4, and that up to the date

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Barker v. Eccles.

of the plaintiffs' mortgage ho farmed lot 4 in the usual manner, but did not reside upon it. The payment of his purchase money was not proved.

The cause was brought on for the examination of witnesses and hearing at the sittings of the Court at London, before Chancellor *VanKoughnet*.

Mr. *Barker*, for the plaintiffs.

Mr. *Norris*, for the defendants *Ostrander*, contended that the possession of *McSloy* was notice to the plaintiffs and therefore the non-registration of the deed was not fraudulent against them under the Registry Laws, and consequently they should be relieved from the mortgage. In any event, as *McSloy* was the first purchaser from *Conolly*, his portion of the mortgaged premises should be protected by a prior sale of the remainder.

Argument.

Mr. *Walsh*, for the defendant *Gerrard*, submitted that the defendants ought to redeem the mortgage, paying in proportion to the relative values of their several portions of the mortgaged premises.

Mr. *Cronyn*, for the infant defendants.

Mr. *Barker*, in reply, cited *Moore* v. *Bank of British North America* (*a*).

At the close of the case—

VanKoughnet, C., decreed a sale of the mortgaged premises, but reserved judgment as to the claim set up by the defendants *Ostrander* to have lot 15 sold before lot 4. His Lordship having died before giving judgment the cause was set down for hearing before his

(*a*) 18 Grant, 461.

Lordship the present Chancellor. The same counsel appeared for the several parties. 1870.

Barker v. Eccles.

March 23.

SPRAGGE, C.—When this case was before the late Chancellor at the sittings at London, he decreed a sale of the mortgaged premises, reserving a question made between the defendants upon the claim of one set of defendants, whom I may designate as the *Ostranders*, that the portion of the mortgaged premises, the equity of redemption in which is in them, may be sold after the sale of the other portion of the mortgaged premises, and only in the event of that other portion not realizing sufficient to satisfy the mortgage debt; and that question has been since argued before me.

Judgment.

The claim of the *Ostranders* rests upon this, that the parcel in which they are interested, the south half of 4, 7th concession of Dereham, was purchased from *Conolly*, the mortgagor, by the person through whom they claim, before the purchase of lot 15, in the 8th concession of the same township, the other portion of the mortgaged premises, which was sold subsequently. The earlier purchase was by one *McSloy*, whose conveyance bears date 10th February, 1852, and was registered 16th October, 1857. The conveyances proving this chain of title are put in. Those relating to lot 15 are not; but the point was argued, as I understand, upon the assumption that the dates stated in the bill are correct. The bill states a conveyance from the mortgagor of the part of lot 15, south of the concession line, containing forty acres, to one *McIntyre*, who it is alleged is dead, and his heirs are made parties. The bill alleges a conveyance bearing date 14th July, 1863, from the mortgagor to *William Eccles*, of the whole of lot 15, and then alleges that defendants *Westbrooke* and *Gerrard* claim some interest in a portion of lot 15.

The defendant *Gerrard* has put in an answer, claiming

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that forty acres, part of lot 15, were conveyed by the mortgagor to *Westbrooke* by deed dated 21st January, 1857, and were conveyed by *Westbrooke* to him *Gerrard*, on the 25th of May, in the same year; and he claims that upon redemption he should be charged only so much of the mortgage debt as the value of his parcel bears to the value of the whole of the mortgage premises. *Gerrard* does not state whether the forty acres of lot 15, claimed by him, are the forty acres south of the concession-line stated by the bill to have been sold to *McIntyre*, at least I am not sure whether his answer was intended so to state. If the bill and the answer of *Gerrard* are correct, the conveyances to *McIntyre* and to *Westbrooke* bear date the same day.

Judgment.

I do not find, except in the bill, anything respecting a conveyance by *Conolly*, the mortgagor, to *Eccles* of his equity of redemption in lot 15. The only conveyance between these parties of which I have any evidence, is an assignment to *Eccles* of a mortgage given by *McSloy* to *Conolly*, and that is of a different lot, and the date also is different. The answer of the infant children of *Eccles* throws no light upon it. It is what is generally styled the usual infant's answer. If the infants really have any claim to lot 15, or to any part of it, that claim should have been made by their answer.

I am left entirely in the dark as to the position and rights of the parties having an interest in lot 15 as between themselves. The question reserved, was as between them collectively, and those interested in the land which was the subject of the earlier conveyance from *Conolly*, the south half of lot 4. That question is decided in the case of *Beavor* v. *Luck* (*a*), by the present Lord Chancellor, then Vice Chancellor following, *Titley* v. *Davies* (*b*), and was before me in the case of

(*a*) 4 Eq. 537, 547. (*b*) 3 Y. & C. Ch. 299.

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Davis v. *White* (*a*), in which I followed *Beavor* v. *Luck*. In *Beavor* v. *Luck*, six months were allowed to the first purchaser, and three months to each of the others in the order in which they had acquired their respective interests in the equity of redemption, placing purchasers upon the same footing as second and subsequent mortgagees. I explained the principle as I understood it in the case before me to which I have referred. To apply the same principle to a sale to satisfy the mortgage debt; the property last sold by the mortgagor should be the first sold, just as it would have been if it had remained the property of the mortgagor. There need be only one advertisement and one sale. The sale will as is always, or should be always the case, of only so much of the mortgaged premises as will suffice to satisfy the mortgage debt, as is expressed in the decree for sale "of the mortgaged premises or a *competent part thereof*." If lot 15 should suffice to satisfy the mortgage debt, the south half of 4 will remain untouched. It may be that a part only of lot 15 will suffice for that purpose, and the same principle will apply, the parcel last purchased should be first offered for sale. It may be again that there have been subdivisions of one purchase from the mortgagor, in which case the principle invoked by *Gerrard* in his answer, would, I conceive, apply.

Judgment.

I am asked to direct an inquiry by the Master as to the respective rights of the parties interested in lot 15. If the conveyances are furnished to me promptly, a reference to the Master may be unnecessary.

(*a*) 16 Gr. 312.

1870.

SHAW v. SHAW.

Parol trust—Suit by third person.

In a suit to enforce a trust, the 7th section of the Statute of Frauds not being set up by the answer, it was *held* that the trust might be shewn by parol, and might be shewn to be different from the trust stated in the answer.

Land having been conveyed in consideration of the grantee's agreeing to convey a certain portion to a third person who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion.

Examination of witnesses and hearing at Woodstock.

Mr. *J. A. Boyd* and Mr. *Ball*, for the plaintiff.

Mr. *Roaf*, Q.C., and Mr. *P. McKenzie*, for the defendant *Angus Shaw*.

The bill was *pro confesso* against the other defendant.

March 23. SPRAGGE, C.—The plaintiff is the brother of the defendant *Angus Shaw*, and the son of the defendant *Mary Shaw*. The substance of the bill is that the mother, being seized of certain land, conveyed it in fee to her son *Angus*, upon condition, *inter alia*, that he should convey a certain portion thereof to the plaintiff in fee; and it is alleged that he did in colorable pursuance of this condition make a conveyance of a portion of the lot to the plaintiff; but that it was a different portion from that which he was to convey; and only of a life-estate.

Judgment.

The answer of *Angus* admits that the conveyance was made to him upon a condition; but alleges that it was not the land claimed by the bill that he was to convey but another portion; and that the conveyance was

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to be only of a life-estate. He sets up the 4th, but not the 7th section of the Statute of Frauds.

The question now raised is whether the plaintiff has a *locus standi* in Court. It is contended that the mother ought to be the plaintiff. The consideration for the agreement on the part of *Angus* to convey, moving from her, not from her son the plaintiff. *Tweddle* v. *Atkinson* (*a*) before the Court of Queen's Bench in England is the case principally relied upon for this position.

At law I apprehend it would be so; but I incline to think it is otherwise in equity. The bill indeed does not state very clearly upon what head of equity the plaintiff comes into court; whether as a *cestui que trust*, or as beneficially entitled to the consideration, or as entitled to specific performance. It does not make a case of fraud, the son *Angus* by a promise on his part, intercepting something which the mother was about to do, and would otherwise have done, for the benefit of the plaintiff.

Judgment.

As a *cestui que trus* , the plaintiff has, I apprehend, a *locus standi* in Court; and the 7th section of the Statute not being set up by the answer of the defendant *Angus*, the trust may be shewn by parol; and shewn to be different from what it is admitted or stated to be by the answer. I apprehend, too, that as appointee of the consideration to be paid by *Angus*, he may come into Court in his own name. In either view he is the party beneficially entitled; and as a general rule such party may come into Court as plaintiff.

The old case of *Dutton* v. *Poole* (*a*) has been referred to: there a father being about to fell timber to raise

(*a*) 1 B. & S. 393. (*b*) 2 Lev. 210.

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the sum of £1000 as a marriage portion for his daughter, his son promised that if he would abstain from cutting the timber, he, the son, being heir, would pay that sum to his sister: and it was held after some fluctuation of opinion that an action at law was maintainable by the daughter and her husband against the heir-at-law. Of that case Lord *Cottenham* observed in *Hill* v. *Gomme* (*a*): "Of the plaintiff's right to sue at law in that case I say nothing; there was much difference of opinion amongst the judges who decided it; but the facts of that case would, I conceive, give to the plaintiff an undoubted right to relief in this Court:" his Lordship adds: "though upon a principle which has no application to the present case." The case before him was for specific performance, the bill being filed by a son for specific performance of an agreement entered into on his behalf by his father. When the cause was in the Court below, before Lord *Langdale* (*b*), it was objected, as it is here, that the plaintiff's rights were derivative from, and could only be worked out through, his father; and that would have been a short and complete answer to the bill, if an answer at all, and would have relieved the two learned Judges before whom the cause was heard, from considering the questions, which they did at some length, upon which they decided the case, and refused relief.

Judgment.

I think this suit may be treated as a suit for specific performance. It does not, indeed, use the term specific performance; but it alleges that the defendant *Angus* "failed to carry out his said agreement, made and entered into with the said *Mary Shaw* on your complainant's behalf," and the prayer is sufficient. In such a suit the *cestui que trust* is, I think, a proper party plaintiff. In *Cope* v. *Parry* (*c*); one *Cope* covenanted in his

(*a*) 5 M. & C. 254. (*b*) 1 Beav. 546.
(*c*) 2 J. & W. 535.

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marriage settlement with one *Jones*, a trustee, to surrender to him a copyhold estate for the uses of the settlement. *Cope*, the settlor, died; and the bill was filed by persons interested under the settlement against one, who it was alleged had purchased with notice. An objection as to parties was made, but not that the *cestui que trust* were not proper parties as plaintiffs, but only that the trustee was a necessary party; and it was adjudged that he was so. *The Attorney General* v. *Green* (*a*), and *Cooke* v. *Cooke* (*b*), cited in that case, are authorities to the same point. In this case the mother is a party defendant, and I may add my own opinion that in principle a suit, in the shape in which this suit is, is properly constituted.

Before the argument of this point an application was made on behalf of the defendant to open publication; that application has not been answered, and has been standing for decision upon the point argued. I suppose it will now be proceeded with.

Judgment.

The costs of this argument will properly be costs in the cause. The question of parties is the only one argued, and I decide now no other point in the case.

(*a*) 2 Bro. C. C. 492.

(*b*) 2 Ver. 36.

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CAMERON v. SUTHERLAND.

Setting aside deed—Consideration not correctly expressed—Verbal agreement.

A man deliberately and with legal assistance executed to his son-in-law a deed of his farm, subject to a life-estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, and to indemnify him against certain mortgages; there was no fraud or pretence of undue influence, and the grantor fully understood the meaning and effect of what he was doing: but quarrels subsequently arose and the son-in-law left the farm; whereupon the father-in-law filed a bill to set aside the deed on the ground that the conveyance incorrectly mentioned a consideration of $2000, and that the true consideration was not in writing; but as it appeared that the solicitor had recommended a writing, and that the grantor had voluntarily preferred to dispense with it, the Court declined to cancel the transaction.

Examination of witnesses and hearing at Woodstock.

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

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

March 23. SPRAGGE, C.—I am of opinion that the plaintiff has not made out a case for setting aside the conveyance made by him to his son-in-law the defendant.

Judgment. It may be conceded, to put the case as high as it can be put for the plaintiff, that there was no valuable consideration, though it is apparent from the evidence, that the conveyance was not a mere act of bounty on the part of the plaintiff. But taking the case as one of voluntary conveyance, and applying to it the rules enunciated in *Cooke* v. *Lamotte* (*a*), rules at least as stringent as are enunciated in any other case, there is not, as I think, a case established for setting aside the deed. The evidence shews that the plaintiff understood

(*a*) 15 Beav. 234.

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the nature and effect of what he was doing. That he knew that while a will was revocable, a conveyance was not so, is quite clear; for the defendant had objected to the will already made that it was revocable, and a conveyance was substituted for the very purpose of giving the defendant a better security than a will would give him. It is also clear that it was present to the plaintiff's mind that a conveyance would by itself divest him of the control of the property. In *Anderson* v. *Elsworth* (*a*), it was the absence of any explanation upon this point that induced the Court to set aside a voluntary conveyance, the Court being satisfied that the donor, an aged and infirm woman, did not understand the difference in that respect, between a conveyance and a will; she was not told, as Sir *John Stuart* puts it, "that she ought to reserve to herself for life the use of the property which she would have retained in case she had executed a will." In this case that the plaintiff was quite alive to this, is shewn by his taking from the defendant a conveyance of a life-estate.

Judgment.

In *Hoghton* v. *Hoghton* (*b*), Lord *Romilly* referred to his previous decision in *Cooke* v. *Lamotte*, reiterating his opinion "that wherever one person obtains by voluntary donation, a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord *Eldon* in *Gibson* v. *Jeyes* (*c*), falls on the person taking the benefit;" and he then adds his own interpretation of the term righteous, "But this proof is given, if it be shewn that the donor knew and understood what it was that he was doing." There is no pretence of undue influence: the frame of the bill and the evidence in the cause alike negative its existence.

The plaintiff points out in his bill, the errors that he complains of in the conveyances between himself and

(*a*) 3 Giff. 154. (*b*) 15 Beav. 298. (*c*) 6 Ves. 266.

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the defendant. There are errors certainly, but they are not traceable to the defendant and are easily corrected. They do not, in my judgment, form any ground for the extreme course of setting aside a conveyance. The property conveyed was subject to two mortgages amounting together to $1900. The conveyance a printed form contained the usual covenant by the grantor, that he had done no act to incumber. This was of course wrong, and inasmuch as it was agreed between the parties, that the burthen of paying the interest, and eventually of discharging the principal of these mortgages should be upon the defendant, there should have been a covenant of indemnity on his part. Another complaint is that the consideration is untruly stated, as a money consideration of $2000.

Judgment.

In *Watt* v. *Grove* (*a*), Lord *Redesdale* used strong language in regard to conveyances, the consideration of which is untruly stated; but he was speaking of instruments, which, as he said, as far as any of them actually appeared before him were "all without exception false," and he adds language which shews that he did not consider that setting aside an instrument was a necessary consequence of its being what he styles "false" even in a material point. "When (he says) an instrument is shewn to be in itself false in a material point, it lies on the party who claims benefit under it to support it, for it cannot stand by its own force as an instrument executed by the parties; being impeached by its own falsehood. A Court of Equity cannot permit it to operate according to its legal import, because it is proved to be in itself false, and therefore has not the credit due to an unimpeached instrument. It therefore must be according to circumstances, reformed, and either made what it ought to have been, or set aside in the whole or in part, and upon such terms as justice requires. If

(*a*) 2 S. & L. 492.

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the matter in which it is not correct, demonstrates fraud, the Court will generally set it aside; it can reform the instrument only where the incorrectness arises from pure mistake, from ignorance, or from accident, or does not go to impeach the general fairness of the transaction." The misstatement of the consideration may, no doubt, be more or less evidence of fraud. In some cases it is clear that it does not at all arise from fraud, and this was the case in *Harrison* v. *Guest* (*a*), in appeal to the Lords from the judgment of Lord *Cranworth*. The misstatement of consideration was censured as improper, but inasmuch as it was not to be attributed to fraud, it could only be a ground for reforming the conveyance, not for setting it aside; and it was so adjudged. In this Province the practice has been very prevalent of stating some consideration other than the real one; and that from no corrupt motive, but simply because parties and conveyancers have not been alive to the propriety of having the consideration truly stated. In this case the consideration expressed was given to the conveyancer, Mr. *McDonald*, by the parties. Mr. *McDonald* says that it was, as far as he knew, a nominal sum. It was named by the defendant after he and the plaintiff had conversed together about the amount of the mortgages.

Judgment.

The plaintiff also complains of the omission to put in writing the agreement between him and the defendant, that the latter, with his wife, the plaintiff's daughter, should live upon the farm as they had previously done, and should work it, with the plaintiff. There is no doubt that this was the agreement of the parties; and further, that it was the principal inducement in the mind of the plaintiff to make the conveyance to the defendant. But it appears, by the evidence of Mr. *McDonald*, that the parties desired not to have it in writing. There are detached passages in his evidence

(*a*) 8 H. L. C. 481.

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bearing upon this point, together with some other points in the case. He says, "They talked among themselves about the amount of the mortgages, and then defendant after, gave me the sum of $2000; they talked before that, what their agreement was, and talked about who should pay off the mortgages; they said they were to work the place together, and out of the proceeds they were to keep down the interest and pay as much of the principal as they could; they expected the place would remain incumbered up to the plaintiff's death, and that the defendant would have to re-mortgage the place. Defendant said he expected his father would help him to pay off the principal of the mortgages. I told them the agreement ought to be in writing, or would they trust to one another; they both replied no, they did not require it in writing. I cannot say in what terms they expressed it. * * * Nothing was said about the stock and implements that I recollect. They were to work the place together as they had done, and the defendant and wife to continue to live with him. * * * I did not think it fair to make defendant covenant to pay off the mortgages as the plaintiff and he were to work the place together. * * Nothing was said about plaintiff being protected against his personal liability on his covenants in the mortgages, and I made no inquiry about it. His personal liability on his covenants was not talked of by them, nor did I introduce it. As to the defendant working the place I omitted it for the reason I gave before, and for no other. I did not press on them to have the agreement as to the labour in writing. * * * I told the parties that this part of the agreement as to paying off incumbrances, and as to labour and continuing to live together ought to be in writing; and I asked them if they would have it so, or trust to one another, and they both answered in the negative, and did not require it to be in writing."

Judgment.

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There is no reason to suppose that the agreement as to the defendant and his wife continuing to live on the place was not put in writing, through any fraudulent procurement of the defendant: and for this reason, amongst others, that it was quite as much for the benefit of the defendant himself as of the plaintiff. The use of such a farm as this is described to be, and especially to the person entitled in remainder would obviously be more than an equivalent for the costs of the maintenance of the plaintiff, even if no services were rendered by him. The parties indeed expected that it would support them all, and keep down, at least, the interest on the mortgages; and the plaintiff may have thought that having a life-estate in the place giving him the absolute legal control of the place for his life, to the exclusion if he thought fit of the defendant, was a sufficient protection to him. His having that power, and its being to the interest of the defendant, to continue on the place, might well induce the plaintiff to feel safe in dispensing with any written agreement in this respect. At any rate he did choose to dispense with it, when the fact, and the propriety of it were presented to his mind, unwisely perhaps, but still advisedly. He says that he had no independent legal advice. There were certainly not two solicitors, one for each party, concerned in the putting into legal shape the agreements of these parties, nor is it usual that two should be employed in cases of this kind. It was not through the procurement of the defendant that one only was employed; and that one was not peculiarly the solicitor of the defendant. He acted for both in this matter. He had not been employed at all before by the defendant. He had been the solicitor employed by the plaintiff to draw his will.

Judgment.

The defendant and his wife leaving the farm in the month of November, after the execution of the conveyances, no doubt, disappointed the plaintiff of that which was his inducement for making the conveyance to the

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defendant; and if it had appeared that the defendant had procured this conveyance upon a representation of intention in that respect, which he did not intend to fulfil, I am not prepared to say that it would not have been a case of fraud upon which this Court would have set aside the conveyance; but nothing of this kind is proved or even alleged. There is nothing in the case beyond the points with which I have already dealt, except this; that after the execution of these documents, and after the parties had acted for awhile upon what it is conceded on all hands, was the real intention and agreement between them; misunderstandings and quarrels arose: abusive language and unseemly conduct ensued; and the defendant and his wife left. I think the fair result of the evidence is that the defendant left in consequence of these quarrels. He desired and expected to have the management of the farm; quarrels arose out of differences between them upon this point. How far these differences, and how far the threats of violence on the part of the plaintiff, may have been the inducement to the defendant leaving, it is impossible to say. I am satisfied that he left for these reasons, and not from any foregone conclusion in his own mind before the execution of the conveyance to him, that he would leave afterwards. Assuming that the defendant was in the wrong in the matter of these differences between himself and the plaintiff? I do not see how this matter, subsequent to the execution of the conveyances, can form any sound intelligible ground for setting them aside.

Judgment.

All that the plaintiff is, in my judgment, entitled to is a reformation of the conveyance from himself to the defendant by striking out the covenant against incumbrances. Such a covenant is against the agreement of the parties, and was evidently only a conveyancer's mistake. I cannot assume that the defendant would not have agreed to its correction if applied to. He declares his willingness that it should be corrected by his

answer. He also by his answer declares his willingness to enter into a covenant to pay off the mortgages. 1870.

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The plaintiff has failed upon these questions, which are really the matters in contest, between him and the defendant, and the defendant is therefore entitled to his costs.

It would, I have no doubt, now be best for the interest and comfort of both parties that the defendant and his wife should return to the farm. There is something to forgive on both sides; and probably in the future some forbearance on both sides may be necessary. It would be wise as well as Christian to forgive the past, and bear and forbear in the future. Judgment.

MULHOLLAND v. MORLEY.

Mortgages by married women.

Two mortgages on property of a married woman executed by her and her husband, in manner required by the statute in that behalf, were impeached by her for want of the evidence necessary in equity to sustain gifts:

Held, that as the mortgages had been given for valuable consideration, and the mortgagee had been guilty of no fraud in obtaining them, they were valid securities.

The bill in this case was filed by a mortgagee to enforce two deeds, a mortgage and a further charge made by the defendants Mr. and Mrs. *Morley*. The defendant *Elliott* was a purchaser from Mrs. *Morley* of a portion of the mortgaged property. The defendant Mrs. *Morley* set up that the instruments in question were obtained by fraud practised upon her by the plaintiff colluding with her husband. The first deed, the mortgage in question, was dated the 6th of August, 1860, and the property comprised in it was

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part of the estate of Mrs. *Morley's* father, *Edward Mathews*, under whose will she was a devisee and legatee. Prior to the date of this mortgage, and to the application for the loan which led to its execution, a bill had been filed by Mrs. *Morley* for the administration and division of her father's estate, and that suit was pending when the mortgage was made. Mr. *Hodgins* was Mrs. *Morley's* solicitor in the administration suit, as he also was in the present cause. In May, 1860, *Samuel Morley* had applied to the plaintiff for a loan which was required to carry on the administration suit, and after some negociation the plaintiff agreed to advance $400 on the terms that a debt of about $1400 which *Morley* owed the City Bank, and which the plaintiff considered himself bound to see paid, and the advance of $400, together with the premiums which the plaintiff should pay on a certain policy of insurance effected on the life of *Morley* should be secured on Mrs. *Morley's* interest in the lands described in the mortgage, and also by the assignment of the policy of assurance on the lives of Mr. and Mrs. *Morley*, which was then held by Mrs. *Mathews*, Mrs. *Morley's* mother. The plaintiff, who was a merchant in Montreal, instructed Mr. *John MacNab*, of Toronto, as his solicitor in the mortgage transaction, and Mr. *MacNab* at once put himself in communication with Mr. *Hodgins*, who was, as before stated, Mrs. *Morley's* solicitor, in the then pending Chancery suit relating to her father's estate, and whom Mr. *MacNab* said he understood to be acting also for Mrs. *Morley* in the matter of the mortgage. After considerable delay caused by inquiries about the title during which Mr. *MacNab* had several conferences with Mr. *Hodgins*, a draft of the mortgage deed was prepared by Mr. *MacNab* and submitted to Mr. *Hodgins*, who settled it, making some alterations. The mortgage was then engrossed, and on the 20th of July, 1860, was sent for execution by Mr. *MacNab* to Mr. *Hodgins*, together with the following letter:

Statement.

"Toronto, 20th July, 1868. 1870.

"DEAR SIR,

"*In re Morley.* Mulholland v. Morley.

"Herewith I send you mortgage and memorial. As the money is in the city subject to *Morley's* order, you get an order by him on *T. Woodside*, Esquire, in your favour, and when I get papers back in satisfactory state I will direct him to pay it. Do give me some evidence of title.

"Yours truly,

"JNO. MACNAB.

"*T. Hodgins*, Esq.,
"Barrister, &c., Toronto."

The mortgage, which appeared to have been duly executed by both Mrs. *Morley* and her husband, and had the certificate signed by two justices of Mrs. *Morley's* examination as a married woman, and her consent to convey, indorsed, was afterwards returned by Mr. *Hodgins* to Mr. *MacNab*, and the advance of $400 was then made on *Morley's* draft in favour of Mr. *Hodgins* who procured the draft to be cashed; and paid *Morley* out of the proceeds $100, retaining the balance of $300 to be applied towards the costs of the suit of *Morley* v. *Mathews*. Statement.

In 1864, an application for a further advance was made by Mr. *Morley* to the plaintiff, which the plaintiff agreed to make on condition that a debt due to him by *Morley's* father should also be secured, and this resulted in the execution of the deed of further charge which was dated the 23rd November, 1864, and purported to be a security for two sums of $350.89, and $435. The former amount being the debt due to the plaintiff by Mr. *Morley's* father, and the latter sum it was alleged had been the advance, though the plaintiff swore in his evidence he could not state how the money was paid. The execution of this latter instrument was procured by Mr. *Morphy*, who acted in that matter as the solicitor of the plaintiff. Mr. *Hodgins*, in his evidence, swore

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he knew nothing of this deed of November, 1864, until the bill in this suit was filed. In connection with the further charge the following letter in Mrs. *Morley's* handwriting was relied on by the plaintiff as shewing that Mrs. *Morley* understood the transaction:

"Cobourg, 7th November, 1864.

"SIR,

"I will carry out any arrangements you may make with my husband, provided they are done at once. I am very sorry there has been so much delay. I enclose a note signed by myself.

"Yours respectfully,

"A. C. MORLEY.

"*H. Mulholland*, Esq.,
"Montreal."

The interest reserved by these deeds was at the rate of seven per cent. on the old debts which were foreborne, and ten per cent. on the new advances, with a provision for the annual capitalizing of overdue interest.

Statement.

The mortgage of August, 1860, was attested by Mr. *William Jeffrey* as a subscribing witness, and the certificate indorsed thereon of Mrs. *Morley's* examination and consent was signed by two justices of the peace, Messrs. *Andrew Jeffrey* and *Peter McCallum*. Mr. *Andrew Jeffrey* had died, but both *William Jeffrey* and Mr. *McCallum* were called as witnesses. *William Jeffrey* said that the mortgage deed was not read over or explained to Mrs. *Morley* at the time of its execution; that she signed it in his office, and that the witness then went out leaving Mrs. *Morley* and his father *Andrew Jeffrey* together in the office, where, it appeared, they remained until Mr. *McCallum* came in. Mr. *McCallum* stated that the instrument was not read over or explained either by Mr. *Andrew Jeffrey* or himself, but that by their examination they ascertained that Mrs. *Morley* executed it with her free consent; that she declared it to be her voluntary act and seemed to be fully sensible of

what she was doing. With reference to the execution of the deed of further charge, the subscribing witness to that instrument, a Mr. *Payne*, was not examined, and it was stated that he was incapacitated from illness from attending to give evidence, but Mr. *Creighton*, the survivor of the examining justices, was called and he swore that the instrument was executed in the office of the Messrs. *Kerr*, solicitors, at Cobcurg, and the examination of Mrs. *Morley* was taken at the same time and place, and the witness thought that one of the Messrs. *Kerr*, as well as the subscribing witness, Mr. *Payne*, who was then a clerk in Messrs. *Kerr's* office, was also present. Mr. *Creighton* swore that he examined Mrs. *Morley* himself, and that she declared she executed the deed voluntarily. The plaintiff and the defendant, Mrs. *Morley*, both tendered themselves as witnesses. The plaintiff stated he knew nothing of the execution of the deeds which, as before stated, he had entrusted to his solicitors Mr. *MacNab* and Mr. *Morphy*, respectively. He said, however, that he looked on Mr. *Hodgins* as Mrs. *Morley's* solicitor. The Court considered the plaintiff's evidence on the whole satisfactory. Mrs. *Morley* swore that she did not understand the nature of the deeds in question; and that she had no recollection of signing either of them. Mrs. *Morley's* memory appeared imperfect and her evidence was not considered satisfactory.

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Mulholland v. Morley.

Statement.

The cause came on for the examination of witnesses and hearing at the Spring Sittings in Toronto.

Mr. *Bain*, for the plaintiff.

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

STRONG, V.C. [After stating at length the circumstances above set forth].—On this state of facts two contentions are raised by counsel for Mrs. *Morley*.

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[Mulholland v. Morley.

First, it is said that the *primâ facie* presumption in favor of the legal execution of these deeds by Mrs. *Morley*, and of her due examination as a married woman afforded by the evidence of Mr. *Jeffrey*, and by the proof of Mrs. *Morley's* signature, and the certificates indorsed of the justices, is displaced by the testimony of Mrs. *Morley* herself, and that of Mr. *Creighton* and Mr. *McCallum*, and that it does not appear that there ever was a sufficient execution of either of these instruments to constitute them the deeds of Mrs. *Morley* or to pass her estate at law. I am clearly of opinion that this ground of defence is not sustained. I cannot rely on the evidence of Mrs. *Morley*, and as to the evidence of the examining magistrates, I think they fully confirm what they have stated in their certificates.

Judgment.

It is next contended that even though there was a sufficient legal execution of the instruments in question, they ought to be avoided on the ground of equitable fraud, and this question was very fully and ably argued on both sides. Mr. *Crooks*, for the defendant, relied on the doctrine well established by many authorities, but more fully explained by the Master of the Rolls in the cases of *Cook* v. *Lamotte* (*a*) and *Hoghton* v. *Hoghton* (*b*) as applicable to the present case, and he contended that it was in consequence incumbent on the plaintiff to prove that Mrs. *Morley* fully understood the nature and consequence of her acts at the time she executed these deeds. Mr. *Bain*, on the other hand, relied strongly on *Cobbett* v. *Brock* (*c*) as shewing the inapplicability of that doctrine to the case of a mortgagee for valuable consideration. I think the distinction pointed out by the Master of the Rolls in *Cobbett* v. *Brock* applies in the present case, and that the plaintiff is not bound to give further proof as to the due execution of

(*a*) 15 Beav. 234. (*b*) 15 Beav. 278.
(*c*) 20 Beav. 524.

these deeds than he has done, and that in the absence of evidence on the part of the defendant sufficiently establishing fraud or undue influence, I must determine that these instruments are binding in equity. The language of the Master of the Rolls, in *Cobbett* v. *Brock*, is as follows:—"I fully adhere to what I expressed in the cases of *Cook* v. *Lamotte* and *Hoghton* v. *Hoghton*, and if this were a case between Mr. *Brock* and his wife I should require him to prove all the requisites I pointed out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of, or privy to, the fraud." Now it is out of the question to say that on the evidence before me I could determine that the plaintiff has been privy to a fraud. As regards the deed of August, 1860, the plaintiff did all he could well do; he and his solicitor, Mr. *MacNab*, had from the circumstances and from the conduct of Mr. *Hodgins* every reason to suppose that Mr. *Hodgins* was acting for Mrs. *Morley*. Mr. *Hodgins* was Mrs. *Morley's* solicitor in the Chancery suit to raise funds for the prosecution of which the mortgage was given, the security consisted of part of Mrs. *Morley's* property in question in the pending cause, and during some three months there were negotiations as to the title and the sufficiency of the security. Further, I think, I must presume that when on the 20th July, 1860, Mr. *Hodgins* received the mortgage from Mr. *MacNab* for the express purpose of procuring its execution by all necessary parties, he held himself out as the solicitor of Mrs. *Morley*. I must also infer from what Mr. *Hodgins* subsequently did—when he returned the instrument to Mr. *MacNab* as a regularly executed mortgage, and received to his own use the greater portion of the advance made on the faith of its being a valid security—that he in truth did act throughout the transaction as the legal agent of Mrs.

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Judgment.

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Morley, and that his memeory is at fault when he now states that he made a separation between the interests of the husband and wife. It is not suggested by Mr. *Hodgins* that he ever communicated this separation of interests, and his consequent non-representation of Mrs. *Morley*, to Mr. *MacNab*, who, it must have been apparent, dealt with him as solicitor for the wife as well as for the husband; and what could be more unreasonable than to say that Mr. *MacNab* ought to have had the least suspicion that Mr. *Hodgins*, who was the solicitor for Mrs. *Morley* in a Chancery suit respecting the identical property which was the subject of the mortgage, was not, having regard to his course of conduct, also the solicitor for her in the mortgage transaction. If the plaintiff was not sufficiently protected by what was done here, it would be hard to say what a mortgagee ought to do.

Judgment.

Then with regard to the deed of November, 1864, as in the case of the mortgage, the onus of establishing fraud in procuring this deed is on the defendant, and she has not proved any such defence. However, I think Mrs. *Morley's* letter of the 7th November, 1864, of which no satisfactory explanation is given by the defendant, shews that she knew more about this matter than she appears now to recollect. It is, however, sufficient to say that this deed has been proved to have been given for a valuable consideration, and that the defendant has wholly failed in her attempt to impeach it.

Evidence was gone into to shew that Mrs. *Morley* has received moneys from her father's estate, and that nothing has been paid by her to the plaintiff; and this being so, I think, having regard to the terms of the provision in the deed of August, 1860, that the plaintiff is entitled to the usual foreclosure decree.

I have not omitted to notice that the terms of these

deeds are very oppressive as to interest, but no authority was cited, and I cannot find any for relieving the defendant on this ground alone. Indeed there is authority directly the other way: *Goodhue* v. *Widdifield* (*a*).

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Mulholland v. Morley.

Brooke v. The Bank of Upper Canada.

Pleading—Parties.

The trustees of the Bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders.

Statement.

After the decision of the demurrers in this cause as reported *ante* volume xvi., page 269, the plaintiff amended his bill by making it one on behalf of all the creditors of the bank.

The defendants answered the bill setting forth the fact that the assets of the bank had become vested in certain trustees under the provisions of the statute 31 Vic. ch. 17, and submitting that the trustees ought to have been made parties.

The plaintiff without amending put the cause at issue, and set the same down for the examination of witnesses and hearing at the Sittings held in Toronto in the Spring of 1870.

Mr. *McLennan*, for the plaintiff.

Mr. *G. D. Boulton*, for the defendants, on the cause being called on, renewed the objection for want of parties.

(*a*) 8 Grant, 531.

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Brooke v. Bank of U. Canada.

April 5.

STRONG, V. C.—That this bill can be maintained by some of the creditors, suing on behalf of all, against some of the shareholders, is, I think, clear on the authorities.

That some of the creditors may represent the whole body as plaintiffs is so well established that I need not refer to authorities on that point; and that in a case like the present a few individual members of a class may be sued as representing all, is, I think, now to be considered the rule deducible from the cases, many of which are collected in *Daniell's* Practice (*a*).

I am of opinion that the suit is not premature, having regard to the 16th section of the Act of 1867, which provides that the rights or remedies of creditors against shareholders shall not be "in any manner affected, impaired, diminished, or varied." It is however to be observed that the section just quoted also provides that the Act "shall not in anywise affect or vary the liability of any shareholder to any creditor." It appears therefore from this enactment that whilst on the one hand the effect of the Act making valid the deed of trust is not to be to hinder or delay creditors against shareholders, so, on the other hand, the liability of shareholders to creditors is not to be increased, or the remedies accelerated.

Judgment.

The liability of shareholders then being only for such amount of the debts of the bank, as the assets are insufficient to satisfy, I think this deficiency must necessarily be ascertained in this suit, and for that purpose an account of the trust estate must be taken. The trustees are therefore necessary parties in their corporate capacity.

In the Act of 1867 there are certain provisions relating

(*a*) Ed. 4, Vol. 1, p. 262.

to summary applications by creditors and shareholders to this Court, and also for like applications by trustees; but I find nothing excluding the general jurisdiction of this Court to direct the accounts to be taken.

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Brooke v. Bank of U. Canada.

To hold that a deficiency need not be ascertained would be to determine that the effect of the Act of Parliament and the deed was entirely to abstract the assets, as the primary fund for the payment of creditors, and to make the shareholders liable in the first instance for the whole debt of the bank, leaving them to look for indemnity from the trustees. This would be manifestly greatly increasing the liability of the shareholders, and I cannot determine that it was the intention of the Legislature that the Act should have such an operation.

Judgment.

The cause must stand over with liberty to add the trustees as parties; and as the defendants have taken the objection by their answer, they are entitled to the costs of the day.

MITCHELL v. ENGLISH.

Co-sureties—Contribution.

Accommodation indorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controled by contract; but such a limitation if stipulated for is binding.

Examination of witnesses and hearing. The bill was filed by the assignee of an accommodation indorser against a subsequent accommodation indorser to enforce contribution by the latter, towards the amount which such prior indorser had been obliged to pay to retire the note. The point in issue and the authorities relied on appear sufficiently in the judgment of the Court.

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Mitchell v. English.

Mr. *S. Blake* and Mr. *J. A. Boyd*, for the plaintiff.

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

April 5.

STRONG, V. C.—Nothing can be better settled than that co-sureties for the same debt are liable to mutual contribution although they contract independently, and indeed without knowledge of each other: *Dering* v. *Winchelsea* (*a*).

It is equally well established that accommodation indorsers of a negotiable security are to be considered as co-sureties, irrespective of the order of their liability on the instrument itself: *Clipperton* v. *Spettigue* (*b*), *Cockburn* v. *Johnson* (*c*).

Judgment.

But every surety does not necessarily undertake an equal liability with other sureties for the same debt, it is true that he will be presumed to do so in the absence of any limitation of his liability, but there is nothing to prevent him from qualifying this by contract: *Craythorne* v. *Swinburne* (*d*).

Now, in the present case, I find as a conclusion of fact from the evidence—that of Mr. *English* and Mr. *Hall*, which is strongly confirmed by the conduct of the parties—that Mr. *English* indorsed the promissory note on the express stipulation that he should be liable only in default of *Hamilton* and *Hall*.

It was, however, argued by the learned counsel for the plaintiff with great force, that Mr. *McIlroy* having indorsed on the faith of having Mr. *English* for a co-surety, the latter was for this reason disabled from limiting his liability in the way I have mentioned.

(*a*) 1 Cox 318.
(*b*) 15 Gr. 577.
(*c*) 15 Gr. 269.
(*d*) 14 Ves. 160.

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The answers to this argument are, I think, twofold.

First, I do not think it established in point of fact that Mr. *McIlroy* ever relied on any liability to contribution by Mr. *English*. I do not consider that the evidence of *Connell* sufficiently proves it, and Mr. *McIlroy's* whole course of conduct, and even the manner in which he puts forward his claim in this suit, alleging, as he does, that he only lately discovered his right to call on Mr. *English*, make it impossible to believe that he ever looked to Mr. *English* for partial indemnity.

But secondly, even if Mr. *McIlroy* did only agree to become a co-surety with Mr. *English*, there was nothing in that to impair the defendant's right of limiting his liability to a subordinate suretyship by contract, as freely as he could in any case have done, in the absence of notice to *English* of Mr. *McIlroy's* stipulation that he should have the defendant for a co-surety, and there is no evidence of such notice.

Judgment.

If I had found against the defendant that the facts were that Mr. *McIlroy* had indorsed on the strength of being able to claim contribution from the defendant, and that the defendant had notice that such were the terms on which Mr. *McIlroy* had undertaken the liability, I incline to think that the defendant would have been bound by *McIlroy's* equity. In the view which I take of the case, I need not notice the other grounds taken by the bill with the object of shewing that if *McIlroy* was entitled to contribution, he has not lost it by the subsequent dealing.

The bill must be dismissed with costs.

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DENISON v. DENISON.

Administration suit—Legacy to executors.

Where the judgment on an appeal from the Master's report enunciates a principle which is applicable to other parties and other points, the Master should so apply it in the further prosecution of the reference.

Three parties made purchases before suit, and two of them only being charged by the Master with compound interest in respect of their respective purchase money, they appealed unsuccessfully against the charge, and they afterwards appealed against the charge of simple interest only to the third party:
Held, that such appeal was regular.

Where the estate to be administered was large, requiring great care, judgment and circumspection in its management for a number of years, the Court sustained an allowance of $1500 to the principal executor and trustee, and $1500 to the others jointly.

Where a legacy is given to executors as a compensation for their trouble, they are at liberty to claim a further sum under the statute if the legacy is not a sufficient compensation.

This was an appeal and cross-appeal from the report of the Accountant.

In taking the accounts an allowance was made to *George T. Denison*, who was the executor and trustee upon whom the management of the estate principally devolved, of the sum of $1500 as commission, and to Messrs. *Wilson* and *Ridout*, the other executors and trustees, of $1500 between them.

Statement.

This allowance formed one of the grounds of appeal and cross-appeal: the contention on the one hand being that the testator had by his will given to each of the executors a legacy of £100; the words of the bequest being, "and my will further is that after all those different allotments of lands which I have left to be sold, and that after all my just debts and funeral expenses and other charges shall have been paid and fully satisfied,

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that each of my trustees shall be paid the full sum of one hundred pounds out of my estate to see my will fully carried out," it was to be inferred that the testator considered this sum a sufficient allowance by way of remuneration for any trouble they might be put to in carrying out the trusts of his will. *George T. Denison* on the other hand founded a cross-appeal in respect of the allowance made to him as being too small.

The other facts appear sufficiently in the judgment.

Mr. *Graham*, for *Richard L. Denison*.

Mr. *Crooks*, Q. C., for *George T. Denison*.

Mr. *McLennan*, for *Charles L. Denison*.

Mr. *S. Blake*, for the trustee *Ridout*.

Mr. *J. C. Hamilton*, for the trustee *Wilson*.

Mr. *Mulock*, for *Sims* and wife.

April 6.

Judgment.

SPRAGGE, C.—The first objection is that in taking the account of purchase money in respect of lands purchased by *Charles L. Denison*, one of the plaintiffs, the Accountant has charged the purchaser with simple interest only upon his purchase money; instead of charging him with compound interest, as, by the order made on the former appeals in this cause, the other purchasers were charged.

A preliminary objection is taken to this ground of appeal that it is not now open. I expressed my dissent from this objection when it was made; but as some cases were cited upon the point, and as I reserved my judgment upon the merits I reserved the preliminary objection also. It is in substance that by the order made on

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the former appeal, the report was varied in certain particulars; and that it stood confirmed in all other respects. I expressed my opinion to be that if the judgment on the appeal enunciated a principle, which was applicable to other points, or other parties, besides those to which it was in terms applied by the order, the Master ought to apply it; and that is still my opinion. The cases to which I am referred do not establish the contrary.

In the former appeal upon which the same question arose, *Richard* and *George* objected to being charged with compound interest, while *Charles*, with the other plaintiffs, insisted that they should be so charged. I decided that they ought to be charged; and now *Richard*, accepting my decision, seeks to apply it to another purchaser, the purchaser who insisted upon its application against him. In *Ross* v. *Perrault* (*a*) the same party as I understand was appealing piecemeal, introducing into a second appeal objections which were proper to the first report, and this it was decided he could not do. This case is quite different, *Richard's* position being that purchasers should be charged with simple interest only, he could not consistently object, that *Charles*, a purchaser, should be charged with more. He is not now doing what the plaintiff did in *Ross* v. *Perrault* take objections by a second appeal, which he ought to have taken by his first; that case therefore does not apply.

Judgment.

There is no positive rule against a party appealing upon a new ground not taken on a former appeal; and where there is a good reason for it, as in this case, it is no bar to such appeal: and see *Birch* v. *Joy* (*b*).

Crooks v. *Street* (*c*) was cited for the position that a Master cannot vary his own report. The Master had

(*a*) 13 Grant, 208. (*b*) 3 H. L. C. at page 577.
(*c*) 1 Cham. Rep. 78.

taken accounts and reported upon them, and the report was confirmed. On further directions he was directed, in effect, to continue the account: as put by the late Chancellor (at page 82) to continue the accounts "from the date of his former report, and on foot of the accounts then taken." Upon this the Master varied his first report; and this it was held it was not in his power to do. The case is essentially different. I do not myself feel any doubt that the principle being established against three purchasers that they were chargeable with compound interest it was not only in the power of the Master but it was incumbent upon him to apply the same principle to the fourth, unless the circumstances of his purchase so differed from the others as to make the principle inapplicable.

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As to the merits: I find upon referring to my judgment, upon the former appeal, that the defendants, *Richard*, *George*, and *Robert*, contended against being charged at all with more than simple interest; they contended that they should not at any rate be so charged after they received their conveyances in 1862; at any rate not after the agreement of 13th February, 1864; at any rate not after the compromise of 25th January, 1865, followed by the decree made 26th February, 1866. On the other hand the plaintiffs contended, and I agreed with them, that all the beneficiaries of the estate, and I referred especially to Mrs. *Sims* and *Charles*, must be placed upon the same footing as if the sales of real estate had been to strangers, unless their rights had been qualified by something that had been done by them, or by the Court; and I did not find that their rights had been so qualified. There were some reasons which I thought applied specially to the three purchasers who were defendants: *George*, I thought, could not do otherwise than place himself upon the same footing as if sales of the lands purchased by him had been to strangers: *Richard* had expressly agreed to be placed

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upon the same footing; and *Robert* had acquiesced in being so placed. I find upon referring to my judgment, that besides the reasons to which I have referred, I thought there were sufficient reasons, especially looking at the directions in regard to investments, contained in the will, why beneficiaries purchasing portions of the real estate should be placed upon the same footing as if strangers had purchased and paid their purchase money; and I thought therefore that the same principle of computation—compound interest—must be followed throughout, and ought not to be made to stop at any of the periods suggested.

I entered into the question at some length, and in looking again at the reasons contained in my former judgment, and which I do not repeat here, I think that they apply to the purchase by *Charles;* and that he must be charged with interest upon the same footing as other beneficiaries who were purchasers of lands of the estate. The first ground of appeal is therefore allowed.

Judgment.

The third ground of appeal is upon the quantum of allowance to the executors and trustees, and there is a cross-appeal by the defendant *George T. Denison*, that the allowance made to him is too small. In referring the question of amount to the Accountant, I referred him to the observations of the late Chancellor in *Chisholm* v. *Barnard* (*a*), and in *McLennan* v. *Heward* (*b*), and added some observations of my own. I cannot say that the allowance made by the Accountant is wrong. One cannot read the will without seeing that there was not only a large estate, but one requiring care, judgment, and circumspection, in its management; and it appears to have involved the exercise of these qualities, in a large degree, and that for a period extending over a number of years. The Accountant has allowed to

(*a*) 10 Grant, 479. (*b*) 9 *Ib.* 279.

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George T. Denison the same amount that he has allowed to the other two executors together, and as far as I see, rightly; for the chief burthen of the management of the estate has fallen upon him, and it is not asserted that he has not discharged it diligently and faithfully. The language of the late Chancellor in *Proudfoot* v. *Tiffany* (*a*), is not inapplicable to Mr. *George Denison*. Speaking of one of the executors, *Thompson*, he observed that his co-executors "testify to the faithful manner in which *Thompson* discharged his very important duties," and he adds "not that they involved much manual or physical labor, for this was performed by a clerk, but they required and caused anxiety and watchfulness, skill and exactness, good judgment and honesty, all which seem to have been rendered. In view of all this, I cannot say that the Accountant, who has cognizance of the whole details, has allowed too much." I adopt the language of the late excellent and learned Judge whom I have quoted, as sound, as well as felicitous in expression. In the case to which I have referred, the co-executors of *Thompson* claimed no allowance for themselves; they appear indeed to have thrown upon *Thompson* the whole burthen of the management of the estate. It was otherwise in the estate which is the subject of this suit. All the executors appear to have engaged actively in the management of the estate. If I am to say that the Accountant was wrong, I must be enabled to see it. The sum allowed may be much more than the usual per centage upon sums received and paid, and still be no more than a fair and reasonable compensation.

Judgment.

It is said, in regard to the allowance to *George*, that the Accountant has given him interest upon his allowance. This is rather in appearance than in reality, and is, I apprehend, only following out my direction that the

(*a*) Court Book 4, p. 160.

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commission or other compensation should be allowed from time to time as earned. Strictly, he should have been credited from time to time, and if he had, it would have reduced the interest (and perhaps the principal) with which he has been charged. He is charged with interest upon interest; on the other hand he should be allowed interest upon that which, if taken into account at the time, and from time to time, would have reduced the amount bearing interest charged against him.

Mr. *George Denison* objects by cross-appeal that the amount allowed to him is too small. I am not prepared to say that it is so, and that a proper judgment and discretion has not been exercised in the matter by the Accountant.

Judgment.

It is urged against the allowance by the Accountant that no sum beyond the legacy given by the will to the executors should be allowed to them; that they have accepted the trust with that compensation, and should be allowed nothing more. I do not agree in this. The majority of wills give no legacy by way of compensation to executors, but it has never been contended and of course could not be, that accepting the trust they accepted it upon the footing of receiving no compensation. Until the passing of the Act allowing compensation, they could of course look for none, and undertook onerous and responsible duties generally out of pure good will to the testator or his family, and I have no doubt that the testator reckoned upon that feeling in the gentlemen whom he named as his executors, "his trusty and worthy friends" as he styles them, to carry out his will and did not look upon the £100 which he gave to each of them as a *compensation* for their services.

Now that the principle of compensation is established by the Legislature, I do not think that the circumstance

of a legacy to the executors should take the case out of the general rule. Where indeed the amount bequeathed is sufficient compensation there is no reason for allowing more. The allowance in such case is no exception to the statute as the question of what is fair and reasonable is considered.

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The appellants are to be allowed their costs.

Bank of Montreal v. Little.

Interpleader suit—Assignee in insolvency, payment to.

M. deposited a sum of money with the plaintiffs, and soon afterwards absconded. The bank had given him a receipt, stating the money was payable on the production of that document. A writ of attachment issued against the depositor's property as an absconding insolvent debtor, under the Insolvency Acts; and the defendant *Little* was appointed official assignee. The latter then demanded the money, without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of the appointment of *Little* as assignee. The assignee then sued the plaintiffs for the money. Proceedings in the action were restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant *Little* and another claimant of the money, whose claim accrued after the attachment to interplead. The Court, under the circumstances, *held*, that, the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it, with the costs occasioned to the estate by their refusal.

Statement.

This was an interpleader suit. It appeared that one *McDonell* had deposited in the plaintiffs' branch at Guelph, in December, 1858, $700, which was to be repaid, with interest at four per cent, on production of a receipt then given to the depositor. Soon afterwards *McDonell* absconded to the United States, where he has

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ever since remained. About the 11th of January, 1869, the defendant *Little* procured a writ of attachment to be issued against *McDonell's* estate, under the Insolvency Acts, as an absconding debtor, of which the plaintiffs had due notice. *Little* was appointed official assignee of the estate about the 22nd of May thereafter, of which he immediately gave the plaintiffs notice, and required them to pay him the amount of the deposit, with the interest accrued. But he did not produce, or offer to give up the receipt, which the plaintiffs had given to *McDonell*.

It appeared, that shortly before the attachment issued, *McDonell's* wife called at the bank with the receipt, and applied for the money, stating that her husband had gone to the States; but the plaintiffs declined to pay her. *McDonell's* wife called at the bank a second time, after the attachment, and inquired if the money had been attached, when she was informed that it had. She had kept the receipt till March, when she forwarded it to her husband, and *Little* never obtained it.

Statement.

Some time in August, *Calligan*, the other defendant, a resident of St. Joseph, in the State of Missouri (to which *McDonell* was said to have gone), gave notice that he held the receipt, and claimed the money. Soon afterwards *Little* commenced an action in the Court of Common Pleas against the plaintiffs to recover the money. The plaintiffs then filed their bill, stating that they were ready to pay the money as the Court might direct; and praying that the defendants might be directed to interplead, that *Little* might be restrained from proceeding with his action at law, and that they might be paid their costs.

The bill was noted *pro confesso* against *Calligan*. *Little* answered, claiming the money as assignee, and denying the right of *Calligan*.

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The case was heard on motion for decree as against *Little*, and *pro confesso* as against *Calligan*.

Mr. *James McLennan*, for the plaintiffs, contended that, under the circumstances, the plaintiffs could not safely pay the money to either of the defendants, without the intervention of this Court, and that consequently they should have their costs out of the fund. He cited *Hodges* v. *Smith* (*a*), and *Campbell* v. *Solomans* (*b*). He further contended that the production of the receipt was a condition precedent to payment.

Mr. *McGregor*, for the defendant *Little*, contended that the rights of *McDonell* had all passed to his assignee; and he referred to the Insolvent Act of 1864, sec. 2, sub-sec. 7; sec. 3, sub-secs. 7 and 22; and sec. 4, sub-sec. 9. The claim of *Calligan* did not accure till long after the attachment, and it was evidently no more than an attempt by *McDonell* to get the money. He argued that the production of the receipt was not a condition precedent, as the bank was bound to pay *McDonell* himself, on his tendering a proper receipt, and *Little* had the same right. He asked for all costs, as the plaintiffs should have paid the money to the assignee, and for interest at six per cent. from the time the demand was made.

April 6.

Judgment.

SPRAGGE, C.—All that is before me in evidence is that one *McDonell*, on the 2nd of December, 1868, deposited $700 with the plaintiffs at the branch of their bank in Guelph; that on the 11th of January, 1869, the defendant *Little* caused an attachment to be issued against *McDonell*, under the Insolvent Act, and on the 22nd of May, was appointed official assignee; that he thereupon gave notice to the bank of his appointment, and required the bank to pay to him the $700 deposited

(*a*) 1 Cox 357. (*b*) 1 S. & S. 462.

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by *McDonell* with interest, but did not then produce or offer to give up the deposit receipt; and that on the 27th of August, in the same year, he brought an action against the bank for the recovery of the money. The only proof of these facts is their admission in the answer. There is no proof of a deposit receipt being given unless by the indirect admission implied in the statement that when *Little* demanded payment of the money, he did not produce or offer to give up the said deposit receipt, and the form of his admission in which he says that as to the alleged terms and conditions of the receipt he has no knowledge. The answer of *Little* states that before the issue of the attachment *McDonell* absconded from Canada to the United States, where he has ever since remained; and, the hearing being by way of motion for decree as against *Little*, his answer is evidence. He states other matters upon information and belief which I do not read as evidence. The plaintiffs state that *Thomas Calligan*, who is made a defendant, and against whom the bill is taken *pro confesso*, in the month of August last (1869), gave notice to the bank that he was the holder or assignee of the deposit receipt, and claimed the moneys deposited; but this allegation is not admitted, or proved otherwise. The bill then proceeds to say that *Little* and *Calligan* each claim to be entitled to the deposited moneys—*Little* does of course. There is no evidence as to *Calligan*.

Judgment.

Upon the facts before me *Little* is clearly entitled as assignee in insolvency, to the money deposited by the insolvent. It is true that the bank as a stakeholder is entitled to be protected, not only against double liability, but against double vexation; *East and West India Dock Company* v. *Littledale* (*a*); but it would have been idle to have filed a bill of interpleader against *Little* and *McDonell*, because as between them there could be no

(*a*) 7 Hare, at p. 60.

question, and *McDonell* is not made a party; *Calligan* is, upon the bare allegation, not proved, that he gave notice that he was holder or assignee of the deposit receipt, such notice being given some eight months after the attachment, and some three months after *Little* had been appointed assignee.

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It appears to me that the bank would have been quite safe in paying the money deposited to the official assignee of the insolvent. The bank was notified of his appointment; and required to pay the money to him in May, and ought to have paid the money then. No reason is given for its not being paid then, unless the allegation that one of the conditions of repayment contained in the deposit receipt was that it should be given up to the bank when payment should be required, is intended as the reason. It is, in my opinion, an insufficient reason, and it was so held in *Cochran* v. *O'Brien* (*a*) by Lord *St. Leonards* when Lord Chancellor of Ireland. If the inability to produce the receipt, were held a sufficient reason to refuse payment in such a case, a bank might be able to keep the money for ever, for an absconding insolvent debtor would scarcely care, in many instances at any rate, to send his evidences of debt to his assignee in insolvency. I do not for a moment suppose that the bank or any of its officers desired to retain this money; I think only that they acted with overcaution and that they were not justified in putting the insolvent estate to litigation and consequent costs, when it was not necessary for their own protection and safety.

Judgment.

I may add, in regard to the alleged necessity for the production of the deposit receipt, that if the bank were right in that position it would, I apprehend, be a good defence at law, and should have been pleaded to the action brought by *Little* against the bank. This is a

(*a*) 2 J. & L. 380–7

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bill of interpleader. There is a clear title in one defendant unless something is shewn in the way of reasonable claim on the part of another. Literally nothing is shewn, and I must therefore adjudge that the bank is bound to pay the amount deposited with the agreed interest to the assignee in insolvency with the costs to which, in my judgment, the estate has been unnecessarily put.

GRAHAM v. ROBSON.

Administration suit—Costs—Commission.

Where the executor has power under a will to sell real estate for the payment of debts and legacies; and there was available in money more than enough to pay the debts, the Court considering a suit for administration unnecessary, refused the executor the costs, and also his commission.

Hearing on further directions.

Mr. *Evans*, for the plaintiff.

Mr. *Roaf*, Q.C., for the widow and testator claimed to be entitled to an inquiry, to ascertain whether dower or the provision made for her by the will was more advantageous for the widow.

Mr. *McLennan*, for the infant defendants.

Mr. *Scott*, for the other defendants.

The question as to who should pay the costs of the suit was the one principally argued.

Cummings v. *McFarlane* (*a*), *Hutchinson* v. *Sargent* (*b*) were referred to.

(*a*) 2 Gr. 151. (*b*) 16 Gr. 78.

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April 6.

SPRAGGE, C.—I have examined the papers laid before me, upon the hearing upon further directions, and have sent for and examined the papers in the Master's office, and my conclusion is that the executor has thrown the administration of the estate into this Court without sufficient reason.

The personal estate was trifling, but the real estate was considerable, and the will gave the executors ample power to deal with it. It is not now contended that the executor had not power under the will to sell the real estate for payment of debts, as well as for payment of annuities and legacies; but it is said that the executor *Graham*, by whom alone the will was proved, was advised that he had not If there was any serious doubt upon the point, he might have obtained the direction of this Court under the statute, a course, the expense of which would have been comparatively small; and he would have been told, I think, that he had the power, as I think clearly that he has.

Judgment.

The testator left two parcels of land, one a two-hundred-acre lot, yielding a rental, as I gather from the papers, of $340 a year, and subject to a mortgage for $500 to Mr. *Cawthra*, the other a parcel of fifty acres, subject to a mortgage for $550. Both parcels are in the Gore of Toronto. The latter parcel has been sold by the sheriff, and after satisfying the judgment debt, and of course the mortgage debt and the costs, there remains a sum of $632 in the hands of the sheriff. The whole debts proved (besides the mortgage debts) are only $345, including interest, and all of them undisputed by the executor, except one for $44 which was proved in the Master's office.

At what time the sale by the sheriff took place the papers do not shew, nor do they shew whether the action was against the testator or the executor. I

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suppose probably against the testator—the probate stating his death as of the 18th of August, 1868, and the will being proved on the 18th of November in the same year. The plaintiff's affidavit reads as if it were only a thing that he had heard of, though he does not say when he first heard of the action or of the execution. For aught that he shews to the contrary, he might, by the exercise of diligence, have averted this sale by exercising his powers under the will. A sheriff's sale is so often at a great sacrifice, that he ought to have shewn that he made an effort to do so, or that he did not know of it in sufficient time to avert it. This sale by the sheriff is first brought under the notice of the Court by plaintiff's affidavit of 4th December, 1869, after the first report made in the cause. After stating receipts since bringing his accounts into the Master's office, but whether before or after the report he does not say, he proceeds, "There is also in the hands of the sheriff, &c."

Judgment.

stating the surplus of $630, not stating when it came to the hands of the sheriff, or when he first knew of it. He may have known of it before he brought his suit in this Court, and as he is silent as to time, I suppose the proper inference is that he did. If he did, how inexcusable is the bringing of this suit. With $632 available besides the rental, and with less than $345 of debts, because there was then less interest due upon them, the administration of the estate in his own hands was easy and simple. I do not charge the executor with acting wantonly in bringing the estate into this Court, but I am satisfied, assuming the facts to be, as I must take them to be, that he has not acted for the best interest of the estate; that there has been an absence of discretion, prudence, and care, all of which he was bound to exercise when he took upon himself the administration of the estate. It is impossible that I can give him the costs of his unnecessary litigation, and he must pay the infants' costs.

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With regard to the costs of other parties, and to the allowance to the executor under the statute, I am disposed to give neither.

It is suggested that the residue of the land, the two-hundred-acre lot, should be sold under the direction of the Court, inasmuch as its annual produce is not sufficient to pay the annuities, and there is besides the interest on the mortgage. It appears to be necessary that the land should be sold, though its immediate sale is not necessary if there is any good purpose to be served by some delay, and if it should appear to be for the interest of the parties, including the infant, that the sale should be by this Court rather than the executor (who is a trustee for sale under the will), it may be so sold; but if so, it must be at the expense of the estate. I do not think it would be proper to throw the expense of such sale upon the executor. I will receive an affidavit or affidavits upon this point. Judgment.

DICKSON v. COVERT.

Specific performance.

The owner of the land granted to a Railway Company the privilege of crossing his property, in consideration of which the Company agreed, amongst other things, to pay him $400 a year, to carry flour for him on certain favorable terms, and "to bottom out his present mill race from its present unfinished point:"

Held, that this was a contract such as this Court should not decree a specific performance of, or damages for breach of it; but leave the plaintiff to sue upon it at law.

Examination of witnesses and hearing at Peterborough.

Mr. *Blake*, Q.C., Mr. *Denistoun*, and Mr. *Fairbairn*, for the plaintiff.

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Mr. *Strong* Q.C., Mr. *Crooks*, Q.C., and Mr. *Smith*, Q.C., for the defendant *Covert*.

The bill was *pro confesso* against the other defendant.

April 6th. SPRAGGE, C.—This is a bill for the specific performance of an agreement between the parties to this suit, the defendants being therein described as lessees of the Port Hope, Peterborough, and Lindsay Railway Company: it is dated 3rd October, 1865. The first part is an agreement by *Dickson* to permit the defendants to construct a railway through his property, on the west side of the Otonabee River, from Hunter Street across his mill-dam to join and connect with the Chemung Lake Railway: and in consideration of this the defendants agreed to pay to the plaintiff $400 a year, to carry flour for him on certain favourable terms, to "bottom out his present race from its present unfinished point," and to use the excavated material in a particular way. And there are certain stipulations as to the removal of buildings and as to the mode of constructing a railway bridge over the plaintiff's dam: and it is added that the agreement was to be binding in case the defendants "are able to go on with, and construct the railway." Further, "a more formal agreement is to be prepared and executed and consent of mortgagees obtained."

Judgment.

Under this agreement a good deal of work was performed by the defendants, and at a large expense; and on the other hand a building of the plaintiff's which was in the way of the defendants' works, was removed by the plaintiff The bill prays for specific performance, or, in the alternative, for damages under the Statute.

The first question that arises, and one that lies at the very root of the plaintiff's case is, whether this contract is of a nature, that this Court will specifically enforce. I take it to be still the rule of the Court that it will not

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entertain a bill for the specific performance of a contract to execute works; *i. e.*, as a general rule; for there have, of course, been exceptions to it. It is not necessary to go further back than the case of *The South Wales Railway Company* v. *Wythes* (*a*), before the present Lord Chancellor, when Vice-Chancellor; and which was affirmed on appeal by the Lords Justices. The case differed from the one before me in this, that the contract there sought to be enforced was a contract between a Railway Company and some contractors for the building of a branch railway; that it was on a larger scale, and more complicated in its details. Lord *Hatherley* referred in that case to the case of *Ranger* v. *The Great Western Railway Company* (*b*), which was the case of a bill by a contractor against a Railway Company; and in which the language of Lord *Cottenham* was: "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." The question in that case arose upon demurrer which was overruled on the ground that the plaintiff might be entitled to relief in another aspect of the case, and upon an alternative prayer. I refer to the case for the language of Lord *Cottenham*, which was adopted by Lord *Hatherley* in the case before him. Lord *Hatherley*, after quoting Lord *Cottenham*, added, "and I apprehend that there is not any where to be found in the books an instance approximating to such a case as I have before me, in which the Court has been asked to exercise its jurisdiction of specific performance for carrying into effect a contract for the execution of works of a very complicated, and difficult character; and for the non-completion of which contract a remedy

Judgment.

(*a*) 1 K. & J. 186. (*b*) 1 Ry. Ca. 1.

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may be had, and as it seems to me, not only an adequate, but the better remedy in damages."

In the case before Lord *Hatherley*, the difficulties in the way of the Court executing the contract, were certainly much greater than they would be in this case; but, on the other hand, the difficulty of executing the contract in *Storer* v. *The Great Western Railway Company* (*a*) was much less than in this case, yet, as was pointed out by Lord *Hatherley* the Court anxiously guarded itself by pointing out the special circumstances of that particular case: they are thus put shortly in the earlier part of the judgment of Sir *James Knight Bruce*, and he amplifies them afterwards: "It is competent to, and the duty of, this Court to interfere for the purpose of directing the specific performance of a contract, by a defendant, to do defined work, upon his own property, in the performance of which the plaintiff with whom he has covenanted has a material interest—an interest so material that the non-performance is not capable of adequate compensation by damages: such in my opinion is the present case." The work in that case was very simple, being the construction of a "neat archway, sufficient to permit a loaded carriage of hay to pass under the railway," at such place in the pleasure grounds of the plaintiff as he should point out, and forming the approaches thereto; and the learned Vice-Chancellor pointed out that there could be no serious difficulty in the Court seeing to the execution of the contract. Yet he did not make the absence of difficulty the ground of relief; but the special circumstances set forth in his judgment, taking it out of the general rule. But for those special circumstances, it is clear, from the language of Lord *Hatherley*, as well as from that of the learned Judge who decided the case, the judgment would, and ought to have been the other way.

Judgment.

(*a*) 2 Y. & C. Chy. 48.

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The case of *Raphael* v. *The Thames Valley Railway Company* (*a*), in which the judgment of the Master of the Rolls was overruled by Lord *Chelmsford* (*b*), proceeded upon very special circumstances, and does not seem to affect the general principle established by previous cases.

I am referred to *Laird* v. *The Birkenhead Railway Company* (*c*), as an instance of the Court going further to decree the specific execution of works than in former times it was in the habit of doing. The case was before the same learned Judge, as five years before had decided *The South Western Railway Company* v. *Wythes*, and there is not a word in the argument or the judgment pointing to such a change. The decree was indeed for specific performance, but the works had already been executed, and the question was as to acquiescence by the Railway Company.

Judgment.

It is difficult to conceive of a case in which there could be less reason for coming for specific performance, rather than for proceeding at law for damages, than in the case before me. In *Errington* v. *Aynesley* (*d*), the Master of the Rolls, after giving as a reason for the Court refusing to execute a contract for building a house, that if A will not perform it B may, adds "a specific performance is only decreed where the party wants the thing *in specie* and cannot have it any other way." Now, what the plaintiff in this case wants is to have a raceway on his own land "bottomed out" by the defendants and the excavated material used for an embankment; and he wants the money payment stipulated for in the agreement, and if he had still his grist mill, which was burned, it would be an advantage to him, assuming it to be legal, to have his flour carried by the

(*a*) L. R. 2 Eq. 37.
(*b*) L. R. 2 Chy. App. 147.
(*c*) John. 500.
(*d*) 2 Bro. C. C. 343.

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railway on favorable terms. But it was not a railway that he wanted in the sense of wanting the thing contracted for *in specie*, and for that which he really wants, in the words of Lord *Hatherley*, a remedy may be had, and as it seems to me, not only an adequate, but a better remedy in damages. For it would, in my judgment, be in the highest degree unreasonable, under all the circumstances which appear in evidence, for the Court to decree specific performance and direct the defendants to build this railway, the only interest which the plaintiff has in its being built, being the incidental advantages which would accrue to himself from its construction. I apprehend indeed that he could scarcely have looked for a decree for specific performance literally, but hoped rather for a decree for damages under the statute.

Judgment.

The English decisions under Lord *Cairnes's* Act, from which our Act is taken, proceed upon a clear intelligible principle. In *Lewers* v. *The Earl of Shaftesbury* (*a*), Lord *Hatherley*, then Vice Chancellor, said "I have no jurisdiction to deal with the question of damages, as I have held that there has been no agreement established which is capable of being specifically performed;" and in *Ferguson* v. *Wilson* (*b*) before the Lords Justices, damages were refused, because at the time of filing the bill the plaintiff had no equitable title to relief. Lord Justice *Turner* observed that the Act "never was intended, as I conceive, to transfer the jurisdiction of a Court of Law to a Court of Equity. If, therefore (he says), a plaintiff in a suit in Equity had no equitable right at the time of filing the bill * * so that the bill was altogether improperly filed in Equity, I am of opinion that the Act has no application;" and Lord *Cairnes*, in the same case, interprets the meaning of the words that the Court may give damages "in all cases in which the Court of Chancery has jurisdiction to

(*a*) L. R. 2 Eq. 270.

(*b*) L. R. 2 Chy. App. 77.

entertain an application for the specific performance of any covenant, contract, or agreement," to be when there are "all those ingredients which would enable the Court, if it thought fit, to exercise its powers and decree specific performance." In the case before me there are not all the necessary ingredients. There must not only be a contract, but a contract *of a nature* which it is proper for this Court to execute. This contract is wanting in the quality referred to by the Master of the Rolls in *Errington* v. *Aynesley*, and is also of a nature which this Court will not execute for the reasons given by Lord *Hatherley* in the *South Wales Railway Company* v. *Wythes*. It is not a case in which it was a question for the discretion of the Court whether to decree specific performance or not, any more than the last named case was, or any more than would be a contract for the delivery of chattels, not of any peculiar value, and as to which there was no trust.

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Judgment.

But if the case were not open to these objections, but a case in which, to use a common law expression, a suit in this Court "would lie," it is still in the discretion of the Court to give damages, or, as was done, as a matter of discretion before the passing of the Act, to leave the party to his remedy at law. The Court, "if it thinks fit," may award damages. I think this case a much more proper one for damages at law than for a suit in equity; and that it would be a proper exercise of discretion not to retain this suit in equity for any purpose, even if it were of a nature in which specific performance might be decreed.

In dealing with the case I have assumed the liability of the defendants upon the contract, and that the case is not open to the objections upon various grounds other than the one upon which I have proceeded, which have been urged on behalf of the defendants.

In my judgment the bill should be dismissed and with costs.

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SECORD v COSTELLO.

Trustee and cestui que trust.

Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother who was fully cognizant where the money came from and to whom it belonged:

Held, that he was liable to account to the children as their trustee.

The administratrix was afterwards sued by her brother for a debt alleged to have been due by her husband, and judgment was recovered by him in the action, and subsequently a reference was made to arbitration in respect of other moneys come to the hands of the administratrix for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys and the debts of the estate were to be considered and dealt with together; but the infants were not represented before the arbitrators:

Held, that the infants were not bound by the award made under such circumstances.

Examination of witnesses and hearing at Brantford.

Mr. *Strong*, Q.C., and Mr. *McMahon*, for the plaintiff.

Mr. *S. Blake*, and Mr. *Bowlby*, for the defendant *Costello*.

Mr. *E. B. Wood*, for Mrs. *Secord*.

April 7. Judgment

SPRAGGE, C.—The money in question was money recovered under the "Act respecting compensation (as the Act calls it) to the families of persons killed by accident, and in duels." The sum recovered was $12,000, and was apportioned by the jury as follows: $2,400 to the widow of the person killed, and $3,200 to each of his three children. The three children are the plaintiffs in this suit, and the defendants are the widow, who as administratrix of her

husband's estate was the plaintiff in the action, and her brother into whose hands the money recovered was paid.

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I do not think there can be any reasonable doubt that moneys so recovered are trust moneys, and the plaintiff in the action trustee for the parties respectively, for whose benefit the action is brought. These parties might be adults, wife, husband, or parent, of the person killed, in which case it would be the duty of the plaintiff to pay the money in accordance with the verdict. Or, the parties might be infants, in which case it would be the duty of the plaintiff to deal with the money as any trustee is bound to deal with trust moneys of infants.

The plaintiff in the action and her brother strangely misconceived their position and duty. A portion of the moneys recovered was indeed invested, though it would seem rather as a matter of propriety, than of legal obligation, and other portions were dealt with as if they formed part of the estate of the deceased. The evidence establishes very clearly that *Costello* well knew what moneys they were, from whence derived, and on what account they came to his hands.

Judgment.

Costello takes the position that these moneys came to his hands as agent for the plaintiff in the suit, and that, granting her to be trustee for her children, as to the moneys appropriated by the verdict for their benefit, he is accountable to her only, and not to the *cestuis qui trust*. But the rule which he invokes does not apply where, as was the case here, the agent takes upon himself, or has delegated to him, the whole execution of the trust. This has been the rule as long ago as the old case of *Pollard* v. *Downes* (*a*), and has been affirmed since by Sir *John Leach* in *Myler* v. *Fitzpatrick* (*b*),

(*a*) 1 Eq. Ca. Ab. p. 6.

(*b*) 6 Mad. 60.

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by Sir *John Stuart* in *Morgan* v. *Stephens* (*a*), by Lord *Romilly* in *Hardy* v. *Caley* (*b*), and in other cases; and there is this besides, that he concurred with the trustee in plain breaches of trust, mixing the trust funds with other moneys in their dealings; dealing with them as moneys of the estate of the deceased; and again, placing them to his own credit, and so dealing with them as his own. My opinion is that upon the facts disclosed in evidence *Costello* made himself liable, not to the trustee only, but to the *cestuis qui trust*.

I do not think that the arbitration and award are any bar to the plaintiffs' right to an account. Before the reference to arbitration, judgment had been recovered by *Costello* against Mrs. *Secord* as administratrix of her husband's estate. Questions are raised in regard to that judgment which it is not necessary for me now to determine. That judgment, however, with the amount due upon it, was mixed up with questions as to the trust moneys of the plaintiffs at the arbitration, and the award is in respect of all. The whole proceeding went upon the assumption that these trust moneys, and the debts of the estate were to be considered together, and dealt with together; and the infants were not represented before the arbitrators. One of the arbitrators indeed was named by the administratrix, who, to some extent, looked after the interests of the infants in regard to investments made by *Costello*; but except that in shape the interests of the infants were not represented before the arbitrators. Now, assuming that a trustee may submit to arbitration questions concerning the trust estate, it is impossible that *cestuis qui trust* can be bound by an award made under such circumstances, and with such questions before the arbitrators, as was the case in this award.

Judgment.

(*a*) 3 Giff. 226. (*b*) 33 Beav. 365.

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Secord v. Costello.

There are certain parcels of land brought in question in this suit, which are in a very peculiar position. Upon the judgment recovered by *Costello* against the administratrix, three parcels of land which had belonged to the deceased, were sold in execution by the sheriff, and *Costello* himself became the purchaser. These parcels of land were among the subjects referred to the arbitrators, and by their award they directed that they should be conveyed by *Costello* to the three infant children of *Secord*, and *Costello* did convey them accordingly; and *Costello* now submits by his answer that if the award be not held binding, and be avoided, he is entitled to have the same wholly avoided, and to be replaced in his former position touching these lands and otherwise.

Judgment.

Costello appears to me to misapprehend his position. It is not necessary to the plaintiffs having an account that the award should be set aside. They only contend, and I agree with them, that it is not a bar to their relief. It may be a perfectly good award between the parties to it. It is the defendant *Costello* who sets up the award, as concluding the plaintiffs upon the inquiries and accounts sought by them; and he then goes on to say that if it is not a bar to relief it should be wholly set aside. That is not a logical consequence. The plaintiffs are entitled to certain moneys in their own right. These lands descended to them but subject of course to the liabilities of their ancestor, and they were sold in execution to satisfy an alleged liability to *Costello* which has been established by a judgment at law. Upon the arbitration this liability was taken into account; and, as I understand, moneys to which the widow and children were entitled in their own right under the verdict against the Railway Company were allowed by the arbitrators, with the assent, as it is said of the widow, to be retained by *Costello* to satisfy his judgment debt, in lieu of the lands which were thereupon conveyed to the infants the

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plaintiffs. If the judgment was recovered upon a true and just debt due by the intestate to *Costello*, it is not just that his children should have the land, but this suit has nothing to do with it; and the whole difficulty has arisen from the improper mixing up by *Costello* and the administratrix, of the debts, or alleged debts of the estate, and the moneys to which the widow and children were entitled in their own right.

There is one way perhaps in which it may be possible to bring the question of these lands into the accounts, viz., by *Costello* in accounting for money of the infants come to his hands accounting for them *pro tanto* by the conveyance of these lands to the infants. By his purchase at sheriff's sale, and having a sheriff's deed, they were in law his. If his title had been derived in some other way, it would be competent to him to shew that having moneys of the infants in his hands, he had con-

Judgment.

veyed to them (with the assent of their guardian) certain lands by way of an investment of so much money, and it would then be for the court to say, looking at the value of the lands and other circumstances, whether it would be for the interest of the infants to allow the conveyance of such lands as an investment. Having obtained title to them as he did, I apprehend that the Court would require him further to shew that the alleged debt, by means of the recovery of judgment for which he obtained title to these lands, was a just and true debt, and to shew that, as against the infants in the Master's office.

I think he may do this under the general terms of a decree directing a trustee to account, the Master being at liberty, as he is of course, to report specially.

The moneys for which the defendants are to account are the three sums of $3,200 adjudged to the plaintiffs by the verdict. The defendant *Costello* is to pay the costs up to and inclusive of the hearing as he has

resisted the account to which the plaintiffs are, in my opinion, entitled. I give no costs, so far, to or against the defendant Mrs. *Secord*. Further directions and subsequent costs will be reserved. 1870. Secord v. Costello.

SINCLAIR v. BROWN.

Devise of lands contracted for—Revocation.

A testator devised all his estate, real and personal, to his wife. At the time of making the will he was lessee, with a right of purchase, of certain lands on which, after the execution of the will, he paid the balance of purchase money due and obtained a conveyance thereof from the lessor.

Held, that the subsequent acquisition of the fee was not a revocation of the devise, and that the widow was beneficially entitled to the land so purchased; but that the legal estate therein had passed to the heirs-at-law.

Bill to compel the heirs-at-law of a testator to convey, and cause heard by way of motion for decree.

Mr. *Moss*, for the plaintiff, in addition to the cases mentioned in the judgment, referred to *Davie* v. *Beardsham* (*a*), *Potter* v. *Potter* (*b*), *Gibson* v. *Montford* (*c*), *Morgan* v. *Holford* (*d*).

Mr. *Beverly Jones*, for the defendants.

SPRAGGE, C.—The cases to which I am referred, establish, that by a general devise of real estate, lands which the testator has contracted to purchase before the making of his will pass to the devisee; and two of the cases, *Prideaux* v. *Gibbon* (*e*), and *Seaman* v. *Woods* (*f*), April 19. Judgment.

(*a*) 1 Ch. Ca. 39.
(*b*) 1 Ves. 437.
(*c*) 1 Ves. at 494.
(*d*) 1 Sm. & G. 101.
(*e*) 2 Chy. Ca. 144.
(*f*) 24 Beav. 372, 380.

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further establish that the subsequent perfecting of the title by the testator is not a revocation of the devise. It would indeed be against reason that it should be so. The testator having an equitable estate when he makes his devise, afterwards clothes himself with the legal title, I can see nothing in this which should be taken to change the disposition of the land made by the will.

Judgment.

The land in question in this case was held by the testator, at the date of his will, under a Canada Company lease, with right of purchase: an instrument which was held by the late learned Chancellor in *Henrihan* v. *Gallagher* (*a*), to be a contract on the part of the Canada Company to sell to the lessee at any time during the currency of the lease at a fixed price, giving him a lease in the meantime; and I think that Canada Company leases have received the same construction in other cases. *Henrihan* v. *Gallagher* was affirmed upon appeal (*b*). In the case before me the testator paid the purchase money to the Canada Company in his lifetime after making his will, and obtained a conveyance. By his will he left all his estate, real and personal, to his wife. The plaintiff is a purchaser from her, and she has conveyed. His position is that she was entitled as devisee; but that the legal title passed to the heirs-at-law. This bill is for a conveyance by the infant heirs of the testator, the adult heirs having already conveyed to the plaintiff, and I think he is entitled to this. The contract being unilateral makes no difference; the land is realty; and, as was held in *Henrihan* v. *Gallagher*, goes to the heir (in the absence of a devise) not to the personal representative. It follows that it was realty from the moment of the contract, and so was realty at the date of the will, without waiting for the election by the testator to purchase absolutely. The plaintiff must pay the costs of the infants' guardian.

(*a*) 9 Grant, 488.

(*b*) 2 U. C. E. & Ap. 238.

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The parties treated the plaintiff's case as proved in evidence, but I do not find among the papers any of the conveyances, and what is most material, the Canada Company lease and contract of purchase; this, and proof that it was entered into before the making of the will, are essential to the plaintiff's case. Upon the necessary papers being produced, I will direct the decree to be issued.

MILLS v. COTTLE.

Advances to trustees.

A party making advances to trustees for the benefit of a trust estate, and which advances are applied to the purposes of the trust, is entitled to stand *pro tanto* in the place of the trustees as against the trust estate.

This cause was set down for the examination of witnesses and hearing at Woodstock, where the evidence was taken before the late Chancellor (*Van Koughnet*), and the hearing subsequently took place in Toronto before the present Chancellor.

Mr. *Barrett*, for the plaintiff.

Mr. *Moss* and Mr. *Barwick*, for defendant *Barwick*.

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

April 19.

Judgment.

SPRAGGE, C. — The plaintiff's equity is that he advanced money to the defendants as trustees, taking their personal bond for repayment, and that the money so advanced was applied to the purposes of the trust, and he claims to stand *pro tanto* in the place of the trustees as against the trust estate. It is not disputed that money was so advanced by the plaintiff and that it was so applied by the trustees.

1870. Mills v. Cottle.

By the decree made in *Cottle* and *Barwick* v. *Van-Sittart* it was declared that the trustees had a lien upon the trust estate for all moneys paid by them, and for all liabilities incurred by them on account of the trust estate; and by the report made in that cause it was found that they were largely in advance to the estate, and a sale of the estate was directed in order to their reimbursement and to pay the liabilities incurred by them.

I think that the plaintiff has the equity which he claims by his bill. I refer upon this point to the cases cited by me in *Ewart* v. *Steven* (*a*), and to my judgment in that case.

It is objected that the plaintiff should have come in under the decree in *Cottle* v. *Van Sittart*. None could come in under that decree but incumbrancers upon the estate; and this plaintiff did not fill that character, in the ordinary sense of the term, or in the sense in which it was used in the decree in that suit, as is evident from the directions contained in it in the event of their being redeemed, and indeed from the whole scope and tenor of the decree. Neither could this plaintiff come in by petition, as appears by the judgment of my brother *Mowat* in *Slater* v. *Young* (*b*). The plaintiff's equity as against this estate existed before the institution of the suit of *Cottle* v. *Van Sittart*, and is the proper subject of an original bill.

Judgment.

It is said further that the plaintiff might have obtained in that suit, all that he can obtain in this. That could only be by his receiving out of the proceeds of the sale of the trust estate payment of his advance to the trustees, and that through the hands of the trustees, or it may be upon his application to the Court shewing his

(*a*) 16 Grant, 193. (*b*) 11 Grant, 268.

title to a fund in Court. He was powerless to force the parties to act upon the decree, and sell the trust estate, as the trustees themselves were authorized to do. 1870. Mills v. Cottle.

The final order for sale, after report and after default, was made on the 29th of September, 1863, and the plaintiff waited till February, 1869, before he filed his bill, and his personal remedy against the trustees was unavailing, as appears by the evidence of the plaintiff's solicitor and the sheriff. The trust estate has had the benefit of the plaintiff's money, and if he has an equity to be relegated to the rights of the trustees against the estate, as I think he has, he seems to me to be right in enforcing it in this way; the only effectual way in which, as it appears, he can enforce it: he certainly was not bound to wait the result of the very dilatory proceedings in *Cottle* v. *Van Sittart*.

Judgment.

It is objected that *Van Sittart*, the creator of the trust, should be a party. Under the general order he is not a necessary party, and I see no good reason for directing, as a matter of discretion, that he should be made a party. He was principal defendant in the suit of *Cottle* against *Van Sittart*, and in that suit the trust estate was fixed with the liability to pay, *inter alia*, the advance by the plaintiff which is the subject of this suit, and payment was made enforceable in that suit in the way in which it is sought to be enforced in this suit.

Then, what is the plaintiff's right? It is suggested that he is entitled only ratably with others, who are entitled under the trust deed. I think this is so, and counsel for the plaintiff do not, as I understand, contend that he is entitled to more. The proceeds of the trust estate, are of the nature of equitable assets, and being so, should, I think, be distributed ratably. The defendant *Barwick* alleges that two of those to whom the trustees incurred liabilities on account of the trust

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estate have recovered judgments; and that there is an execution against him therefor, in the hands of the sheriff, and he claims that those judgments should be first satisfied, and he expresses his willingness that the plaintiff should afterwards be paid "ratably with the other creditors of the trust estate." I see no reason for this claim. The trustees became, and still are, personally liable to pay the plaintiff his debt in full. In fact all to whom they made themselves liable are entitled to be paid in full. The circumstance of one or more enforcing their debt by action at law, cannot qualify or vary the rights of the others against either the trustees, or the estate in this Court. Mr. *Barwick* asks in effect to be exonerated out of the estate at the expense of those from whom he borrowed money for the purposes of the estate. His position is obviously untenable.

Judgment.

I do not apprehend that there will be much, if any, difficulty in working out the rights of the plaintiff and other parties similarly entitled. It is probable that the debts of all have been proved by the trustees in the other suit in the Master's office. Still it will be proper as a direct remedy is sought by a creditor against the trust estate, and a distribution of it among creditors is directed, that before such distribution all should be notified to come in, *i.e.*, all, if any there be, whose debts have not been proved by the trustees in *Cottle* v. *Van-Sittart.*

The plaintiff is entitled to his costs against the defendants and against the estate: against the defendants because by their default in not repaying him his advance, and by their supineness in carrying out the decree in *Cottle* v. *Van Sittart*, they have made a suit by the plaintiff, or some one in his position, necessary; and against the estate upon the principle that costs of an administration suit are given against the estate.

1870.

WESTBROOKE v. BROWETT.

Suits for trifling amounts—Costs—Practice.

The rule and policy of the Court is to discourage suits for trifling amounts or brought vexatiously: where therefore a bill was filed in respect of a sum not exceeding $10, including interest, the Court at the hearing, without reference to the merits of the demand, dismissed the bill; but, without costs; as the defendant ought, under the circumstances, either to have demurred or moved to take the bill off the files.

Examination of witnesses and hearing at Brantford, Spring Sittings, 1870.

Mr. *Bowlby*, for the plaintiff.

Mr. *V. McKenzie*, for the defendant.

SPRAGGE, C.—I expressed myself fully, and perhaps strongly, at the hearing in regard to the insignificance of this suit, and said my impression as to the proper mode of dealing with it was to dismiss it out of Court. April 19. Judgment.

The sum really due, without interest, appeared to be only between six and seven dollars. It is not clear that upon the arrangement any future interest was to be charged; but assuming that it was to be, the amount would be only about ten dollars.

I am by no means clear that the subject of the suit is not of a nature that is within the jurisdiction of the Division Court, as it certainly is as to amount. "All claims and demands of both account and breach of contract or covenant, or money demand," within certain limits, and with certain exceptions which do not apply to this case, are within the cognizance of the Court; which is to make such judgments, orders or decrees therefor as appear to be just and agreeable to equity

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and good conscience. The matter in question between these parties is a "money demand," and the Division Court Judge is to decide according to equity. I incline to think that the proper forum is the Division Court.

But, assuming this not to be so, there is the old well established rule, that it is an objection to a bill in the Court of Chancery that the value of the subject of the suit is too trivial to justify the Court in taking cognizance of it. Mr. Justice *Story* (*a*) states the true ground of this objection to be that the entertainment of suits of small value has a tendency not only to promote expensive and mischievous litigation, but also to consume the time of the Court in unimportant and frivolous controversies to the manifest injury of other suitors, and to the subversion of the public policy of the land. "Courts of Equity," he adds, "sit to administer justice in matters of grave interest to the parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation."

Judgment.

One of Lord *Bacon's* orders concludes with these words, "and all suits under the value of ten pounds are regularly to be dismissed." And Mr. Justice *Story* assigns to the rule a still earlier date; he adds that a similar rule appears to prevail in the Courts of Equity in the United States, or at least in those which have been called upon to express any opinion upon the subject. In New York, he says, the amount has been recently increased by the Legislature to the sum of one hundred dollars.

This Court has not been called upon hitherto to act upon the rule; but in this case the subject of the suit is so trivial that I must either act upon it or ignore its existence altogether. I am persuaded that the rule is a

(*a*) Eq. Plg. s. 500.

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salutary one: I do not mean particularly the one contained in Lord *Bacon's* orders; as the placing it there was only a formal promulgation of a rule which had existed long before, but that it is a salutary rule upon the grounds upon which it is put by Mr. Justice *Story*.

As to the amount: the costs in this Court are very much smaller than in the Court of Chancery in England; and the costs, in questions of small amounts, do, as a rule, fall within the lower scale of fees. On the other hand it is to be remembered that 250 years ago, when Lord *Bacon's* orders were promulgated, £10 sterling was a considerable sum: and there is the Act of the New York Legislature, which, as an expression of opinion, is of some weight. It was probably passed to discourage petty litigation in Courts of Equity. Further, the practice and rule of decision of this Court being—where not altered—the same as obtained in England when this Court was established, I apprehend that the rule in question became a rule in this Court without any express provision: but if it were not so, there would still be the reasons which Judge *Story* puts as the true ground of the rule in England, and which I should certainly say do apply to the case before me.

Judgment.

The order will be to dismiss the bill, but without costs. I dismiss it, because open to the objection to which I have adverted; and I dismiss it without costs, because the defendant should have demurred, or if that were considered doubtful, should have applied to the Court to take the bill off the files. There is precedent for both courses.

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COTTLE v. MCHARDY.

Equitable dower—Family arrangement—Execution.

A widow having by her conduct parted with her right to equitable dower, in favour of her son, a subsequent creditor of hers, was not entitled to have her dower set out, and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it.

Examination of witnesses and hearing at the Goderich sittings in the Spring of 1870.

This was a suit by an execution creditor of *Mary Ann McHardy*, widow of *Alexander McHardy*, claiming, amongst other things, that Mrs. *McHardy* was entitled in equity to dower in a lot of land in the township of Colborne, and that the plaintiff was entitled to have her interest sold for the satisfaction of his writ.

Statement.

On the 14th July, 1842, *McHardy* leased the lot in question from the Canada Company. The lease was in the form which was at that time in use by the Company; and it contained a provision for the conveyance of the land to *McHardy* on the due payment of the rents reserved (amounting to £110), and the due performance of the lessee's covenants; time was declared to be of the essence of the contract. The lot was at the date of the lease in a state of nature. *McHardy* went into possession; and between that time and 1850, he built some kind of a house on the lot, and cleared from five to ten acres. He made but one payment to the Company. In May, 1850, he went to the United States, leaving his family in possession. He was last heard of in August or September of that year: and he is supposed to have died a few months afterwards. He died intestate, leaving minor children, the eldest eleven or twelve years old, and leaving no means whatever. To save the lot, one *Alexander Ennand*, a relative of

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the family, paid several sums, which the Canada Company accepted, on account of the rent. In 1863, the eldest son of the lessee, namely, *James McHardy*, who was a defendant, applied to the Company for a deed of the lot to himself. He made this application with the knowledge and concurrence of his mother, and she assisted him in the application by making an affidavit which the Company required. The Company thereupon (23rd October, 1863), for the expressed consideration of £110, granted a conveyance to *James*, and it was therein stated that the same was given "upon claim made as eldest son and heir-at-law of *Alexander McHardy*." On receiving the deed, *James* gave a mortgage to the Trust and Loan Company to secure a loan obtained from the mortgagees; and the loan was paid over to *Ennand* in discharge, it appeared, of the advances which *Ennand* had made upon the lot. In 1866 (according to the date given in the bill), *James*, with his mother's knowledge, sold and conveyed half of the lot to one *Gallaher*. That purchase had been completed, and the plaintiff did not seek to disturb it. Subsequently, *McHardy* sold the other half of the lot to *Joseph Tiffen*, who had not paid all his purchase money, and who was a defendant. The debt for which the plaintiff had recovered a judgment against the widow was on a note given in 1866—she said for the debt of another person.

Statement.

Counsel for the defendants made objections to the frame of the bill as to parties; and also contended, that the widow could not claim dower in the property; and that, if she could, her execution creditors could not.

Mr. *Moss*, and Mr. *W. R. Bain*, for the plaintiff.

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

May 18.

MOWAT, V. C.—It was the widow's own wish that her son should get the property from the Canada Com-

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pany, and it was in part by her procurement that he got it. The value of the land, with all the improvements which her son made, appears to be less than £500; her interest in it, as dowress, must therefore have been considerably less than £10 a year; and what took place in 1863, may reasonably be treated as a release or gift of that interest to her son (*a*). The plaintiff was not then a creditor; nor is it suggested that the widow was indebted to any one else at the time; or that for any reason she was not then at liberty to do what she chose with her own; and if, notwithstanding all that had occurred, she had, at the time at which this bill was filed, a right to recall her gift by reason of her ignorance at the time of making it that she had a right in this Court to an interest in the property, it by no means follows that a subsequent creditor of hers had a like right to recall the gift. A gift of land may be defeated by a subsequent sale by the donor for his own benefit; but, if he owed no debt at the time of making the gift, and if the gift was made without any fraudulent intent, a subsequent creditor cannot have relief against the property. It has been held, also, that a creditor cannot avail himself of legal or equitable rights of his debtor which arise *ex delicto;* and that, for example, a right to set aside a conveyance cannot be seised under a sequestration (*b*).

Judgment.

I have said that the widow's interest in the property was at the time of no great value; and I think that the transaction of 1863, by which she, in effect, parted with it, may properly be looked upon as a family arrangement, and may be disposed of on the principles applicable to such arrangements. The father had died having the lease, though he had forfeited his rights under it, and

(*a*) Williams v. Williams, 13 W. R. 734.

(*b*) See Irving v. Boyd, 15 Gr. 157, and cases there cited. Also Roberts v. Toronto, 16 Gr. 236.

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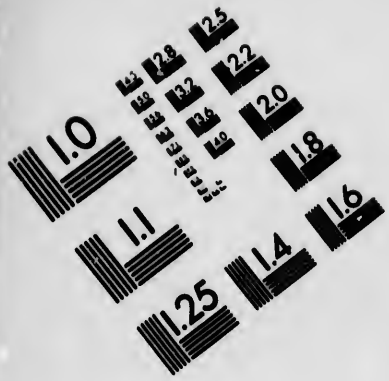
leaving his family in possession of the property. The family had no means of paying for the land, but a friend advanced the money required from time to time; and, after the eldest son had come of age, all united in enabling him to get the deed; and he raised by mortgage the money required to repay the friend. It is not suggested that the widow's co-operation in obtaining the deed was obtained through any fraud, concealment, imposition, or improper conduct of any kind on the part of the son, or that the son was in a position which enabled him to exercise any influence over his mother. All that the plaintiff seems to rely upon is, that the widow, by contributing her quota towards the purchase money, might have insisted on the deed being subject to her dower, and that she was not aware of this right at the time of the transaction in question. But if she was not aware of it, neither was her son; and the rule is, that when a family arrangement "has been fairly entered into without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement" (*a*). In the case of a transaction between even strangers, a mistake in law or fact does not entitle a party to relief unless he is able to satisfy the Court that his conduct was occasioned by the mistake (*b*). But where the parties are strangers, that inference may fairly be drawn from facts which would not warrant the same conclusion as between near relatives. It may be presumed that a stranger would not without consideration have given up a valuable interest if he was aware of the interest; but between relatives the consideration of love and affection,

Judgment.

(*a*) Gordon v. Gordon, 3 Sw. at 463. See Neale v. Neale, 1 Keen. 672; &c.

(*b*) Stone v. Godfrey, 5 DeG. McN. & G. at p. 90.



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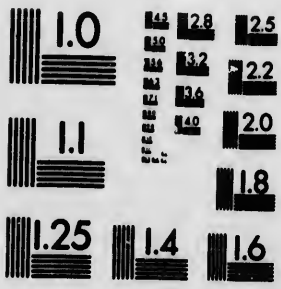

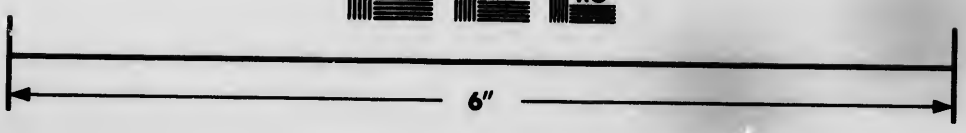

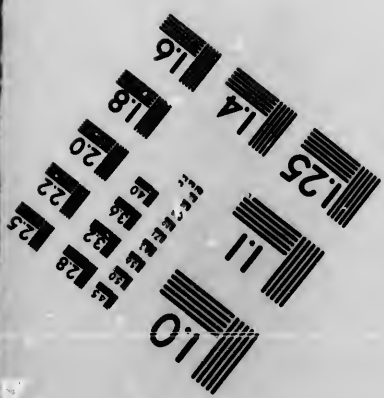

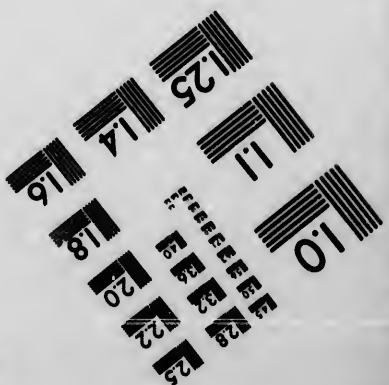

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and the like, has to be taken into account (*a*); and the absence of any other consideration may not be material. In this case, so far from being satisfied that the mistake occasioned the mother's action in favor of her son, I think it extremely probable (looking at her evidence and all the circumstances) that if she had known that she could claim one-third of the lot for her life, subject to paying her quota on account of the purchase money, the knowledge of that fact would not have made the slightest difference in her conduct; that she would not have availed herself of this right, or stipulated that it should be reserved, but would still have consented and desired that her son should take the property absolutely.

Judgment.

It is further to be observed that the son, in reliance on the title which he had acquired, mortgaged the property, improved it, and sold and conveyed part of it, before the plaintiff's claim was set up. In a word, until 1868, when that claim was advanced, the son had been permitted to regard and treat the property as in all respects his own (*b*); and during that period he was contributing, with his brothers, to his mother's support.

I think that under these circumstances a subsequent creditor of the widow cannot disturb his title, and that the bill must be dismissed with costs.

(*a*) Presse v. Presse, 7 C. & F. at 318.

(*b*) See Bentley v. McKay, 31 Beav. at 156, 157.

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NORTHWOOD v. KEATING.

Husband and wife—Altered deed—Onus of proof.

A mortgage, or alleged mortgage, of property of a married woman, was sued upon by an assignee of the mortgagee some years after the death of the husband; the alleged mortgage was a patched document, and the alterations or attached parts were not referred to in the attestation clause, or otherwise authenticated; the widow by her answer impeached the mortgage; and at the hearing swore that she had never to her knowledge executed it, and had never meant to do so, or been asked to do so; the Court believed her evidence; and, the only evidence offered by the plaintiff being as to the genuineness of the signatures, the Court held this evidence insufficient to prove the execution of the mortgage in its then state, and dismissed the bill with costs.

Statement.

This was a suit of foreclosure brought by the assignee of a mortgage, or alleged mortgage, dated 14th April, 1858, expressed to be made between *Thomas Keating*, since deceased, and his wife, the defendant *Mary M. Keating*, of the first part, and *Robert S. Woods* and *William Northwood*, of the second part. The mortgage purported to secure the mortgagees in respect of a promissory note of £140, theretofore indorsed by them for *Thomas Keating*. The mortgaged property belonged to Mrs. *Keating;* and on the mortgage was indorsed a certificate by the County Court Judge as to the due execution by the defendant, &c. The promissory note mentioned was held at the time by the Bank of Upper Canada, and had been overdue for more than a year.

The defendant by her answer disputed the mortgage; and alleged, that she had never to her knowledge signed it; that if her signature was attached thereto it had been obtained by fraud and deception, namely, by procuring her to sign under the impression that she was executing an instrument for some other purpose; that she never had been asked to sign such a document, and had not been informed that she was doing so; that she had never

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received any benefit of the promissory note, or of the moneys which had been obtained thereby, or for which the same had been given; that she had not been aware of the existence of the mortgage until after her late husband's death, or about 30th September, 1864, when one *John B. Williams* informed her that there was such a document in existence; that upon the day on which the mortgage purports to bear date, her husband had requested her to sign a mortgage to secure certain money due to *Robert S. Woods*, and *John B. Williams*, the executors of her father's estate; that she had signed no other document on that day to her knowledge; and that, if her signature had been obtained to the mortgage in question, it must have been so obtained by fraudulently representing the same as being a part of the mortgage to the executors.

The cause having been put at issue came on for the examination of witnesses and hearing at the sitting of the Court at Chatham, in the Spring of 1870.

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

Mr. *McLennan*, and Mr. *Pegley*, for defendants.

Cooke v. *Lamotte* (*a*), *Corbett* v. *Brock* (*b*), *Baker* v. *Bradley* (*c*), *Berdoe* v. *Dawson* (*d*), *Archer* v. *Hudson* (*e*), *Espey* v. *Lake* (*f*), *Blaikie* v. *Clark* (*g*), *Rhodes* v. *Bate* (*h*), *Mulholland* v. *Morley* (*i*), were referred to.

May 18.

Judgment.

MOWAT, V. C.—If the doctrines of equity as to undue influence were the same in the case of husband and wife, as in the case of other relations of confidence

(*a*) 15 Beav. 234–240.
(*b*) 20 Beav. 524.
(*c*) 7 D. M. & G. 597.
(*d*) 13 W. R. 420.
(*e*) 7 Beav. 551.
(*f*) 10 Hare, 260.
(*g*) 15 Beav. 600.
(*h*) L. R. 1 Ch. App. 252.
(*i*) *Ante* page 7.

and influence, the plaintiff's suit must fail (as counsel for the defendant contended) for want of any of the evidence of that independant advice, knowledge, due deliberation, and freedom from influence, which in such cases the rules of this Court make indispensable; but in *Nedby* v. *Nedby* (*a*) Sir *James Parker*, V. C., held that a gift from a wife to a husband was not governed by those rules. 1870. Northwood v. Keating.

Independently of that consideration, has the plaintiff proved sufficiently the mortgage in question? And is he, on the whole evidence, entitled to a decree?

It was proved that on the day on which the document sued upon bears date, the defendant had executed, jointly with her husband, a mortgage of the same date on the same property to the same *Robert S. Woods*, with *John B. Williams*, as stated in the answer, to secure $550, to be paid on the 14th April, 1862, with interest meanwhile half-yearly. Indorsed on this mortgage, there is a certificate to the same effect as on the document sued upon, and signed by the same Judge. This mortgage is in a printed form, and there is nothing irregular or questionable in its appearance, nor has the defendant ever disputed its genuineness. Judgment.

The instrument sued upon presents a very different appearance; and its condition is most unsatisfactory, considering that the instrument is impeached, and that the plaintiff has failed to support it by any other evidence. This document consists of two leaves of unequal length, and united by a wafer. The printed portions correspond with the form employed for the admitted mortgage. The first leaf does not appear to have been part of the same sheet or form as the second leaf, but rather to have been torn off another sheet;

(*a*) 5 DeG. & S. 377.

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and the leaf is in three pieces which are united with gum or paste, the first leaf of the form having been cut in two, and a piece of paper having been inserted between the two parts. On this first leaf so made up are all the material parts of the instrument, the other leaf containing only some of the printed covenants, the attestation clause, the signatures, and the Judge's certificate. The attestation clause contains no reference to the patching of the first leaf, or to the alterations in it; nor is the first leaf identified, nor is any part of it authenticated, by the signatures or initials of the parties or of the witnesses, or in any other way. In the absence of all customary evidence of that kind, ought I to assume, against Mrs. *Keating*, that the whole document, as now altered, patched, gummed, and wafered, is in the same condition as when the second leaf received the signatures which appear upon it? I was convinced, from Mrs. *Keating's* demeanour in the witness box, and from the evidence which she gave there, that she recollected the facts accurately, and stated them truly, and that she had not meant to sign such a mortgage as this, and had not to her knowledge done so; that she had consented to execute the other mortgage; that (for reasons which she mentions) she would not have signed this mortgage knowingly; and that if she signed her name twice, it was under the supposition that its repetition was necessary for the one mortgage for which alone her consent had been given or asked. The plaintiff's counsel admitted that she meant to speak the truth; and they impugned her evidence on the ground only of probable or possible misrecollection and unconscious bias. Believing her evidence as I do, am I, notwithstanding, bound to disregard it, and to hold the whole paper to be established against her by the mere proof of the signatures to the leaf to which the patched and altered leaf, containing the principal parts of the instrument, is now attached by the wafer?

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In the case of a regularly drawn instrument, presenting nothing questionable in its appearance or otherwise, I would be disposed, on grounds of public policy, to hold that the uncorroborated testimony of the mortgagor, however favorably it might impress the Court, ought not to be sufficient to get rid of the mortgage (*a*). But is there any such reason for refusing to give weight to the credited evidence of the party against such a document as this, which does not present the ordinary and recognized safeguards against fraud, and which, if fraudulent, cannot, from the nature of the case, be proved to be so except by the oath of the party?

Judgment.

The general rule in regard to erasures, interlineations, and the like, is, that they are presumed, in case of bills, notes, and wills, to have been made after execution; and in case of deeds, to have been made before execution. But does that rule with respect to deeds apply, however extensive or important the alterations are? Deeds are often executed in one part, without any previous written communication, and without the intervention of any professional person on the part of the grantor or obligor; so that the grantor or obligor may be without the means of shewing the intention, except so far as it appears from the deed. Now, if a deed, executed under such circumstances, is found on inspection to have been origin say, for half a lot of land, and to have been altered striking words out so as to make the deed convey the whole lot; or, if the deed contains an interlineation of an additional lot; or if there is an alteration increasing the amount to be paid from one hundred dollars to five hundred, is the rule of presumption so strong in favor of the rightfulness of alterations as to

(*a*) See Walker v. Smith, 29 Beav. at p. 396; Bentley v. McKay, 31 Beav. 15, 23; Grant v. Grant, 34 Beav. 623; Down v. Ellis, 35 Beav. 578; Hartford v. Power, L. R. 3 Eq. 602; Morley v. Finlay, Coram V. C., James, March 7, 1870 (Weekly notes, 82).

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put on the grantor or obligor, in each of these cases, the onus of proving by independent evidence that the alteration was made after execution? Would it not be far more reasonable to hold that, where an important alteration has been made, and has not been noted in the attestation clause, or otherwise authenticated, as it ought to be, the credited evidence of the party who is prejudiced by the alteration is sufficient, if any extraneous evidence is necessary, to put the party claiming under the instrument to the proof that the document when signed was in the state in which it appears when produced?

In the enumeration of circumstances in which an erasure or other alteration "is most dangerous, and the deed thereby most suspicious," the first two mentioned in *Shephard's* Touchstone (*a*) are, "when it is a deed poll, and there is but one part of the deed; and where the rasure or other alteration is in any material part of the deed." Now there was but one part of this deed; the defendant had not the protection which a counterpart would have afforded her; and the principal portion of the instrument is the patched leaf which has been affixed by a wafer to the leaf containing the signatures.

Judgment.

There were in the case further circumstances which facilitated deception if intended; and there are various facts which make it unjust to put the burden of further proof on the defendant, rather than on the mortgagees or their assignee. No previous application for the mortgage had been made to Mrs. *Keating* by either of the mortgagees, and no communication whatever had been made to her on the subject, except by her husband on the very evening that the mortgage was executed. It was her husband who induced her to give the mortgage, and she had no advice or assistance in the matter from

(*a*) At p. 69.

any one else beforehand. It was her husband who drew the mortgages; Mr. *Wood*, one of her father's executors, was the first of the mortgagees named in each; and it was her husband who brought the Judge and witness to the house at the time of execution; and no one else was present. The memorials were signed by her husband alone, and the mortgages were then by him taken to Mr. *Wood*. Notwithstanding the irregular condition of the instrument in question, Mr. *Wood*, who was himself a practising lawyer, made no communication to Mrs. *Keating* on the subject of the mortgage after receiving it, and she had, in fact, no intimation of its existence, and no opportunity of repudiating it, for nearly five years. On the 17th December, 1863, she was served with two notices of sale, one under each mortgage; but as she knew nothing of such matters, and had heard nothing of a second mortgage, these notices did not possess her of the fact that they referred to more than the mortgage to the executors. The notice put in is a formal document, comprising two closely-written pages of foolscap. Mrs. *Keating* gave, on cross-examination, the following account of these papers: "Two papers were served upon me, the dates were the same, and the amounts, except the difference of $30. *Wood* and *Williams's* names were in one paper, and *Wood* and *Northwood's* were in the other paper. I concluded from the resemblance that they related to the same mortgage; but seeing *Northwood's* name on the one paper surprised me, as I had not heard of his name in the matter before, and I did not know what it meant. When my husband came in, I gave him the papers, saying that I had got them from Mr. *Campbell*, I asked him why Mr. *Northwood's* name was there. He said that when he got the money from *Wood* and *Williams*, *Northwood* was indorser, and that the papers had to be drawn out in that way. I did not ask him for any explanation as to the two amounts. I thought the difference might be costs and interest. I asked him no further questions. When I

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handed him the papers, he said he knew about them, and I think he threw them down as if indifferent about them."

These notices of sale were not acted upon. Mr. *Keating* died in September, 1864; a few days afterwards Mr. *Williams* told Mrs. *Keating* of the mortgage in question, and this was the first time that she really knew of it. She denied then having given such a mortgage, and has so insisted ever since. No demand for it, however, was made on her for five years more; and it was upwards of eleven years after the date of the mortgage, and five years after her husband's death, before any attempt was made to enforce the instrument. During the whole of this time she was in the personal, undisputed, occupation of the property. The present suit was brought on the 6th September, 1869, and a few days before the hearing came on, the subscribing witness to the document died suddenly in Michigan. The Judge by whom the certificate was signed, is living, and was a witness at the hearing. He recollects the occasion of examining Mrs. *Keating* in respect of some deed, but does not recollect more than one deed, or that the document in question, if it was then executed, was in the same state as now. There is no reason for supposing that the subscribing witness, if living, would, at this late period, remember more than the Judge. It is to be borne in mind, also, that the debt which the instrument purports to secure is an antecedent debt of the husband; that the time of paying it was not extended by the mortgage; and that there was no new consideration of any kind for the mortgage. *Keating* had been pressed for security; he gave this instrument in the state in which it is now; and it remained uncommunicated to the defendant and unacted upon for years. (The good faith of the mortgagees I do not question.)

Judgment.

In view of all these circumstances, I am of the clear

opinion that I cannot hold the alleged mortgage sufficiently proved by the mere proof of the signatures to it, against the credited evidence of the defendant. The bill must be dismissed with costs.

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McKelvey v. Davis.

Accommodation indorser—Contribution.

A note, indorsed by *B.* and *C.* for the accommodation of the maker, being overdue, the maker, to provide funds for taking it up, procured another person, *D.*, to indorse for his accommodation a new note, and on applying to his former indorsers for their signatures untruly stated that he had sold goods to *D.*, who would be in funds to take up the note at maturity. The note was taken up by *D.*, who was the first indorser:

Held, that he was entitled to contribution.

D's suit for contribution was not brought for five years, nor until *C.* had become insolvent:

Held, that *B.* must share with *D.* the loss; that he might have had his liability ascertained, and might have paid the amount, before *D.* sued.

Examination of witnesses and hearing at Chatham, at the Spring sittings, 1870.

Mr. *Douglas*, for the plaintiff.

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

May 18.

Judgment.

Mowat, V. C.—The plaintiff and the defendant, with *William* Count *Brockdorff*, were indorsers of a note made by Baron *Jasmund*, bearing date 15th July, 1864, for $450. The plaintiff afterwards paid the note. The maker has absconded; Count *Brockdorff* has become insolvent; and the bill is for contribution by Mr. *Davis* towards the plaintiff's loss. I am satisfied that the plaintiff was an accommodation indorser as well as the defendant; and that as such, on the authority of

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Clipperton v. *Spettigue* (*a*), *Cockburn* v. *Johnston* (*b*), and *Reynolds* v. *Wheeler* (*c*), he is entitled to contribution from the defendant.

The defendant deposed at the hearing, that, when the Baron applied to him to indorse the note, the Baron said that he had got *McKelvey's* (the plaintiff's) name on the note, as he had sold wood to "the *McKelveys*;" and that the plaintiff would have funds in his own hands to take up the note when it became due. I am satisfied from the evidence that these statements of the Baron's were not correct; that he had not sold wood to the plaintiff; and that when the note became due the plaintiff owed the Baron nothing, and had in his hands no funds of the Baron's. The note was made to take up an over-due note which Mr. *Davis* and the Count had previously indorsed for the Baron's accommodation, and to which the plaintiff was no party; and the statement made by the Baron to Mr. *Davis* does not affect the liability of the latter to contribute as prayed.

Judgment.

It was contended that, if the plaintiff had sued earlier, the Count would have been able to contribute his proportion, and that the defendant should not suffer from the delay. The plaintiff had the period fixed by the Statute of Limitations to commence his suit, and it was open to the defendant at any time after the plaintiff had paid the note, and while the Count was solvent, to contribute and pay his one-third, or, if necessary, to institute a suit in this Court for the adjustment of the matter. As he did not do so, he must share with the plaintiff the loss arising from the Count's misfortunes.

The plaintiff is entitled to the usual decree with costs.

(*a*) 15 Gr. 269. (*b*) *Ib.* 577. (*c*) 10 C. B. N. S. 561.

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McRae v. Froom.

Vendor and purchaser—Inadequacy of consideration—Misrepresentation.

A. and *B.* had each a wild lot of land, and they negociated for an exchange. *A.* claimed that his lot was worth $900; *B.*, that his lot was worth $800; they ultimately agreed to exchange, *B.* to pay $100 in money. Neither had any knowledge of the other's lot, but the truth was, that *A's* lot was worth $400 only. *Held*, that the doctrine *caveat emptor* applied, and that *A* was entitled to enforce the contract.

This was a suit for the specific performance of an agreement entered into between the plaintiff and defendant, by which the plaintiff was to convey to the defendant a lot of land in Aldborough in exchange for a lot in Ekfrid, the defendant paying $100 in addition; and it was provided, "that either party withdrawing from the agreement should pay a penalty of $200." The defendant, by his answer, set up three defences: (1), that the plaintiff had misrepresented to him the value of the Aldborough lot; (2), that he represented contrary to the fact, that there was on it sufficient timber for the ordinary uses of a farm; and (3), that the intention was, that either party should have the right of withdrawing from the bargain by paying $200. Statement.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at London, in the Spring of 1870.

Mr. *Barker*, for the plaintiff.

Mr. *Glass*, for the defendant.

As to the first defence—the excessive value which the plaintiff put on his lot—it was proved that the plaintiff's lot was only worth $400; that the defendant's was worth $700 or $800; while the plaintiff had represented his lot

1870. to have been worth $900, and or that assumption of value the defendant was to pay the difference in cash. How the plaintiff came to value his lot so much beyond its value did not appear.

McRae v. Froom.

June 7. MOWAT, V. C.—It is quite clear that inadequacy of price or consideration alone is not a sufficient ground for escaping from a contract. This is laid down in the text books (*a*); and in numerous authorities, some of which I had occasion to state in *Bettridge* v. *The Great Western Railway Company* (*b*).

It is said that there was misrepresentation of value, as well as the inadequacy of consideration. The misrepresentation, however, was not of the sort which relieves a party. Every misrepresentation is wrong and inexcusable in point of morals; but if a party enters into a contract for the purchase of property, it has been thought best that he should be made to abide by his contract, though the opposite party may, in the negociations, have overpraised or overvalued the property. "Our law adopts the rule of the civil law, *simplex commendatio non obligat*" (*c*). A purchaser cannot "obtain any relief against a vendor for false affirmation, of value, for value consists in judgment and estimation in which many men differ" (*d*). It is not suggested that there was any fiduciary relation between these parties, or any inequality. Neither appears to have known the other's lot. Both lots were uncultivated. The defendant's lot was twenty-four miles from the place where he lived and where the bargain was made; the plaintiff's lot was within twelve miles; and the defendant's desire to exchange was on account of the greater

Judgment.

(*a*) Fry on Specific Performance, sec. 279; Dart on Vendors, 3rd ed., 695, 696; Sug. on Vendors, 14th ed., 272.

(*b*) 3 Er. and Ap. at pp. 86, 87, 95; See also Abbott v. Sworder, 4 DeG. & Sm. 448.

(*c*) Sug. V. & P. 14th ed., p. 2. (*d*) *Ib.* 2, 3.

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nearness of the plaintiff's lot. The proposal to exchange appears, from the defendant's evidence, to have begun with himself; and the negotiation is said, by a witness who was present, to have been on the footing of "unsight, unseen." The defendant is a tavern keeper; his house is frequented by farmers from Aldborough, where the plaintiff's lot is; and there appears to have been an interval (the length of which is not stated) between the day on which the exchange was first talked of, and the day on which it was agreed to, and on which the writing was drawn and signed. In such a case, according to the rules of this Court, as well as of Courts of law, it was the defendant's duty to have ascertained for himself the value of the property which he was bargaining for; and not to have relied on the naked assertion of the opposite party. The rule of *caveat emptor* governs the case, and forbids my attaching any weight to the influence which the plaintiff's false asseverations of value may have had on the defendant.

Judgment.

The second defence—that the plaintiff represented, contrary to the fact, that there was on the lot sufficient timber for the ordinary uses of a farm—failed on the evidence. The third defence, as to the right of withdrawing by paying the penalty, was not strengthened by the parol evidence; and it is clear that the penalty clause contained in the writing does not give to either party the right of electing to cancel the bargain by paying the amount named; the penalty is for protection against nonfulfilment, and is not the price of an option by either not to fulfil the bargain. Other points suggested for the defence by the learned counsel for the defendant I disposed of at the close of the argument.

There will be the usual decree for reference as to title of both lots. If the title to both lots is good, the plaintiff will have the costs of the suit, and the contract will be specifically performed. If the title to

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either lot is bad, the matter must come on again for further directions and as to costs. I would be disposed to withhold the costs from the plaintiff; but I find, on looking into the late authorities, that they would not warrant that course (*a*).

Mossop v. Mason.

Sale of good will—Injunction—Laches.

The defendant sold to the plaintiff the good will of the business of an innkeeper which he was carrying on in London in this province under the name of "Mason's Hotel," or "Western Hotel:"

Held, that the sale of the good will implied an obligation, enforceable in equity, that the defendant would not thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel;" and would not resume or carry on the business of an innkeeper, under any name or in any manner, in the premises in question; and would not hold out in any way that he was carrying on business in continuation of or succession to the business formerly carried on by him under the said names, or either of them.

Held, also, that the plaintiff's removal to other premises, fifteen months before the expiration of the term, in consequence of the burning down of the stabling, did not relieve the defendant from this obligation.

On the removal of the plaintiff, the owner of the property induced the defendant to accept a new lease and to resume business, and agreed to save the defendant harmless in respect of his obligation to the plaintiff; the new lease was made on the 1st October; and between that date and the 17th November, the defendant provided new furniture; the plaintiff had some knowledge of the defendant's intention to resume business, and of his proceedings for that purpose; on the 19th November, the plaintiff filed a bill to enforce the defendant's obligation:

Held, that the lapse of time was not such as to be any defence.

Examination of witnesses and hearing at London, at the Spring Sittings, 1870, before Vice Chancellor *Mowat*.

(*a*) See Abbott v. Sworder, *supra*; &c.

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This case had been considered by Chancellor [then V. C.] *Spragge* and Vice Chancellor *Mowat* on the re-hearing of the motion for an interlocutory injunction (*a*), but was again contested at the hearing of the cause at London. It was there contended on the part of the defendant, that the case, as it appeared on the evidence there given, varied materially from the view of the case on which the judgment at the re-hearing proceeded.

The facts which his Honor found to be established at the hearing were these:—The defendant had been an innkeeper in London, Ontario, for many years; had during this period carried on the business in several houses successively; and had been always extremely popular and very successful, up to the time of the sale of his business to the plaintiffs—which is the transaction in question in the suit. He was then carrying on the business in premises which he had leased three years before from *Francis Smith*, Esq., for five years, and which were called "The Western Hotel." An informal note of the agreement between him and Mr. *Smith* had been made in a memorandum book belonging to the latter, and had been signed by both parties. The defendant's object in selling was, as he stated, in order to retire permanently from the business of an innkeeper, and to betake himself to the occupation of a farmer; and it was part of his bargain with the plaintiffs that he should not again go into the business. An instrument was executed by the parties, dated 1st January, 1868, purporting to state the terms of the sale. In this writing it was set forth, that the defendant had agreed to sell to the plaintiffs "all his goods, chattels, effects, and good will of the business theretofore carried on by him, situate at the corner of Mark Lane and Fullarton Street, in the said city of London, and known as Mason's Hotel." The instrument

Statement.

(*a*) *Ante* vol. xvi. p. 30.

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contained no direct covenant by the defendant not to resume business; but he thereby agreed to pay to the plaintiffs $4,000 "liquidated damages," in the event of his "directly or indirectly, continuing, commencing, or carrying on the business or calling of an innkeeper within the term of ten years." The defendant had told the plaintiffs that two years of his term were unexpired, but that he had no lease of the premises, meaning thereby no written lease; and until the following September the plaintiffs did not hear that there was any writing between him and his landlord. It was probable that the defendant had himself forgotten the memorandum until reminded of it then by Mr. *Smith*.

Statement.

The sale was carried out; so much of the purchase money as, according to the agreement, was to be paid down, was so paid; the possession of the premises was delivered to the plaintiffs; the defendant remained with them for a few days to introduce them to his customers; he went then to his farm in the country; and the plaintiffs continued the business under the same name, "Western Hotel," though the place was as before spoken of sometimes as "Mason's Hotel."

From the time of their purchase until 1st July, the plaintiffs paid the rent to the landlord monthly. On the 27th July the stabling was destroyed by fire. Its immediate restoration was necessary, as the inn was chiefly for the accommodation of farmers. The landlord was under no agreement to rebuild; and the plaintiffs found on inquiry immediately after the fire that he was in Europe. His agents declined to do anything, or undertake anything, before his return; and were unable to say where a telegram, which the plaintiffs offered to pay for, would find him. Under these circumstances, finding that certain premises which were then occupied as officers' quarters, but which had been formerly occupied by the defendant, and were as well adapted for the

business as the premises belonging to Mr. *Smith*, or perhaps better adapted, were about to become vacant, the plaintiffs determined to lease them, and to remove their business to these premises. They accordingly took a lease in the latter part of August, and removed to the new stand in the latter part of September.

While the work of removing was in progress, Mr. *Smith* arrived, and manifested much concern at finding his house closed, or about to be, which might be an injury to it that the rent meanwhile would not compensate for. He was therefore desirous of getting a new tenant at once; and the defendant, if he could be induced to resume business, was the best tenant that could be got. Accordingly, to the defendant he applied; and Mr. *Smith* stated in his evidence, that he did all he could to induce the defendant to take the hotel again. For this purpose he told the defendant that he thought he (the defendant) would like hotel-life better than farming; that he (Mr. *Smith*) would erect more extensive stabling than that which the fire had destroyed; that he would make other improvements; would give to the defendant a lease for seven years, at $1,000 a year; and would see him harmless with respect to his obligation to the plaintiffs. Mr. *Smith* had not then taken advice as to the validity of the defendant's covenant, but he thought that the plaintiff's removal to other premises had destroyed both the legal and the moral obligation of the defendant with respect to resuming business. The negotiations seem to have gone on for several days.

Statement.

Meanwhile, viz., on the 29th September, the plaintiffs paid to Mr. *Smith* $200 for the rent up to 1st October, and Mr. *Smith* gave to them the following receipt, written by himself:—

"London, 29th September, 1868.

"Received from *J.* & *T. Mossop*, Esqs., two hundred dollars in full of rent up to the first October instant;

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and I hereby relieve them from any further rents or claims on them for that property known as the 'Western Hotel.' F. SMITH."

Statement.

Up to this time the plaintiffs had expressly refused to give up their right against the defendant with respect to his resuming business. Two days after Mr. *Smith's* release, the defendant accepted and executed a new lease on the terms mentioned, the agreement as to the same having been concluded on the day the lease was executed (1st October), or on the day before. Mr. *Smith* rebuilt the stables; the defendant refurnished the house; and on the 17th November he resumed business in it, with all the advantages of new furniture, with some of the same servants, and under the same name as before. From that time the plaintiffs, strangers in London, had with the old furniture had to compete with the old established hotel, newly furnished, and under the long known and popular landlord whose good will, a few months previously, they had bought, and had come to London relying upon. It appeared from the evidence that the plaintiffs had been more harmed by the defendant's opposition than they would have been by that of any other person who might have succeeded them in the "Western;" and that the injury done to them would not terminate on the defendant's now leaving the business. On the 19th November the bill in this cause was filed.

Mr. *Magee*, for the plaintiff.

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

June 7.

Judgment.

MOWAT, V.C. [after stating the facts as above set forth, proceeded:]—On the rehearing of the motion for an injunction, the Chancellor and myself held that, independently of the express covenant, the sale of the good will implied an obligation on the part of the defendant,

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enforcible here, that he would not thereafter resume or carry on the business of an inn-keeper at, or in the neighbourhood of London, under the name of Mason's Hotel, or Western Hotel; and would not resume or carry on the business of an innkeeper, under any name or in any manner, in the premises in question; and would not hold out in any way, that he was carrying on business in continuation of, or succession to, the business formerly carried on by him under the said names or either of them (*a*). For the reasons for that opinion I refer to the case as reported (*b*).

On the part of the plaintiffs it had been contended before us, that they were entitled to an injunction on other grounds, besides the ground on which we put our judgment. It was argued, for example, that the express covenant was valid, notwithstanding that it contained no limit, or no express limit, as to place; and on that point the Chancellor intimated an opinion that, having regard to the purely local character of the business of an innkeeper, the express covenant between the parties might be read as if it had contained the restricting words "in London." The principle of such a construction seems involved in what was stated by V. C. *Wood*, now Lord *Hatherley*, in *Avery* v. *Langford* (*c*), as being a rule of law, as well as equity: "I think that a Court of law would not hold such a bond to be invalid because the terms of the condition were too large, but would construe that condition with respect to the nature of the trading establishment which was the subject of the sale, and would take it to mean that the defendant was not to set up within this district any trading establishment which would interfere with that of the plaintiff." If general language as to the character of the business may, by means of

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(*a*) Churton v. Douglas (Johns, 197); see cases collected, Lindley on Partnership (2nd Ed.,) 838, *et seq.*; Addison on Contracts (6th Ed.,); 892 Kerr on Inj. 504, *et seq.*

(*b*) 16 Gr., 302.

(*c*) 1 Kay, 663.

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such evidence, receive a restricted construction, why may not the want of express restriction as to the limits within which a business is to be carried on be, on like evidence, supplied, according to the intention of the parties; and the restraint be held in equity to be confined to limits which would interfere with the business sold (*a*)? If the point is not fettered by authorities to the contrary, that would seem the reasonable and proper construction. It was further contended on the part of the plaintiffs that the defendant's conduct in the sale entitled the plaintiffs to relief on the ground thus stated by Lord *Eldon*, in *Crutwell* v. *Lye* (*b*): "A man might stand by and give encouragement, generating a confidence that he would not engage in such a trade; inducing other persons to involve themselves; on the ground of which conduct this Court might interfere;" and *Harrison* v. *Gardiner* (*c*) was referred to by Mr. *Magee* as a case in which relief was granted on that principle. On these and other grounds it was contended that the injunction should be absolute, to restrain the defendant from resuming the business in London or its vicinity, even on other premises and in his individual name.

Judgment.

In reference to an argument offered in *Churton* v. *Douglas*, for debarring a party, who had sold his good will, from carrying on business even in his own name, Lord *Hatherley* said: "How the Court would deal with the case if the business had acquired a reputation under the single name of *John Douglas* alone [who was the vendor], it is not necessary to inquire;" but his Lordship intimated that there might be a case for it. Here the defendant had acquired a reputation for the Hotel under his own name, "Mason's Hotel." That appears to be the name by which the hotel in question was best

(*a*) See Cooper v. Watson, 3 Doug. 413; Mumford v. Gething, 7 C B. N. S., 305.

(*b*) 17 Ves., 341. (*c*) 2 Madd., 197.

known, for it is the only name mentioned in the agreement with the plaintiffs. The other name, the "Western," was the name which the premises had gone by under previous tenants, and which the defendant had merely retained; and a change of that name, the witnesses testify, would be of little service to the plaintiffs as long as the defendant himself was there. 1870. Mossop v. Mason.

But there did not appear on the application for the injunction, and there does not appear now, any reason for supposing that the defendant ever contemplated resuming business in any other premises; so that an injunction in the terms stated in the judgment on the rehearing met all which the case required; and any consideration of other grounds for relief, which if sustained might shew the plaintiffs entitled to a more extensive injunction, seems unnecessary.

Judgment.

The learned Counsel for the defendant contended at London, that *Churton* v. *Douglas* was no authority for restraining the vendor from carrying on business in the same premises, as the injunction granted there contained no such provision. The answer is, that such a restraint was inapplicable there, because the plaintiffs themselves were in possession of the premises; but the learned judge, in his judgment, expressly recognized the principle that the good will comprehended every advantage which the vendor's firm had acquired in carrying on its business, "whether connected with the premises in which the business was previously carried on, or with the name of the late firm," &c.; and that the purchaser of a good will is entitled to that advantage, is stated or assumed in many authorities; amongst the rest in *Crutwell* v. *Lye*, which on another point I have already referred to. Being entitled to that advantage, the purchasers may make it available in any way which suits them; they may endeavor to retain it by carrying on business in the same premises; or to transfer it to other premises in

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which they then or afterwards carry on business. The good will of a business is, in fact, often purchased for the very purpose of transferring it to other premises. I apprehend that, as between the vendor and the purchaser, the latter has as clear a right to transfer to other premises the good will, as he has so to transfer to them goods which he bought with the good will. It has been held, that a covenant by a lessee on assigning his lease and good will, not to carry on the business within certain limits, did not cease to be a binding covenant, even on the expiration of the term, or on the covenantee's death, or on his ceasing, by himself or his assigns, to carry on the business assigned (*a*); and for the contention, that the obligation during the residue of the term, was dependent on the purchaser's continuing the business on the premises, I have been able to find no authority either at law or in equity.

Judgment.

It was further contended, as a justification for the defendant's resumption of business, that the plaintiffs' removal left him without security for the plaintiffs' paying the rent to Mr. Smith, and performing a tenant's other obligations to the landlord. But no such security had been stipulated for; the plaintiffs' ability to fulfil all their obligations does not appear to have been doubted at any time by the defendant; nor is it questioned now. I agree with the learned counsel for the defendant, that the transaction between the plaintiffs and defendant implied a transfer to the plaintiffs of the defendant's interest in the lease, and an acceptance thereof by the plaintiffs; but the defendant had entered into no stipulation with the lessor to keep the hotel open; he might have shut it up at any time; and he might have opened a new house, as the plaintiffs did, without thereby giving his lessor any ground for complaint either at law or here. The plaintiffs were in the same position with

(*a*) Elves v. Crofts, 10 C. B., 241.

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respect to both. The obligations which the plaintiffs were really under as assignees, they fully performed up to the time of the defendant's taking a new lease from the proprietor. From the whole evidence, I have no doubt that the plaintiffs never had a thought of throwing the premises on the defendant's hands, or of subjecting him to any liability, in ease of themselves; and, in fact, I do not see on their part, in act or intention, a tittle of bad faith towards the defendant.

If the plaintiffs had entered into an express covenant with the defendant to continue the business, such a covenant would not necessarily have ope ated, either at law or here, as a condition precedent to the defendant's obligation with respect to his own covenants. That question would have depended on the intention of the parties, as manifested by the language of the instrument. Looking at the instrument which the parties executed, I see no reason for holding that the plaintiffs were not at full liberty to remove to other premises without thereby forfeiting any of their rights.

Judgment.

It was said that the purchase money was based on a valuation of the furniture and other effects only, and included no sum for the good will. But that, obviously, is immaterial. It was the good will which enabled the defendant to sell his goods at a valuation (and a high value is said to have been put upon them). The transfer of the good will with the furniture was the basis on which the negotiation had proceeded from the beginning; and but for the inducement of the good will, it is not pretended that the plaintiffs would have bought the goods, or that the defendant had any expectation of finding a purchaser, on the same terms. The amount having been ascertained, the defendant, in consideration of it, intended and agreed to transfer, and by the instrument which he executed he did transfer, not only "all his goods, chattels, and effects," but also the "good will of the business."

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Then it was contended that there was no evidence at the hearing, of the defendant having represented the business to be the same as before. He had resumed the business two days before the present suit was brought, and thus had not much time to make representations which the plaintiffs were likely to know and to be able to prove. But I think that the business was in fact the same; and that no express representation of its being the same, was needed to give to the defendant all the advantage of its being so considered by his old customers and by the public. It was, confessedly, the same kind of business; it had in view the same part of the public; it was carried on in the same premises; under the same name; and by the same well-known person. A business so carried on cannot be said to be similar only; it was in fact, as well as in name, the same, as much as such a business recommenced after an interval could be the same as the business previously carried on.

Judgment.

The advertisements in the newspapers purported to be the defendant's, and were drawn in his interest; they spoke of the Western Hotel being reopened, and of the defendant resuming the proprietorship—language which was a distinct claim of identity with the former business. Whoever drew these advertisements, I must impute to the defendant the knowledge of their terms after the advertisements appeared, as he never objected to them; he was content to derive from them whatever advantage they might bring to him. If they were put into shape and published without his privity, they at any rate illustrate the view which the writers took, and which the public must have taken, and were intended to take of the new business.

It was further contended, that the plaintiffs' delay from the 1st October to the 19th November, when the suit was commenced, is a bar to relief—the defendant

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having, during this period, bought his furniture and commenced the business. But it is clear that no such defence can be made out from the length of this interval, or from its circumstances, or from the character of the acts relied upon. For the purpose of such a defence, the purchase of chattels is a very different matter from an expenditure on land; and I do not know that the defendant's purchase will entail on him any loss. It does not appear how soon after the 1st of October the plaintiffs knew of the lease having been executed; or of the defendant's proceedings towards refurnishing; or as to how far he meant to go in violating his engagement to the plaintiffs; or how soon the plaintiffs were advised or knew that they had a remedy in this Court—all of which, with reference to a defence of this kind, are very material considerations. The plaintiffs, before the lease was executed, had distinctly refused to give up their rights against the defendant in the matter. The defendant had been told that his undertaking was not valid, and could not be enforced; and what he relied upon was, not any supposed acquiescence of the plaintiffs (which there appears to have been no ground for his imagining), but the mistaken assurance of Mr. *Smith* that the instrument was invalid, and Mr. *Smith's* undertaking to see him harmless. After the plaintiffs had become aware of the necessary facts, counsel had to be consulted, the bill drawn, &c.; and yet in less than two months after the lease had been signed, and on the very day after the first advertisement of the re-opening had appeared, the suit was commenced. Under such circumstances, the defence of acquiescence, abandonment, or laches, is, upon the authorities, out of the question.

Judgment.

On the whole case, I see no ground on which the plaintiffs can be refused relief.

As to the terms of the decree:—The defendant is

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to be restrained as mentioned in the judgment on the rehearing of the motion. There will be an inquiry as to damages, as asked. Also, as to the amount still due to the defendant on account of the purchase money. The interlocutory injunction having been withheld upon condition (amongst other things), that proceedings for the recovery of the unpaid purchase money should be stayed meantime; and the defendant having accepted the condition; I think that, in furtherance of justice, it is competent and proper for the Court now to continue the stay of the action, and to take into account here the amount due. The plaintiffs are entitled to their costs of this suit. The balance in respect of all these particulars will be paid by the party against whom the same may be found.

Judgment.

KELLY v. SWEETEN.

Vendor and purchaser—Writing not naming price—Specific performance—Lapse of time.

Where a writing provided for the conveyance of land on payment of the balance of the principal, not naming any amount, under a penalty of $100, and there had been no part performance: *Held*, that the writing was insufficient for not naming the price, and that it could not be made binding on the vendor, by the subsequent consent of the vendee's heirs to treat the penalty as the price.

A contract in writing for the sale of land had not been acted on during the vendor's life; possession was afterwards taken by the vendee, but no improvement was made. In a suit for specific performance brought by the vendor's heirs against the vendee's heirs after the latter had come of age, evidence was given which threw considerable doubt on the contract:

Held, that the doubt was sufficient to prevent the contract being enforced.

Examination of witnesses and hearing at London.

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

Mr. *McLennan*, for the defendants.

June 22.

MOWAT, V.C.—The bill in this cause alleges that, prior to and on the 9th March, 1837, *John Kelly*, the father of the plaintiffs, and *George Sweeten*, the father of the principal defendant, were equitable owners in fee simple of the property in question, having contracted for the purchase thereof, and the legal estate therein being vested in *William B. Stone;* that on the 9th March, 1837, *Stone* conveyed to *Sweeten*; and that *Sweeten* agreed to hold for the benefit of himself and *Kelly*. These statements of the bill are substantially correct.

Judgment.

It further appears by the evidence, that in the spring of 1837 a partition of the property was verbally agreed to between *Kelly* and *Sweeten*, by which *Kelly* got the east-half as his share, and *Sweeten* the west-half as his share; and that from that time each had sole possession of his own half, living on it, and improving and cultivating it. The reason of the conveyance of the whole parcel being made to *Sweeten* alone does not expressly appear. *Sweeten* seems to have had means beyond what was necessary to pay for his portion of the price; and to have expended part only of these means in the purchase for himself of a lot of land in another township. He and *Kelly* appear to have had together some small transactions besides their joint purchase from *Stone;* and in respect of the consideration paid for the lot which they so purchased, and of their other transactions, *Sweeten* appears to have claimed a balance to be due to him, which he was to receive from *Kelly* before conveying *Kelly's* half of the lot.

The bill alleges, that subsequently to the 9th March, 1837, *Sweeten* agreed to sell to *Kelly* for $100 all

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Sweeten's interest in the property; that, in pursuance and part performance of this agreement, *Kelly* received possession, and thenceforward remained in possession until his death; and that subsequently to the agreement, viz., on the 27th April, 1842, the agreement was put into writing. The bill further alleges, that, after this purchase, *Kelly* made divers and considerable improvements on the property. The suit is by the heirs of *Kelly* against the heir of *Sweeten* for the specific performance of the alleged contract.

To a certain extent the evidence disproves the case thus made by the bill; for it appears, that, if there was an agreement for the purchase of *Sweeten's* interest, it was not of an earlier date than the date of the writing. It is further proved beyond a doubt, that *Kelly* never received possession from *Sweeten* of this half of the lot; that, on the contrary, *Sweeten* remained in exclusive possession of his half until his death on 24th December, 1842; that his widow with their two infant children (of whom the defendant then six years old was one) remained in possession from that time until March, 1846, when the widow (who had married a second time) became a Mormon, and the whole family left the country for Utah; that, until this time, the east-half only of the lot was assessed against *Kelly*, and the west-half was assessed first to the widow and afterwards to her new husband; and that it was not until they had left the country in 1846, that *Kelly* got possession of the west-half. There is no evidence that *Kelly* made any payment on the alleged contract to *Sweeten* in his lifetime; nor to any one else until the family were starting for Utah, if any was made on the contract then. There is no evidence, either, of any arrangements, negotiations, proposals or acts by or between the parties during this period, on the footing of there having been a contract for the sale of the west-half; and it is incorrect that, after *Kelly* had got possession of the west-half, he

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made any improvements on it. Therefore, the question of there having been any purchase by *Kelly* of the west-half depends on the writing of the 27th April, 1842, without any corroboration or confirmation from the subsequent acts of the parties. 1870. Kelly v. Sweeten.

This writing consists of part of one leaf; and there had evidently been something written on the upper part of the leaf, which part has been cut off by a pair of scissors or the point of a knife, leaving the lower parts of a few letters on that portion of the leaf on which the alleged contract is written. The contract occupies only half of one side of the leaf, but is commenced with curious closeness to the top. The learned counsel for the defendant argued, that the whole document was a forgery; that if the document was not a forgery, the upper part may have been an explanatory memorandum, or instrument, which would shew the lower part to relate to the east-half only of the lot. It is not easy to see what memorandum or instrument, likely to be written there, would have that effect. Judgment.

The writing is as follows:

"Brook, 27th April, 1842.

"Know all men by these presents, that I, *George Sweeten*, of the township of Brook, county of Kent, western district, province of Canada West, yeoman, do hereby bind myself, my heirs, executors or assigns, to give to *John Kelly*, his heirs or assigns, a transfer deed of lot No. 21, 14 concession of Brook, county and district aforesaid, when the last of the purchase money is paid, or as soon thereafter as possible, under the penal sum of one hundred dollars lawful money of this province, the said *John Kelly* to pay all the costs of transfer deed. Signed, sealed, and delivered before these witnesses.

his
GEORGE × SWEETEN.
mark.

ROBERT GARDNER,
WILLIAM WHITCRAFT, } Witnesses."

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Assuming this document to be genuine, I have not been able to satisfy myself that it is a sufficient writing to bind the supposed vendor. It does not purport to contain all the terms of the bargain; it does not name the price. It was argued for the plaintiffs, that the price cannot be presumed to have exceeded the penalty; and it was said that the plaintiffs are willing to regard the penalty as the price. But penalty and price are two different things. The vendor could not have insisted on the one being taken for the other; and, though it may now be for the interest of the vendee's heirs to consent to the $100 being regarded as the price, I do not see how their consent now can correct the insufficiency of the writing when signed. There is no evidence whatever as to the price to be paid.

Judgment.

But if the writing had been sufficient evidence of the bargain, it would be impossible to enforce it specifically at this late period, consistently with the settled rules of equity. Assuming the writing to be genuine, I think that the evidence compels me to regard the contract as at most a bargain made, but not acted upon. *Kelly*, not having signed the alleged contract, was not bound by it. Eight months elapsed before *Sweeten's* death without (so far as is proved) any payment being made on the contract; and without any application to him to carry out the contract. *Sweeten's* heirs remained in possession for upwards of three years more, without anything being done towards procuring performance by *Sweeten's* heirs, or towards carrying out the contract on the part of *Kelly* himself. The vendor's heir being a minor, his rights cannot be affected by *Kelly's* taking possession in 1846. The present suit was not brought for twenty-seven years after the contract is alleged to have been made.

The defendant has given considerable evidence which goes to disprove, or throw doubt upon, the plaintiffs'

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case; and doubt alone must defeat a claim to specific performance of a contract which, so far as the evidence shews, was allowed to sleep during the vendor's life, and for more than three years after his death, and which there has been no attempt to enforce for upwards of twenty years more, or until after every one who had a personal knowledge of the bargain (if made) had died. I have already mentioned the deaths of the vendor and vendee. *Gardner* likewise, who drew the document, is dead; and Mrs. *Sweeten* also, who is the only other person stated to have been in the house at the time of the transaction, is dead. *Whitcraft*, who is the survivor of the subscribing witnesses, does not claim to have heard the bargain made, or its terms discussed. He claims to have seen the writing drawn; and to have heard it read before being signed—that is all. The plaintiffs have produced two witnesses besides *Whitcraft:* one of these is *Alexander Kelly*, an uncle of the plaintiff, who testifies to having seen the produced document in his brother's possession, and to have lent him $60 to pay on the purchase. But there is no receipt or other evidence shewing that the payment was made; and one of the defendant's witnesses says that *Kelly* told him when Mrs. *Sweeten* and her family were leaving for Utah, that he had paid money which he had borrowed from this brother, to Mrs. *Sweeten*, for the use of the place during the defendant's minority. The plaintiffs' only other witness is their mother, who testified that she had received the produced document from her husband on the day after *Sweeten's* attack, and had had it in her possession ever since. It does not seem from her evidence that she was aware that the writing embraced the whole lot; nor does her memory seem to have retained any circumstance confirmatory of *Alexander Kelly's* evidence as to the $60.

Judgment.

The plaintiffs' whole evidence is therefore reduced to this—the present existence of a document which was not acted upon for four years after its date, and which,

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if acted on then, was only acted upon by the purchaser's taking possession when the vendor's family, including his infant heir, had left the country.

The fact of the existence of the document seems more than outweighed by the opposite fact of continued possession by the vendor and his family; and there are some other facts in the defendant's favor. The occasion of any writing being executed at the time in question was, no doubt, *Sweeten's* alarming illness, and the fear which *Kelly* and his wife and friends naturally had, that if *Sweeten* died without executing any writing shewing *Kelly's* right to the east-half, *Kelly* might lose his property; and there is not in evidence a scrap of conversation by *Sweeten* from that time indicating that, instead of giving such a writing, he had contracted to sell his interest in the whole lot; or indicating that, within 24 hours after giving the required writing as to the east-half, he sold to *Kelly* the whole lot. Then, two witnesses swear, that in the afternoon of the day of *Sweeten's* attack (April, 1842), *Sweeten*, at *Kelly's* instance, executed a writing agreeing to convey to *Kelly* the east-half only of the lot, on receiving the balance due to him; which balance the one witness calls $18, and the other calls $25. These witnesses seemed to be swearing honestly and to the best of their recollection (a remark which would apply to all the witnesses on both sides). Evidence is given of subsequent conversations with *Kelly*, and of admissions by him, which are inconsistent with the idea of his having purchased and become entitled to the whole lot.

Judgment.

On the whole evidence, I am clear that the plaintiffs have not established such a case as entitles them to a decree for the west-half of the lot. As to the other or east-half, *Kelly* went into sole possession of it in 1837; and he and his heirs have been in possession ever since. If anything was due to *Sweeten* upon this half, the

amount was small, and has been long since barred by lapse of time. There may be a vesting order or conveyance as to this half. As to the west-half, the bill will be dismissed. If the defendant is willing to forego mesne profits previous to the filing of the bill, he may take a decree for the costs of the suit generally; otherwise no costs.

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FORRESTER v. CAMPBELL.

Reforming deed—Registration.

A conveyance may be reformed by inserting additional parcels on clear parol evidence that the omission was by mutual mistake.

The Registry Act of 1865 (section 66) does not avoid an equity against a subsequent instrument which is registered, but was taken with notice of the adverse claim.

Examination of witnesses and hearing at London at Spring Sittings, 1870. Statement.

From the pleadings and evidence it appeared that one *Gilbert McIntosh* executed four mortgages on his mill property at St. Mary's, or on portions of it. The first of these mortgages was to one *William Mayhew*, whose mortgage was afterwards purchased by the plaintiff; the second mortgage was to the plaintiff; the third was to the defendant *Campbell* (a son-in-law of the mortgagor); and the fourth was executed in favor of the defendant *Fisher* (a nephew of the mortgagor) after the plaintiff had become the owner of *Mayhew's* mortgage. The bill was for the rectification of certain mistakes in the two mortgages held by the plaintiff, and for foreclosure.

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

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

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June 22.

MOWAT, V.C.—The plaintiff established, that his mortgage was intended and supposed by both parties to cover the whole of the mill property, including the factory (which was the parcel numbered two in the bill), and the part of the lot number ten on which the mortgagor's house was situate; that by mutual mistake the descriptions in the mortgage did not cover these parcels; that the mortgage to *Mayhew* was intended and supposed by both parties to cover the factory; and that it was omitted by mutual mistake. *Mayhew's* mortgage was to have included the house; and the mortgagor claimed to own that part of the lot as well as the other; but *Mayhew's* solicitor found, or inferred, from the description in the deed to the mortgagor, that it did not cover the house; he thought that the land was wrongly described in the deed; and he followed that description believing that it did not cover the house, but being satisfied that the rest of the property was a sufficient security for the contemplated loan. I cannot say that in the case of *Mayhew's* mortgage there was a mutual mistake with respect to this lot.

Judgment.

I am satisfied that the money was in each case advanced by the mortgagee on the faith and security of the omitted parcels; and that the omissions were not discovered by any one until some time after the mortgages had been completed.

It was suggested at the hearing that the Statute of Frauds made a difficulty in the way of rectification in such a case; but the late Chancellor held otherwise in an unreported case of *Morrison* v. *Roblin* (*a*); a decision which was followed by myself in a case of *The Merchants' Bank* v. *Roblin* (*b*). Both decisions were acquiesced in. The point was not much pressed in the present case; but I have reconsidered it since the hear-

(*a*) Belleville Sittings, October, 1868.

(*b*) Belleville Spring Sittings, 1869. See White v. Haight, 11 Gr. 420.

ing, and am of opinion that the decisions referred to were correct. As against the mortgagor, therefore, the plaintiff would be entitled to the relief which he prays. 1870. Forrester v. Campbell.

The mortgago afterwards executed to *Campbell* included the omitted parcel numbered two, and the mortgage to *Fisher* included the factory. Subsequently to executing the mortgages, the mortgagor sold and conveyed his equity of redemption in all the parcels to *Alfred McDougall*, who holds the same in trust for the plaintiff. The question is, whether the plaintiff is entitled to relief as against the subsequent mortgagees?

Judgment.

First, as to *Campbell:* The legal estate in the omitted parcel two passed to *Mayhew;* and *Campbell's* mortgage, therefore, is of an equitable estate only. He denies notice of the plaintiff's claim; and notice has not been proved against him; but it was contended for the plaintiff that, the interest of both the plaintiff and *Campbell* being equitable, and the plaintiff's equity having arisen before the mortgage to *Campbell*, it takes precedence on the principle that between equal equities the first in point of time must prevail It was answered that that principle does not apply between equities like these; but *Phillips* v. *Phillips* (*a*), and other cases shew that it does apply. I shall speak hereafter of the effect of the registry law as to *Campbell's* mortgage.

Then, as to *Fisher:* I think that it has been satisfactorily established that, at and before the time of taking his mortgage, he had actual notice that the plaintiff claimed the factory as mortgagee thereof, and that the mortgage had been intended and supposed to include the factory. *Fisher*, no doubt, thought that, as it was not covered by the descriptions which the mortgage con-

(*a*) 8 Jur. N. S. 1459.

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tained, the plaintiff was remediless; but that misapprehension of the defendant's is immaterial (*a*).

Then, as to that part of ten on which the house is situated, the matter stands thus: a plan is produced which shews two adjoining lots numbered ten, the two extending along St. Maria street from Thames Avenue (or Thames street) to Water street. The house is on the easterly half of the westerly ten. Both mortgages describe the mortgaged property as the west-half of lot number ten running to Thames street in the said town of St. Mary's; but *Fisher's* mortgage contains these additional words, which are not in the plaintiff's mortgage: "being the property on which is erected the residence of the said mortgagor." (I take the words from the bill, their accuracy being admitted; the mortgage itself was not produced). Now this explanation shews that the land on which the house stood was considered to be part of "the west-half of lot number ten, running to Thames street," or Thames Avenue; and is abundantly sufficient to fix *Fisher* with notice of the plaintiff's rights with respect to this lot. There is other evidence confirmatory of that conclusion.

Judgment.

It was contended, however, that the Registry Act of 1865 makes the plaintiff's equity void as against subsequently registered instruments, whether the parties entitled under these had or had not notice of the equity; and my impression was with the defendants on this point before I had fully considered it. But having considered it now with a view to judicial action, the construction appears to me to be unmaintainable on any solid judicial ground.

The 66th section of the Act of 1865 does not contain any stronger words for excluding notice than the 62nd does; and the enactment in the English and

(*a*) See cases cited, Goff v. Lister, 14 Gr. at 457.

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Irish Acts, as well as in the former Canadian Acts, which corresponds with the 62nd section, has always been held inapplicable to a deed taken with notice of an unregistered interest. The 62nd section provides, that any unregistered instrument "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee." The 66th section is, that "no equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns." The terms of both sections appear to be absolute; and if the judicial construction of the language of the 62nd restricts its operation to cases where the registering party before his purchase or mortgage had no notice of the unregistered instrument, a like construction of the 66th cannot be withheld.

Judgment.

Indeed, there could be no room for argument to the contrary, except for the inference which the 35th section is supposed to afford. That section enacts "that priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration." Now it is to be observed that this section cannot be construed as a full statement of the law, as the Courts are to enforce it; for it does not in terms confine the effect of prior registration to purchases and mortgages for value; and, assuming no change in the old law in that respect to have been designed, the enactment does not indicate an intention to limit the doctrine of notice as previously laid down by the Courts. The settled rule of the Court of Equity in this Province, at the time of passing the Act, was to require proof of "actual notice" (*a*) before the comple-

(*a*) McMaster v. Phipps, 5 Gr. 258; Burgess v. Howell, 8 Gr. 37; McQueston v. Campbell, 8 Gr. 245; Cherry v. Morton, *Ib.* 407; McCrum v. Crawford, 9 Gr. 340; Bank of Montreal v. Baker, *Ib.* 299; Robson v. Carpenter, 11 Gr. 293; Harrison v. Harrison, *Ib.* 303.

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tion of the transaction (*a*); and notice after that time and before registration would not have been sufficient to postpone the instrument first executed. I am not prepared to say that the Court will hold that the law as to the effect of notice in that interval has been changed by the Act, as counsel for the defendants argued that it was; but the words of the enactment favor the contention. Therefore, if that section made any change in the previous law, it was by giving a more extensive effect to notice than the Courts had previously given.

Judgment.

If the 65th section was not intended to be a complete and an exact statement of the law with respect to the matter to which that section relates; neither is it possible to ascribe that purpose to the 66th section. That section purports to avoid, as against a registered instrument, every "equitable lien, charge, or interest." But it is quite certain that the Legislature did not thereby design to avoid every such interest as against registered instruments with notice; for equitable interests may be, and generally are, created by writing; conveyances and mortgages of equities of redemption, interests arising under trust deeds, written contracts for the purchase or sale of land, are some of the familiar instances; and no one can suppose that there was any intention of putting these on a different footing from legal interests arising under like instruments. Often, indeed, the same instrument gives a legal interest to one, and equitable interests to others. If, therefore, the Legislature did not mean to avoid all equitable interests as against registered instruments with notice, I do not think that I am at liberty to disregard the general words employed; to conjecture that the Legislature contemplated avoiding, notwithstanding notice, some particular class or classes of equitable interests; and to hold that, while under this section some interests are to be excluded notwithstanding notice, others are not to be excluded.

(*a*) McCrum v. Crawford, 9 Gr. at 420; &c.

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The possibility of the Legislature having meant equitable interests not created by or founded upon any instrument may be suggested. But if the broad distinction which the enactment appears to make was not intended, there would be no propriety, but (on the contrary) great danger, in spelling out from the Act a more recondite distinction, and in giving to it the effect contended for as to notice. Unless the Legislature has expressly said so, I cannot assume that the distinction contemplated was, between, on the one hand, cases where there was some sort of writing, however informal, and whether capable of registration or not; and, on the other hand, cases where there was no writing of any kind. In the former class of cases, the non-registration may have been from the gross negligence of the party; and in the latter class his want of a writing is often a mere misfortune, and may arise from fraud on him, or from mistake or the like, for which no sort of blame is attachable to the party whose equity is to be considered. There has long been a difference of opinion among legislators and jurists as to whether notice should be admitted in any case against a registered title; though the present law has maintained its place hitherto in Great Britain, as well as in most or all of the American States; and there is undoubtedly much to be said in its favor. But if notice is to be admitted at all, a distinction between equities arising under an instrument, and those arising from fraud, mistake, or misfortune, would be arbitrary; would be maintainable, I humbly think, on no sound principle of public policy; and is not likely to have been resolved upon by the Legislature.

Judgment.

It being quite certain, therefore, that some equitable interests are not avoided, or intended to be avoided, against registered instruments with notice, the section must be limited in that way as to all equitable interests. And such instruments without exception being made void as against "registered instruments," that expression must be construed as meaning instruments for value without

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Forrester v. Campbell.

notice. I think that the two sections must be regarded as substantial affirmances of the existing law; as consolidated and other statutes often embody the doctrines previously laid down by the Courts.

For the present case, it is only necessary to hold that there is nothing in the Act to affect the plaintiff's equity to have his mortgages rectified as against *Fisher*, who had notice of them; and, being of that opinion, it is not necessary for me to consider whether, if my construction of the statute had been different, *Fisher* should, under all the circumstances, have leave to file a supplemental answer to set up the defence. *Campbell* (so far as appears) had no notice, and therefore should not, I think, be excluded from making the defence of the statute; but the plaintiff will have the usual opportunity of shewing that the omission to set up the defence by the answer has prejudiced him; and on being satisfied of the fact I shall give such directions as justice may require (*a*).

Judgment.

Decree for rectification as against *Fisher* with costs. Redemption and foreclosure on usual terms.

GORHAM v. GORHAM.

Administration suit by residuary legatee—Costs—Separate solicitor for other residuary legatees.

In a suit by a residuary legatee for the administration of an estate the plaintiff represents all the residuary legatees: and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the Master's office: to entitle them to such costs some sufficient reason must be shewn for their being represented by a separate solicitor.

This was a motion on the part of the plaintiff to vary minutes.

(*a*) McGregor v. Boulton, 12 Gr. at 294; &c.

1870.

Gorham v. Gorham.

Mr. *McLennan*, for the motion.

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

Mr. *Scott*, for the residuary legatees, other than plaintiff.

June 22.

MOWAT, V. C.—This is a suit by a residuary legatee for the administration of the estate of the testator. Two of the other legatees appeared in the Master's office by a separate solicitor; and this solicitor was afterwards appointed by the Accountant to act for all the residuary legatees other than the plaintiff. It does not appear from the report that there was any diversity of interest between the plaintiff and these other residuary legatees, or that there was any reason for naming a second solicitor to represent them. The report does not mention when the appointment was made. It is said on the one hand, that it was made on the return of a warrant for considering the decree; and on the other hand, that the other parties to the suit, or some of them, were ignorant of the appointment of the second solicitor before the Accountant mentioned the fact in his report. There may have been good reasons for there being a separate solicitor, though no reason is stated. I cannot gather from the report whether the Accountant appointed a separate solicitor, because he considered a separate solicitor necessary; or, merely because he thought that, if the other legatees were to appear separately, it would be better, as between themselves, that they should be represented by one solicitor, rather than by several solicitors.

Judgment.

I think that the general estate cannot be burdened by a second set of costs unnecessarily. In *Stevenson* v. *Abington* (*a*) no question was raised as to whether

(*a*) 11 W. R. 936.

1870.

Gorham v. Gorham.

all the residuary legatees were sufficiently represented by the plaintiffs; and there may, therefore, have been circumstances which made a second solicitor proper, and which are not reported. I have no doubt that other cases may be found in which a second set of costs has, without objection, been allowed to those residuary legatees who were defendants. But where a question is raised upon the point, I do not see how the Court can allow out of the estate, a second set, as of course, without any reason for the allowance. The general orders (*a*) provide that, where two or more defendants defend by different solicitors under circumstances that by the law of the Court entitle them to but one set of costs, the taxing officer, without any special order from the Court, is to allow but one set of costs; and in the present case, as it might not be just, on the materials before me, to decide the question raised, the decree may contain a direction to the taxing officer to tax the costs of those residuary legatees who are defendants, in case they shall appear entitled to be represented by a separate solicitor at the expense of the general estate. Otherwise their solicitor's costs must be paid by those by or for whom he was authorized to act.

Judgment.

(*a*) No. 315.

1870.

ROE v. STANTON.

Solicitor—Negligence—Costs.

It is the duty of a solicitor before commencing a suit to examine the instrument on which the suit proceeds; or, in case of its loss, to use due diligence in resorting to the means of information which are open to him, and to which he is referred by the client.

Where this duty had been omitted, and the instrument sued upon had in consequence been set forth so incorrectly in the bill, that the proceedings were useless, and had to be abandoned after decree, the solicitor (though he had acted in good faith) was held not to be entitled against his client to the costs of the suit.

On the 4th April, 1870, the plaintiffs' solicitor obtained, on petition, the usual order against the plaintiffs for the taxation of his costs. On the 5th May the Master reported that he had disallowed the whole bill. The solicitor appealed against this report; and the appeal was argued before Vice Chancellor *Mowat*, on the 25th May. The ground of disallowance was, that in consequence of an error in the bill of complaint, the solicitor's proceedings had been entirely useless to the plaintiffs, and that in the Master's opinion the error was such as to deprive the solicitor of his right to the costs. The uselessness of the proceedings was admitted, and the question argued was, whether, and how far, the solicitor was to blame for the error. Statement.

The suit was on a mortgage executed by the defendant to the plaintiff *Charles Roe*, to secure to the co-plaintiff *Margaret Hall* an annuity of $180 for her life; being the interest on £500, which had been bequeathed by a relative of Mrs. *Hall*, and to the interest on which Mrs. *Hall* was entitled for her life. The instructions for the suit were given verbally by Mrs. *Hall* to a solicitor associated in business with the appellant, though he was not sharing profits. The mortgage had been lost, but she was not aware of the loss at this time.

1870.

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In order to get the trustee's authority to file the bill in his name, the firm wrote to him informing him of Mrs. *Hall's* instructions "to take proceedings to recover the interest due on a certain mortgage made by," &c., and asking him for the necessary authority. In a postscript they added: "If you have mortgage send same to us." Mrs. *Hall* also (it appeared) had written to Mr. *Roe* on the same subject; and on the 26th November that gentleman wrote to the solicitors the following letter: "I am in receipt of a letter from Mrs. *Hall* requesting me to instruct you to take proceedings against *James Stanton* for the recovery of six months' over-due interest on a mortgage I hold in trust for her; and I hereby authorize you (at her request) to take such steps in my name as you may deem necessary. The mortgage I have not got, but it is recorded all right, and Mr. *McMillan* of London can give you all the particulars you want to know about the property, as he has already served *Stanton* twice on same mortgage for Mrs. *Hall*."

Statement.

Whether the solicitors did anything towards getting this further information before filing the bill, did not appear from the affidavits filed, or from the papers put in. They were under the erroneous impression that the mortgage was for both the principal sum of £500 and the interest; and that by the terms of the instrument on a default in paying an instalment of interest, the principal became due; and they seemed to have acted on this impression without further inquiry. But Mrs. *Hall*, in her conversations with the solicitor, had not claimed to be entitled to the principal, or to more than the interest for her life. This appeared from her affidavit; and the opposing affidavits did not conflict with hers on that point. It was contended that the supposition which the solicitors were under, though it was erroneous, yet was reasonable. This contention rested in part on the language of a power of attorney drawn by the solicitor, and executed by Mrs. *Hall*, in which she professed to

1870.

Roe v. Stanton.

authorize the solicitor to collect "the principal money and interest which is now due, or may hereafter grow due upon a certain mortgage [describing the parties], and upon payment of the said mortgage in full to execute a statutory discharge thereof." This power was dated 16th October, 1866. The solicitors' erroneous supposition, it was alleged, had been confirmed by the way in which Mr. *Roe* answered the solicitors' letter, speaking in his answer of six months' arrears of interest. The memorial of the mortgage mentioned the consideration as £500; and stated the proviso to be for payment "of certain sums of money in the said indenture mentioned and set forth." It did not appear from the affidavits whether the solicitors first had a copy of this memorial before or after filing their bill. The bill was filed on the 5th December; and it stated, in accordance with the erroneous impression which the solicitors had of the mortgage, that it was "for securing payment of the sum of £500, and interest at nine per cent. per annum, in trust for" the said *Margaret Hall;* and that by reason of default in paying half a year's interest, the whole principal sum of £500 had become due. On the 5th March, 1870, the usual decree was obtained on *præcipe*, directing the Master to ascertain the amount due on the mortgage, and the accounts due to other incumbrancers; and providing that in case of payment thereof the mortgaged premises should be reconveyed to the mortgagor. The solicitors, on sending to Mr. *Roe* for an affidavit to be used on the reference, became aware of the error into which they had fallen; and they in consequence found, or considered, it necessary to abandon the suit, after having made some abortive attempts to remedy the error, the practical effect of the decree if proceeded with being, as one of their affidavits stated, to entitle the mortgagor to a reconveyance on payment of arrears only, and to leave future instalments of the interest or annuity without any security. A new suit was subsequently brought.

Statement.

1870.

Roe v. Stanton.

Mr. *Munro*, for the appellant.

Mr. *Smart*, contra.

June 22.

MOWAT, V.C., [after stating the facts as above set forth.]—The question is, were the solicitors justified in acting on their erroneous supposition as to the terms of the mortgage? and I think that the authorities make possible but one answer to the question.

Thwaites v. *Mackerson* (*a*) was an action by an attorney for the costs of bringing a suit which failed in consequence of a marriage settlement not having the effect which the client had represented. The attorney had been told where the settlement was; but, relying on the client's representation, he had not looked at the settlement before bringing the suit. Lord *Tenterden*, on this state of facts, laid it down that "as the plaintiff knew where the deed was, it was his duty to see it before he brought his action, and not to trust to his client's representation as to the legal effect of a deed." The verdict was for the defendant.

Judgment.

Long v. *Orsi* (*b*) proceeded on the same principle. The attorney there had received from the defendants instructions by letter to sue the acceptors on five foreign bills of exchange which were of the same dates, tenor, and sums; and which the defendant's letter represented to be "unpaid, and duly protested in our hands." A copy of one of the bills accompanied the letter. The attorney assumed that the defendants had authority to sue thereon as assignees; and accordingly they commenced an action in their names without seeing the bills. On subsequently seeing the bills, they found that there was no special indorsement to the defendants, as was required by the law of France, which law governed the bills.

(*a*) 3 C. & P. 341. (*b*) 18 C. B. 610.

The suit had in consequence to be discontinued. The attorney sued for the costs of this suit and of another. There was a verdict for the plaintiff with leave to move, and on making absolute the rule which was moved accordingly, *Jervis*, C. J., said: "It was his (the attorney's) duty to see the bills before he took any steps. He would then have known that the action could only be brought in the names of *Cusin, Legendre & Co.;* and so the expense of the first abortive action he brought would have been avoided." *Cresswell*, J., concurred, and pointed out that the attorney "was obliged to guess at something, to justify him in suing out the writ against *Simpson*" (the party sued).

The solicitors in the present case could not see the mortgage, but it was incumbent on them to possess themselves of its terms by resorting to the means of information which were open to them. The bill in the former suit gave the information accurately; and the solicitor by whom it was filed could no doubt have given the information on which it was prepared. Mr. *Roe* himself could probably have given it if these sources of information had been wanting. But, unfortunately, the solicitors were content with what they knew already. They expected that the mortgagor would have paid the debt, as he had done the previous instalments when sued; and they considered that the accuracy of the statements in the bill was therefore not very material. That is represented as one reason of the course which they took. But it would not be just that the client should suffer in costs for such a reason; and accordingly such an excuse was expressly held in *Cox* v. *Leech* (*a*) to be insufficient. I refer also to *Stokes* v. *Trumper* (*b*).

Judgment.

The good faith of the solicitors is not impeached; but good faith does not relieve from the duty of due diligence.

(*a*) 1 C. B. N. S. 617.

(*b*) 2 K. & J. 232.

1870. I think that the Master's report is correct, and that the appeal must be dismissed with costs.

Roe v. Stanton.

TYRRELL v. ROSE.

Landlord and tenant—Absconding debtor

A tenant absconded leaving rent in arrear, whereupon the landlord levied upon the goods of the tenant under a landlord's warrant, but before selling, the tenant sent to the landlord, a power of attorney, authorizing him to dispose of the property; and by letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof and of the claim of the plaintiff to remit the balance to the tenant. Upon receipt of this power the landlord abandoned proceedings under his warrant, and disposed of the property under the power of attorney. In a suit brought by the plaintiff, it was *held* that the landlord by his proceedings under the power of attorney had not waived his right to payment of the rent due by the absconding tenant, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power.

Statement. In the month of May, 1866, the defendant *Horton*, who had been a hotel keeper at the village of Morrisburgh, and a tenant of the defendant *Rose*, suddenly left for the United States, leaving household furniture in the hotel, the land and buildings being the joint property of *Rose* and one *James W. Cook*. The plaintiff and defendant *Rose* both claimed to be creditors of *Horton*, *Rose's* claim being for rent of the house, and the plaintiff's claim being for money lent.

Shortly after his departure *Horton* wrote a letter to *Rose*, dated 18th June, 1866, enclosing an instrument under his hand and seal, whereby he constituted *Rose* his attorney to dispose of the property which he, *Horton*, had left in the hotel, and to sell and assign as he should

see it the residue of *Horton's* term under his lease of the hotel. 1870.

Tyrrell v. Rose.

By this letter *Rose* was directed by *Horton* to pay himself his claim for rent and for his expenses and trouble, and after paying plaintiff's claim, to remit the residue to *Horton*.

Shortly after *Horton's* departure, *Rose* had *Horton's* effects seized under a landlord's warrant, but on receipt of *Horton's* letter and power of attorney withdrew the proceedings under the landlord's warrant. *Rose* subsequently disposed of the property, and, as he asserted, the proceeds were not sufficient to cover his own claim for rent and his disbursements, together with his charge for his own services, leaving nothing whatever to apply on the plaintiff's claim.

The plaintiff contended that the effect of *Horton's* letter of the 17th June and the power of attorney was to make *Rose* a trustee of *Horton's* goods for the following purposes: first, to reimburse *Rose* the expenses connected with the execution of the trust; second, to pay the plaintiff the amount due to him from *Horton*; and lastly, to pay the residue to *Horton*. Statement.

It was contended on the part of the defendant *Rose*, that his own claim for rent, including a sum due by one *Empy*, a prior tenant, had priority, and that it exhausted the proceeds of the sale of *Horton's* property, and that the plaintiff had no claim upon *Rose*. It was further contended on *Rose's* behalf that as the holder of a prior lien he should be allowed his costs of this suit in addition to his claim in the taking of accounts, if it should be found necessary to direct the taking of accounts.

The cause was heard before Vice Chancellor *Strong*, at the Sittings at Cornwall, in May, 1870.

1870.

Tyrrell v. Rose.

Mr. *J. Bethune*, for the plaintiff.

The *Attorney General* and Mr. *D. B. MacLennan*, for defendant *Rose*.

The defendant *Horton* did not appear.

June 24.

Judgment.

STRONG, V.C.—I think the effect of the power of attorney and the letter of the 18th of June, 1866, and the subsequent communication of these documents to the plaintiff, was to constitute the defendant *Rose* a trustee of *Horton's* interest in the goods; but I am clearly of opinion that this trust was to pay Mr. *Rose's* own debt, including arrears of rent due by the former tenant *Empy*, for which *Rose* could have distrained, in the first place; and then to apply any surplus which might remain in paying off *Tyrrell;* the ultimate residue, if any, to be handed over to *Horton* himself. I think this clear from the letter of the 18th June; from the evidence and from the facts of the case; for it would be absurd to suppose that Mr. *Rose* ever intended without consideration to waive his own right of priority to be paid out of the goods in favour of Mr. *Tyrrell*. Having accepted the trust, as I find he did, it became Mr. *Rose's* duty to execute it with all convenient speed. The decree will direct a reference to the Master to take an account of the trust estate; of the expenses of executing the trust; and of the amount due to defendant *Rose* either by *Horton* or by *Empy*, so far as he could have levied a distress on the goods, which would involve the question of Mr. *Rose's* right to distrain for arrears of rent due from *Empy*, and also an account of the amount due to plaintiff for principal and interest.

The subsequent transaction between *Rose* and *Horton*, through the intervention of *Swan*, seems to have resulted in a purchase by *Rose* of *Horton's* interest in any residue which might remain for $100. Further directions and costs must be reserved.

SMITH v. SEATON. 1870.

Will, construction of—Time of payment—Interest—Charitable gifts out of special fund.

Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realised; and from and out of the same, when so realised and invested in the whole, and thus available for division, and not before, to pay certain legacies:

Held, (1) That until the whole was realized the legatees were not entitled to interest.

(2) That mortgages properly secured, which the testator held, should for the purposes of the will, be deemed to be realised and invested immediately after the testator's decease.

(3) That the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realised, and

(4) That the trustee could not prolong the period by selling the real estate on time.

The testator gave £3000 to Trinity College, and £1000 to Trinity Church, both to be paid out of certain gas stock. By a codicil he reduced the latter bequest to £500, and gave to two other churches a further sum of £500:

Held, that this sum was to come out of the gas stock.

Statement.

This was a suit to obtain the opinion of the Court on the construction of the will, and codicils thereto, of *Enoch Turner*, who died on the 5th January, 1866. The will was dated 14th February, 1858. There were several codicils.

By his will, the testator gave all his real and personal estate to his executors on the following trusts: that the trustees or trustee should, with all convenient speed after his decease, call in and convert into money his said personal estate (except his stock in the Toronto Gas Company); and should, but at such time and times only as to them should seem fitting and beneficial to the estate and trusts so to do, absolutely sell and dispose of his real estate, either entirely and altogether, or in lots

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and parcels, by public auction or private contract; and he directed that the trustees should stand and be possessed of the proceeds, and of the produce of his personal estate, and of the rents, issues and annual or other products thereof respectively until sale, upon trust, to lay out and invest the same (always excepting any sum that might be required to make up the annual income to be paid to his wife as thereinafter mentioned) in and upon such stocks, funds, or securities, as they might, in their discretion, think proper; with full power to vary the investments so to be made, and already made, from time to time, for any others of the same or the like nature, as they might think fit; *such investments to continue to be made until the whole of his property should be realised;* and, with regard to his estate so to be realised and invested, his will was, that his said trustees should, from and out of the same *when so realised and invested in the whole*, and thus available for division, *but not sooner*, pay the following bequests, viz.: to *Eleonora Hulme* £2000; to *William Turner* £2000; to *Alice* and *Martha Turner* £1000 each; and to *David William Turner* £500. [Variations in the amounts so bequeathed were made by the codicils]. Provided always, that his trustees should take care to hold a sufficient amount of investment to make up, from the proceeds of the same, the yearly income bequeathed to his wife, in case of the insufficiency of the returns from his gas stock—which he specially appropriated for the payment of the said yearly income to his wife. The residue of his estate he bequeathed to the children of a deceased brother and sister; and he declared that it should be lawful for his trustees or trustee to allow any part or parts of his personal estate to remain in their actual investment at the time of his decease at their or his discretion; and that it should not be necessary for his said trustees to sell his real estate until they should, in their discretion, think proper so to do; and he directed that until the same should

Judgment.

be sold, his trustees should apply the rents in the manner in which the annual income of the moneys to arise from the sale thereof would be applicable if the same were sold. 1870. Smith v. Seaton.

The testator's widow died less than a year after the testator, viz., on the 2nd December, 1866. The pecuniary legatees above mentioned claimed to be entitled to interest on their legacies after a year from the testator's death. This claim was resisted on the part of the residuary legatees; on whose behalf it was insisted that the estate had not yet been completely realised, and that the legacies were not payable, or interest thereon chargeable, until such complete realisation.

Mr. *Fitzgerald*, for the plaintiff, the trustee and executor.

Mr. *J. Duggan*, Q. C., for *Samuel Turner*, a residuary legatee.

Mr. *Crooks*, Q. C., for the other residuary legatees.

Mr. *Crombie*, for *Eleanora Hulme*.

Mr. *Bain*, for the defendant *Seaton*.

Mr. *Osler*, for the Trustees of *St. Peter's Church*.

Mr. *C. Moss*, for the Trustees of *St. Paul's Church*.

June 27.

Judgment.

MOWAT, V.C.—I think it quite clear that the testator meant that the legacies should not be paid until the whole of his estate was realised and invested; and, though such a provision is inconvenient, and the intention must therefore be distinctly expressed in order to have effect given to it, yet such an intention is not opposed to any rule of

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law, and, when distinctly expressed, must be carried out. I refer to *Elwin* v. *Elwin* (*a*), *Bernard* v. *Mountague* (*b*), and *Law* v. *Thompson* (*c*). I have looked into all the cases cited on behalf of the pecuniary legatees; and I am satisfied that these cases contain nothing which would justify my adopting a different construction.

But the period is not to be extended beyond the time when the realisation might, with due diligence, have been effected (*d*).

Those portions of the estate which were in a proper state of investment at the testator's death are to be considered as realised from that time (*e*); and I think that mortgages may be treated as a proper investment. Previous to a late Act, it seems to have been a doubtful point in England whether trustees could safely invest in mortgages (*f*); but in this country that mode of investment has been adopted of necessity, by the Court itself as well as by private trustees. The will here authorizes investments to be made in "securities."

Judgment.

The trustee in his deposition states that within a year after the testator's death, all his personal estate was converted into cash with the exception of his mortgages, and of a small note of $30. Only one of the mortgages appears not to have been a good security for the mortgage money, namely, the *Beard* mortgage. It was paid, however, on the 3rd October, 1867. The last payment ($10) on the small note was made, the executor says, "within two years of the testator's death," and was made without suit. It would be absurd to consider the

(*a*) 8 Ves. 547. (*b*) 1 Mer. 422. (*c*) 4 Russ. 92.

(*d*) See cases *supra*; Small v. Wing, 5 B. P. C. at 74; Re Arrowsmith's Trusts, 2 DeG. F. & J. at 480.

(*e*) Gaskell v. Harman, 11 Ves. at 500 *et seq.*

(*f*) See the cases, Lewin on Trusts, p. 255.

realisation of an estate which amounted to $44,500, over and above specific gifts, as postponed until that trifling sum had been collected. In the realisation of the general estate, it is not suggested that the trustee has not acted with due diligence; and if all parties are willing to accept his evidence as correctly stating the facts, I think that the estate should be regarded as realised on the 3rd October, 1867, and that the legacies should bear interest from that date. But any party concerned is entitled to an inquiry as to when the realisation of the whole estate might, in a due course of administration, have been effected.

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The trustee sold the real estate on time, and the time has not yet arrived, I believe, for payment of the last instalment; but I do not think that the period of presumed realisation can be postponed on that account. The will does not in express terms authorize a sale on time; and no authority was cited which shews that, under such an authority as this will contains, a sale on time was proper (*a*). Besides, the trustee deposes that he considers the property sold was ample security for the balance of the purchase money, which may, therefore, on that ground alone, be deemed to have been realised and invested from the date of the sale.

Judgment.

Mrs. *Seaton*, one of the pecuniary legatees, further claimed, that she was under age at the time of the testator's death; that he stood towards her *in loco parentis;* and that on that ground she was entitled to interest on her legacy from tho time of the testator's death. She was held to be entitled to an inquiry as to these matters if she desired it.

(*a*) See Fisher on Mortgages, 2nd ed. pl. 928, p. 526, Lewin on Trusts, 5th ed. p. 238.

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Another question was raised as to two legacies of $1000 each, given by the testator's last codicil to two churches, one (St. Peter's) on Carlton Street, and one (St. Paul's) on Bloor Street, in the City of Toronto. It was contended, on behalf of the residuary legatees, that these legacies were intended to come out of the general estate, and must abate to the extent that the estate was derived from realty. On the other hand, it was contended that these legacies were charged on the gas stock alone, which was sufficient to pay them in full.

By the will the testator separated his gas stock from the rest of his property; and provided that, with regard to his gas stock, his trustee or trustees should hold the same to pay an annuity to his widow; and that from and after her death they should, of the principal, pay £2000 to Trinity College, and £1000 to Trinity Church, to be applied towards enlarging the church. By the third codicil, he mentioned the method of enlargement which he desired, and directed that, if the enlargement was not made in eighteen months, the said sum should be employed in the building of the church on Carlton Street. By the fifth and last codicil, he reduced the gift to Trinity Church from £1000 to £500; and directed that it should be paid over with interest in five years, if the church was then out of debt; but that if the debt should not be paid by the end of the five years, the sum should be divided between the Church on Carlton Street and St. Paul's Church on Bloor Street. Then, after a direction that Mrs. *Hulme* should have £1000 instead of the £2000 given to her by the will, there is the following clause: "I give also to the two churches already mentioned on Carlton Street and Bloor Street, $1000, to be applied in liquidation of building debt, and after that is paid to increase the endowment."

Judgment.

MOWAT V.C.—The testator does not expressly say that these legacies are to come out of the gas stock.

1870.

Smith v. Seaton.

But by the will the £1000 to Trinity Church, which he had in the previous clause reduced to £500, was to come out of the gas stock, leaving the remaining £500 undisposed of. In the former £500 he had given to the two churches a contingent interest, and it is contended that the principle is, that the added legacies are presumed to be payable out of the same fund as the original legacies. *Crowder* v. *Clowes* (*a*), was cited in support of the contention; and there are other cases to the same effect (*b*). I think that, by the subsequent gift to the two churches, the intention of the testator was to dispose of the £500 of gas stock which he had just withdrawn from Trinity Church; and that this presumption is stronger than the like presumption in some of the cases in which the principle referred to governed the decision. Interest should be allowed on these legacies from a year after the testator's death.

Judgment.

Re Chisholm.

Will, construction of—Dying without issue—Personal trust.

A testator devised certain real estate to his granddaughter; and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of such sales, and from such other of his property as might be then remaining in their hands, he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:

Held, that these provisions shewed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death.

The question in this matter was as to the construction of the will of *Ashman Pettit*. *Daniel Black Chisholm* had petitioned for a certificate of title. *Pettit* was formerly

(*a*) 2 Ves. Jr. 449. (*b*) See Jarman on Wills, p. 172.

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Re Chisholm.

the owner in fee of the property in question; and the petitioner claimed under *Sarah Eliza Emery*, a devisee named in *Pettit's* will. His claim was contested by certain legatees of *Pettit*, who insisted that they had a contingent interest as legatees under the will. The petitioner contended that *Sarah Eliza Emery* took an estate in fee under the will, and that her conveyance gave a good title; the contestants argued that the estate she took was subject to an executory devise over in case of her dying without issue living at her death; and that under this executory devise over they had a contigent interest.

Statement.

The will directed that, for the maintenance of the testator's widow, she should "have the possession, disposal and profits of so much of" his farm as was specified, until his "granddaughter *Sarah Eliza Emery* becomes married." The will proceeded: "at which time I direct that she then give up her claim to the said land to her granddaughter's husband; and that she shall receive instead thereof, during the remainder of her natural life, one-third of the profits that may be derived from the whole of the farm now in my possession. * * I direct that my granddaughter, upon her becoming married, shall have full possession of the aforesaid whole farm and premises (with all the appurtenances and privileges granted to her grandmother as before expressed); and that she or her husband shall pay unto her grandmother one-third of all the crops raised upon said farm, or a commutation equal to all the profits arising from said land. * * And I further direct that in case of my granddaughter dying without lawful issue or heir, the whole of the farm now in my possession (after the death of my beloved wife), shall be sold by my executors; and from the avails of such sale, and also from such other of my property that may be then remaining in their hands, I direct the following sums to be paid as further legacies, viz.: To my granddaughter's

husband, £250; to *Aaron Dunham Emery*, £250; to *Sarah A. Beach*, £25; to my sister *Martha*, £25; and the remainder to be applied at the discretion of my executors to missionary purposes."

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Mr. *Fitzgerald*, for the petitioner.

Mr. *McLennan*, for *Aaron D. Emery*.

Mr. *S. G. Wood*, Mr. *W. N. Miller*, and Mr. *A. Hoskin*, for other contestants.

MOWAT, V. C.—The point in controversy in this matter turned upon the question, whether the expression, "dying without lawful issue or heir," referred to an indefinite failure of issue, in which case the deed of the granddaughter conveyed the fee absolutely; or whether the reference was to want of issue living at the death, in which case, should she leave no issue at her death, the executory devise over would take effect, and the contestants would be entitled to their legacies. June 27. Judgment.

In *Greenwood* v. *Verdon* (*a*) Lord *Hatherley*, then Vice Chancellor, stated the established rule to be, "that when it is apparent on the face of the will that the testator intended to give a personal benefit, to those to whom the estate is limited in default of issue, and not a transmissible interest; in such cases, the construction that an indefinite failure of issue was intended is out of the question, because it could not be supposed that the testator could have intended to confer a personal benefit, and yet to postpone it until after an indefinite failure of issue." And I apprehend that Mr. *Jarman*, in his book on Wills (*b*), is correct in stating that a personal trust raises as strong an argument for this purpose as a personal interest. Now this

(*a*) 1 K. & J. at 80.

(*b*) 3rd ed. vol. 2, p. 501.

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Re Chisholm.

testator manifests by his will a personal trust in his executors, in respect of the sale of the land, and in leaving to them the application of the residue to missionary purposes at their discretion. The circumstance of the latter gift being illegal does not affect the argument. A legacy is transmissible to the legatee's representatives, but a power to executors to sell is not transmissible (*a*); nor is a discretion to apply money to missionary purposes. Such trusts are entirely personal; and should the executors not be living at 'the death without issue,' relief, in respect of these provisions, could only be had by means of a suit in this Court, the rule being that equity does not permit a trust to fail for want of a trustee.

The power of sale given to executors by the will in *Feakes* v. *Standley* (*b*), to which case I referred during the argument, was to the executors, not of the testator, but of the prior devisee; and, such executors being unknown to the testator, he did not, by giving to them the power of sale, shew a personal trust in them.

Judgment.

The direction in the will before me, that the executors should pay the legacies from, not only the proceeds of the sales, but also from such other property of the testator as might "be then remaining in their hands," is a further indication that the testator was contemplating an event which should happen within the compass of existing lives.

The order will declare accordingly. The contestants will have one set of costs against the petitioner.

(*a*) See Sug. on Powers, 8th ed. 129 *et seq.*
(*b*) 24 Beav. 485.

HEWSON v. SMITH. 1870.

Trustee for sale, purchase of a judgment at a discount by—Rights of assignee.

The title of a trustee for sale being liable to be impeached by creditors of a former owner, the former owner being also entitled to the residue under the trust, the trustee bought at a discount a judgment recovered against such former owner. The trustee was at the same time a debtor to the trust in a sum greatly exceeding the amount paid for the judgment:

Held, that he could not retain the profit on the purchase, and that his *cestuis qui trust* were entitled to it.

After his purchase the trustee assigned the judgment: *Held*, that his assignee took subject to the same equities as affected himself.

The plaintiff *Hewson* was the assignee of two judgments recovered by the co-plaintiffs the Bank of Upper Canada against *Benjamin Walker Smith*; upon which judgments executions against the goods and lands of *Smith* were in the hands of the coroner when the bill was filed (2nd March, 1869). The bill alleged, amongst other things, that on the 6th March, 1861, *Smith* borrowed $4000 from the defendant *Robert Ross* on an arrangement by which the latter had raised the amount for him by mortgaging property belonging to *Robert Ross*; and which mortgage *Smith* undertook to pay; that by way of security *Smith* gave to *Robert Ross* *Smith's* own note for the amount, payable in ten days; that *Robert Ross*, on the 16th July, 1861, recovered judgment against *Smith* on this note; that execution against *Smith's* lands was issued on the judgment so recovered; that *Benjamin Walker Ross*, who was the son of *Robert*, and through whom, as his father's agent, the whole matter was transacted, attended at the coroner's sale, and bought *Smith's* lands at greatly less than their value, on an agreement that he should hold the same, first, for the indemnification of his father, and then, for the use of *Smith*; that as further security for the debt *Smith*, on the 20th November, 1862, Statement.

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assigned to *Benjamin Walker Ross*, as trustee and agent for his father, five promissory notes, four of £262 10*s.* each, and one of £100, all made by one *Tyson;* and that *Benjamin Walker Ross* made sales of some of the lands. The bill was for redemption and other relief.

The answer of *Benjamin Walker Ross* (amongst other things) admitted the loan, and the notes which were made and assigned respectively by way of security; but the answer disputed the alleged agreement as to the lands bought at the coroner's sale; claimed that this defendant was absolute owner of these lands for his own benefit; alleged, that *Smith*, at the time of the transactions in question, was insolvent and wholly unable to meet his engagements; that if the purchase money at the coroner's sale was small in comparison with the value of the lands (which the answer did not admit), the

Statement.

circumstance was owing to the embarrassed state of *Smith's* affairs, "and to his generally supposed insolvency, which would naturally deter persons from bidding for real estate alleged to be his, at a coroner's sale, where no title was guaranteed, and where the purchaser had to pay his purchase money instantly, without having an opportunity of investigating the title, which was the condition of said sale, according to the then and now practice of sheriffs' and coroners' sales of lands under executions at law, and to run the risk of acquiring some estate, or not taking anything by the purchase, as the case might be;" that *Smith*, shortly after the sale, executed a deed of confirmation, in which his wife joined; and that he made this conveyance "because it was the only thing he had at that time the means of doing" by way of returning to *Robert Ross* some slight benefit for his obligations to *Ross*. The answer charged, that if the coroner's sale and the subsequent conveyance were made under the agreement mentioned in the bill (which the defendant did not

admit), such a transaction would be in fraud of *Smith's* creditors; and that *Smith*, whom this defendant alleged to be the real plaintiff, could not, under such circumstances, obtain the aid of this Court, or have it declared that this defendant's purchase was on such secret trust. 1870. Hewson v. Smith.

At the hearing (5th May, 1869), before Vice Chancellor *Mowat*, he expressed the opinion that the agreement alleged by the bill had been established; that *Smith* was not the real plaintiff; and that, whether *Smith* would or would not be entitled to file a bill (*a*), the plaintiffs were under no incapacity; and the Vice Chancellor made a decree declaring, that the defendant *Benjamin Walker Ross* was a trustee of the lands so purchased by him at the coroner's sale, and also of *Tyson's* notes; and that the plaintiff *Hewson* was entitled to redeem the same; directing the usual accounts and inquiries; disposing of certain costs up to the hearing; and reserving further directions and other costs. Statement.

The Master made his report (17th May, 1870), finding that the sum of $15,961.44 was due to the plaintiff *Hewson* for principal, interest and costs; and the sum of $1721.11 to *Maitland McCarthy*, who was made a party in the Master's office, and whose claim was under a judgment recovered by one *S. B. Smith* against the defendant *Smith* on the 31st October, 1861, assigned to *Benjamin Walker Ross* on the 27th August, 1868, and by *Benjamin Walker Ross* assigned to *Maitland McCarthy* on the 7th August, 1869, on which judgment *fi. fas.* were delivered to the coroner on the 28th August, 1868; that the balance due on *Robert Ross's* loan for principal and interest was $1973.29; that *Robert Ross* had the first charge on the property; *Maitland McCarthy*, the second charge; and the plaintiff *Hewson*, the third charge; and that *Benjamin Walker*

(*a*) Referring to Symes v. Hughes, L. R. 9 Eq. 475.

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Ross was indebted to the trust estate for principal and interest in the sum of $850.40.

On the 31st May, 1870, the cause was heard upon further directions, and by way of appeal from the Master's report.

Mr. *Snelling*, for the plaintiff.

Mr. *D. McCarthy*, contra.

June 27.

MOWAT, V. C.—With respect to the plaintiff's appeal from the report, I reserved two matters—one being as to the amount due to *Maitland McCarthy*, and the other as to the amount of certain law costs.

Judgment.

With respect to *Maitland McCarthy's* claim the facts are, that *Benjamin Walker Ross* purchased the judgment at a large discount, namely, at $300; that the assignment by him to *Maitland McCarthy* was made three months after the decree in this suit had been pronounced; that the consideration for the assignment was *Maitland McCarthy's* note at six months for $1600, which note has not been paid, but has been indorsed over by *Benjamin Walker Ross* to his solicitors Messrs. *McCarthy & McCarthy*, to which firm *Maitland McCarthy* does not belong; and that they hold the note in security for *Benjamin Walker Ross's* indebtedness to them, which is supposed to amount to about the same sum.

In support of the Master's finding it was contended that *Benjamin Walker Ross* being himself an assignee of the judgment, his assignee was not subject to the equities between him and the judgment debtor, or to the equities between him (*Benjamin Walker Ross*) and the present plaintiffs. It is clear that there is no foundation for the contention, even if *Maitland*

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McCarthy is an assignee for value without notice (*a*); but I do not see any affidavit by him denying notice; and he has not paid any part of the consideration. The note is in the hands of his assignor's solicitors, who evidently took it with notice of all the facts. Besides, the assignment was after the decree to account. The only question, therefore, is, whether *Benjamin Walker Ross* was entitled to claim more than he had actually paid? and I think it clear, on several grounds, that he was not.

It is a settled rule, that a trustee for sale cannot claim for his own benefit a mortgage on the trust property, or any other interest therein, purchased by him after he has become trustee; and I think that the principle which disqualifies him applies to his purchase of judgments which may, at any moment, be converted into incumbrances by writs being issued on them (*b*). Again, such judgments may be regarded as clouds on the title of the trustee. This judgment creditor might at any time have placed executions in the sheriff's hands, and have either attacked the trustee's title as void against creditors, or claimed to be interested in the equity of redemption subject to *Robert Ross's* debt, and thus have prevented or embarrassed sales by the trustee in the meantime, and possibly have avoided altogether his title ultimately. There was, at least, danger of this; and Lord Chancellor *King*, in *Balsh* v. *Hyham* (*c*), stated the rule to be that, where a trustee has honestly and fairly laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great *hazard* of being so, he ought to be repaid; and

Judgment.

(*a*) See Ord v. White, 3 Beav. 357.

(*b*) Lewin on Trusts, 5th ed., 229, pl. 3; and cases there cited. Also Keech v. Sandford, 1 Wh. & Tu. 39, and notes; Thornbrough v. Baker, 2 Ib. 960 notes.

(*c*) 2 P. W. 455.

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his lordship decreed accordingly. *Bright* v. *North* (*a*) is another illustration of the same principle as to hazard. In the present case, the purchase for the benefit of the trust certainly saved *Smith* a large sum, and the neglect to purchase would have involved hazard otherwise. The purchase was, in fact, a protecting of the title as respects *Smith's* interest, and perhaps as respects the interest of *Robert Ross* also; and if the trustee had taken a release instead of an assignment, and were now claiming to be allowed in account the $300 as against *Smith*, his *cestui que trust*, the allowance could not be successfully resisted. It follows from these considerations that he cannot elect to treat such a purchase as made for himself, and claim the profit for his own benefit. To permit him to do so would also be inconsistent with the principle of that other general rule, which forbids a trustee from setting up any claim of his own which is adverse to the trust.

Judgment.

If I were to go more minutely into the particular circumstances, further reasons might be stated in favor of the same conclusion. The confidential relation between *Benjamin Walker Ross* and *Smith* had been much closer than that which exists between an ordinary trustee for sale and his *cestui que trust;* and the trustee had in his hands at the time of his purchase, and has had thenceforward until now, trust money equal to twice the sum which was paid for the judgment.

It appears, however, that his solicitors Messrs. *McCarthy & McCarthy* advanced the money which was actually paid for the judgment, and claimed a lien therefor on the assignment. The plaintiffs, therefore, do not object to treat the amount as still a charge on the estate in priority to their own debt, and I think that the respondent is entitled to no more.

(*a*) 2 Ph. 216; see Attorney General v. Pearson, 2 Colly. 581.

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Howson v. Smith.

The other matter reserved on the appeal was the allowance to the trustee of a sum of $509.59 for the costs of a common law suit brought by the trustee; such costs being unpaid to the attorneys; the allowance having been made without production of the bill of costs; and on the allocatur of the taxing officer at law, obtained for the purposes of the suit, *ex parte*, by the attorneys, while the reference under the decree was in progress. I was referred to no authority for this course. The amount seems large, and the more reasonable course for ascertaining its correctness would seem to be, to produce the bill, and to give the plaintiffs' solicitor an opportunity of being present when it is considered or taxed. Let this be done.

Some other objections taken by the plaintiffs to the report were disallowed by me at the close of the argument. There will be no costs of the plaintiff's appeal. There was a counter appeal, which was abandoned, and must therefore be dismissed with costs. *Benjamin Walker Ross* will pay the plaintiffs' costs, except of any unsuccessful claims made by the plaintiffs in the Master's office.

Judgment.

I presume no reference back will be necessary. The Registrar can embody in the decree to be now drawn up the result of this judgment. *Benjamin Walker Ross* will be ordered to pay his balance into Court in a month. The plaintiffs will have six months to redeem *Robert Ross* and *Maitland McCarthy;* and in default, the bill, as against them, will be dismissed with costs.

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LEVITT v. WOOD.

Will, construction of—Gift to heirs and assigns of a living person.

A testator gave one-fifth of his residuary estate, real and personal, to the heirs and assigns of A and his wife, who were both living:

Held, that *A.* or his wife took no interest or power of appointment, but that their children living at the testator's death were entitled absolutely.

This was a suit for the administration of the estate of *James Beachell*. The cause came before Vice Chancellor *Mowat* on the 28th May, on motion for decree; and the proper construction of one of the clauses of the deceased's will was then discussed. The clause occurred in disposing of the residue. The words were these: "That the whole of the residue of the property be devised as follows; first, one part to *Richard Beachell* or *Bearchell*, his heirs or assigns; * * second, one part to *Mary Beachell* or *Bearchell*, her heirs or assigns, now resident in England; third, one part to *Elizabeth Beachell* or *Bearchell*, now residing in England, her heirs and assigns; fourth, one part to *Jane Beachell* or *Bearchell*, now residing in England, her heirs or assigns; * * fifth, one part to the heirs and assigns of *Thomas James* and *Margaret Watson* his wife, now residing in Canada." The question was as to this fifth part.

Statement.

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

Mr. *Hoskin*, for the infant children of defendants *Watson*.

Mr. *A. Hoskin*, for *Jane Ann Watson*, an adult daughter.

Mr. *Fitzgerald*, for the defendants *Watson* and wife.

Mr. *Crooks*, Q. C., for a posthumous child.

Mr. *Huson M. Murray*, for the other defendants.

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Quested v. *Michell* (*a*); *Smith* on Real Property, 1009; *Cruise's* Digest, vol. 6, p. 166; *Jarman* on Wills, vol. 2, pp. 154, 170, were cited.

June 27.

MOWAT, V. C.—The question argued had reference to the gift "to the heirs and assigns of *Thomas James* and *Margaret Watson* his wife." These persons had several children living at the time of the testator's death, and another child has been born since. It is clear that this child is not entitled to share in the gift.

On the part of the other children it was argued, that the gift was an absolute one to them; and on the part of their parents it was contended, that the children took subject to a power of appointment by the parents. I have no doubt that the testator did not mean to give such a power of appointment. He did not directly give any beneficial interest whatever to the parents; and it is impossible to suppose an intention to give to the parents the right of selling and disposing of the property for their own benefit, and yet to give, not to them, but to their children, the beneficial interest until such sale.

Judgment.

It was said that the construction contended for by the parents was necessary in order to give any effect to the word "assigns." But it is to be remembered that the expression "heirs and assigns" is constantly used where the word "heirs" alone would convey the meaning. In *Re Newton's* Trusts (*b*), the very expression "heirs and assigns" in regard to personal estate was used in precisely the same sense as is contended for on behalf of the children in the present case.

Reference was made to the cases of *Tapner* v. *Merlott* (*c*), and *Quested* v. *Michell* (*d*), as opposed to this construction.

(*a*) 24 L. J. Ch. 722.
(*b*) L. R. 4 Eq. 171.
(*c*) Willes, 177.
(*d*) 1 Jur. N. S. 488.

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In *Tapner* v. *Merlott*, hereditaments had been settled to the use of *John Farrington* and his assigns for ninety-nine years, if he should so long live, without impeachment of waste; then to trustees in his lifetime, to preserve the contingent remainders; and from and after his death, to the use of his wife for her life; and on her death to the use of the first and every other son, &c.; and, for default of such issue, to the use and behoof of the heirs and assigns of the said *John Farrington* for ever. The case was not decided on the point for which it was cited to me, nor had that point been taken in argument. But the learned Chief Justice in giving judgment said: "Another answer suggested itself to me this morning, on which I will give no mature opinion, because there is no occasion, but I think there is some weight in it, that this word [assigns], though it does not alter his own estate, might give him [*John Farrington*] a power of disposing of it. For supposing this last remainder to be to him and his heirs, 'or to such persons as he should appoint,' he might certainly in that case have disposed of it by his will; and I am inclined to think, as at present advised, that the word "assigns" may admit of this construction. But I say this only by the bye, and as only my private opinion, which occurred to me but this morning, there being no occasion to give any resolution upon it, as we are all of opinion, for another reason, that the plaintiffs cannot recover in this ejectment." There *John Farrington* had the beneficial interest in the property as long as he lived; express provision was made for the property going to his issue after his death; and there was not the slightest reason for supposing that in the contingent limitation to his "heirs and assigns" for default of issue, a personal benefit to those who might happen in that event to be his heirs, was intended.

Judgment.

Quested v. *Michell* is open to the same observations. That case was before Vice Chancellor *Kindersley*, and

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is not to be found in the regular reports. There the testator had given one-sixth part of his residuary estate, real and personal, to trustees for the life of his niece, and from and immediately after her decease unto her heirs, executors, administrators, and assigns, according to the several natures and qualities thereof. The niece, being unmarried, mortgaged her interest. The trustees had, by the will, a power of sale, under which they sold the real estate; and it therefore became necessary to decide whether the niece took an absolute interest under the will. As to the personalty, there was no question that the effect was to give an absolute interest (*a*); and the doubt was as to the real estate only. The Vice Chancellor was satisfied that a decision in favor of an absolute interest in the niece was in conformity with the intention of the testator; but the technical reasoning on which he put his decision, was the necessity of giving some meaning to the word "assigns."

Judgment.

I think that essential circumstances in the cases to which these opinions apply are wanting in the present case. I think that neither of the learned Judges would have construed the word 'assigns' in that way if the party who was held entitled to assign had not had the beneficial interest for his life; and if the beneficial enjoyment of the heirs was not to come into existence, if at all, at his death and not before. I think that the cases cited have no application where the party claiming the power of appointment takes no other interest in the estate; where a personal benefit to the children is plainly contemplated; and where the effect of such an appointment would be to divest an estate which until such appointment is held by the children beneficially.

(*a*) See the cases, Wms. Ex. 6th ed., 1050, 1052.

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THE CANADA LANDED CREDIT COMPANY v. THE CANADA AGRICULTURAL INSURANCE COMPANY.

Insurance—Forfeiture—Waiver—Condition as to vacancy of premises—Preliminary proofs.

Conditions in a policy for avoiding the same have, in case of a breach, the effect of avoiding the policy, not *ipso facto*, but if the Insurance Company so elect.

Where breaches of such conditions had occurred before loss, and the Insurance Company, after being notified of such breaches, took no notice thereof, but called for the proofs of loss which were required on the footing of the policy being a subsisting instrument; and these were furnished; the Insurance Company was held to have precluded themselves from afterwards setting up the forfeiture.

A condition provided that in case the premises became vacant or unoccupied, the fact should be communicated to the Company, and that unless such notice was given, and the Company consented to retain the risk, the policy should be void:

Held, that the insured had a reasonable time to give the notice; that three days was not too long a delay, the property being at Owen Sound, and the office of the Company at Hamilton; and, a fire having occurred on the third day, the Insurance Company was bound to make good the loss.

An Insurance Company cannot set up, in discharge of their liability, that the preliminary proofs were defective, where they did not make the objection to them when furnished, or until after a suit had been instituted for the loss.

Statement.

This was a suit for the insurance money on a policy effected by *William Street*, a defendant, with the co-defendants the Insurance Company; and afterwards assigned by *Street* to the plaintiffs. The property insured was a new house situate about sixteen miles from Owen Sound; the Insurance Company's agent had seen the building while in course of erection, and had urged *Street* to insure it with the co-defendants' Company. In the latter part of 1868, *Street* negociated with the plaintiffs for a loan of $1700, to be secured by a mortgage on the property on which the house stood, and by a policy for $700 on the house.

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The mortgage was executed accordingly, and was dated 1st October, 1868. On the 17th November, 1868, the plaintiffs paid off a prior mortgage, on which the amount due was upwards of $1000; and they paid to *Street* himself $100. The balance of the loan was to be paid when the contemplated insurance was effected. On the 21st November, *Street* applied to the Insurance Company's agent at Owen Sound for that purpose; stated his object in insuring; and signed the necessary papers. He represented to the agent that the matter was pressing; and the latter therefore gave him a certificate, stating that he had insured the house for $900. *Street* produced this certificate to the plaintiffs' solicitor. The plaintiffs were in the habit of receiving from borrowers assignments of policies effected in the defendants' Company, and the defendants on that account used to dispense with the fee charged in other cases on assignments. Assuming that the assignment of this policy would be sanctioned by the Insurance Company in due course, the plaintiffs' solicitor, on receiving the agent's certificate, paid to *Street* the balance of the loan. The Insurance Company afterwards executed the policy, agreeably to the certificate, and sent it to *Street*.

Statement.

One condition indorsed on this policy was, that no assignment should be valid until approved by the Board of Directors, and that until such approval the Company should not be bound by the policy. Another of the indorsed conditions provided that, "if, after insurance being effected, any building or buildings so insured become vacant or unoccupied, notice of the same shall be given to the Company, that the directors may decide whether it would be prudent to retain the risk. Failing such notice and consent on the part of the Company, the policy in regard to such building or buildings shall be void."

The matter of the assignment was not immediately attended to; in February, 1869, the plaintiffs' solicitor

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wrote to the Insurance Company on the subject. On the 5th February, the Company's manager enclosed this letter to their agent at Owen Sound, with a letter from the manager himself, stating that there was a form of assignment on the back of the policy; that Mr. *Street* must sign it in the presence of a witness, and transmit it to the office at Hamilton, with one dollar; that the manager would then confirm the assignment and return the policy to Mr. *Street*, or forward it to Mr. *Jarvis* [the plaintiffs' solicitor] as might be desired. The manager stated in his evidence that transfers were not usually submitted to the board, and that he had authority to confirm them in the usual course of business. The agent had removed from Owen Sound before the letter arrived, and he therefore did not receive the letter; but on the 3rd March, *Street* executed, in the presence of a witness, the assignment indorsed on the policy, the plaintiffs' name being inserted as assignee. The document was not then forwarded by *Street* to Hamilton.

Statement.

On Monday, the 8th March, *Street* left home for Toronto, and he went thence to the United States, where he thenceforward continued to reside. Up to the 8th March it appeared that, not being married, he had resided alone in the house, and that when he had occasion to leave home no one lived in the house.

On Thursday, 11th March, the house was destroyed by fire.

On the 16th March, Mr. *John Street*, the father of the insured, wrote to the manager, stating (amongst other things) that it was his painful duty, in his son's absence, to inform the manager that the house had been destroyed by fire on the previous Thursday, when *William* (the insured) was absent in Toronto, that *William* had not yet returned; that he had not intended to return for a month or so, having gone west; that he had not been home for a week previous, and

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that the house had been locked up, and at the time of the fire was totally unoccupied, as (he said) was usual in *William's* absence. The letter also stated that the policy had been assigned. After some other correspondence, the manager, on the 23rd April, wrote to Mr. *John Street*, enclosing two forms of affidavits, one for *William* and the other for another person; giving instructions as to the information which the affidavits should contain; and directing that *William* in his affidavit should mention that the policy had been assigned to the plaintiffs. Affidavits were accordingly made and sent to the Insurance Company. These affidavits being defective, further affidavits were called for, and at length all the requisitions of the Insurance Company were complied with through Mr. *John Street* or the plaintiffs' solicitor. This occupied some months, owing partly to the continued absence of *William*.

Statement.

After all had been completed, viz., on the 1st July, 1869, the manager of the Insurance Company wrote a letter to Messrs. *Jarvis & Jarvis*, plaintiffs' solicitors, acknowledging the receipt of certain letters from the latter, and stating that he was desired to say, that the directors looked on Mr. *William Street* as the holder of the policy, and not the plaintiffs; that they would treat only with Mr. *William Street* and, furthermore that he had forfeited his claim by leaving the house unoccupied. On the 9th March, 1870, the plaintiffs commenced the present suit.

The cause was brought on for the examination of witnesses and hearing at the sittings of the Court at London, in the spring of 1870.

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

Mr. *Proudfoot*, for the Insurance Company.

Mr. *Rock*, for *William Street*.

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June 27.

MOWAT, V. C.—The Insurance Company at the hearing insisted that there were four grounds of defence to the suit. They contended that the policy had been forfeited (1) by the assignment, and (2) by leaving the premises unoccupied. The assignment, or the leaving the house unoccupied, did not *ipso facto* avoid the policy. In *Turquand* v. *Armstrong* (*a*), it was expressly held that the policy in such case was void in case only the Insurance Company, on becoming aware of the breach of the condition, elected to treat the policy as void. The case proceeded on the settled doctrine to the same effect in regard to leases; and the well-known rule in the case of leases is, that any act by which the landlord acknowledges the continued existence of the tenancy is a waiver of any previous forfeiture. The acceptance of subsequently accrued rent has that effect (*b*). The same result follows from bringing an action for such rent (*c*); or making a demand of the rent (*d*); or giving a notice to the tenant to repair the demised premises (*e*); whether the tenant does or does not repair in pursuance of the notice (*f*). The same has been held to be the effect of a conveyance to a stranger which was expressed to be "subject to the lease" (*g*).

Judgment.

Now it is not pretended that, previous to the manager's letter of the 1st July, the Insurance Company had elected to treat the policy as forfeited and at an end by reason of the premises having been left unoccupied for the three days; or that then, or at any time before this suit was brought, an election was made to take

(*a*) 9 Ir. Com. L. 32; see also Wing v. Harvey, 5 DeG. M. & G. 265.
(*b*) See 1 Smith's L. C. 5th ed. notes 34, et seq.
(*c*) See Dendy v. Nichol, 4 C. B. N. S. 376.
(*d*) Doe dem. Nash v. Birch, 1 M. & W. 408.
(*e*) Doe v. Meux 4, B. & C. 606; Doe v. Lewis, 5 A. & E. 277.
(*f*) Doe v. Lewis, supra.
(*g*) Hunt v. Bishop, 8 Exch. 675; Hunt v. Remnant, 9 Exch. 641.

advantage of the assignment as a ground of forfeiture. On the contrary, though they were informed of both facts at the same time that they were notified of the fire, instead of electing to hold the policy at an end, they called for, and obtained from the parties concerned, the proofs of loss, on the footing of the policy being still in full force. After this election to treat the policy as subsisting, the Insurance Company was not at liberty to elect to treat it as forfeited. 1870. Canada L. Credit Co. v. Canada Ag. Ins. Co.

The defence of non-occupation is open to other answers also, which were discussed at the hearing. I have not observed in the books any example of the condition as to non-occupation. If all the conditions of a policy, which is prepared by the Insurance Company, are to be construed favorably to the insured (*a*), the rule seems to apply in an especial manner to new conditions. Does the clause refer equally to a stable, a workshop, and a dwelling? Does it apply to any absence however short—an hour, or a day, or a week? or from whatever cause it arises, however accidental, unexpected, or beyond the control of the insured? The condition does not in terms declare, as the condition against assigning does, that until the Company's consent is given the Company shall not be bound by the policy. An assignment may be deferred until consented to; but the non-occupation of the premises may take place without having been anticipated; or the necessary vacancy of a day may be unexpectedly prolonged to three or four days. I think that the proper construction of the condition is, that it does not relate to an absence from personal occupation for a day or so; that where the non-occupation is longer, the policy remains valid until the insured has had a reasonable time for giving notice to the Company; and that if a fire takes place Judgment.

(*a*) Notman v. Anchor Assurance Company, 4 C. B. N. S. 481; Braunstein v. Accidental Death Insurance Company, 1 B. & S. 799.

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before such reasonable time has expired, the Insurance Company is bound. I am not prepared to say that three days' time in the present case was an unreasonable time for this purpose.

The third defence as set up by the answer is, that the value of the insured property was grossly over-estimated when the insurance was applied for. But over-valuation, unless fraudulent, does not avoid a policy; and the fraud must be expressly charged as well as proved. There was certainly some evidence of over-valuation, but the Insurance Company's agent was of opinion from his own inspection of the building, and from what he had learned of the cost of another building of the same kind with which he had had to do, that the value named was reasonable. I cannot refuse my concurrence to the contention of plaintiffs' counsel that on the pleadings they were not bound to meet by evidence a case of fraudulent over-valuation by their assignor.

Judgment.

The remaining defence was that the preliminary proofs were defective; but as all were furnished which the Insurance Company had demanded, and as the alleged defects were not suggested before suit, it is not open to the Insurance Company to set up the deficiency (if any) as a ground of discharge from their liability (*a*).

I think that the plaintiffs are entitled to a decree with costs. The Insurance Company may have a reference to ascertain the amount of the loss if they suppose it to be less than the amount claimed

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(*a*) See Phillips on Insurance, 5th ed., secs. 1803, 1813, pp. 478, 476.

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THE MUNICIPALITY OF THE TOWNSHIP OF BROCK v. THE TORONTO AND NIPISSING RAILWAY COMPANY.

Municipal law—Duty and powers of Reeve—Construction of bond—Recitals.

At a meeting of a township council the Reeve who was in the chair refused to put a motion which had been duly made and seconded, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favor of the motion:

Held, that the Reeve had no right to refuse to put the motion, and that the vote was proper and effectual.

A municipal by-law for issuing debentures which had been submitted to the rate-payers and approved by them, contained a clause stating that the debentures were to be signed by the Reeve:

Held, that the council had power to appoint another person to sign the debentures in place of the Reeve.

A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a Railway Company, the Company executed a bond to the township reciting that the township had agreed to give the bonus on condition (amongst other things) that sixty continuous miles of the road should be built within two years; that the debentures should not be disposed of by the Company until the contracts had been let and the work commenced; and that if the road were not commenced and built as mentioned, the debentures should be returned to the municipality; and the condition of the bond was, that in case of failure the Company would, on demand pay over to the township the sum of $50,000, or return the debentures. The contracts having been let and the work commenced as stipulated:

Held, in view of the whole instrument, that the Company should not be restrained from disposing of the debentures before the completion of the work.

Examination of witnesses and hearing.

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

Mr. *J. Hillyard Cameron*, Q.C., Mr. *Blake*, Q.C., and Mr. *McMurrich*, for the defendants.

SPRAGGE, C.—In the course of the hearing of this cause I disposed of some of the questions that arose. Judgment. July 19.

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Some yet remain to be disposed of. The principal question remaining is, whether By-law No. 188, authorizing the granting of a bonus of $50,000 to the Railway Company, was duly passed by the township council. The council consisted of five members, the Reeve and four others. It was moved by one member and seconded by another, at a meeting of the council, at which all the members were present, but the date of which is not given in the copy of minutes furnished to me, "that the by-law be now read a third time and passed, and that the Reeve sign the same and cause the seal of the corporation to be attached thereto, and that it become a by-law for the purposes therein mentioned." What ensued thereupon is thus stated in the minutes of the council.

"The above motion was read from the chair by the Reeve."

Judgment.

Mr. *Amey*, a member of the council, here demanded the Reeve to put the motion.

The Reeve here stated that before he put the motion it required careful consideration. It was a matter of great importance to the people of Brock, and as such there was no hurry; if necessary he would sit there for a week before putting said motion. Here Mr. *Amey* demanded the yeas and nays, and insisted on the clerk to take such. The Reeve here demurred, and would not permit it. Nevertheless Messrs. *Amey*, *Carmichael*, and *Brethour*, voted yeas. It is then noted that the council adjourned to 18th instant,—December, 1870.

What was done, as appears by the minutes of the council which I have cited, amounted to this: a motion was in the hands of the Reeve for the passing of the by-law, he remonstrated against precipitancy, which he had a right to do, and refused to put the motion, which

he had no right to do; and thereupon a majority of the council gave their votes in favor of the passing of the by-law, and that vote is recorded in the minutes of the council. The only thing wanting to make the proceeding perfectly regular, was that the motion should have been put to the council through its presiding officer, the Reeve. 1870. Municipality of Brock v. T. and N. Railway Co.

It is contended for the plaintiffs that the case which has occured is a *casus omissus* from the Municipal Act; that while the Act has directed what should be done in the event of the death or absence of the head of a council, or of his non-attendance within a reasonable time after the hour appointed for meeting, it has omitted to provide for the case of the head of the council being present and refusing to perform his duty, and it is contended that the only remedy is by mandamus directing the officer to do his duty. I said at hearing, and I repeat, that I should not expect to find such a case provided for by Statute, for the Legislature would not assume that such a case could occur; that the head of a council would be so ignorant of his duty as the presiding officer of a deliberative body, or so wrongheaded and perverse, as not to discharge it. It would be assumed that twenty years experience of municipal institutions would be sufficient to educate those filling offices in them in the first principles by which the proceedings of the bodies thereby created are regulated. Judgment.

There appears, indeed, to have been one instance in which a Reeve ignored his duties in a similar manner. It came before the Court of Queen's Bench on a motion to quash a by-law which was passed by a township council—in that case, *Preston* v. *The Township of Manvers* (*a*), the course taken by the council differed somewhat from the course taken, as appears by the

(*a*) 21 U. C. Q. B., 626.

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minutes, in this case. The by-law in that case appears to have been already passed, and the refusal of the Reeve was to sign it, and to put the corporate seal to it. It was then moved that he should leave the chair, which he did, either without objecting, or protesting, the affidavits differing upon that point, and thereupon the Deputy Reeve was placed in the chair, and he, as stated in the judgment, by the direction of the council, signed the by-law and put the township seal to it. The by-law was held to be valid, the Court designating the conduct of the reeve as capricious or obstinate, and holding the remaining members of the council to be "quite justified in requiring the Deputy Reeve to do what the Reeve previously refused to do."

What was done in the case cited was done with more apparent attention to form than was observed in the case in question, but still it was a course not authorized by the Statute, as the head of the council was actually present, and when present he is the person appointed by the Statute to preside. In the case cited the Reeve was for the occasion deposed, and rightly deposed, as the Court held. In the case before me he was left in the chair, and the members voted upon the motion as if he had put it. There is no substantial difference between the two courses of proceeding, nor is it contended that there was; the only difference pointed out being the difference in the mode of appointment of Reeves at the date of the case cited, and at the date of this case. I think there is nothing in that, the functions and duties of the Reeve as presiding officer at meetings of the council were the same at both times.

Judgment.

The essential point is that there should be the assent of a majority of the governing body to the proposition that is before it. It is proper, certainly, that the proposition should be submitted, formally by the presiding officer. It promotes decorum and regularity, and should

not be dispensed with upon light grounds; but after all it is only this, that the presiding officer reads the motion already read by the mover, and asks the council whether it is its will that it should pass. It is matter of form, of proper form certainly, but still only matter of form; and its absence through the fault of the officer ought not to be allowed to defeat that which is of the essence of the proceeding.

All that remained to be done in this case was to put the question to the council. The Reeve received the motion, he had it in his hands. This must have been the case, for he read the motion from the chair, and there, in his ignorance of his duty, or in his perverse disregard of it, he stopped, refusing to proceed further; and thereupon the majority of the council voted for the motion, just as if it had been actually put.

Judgment.

I cannot say that they misapprehended their position; they had to choose between taking the course they did take; and allowing their functions as a deliberative and legislative body to be virtually paralysed at the will of one of their own body; what they did was *ex necessitate rei*. In my judgment, they rightly decided not to abdicate their functions, because their presiding officer had most improperly abdicated his. There is no substantial difference in the case in the Queen's Bench, and the case before me; indeed, as stated in the bill, and probably correctly stated, the course taken was the same; I have no hesitation therefore in holding the by-law validly passed.

Another question is, whether the debentures were duly executed? The clause of the Statute upon this point is (sec. 213):—"All debentures and other specialties duly authorized to be executed on behalf of a municipal corporation shall, unless otherwise specially authorized or provided, be sealed with the seal of the corporation, and

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be signed by the head thereof, or by some other person authorized by by-law to sign the same, otherwise the same shall not be valid." The by-law granting the bonus, after going on to provide for the issue of debentures by the Reeve, contains this clause:—"Which said debentures shall be sealed with the seal of the said municipality, and be signed by the Reeve, and countersigned by the treasurer of the said municipality." This is a mere re-enactment of the Municipal Act, adding a requirement of the signature of the treasurer, a directing of that to be done which would be done, as of course without such direction. This direction was not in terms carried out, the council passing a by-law under the provision to that effect, in the clause that I have cited from the Municipal Act appointing a person other than the Reeve to sign the debentures, and the debentures were in fact signed by the person so appointed. But for the provision in the by-law granting the bonus that the Reeve should sign the debentures, there could be no question as to the regularity of what was done; or, if the by-law had been one not requiring to be ratified by the ratepayers, it would clearly be competent to the council to pass a by-law appointing some other person than the Reeve to sign the debentures, although the by-law authorizing the issue of debentures had directed that they should be signed by the Reeve. Therefore, what was done was regular and valid, unless this direction that the Reeve should sign abridged the power of the council under section 213, disabling it from substituting for the Reeve some other person to sign these debentures. This direction was clearly an unessential part of the by-law. It was mere surplusage. It was not a point to which the consent of the ratepayers is made necessary by the Railway Act: the provision in regard to that is as follows: "No municipal corporation shall subscribe for stock or incur any debt or liability under this Act or the special Act, unless and until a by-law to that effect has been duly made and

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adopted with the consent first had of a majority of the qualified electors of the municipality." The proviso in the special Act is, "that no such loan, bonus, or guarantee shall be given, except after the passing of by-laws for the purpose, and the adoption of such by-laws by the ratepayers, as provided in the Railway Act." The Railway Act and the special Act must, of course, be read together; the adoption of the by-law by the ratepayers, spoken of in the special Act, must mean the same as the "consent" of the qualified electors in the Railway Act. Then to what is their consent required? A consent to "a by-law to that effect," that is, that the municipal corporation shall subscribe for stock, &c.; this consent is to precede the passing of a by-law, and it would do so, as a matter of course. The word "adopted" is used in the Railway Act, but not in the same connection as in the special Act. It is that the by-law shall be duly made and adopted by the council. What is required by the statutes, and all that is required, before granting aid to a Railway Company, is, that the consent of the ratepayers to the granting of such aid shall be given; that a by-law for that purpose shall be passed, and that the consent of the ratepayers shall be had before the passing of the by-law. The Statute does not prescribe the form in which the question shall be submitted to the ratepayers. It is not provided that the by-law itself shall be submitted. The proposition might be submitted in any shape that would be sufficiently definite; for instance:—"It is proposed in the event of a majority of the qualified electors of the municipality of ————consenting thereto, that a by-law shall be duly passed and adopted by the municipal corporation of the said municipality, for granting aid to the———— Railway Company, by taking stock in such Company to the amount of $——, (or by granting a loan or bonus, or whatever be the shape of the proposed aid). The vote of the electors will be taken on the foregoing proposition at" such a time and place; the proposition

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being of course submitted under the authority of the township council. The more simple the form in which the proposition is submitted the better. It is true that the manner and form of the signing, or indorsing and countersigning, are to be prescribed by by-law, but there is nothing in the Act requiring the by-law prescribing these particulars to be submitted to the ratepayers.

What is required under the Act is not, in my opinion, analogous to the passing of a Legislative Act by two Legislative Chambers, as put by the learned counsel for the plaintiff. In that case the Chambers have co-ordinate power; the passing of a law by them is equally the Act of each; and it results from their position that each must have assented to every particular. But in the case of by-laws assented to by ratepayers, the by-law is the Act of the municipal council; when submitted to the ratepayers it is only a proposition at most, the project of a law to which the council has not itself given its final assent, differing in these particulars also from a "bill" passed by a Legislative Chamber.

Judgment.

To apply these considerations to what has been done in this particular case. A by-law for granting a bonus to the Railway Company was introduced into the council and read a first and second time, and was submitted to the vote of the rate payers. It was of course competent to the council after the second reading of the proposed by-law to withhold it from the rate payers, and after it had received the consent of the rate payers, still to withhold its assent to its passing. To put the matter in a familiar shape, what passed was in substance this: "We, the Township Council, propose to aid the Railway Company by granting to it a bonus of $50,000, and the law requiring that you, the rate payers, should assent to this; we lay before you the draft of a by-law, which we propose to pass for that purpose;"

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and thereupon a majority of the rate payers voted in favor of what was proposed to them. In my opinion the council did not stand committed to pass the by-law *literatim et verbatim* in the terms of the draft which was placed before the rate payers. In all essential particulars—in everything that could induce ratepayers to vote one way or the other, they were, I should say, bound, as a matter of good faith, to adhere to what they had informed the rate payers they intended to do. But after all, the substantial question was, Aye or No to the granting of a bonus of $50,000 to the Railway. The minor details, such as the one in question, whether the debentures were to be signed by the Reeve or by some other person, could not have been understood by either the counsel or the rate payers to have been submitted to the vote of the latter. It could not have been understood that the council tied their hands from acting as they might think fit in a matter so entirely within their competency, and with which the rate payers had nothing to do.

Judgment.

It is contended that the signing of the debentures was not a purely ministerial act, that the amounts of the debentures and the times and places where interest should be made payable were to be fixed by the Reeve. These points are left at large by the by-law, but it does not follow that they were to be settled by the Reeve. All that the by-law says is, that the Reeve was to sign the debentures. If any matters requiring the exercise of discretion remained, they were left to be dealt with by whatever person or body was competent to deal with them; and this, I apprehend, would be the township council. The signature by the Reeve is put in the by-law as purely ministerial,—placed in the same category with the affixing of the corporate seal and the countersigning by the treasurer.

The conclusion at which I arrive is, that the township

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council, by submitting the question of granting aid to the Railway Company, to the rate payers, in the shape in which they did submit it, did not debar themselves of the right which they had or otherwise would have had under section 213, of appointing some person other than the Reeve to sign the debentures.

I put it to the plaintiffs' counsel at the hearing, what would be the consequence supposing I came to a different conclusion? It would be that the by-law authorizing another person to sign them would be invalid in my judgment—but what then? It would be the official duty of the Reeve to sign them, and he would be compellable to sign them. Would the inoperative by-law under which they were signed, and the actual signing of them under that by-law give the township an equity to come into this court?

I received no satisfactory answer to this question.

Judgment.

There remains one more question, the construction of the bond given by the Railway Company to the Corporation of Brock. It is clear, I think, that there is nothing in the condition of the bond requiring the Railway Company to keep the debentures in hand until the several works mentioned in the recital of the bond are completed. The condition is, that in case of failure to do them, they will on demand pay over to the Township the sum of $50,000 or return the debentures. But it is said that the recital is the key to the condition, and controls it. Supposing this position to be correct, we must at least see that the recital is explicit, unambiguous, and consistent with itself: this recital is not so. It recites a request by the Railway Company to grant the bonus, and that the Corporation of Brock had agreed to do so, provided the Company "would become bound" to run their railway through the township in a manner specified, "and also to become bound" to use three regular sta-

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tions in the Township, at places specified, "and also to become bound"—and it is upon this that the question turns—"that not less than sixty continuous miles of the said road shall be built within two years from the first day of March next on the route mentioned above, or if not the debentures to be issued to be returned to said municipality." The contention is that the Company is bound to be in a position to return the debentures in specie in the event of their failing to build the sixty continuous miles of road, and this it is contended they cannot be if they part with them, as they contend they have a right to do. This is a matter of inference and reasoning only, and however forcible it may be. taken by itself, we must look at the whole of the recitals and we find one expressly defining what the Company is bound to do, before the trustees, in whose hands the debentures were to be placed, should be at liberty to dispose of them; and that is, that they shall not be disposed of "until the contracts are let for the building of said sixty miles of road and work commenced thereon;" in other words, that upon the contracts being let and work commenced, they are at liberty to dispose of them. This explicit provision more than countervails the inference to be drawn from the recital upon which the plaintiffs rely. It is of course impossible that this inference can control the condition.

Judgment.

On behalf of the Railway Company, evidence is given, shewing that the construction of the road is being actively prosecuted.

It does not appear that the company contemplate disposing of the debentures in question before they are entitled to do so under the terms of their bond, according to what is, as I conceive, its proper construction.

The plaintiffs fail upon all the points upon which their bill is founded. Their bill must be dismissed with costs.

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JAY V. MACDONELL.

Principal and agent—Liability of agent.

It is the duty of an agent to defend an action improperly instituted against his principal: where therefore an insurance company had been carrying on business in this country, and, having ceased to do so, paid off a clerk who was immediately employed by a firm of which the agent of the company was a member; notwithstanding which the clerk sued the company for his salary, and the agent allowed judgment in the action to go by default, and paid to the plaintiff in the action the amount of the judgment:

Held, that the agent was not entitled to credit for the amount so paid on taking an account of his receipts and payments on behalf of the company: that the utmost to which he could be entitled to credit was the excess of the salary at which the clerk had been engaged by the company over and above what he received in his new employment.

Where on an insurance company quitting business a quantity of office furniture was in the possession of the agent, which was not forthcoming, it was *held*, that it was the duty of the agent to have made proper entries shewing what had become thereof; and in the absence of such proof that his estate was properly chargeable with its value.

A paid agent whose duty it is to receive from other agents moneys due to the principal, is bound to take steps for the recovery thereof, unless he shews that had he taken proceedings to enforce payment, or that there was reasonable ground for believing that if proceedings had been taken, they would have proved ineffectual.

Statement.

The bill in this case was filed in March, 1860, against the late *Archibald John Macdonell*, as the special agent, attorney, and solicitor, for winding up the affairs of *The Times Fire Insurance Company*—a company formerly carrying on business in Canada. The bill prayed an account of *Macdonell's* transactions in winding up the business of the Company in Canada. A decree was made in March, 1866, and the Court directed the Master to take an account of *Macdonell's* receipts and payments on behalf of the Company, and generally as to all his transactions in winding up the Company's business in Canada. *Macdonell* died after the making of the decree, and the cause was revived

against his executrix. The Master made his report on the 25th March, 1868, against which the plaintiff appealed, and his objections being allowed, the cause was again referred to the Master to review his report generally, and to receive further evidence, and he thereupon made his second report on the 1st June, 1869, against which the plaintiff also appealed, renewing the objections he had previously made to the first report.

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The cause was referred back to the Master to review his report generally on the objections taken. But on the 2nd and 4th objections only is it necessary to give a report of the case. These objections as taken were to the following effect:

(2.) Because the Master had improperly allowed the defendant $844.47, alleged to have been paid by *Archibald John Macdonell*, and in the said report and proceedings particularly mentioned and referred to. That the said sum of $844.47 was alleged to have been paid in respect of a judgment obtained by one *Noel* against the Company; that such judgment was obtained by the collusion of *Noel* with *Macdonell;* that *Noel* was discharged from the service of the Company on the 10th of February, 1859, and paid his salary up to the 17th of that month; that he was in the employ of the firm of *Macdonald & Macdonell* from the 10th of February, 1859, and from thence to the dates in the evidence mentioned; and that the evidence taken in the cause clearly established that the said judgment was obtained, and the said payment made by the collusion of *Macdonell*, and in fraud of the Company; that the Company are not debited in the books produced by the defendant with the payments made in respect of the said judgment, but the same are charged and debited to the said *Archibald John Macdonell* by his express desire and instructions; and that it appears from the evidence taken in the cause, and the exhibits therein

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referred to, that the Master improperly allowed to the defendant the said sum of $844.47.

(4.) Because the Master should have charged the defendant with the value of the furniture in the said report and proceedings particularly mentioned and referred to; and also with the said balances in the said report and proceedings particularly mentioned and referred to, but he has not done so. And particularly he should have charged the defendant with such of the said balances, which but for wilful neglect and default could and ought to have been collected and recovered; and that the said *Macdonell* was guilty of great negligence in respect of the said balances, and the defendant should therefore be charged therewith.

Mr. *Snelling*, for the plaintiff (the official manager of *The Times Fire Insurance Company*) who appealed.

Mr. *Hector*, Q.C., for the defendant. The following authorities were cited: *Goodwin* v. *Pocock* (*a*), *Elderton* v. *Emmens* (*b*), *Gandell* v. *Pontigny* (*c*), *Davis* v. *Marshall* (*d*), *Addison* on Contracts 436, 438, (4 ed.) 1083, 1102, (edit. of 1869).

Judgment.

SPRAGGE, C.—The second objection to this report is against an allowance by the Master to *Macdonell* of a payment to *Noel* of $844.47, in satisfaction of a judgment recovered by *Noel* for salary.

There must be a reference back to the Master upon this objection: subsequent evidence, a further consideration of the case, and an examination of the authorities lead me to the conclusion that Mr. *Macdonell* was wrong in paying to Mr. *Noel* his full salary. No actual

(*a*) 15 Q. B. 576; 19 L. J. Q. B. 410.
(*b*) 6 C. B. 160; 4 H. L. C. 624.
(*c*) 4 Camp. 375.
(*d*) 9 W. R. 520.

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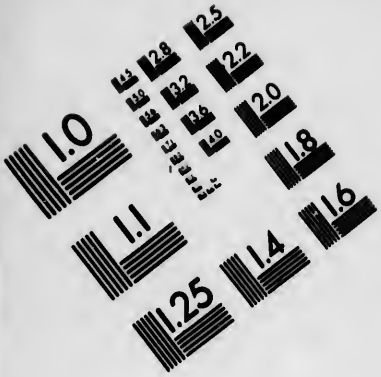
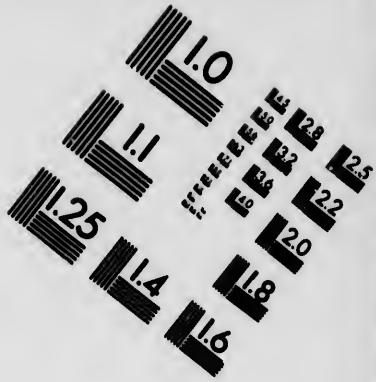
services were rendered by *Noel* to the Company after 10th February, 1859. He passed immediately from the service of the Company to that of the law firm of which *Macdonell* was a member. [illegible] was paid by *Macdonell* his full salary up to the e[illegible] the year, as if still in the service of the Company. He sued for it, the action was undefended, and he recovered the full amount. I think it clear from the authorities that this was more than he was entitled to. The case does not fall within the rule applied to domestic servants. The case of *Goodman* v. *Pocock* (*a*), was the case of a clerk who had been dismissed by his employer, and in that case Chief Justice, then Mr. Justice *Erle*, stated what he conceived a person so dismissed to be entitled to. He said "I think that the servant cannot wait till the expiration of the period for which he was hired and then sue for his whole wages, on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal. The servant after dismissal may, and ought, to make the best of his time, and he may have an opportunity of turning it to advantage." The learned Judge referred to a then recent decision in the Exchequer Chamber, *Elderton* v. *Emmens* (*b*), in which Lord *Wensleydale*, then Mr. Baron *Parke*, who delivered the judgment of the Court, designated as pernicious, a doctrine that would give to a party dismissed his wages for his whole time, on the ground of his being ready to serve. Upon the appeal of the same case to the House of Lords (*c*), some of the learned Judges who gave their opinion to the House, gave their view of the law in much the same terms. Mr. Justice *Crompton* treated it as settled law (*d*), "that after a dismissal the servant or party employed may recover such damages as a jury may think the loss of his situation has occasioned," and

Judgment.

(*a*) 15 Q. B. 576.
(*b*) 6 C. B. 160.
(*c*) 4 H. L. C. 624.
(*d*) At p. 645.





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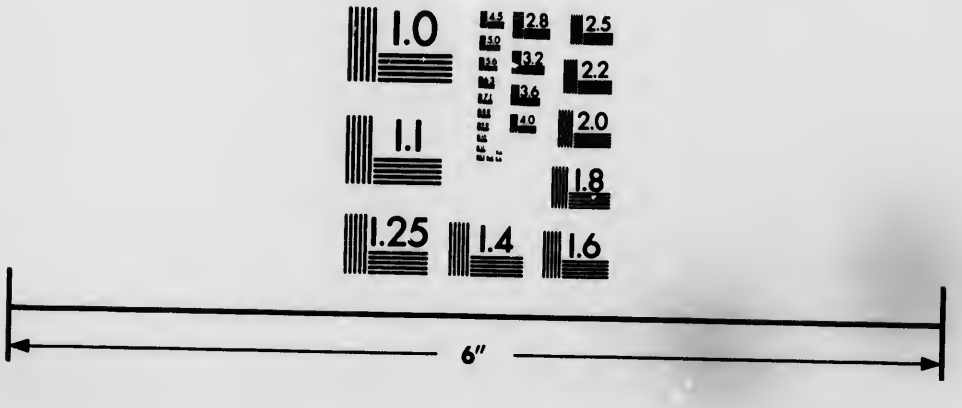

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he puts the case, which actually occurred in the case of Mr. *Noel*. "If he has obtained or is likely to obtain another situation the damages ought to be less, or nominal, according to the real loss; and in such case the servant need not remain idle in readiness to give services which cannot be required." Other language to the like effect is used by the same learned Judge and also by Mr. Justice *Erle*. I would refer also to *Hochester* v. *De La Tour* (*a*), *Hartley* v. *Harman* (*b*), and *Beckham* v. *Drake* (*c*). The learned counsel for the defendant refers me to *Yelland's* case, *In re English Joint Stock Bank* (*d*), but it supports the doctrine enunciated in the cases to which I have referred: for while it awards to *Yelland* the value of an annuity based upon the time for which he was engaged, it is added, "From this amount something will have to be deducted, for Mr. *Yelland* being at liberty to obtain a fresh appointment; and regard must also be had to the liberty reserved to him by the agreement of acting as agent for other Companies." I find no countenance for any other principle for the measure of damages except in a note to *Smith's* Leading Cases which is referred to in *Goodman* v. *Pocock*, and in the language of Lord *Ellenborough* in a *Nisi Prius* case, *Gandell* v. *Pontigny* (*e*). In that case there was the dismissal of a clerk in the middle of a quarter, and it does not appear that he found other employment during the remainder of the quarter. If, indeed, at the date of this transaction, it had been the understood and received law, that a clerk dismissed during the currency of the term for which he had been engaged was entitled, as of course, to his full salary whether employed elsewhere or not, it would be in the defendant's favor; but the cases to which I have referred are of older date: and in a work very generally

Judgment.

(*a*) 22 L. J. Q. B. 455.
(*b*) 11 A. & E. 798.
(*c*) 2 H. C. 579.
(*d*) 4 Eq. 350.
(*e*) 4 Camp. 375.

referred to in the profession at that date as well as now, *Addison* on Contracts, the law is stated in precisely the same terms in the edition of 1856 (*a*), as in the edition of 1869 (*b*), thus "The action may be brought as soon as the dismissal takes place; and the measure of damage is an indemnity to the plaintiff for the loss he sustains by the breach. If he has found other equally eligible employment the damages would be small; but if not, they might far exceed the salary agreed to be paid."

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Mr. *Macdonell* was aware of the action brought by *Noel*. It is not pretended that he was not. His duty to the Company was to defend it, that the Company might suffer no detriment through his neglect. I should say indeed that his duty commenced at an earlier date. Upon *Noel* passing from the actual employ of the Company to that of Mr. *Macdonell's* law firm was a fitting occasion for the making of some arrangement with him. It may be indeed that Mr. *Macdonell* assumed that *Noel* had no further claim, and would make none upon the Company; and if the salaries were equal that would have been a reasonable assumption. However, that may be, when the claim was made, it ought not to have been acquiesced in. The law upon the point is clearly in accordance with common sense and justice, and the claim for full salary, under the circumstances, was so manifestly unreasonable that it behoved the agent of the Company to ascertain whether he was legally bound to pay. I think it probable that Mr. *Noel* conceived that he was entitled in strict law to what he claimed; and I should be slow to impute to Mr. *Macdonell* anything like collusion with him; but I must impute to him such an absence of careful regard to the interests of the Company whose agent he was, as amounts in law to breach of duty. He does not appear even to have objected to this demand, or to have offered any remon-

Judgment.

(*a*) p. 1152. (*b*) p. 1082.

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strance, but to have quietly acquiesced. It could not have been established against the Company if resisted. It was established by judgment through his neglect to take such steps as must have been successful if taken.

All that can now be allowed to the defendant is such amount as *Noel* could have legally recovered in the way of damages. The principle upon which these damages should be computed is clearly pointed out in the cases to which I have referred. If the salary allowed and paid by the law firm was equal to that he had been receiving, there was, *prima facie* at least, no damage; if less, the damage would, *prima facie*, be the difference. There may, however, be other elements of consideration which do not appear. So far as appears, the hiring I should say was by the year, the salary being paid at shorter periods, say monthly, would not shew the hiring to be monthly: *Davis* v. *Marshall* (*a*) is an authority upon this point.

Judgment.

The fourth objection embraces two distinct heads of claim against the estate of *Macdonell*. As to the office furniture, what I said when this matter was before me on the former appeal, should have led the legal adviser of the defendant to seek for evidence to account for it. What further evidence has been given, has been by the plaintiff: none by the defendant. It lies upon the defendant to account for this furniture, and unless it is in some way accounted for, the estate must be charged with its value. If sold at auction, as was probably the case, the sum it brought will be the sum to be charged.

As to the sums due from agents, the matter seems to have gone off upon the question, upon which party the onus was to prove the sums in the hands of the agents and not paid over, to be recoverable. It was part of

(*a*) 9 W. R. 520.

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the duty of *Macdonell* to receive these moneys; to call for payment when there was default, and he appears to have discharged this duty to a certain extent; to have written letters to those in default, and to have sued at least one of them, and he may have discharged the whole of his duty in that behalf; but that has not as yet been made to appear. I am of opinion that the onus was upon the defendant to prove that all was done that reasonably could be done to obtain payment. I will refer to only two cases upon this point. In *Clack* v. *Holland* (*a*), Lord *Romilly* stated the law thus: "Where it is the duty of a trustee or executor to obtain payment of a sum of money, the trustee or executor is exonerated and never required to make good the loss, if he has done all he can to obtain payment; but his efforts have not proved successful. Nay more, if he has taken no steps at all to obtain payment, but it appears that if he had done so, they would have been, or there is reasonable ground for believing that they would have been ineffectual, then he is exonerated from all liability."

Judgment.

In all this it is implied that it lies upon the trustee or executor to excuse himself for not getting in the moneys which it was his duty to receive; and what is so implied, was expressly decided by Sir *Launcelot Shadwell* in *Stiles* v. *Guy* (*b*). At the conclusion of the argument the Vice Chancellor said, "Those who seek to exonerate themselves from a debt due from a third person ought to prove that that person could not have paid the debt. If a debt is due the law always presumes, until the contrary is shewn, that the debtor can pay it. Insolvency cannot be presumed." And in giving judgment on a subsequent day the learned Judge said, "If an executor is sued for a *devastavit* in not having recovered a debt due to his testator's estate, all

(*a*) 19 Beav. at 271. (*b*) 16 Sim. 230.

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that it is necessary for the plaintiff to shew is that the debt existed, and that the executor took no step to call it in. It might be a justification for the executor to prove that at the death of the testator, the debtor was utterly insolvent; but until that is proved, the law assumes the fact to be the other way." Mr. Justice *Williams* in his Treatise on Executors (*a*), after citing *Clack* v. *Holland*, adds, "But, in such a case, it should seem that it lies on the executor to prove that if he had taken proper measures to obtain payment they would have failed," and for this he cites *Stiles* v. *Guy* (*b*). There is a case, *East* v. *East* (*c*), where an executor was not put to shew this, but it was decided upon its peculiar circumstances. It is hardly necessary to say that the law cannot be less stringent in the case of a paid agent, than in the case of a trustee or executor in England. It is a pity that the law upon the point was not cited to the Master. I assume that it was not, inasmuch as it was not cited to me. There must be a reference back to the Master upon this objection.

Judgment.

This is not a case in which costs should be given to either party.

(*a*) p. 1667. (*b*) *Supra.* (*c*) 5 Hare, 348.

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HILL v. THOMPSON.

Husband and wife—Proof of debt against grantee of debtor.

A purchase by a wife from her husband, the consideration being paid out of her separate estate, was *held* to be maintainable against creditors of whose debts she had no notice.

The husband after the purchase expended money in improving the property:

Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought.

Examination of witnesses and hearing at St. Catharines.

Mr. *Moss*, for the plaintiff.

Mr. *Freeman*, Q.C., for Mrs. *Thompson*.

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

Judgment.

July 19.

SPRAGGE, C.—The peculiarities in this case arise from the position and relationship of the parties. They are all related or connected. The plaintiff is a judgment creditor, and is a son-in-law of the judgment debtor; and the object of the bill is to set aside a conveyance made by him to his wife, through his wife's brother, the defendant *Vanderburgh*. The hostile parties are, as I gather from the evidence, the plaintiff and the defendant *Archibald Thompson* on the one hand, against the wife—a second wife—on the other. *Vanderburgh* appears to have been a mere instrument in the hands of some of the parties.

Vanderburgh at the time of his conveyance to Mrs. *Thompson* was a bare trustee for her husband, the purpose for which the land in question had, with other

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lands, been conveyed to *Vanderburgh* having been answered. Mrs. *Thompson* knew the facts as to this, and though she says she thought she was buying from *Vanderburgh*, and went through the form of paying the purchase money to him, that could be only because of the form that the transaction took: there was no bargain for purchase between her and *Vanderburgh*: when *Thompson* conveyed to him it was agreed that in case *Vanderburgh* should reconvey (the conveyance to him having been by way of indemnity), the particular lot in question should be conveyed to Mrs. *Thompson*. I find from the evidence that Mrs. *Thompson* had moneys of her own which came to her from the estate of a former husband, and that out of those moneys she paid the consideration money, $100, to *Vanderburgh*, who handed the same to Mr. *Thompson* who was present. If there had been no valuable consideration, she would have been the appointee of her husband: as it was, she was a purchaser for value from her husband, indirectly, but still that was the character of the transaction; and putting creditors of the husband out of the case, I apprehend it was valid and effectual to vest the estate in Mrs. *Thompson* as a purchaser for value. It does not appear that the consideration paid was less than the value.

Judgment.

The transaction was real not colorable, and if it had been a dealing between the debtor and a stranger, it would not be necessary for the purchaser to impeach the judgment: he would hold against the judgment creditor unless the latter were able to shew affirmatively that the intent of the transaction was to defeat creditors. The transaction being with the wife, it would be open to grave suspicion, if thereby creditors were hindered; and if it were known to the wife that her husband was in embarrassed circumstances it might be a proper inference that it was a contrivance to hinder them.

Assuming that where the husband is indebted such

would be the proper inference, it would not be conclusive; it would be open to the wife to rebut it if she could; and in no way could she do it more effectually than by shewing that in truth there was no indebtedness; and this is shewn very satisfactorily in this case. Only one debt, that of which the plaintiff is assignee, and a mortgage debt are proved to have existed against *Thompson*. The dates are material. It is not proved that *Thompson* was indebted to any one whatever, with the exception of a mortgage debt upon other land at the time of the conveyance from *Vanderburgh* to Mrs. *Thompson*. That conveyance was made on the 11th of November, 1865, and was registered on the 30th of the same month. The agreement for sale from *Thompson* to *Zimmerman* was entered into on the 23rd of October in the same year. *Zimmerman* in his evidence says that he paid *Thompson* $630 on account of the purchase money, and that after he had paid this he "heard from a Mr. *Bald* that he had a mortgage, and, on search, found one registered against the land:" and upon this discovery negotiations ensued between *Zimmerman* and *Thompson* for a rescission of the contract, which are detailed in the evidence of the former. This $630 (or it should be $636.30) was the aggregate of two payments, the second of which was made, as appears by indorsement on the contract, on the 3rd of November, 1868, and it is for the above amount, with interest, that the plaintiff's judgment was recovered. It was therefore long after the conveyance to Mrs. *Thompson*, a year or more, before any question of indebtedness from *Thompson* to *Zimmerman* arose. It could not therefore be to hinder that creditor that the conveyance was made, and, except the mortgagee *Bald*, there does not appear to have been any other creditor. It would be a violent presumption to suppose that Mrs. *Thompson* purchased in order to defeat *Bald*, or to defeat some future claim by *Zimmerman*. It is not shewn or even suggested that she was aware of the sale to *Zimmerman*, or if she were,

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it cannot be supposed that she could expect that a debt *from* her husband *to Zimmerman* could grow out of it.

It is suggested that a large expenditure of moneys of the husband having been made in building upon the land in question, the case falls within the principle of *Jackson* v. *Bowman* (*a*). If there is no creditor defeated or hindered by what has been done in this respect, Mrs. *Thompson* is entitled to the benefit of this improvement upon her property. And if so entitled, she is entitled to shew that there is no such creditor. *Primâ facie* the judgment is evidence of a debt, but Mrs. *Thompson* being a third person affected by that judgment, if valid, must be allowed to impeach it if she can. I apprehend that she could come into Court as a plaintiff to do this; *a fortiori* may she defend herself when attacked, by displacing the *locus standi* of the plaintiff; by shewing that he is not a creditor, and so not entitled under the statute of Elizabeth, to impeach her conveyance.

Judgment.

It is clear from the evidence of *Zimmerman*, the person in whose name this judgment was recovered, that the debt upon which the action was brought, had been compromised and satisfied, before action brought. And I believe his evidence when he says, that the document which he signed on the 22nd of August, 1868, and which is in terms an assignment of the contract of sale to the plaintiff was intended, and believed by him, to be a release to *Thompson*. The contract was in duplicate, and the agreement was that each should release the other. *Zimmerman* says expressly that there was no bargain between him and the plaintiff. The consideration expressed leads to the conclusion that the plaintiff was not what he sets himself up to be, a purchaser for value. It is one dollar, "and in further consideration of the said *Hill* procuring the cancelling of a certain

(*a*) 14 Grant 156.

agreement, being the same as the written agreement, held by one *Archibald Thompson*, of," &c. This last consideration is purely imaginary. The agreement for the rescission of the contract of sale was between the parties to it themselves. *Hill* had nothing to do with it. The parties went to *Hill* only professionally, to draw the papers proper to carry their agreement into effect. 1870. HILL v. THOMPSON.

This appears from the evidence of *Zimmerman*. The plaintiff himself was not presented as a witness. My conclusion is, that there was no debt due by *Thompson* to *Zimmerman* after this, or due to any one, in respect of this contract of sale; and that the plaintiff was not a purchaser for value. Assuming that it was, it would make no difference, being assignee only of a chose in action, unless the parties stood by and assented by silence or otherwise that there was a debt or cause of action against *Thompson*, which it was intended to pass by assignment to *Hill*. I am perfectly satisfied, from all the circumstances, that nothing of the kind took place: and further, if it had, I do not see how it could affect a third person, Mrs. *Thompson*. Judgment.

At a subsequent date, 19th October, 1869, *Hill* having brought an action in the name of *Zimmerman* against *Thompson* for the moneys paid on the contract of sale, and having recovered judgment upon default of appearance, procured from *Zimmerman* an assignment of the judgment. *Zimmerman* was wrong certainly in making such assignment, whatever may have been the reason or inducement, but his doing so does not lead me to doubt the truth of his account of the arrangement between himself and *Thompson*; and of what passed at the plaintiff's office.

What appears to have been done was, the keeping alive a debt which was extinguished; taking an assignment of it to the son-in-law of the *quondam* debtor.

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suing for and recovering judgment upon it. All this, unaccounted for, appears strange. The key to it may possibly be found in the third paragraph of Mrs. *Thompson's* answer. I examined a report bearing the same date as that to which she refers, and find that *Archibald Thompson* was thereby found indebted to the estate of his brother in a balance of upwards of $12,000. If the *Archibald Thompson* defendant in that suit is the same *Archibald Thompson* who is defendant in this suit, it may account for the strange proceedings to which I have referred; and it may be that *Zimmerman* lent himself to fencing-off a creditor of *Thompson*.

All that was done upon *Thompson* and *Zimmerman* going to the plaintiff's office, and all that was done afterwards, was wrong. And it is no less wrong in Mr. *Hill* to use the judgment which he has in this manner obtained, for the purpose for which he is seeking to use it in this suit.

Judgment.

His bill must be dismissed with costs.

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WOOLANS v. VANSICKLE.

Practice—Costs—Partnership suits—Hearing on circuit instead of moving for decree.

In a partnership suit the defendant's answer stated the terms of the partnership. The plaintiff, not accepting the statement, took the case to a hearing, instead of moving for decree, and he proved a slight difference, which involved a further charge of £4 only against the defendant:

Held, that plaintiff should pay the extra costs occasioned by the hearing.

The rule which charges the costs of taking partnership accounts on both parties is not to be applied where it would be tantamount to the denial of any remedy.

In a partnership suit, the reference embraced private as well as partnership transactions; there were no partnership assets; the suit did not involve the administration of a partnership estate; the defendant claimed a large balance to be due to him, while the result had been a report for $118.74 in favor of the plaintiff; and there were no special circumstances in favor of the defendant: the court charged him with the costs of taking the account.

Statement.

This was a suit by one partner against another in respect of a partnership which terminated before the filing of the bill. The bill was in the form provided by the General Orders of the Court. The defendant, by his answer, admitted the partnership; set forth its terms; and claimed that the plaintiff was largely indebted to him in respect of the partnership transactions. The plaintiff went down to a hearing at the autumn sittings in Hamilton, 1869, when evidence was given shewing the terms to have been as stated by the defendant, with a slight variation which resulted in an additional charge of about £4 against the defendant. By the decree, the necessary accounts were directed as well of the partnership transactions of the parties, as of all other transactions between them; and the Master was further directed to inquire as to a suit at law brought by the plaintiff against the defendant. The Master, by his report, dated 24th March, 1870, found that there

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were no assets of the partnership; that the sum of $418 74 was due by the defendant to the plaintiff, the defendant having drawn that sum from the partnership beyond his share of the profits, and beyond a sum which the plaintiff owed him in respect of their private transactions; and that the plaintiff had no cause of action at law.

The only question on further directions was as to the costs.

Mr. *D. B. Osler*, for the plaintiff.

Mr. *Moss*, for the defendant.

June 14. Judgment.

MOWAT, V. C.—The defendant is entitled to the costs of the action at law, and of so much of the costs in the Master's office as was occasioned by the inquiry as to that action; also to the extra costs occasioned to him by the plaintiff's having gone to a hearing at Hamilton instead of moving for a decree. It was not disputed that the decree would, on motion, have been made in the same terms, with a slight difference which only affected the result to the extent of £4.

Then, as to the general costs of the suit. The ordinary rule in cases of partnership suits is stated to be, to give no costs up to the hearing; and to direct the costs of taking the accounts to be defrayed out of the partnership assets, or by a contribution from each partner (*a*). That rule is not unreasonable where there is a large partnership estate to be administered. Where there is no partnership estate, the accounts may be so complicated, and the questions on which the rights and liabilities of the partners depend may be so intricate

(*a*) Lindley on Partnership, 2nd ed., 986; Seton on Decrees, 3rd ed., 547, 1295; Morgan & Davey on Costs, 175.

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and difficult, that the aid of a Court, or of arbitrators, may, without the fault of either party, be essential in order to determine the proper result; and where the amount to be recovered is so large that the costs bear to it a moderate proportion, it may be just that the partners should share the expense of the necessary investigations. But the rule ought not to be applied where it would be tantamount to a denial of any remedy. In the present case, where the reference embraced private as well as partnership transactions, where there are no partnership assets, where the suit has not involved the administration of a partnership estate, where the defendant claimed a large balance to be due to him, while the result has been a report for $418.74 in the plaintiff's favor, and where no special circumstances in the defendant's favor appear, I think that it would not be just to charge the plaintiff with the costs which he has incurred in recovering the debt; and I am not aware that the authorities go so far as to make that the proper decree. I shall make no decree for a few days, in order to give the defendant's counsel an opportunity of searching for precedents. Otherwise, the plaintiff will take the costs of the suit, less the costs to which I have already said that the defendant is entitled. The debt should bear interest from the date of the report.

Judgment.

No adverse precedents having been produced, the decree was drawn up as directed.

WHITING v. TUTTLE.

Patent, sale of by patentee—Infringement.

During the existence of a license the licensee cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another.

Statement.

It appeared that on the 2nd March, 1866, letters patent were granted to the defendant *Tuttle*, as the inventor and discoverer of an improved socket for hoes, forks, and spades, called "Tuttle's Improved Socket," granting to him the exclusive right to manufacture the same for fourteen years; that for some time thereafter the plaintiff *Whiting* and the defendant *Tuttle* continued to manufacture such articles in partnership; that in August, 1866, *Tuttle* retired from the partnership, and assigned, for valuable consideration, all his interest in the partnership lands, tenements, machinery, and buildings—also his share in the good-will of the business; and also the sole and exclusive right in all or any of the British Provinces of North America to use the said patent right; that the sale, though in fact made to *Whiting*, was for the joint benefit of himself and his co-plaintiff, *Cowan*; that the defendants had entered into partnership and were carrying on business near the town of St. Catharines, and were manufacturing forks and hoes with *Tuttle's* improved socket, without any authority from the plaintiffs.

The bill was filed to restrain such infringement of the patent, or otherwise interfering with the rights of the plaintiffs; for an account of gains made by the defendants by such manufacture; and for further relief.

The defendants by their answers, amongst other defences, impugned the validity of the patent obtained by *Tuttle*, on the ground of want of novelty in the alleged invention.

The cause came on for the examination of witnesses and hearing at the sittings of the Court, at Cobourg, in the Spring of 1870. 1870. Whiting v. Tuttle.

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

Mr. *McLennan*, and Mr. *Miller*, for the defendants.

STRONG, V. C.—At the conclusion of the argument I expressed the opinion that no right to relief had been established against the defendants other than the defendant *Tuttle*, and that the bill as against them must consequently be dismissed with costs. I also determined that the whole partnership-interest of *Tuttle* was purchased for one gross price, and that therefore it could not be said that the assignment of the patent was not for valuable consideration. June 15.

There remained the question as to how far it was competent to *Tuttle* to dispute the plaintiffs' title to the patent on the ground of want of novelty. During the progress of the case, I thought it clear that *Tuttle* was estopped from insisting on the invalidity of the patent; but Mr. *McLennan's* able argument gave rise to doubt which induced me to reserve my judgment on this point. On referring to authorities I find it very clearly established that it is not competent to a patentee who has assigned his patent, and is afterwards guilty of an infringement, in respect of which relief is sought against him by a bill in equity, to set up the invalidity of the patent: in other words, the patentee in such a case will be restrained from derogating from his own grant. In 1 *Webster's* Patent Cases, page 291, there is a note of the case of *Oldham* v. *Longmead*, before Lord *Kenyon*, which is as follows: "In this case, where the action was brought by the assignee of the patentee against the patentee, Lord *Kenyon*, before whom the cause was tried, would not permit the latter Judgment.

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to shew it was not a new invention against his own deed;" and in the case of *Hayne* v. *Maltby* (*a*) Lord *Kenyon* says: "In the case of *Oldham* v. *Longmead* the patentee had conveyed his interest in the patent to the plaintiff, and yet, in violation of his contract, he afterwards infringed the plaintiff's right, and then attempted to deny his having had any title to convey, but I was of opinion that he was estopped by his own deed from making that defence."

Again, the late case of *Chambers* v. *Crichley* (*b*) is even more directly in point. There the case was, that "for several years prior to 1857, and down to the end of 1860, the plaintiffs *Chambers* and *Wright*, and the defendant *Crichley*, carried on the business of stove and grate manufacturers. Part of their assets consisted of a patent for making 'Bivalve Stoves,' granted to the plaintiff *Wright* in 1857. * * * The defendant, in 1862, assigned to the plaintiffs all his share, right, title, and interest in the partnership assets," including this patent.

Judgment.

The plaintiffs filed a bill alleging an infringement by defendant. The Master of the Rolls, after deciding the fact of infringement against the defendant, proceeds as follows: "I do not intend to express my opinion as to the validity of *Wright's* patent. I will assume for the purpose of my judgment that it is worth nothing at all. But this is certain, that the defendant sold and assigned that patent to the plaintiffs as a valid one, and having done so, he cannot derogate from his own grant. It does not lie in his mouth to say that the patent is not good. I am satisfied that the defendant has taken advantage of the patent, but I am of opinion that he is not entitled to do so."

(*a*) 3 T. R. 438. (*b*) 33 Beav. 374.

1870.

Whiting v. Tuttle.

If this direct authority did not exist, the converse principle, that "a licensee is estopped from denying the validity of the patent during the continuance of the license," which is well established by the case of *Crossley* v. *Dixon* (*a*), and by the numerous cases collected in *Kerr* on Injunctions, p. 424, would be sufficient to warrant the application to this case of the doctrine which the plaintiff invokes. The answer to the argument urged on behalf of the defendant is that no rule of policy is contravened by holding the agreement to be binding between the parties.

The case of *Chambers* v. *Crichley* is also a conclusive answer to Mr. *MacLennan's* objection to the form of this suit by *Whiting* as a co-plaintiff; for in *Chambers* v. *Crichley, Wright*, one of the plaintiffs, was himself the patentee.

Judgment.

This being my conclusion as to the plaintiffs' rights under the assignment of the patent, I am not called upon to determine the secondary question raised by Mr. *Blake* as to the effect of the agreement not to manufacture the patent articles considered as a mere covenant in restraint of trade; and I express no opinion on this part of the case.

There must be the usual decree for an injunction and account against the defendant *Tuttle*, with costs.

(*a*) 10 H. L. 293.

1870.

TAIT v. HARRISON.

Practice—Error in proceedings at law.

So long as a judgment at law, although irregularly entered up, remains a record of the Court in which it has been recovered, and neither fraud nor collusion in obtaining the judgment is alleged, a bill to impeach it in this Court on the ground of the irregularities, will not lie.

Examination of witnesses and hearing at Cornwall Spring Sittings, 1870.

Mr. *James Bethune*, for the plaintiff.

Mr. *J. McLennan* and Mr. *D. B. McLennan*, for the defendants.

June 15. STRONG, V. C.—In this case the plaintiff and the defendant *Harrison* were execution creditors of the defendant *Allen D. McDonell* and both had executions against lands in the Sheriff's hands, the defendant *Harrison's* being the elder writ. At this time the execution debtor was entitled to the equity of redemption in certain lands which were mortgaged to the Canada Permanent Building and Savings Society. The executions were, in the order of priority I have mentioned, liens, on the equity of redemption. The mortgagees exercised a power of sale contained in their mortgage, and sold the lands, and, after paying off the mortgage debt and expenses, there remained a surplus of $188 in the mortgagees' hands, which they paid over to the defendant *Harrison* as being entitled to it by reason of his execution.

Judgment.

The plaintiff now files his bill alleging that the defendant *Harrison's* judgment and the writ of execution thereon issued were nullities, and that the plaintiff is therefore entitled to recover from the defendant *Harrison* the money received by him from the mortgagees.

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Tait v. Harrison.

The defect in the defendant *Harrison's* proceedings, consists in the omission to swear to the affidavit of service of the specially indorsed writ of summons on which the judgment was entered up. This defect would, of course, be fatal if the judgment were impeached in the Court of which it is a record by the defendant in it. But so long as it remains a record of the Court in which it was recovered, I am of opinion that, in the absence of even a suggestion of fraud or collusion between the parties to it, it must be regarded as a valid judgment; and that it is not competent to the plaintiff to impeach it here any more than he could do so at law: and it is clear upon the authorities that, in the absence of fraud, the plaintiff could not ask for the interposition of the equitable jurisdiction of the Court of Common Law. If I were to give the relief sought, I should be interfering with the records of a Court of Law in a manner warranted neither by principle nor authority.

Judgment.

The bill must be dismissed with costs.

HOWES v. LEE.

Injunction—Sale by sheriff under invalid writ.

The equity of redemption in mortgaged premises was sold under execution at law, and a conveyance thereof was executed by the Sheriff purporting to convey the same to the purchaser, who subsequently paid off the mortgage; obtained from the mortgagee a statutory discharge thereof, which he caused to be registered; and went into possession of the mortgaged property. In a proceeding at law, the sale by the Sheriff was declared void in consequence of the invalidity of the writ under which he had assumed to sell:

Held, that the purchaser was entitled to restrain an action of ejectment brought by the mortgagor to obtain possession of the mortgaged premises.

This was a motion for an injunction to stay an action of ejectment brought by the defendant against the

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plaintiff. The facts stated in the affidavits, so far as they are material, were as follow: The defendant had mortgaged the property in question to one *Britton*; afterwards a judgment creditor of the defendant issued a writ of execution against lands, under which the Sheriff assumed to sell the equity of redemption of the defendant in the mortgaged property; the plaintiff became the purchaser; and the Sheriff executed a conveyance to him. It was, however, subsequently determined by the Court of Law out of which the writ of execution issued, that the sale was void by reason of the invalidity of the writ.

Statement.

It appeared that, after obtaining the Sheriff's deed and, before the sale of the equity of redemption was declared void at law, the plaintiff, in good faith, paid off Mr. *Britton*, but instead of taking an assignment of his mortgage, he simply took and registered the ordinary statutory discharge, which, if the plaintiff had been the owner of the equity of redemption, as he then believed himself to be, would have been sufficient to have passed the legal estate. According to the determination of the Common Law Court, however, the plaintiff, not having acquired the equity of redemption under the Sheriff's sale, did not, by virtue of the registration of the discharge, obtain the legal estate; but the same became vested in the defendant, the mortgagor. The plaintiff, after paying off Mr. *Britton*, obtained possession of the property, to recover which the action of ejectment sought to be restrained was brought.

The defendant insisted that the plaintiff was not entitled to the possession, and had no equity entitling him to have the action restrained.

Mr. *Moss*, for the plaintiff.

Mr. *Scott*, contra.

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July 17.

STRONG, V. C.—I am clearly of opinion that the plaintiff is entitled to an injunction. Upon paying the money to Mr. *Britton*, the plaintiff became beyond all question entitled to a conveyance of the legal estate. Acting on the supposition, since determined by the decision at law to have been erroneous, that the plaintiff had acquired the equity of redemption, a mode of passing the legal estate was adopted which had not the effect it was intended by both Mr. *Britton* and the plaintiff it should have, but an effect entirely at variance with that intention, and one which was never contemplated by the parties. Mr. *Britton* being (as he was, as soon as he was paid off by the plaintiff,) a trustee of the legal estate for the plaintiff, intending to convey it to the plaintiff, through error and mistake conveys it to the defendant. There can be no question but that in such a case it is the duty of a Court of Equity to interfere to prevent the defendant from making a fraudulent use, as this defendant seeks to do, of the advantage he has accidentally gained by the mistake of other parties. It is no answer to the plaintiff's application to say that the misapprehension as to the effect of the Sheriff's sale was a mistake of law which this Court will not relieve against. It is clear, on the highest authority, that the error into which the parties fell in the present case was one which the Court will remedy. In *Cooper* v. *Phibbs* (*a*), Lord *Westbury* says: "It is said, '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law—the ordinary law of the country. But when the word '*jus*' is used in the ordinary sense of denoting a private right, that maxim has no application."

Judgment.

If the registering of the discharge had been wholly ineffectual, so as to have left the legal estate still vested in Mr. *Britton* instead of transmitting it to the defend-

(*a*) L. R. 2 E. & I. App., at p. 170.

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ant, there can be no doubt but that Mr. *Britton* would have been decreed to have executed a proper conveyance to the plaintiff. Then what better equity has the defendant than Mr. *Britton*? It is plain he has none, for he is not a purchaser for value, but a volunteer, who, moreover, had notice from the very nature of the transaction. Beyond all question, if this motion had been made before trial, the defendant would have been restrained from setting up any title in the ejectment founded on this discharge and its registration.

The action, I understand, has been tried, and judgment has been entered, the recovery having proceeded upon the discharge. The injunction will go in the terms asked.

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF EAST ZORRA v. DOUGLAS.

Principal and Surety—Discharge of surety—Appropriation of payments—Suit for account against municipal treasurer and his sureties.

A surety cannot get rid of his liability on the ground of having become surety in ignorance of material facts, unless he can shew that information was fraudulently withheld from him.

Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety.

A township council tacitly permitted the treasurer of the township, to mix the township money with his own:

Held, that this conduct was wrong, but did not discharge the treasurer's sureties.

A township treasurer had in his hands a large balance belonging to the township when he gave to the corporation new sureties: *Held*, that subsequent payments by the treasurer were applicable first to the discharge of that balance.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties.

At the time of the transactions in question in this cause, the defendant *James Kintrea* was, and for many

years had been, the plaintiffs' treasurer. On the 7th May, 1868, he as principal, and the other defendants *Douglas* and *Dunlop* as sureties, executed a bond to the plaintiffs by the name of "The Municipal Council of the Township of East Zorra" (*a*), in the penal sum of $3,500, with a condition thereunder written, that, if *Kintrea* should "duly receive, keep and pay over all moneys coming into his hands, and safely keep and surrender all papers, receipts, vouchers, books, papers, and documents to him committed, and do give an account therefor, according to the true intent and meaning of any Statute of this Province, or any by-law or resolution of said corporation," the obligation was to be void. The prayer of the bill was for (amongst other things) the rectification of the bond with respect to the plaintiffs' name, and an account. The principal defence was, that the bond was not valid, by reason of *Kintrea's* having, before the execution of the bond, been unfaithful and dishonest as treasurer; of his having theretofore appropriated to his own use township money, and being then unable to repay the same; and of these facts having been known to the plaintiffs and fraudulently concealed by them from the sureties. The answer also set up that, if the facts were not then known to the plaintiffs, the plaintiffs had information which should have led them to a knowledge of the facts, and that such knowledge must be imputed.

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Mu. Corp. of East Zorra v. Douglas.

Judgment.

The principal facts in proof which bore on this defence, were these:—*Kintrea*, before the execution of the bond, had received considerable sums beyond the sums which he had paid out for the township. According to the printed accounts, the balance against him on the 20th December, 1867, was $1556.98; and the balance on the 7th May, 1868 (the date of the bond), was not much less. This balance was not on deposit at any bank to

(*a*) See Corporation of Bruce v. Cramahe, 22 U. C. Q. B. 321.

1870. the credit of the corporation, nor did it exist specifically any where. In fact, the treasurer, during the many years that he held office, did not appear to have ever kept a bank account for the township money, or to have ever kept the township money separate from his own money, or from the other money passing through his hands. He was county treasurer, as well as treasurer for this township; and he held also the offices of deputy clerk of the Crown, and clerk of the Surrogate Court. He had never, so far as appeared, been asked to keep the township money distinct, or made any representation that he was doing so. When asked once by one of the auditors about the balance in his hands, he said that that was not the auditors' business. The auditor mentioned this answer to the reeve and deputy reeve; and it appeared to have been acquiesced in. The auditors did not seem to have ever regarded it as their duty to ascertain that the balance was specifically in existence any where, and, with the one exception, they never made any inquiry about it. The council made no inquiry, either; and successive councils appeared either to have assumed that they had no right to make such inquiry, or to have thought the point doubtful. *Kintrea* had always met all payments which he was directed to make for the township, and had never been in any default which any of the council heard of; and they had great confidence in his integrity and honesty.

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Statement.

It was the practice of this township to appoint annually the treasurer, as well as the other township officers. In the by-law appointing officers for 1867, it was directed that the treasurer and collector should furnish two good and sufficient sureties, to the satisfaction of the council, in double the amount of money passing through their hands as such treasurer and collector. (It was said that the only bond from the treasurer which the corporation held at this time was

ten years old; that the defendant *Douglas* was one of the sureties therein; that he had afterwards obtained his discharge in insolvency; and that the other surety had put his property out of his hands.) It did not appear what (if anything) was done under the by-law of 1867. *Kintrea* was appointed treasurer again in 1868; and in February, 1868, a by-law was passed reciting that it was "necessary to fix and determine the amount in which the treasurer of the township shall be bound to the corporation of the said township for the faithful performance of his duties as treasurer;" and naming $3500 as the amount. It appeared that a person (Mr *Grey*, of Woodstock) about this time told a member of the township council that he believed *Kintrea* "was going down hill;" but, so far as was shewn, giving no particulars, and stating no reasons for his belief. The councillor mentioned the matter at a meeting of the council, and got a resolution passed appointing a committee to inquire as to the solvency of the treasurer's sureties. If Mr. *Grey's* opinion excited the suspicion of this councillor, it did not seem to have destroyed the confidence of the other members of the council; nor did the confidence which both the council and the sureties had placed in the treasurer's integrity appear to have been destroyed even when, in February or March, 1869, he acknowledged his inability to pay the balance due from him as treasurer. Either at the instance or with the approval of the sureties, the council abstained from removing him from his office until he absconded in the month of May following.

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Mn. Corp. of East Zorra v. Douglas.

Statement.

The case came on for examination of witnesses and hearing at the sittings of the Court at Woodstock, in the Spring of 1870.

The facts above stated were those which the Court considered to be deducible from the evidence.

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Mu. Corp. of East Zorra v. Douglas.

Mr. *Crooks*, Q. C., and Mr. *John Hoskin*, for the plaintiffs.

Mr. *Blake*, Q. C., and Mr. *Richardson*, for the defendants *Douglas* and *Dunlop*.

The bill was *pro confesso* against defendant *Kintrea*.

August 24.

Judgment.

MOWAT, V. C. [after stating the facts as above set forth.]—With reference to the points urged by the learned counsel for the defendants, I may say, that I am satisfied that, when the defendants became sureties, the council believed *Kintrea* to be honest, and to have been faithful to what was mutually considered his duty as treasurer; that it was from no apprehension as to what might be discovered that they had at any time refrained from inquiry as to the specific existence, in money or on deposit, of the balance of the treasurer's receipts; that, at or before the execution of the bond in question, the members of the council, with possibly one exception, did not suspect that the treasurer was insolvent, or that the debt or fund was in danger; that the council had no fraudulent motive in calling for new sureties, and did not fraudulently withhold from the sureties any information which the members had. So far, therefore, as the defence of the sureties is founded on the fraud of the council, I think that the defence is not sustained by the evidence.

The answer does not rest the defence on fraud only; but without proof of fraud it is clear that the defence cannot be sustained. There was a dictum of Lord *Truro's* in *Owen* v. *Homans* (*a*), followed in *Cashin* v. *Perth* (*b*), the effect of which was, that the rule which prevails in insurance cases was applicable as between a creditor and an intending surety; that, as all material

(*a*) 3 McN. & G., 378. (*b*) 7 Gr., 340.

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circumstances known to the insured must be communicated on his application to insure, a creditor was under an obligation to be equally full in his communications to an intending surety; and that neglect of this obligation, though without fraud, vitiates the surety's contract. But this opinion was corrected by the *North British Insurance Company* v. *Lloyd* (*a*), where all the previous cases were reviewed; and the doctrine was distinctly laid down, that a surety cannot get rid of his obligation on the ground of want of information, unless he can shew that the information was fraudulently withheld. The same view has been maintained in all the late cases.

Judgment.

It appears by the treasurer's cash-book that his balance on the 7th May, 1868 (the date of the bond in question), was $1392.38. This balance was largely increased by his subsequent receipts, so that after making all payments the balance on the 21st December amounted to $3391.03½, according to the treasurer's account of that date as audited and printed. The treasurer's subsequent payments seem to have exceeded his receipts for the township. The money received after the 7th May, 1868, was, like all the money received previously, allowed to be mixed up by the treasurer with his other money, and was used by him; so that when, in February, 1869, the balance was called for, he was unable to pay it; and it is now clear that he had been insolvent for some time—probably for several years. The bill does not complain of the conduct of the council after the execution of the bond. If the allowing of the treasurer to mix up township money with his own, and to use the whole in common, as a banker might, does not relieve the sureties from their obligation, like conduct before the bond certainly cannot affect the sureties' liability. Now, in *Black* v. *Ottoman Bank* (*b*), it was held by the Privy Council to be clear, "that the mere

(*a*) 10 Exch, 523. (*b*) 8 Jur., N. S., 803.

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passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the surety; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of Sir *W. P. Wood*, V.C., in *Dickson* v. *Lawes*, to imply connivance, and amount to fraud. The surety guarantees the honesty of the person employed, and is not entitled to be relieved of his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty."

Judgment.

In *Dickson* v. *Lawes* (*a*), which is referred to in this extract, Lord *Hatherley*, then Vice-Chancellor, referred to the argument of a surety that there was a step which the creditor might have taken that would have led him to the discovery of the debtor's fraud, and that the fraud remained undiscovered solely on account of the creditors having neglected to take that precaution; and the learned Judge answered the argument by saying: "No authority has yet been produced which goes anything like to the extent that, in such circumstances, the surety would be discharged; and all the analogy to be derived from the cases which have been hitherto decided by the Court is the other way. Nothing can exceed the neglect of parties, who, for ten or twelve years, fail to call upon a clerk for an account. They have a high opinion of his honesty, and they trust him; the surety can know nothing of it; all of a sudden they find out a default in his accounts; and they have been allowed to sue the surety; and the surety never has escaped on account of that species of negligence. It is possible to put the doctrine higher than this; that there must be, as Lord *Brougham* expresses it, such an act of connivance as enables the party to get the fund into his hands, or such

(*a*) Kay, 306.

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an act of gross negligence as to amount to a wilful shutting of the person's eyes to the fraud which the party is about to commit, in order to discharge the surety. It was put forcibly in the argument, that the frauds in this case were all discovered very quickly after the death of *George William Freeman* [the principal debtor]. That was because the moment there was a suspicion, the whole matter was unravelled; and by searching and inquiring into the various matters, it was perceived that, if they had been looked into a little more closely, the fraud would have been found out before. That does not prove that the parties have been guilty of such negligence of duty in the obligation in which they were bound towards the surety as to exonerate the surety."

Judgment.

That was the case of sureties for an official assignee in bankruptcy. One of the rules promulgated for the direction of official assignees had expressly provided that no official assignee "should keep under his control, upon any estate, more than £100, or in the aggregate of moneys of bankrupts' estates more than £1000; and that any excess beyond such sum should be paid by him forthwith into the Bank of England" (*a*). The bill charged, that it was the duty of the commissioners, and of the creditors' assignees, and of the creditors themselves, to see that the official assignee observed this rule and the other rules; that this had not been done; and that, by means of the neglect, the official assignee had kept large sums and applied them to his own use. But his Lordship was of opinion that such neglect, if established, would not relieve the surety. The same view was taken by the House of Lords under like circumstances in *McTaggart* v. *Watson* (*b*).

I may refer to *Creighton* v. *Rankin* also (*c*). That

(*a*) *Ib.*, at p. 205. (*b*) 3 C. & F. 525. (*c*) 7 C. & F. 325.

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was a suit by trustees of district roads under a local act, and was brought in the name of their clerk against their treasurer's sureties. The facts of the case, and the law applicable to them, were summed up by Lord *Cottenham* as follows (*a*): "The accounts were regularly examined and audited, and it may be assumed that it was the duty of the trustees not to leave more money in the hands of the treasurer than might be necessary for the current expenses of the road, and that, in fact, more was left in his hands than was necessary for that purpose; but there is no evidence of any alteration in the terms of the contract to which the surety was a party, nothing that could have precluded the trustees from requiring payment of the balance found due. There was, therefore, nothing more than an omission to require payment; and, although this might be a neglect of the duty imposed upon the trustees by the Act, it does not, for that reason, operate more strongly in favour of the surety, than a similar neglect of a course of proceeding which the surety might, from the usual course of business, or the routine of trade, or the nature of the transaction, have been led to expect would take place. Such neglect can only be urged in his favour as placing him in a different situation, and exposing him to greater risk than he had intended; and this effect is produced by every omission in keeping the principal punctual to his payments, but such omission cannot be pleaded as an exoneration of the surety."

Judgment.

In consequence of the view which I have thus taken, it is unnecessary to consider the effect of the arrangement made between the plaintiffs and defendants in March, 1869, for continuing *Kintrea* in office.

It was contended on the part of the sureties, that they were sureties for one year only. But the treasurership

(*a*) At p. 347.

was not made an annual office by the Statute (*a*); and the by-law for 1868, appointed *Kintrea*, and the other officers therein mentioned, for the year 1868, "and until their successors shall be appointed."

It was contended that, at all ovents, the sureties are only liable for sums received by the treasurer after the execution of the bond; but, as his payments after that date appear to have exceeded the amount then due by him, and are applicable thereto in the first instance, it is unnecessary to consider at present the proper construction of the condition with reference to the balance (if any) which such payments might not satisfy.

The answer raises an objection to the jurisdiction of the Court to take the account as against the sureties. I think that the jurisdiction against *Kintrea* is maintainable on the ground of agency alone; and that, on the principle of avoiding multiplicity of suits, the sureties, being interested in the account, are proper parties to the taking of it. I think that the jurisdiction is maintainable against all the defendants on the ground, also, that the account is not such as can be conveniently and properly investigated before a jury at *Nisi Prius*.

Judgment.

The decree as drawn up declared the bond valid against the sureties, as well as the principal; directed an account to be taken of the amount due to the plaintiffs thereon; ordered the defendants to pay the costs to the hearing; and reserved further directions and subsequent costs.

(*a*) 29 & 30 Vic. ch. 51, sec. 161.

1870.

PEERS v. OXFORD.

Principal and surety—County treasurer.

County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money.

To invalidate a bond given by sureties on the ground of material facts having been concealed from them until after they had executed the bond, it must appear that the concealment was fraudulent.

A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way; in this state of things he had occasion to give to the corporation a new bond with two new sureties, shortly after giving which, it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct, and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the Court, being of opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, *held* the bond to be valid.

Statement. In the year 1868, the plaintiffs, *William Peers*, *Jacob Topping*, and *Freeman B. Schofield*, with *James Kintrea*, entered into a bond to the Corporation of the County of Oxford, bearing date 16th June, 1868, with a condition to the following effect: "The condition of this bond is such that, if the above bounden *James Kintrea* shall well and truly pay, or cause the same to be well and truly paid over, according to law, all moneys coming into his hands by virtue of his office as treasurer of the said County of Oxford, and shall at all times, when lawfully called upon so to do, produce all accounts, vouchers, bills, bonds, notes, or securities of any description whatsoever, which may have come into his hands by virtue of his being said treasurer, and hand the same, along with all records and papers in his possession by reason of his being the treasurer of the said county, over to his successor in

office, as the law directs, then this obligation shall be null and void, otherwise to remain in full force and virtue."

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Peers v. Oxford.

The bill was against the Corporation and *James Kintrea*. It alleged, amongst other things, that, for fifteen years previous to 1868, *Kintrea* had been treasurer of the county; that the corporation represented that they intended to retain him as treasurer; that the plaintiffs, believing (as they contended they had, in the absence of any information to the contrary, a right to believe) that *Kintrea* had conducted and was conducting himself as treasurer with honesty, faithfulness, and integrity, agreed to become his sureties, and executed the bond; that, at the time of so agreeing, *Kintrea* was in fact a defaulter as treasurer to an amount exceeding $10,000; that he had used the money of the corporation to that amount, and was unable to replace it; that he had conducted himself dishonestly and unfaithfully as treasurer; that these facts were known to the corporation, and to their officers, and had, fraudulently and contrary to the defendants' duty, been concealed from the plaintiffs, in order to induce them to become sureties. The bill further alleged that the accounts of the treasurer which were involved in ascertaining the amount of the plaintiffs' liability (if any) were very voluminous, complicated, and intricate, and could not, conveniently or properly, be taken in an action at law. The bill prayed, that the bond might be cancelled; or that it might be declared that the plaintiffs were not liable for money misapplied before the date of the bond; that all necessary accounts might be taken to ascertain the amount due on the bond; and for other relief.

Judgment.

The cause came on for the examination of witnesses and hearing at the Sittings at Woodstock in the Spring of 1870.

1870.

Peers v. Oxford.

Mr. *Blake*, Q. C., Mr. *J. A. Boyd*, and Mr. *Richardson*, for the plaintiffs.

Mr. *McLennan* and Mr. *Moss*, for *The Corporation of Oxford.*

The bill was *pro confesso* against the defendant *Kintrea.*

August 24.

Judgment.

MOWAT, V. C.—What the bill sets up to invalidate the bond, is a case of express or actual fraud; and, according to the authorities, as I had occasion to say in the *Corporation of East Zorra* v. *Douglas* (*a*), fraud was necessarily alleged, and needs to be established by some evidence satisfactory to the Court (*b*). The surety, it has been remarked, is, in general, a friend of the principal debtor, acting at his request, and obtains from the debtor all the information which he requires; and it is thought "that great practical mischief would ensue if the creditor were by law required to disclose everything material known to him, as in a case of insurance" (*c*). In *Hamilton* v. *Watson* (*d*) Lord *Campbell* mentioned, as matters which may be extremely material to be known by an intending surety to bankers for a customer's account, but which the bankers are under no obligation to disclose,—"how the account has been kept, whether the debtor has been in the habit of overdrawing, whether he was punctual in his dealings, whether he performed his promises in an honorable manner." In *Wythes* v. *LaBouchére* (*e*), Lord *Cottenham*, recognizing the same doctrine, held that "the creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor." *Way* v. *Hearne* (*f*)

(*a*) Ante p. 462.
(*b*) North British Insurance Company v. Lloyd, 10 Exch. 523.
(*c*) Lee v. Jones, 11 Jur., N. S., at 85.
(*d*) 12 C. & F. 109.
(*e*) 3 DeG. & J. at 609.
(*f*) 13 C. B., N. S., 292.

is to the same effect. There the plaintiff had concealed a debt of £2,000, due to himself by the principal; the defendant was thereby deceived as to the condition of the debtor's affairs; and the supposition that the debtor was in a better state by £2,000 than he really was, had a considerable influence on the defendant when he entered into the undertaking. But there having been no express representation to the defendant, no actual fraud, and no intention on the part of the plaintiff to over-reach the defendant, the undertaking of the surety was held to be valid.

Though fraud must be made out in order to invalidate the contract of a surety, it is not necessary that there should be any misleading by express words: "It is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant (the surety) to enter into the contract by leading him to believe that which the plaintiffs (the creditors) knew to be false, knowing that if he had not been thus misled he would not have entered into the contract. * * * To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact. But if it be made by one party in such terms as would naturally lead the other to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms." (*a*) Judgment.

Has such fraudulent conduct on the part of the corporation been established in the present case? I cannot say that it has.

It is admitted that *Kintrea* was insolvent in and before 1868, and to an extent that no one except his

(*a*) 11 Jur., N. S., 86, 87.

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own clerk and himself then knew or suspected. He had, as treasurer, received a large sum beyond what he had been called upon to pay out; and we know now that, if he had been called upon to pay the whole balance, he would have been unable to do so. But, from the system adopted in this county, that balance was in his hands as a debt, not as money ear-marked, and belonging in specie to the corporation. Since 1859, the council had not requested the treasurer to keep the money which he received for the county separate from his own money, and from money received from others; and he never had kept it separate. The system which he pursued in that respect was wrong. The county money should, as far as possible, have been kept separate from other money. But the wrong system had, unfortunately, had the sanction of successive councils, and had the sanction of the plaintiffs themselves, they having been members of the council at different periods. *Peers* was in the council from 1863 to 1866, four years; *Topping* in 1865 and 1866, two years; and *Schofield* in 1866, one year. *Peers* was warden, also, in 1864; and *Topping* was warden in 1865. Indeed, the general, though erroneous, impression seems to have been, that the council had no right to interfere with, or even inquire about, the way in which the treasurer kept the money, and that their duty was only to see that he was a proper person to be treasurer, and that his sureties were sufficient. In a discussion which took place at a meeting of the council in 1866, when the three plaintiffs were members, this view was stated by a very old and influential member, and was acquiesced in by the other members; and the plaintiff *Schofield* is proved to have expressed an opinion to the same effect as late as March, 1869.

Judgment.

If the county money was not to be kept separate from other money belonging to the treasurer, or passing through his hands, it follows that he might use it in common with such other money, and that his duty, as

understood by the council and the plaintiffs, would be discharged if he was ready to make the payments which from time to time the council should direct, or the law require. As early as 1862 *Kintrea* was using the county money in common with his own; in 1863, when *Peers* was in the council, *Kintrea* used no less a sum than $8,000 of county money for his private purposes; and he continued the same practice until 1869. A member of the council, a witness for the plaintiffs, testifies to his knowledge or belief of the fact in 1862, and thenceforward; to the witness's apprehension of trouble in consequence; and to his having spoken on the subject from year to year to various members of the council. But they did not share his apprehension, and they allowed the system to continue without check, having confidence in the treasurer's means of paying, and in his integrity.

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I have held in *East Zorra* v. *Douglas* that the fact of the township treasurer not being required to keep the corporation money separate from every other, or to shew its specific existence otherwise than as a debt due by the treasurer to the corporation, was not a fact the non-communication of which made the bond of the sureties void, even though these sureties were otherwise strangers to the corporation; and *à fortiori*, must I apply the rule as against sureties who, as representatives of the corporation at former periods, had contributed to continue and confirm the objectionable practice.

Judgment.

The bill says, that *Kintrea* was a defaulter at the time the plaintiffs agreed to become sureties. I think that the successive councils had regarded the treasurer as they would their banker. A banker uses, as of right, a certain part of the moneys deposited with him on call, and, notwithstanding such use, he is not in default except so far as he fails to pay the cheques and orders of those

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whose money he has received. *Kintrea* is not shewn to have been a defaulter in that sense when the plaintiffs became sureties. In 1866, when all the plaintiffs were members of the council, *Kintrea* had left unpaid for some months the money going to some of the municipalities from the Clergy Reserve Fund; but all of these were settled with before the year expired. *Kintrea* had at other times been in default, sometimes for a few weeks, and sometimes for a few days, in respect of sums the amount of any of which does not appear; but every thing, so far as appears, had been duly paid ultimately, and without any one making a complaint on the subject to the council or to any of its committees. I am satisfied from the conduct of all parties throughout, and from the conduct of the plaintiffs themselves, even after *Kintrea* confessed inability, in February or March, 1870, to pay his balance, that the parties interested did not in general, and that the plaintiffs did not, regard the delays in making previous payments as occasioned by, or as manifesting, dishonesty or unfaithfulness on his part, any more than like delays on the part of any other debtor would have implied, of necessity, that he had been dishonest or unfaithful to his duty. If it had been *Kintrea's* known duty to keep separate the county money, and to draw on it for county payments only, the dishonesty and unfaithfulness would have been manifest, and would have been felt by every one.

Judgment.

The evidence, oral and documentary, being very voluminous, it would be tedious to refer to it in detail; and I shall merely say that, after having repeatedly perused and considered the whole, and given my best attention to the observations of counsel, I am satisfied that most, if not all, of those material facts which were known or believed by various members of the council, and on which the plaintiffs rely as shewing *Kintrea's* misconduct, were communicated or otherwise known to the plaintiffs before they became sureties; that nothing

was withheld from any fraudulent motive; and that the plaintiffs were left in ignorance of nothing which it was, under all the circumstances, the legal duty of the corporation, or of its representatives or agents, to communicate.

As for the fraudulent motive which the bill charges, the occasion alone of getting the plaintiffs' bond puts it almost out of the question; for the corporation already held a bond (dated 9th November, 1866,) of the same tenor and amount ($16,000) from other sureties, whose sufficiency is unquestioned, and is (I have no doubt) unquestionable; and the only reason for the new bond was, that the existing sureties (one of whom had been such surety in successive bonds since 1859) wished to withdraw from the suretyship; and the council, as usual in such cases, was willing, for the convenience of parties, to allow one good bond to be substituted for another.

Judgment.

For these reasons, and without considering the effect of the agreement entered into by the plaintiffs with the corporation in March, 1869, I am of opinion that the plaintiffs' bond is valid, and that they should pay the costs of the corporation up to the hearing of this suit. It was not disputed that they are entitled to a decree for an account and to a stay of the action at law. Further directions and subsequent costs may be reserved, if the plaintiffs desire it.

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McWhirter v. The Royal Canadian Bank.

Insolvency—Mortgage for antecedent debt.

A mortgage was obtained by pressure from an insolvent person (a miller) three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforceable for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him, by pressure, a mortgage on his chattels used in his business: this mortgage was held void against the assignee in insolvency.

Statement.

This was a suit by the assignee of *Abraham Raymer Stauffer*, an insolvent, to set aside two mortgages executed by the insolvent in favor of the defendants shortly before he made an assignment under the Insolvent Acts. The first of the two mortgages was dated 13th February, 1869, and was given on the insolvent's mill property to secure the payment of four notes or drafts not then due, made or drawn by the insolvent, and indorsed by a third party, amounting together to $13,900; and a draft for $6000, dated 29th January, 1869, which had been drawn by the insolvent on one *Hunsicker* of Montreal, and which he had refused to accept. The second mortgage was dated 4th March, 1869; it comprised certain chattels; purported to secure thereon a sum of $800; and was intended as a further security for that amount of the debt secured by the other mortgage.

The cause was heard at Woodstock at the Sittings there in the Spring of 1870.

Mr. *J. A. Boyd* and Mr. *Ball*, for the plaintiff.

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

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August 24.

Judgment.

MOWAT, V. C.—The mortgagor was insolvent when he executed the mortgages which are in question in this cause. Both were given on the application of the mortgagees, and in consequence of urgent pressure. At the time of obtaining the mortgage on the mill, I think that the bank or its officers had no notice of the mortgagor's insolvency; did not suppose that he was insolvent; and had not "probable cause for believing" it (*a*). The occasion for applying for security was the unexpected refusal of *Hunsicker* to accept the $6000 draft. *Stauffer* gave the mortgage reluctantly, and with the expectation that the bank would thereby be induced to give him further assistance for carrying on his business of a miller, and that he would, by that means, be enabled to continue his business, and ultimately to pay all his creditors. He did not execute the mortgage voluntarily, or in contemplation of insolveney, or from any desire to give to the defendants a preference over his other creditors. Between the dates of the two mortgages, the bank had become aware of the mortgagor's insolvent circumstances. The date of his assignment to the plaintiff is 25th May, 1869.

The English authorities, in regard to mortgages by a bankrupt to secure an antecedent debt, make a broad distinction between such mortgages, when given by the debtor voluntarily or spontaneously in contemplation of his bankruptcy, and when given upon pressure of some kind on the part of the creditor (*b*). Mortgages of the former class are wholly void against the assignee in bankruptcy. Mortgages of the latter class, that is, mortgages obtained by pressure, are valid or invalid according to circumstances. Such a mortgage is not valid if it covers the whole of the debtor's assets (*c*); or if it

(*a*) Insolvent Act, 1864, sec. 8, p. 124.
(*b*) See Johnson v. Fesenmeyer, 25 Beav. 88.
(*c*) *Ib.*; Lindon v. Mason, 6 M. & Gr. 895.

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covers so much or such part as necessarily stops the mortgagor's trade, or prevents its being carried on in its usual and ordinary course, or enables the mortgagee forthwith to put a stop to the business (*a*). In *Smith* v. *Cannan* (*b*), it was held that a conveyance delaying the general creditors may be void, though it does not stop the trade. But, as was observed *arguendo* in *Ex parte Wensley* (*c*), delay of other creditors is to some extent the consequence of every conveyance to one creditor of part of an insolvent debtor's property (*d*); and the propriety of the test as to the debtor's trade being stopped, has been recognized in several subsequent cases (*e*). The mortgage of the 13th February, did not put it in the defendants' power to stop immediately the debtor's business, for it contains a provision that no proceedings were to be taken to obtain payment out of or against the mortgaged property until after the expiration of two years. In all the cases (so far as I have observed) in which the mortgage has been held void as stopping (or enabling the mortgagee to stop) the business, he was authorized by the mortgage to enforce it immediately (*f*), or on demand (*g*), or at longest in seven days after demand (*h*).

Judgment.

In the absence of these grounds of objection to such a mortgage in England, it may be void if the property reserved by the insolvent mortgagor was but a "color-

(*a*) Ex parte Bailey, 3 DeG. M. & G. at pp. 544, 545 and 546; Stanger v. Wilkins, 19 Beav. 626 (explained 25 Beav. 91); Johnson v. Fesenmeyer, supra; S. C. on Appeal, 3 DeG. & J. 13.

(*b*) 2 El. & Bl. 35.

(*c*) 1 DeG. J. & Sm. 280.

(*d*) See Johnson v. Fesenmeyer, supra.

(*e*) *Ib.*; Ex parte Bailey, supra; Goodrick v. Taylor, 2 DeG. J. & Sm. at 139, 141; Ex parte Foxley, L. R. 3 Ch. App. 515; Woodhouse v. Murray, L. R. 2 Q. B. 634 (4 Q. B. 27), &c.

(*f*) Ex parte Bailey, 3 DeG. McN. & G. 535, &c.

(*g*) Smith v. Cannon, 2 El. & Bl. 35, &c.

(*h*) Goodrick v. Taylor, 2 DeG. J. & Sm. at 135.

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able" exception, and was not a "real and substantial exception" (*a*), or was a "very small portion" of his means (*b*). What then was the amount of this insolvent's means at the date of this mortgage? The mill property seems to have been worth less than $8000. That is what the assignee has asked for it; the highest offer which he has received is $6000. The debtor's other assets seem to have amounted to about $4000, consisting of wheat, flour, other chattels, good debts, and land. His unsecured liabilities seem to have amounted to about $20,000. I can hardly hold a reservation of $4000, including the whole of the debtor's personal assets, to be "colorable." In *Timms* v. *Smith* (*c*), it was expressly held that the reservation of about one-third was a substantial reservation, sufficient to maintain the validity of a mortgage obtained by pressure. A much larger reservation would not save a mortgage which necessarily stopped the business, or which enabled the mortgagee immediately to stop it (*d*). Judgment.

The view which I have thus taken renders it unnecessary for me to remark upon the effect of the defendants' ignorance of the mortgagor's insolvency at the time of taking the mortgage, either in reference to the English authorities (*e*), or to the latter part of the 1st sub-section of section 8, of the Insolvent Act of 1864. There has been a difference of judicial opinion as to whether that enactment affects a mortgage to a creditor (*f*). I incline to the opinion that it affects transactions with creditors as well as with strangers.

(*a*) Pennel v. Reynolds, 11 C. B. N. S. at 721.

(*b*) Siebert v. Spooner, 1 M & W. 718. See Smith v. Cannon, supra.

(*c*) 1 H. & Colt. 849. (*d*) Ex parte Foxley, supra.

(*e*) Comp. Smith v. Cannon, 2 El. & Bl. 35, 39; Hall v. Wallace, 7 M. & W. 353; Ex parte Bailey, 3 D. M. & G. 543; Stanger v. Wilkins, 19 B. 626; Young v. Fletcher, 3 H. & Colt. 732, &c.

(*f*) See Newton v. Ontario Bank, 13 Gr. 653; 15 Gr. 287.

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The second mortgage was taken with knowledge of the debtor's desperate circumstances, and there is no evidence that he had any other property at the time except some book debts. The mortgage was of all his horses, and of divers waggons, sleighs, and harness, —all I understand being employed in, and required for his business. The effect of this mortgage, in connection with the prior proceedings of the bank, was to stop the business. I think that this mortgage cannot be maintained.

The decree will dismiss the bill as respects the mortgage of February; and will declare the mortgage of March to be void as against the plaintiff (there is no occasion for calling it fraudulent). The plaintiff having failed as to the one mortgage, and succeeded as to the other, there will be no costs.

Judgment.

Bickford v. The Welland Railway Company.

Injunction—Breach.

Injunctions must be obeyed according to the spirit as well as letter.

Where defendants were enjoined against removing from their premises certain iron rails to which the plaintiff claimed to be entitled, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States:

Held, that they had committed a breach of the injunction.

On the 9th March, 1870, the Chancellor granted an injunction *ex parte*, restraining the defendants from (amongst other things) removing "the 180 tons of old iron rails at Port Colborne, in the bill in this cause mentioned, or any part thereof," until the further order of the Court. This injunction was served on Mr. *Reekie*, the managing director of the Company, and on

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Mr. *Magrath*, the general manager of the Railway. On the 12th of April, the Company moved before Vice Chancellor *Strong* for a dissolution of the injunction; and the motion was refused.

At this time the rails in question were lying on the Company's property at Port Colborne, and had been lying there from a date antecedent to the 1st of February; they were in the Company's possession and custody.

On the 4th of May, the rails were removed by Messrs. *Pratt & Co.*, residents of Buffalo, and were taken by them to the United States. *Pratt & Co.* claimed to be purchasers and owners of the rails. The plaintiffs' claim was under a written contract of purchase from the Company, dated the 26th of October, 1869, whereby the Company agreed to deliver to the plaintiff 180 tons of old rails at Port Colborne, on or before the 1st of February, 1870, at the rate of $23 per ton, cash on delivery. On the 20th of January, the plaintiff wrote to Mr. *Magrath*, intimating an intention not to remove the rails before the opening of the navigation, but stating that when the Company wished the money for them he would go to Port Colborne, and settle for them. On the 22nd, Mr. *Magrath* replied to this letter, stating that if the plaintiff was not prepared to receive and pay for the rails on or before the 1st of February, he would consider the agreement at an end. The plaintiff, being absent from home, did not receive this letter until long afterwards; and meanwhile, viz., about the middle of February, Mr. *Magrath* resold the rails at a small advance to *Pratt & Co.*, and received the price in full. The plaintiff insisted, on various grounds, that this sale did not affect his rights; that the rails were of peculiar value to him; and that he was entitled to relief in this Court. His bill was for specific performance, and an injunction. To the original bill *Pratt & Co.* were not

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parties; but since the motion to dissolve, they had been made parties by amendment.

The plaintiff moved against the Company, Mr. *Reekie*, and Mr. *Magrath*, for breach of the injunction.

Mr. *Moss*, for the plaintiff.

Mr. *Read*, Q. C., and Mr. *J. A. Boyd*, contra.

August 24. MOWAT, V. C.—It is clear that the Company or its officers did not themselves remove the rails; and it is not proved that they suggested the removal, or knew that it was to take place on the 4th of May. But I am satisfied, from the whole evidence, that, at and after the time of being served with the injunction, they expected *Pratt & Co.* would send to Port Colborne for the rails on some day; that the Com-

Judgment. pany through its principal officers knew or believed that, without instructions to the contrary, the officers of the Company at Port Colborne would deliver the rails to *Pratt & Co.*, or would allow *Pratt & Co.* to remove them; that the Company and its officers believed they could prevent the removal if they chose to interfere; that they did not choose to interfere; and that the rails were removed with the knowledge of several of the Company's officers, and without the slightest objection on their part. I am clear that this conduct was a violation of the injunction. An injunction must be obeyed according to its spirit as well as its letter; and a party who is enjoined against removing, destroying, or injuring property in his possession, is not at liberty to stand by, and, without objection, allow others to remove, destroy, or injure the protected property.

The Company or its officers may have taken no active part in the removal of the rails from their possession:

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they may have done nothing in the way of actively procuring or assisting in the removal. But they were not at liberty to do nothing, while others were removing from their premises property which the Court had determined that the interests of justice required to be preserved. Had they interfered, their interference might (it is said) have been ineffectual; but they were bound to make the attempt. They acquiesced in the removal because they were willing that the removal should take place, and not because they thought that objection or resistance would have been unavailing.

It was urged that the orders were made improvidently. But I cannot sit in appeal from orders made by the other judges of the Court; and it has long been held, that an injunction must be obeyed whether the party enjoined considers the writ to have been properly granted or not; he must act on it as if properly granted, until and unless he can get it set aside.

Judgment.

The rails being beyond recall, and the parties having been under a misapprehension as to their duty, I think that, under all the circumstances, I may refrain from making any order, except that the Company and parties moved against, do pay the plaintiff's costs of the application—one set of costs only. Counsel urged that no case was established against the officers of the Company, or at all events none against Mr. *Reekie*. After reading the papers, I have been unable to adopt that view.

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COOK v. JONES.

Sales for taxes—Amendment at hearing.

The warrant for the sale of land for taxes described the lands as "all deeded:"

Held, sufficient.

The statutory provision requiring certain rates to be kept separate on the collector's roll is directory only; and where the direction had not been observed, a sale for non-payment of the taxes was held valid notwithstanding.

Leave to amend is, at the hearing, granted in furtherance of justice and not otherwise, and is not proper when the object is to enable the plaintiff in a speculative suit to take advantage of a technical defect in the defendant's title.

Examination of witnesses and hearing at Whitby.

Mr. *Crooks*, Q. C., and Mr. *McCarthy*, for the plaintiffs.

Mr. *S. H. Blake* and Mr. *Moss*, for the defendants.

September 1. Judgment. SPRAGGE, C.—The plaintiffs have no *locus standi* in Court unless they can successfully impeach the sale for taxes, at which the defendant *Edward Jones* was a purchaser. They claim under *McFarlane*, and *McFarlane's* title was divested by the tax sale, if the sale and the purchase by *Edward Jones* thereat can stand. If they cannot stand, the *prima facie* case of the plaintiffs is made out, for they shew title in *McFarlane*, and they derive title from him; and as to *Thompson*, under whom, apart from the tax sale, the defendants derive their title, the plaintiffs shew that *McFarlane* had, as against him, an undoubted equity to obtain from him a reconveyance of the land in question. The first question therefore is, whether the tax sale is impeachable.

Before discussing the several grounds of objection, I

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will premise that the case of *Connor* v. *Douglas* (*a*), before the late Chancellor, and afterwards in the Court of Appeal, seems to settle it as a principle that the Statutes for the sale of lands for taxes are not to be construed as statutes creating a forfeiture. The language of Chief Justice *Draper* in a previous case, *Payne* v. *Goodyear* (*b*), states accurately, as I think, the purpose and character of these Statutes. "The primary, it may be said, the sole object of the Legislature in authorizing the sale of land for arrears of taxes was the collection of the tax. The Statutes were not passed to take away lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands." This is the language of a learned Judge less disposed than some other Judges of the Courts, and less disposed than the majority of the Court in *Connor* v. *Douglas*, to hold tax sales not vitiated by irregularities. I think that Mr. Justice *Wilson* in *Cotter* v. *Sutherland* (*c*), takes a just view of the objects and nature of these Statutes.

Judgment.

One of the objections taken in this case is, that the rates, or some of them, imposed by the municipality are excessive. I feel clear that there is nothing in this objection. The Statutes create a machinery for the raising of money by taxation for local purposes. They vest power for the purpose in bodies elected by the tax payers themselves. If they err in matters where they have a discretion, I do not see how their action can be reviewed by the Courts. If they trascend their powers, the remedy, I apprehend, would be in applying to quash the by-law, by which they do so. But here is a subsisting by-law by which a tax is imposed and under which

(*a*) 15 Grant, 456. (*b*) 26 U. C. Q. B. 451.
(*c*) 4 VanK., 384.

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proceedings to levy it are taken. Assuming for a moment that it is open to objection, still while it stands it must be an authority for what is done under it. It would, in my judgment, be against principle, as well as in the highest degree mischeivous, if a sale for taxes could be impeached on such a ground as this.

Another objection is, that the warrant for sale does not sufficiently distinguish between lands patented, and unpatented lands. It has been held that the words "all patented" are sufficient, *Brooke* v. *Campbell* (a), *Bell* v. *McLean* (b). The words here are "all deeded." What the Statute requires in the warrant is to "distinguish lands which have been granted in fee, from those which are under a lease or license of occupation, and of which the fee still remains in the Crown." It is contended that the word "deeded" may apply to a patent in fee or to a lease, to one as well as the other.

Judgment.

But so may the word patent, or the word grant. "Deeded" is indeed a more colloquial expression, but still has an understood meaning, viz., conveyed in fee; and the words *all* deeded, or *all* patented could have no other meaning, as it is implied that all were upon the same footing; that where a distinction, if any existed, was to be noted, and the bulk of the lands enumerated were certainly granted in fee, the proper construction would be that all were so, and that there were none to distinguish. I am not disposed to be more strict than the Judges who have held the word "patented" to be sufficient. Still, I cannot help remarking that this is only another instance of the inaccurate and careless way in which many municipal officials discharge their duties.

It is objected that the rates are not kept separate in the collector's roll. I think that though there are very good reasons for the provision in the Statute that they

(a) 12 Grant, 526. (b) 4 VanK., 416.

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should be kept separate, still the provision is only directory, and under *Connor* v. *Douglas*, the omission to keep them separate would not invalidate a sale for taxes. I say this, assuming that the facts in this case are in favor of the objection. I am not satisfied, however, that this is the case, for the aggregate of the different columns which are set out separately agree with the sums set down in the column headed "total taxes." This was not the case in *Colman* v. *Kerr* (*a*), to which I am referred. It is true that other lots are charged with rates not set down against these lots, but they appear to be special rates which may have been chargeable for local reasons against those lots and not chargeable against the lots in question; but, however, that may be, I should hold the omission to keep the rates separate no ground for setting aside the sale.

Judgment.

A fourth objection is, that for some of the rates inserted in the collector's roll there was no by-law of the township to warrant them; as put in paragraph fifteen, "the towhship clerk in making up said rolls inserted rates, and more especially the rates called the 'Township rate,' without any rate or tax having been imposed or levied by by-law of the corporation of the said township which the plaintiff submits was the only manner in which such corporation could impose a rate or tax." The objection upon this is, that by-law No. 14, passed in 1856, which was a by-law for the imposition of taxes, and 1856, being one of the years for arrears of taxes in which the lands in question were sold, was not regularly passed; that in short there was no valid by-law, the document called by-law No. 14, not being authenticated by the seal of the corporation. I do not think, upon the evidence, that I can find this objection to be founded on fact. It is true that in the book produced by the township clerk containing copies of by-laws passed by

(*a*) 27 U. C. Q. B. 5.

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the township council, no seal of the municipality is appended to the copy of the by-law in question, as it is to the copies of by-laws entered in 1857, and in subsequent years; but the explanation is, that 1857 is the first year in which this was done, and the clerk swears that the seal was appended to the original by-law. I should not assume that it was not so, although not appearing in the entry in the book, because the entry purports to be a copy only, made probably at first only for convenience of reference, and the presumption would be that the by-law itself was passed and duly authenticated.

There is indeed evidence in respect of other by-laws passed in the same year by the county council, which is much stronger against their authenticity, but these are not impeached by the bill. The bill impeaches no county by-law, but only a by-law or by-laws passed by the township council; the plaintiffs did not ask leave to amend by inserting allegations impeaching the validity of any county by-laws, and if leave had been asked I should have refused it, as not in furtherance of justice. The plaintiffs are purchasers, for the sum of $50, of the interest of *McFarlane* in the lots sold for taxes, and they say in argument that the sum of $1200 paid by the trustee of Mrs. *Jones* for the same land was an inadequate consideration. It is manifest that what they really purchased was the chance of finding some flaw in the proceedings connected with the tax sale, that would enable them to set it aside, and thus obtain the land for less than one-twentieth of its value. If there are objections to a sale to which the Court must give effect, the Court will decree against the sale: but it will do so only where the plaintiff is entitled *strictissimi juris*. It certainly will not aid him by granting any indulgence. Mr. Justice *Wilson* in *Cotter* v. *Sutherland* (*a*), describes

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(*a*) 4 Van. 385.

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those in the like position with these plaintiffs as "speculating on some defect discovered, or which they hope may be discovered in the course of litigation, and who have paid but little, if any, more for the chance of the suit, than the persons whose titles they dispute have paid in taxes." In this case the sums paid in taxes were more than three times the amount paid by these plaintiffs for the chance of setting aside the tax sale. Mr. Justice *Wilson* goes on to say "the former Statutes of maintenance and champerty might properly be re-enacted and enforced against such persons, for they are in no sense entitled to legal favor." In all this I entirely agree.

The plaintiffs are not entitled, in my opinion, to succeed upon any of the grounds upon which they have impeached the tax sale, and their bill must be dismissed with costs. I should observe that some of the grounds taken by the bill were abandoned in argument: upon them I make now no observation.

Judgment.

Taking the view of the case that I do, I have not thought it necessary to express any opinion as to whether the defendant Mrs. *Jones* and her trustee are entitled to the protection afforded by the law to purchasers for value without notice, and having registered titles.

In same case XIX Grant 133

JOHNSTON v. JOHNSTON.

Father and son— Void sale.

A son who had purchased property for his father, and had taken the conveyance in his own name, afterwards induced his father while in a state of mental depression to enter into a contract that the son should retain the property on certain terms which were hard and unfavorable to the father:

Held, that the contract was not valid in equity, and that the father was entitled to a conveyance, on payment of the sum which the son had paid on the contract.

Examination of witnesses and hearing at Guelph.

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Mr. *Blake* and Mr. *Cross*, for the plaintiff.

Mr. *Moss* and Mr. *Merritt*, for defendant *James Johnston*.

The defendant *Thomas Johnston* appeared in person.

September 1.

SPRAGGE, C.—The plaintiff's case is clearly established. It is, shortly, that the defendant *James Johnston*, who is one of his sons, purchased the land in question, the north-half of lot 20, in the second concession of Arthur, with his father's money, and as his agent. There is indeed no question as to this. Besides the parol evidence and the letters of *James*, it is admitted in his answer. I refer particularly to the first six paragraphs, and to the nineteenth. The land was still in the Crown, and what was purchased was the interest of a purchaser from the Crown.

Judgment.

The plaintiff contemplated emigrating with his family from Scotland to Canada in 1858, and in that year *James* was sent out to purchase land, and upon his arrival made the purchase of the land in question; the father with his wife and children, with the exception of a son who remained in Scotland, following him some two years afterwards. In the meantime *James* had cleared about twelve acres of the land, but had not lived upon it. Upon the arrival of his father and family, they, after a short interval, during which a house was fitted up upon the land, went, *James* included, and lived upon the land, and it was thereafter further cleared and improved by the joint labor of all of them, until, in 1866, there were about sixty acres cleared.

The possession all this time was the possession of the father. I believe neither party disputes this. Upon the arrival of the father in Canada he discovered that *James* had taken the assignment in his own name, and expressed

dissatisfaction at the circumstance. I shall have occasion to touch more fully upon this point hereafter. After the lapse of somo years, and in or about 1865, as I gather from the evidence, a further purchase was made. This was also of land still in the Crown. It was of lot 16 (200 acres), in the first concession of the same township. The purchase was from a purchaser from the Crown, and for the purchase money to him, promissory notes in which the father, *James*, and another son *Thomas*, were parties, were given; and this land, like lot 20, was improved by the joint labour of the three, one or two other sons assisting. It seems to have been a thing understood and acted upon in the family, that lands should be purchased, improved, and paid for, by the joint means and labor of the family. This, however, was some time after the arrival of the family in Canada, and does not apply to lot 20. I have referred to lot 16, because it enters largely into the dealings of the father, and *James*, and *Thomas*, in relation to lot 20.

Judgment.

So far, if there were nothing more in the case, the right of the father in this Court to compel *James*, to transfer to his name the title to lot 20, would be indisputable. *James* opposes this by setting up an agreement made in October, 1866, to the effect that for certain considerations, moving from him, the father agreed, that he *James* should have lot 20 as his own, absolutely. There is no doubt that at that time the equitable title was in the father. Any agreement that there was was by parol; but it is contended on behalf of *James* that the case is not within the Statute of Frauds, and that if it is, there has been a sufficient part performance to take it out of the Statute.

I cannot accede to the argument of Mr. *Moss*, that inasmuch as the father might prove by parol that *James* was his trustee, it was competent to *James* to displace by parol, the equity arising from that position; and

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that therefore he might shew by parol the agreement that he sets up. The fault of the position lies in this, that what is set up does not rebut the plaintiff's equity. It shews nothing that affects the fact, that the relation of trustee and *cestui que trust* did exist, or that displaces or qualifies the equities flowing from that relation. What is set up is an independent agreement, and if *James* were plaintiff it is clear that he would have to bring himself within the Statute or to shew such part performance as would take his case out of it; and I do not stop to inquire whether his position upon the record makes any difference. I incline to think there was a change in the possession. What took place on the division of the chattels is some evidence of this; the language of the instrument executed on that occasion proves it; the phrase of *Parkin* in regard to the father leaving the house on lot 20, after signing the paper, that "he went home," *i. e.*, to the shanty on lot 16; the language of the note for $120, given by *James* to his father, and taken by the father "to be paid at my house, Lot 20, second concession of Arthur," are all pieces of evidence in the same direction.

Judgment.

Assuming then in favor of *James*, that the Statute of Frauds is not in his way, the next step is to see whether he proves the agreement he alleges, and proves it with sufficient clearness and certainty: and the question still remains whether the contract is such a one, and was entered into under such circumstances that it is fit and proper for this Court to execute; and upon these points I apprehend that the Court must be governed by the same principles as if the party setting up the agreement were a plaintiff filing a bill for specific performance.

Assuming for the present that the fact of the alleged agreement is proved; is it one that this Court ought to execute? Many circumstances are material upon this

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point. Among them the intelligence, and mental condition at the time, of the father. His general intelligence, education and business capacity, appear not to have been below the average; but he was subject to fits of extreme depression moving him often to tears; and this was particularly the case after his wife's death which occurred early in October, 1866. The alleged agreement was entered into just about a fortnight after her funeral. He appears to have recovered somewhat in the meantime, and to casual observers seems to have appeared much as before. His intimate friend, *Robert Sim*, gives, however, this account of him:—

"I used to see the plaintiff frequently; I had a good deal of talk with him; he was weakly in mind; when he would come to my place he would be depressed and low, and would cry like a child; he was at my place pretty often; he behaved in this way pretty often before his wife's death, but more so after; he was complaining of the family worrying him. He said they had taken the farm from him, and that *James* had his name in the office, and refused to change it. He would tell me this and weep over it. I had dealings with the plaintiff. I once traded a plough with him. We worked back and forward together. * * * About the time he came back, two or three weeks after the funeral, he was not in a fit state to do any business or arrange about the land. When in a melancholy state he would talk low and foolish. At the time *Tom* and *John* left, he was about in the worst state I had seen him—this was sometime that fall."

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There is this fact also, that on two occasions, one in Portland and one in Canada, he had been out of his mind. After the wife's death, as well as before, there were negotiations between the father and *James* as to the terms upon which *James* should give up lot 20; a pecuniary compensation was talked of, *James* demand-

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ing $1000, or as he says, $800, while his father was willing to allow him $600, and it was while they thus differed that an alternative proposition was made, according to *James*, that he should keep lot 20 upon certain terms; and which proposition resulted, as *James* says, in the agreement which he now sets up.

It is manifest that the circumstance of the land being in his name instead of his father's, as it ought to have been, gave him a great advantage in these negotiations: this is apparent even from the evidence given by himself.

His own account of the matter is as follows:—"He claimed that lot 20 was his; I said he might have it if he would pay me $800. He refused to give me $800, and offered me either $500 or $600. I said I would not take it. I did not ask whether it was to be cash or not, because I thought it was too little. I understood his offer was to be cash; I refused to surrender what I had worked for until we would come to an agreement. I never had been asked by any one to put this lot in his name—I never had been asked to transfer it to him, or to put it right in the Crown Lands office; he knew it was in my name after he came out. I don't remember of his expressing dissatisfaction about it—not to me—I never learned it. I did not tell him it was all the same whether it was in my name or his: I always acknowledged it to be his. It was in consequence of the agreement that I refused to convey him the land unless he gave me $800; he thought this was too much money for me to claim. I did not make any other offer about lot 20. At the time he was generally living on 16 and his other sons. At this time I was living on lot 20, occupying it. I first claimed a full right in the lot after the agreement was drawn up. I never claimed any right on the lot at all, until the agreement was drawn out by *Mitchell*. We had talked over the chattels in the

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morning; we got as far as the colt, and afterwards I drew that writing as far as it had gone. My father said it was best to go to *Mitchell's*, and get the bond drawn first, and that we would settle about the colt and other things after; it was the same day after the writing of the bond that we talked about the colt. I was out doors when we talked about it. My father got pretty angry; I got angry also."

James denies in his evidence that he was ever asked to transfer the lot to his father's name, but this is disproved by other evidence: and even he says in another part of his evidence, "We have had words about the lot standing in my name instead of his;" and the evidence of *Sim* and of *Davie* shew that the father felt it to be a wrong; and a disadvantage to him. My conclusion from all the evidence upon this point is that *James* originally took the transfer in his own name wrongfully, without his father's authority; that he made excuses when requested to transfer it to his father, and succeeded in evading a transfer; and that there is no proof that his father ever acquiesced in its remaining in the name of *James*.

Judgment.

There was besides a motive which was brought to bear upon the father to bring about this agreement. He and his son *Thomas* were working together upon lot 16, and *Thomas* declared to his father that he would work no more, until his father came to a settlement with *James;* and *Thomas* says that he and *James* were acting together in procuring the agreement from the father.

Under the agreement *James* did certainly take burthensome obligations upon himself, and he appears to have fulfilled them faithfully. Still the bargain was a favorable one for *James*. As between him and his father the best of the bargain is with him. I am not

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prepared to say that it is so, to the extent of being unrighteous or even unfair, if made between parties standing in a fair and equal position; but looking at the position of these parties, and at the circumstances under which the bargain was made, it is a material circumstance that it is a favorable one for *James*.

It is impossible not to see that the parties did not deal upon equal terms; and the inequality (apart from the mental condition of the father) was the work of *James* himself. It is a maxim, that a man shall not take advantage of his own wrong. In the dealing *James* had the advantage of his own wrong. The position of advantage which he had, should have been his father's; as it was, he was able almost to make his own terms. The difference was not imaginary. It was real and cogent. The rightful position of the parties was reversed; and that by the wrong of the party who had the advantage. It is quite impossible to say, that the father would have entered into this agreement if he had occupied his rightful position. He is virtually coerced into it with indecent haste after the death of his wife; and before his mind had recovered its tone; and a hard bargain is driven with him by one who had usurped a position which should have been his. If the agreement had not been acted upon, and *James* had come as plaintiff for specific performance, I feel satisfied that his bill must have been dismissed.

Judgment.

Further, I have considerable doubt whether there was that clear understanding on the part of the father of the terms of the agreement which there should be before the Court will decree specific performance; as put by Mr. *Fry*(*a*), whenever there is anything which seems to import that there was not a full, entire, and intelligent consent to the contract, the Court is extremely cautious in

(*a*) Sec. 240.

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carrying it into effect. According to the evidence of *Thomas* there was a deliberate conspiracy between *James* and himself to deceive the father; and he the father was told that he was to have the right of living upon lot 20, or upon lot 16 as he might prefer. It is not necessary to go so far as this, and I do not desire unnecessarily to affirm the fact of such a gross and unnatural fraud practised by these two young men upon their father. The father, however, was himself examined on his own behalf, and looking at his state of mind as described by *Sim*; at his manner in the witness box; and at the evidence that he gave, I think it is, at least, doubtful whether there was an intelligent consent on his part to parting with all right and interest in lot 20. I doubt whether he had any definite idea on the subject, but I think his understanding was that he retained some interest. This however, is not, in my judgment, necessary to the decision of the case, unless perhaps in one view of it, that the father, by accepting the note for $120, and receiving payment of it from *James*, may be taken to have ratified and confirmed some agreement. But even in that view of it, the Court may, I apprehend, act upon the same principle as it would have acted if *James* were plaintiff, *i. e.*, under the Statute of 1865. In this case he asks specific performance, and he may, I think, properly be told that the Court cannot give him specific performance of a contract obtained as his has been obtained; but inasmuch as the party resisting specific performance has obtained some advantages under it, the Court will grant relief to the plaintiff only upon such terms as it would have given against him if a defendant in a suit for specific performance: and this I think is the proper principle upon which to proceed in this suit. I will put the matter in a course of inquiry unless the parties can agree upon a compromise. The decree will declare *James* a trustee of the plaintiff, of the north half of 20. It will state that the Court does not think fit to decree to *James* specific performance of the agree-

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ment alleged in his answer. It will declare the plaintiff entitled to an assignment of the land in question, and of the estate and interest therein of *James*, upon terms which I will specify in case the parties fail to agree.

The plaintiff is entitled to his costs against *James* up to, and inclusive of, the hearing.

I am sorry to learn that the parties have failed to come to terms since I gave my judgment in this case. I held the plaintiff entitled to a conveyance or rather an assignment of the portion of lot 20 purchased from the Crown. It remains for me to say, (the parties having failed to agree) upon what terms this relief should be given.

Judgment.

The plaintiff has had direct benefits from *James* under the contract: in the payment of the note for $120; in payment of the store account to the witness *Irwin;* in being furnished with provisions, and in the payments made by him on lot 16, and for all these he ought to be reimbursed. There must be a reference to the Master to take an account of what is properly payable to *James* on those several accounts. The only item on which there is likely to be any difficulty, is that of provisions furnished, and upon that the Master should not be over-exact in the evidence required.

I should not allow interest upon these items; and, on the other hand, I do not charge *James* with rents and profits. Further, I do not disturb the division of chattels made between the parties. It was agreed that *James* was entitled to some compensation for his services upon the land. The chattels appointed to him may fairly be taken as something on that account. I do not see my way, however, in making any direct compensation to *James* for services on the farm as a condition to the granting of relief.

I do not give costs of this inquiry to either party: not to the plaintiff, for it is in order to ascertain what he ought to pay to *James* to reimburse him for advances made by him, and which he the plaintiff votuntarily received; and I do not give them to *James* because the advances arose out of a transaction which is, in my judgment, not sustainable in a Court of Equity. Tho costs up to, and inclusive of, the decree may be set off against any amount payable by the plaintiff to *James*.

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MICKLEBURGH v. PARKER.

Trust fund—Misapplication by one trustee.

Trust funds which stood in the name of two trustees (A. and B.) were paid out on the cheques of the two; got into the hands of one (A.) who was the acting trustee, and were misapplied by him without the knowledge of the other trustee (B.) The primary *cestui que* trust was a married woman; the trust deed contained a clause in restraint of anticipation; there was a trust over with a limited power of appointment. B. insisted that he was not liable, as he had become trustee at the request of the lady and her husband, and it had been represented to him that his name only was wanted; that his co-trustee (A.) was to do the business part of the trust, and that he (B.) was to have no trouble about it:

Held, that these representations did not exempt B. from the duty of seeing that the trust money was properly applied.

Bill by a *cestui que* trust against trustees seeking an account of trust moneys come to their hands, and for payment. During the progress of the suit a motion was made for an order that both of the trustees should pay the amount found to be in their hands into Court, which was resisted by the defendant *Parker;* his co-trustee, who was also a defendant, consented to the order being made as moved for.

Statement.

Mr. *Fitzgerald* and Mr. *Holmested*, in support of the motion.

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

Mickleburgh v. Parker.

February 9.

SPRAGGE, C.—By the order of this Court of 26th October last, the co-trustee of the defendant *Parker* was ordered to pay into Court the sum of $3188. The application was against both trustees, and the order as to the defendant *Parker* was, that the question of his liability for the payment of the same sum, should be adjourned for further consideration; and that question is now brought up before me.

There are some facts upon which there is no dispute. The sum in question was part of a much larger sum of which the defendants (other than the husband) were trustees under a post-nuptial settlement, made by the father of the plaintiff in England. The whole of the trust fund, £3000 sterling, was remitted to Canada and deposited to the joint credit of the trustees in a bank in Toronto. Portions of this were from time to time invested, and sums were from time to time chequed out upon the joint cheque of the two trustees, part in order to investments, part by way of payment of proceeds to the *cestui que trust*. The whole, or nearly the whole, of the moneys deposited have been chequed out upon the joint cheques of the trustees, and the sum now asked to be paid in is an amount unaccounted for by investments or other purposes of the trust. The way in which the cheques came to be signed by the defendant *Parker* as described by him was, that they were brought to him from time to time for his signature, being already signed by his co-trustee who was also the "acting trustee," and that he made no inquiry as to how the funds were to be applied; that he had no reason to suppose that any investments were being made which were unauthorized by the trust deed. It is clear then, in the first place, that the trust funds, of which the money in question forms a part, were actually in the hands of the two trustees; and, in the next place, that the money in

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question has not been applied to the purposes of the trust, and is not now forthcoming. The plaintiff's title is not denied, and, *prima facie*, the case falls within the general rule that trustees must account for the proper application of trust moneys in their hands; and, failing to do so, that they will be ordered to pay them into Court: this, as a general rule, will not be disputed. It is clear that their not having the money in hand; that they have parted with it, does not excuse them. They must shew that it has been parted with properly, *i. e.*, for trust purposes.

Judgment.

I will first dispose of a point made by the defendant *Parker*, that he became trustee at the request of the plaintiff and her husband, the other trustee having already consented to act; and that it was represented to him that his name only was wanted; that his co-trustee was to do the business part of the trust, and that he was to have no trouble about it. If this were made out more satisfactorily than it is, I do not think it would make any difference in the case. The primary *cestui que trust* is the plaintiff, a married woman, the trust deed contains a clause in restraint of anticipation, and the fund is in trust, over, with limited power of appointment. The money in question is a part of the *corpus* of the trust estate. If she had consented to any particular breach of trust, *e. g.*, an improper investment, or that a trustee should use a portion of the trust funds for his own purposes, the trustee would not be excused; and she could maintain a suit against him. For this I refer to *Fletcher* v. *Green* (*a*), and there are other cases to the same point. It would be *a fortiori* not to excuse a trustee on the ground that he was assured beforehand that he should not be held accountable for any breaches of trust, or even for any breaches of trust arising from his own negligence, that he might thereafter commit.

(*a*) 33 Beav. 426.

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It would, moreover, be against principle and against reason. It would be a general license to one, about to assume an office, incident to which are certain duties and responsibilities, that he should be at liberty to disregard those duties, and that in case he did, he should be discharged from his responsibilities.

Mitchell v. *Ritchey* (*a*), is distinguishable. There a voluntary settlor made a stipulation that the management of the trust moneys should be in a particular person, and he made this a condition of the settlement. If Colonel *Coke*, the settlor in this case, had made such a stipulation in regard to the co-trustee of defendant *Parker*, the case would have some application; but a promise such as that alleged on the part of Mrs. *Mickleburgh*, supposing it to have been made, is widely different.

Judgment.

It may be assumed in favor of this trustee, that it was an understood thing between him and the plaintiff and her husband; and between them and the co-trustee, that the latter was to take the active management of the trust estate. Great mistakes, and of very serious consequence, often occur from a trustee assuming that he may safely remain passive, and leave the management of the trust estate to a co-trustee. It is observed by Mr. *Lewin* in his book on the Law of Trusts, p. 210, that "it is not uncommon to hear one of several trustees spoken of as the acting trustee, but the Court knows no such distinction; all who accept the office are, in the eye of the law, acting trustees." So Lord *Langdale*, in *Turner* v. *Corney* (*b*), "Trustees who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons; and if they do so, they remain subject to responsibility towards their *cestui que trust*, for whom they have

(*a*) 12 Grant, 88. (*b*) 5 Beav. 517.

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undertaken the duty;" and a trustee can no more confide the management of a trust fund to a co-trustee than to a stranger. For this there is abundant authority. I will refer here to only two cases *Hanbury* v. *Kirkland* (*a*), before Sir *Lancelot Shadwell*, and *Marriott* v. *Kinnerley* (*b*), before Sir *John Leach*. In these cases the relief was given at the hearing, but it is a clear rule of the Court that when once it is established that trust money is in the hands of trustees, they must shew its proper application, or pay it into Court; and it must follow as a proper consequence of that rule that it applies to the case of a trustee improperly allowing trust moneys to go into the hands of a co-trustee, as well to any other case: and I find a case in which Lord *Romilly* did so apply the rule. The case is that of *Ingle* v. *Partridge* (*c*). There were three trustees of a marriage settlement, one of whom, named *Williams*, was a partner in a solicitors' firm, *Goodwin & Co.* The trustees opened a trust account with London bankers, and trust funds to the amount of £3020 6*s.* 7*d.* were paid into the bank. A smaller sum of Consols standing in the name of the three trustees was sold out by them. The trustees gave the bankers written instructions to "honor the drafts of any two of us or of Messrs. *Goodwin & Co.*, our solicitors on our behalf." The sum paid into the bank was drawn out by *Williams* in the name of his firm, and applied by him to his own use: and the smaller sum was paid over to him alone. These facts were admitted by the other trustees. Upon the application to pay these moneys into Court it was objected, that the Court only ordered trust moneys into Court, when they were in the hands of trustees, or under their control; and that the moneys in question were in the hands of one trustee, *Williams*, alone. The Master of the Rolls ordered the two trustees other than *Williams*, to pay the moneys into Court. The case in its circumstances is not unlike the one before me, and in principle is not distinguishable.

Judgment.

(*a*) 3 Sim. 265. (*b*) Tamlyn, 470. (*c*) 32 Beav. 661.

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I have treated as a fact undisputed, that the trust funds, of which the sums in question forms a part, were deposited in the bank in Toronto, in the name of the two trustees. It is however made a point that the defendant *Parker* has not admitted this. Upon his examination a number of cheques—seventeen—signed with his own name, and that of his co-trustee, were produced to him, and he admitted that they were all signed by him, and, as he supposes, as trustee; and he says that he presumes that the balance admitted by his co-trustee to be in his hands, is correct. In other parts of his examination he speaks of the trust, and of the trust deed, and of his being one of the trustees. His signing cheques upon a bank as a trustee, I take to be an admission by him that trust funds to answer those cheques were in the bank upon which they were drawn, standing in the name of himself and his co-trustee, and especially when he does not qualify his admission by alleging ignorance whether or not trust funds to answer those cheques were in the bank; and he assumes that those cheques were answered in saying that he presumes that the balance admitted by his co-trustee is correct, that balance being made up of unapplied moneys, the proceeds of those cheques. The identity of the trust with that which is the subject of this suit is also assumed throughout his examination. My conclusion therefore is, that the defendant *Parker*, jointly with his co-trustee, was in possession of the trust fund; and, for the reasons that I have given, that the plaintiff is entitled to an order upon him to pay into Court the amount in question

Judgment.

I reserve the costs for this reason: It may be that the plaintiff may fail at the hearing, in that case she ought not to have the costs of this application. If she obtain a decree against this defendant, the costs of the application will be costs in the cause.

The cause was afterwards brought on for hearing, and decree made by consent.

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DAVIDSON v. BOOMER.

Will—Construction of—Mixed fund—Interest on over payment cestui que trust.

Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personality is the primary fund to pay, and the realty is liable only in case of a deficiency.

Where the widow of the testator had received more than her proper share of the personal estate the Court charged her with interest on the excess in administering the estate.

Hearing on further directions.

Mr. *Crooks*, Q.C., and Mr. *Cattanach*, for plaintiff.

Mr. *J. A. Boyd*, for defendant *Boomer*.

Mr. *Moss*, Mr. *Hoskin*, Mr. *J. A. Miller*, and Mr. *C. Moss* for the defendants other than *Harvey* and wife, who did not appear.

Judgment.

SPRAGGE, C.—One of the points remaining undisposed of at the hearing was, whether under the will, the realty and personalty constitute a mixed fund to be applied *pro rata* in payment of legacies and annuities bequeathed by the will. It is not made a question whether realty as well as personalty is charged. It is clear that it is: but the question is, whether the two constitute a mixed fund.

The result of the authorities appears to be that it is only where the will directs a conversion of the real and personal estate, that the two are made to contribute *pro rata:* and, as put by the learned annotator to Mr. *Jarman's* Treatise on Wills (*a*), a devise of real and personal estate to trustees with a direction to pay out of

(*a*) 3 Ed. vol. II., p. 594.

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the issues, dividends, interest, and profits thereof, does not prevent the personal estate from being primarily liable. This was settled by the decision of the House of Lords in *Boughton* v. *Boughton* (*a*), which was followed in the case of *Tench* v. *Cheese* (*b*), before Lord *Cranworth*, Chancellor, and the Lords Justices: the Lord Justice *Knight Bruce* saying that he entertained some doubt upon it; but whether, upon the doctrine, or upon its application to the case in judgment, does not appear. The Lord Justice *Turner* in his judgment refers to *Boughton* v. *Boughton* as establishing this distinction, "that where there is a mixed fund of real and personal estate, the mere fact of the real and personal estate being given together, does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but that, in order to effect that purpose, there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will." *Boughton* v. *Boughton* (*c*), cited as *Boughton* v. *James*, was also followed by Lord *Romilly* in *Ellis* v. *Bateman* (*d*). I am referred by counsel for Mrs. *Boomer* to *Roberts* v. *Walker* before Sir *John Leach*, and to *Simmons* v. *Rose* (*e*), before Lord *Cranworth*, but in neither of those cases was a contrary doctrine held, for in both of them there was a direction for sale. In the case before me there is no such direction; and I must hold in accordance with what I take to be the settled law upon the point, that the personal estate is primarily liable, and inasmuch as that is found to be, as I am informed, sufficient to answer the debts, legacies, and annuities charged by the will, there will be no resort for that purpose to the real estate.

Judgment.

The Master reports that Mrs. *Boomer* "hath received on account of her share of the personalty of the said

(*a*) 1 H. L. C. 406, 435. (*b*) 6. D. M. & G. 453. (*c*) 35 B. 110.
(*d*) 1 R. & M. 752. (*e*) 6 D. M. & G. 411.

1870.

Davidson v. Boomer.

estate, the sum of $39,000;" and it is asked on behalf of parties interested in the residuary personal estate that she be directed to account for so much as she has received beyond her annuity, and that she account with interest. The sum reported by the Master is, as I suppose, exclusive of specific bequests of furniture and other chattels. She must, of course, account for the excess beyond her annuity, that is, such excess should be charged to her; and I think she should be charged with interest. For so much as is beyond her share of the residue as widow, it stands upon the footing of money received to the use of others entitled to the residue, and upon money had and received interest may properly be allowed by a jury; and I think should be allowed here. As to the amount, the widow, there being no children, is entitled herself to half of what she has received out of the residuary estate. For the other half and for interest upon it, she should be directed to account. Before any division of the residue of the personal estate, security must be given for the payment of the annuities. As to the residuary personal estate being divided in specie among those entitled, I see no objection to this so far as those who are *sui juris* are concerned, if they consent, and if there is sufficient in money to satisfy the shares of the infants, as I am told there is.

Judgment.

I have dealt now only with the questions left undisposed of when the matter was before me on further directions.

1870.

BRIGHAM v. SMITH.

Insolvency—Costs—Set-off.

In a partnership suit the partnership was found indebted to the defendant, and, on the other hand, the defendant was liable to certain costs. The defendant having become insolvent, it was *held* that the plaintiff was entitled, notwithstanding the insolvency, to set-off the costs against the debt.

This was an appeal from the report of the Master at Ottawa, by one *McPherson*, a creditor, which was allowed on the motion being brought on: the question of costs only remainiug to be disposed of.

Mr. *S. H. Blake*, for the appeal.

Mr. *Fitzgerald*, contra.

September 1. Judgment. SPRAGGE, C.—Apart from the insolvency of the defendant; and his assignee being added as a party, there could be no question as to the right of the plaintiff to set off against the costs of the defendant, the debt due by the defendant to the partnership; and this right is not denied. But the contention of the assignee is that he stands upon a different footing. The authorities are in my opinion against this contention; and that, whether there be a deficiency of assets in the hands of the assignee to answer the costs or not. In *Appleby* v. *Duke* (*a*) Sir. *James Wigram* said: "I do not think the sufficiency or insufficiency of the assets of the husband to reimburse the provisional assignee his costs of the suit, ought to make any difference in the case. The ground of my decision, founded on *Hunter* v. *Pugh* (*b*) is, that the provisional assignee stands in the same position as the insolvent." Upon the appeal of the case before Lord *Lyndhurst*, his lordship reviewed the cases

(*a*) 1 Hare 309. (*b*) 1 Ph. 272.

upon the point, the earlier of which were in favor of allowing the assignee his costs; and he meets the argument upon which the distinction between the assignee and the interest represented by him was founded. "The assignee (he says) represents the mortgagor: on what ground then can he, consistently with the established principles of the Court, be entitled to costs? It is said that he does not take the assignment by his own voluntary act; that it is cast upon him by operation of law. But he accepts the office to which he knows the assignment to be an incident; and in doing so he must be considered as accepting the assignment." In *Morgan* and *Davey's* book on Costs, it is said: "There is no special right in assignees in bankruptcy or insolvency which exempts them from the ordinary rule on the subject of costs * * and they have therefore no better title to costs than the bankrupt or insolvent would have had;" and they are borne out in this by the cases to which they refer. There is also the rule that an assignee in insolvency is not allowed his costs; though formerly it was otherwise.

1870.

Brigham v. Smith.

Judgment.

The present rule, that the assignee stands upon the same footing as the interest that he represents, is a reasonable one. If allowed his costs it is against some other person or estate who, but for the insolvency, would be entitled to have, or would not have to pay them, as the case might be. There is no reason why such person or estate should suffer in consequence of the insolvency of the person having an opposite interest, vesting that interest in a third person.

In the cases referred to by counsel for the assignee, the question was not as to the assignee's costs, but as to costs of an insolvent husband in suits in which he was made a party in relation to questions between his wife and the assignee: *Green* v. *Otter* (*a*), *Rotheran* v. *Bateson* (*b*):

(*a*) 2 L. J. Chy. 123. (*b*) 2 S. & G. App. 1111.

1870.

Brigham v. Smith.

and in the latter case the husband being a debtor to the estate out of which the property claimed by the wife to be settled upon her, was derived; and that being urged as a ground for not giving him his costs, he was allowed them upon the ground that he was before the Court only in his character of husband, not as debtor. My conclusion is, that the costs of the assignee stand upon the same footing as the costs of the original defendant. The plaintiff is entitled to his costs incurred by this unsuccessful contention on the part of the assignee.

BANK OF TORONTO V. FANNING.

Sale for taxes.

In a suit to impeach a sale of land for taxes, it appeared that about 20 acres of the lot were cleared and a barn was erected thereon, into which hay made on those 20 acres by a person occupying the adjoining lot was stored in winter, no one residing on the 20 acres; the owner being resident out of the country and never having given notice to the assessor of the township to have his name inserted on the roll of the township.

Held, that this was not such an occupancy of the 20 acres as exempted the lot from being assessed as the land of a non-resident.

Examination of witnesses and hearing at Owen Sound.

Mr. *S. H. Blake*, for the plaintiffs.

Mr. *Creasor*, for defendant.

September 1.

Judgment.

SPRAGGE, C.—This bill is filed to impeach a sale, for taxes, of lot 76 in the 1st concession of the township of Holland. The bill impeaches the sale on various grounds, none of which are sustained in evidence. The only point upon which any question is made is this, that the land was assessed as the land of a non-resident, while in fact the land was occupied, though not by the

owner himself; and upon this point the evidence of several witnesses was given, and the case was argued. The taxes in arrear, for which the land was sold, were for the years 1857, 1860, 1861, 1863, and 1864. Before the first of these years, about twenty acres of the lot had been cleared, and a crop had been taken off. A barn was erected about 1852.

1870.

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The owner of the lot, *James Allen*, jr., was not a resident of the township during any of the above years; and did not signify to the assessor his desire to be assessed for the lot. All that appears is that in one year the father of the owner told the assessor for that year, *James Murray*, to put down his son's name on the Roll, as he was the owner of the lot; and that the assessor did put down the son's name for that year: a request by the owner himself has been adjudged to be necessary: *Berlin* v. *Grange* (*a*). *Murray* was assessor for 1857, 1858, and 1860. It does not appear that the land was returned as non-resident in the year in which the owner's name was put on the roll, and it is not likely that it was. It appears that in some years the taxes were paid. For the years 1858, 1859, and 1862, the taxes do not appear to have been returned as unpaid.

Judgment.

The fact appears to be that for five years, though not for five continuous years, the taxes were left unpaid; that during these years the owner was not resident within the municipality, and made no request that his name should be inserted on the roll. The plaintiffs therefore must rest upon the fact of occupancy by some third person or persons as entitling them to avoid the sale.

I take it that the occupancy contemplated by the statute is a visible occupancy; something that the officer,

(*a*) 5 C. P. 211.

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Bank of Toronto v. Fanning.

whose duty it is to note the fact, can see. The word "resident" is applied to the case of the owner of land assessed, who is living upon it; the word "occupant" to the case of some person, other than the owner living upon the land. Both words import actual visible occupation. I have read the evidence carefully; and have come to the conclusion that there was no such occupancy of the premises during any of the years that the land was returned as "non-resident." A person living in the immediate neighborhood would have been able to observe that some use was being made of the land; but even this would not be necessarily apparent to the assessor paying his official visit early in the Spring. The use made of the land was this; that the hay growing upon it from year to year was cut by the owner of the adjoining lot, lot 77, and was kept in the winter in the barn that was on the lot: and the produce of lot 77 was stored in the same barn. There was a house and no barn on lot 77; and a barn on lot 76, but no house. The doors of the barn were gone. Three of the witnesses say that there was nothing to shew the assessor that lot 76 was occupied. It appears from the evidence that some lots of land in the neighborhood had been partially cleared, and then, apparently, abandoned; and the assessor arrived at the conclusion that this was the case with lot 76.

Judgment.

I am not prepared to say that a *personal* occupation, by living on a particular lot is necessary. A lot may be used with another as part of the same farm, and that without there being a house upon it, or even a barn, the house and farm buildings being upon an adjoining lot. In the case of premises so used by an owner, it would be manifestly wrong in an assessor to return any part of such land as non-resident; or in the case of their being so used by a tenant, or other person under the owner, so to return them. But in this case the owner was not resident on any adjoining lot, or in the Township; and

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left his lot in such a state that in the opinion of three witnesses who were cognizant of its condition and use, there was nothing to show the assessor that it was occupied at all. The cutting and storing of hay upon the lot; or the storing of other produce in the barn, was putting the place to some use, which may have been with or without the authority of the owner; but it was not in my opinion, an occupancy of the lot within the meaning of the statute.

It may be that with more care and diligence than assessors generally use, so far as I can judge from the cases that have come under my observation, the assessors of this township might have learned who was the owner of this lot and his address, and have notified him: but I agree with Chief Justice *Draper* that to set aside a tax sale on such grounds would be to contravene the intention of the Legislature. The learned Chief Justice has been more disposed than some of the other judges to hold tax sales invalid for errors in the imposition of taxes, and their levy, yet in *Allan* v. *Fisher* (*a*) he said that he could not in favor of the owner of the property "sacrificed" at sales for taxes, "overlook or disregard the plain effect of the statute, and the palpable intention to make the purchaser at sheriff's sale, safe in his purchase, after the year for redemption has expired;" and he adds, "and when the sheriff's neglect to levy the tax by selling goods actually on the land, and which he had good reason to believe were there, does not invalidate the sale of the land, it appears to me impossible to hold that the collector's neglect to search for goods which with diligence he might have found, or to inquire with sufficient care for the address of the party assessed on his roll in order to transmit a statement to him by post under the 41st section, can have that affect." In

Judgment.

(*a*) 13 U. C. C. P. 63.

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all this I entirely agree, and I may add that I concur generally in the view taken of the Assessment Acts; their policy and proper construction by Mr. Justice *Wilson* in *Cotter* v. *Sutherland* (a). The owner of property is given ample means of protecting himself, and in the different statutes that have been passed the Legislature have been careful in giving him every reasonable protection. If during five years he leaves his taxes unpaid, neglecting also to avail himself of the means provided by statute for his having notice: and if after this his land is brought to sale in order to supply that which is in truth a public necessity, the Courts should not, I think, too readily give effect to errors usually of omission, on the part of municipal officers, discovered for the most part through the acuteness of solicitors. As a matter of discretion a Court of Equity would not avoid a sale, under such circumstances. A plaintiff must come *ex debito justitia*. His position must be that there has been no legal assessment. There has been in my opinion a legal assessment in this case, and the plaintiffs' case therefore fails.

Judgment.

It was not objected, at the hearing, that the objection upon which the evidence was taken and the cause was argued, was not taken by the bill. I have considered the cause as if the case was regularly and properly before me, without, however, saying that it was so.

The bill is dismissed, and with costs.

(a) 4 VanK. 357.

1870.

SPARK v. PERRIN.

Will—Interest on legacy to minor children.

A testator, after giving certain personal estate to his wife, and devising his lands to his two sons and his daughter (all minors), subject to a life estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one; and he further directed that if any of his children should die before attaining that age, then his or her share should be equally divided among the survivors; and if all should die he gave the whole on his wife's death to other relatives, whom he specified.

Held, that the two sons were entitled to the interest on the residuary personal estate for their maintenance during minority.

The testator, *Jonathan Spark*, by his will dated 3rd May, 1866, gave and devised to his wife, all his household goods and furniture, together with the stock and farming implements; also the use and benefit of the south-half of lot 36, in the 3rd concession of Tuckersmith, during the term of her natural life; and he directed that after the death of his wife the said half-lot should be equally divided among his three children (two sons and a daughter), to hold to them and their heirs for ever; that all the rest, residue and remainder of his personal estate which might remain in the hands of his executors after all charges had been paid, should be divided equally share and share alike between his said two sons upon their attaining twenty-one years of age; and if any of the said children should die before attaining the age of twenty-one years, then his or her share should be equally divided between the survivors; and in case of the death of his said children, then all the above-mentioned property should revert at his wife's death to his relatives of the *Spark* family. Statement.

The bill as amended was by the two sons, who were infants and sued by their next friend against the executors, the widow, and the daughter, who was also an infant.

1870.

Spark v. Perrin.

The question discussed was, whether the sons, either alone or jointly with the daughter, were entitled to the interest on the residuary personal estate for their support.

Mr. *Holmested*, for the plaintiffs.

Mr. *Moss*, for the executors.

Mr. *Hoskin*, for the infant daughter.

The bill was *pro confesso* against the other defendant.

Binkley v. *Binkley* (*a*), *Martin* v. *Martin* (*b*), *Deane* v. *Test* (*c*), *Chaworth* v. *Hooper* (*d*), were referred to.

September 7.

Judgment.

MOWAT, V.C.—I understand the law to be, that where a legacy is given to a minor by a parent, or by a person in *loco parentis*, payable at a future period, if no other provision is made for maintenance, interest will be allowed for that purpose even though, by the terms of the will, the legacy is contingent on the legatee's living to the period which is mentioned for payment of the legacy; and even though the will contains a gift over in case of the minor dying before such period. The rule is otherwise in the case of a bequest by a person who does not stand to the legatee in the relation of parent (*e*). A parent is bound to provide for the maintenance of his children; and the court infers that for that purpose he meant to give interest, though he has not expressly said so.

The case of the daughter, who is to have no portion of the residue unless one or other of the sons die before

(*a*) 15 Gr. 560.
(*b*) L. R. 1 Eq. 369.
(*c*) 9 Ves. 147.
(*d*) 1 B. C. C. 82.
(*e*) Martin v. Martin, L. R. 1 Eq. 369; Harvey v. Harvey, 3 P. W. 21; Nicholls v. Osborn, *ib.* 419; Wms. on Executors, 6th ed. 1307, 1320, 1314, and cases there cited.

twenty-one, differs from the case of the sons; and I have seen no authority that would warrant my saying, that while all the sons live, the daughter can claim maintenance out of the interest. But as all the children are living with their mother and are supported by her, and as the interest will not fully maintain even two of the three children, the point as to the daughter's strict right is not at present material.

Declare that the sons are entitled to the interest on the residuary estate for their maintenance during their minority.

PATERSON v. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Railway—Lien for purchase money—Agreement not under seal—Parties—Demurrer for uncertainty.

The Statute 19 Victoria, chapter 21, incorporating the Buffalo and Lake Huron Railway Company with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old Company.

The old Company was held to be a necessary party to a suit by a land-owner to enforce a lien for purchase money in respect of land sold to the old Company before the transfer of the railway to the new Company; it not appearing but that the old Company was interested in the question to be litigated.

An agreement not under seal for the sale of land to a Railway Company, for the purposes of the railway, no price being agreed on, in pursuance of which agreement the Railway Company was allowed to take and did take possession—is enforcible in equity.

A bill alleged that the defendants *A* had taken from their co-defendants *B* their "line of railway for a certain number of years yet unexpired, and under the said agreement the defendants *A*, claim to hold, run, and operate, as they are now doing, the said line of railway." A demurrer on the ground that these statements did not state sufficiently the title of the defendants *A*, was overruled.

Statement.

The bill in this cause was against *The Buffalo and Lake Huron Railway Company*, and *The Grand Trunk*

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Railway Company. The allegations of the bill, so far as it is material for the present report to state them, were as follows:—The bill stated that on or about the 1st September, 1854, the plaintiff having the title which it set forth to certain land in Haldimand, he, at the request of *The Buffalo, Brantford and Goderich Railway Company*, suffered and permitted them to enter into possession of part of the said land (which the bill described), for the purpose of constructing their railway; that, in consideration thereof, that Company undertook and agreed to pay to the plaintiff the just and full value of the land so taken possession of, and all damages incidental thereto, the same to be paid to the plaintiff on a day then past; that no price had ever been fixed as the value of the said land and damages; that, on the faith of the agreement, the plaintiff allowed the Company to enter and take possession as aforesaid; and that the defendants *The Buffalo and Lake Huron Railway Company*, afterwards, under and by virtue of the Statute 19 Vic. ch. 21, and the agreement therein recited, became, and then were, the owners of the said railway, subject to the lien of the plaintiff on the said land. The bill further stated that the said land was necessary for the working of the railway; that, on the making of the agreement last aforesaid, *The Buffalo and Lake Huron Railway Company* entered into possession of the land in question; that they continued in such possession, and were then in possession and occupation of the same land, through the defendants *The Grand Trunk Railway Company;* that the last mentioned Company were then in the actual possession of the same "under and by virtue of an agreement whereby the said defendants last named have taken from their co-defendants the said line of railway for a certain number of years yet unexpired; and under the said agreement *The Grand Trunk Railway Company* claim to hold, run, work, and operate, as they are now doing, the said line of railway." The prayer was for the specific performance of the agreement and other relief.

Statement.

A general demurrer was filed by each of the two Companies who were defendants.

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

Mr. *R. Martin*, contra.

MOWAT, V. C.—The principal point argued was, that the Statute 19 Victoria, deprived the plaintiff of his lien. I stated at the close of the argument that I did not concur in that view.

Sept. 7th.

It was further contended, that the agreement must be presumed to be unwritten, and was therefore void; and that it was also void because the price had not been fixed. But the allegations as to possession having been taken in pursuance of the agreement supply the answer to both grounds of contention.

Judgment.

It was also argued, that the plaintiff's only course was, to have the price fixed by arbitration; and it was said that (if necessary) he might apply at law for a mandamus to compel the Company to name an arbitrator. But, there being alleged to have been an agreement, and possession under it, the authorities shew that a bill for specific performance will lie.

It was further insisted, that the title of *The Grand Trunk Railway Company* was not set forth with sufficient explicitness; that the bill alleges in that Company a present interest only; and that the expression "a term of years not yet expired" is too indefinite. *Hunter* v. *Daniel* (*a*) was cited in support of the objection; and, on the other hand, I was referred to *Baring* v. *Nash* (*b*), and *Ponsford* v. *Hankey* (*c*), as illustrative of the certainty which is considered sufficient in setting forth in a

(*a*) 4 Hare, 432. (*b*) 1 V. & B. 551. (*c*) 9 W. R. 510.

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bill the title of a defendant. I think that this objection to the bill is not maintainable.

It was objected *ore tenus*, that *The Buffalo, Brantford, and Goderich Railway Company* were necessary parties. The pleader seems to have regarded that Company as at an end; but, on looking at the Statute (*a*) and the schedule, it is plain that that is not the case, and that that Company may have an interest in the claim which the plaintiff sets up. Therefore, *The Buffalo, Brantford, and Goderich Railway Company* having been the vendees, and their interest in the matter in question not having (so far as appears) ceased by the transfer to *The Buffalo and Lake Huron Railway Company*, I think that this objection for want of parties is good.

The demurrers on the record are overruled with costs. The demurrers *ore tenus* are allowed without costs, and with liberty to the plaintiff to amend.

Judgment.

(*a*) 19 Vic. ch. 21.

1870.

McCargar v. McKinnon.

Practice—Masters' reports—Executors' accounts.

Masters are bound to see that their reports are not of unnecessary length.

Parties cannot appeal against mistaken findings of the Master which are not of practical importance to them, though they may affect other parties *inter se*.

Executors have power, in the exercise of a prudent discretion, to accept land in payment of an execution debt.

Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the Master may, without taxing the bill, moderate it by deducting charges which appear not to be proper.

In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debts is proper to be taken into account.

The Master's revised report in this case was dated 16th September, 1869 (*a*). An appeal and a cross-appeal against it were argued before *Mowat*, V. C., on the 1st September, 1870.

Mr. *Moss* and Mr. *E. B. Wood*, for the legatees.

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

Mowat, V. C.—I shall first refer to the appeal of the legatees. Sept. 7th.

Their first objection to the report is its unnecessary length. Counsel for all parties admitted that the report, though much shorter than before, is even now longer than it need be. Masters must study brevity in their reports. I shall say nothing more on the subject at present, as the executors do not appear to be answerable for the unnecessary prolixity, any more than the legatees are. Judgment.

(*a*) S. C. 15 Grant 361.

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The second objection is, that the Master has improperly reported Mr. *McKinnon* to have been the acting executor; and the reasons for his having been so. It seems to be correct that he was the acting executor; but it is said that there was no evidence that the reasons were those which the Master has stated. The eighth paragraph, to which the fourth objection refers, bears on the same point, and is uncertain and informal. But so far as the questioned findings may affect the liability of the executors *inter se*, the legatees have nothing to do with them; and as the balance found against Mr. *McKinnon* in respect of his receipts is less than the Master has allowed him for commission, and as the Master has charged the executors jointly with all sums which, but for neglect or default, might have been received, it does not appear to me that any practical importance, as between the legatees and executors, belongs to the findings to which the objections under consideration apply; and they were therefore not proper subjects of appeal by the legatees.

Judgment.

The third objection refers to the debts of the Grand River Navigation Company and *John Turner*, observed upon in my former judgment (*a*). Some further evidence has been given in regard to these debts; the Master has again come to the conclusion that the executors are not chargeable with them; and I think that there is not enough in the evidence to call on me to reverse that conclusion. The *bona fides* of the executors in accepting the lands from *Turner* was not questioned; and the power of executors, in the exercise of a prudent discretion, to accept land in payment of an execution debt was not denied.

The fifth objection relates to a sum paid to Mr. *Thompson*, the late solicitor to the estate, for his costs

(*a*) 15 Grant 361.

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incurred in the administration of the estate (not the costs of this suit). The Master reports that the solicitor charged $621; that the executor had succeeded in getting the amount reduced (without taxation) to $450; and had paid that sum in full. The Master further reports that he has made a careful examination of the solicitor's bills, and that he does not find that the amount paid for the services rendered is unjust or unreasonable; and, as it was paid by the executor in good faith, the Master finds that it should be allowed. It was not suggested that the Master could or should have taxed the solicitor's bill, or that I myself should examine its details. In *Johnson* v. *Telford* (*a*), it was argued that an executor was entitled to have allowed without question the amount of bills paid by him *bona fide* to his solicitor; but the Master of the Rolls denied that, and stated the practice in such case to be, instead of submitting the bill to taxation, to moderate the bill, by making a deduction from charges in it which upon the face of them were irregular or excessive. *Johnson* v. *Telford* (*a*) is referred to in the last edition of *Daniel's* Practice (*b*), and of *Smith's* Practice (*c*), as correctly stating the present rule. In *Lady Longford* v. *Mahoney* (*d*) Lord Chancellor *Sugden* said that in moderating a bill, "the Master will revise the items in a manner similar to taxation; and if upon the reference the charges appear not to be proper charges, they will be disallowed to the trustee." It has not been shewn that this bill contained improper charges to an amount exceeding the sum deducted by the solicitor; and it was admitted that from lapse of time there could be no taxation as against him. I think that this fifth objection fails.

Judgment.

(*d*) Vol. I., p. 988.
(*c*) Vol. II., p. 1150.
(*b*) 3 Russ. 477.
(*d*) 4 Dr. & War. 109.

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The sixth objection of the legatees was not argued.

I come now to the objections of the executors.

Their first objection is, that the Master has improperly charged against them three debts which were due to the testator and have not been paid.

The first is a debt of $27.25, due by one *Knight*, a day labourer. It appears that the only seisable property which he had was a small lot of land for which he had been offered and had refused $30, but the value of which does not otherwise appear. It was not argued that, as the law stood at the time, this land could have been reached for so small a debt, and I think, therefore, that the executors have sufficiently justified their not having sued.

Judgment. The second debt which the executors complain of having been charged with is, the debt of *Rogers*, referred to in my former judgment. The debt was $93.75, and the executors received upon it $55 on the 4th March, 1859—a fact which I do not recollect having before observed, and if mentioned on the former appeal it must have escaped my attention; it is not referred to in my judgment, and I do not find it in my notes of the argument. I stated in my former judgment that, from the time of the testator's death, *Rogers* probably owed more than he had means of paying; that in January, 1860, he was "burnt out;" that what property he had was then sold under execution; and that during the interval he had been applied to on behalf of the executors for payment of the debt in question. The further fact has since been proved, that on 25th June, 1858, which was five months after the testator's death, there was an execution in the sheriff's hands for £206, against *Rogers* and others, and that this execution remained in the sheriff's hands until after the fire. Having reference to the state

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of *Rogers's* affairs at the time of the testator's death—to the existence of this large execution so soon afterwards—to the fact that the demands made on him without suit had resulted in the receipt of $55 on account of a debt of $93—and to the lapse of ten years before the executors were called on to justify by evidence the non-recovery of the small balance, I think that they should be held to have sufficiently met the obligation which the rules referred to in my former judgment imposed on them.

To the extent of these two items, I think therefore that the report should be varied. As to *Lindsay's* small debt of £9 13*s.* 4*d.*, I shall not disturb the report.

The executors' second ground of appeal is, that the husbands of two of the legatees were not admissible witnesses on their behalf. To that I agree.

Judgment.

The appeal of the legatees will be dismissed with costs; the appeal of the executors will be allowed as mentioned, without costs.

CARROLL v. ECCLES.

Partnership accounts—Statute of Limitations.

In a partnership suit, it was held that the defence of the Statute of Limitations could not be raised under the common decree directing an account of the partnership dealings and transactions.

This was an appeal from the Accountant's report.

The suit was in respect of the partnership accounts of the firm of *Eccles, Carroll & Doyle*, who practised law in this city some years ago. The terms of the partner-

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Carroll v. Eccles.

ship were set forth in a memorandum, in the words following :—

"Firm *E. C. & D.*

Business—Common Law—Chancery, and Conveyancing.

"Conditions :—

"1. Mr. *E.* retains all col. bus. of every kind except the foll., viz. :

"(1) Ordinary fees as between party and party in County Court suits.

"(2) Similar fees in undefended cases at assizes and Chancery.

"(3) Practice Court cases.

Statement.

"(4) Chamber Practice connected with the business of the office :

"Which excepted fees are to go to the general fund.

"2. The profits of the business to be equally divided between the three at the end of each year or sooner determination.

"3. Mr. *E.* to charge all counsel fees connected with the business of the office to the firm (except as above), and to be paid as soon as the same shall be collected but not otherwise The partnership—from the 1st October, 1856, so long as the parties agree, not exceeding 4 years—either party to give 3 months notice of the intention to withdraw. In cases where two fees can be taxed either at law or in equity, all but 1st counsel fees to go into general fund."

The remainder of the memorandum did not bear on the matters argued.

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Carroll v. Eccles.

The partnership ceased on the 1st January, 1860, by the retirement of Mr. *Doyle*. In 1863, Mr. *Eccles* died. On the 5th February, 1866, this suit was commenced. The bill contained an allegation (amongst other things) "that the affairs of the said co-partnership were not, during the lifetime of the said *Henry Eccles*, nor have they since been, finally wound up and adjusted." The administratrix of Mr. *Eccles* by her answer admitted this allegation. By the decree (27th March, 1867), the Accountant was directed, amongst other things, to take an account of the dealings and transactions of the partners. The Accountant made his report; from which there were three appeals, one on behalf of each of the three parties interested.

Only one of the matters argued involved any question which it would be useful to report; and therefore, so much only of the judgment as refers to this matter is reported.

Mr. *Ferguson*, for Mrs. *Eccles*.

Mr. *C. Patterson*, Mr. *Hamilton*, and Mr. *Scott*, for the other parties.

Sept. 14.

Judgment.

MOWAT, V. C.—The first objection is, that the Accountant refused to exclude from account sums received by Mr. *Eccles* more than six years before the filing of the bill. Two points were discussed on the argument of this objection. (1). Whether the Statute of Limitations was applicable to the case, and (2), whether it was necessary to set up the statute by the answer, and to have an adjudication upon it at the hearing. On the former point, the material facts for consideration are, that the dissolution took place on the 1st January, 1860; that the bill was not filed till February, 1866; that the assets were not divided, or the affairs of the partnership wound up at the time of

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the dissolution; that assets were outstanding, and that payments were made by one partner to another in respect of their partnership matters, within six years before the commencement of the suit; that entries of such payments were made in the partnership ledger by Mr. *Eccles* within six years; and that the answer of his administratrix admits that the affairs of the partnership were never wound up or adjusted. The decision of Lord *Chelmsford* in *Knoxson* v. *Guy* (*a*), was cited for the appellant. In that case Lord *Chelmsford* overruled a decision of Vice Chancellor *Wood*, that the statute was no defence; and the subsequent cases of *Miller* v. *Miller* (*b*), and *Millington* v. *Holland* (*c*), indicate a disposition of learned Judges to act on the view taken of the matter by Lord *Hatherley*, rather than on that of Lord *Chelmsford*. But I think that the defence, if good, should have been taken by the answer. The Statute of Limitations was not a matter incident to the account directed, but was rather a matter inconsistent with it and destructive of it; it was, if applicable, a reason for not taking the full account which the bill prayed, and which the decree ordered. It was not a matter which there would be any convenience in transferring to the Master's office for adjudication, but entirely the contrary. I do not think the Consolidated Orders 219 and 220 apply to such a case. I think that the first objection to the report must be overruled.

Judgment.

The second objection is in respect of certain bills of costs due by Mr. *Eccles* to the firm in respect of private matters of his own; and it was argued for the appellant, with reference to the Statute of Limitations, that these charges stand in a different position from money transactions; but I have not been able to perceive that any sound distinction can be founded on that circumstance. I think that this objection must be overruled.

(*a*) 16 L. T. N. S. 76. (*b*) L. R. 8 Eq. 499. (*c*) 18 W. R. 184.

1870.

McLaren v. Fraser.

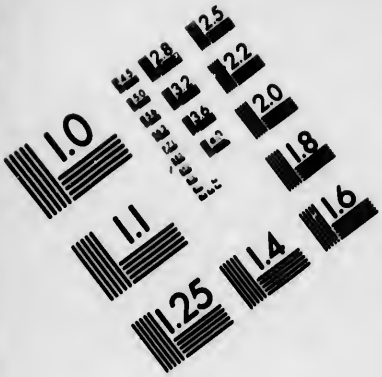
Void sheriff's sale—Enforcing purchase money on—Inconsistent relief—Mortgage—Tacking judgment against devisee.

In a suit for setting aside a purchase made by a mortgagee at a sheriff's sale, and giving the parties interested in the equity of redemption liberty to redeem, the Court, while granting that relief, refused actively to enforce the sale by requiring the mortgagee to give credit for the purchase money in reduction of his debt.

A mortgagor's devisee held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the registry act forbids.

Statement.

This was an appeal from the Master's report, dated May 16th, 1870. The appeal was brought on for argument on the 1st September. The suit was by a second mortgagee for redemption. The appeal was on the part of a defendant, who was a minor, and was one of the mortgagor's devisees; the mortgagor having died on or about the 23rd April, 1863. Another defendant, *Alexander Fraser*, held by assignment the first mortgage on the property. This mortgage was dated 12th November, 1855; and purported to secure the payment of £650 6*s.* 5*d.*, with interest, on the 1st November, 1856, with such other sum or sums of money as the mortgagor should then owe to the mortgagees. The assignment to *Fraser* was dated the 15th April, 1858. Shortly before that date, the mortgagees had commenced an action against the mortgagor—the bill alleged in respect of the debt secured by the mortgage, but the appellant disputed that. Judgment in the action was recovered on the 10th May, 1858, for £1035 9*s.* 10*d.*, for debt and costs. On or about the 20th December, 1862, *Fraser* became the purchaser of this judgment; and on the 27th January, 1868, he purchased certain of the mortgaged lands under an execution issued upon the judgment. The sheriff's sale was found to be void;



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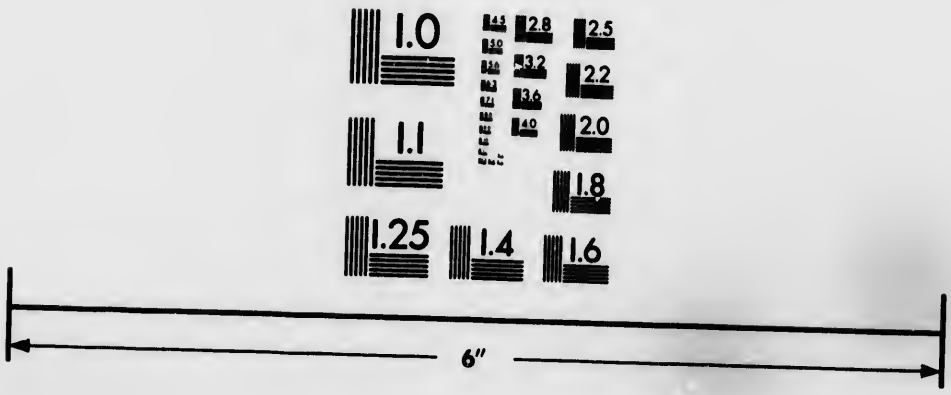

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and the Master in consequence refused to charge Mr. *Fraser* with the purchase money, in reduction of the mortgage debt. The appellant complained of this; and he complained also that the Master had allowed *Fraser* for principal money more than the sum specified in the mortgage, without any evidence that the additional sum allowed was due on the 1st November, 1856, as the mortgage provided. These were the only points contested upon the appeal.

Mr. *McLennan* and Mr. *Rae*, for the appeal.

Mr. *J. A. Boyd*, contra.

Sept. 14.

Judgment.

MOWAT, V.C.—On the first point argued on the appeal, *Ferguson* v. *Ferguson* (*a*), decided by the present Chancellor and myself, was cited as shewing that the purchaser was chargeable with the purchase money. That was a case in which the purchaser sought by bill to treat the sheriff's sale as a nullity, and his debt which it satisfied as still subsisting; and we held that he could not do so—that a sheriff's deed has the same effect in that respect as the deed of any other vendor. That case is no authority as to the terms to which the purchaser may be entitled where he is a defendant, and the aid of the Court is invoked against him by the debtor or his representatives on the footing of the sale being void. But the preceding cases of *Walton* v. *Bernard* (*b*) and *Paul* v. *Ferguson* (*c*) were also cited; and each of these was, like the present suit, a suit for redemption against the purchaser of the mortgagor's equity at a void sheriff's sale. In *Walton* v. *Bernard* the purchaser was a stranger, having no interest in the property when he made his purchase; and Vice Chancellor *Esten* in his judgment referred to

(*a*) 16 Gr. 309. (*b*) 2 Gr. 356, 366, 367.
(*c*) 14 Gr. 230.

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that circumstance; but in *Paul* v. *Ferguson* the purchaser was the mortgagee of the property at the time of the sheriff's sale. In both cases the purchase money had been actually paid to the execution creditor; and the Court held that, on a bill against the purchaser for redemption notwithstanding the sheriff's sale, he was not entitled to add to the mortgage debt the purchase money so paid. In the present case, the money has not been paid; and the appellant seeks, not as in those cases, to treat the sheriff's sale as a nullity for all purposes; but, while the sale is treated as insufficient to give the purchaser the land, the appellant desires to have the transaction treated in this suit as at the same time valid to the extent of charging the purchaser with the purchase money. The sheriff's return does not estop *Fraser* (*a*) from resisting that claim.

Judgment.

I am not sure that, if the point decided in *Walton* v. *Bernard* and *Paul* v. *Ferguson* were new, it would now be decided as in those cases. The general rule certainly is, that on setting aside a conveyance the Court will order repayment of the consideration money, in case the party in whose favor the conveyance is set aside had the benefit of the money (*b*). On the same principle, improvements by the defendant are allowed for. But the rule which the two cases referred to establish must be taken as correct, unless and until the contrary is held on a rehearing of some case before all the judges of this court, or on an appeal to the Court of Error and Appeal. What the appellant here desires is, to carry that rule a step farther, and to apply it for a purpose which does not seem to me to fall within the principle of what has already been decided. It is one thing to make a decree or report which wholly disregards the transaction of the sheriff's sale, and gives to the purchaser no relief as a con-

(*a*) Standish v. Ross, 3 Exch. 527.

(*b*) See cases, Kerr on Frauds, 277, 278; Story Eq. Jur., se. 641, &c.

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dition of setting aside the sale; and it is quite another thing to disregard the transaction for one purpose, and yet in the same suit to enforce it actively for another purpose. I am not prepared to say that the Master was wrong in refusing so to construe the decided cases; and I do not think that the appellant, though a defendant, was in any better situation than the plaintiff, for demanding such a construction. He gets in this suit the benefit of opening the sale; and the inconsistency of, in the same suit, taking from the purchaser the estate which he bought and yet making him give credit in account for the price which he was to pay for it, is equally great whether the demand is made by a defendant or a plaintiff. The Court may take from the purchaser the estate which he bought, and decline to interfere actively on his behalf to obtain back for him the money which he had paid away; but I cannot suppose that it is the duty of the Court, at the instance of either a co-defendant or a plaintiff, while it takes away the land, to interfere actively, at the same moment, in the same suit to enforce the price, for the benefit of the parties who estate is restored to them.

Judgment.

As to the other ground of objection to the report, it does not seem to be necessary to consider the sufficiency of the evidence to shew that the judgment was for a debt due on the day which the mortgage names. The plaintiffs do not appeal from the Master's report on the point; and, to avoid circuity of action, a mortgagor's heirs or devisees are never permitted to redeem the mortgage without also paying a bond or judgment debt owing by the mortgagor (*a*). That is not such a tacking as the Registry Act forbids. All other parties, by not appealing from the report, must be taken to admit that the sum named by the Master is due on *Fraser's* mort-

(*a*) See the cases, Fisher on Mortgages, 2nd ed., secs. 12, 19, p. 667.

gage; and if, as respects one of the heirs, part of the sum is, like the mortgage debt, a lien on the property, but is not proved sufficiently to have been covered by the mortgage, the difference is one of mere form; and an appeal lies for matter of substance only.

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Appeal dismissed with costs.

MONK v. KYLE. [IN APPEAL.*]

Mortgage—Conveyance and agreement to resell.

In 1838 *A.* having a life-estate in certain land, his wife having the remainder in fee, *A.* being also owner in fee of property adjoining, and executions against his lands at the suit of *B.* and others being in the sheriff's hands, *A.* and his wife agreed verbally with *B.* that *B.* should purchase at the sheriff's sale; that they also would execute a conveyance to *B.*, and that he should resell to them. Accordingly *B.* bought at the sheriff's sale; and *A.* and his wife executed a conveyance to *B.*, but the wife was not examined before magistrates until 1841. At the same time that this omission was supplied, two bonds were executed, one by *B.* for reselling the property to *A.* and wife, on payment of the money (the amount of the executions); and the other by *A.* and wife for payment of the money; they agreeing that in case of default they would give up possession, and that any intermediate payments should be retained by *B.* as rent. In 1842 new bonds to the same effect were exchanged, naming a larger sum in order to cover some further advances which *B.* had meanwhile made to *A.* *A.* and wife remained in possession until default and were then ejected. After *A's.* death his widow filed a bill to redeem, claiming that the parties were in effect mortgagors and mortgagee. Chancellor *VanKoughnet* so held, and made a decree for redemption, but the decree was reversed in Appeal. [SPRAGGE, C., dissenting.]

Statement.

The facts of this case were substantially the following: *Matthias Monk* had a life-estate in the west half of lot No. 27, 1st concession, township of Williamsburg, his wife, the plaintiff being entitled to the remainder in fee. *Monk* was also owner in fee of twenty acres, part of the same lot.

[* Before DRAPER, C. J., SPRAGGE, C., HAGARTY, C. J., MORRISON, GWYNNE, and GALT, JJ.]

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Monk v. Kyle.

A creditor of *Monk* had recovered judgment against him, and had in or before January, 1838, put a *fi. fa.* against lands into the hands of the sheriff. *William Kyle* had also a judgment and a similar execution against *Monk*, but his execution was subsequent to the other. *Monk's* lands were advertized for sale by the sheriff early in January, 1838.

According to a part of the answer (which was read on behalf of the plaintiff at the argument) it was agreed between *Kyle*, *Monk*, and the plaintiff that *Kyle* should become the purchaser at sheriff's sale, and that *Monk* and plaintiff should convey to him their title, so that the whole fee simple in the lands above mentioned should vest in him, and that he should "resell" to them.

Kyle did purchase at the sheriff's sale, and obtained a deed from the sheriff; and on the 2nd March, 1838, *Monk* executed a deed to *Kyle* according to the agreement. The plaintiff signed and sealed this deed, but did not execute or acknowledge it in the required legal form. The deed from the sheriff was not put in evidence. It was assumed to have conveyed *Monk's* legal estate in the premises to *Kyle*.

Statement.

It was stated in another part of the answer (read as the former had been) that *Kyle* under the circumstances procured no title under the sale and sheriff's deed, except as a security for the sum he paid the sheriff.

On the 20th January, 1841, the plaintiff duly executed the deed of the 2nd March, 1838 (the date remaining unaltered), before two justices of the peace, who examined her, and indorsed a certificate in the usual form upon the deed.

Kyle gave a bond, bearing date the same day, to *Monk* and the plaintiff, conditioned to convey to them, their heirs and assigns for ever "by a relinquishment or quit claim deed" the two parcels of land above mentioned, if they paid him £341 1*s.* 8*d.* of which £170 10*s.* 10*d.* was to be paid with interest on 15th July, 1842.

On the same day *Monk* and the plaintiff gave their bond to the defendant *Kyle* conditioned to pay him the sum of £341 1*s.* 8*d.* with interest, and on any default in payment to give up peaceable possession to him, and to permit him to retain any money that might have been paid by them "as rent for the premises."

On the 17th June, 1842, *Kyle* gave a second bond to *Monk* and the plaintiff in the penal sum of £640, reciting that he had "bargained and sold" to them the aforesaid premises for £476 7*s.* 6*d.*, and conditioned (on payment by them of that sum with interest on the 1st August, 1843,) "to assign by relinquishment or quit claim deed" the said premises to *Monk* and the plaintiff, their heirs and assigns.

Monk and the plaintiff simultaneously gave their bond in a penalty of £650, reciting this last bond to them, and conditioned to pay *Kyle* £476 7*s.* 6*d.*, with interest from that date, on 1st August, 1843, and upon default to surrender peaceable possession to him, and to permit him to retain any moneys they might have paid as rent for the premises.

Statement.

All these deeds and bonds were produced by the defendants, into whose possession and custody they came after the death of *William Kyle*.

It did not appear, nor was it asserted, that *Kyle* ever received any payment either for interest or principal on either of the bonds given by *Monk* and the plaintiff.

Monk died in 1864, having been ejected by *Kyle* in June, 1845.

On the 24th February, 1868, the plaintiff filed her original bill, which was amended on 26th February, 1869.

On the 28th May, 1869, *VanKoughnet*, C. made a decree declaring that *William Kyle* was a mortgagee, and that the plaintiff was entitled to redeem.

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From this decree the defendants appealed.

Mr. *Moss*, for the appellants, contended that the conveyance of 2nd March, 1838, was an absolute deed and not a mortgage; that the bond of *William Kyle*, dated 20th January, 1851, was a bond for a re-sale of the land in question, and did not, under the circumstances, render the land redeemable after the default of the plaintiff *Elizabeth Monk*, and her husband in not complying with the conditions thereof: and the surrender of the bond to *Kyle*, and the subsequent taking of possession of the premises by *Kyle* and the other facts in evidence, proved that the plaintiff and her husband abandoned all rights under the contract of re-sale; that even if the plaintiff *Elizabeth Monk* ever had a right to redeem the land, such right was, before the filing of the bill, barred by the Statute of Limitations, notwithstanding that she was under coverture for some time after *Kyle* had taken possession of the lands; that such laches, acquiescence, and delay, on the part of the plaintiff were proved, that in view of the increased value of the property, the improvements made and money expended thereon, on the faith of the title of *Kyle* being absolute, it was inequitable to pronounce an ordinary redemption decree: and that in any event the plaintiffs were not, upon the pleadings and evidence entitled to any interest in, or any relief in respect of part of the premises in question.

Argument.

He referred, in addition to the cases mentioned in the judgment, to *Stanton* v. *McKinlay* (*a*), *Beckford* v. *Wade* (*b*), *McIvor* v. *Regan* (*c*), *Hall* v. *Wybourn* (*d*), *Scott* v. *Nixon* (*e*), *DeBeauvoir* v. *Owen* (*f*), *Humphrey* v. *Gery* (*g*), Earl *Kinnoul* v. *Money* (*h*), *Hudson* v.

(*a*) 1 Err. & App. 265.
(*b*) 17 ves. 87.
(*c*) 2 Wheat 25.
(*d*) 2 Salk. 420.
(*e*) 3 Dr. & War. 388.
(*f*) 5 Exch. 166.
(*g*) 7 C. B. 567.
(*h*) 3 Swans. 202.

Carmichael (*a*), *Robson* v. *Flight* (*b*), *Perry* v. *Jackson* (*c*). 1870. Monk v. Kyle.

Mr. *S. H. Blake* and Mr. *J. Bethune*, in support of the decree argued, amongst other things, that *Kyle* was only a mortgagee of the premises in question, as shewn by the deeds and bonds and other evidence in the cause; that there never was any abandonment of the right of redemption of the respondent *Elizabeth Monk*; that the right of redemption could not be abandoned except by a writing, and no such writing was ever signed by the respondents; and that the right of the respondent *Elizabeth Monk* to redeem, was not barred by the Statute of Limitations owing to her coverture.

Referring, amongst other cases, to *Goodman* v. *Grierson* (*d*), *Hawke* v. *Milliken* (*e*), *Fallon* v. *Keenan* (*f*), *Beattie* v. *Mutton* (*g*), *Ravald* v. *Russell* (*h*), *Raffety* v. *King* (*i*), *McDonald* v. *McDonell* (*j*), *Longuet* v. *Scawen* (*k*), *Price* v. *Copner* (*l*), *Wickson* v. *Vyse* (*m*), *Bostwick* v. *Phillips* (*n*), *Robertson* v. *Scobie* (*o*), *Bernard* v. *Walker* (*p*).

DRAPER, C.J.—The first question is, was the original transaction between *William Kyle* on the one side, and *Monk* and the plaintiff on the other, a *bonâ fide* sale with a contract for repurchase, or a mortgage under the form of a sale. June 27. Judgment.

In *Alderson* v. *White* (*q*) Lord *Cranworth* said:

(*a*) Kay 613.
(*b*) 10 Jur. N. S. 1228.
(*c*) 4 T. R. 516.
(*d*) 2 Q. B. 21
(*e*) 12 Gr. 236.
(*f*) 12 Gr. 388.
(*g*) 14 Gr. 686.
(*h*) 1 Young 9.
(*i*) 1 Keen 601.
(*j*) 2 Er. & App. 393.
(*k*) Ves. Sew. 401.
(*l*) 1 S. & S. 347.
(*m*) 2 Con. & Law.
(*n*) 6 Gr. 429.
(*o*) 10 Gr. 557.
(*p*) 2 Er. & App. 121.
(*q*) 4 Jur. N. S. 125.

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"*Primâ facie* an absolute conveyance with a mere stipulation—no loan of money and no contract to pay the money—but an absolute conveyance does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have, either within a limited time or an extended time, a right to repurchase."

It appears to me that if on the 2nd March, 1838, the plaintiff had been duly examined, and had thereupon expressed her willingness to part with the estate, there would be no ground for holding that the "absolute conveyance" could have been converted into a mortgage by anything that appears to have existed *then;* for there is no proof of any agreement at that time but that stated in the answer, namely, an agreement to resell; and if this be so, it negatives any intention at that date to create the relation of mortgagors and mortgagee between *Monk* and the plaintiff on the one hand, and *Kyle* on the other.

Judgment.

Between the date of this conveyance and January, 1841, the defective execution by the plaintiff was discovered, and during that time *Kyle* was the absolute owner of *Monk's* life-estate in the west half and of the fee simple of the twenty acres, and the plaintiff still held her remainder in fee. On the 20th January, 1841, she executed the prior deed in legal form, and then *Kyle* gave the bond which the plaintiff assumes gave to the absolute conveyance the character and effect of a mortgage.

It is, perhaps, not necessary for the purposes of this suit to inquire whether that bond could be held to convert the deed of March, 1838, into a mortgage of *Monk's* estate and interest. At present I will only say I have not arrived at that conclusion; but as it bears even date with the date of the effectual execution by the plaintiff

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of the deed, the two may, I presume, be read together as constituting one transaction. If so, then the plaintiff conveys to *Kyle* her remainder in fee in the land in which *Kyle* already had an estate for the life of *Monk*, and *Kyle* binds himself on payment of £341 1*s.* 8*d.* for which he holds the joint bond of *Monk* and the plaintiff, to convey to them "their heirs and assigns for ever," both the parcels of land; they consenting on their part, in case of default in payment that they would give up possession, and that if they had made any payments on account, *Kyle* might retain them as rent for the premises.

If the arrangement contained in the two bonds had been carried out as it is expressed, *Kyle* would have received £341 1s. 8d for and he would have conveyed to *Monk* and the plaintiff jointly in fee both parcels of land, the effect of which would be to give to the plaintiff an estate in the twenty acres, which she had not before, and to *Monk* an estate in the plaintiff's remainder, which he had not before, while his life-estate would have been extinguished. I do not profess to understand by what process the language of *Kyle's* bond can be construed to mean that he should on payment convey to *Monk* and the plaintiff the several estates which they held in the separate parcels of land prior to the conveyance of March, 1838. No such difficulty presents itself if that deed is treated as an absolute conveyance, with a right in the grantors to repurchase.

Judgment.

The parties, however, before the day appointed for payment of the £341 1*s.* 8*d.* make another arrangement. They exchange bonds again. *Kyle* agreeing on his part, after reciting that he had bargained and sold the same lands to *Monk* and the plaintiff, for the sum of £476 7*s.* 6*d.*, on the payment of that sum with interest from date, on the 1st August, 1848, to assign the premises by relinquishment or quit claim deed to *Monk*

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and the plaintiff, their heirs and assigns, and they binding themselves to pay *Kyle* £476 7*s.* 6*d.* by the day named; and in case of default consenting as in the case of their former bond to give up possession, and that *Kyle* should keep any payment they might have made, as rent.

It appears to me that after this last dealing, there could be no existing right of redemption—if any ever existed between the parties.

The original agreement stated in the answer, and adopted by the plaintiff by its being read as part of her case, is in express terms for a resale by *Kyle*. The natural meaning of this would be, that upon being paid the price stipulated he would convey to *Monk* and the plaintiff the several estates held by each before they were vested in him.

Judgment.

The possession was exclusively that of *Monk* under his life-estate until the sheriff's sale and conveyance, the right of possession was then transferred to *Kyle*, and his permitting *Monk* to retain possession was as consistent with an agreement for resale as with a mortgage.

No observation was made by counsel during the argument on the fact, that the estate for *Monk's* life and the plaintiff's remainder in fee were both vested in *Kyle*. I presume it was not thought it would affect the question whether he took as a purchaser or mortgagee.

On the one hand there is nothing in the bonds at variance with the agreement for resale, while the agreement that on default in payment *Kyle* might retain any sums he might have received as if they had been paid as rent, though not inconsistent with a repurchase, is at variance with the idea of a mortgage. It makes, or

tends to shew that payment at the stipulated day was of the essence of the contract. And further, on payment of a mortgage before default, a certificate of such payment would, without any further conveyance, revest in the mortgagors the estates and interests mortgaged by them.

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The cases of *Ensworth* v. *Griffith* (*a*), *Alderson* v. *White* already referred to, *Tapply* v. *Sheather* (*b*), and *Gossip* v. *Wright* (*c*), are all in favour of treating this as a case of absolute conveyance with an agreement for repurchase. I may add the case of *Shaw* v. *Jeffry* (*d*), although in that case real estate was not in question; but notwithstanding that difference, the observations on pages 460, 461, appear to me very pertinent to the present discussion.

I think the decree should be reversed, and the plaintiff's bill be dismissed with costs. In my view no question under the Statute of Limitations can arise.

Judgment.

SPRAGGE, C.—I am not satisfied that the original transaction between the parties was not a mortgage. What was about to be sold by the plaintiff was the execution debtor's life estate in one parcel—his wife having the remainder in fee—and the debtor's absolute estate in another parcel. The first parcel is the one with which we have to deal. What *William Kyle* would obtain by his purchase would be the debtor's life-estate only. The defendant's position is that the transaction was a sale by *Kyle*, after his purchase, and the conveyance to him of March, 1838. But a sale of what? he had not purchased the wife's remainder. If the conveyance of that date had been effectual to pass her estate, he would have been a donee of it only, a volunteer, and his selling land so conveyed to him is not in

(*a*) 5 Br. P. C. 184.
(*b*) 8 Jur. N. S. 1163.
(*c*) 9 Jur. N. S. 592.
(*d*) 13 Moo. P. C. C. 432.

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accordance with the nature of such a transaction. Its being pledged to him as a security for advances is quite intelligible.

The fifth and seventh paragraphs of the answer are indeed in favor of the plaintiff's rather than of the defendant's contention. To take the fifth at page 5 of the appeal book, it sets out the agreement that *Kyle* attending the sale and purchasing, the husband and wife should execute a conveyance upon his agreeing to resell on payment of his advances. The word "resell" is an inappropriate word. It was not and would not be a resale. It is obvious that the substance of the agreement was that *Kyle* should re-convey on re-payment of his advances, and the defendants appear indeed to have so understood the transaction. Paragraph 7 of the answer is as follows: "We are advised and verily believe, that, under the circumstances aforesaid, the said *William Kyle* procured no title to the said land under the said sale and sheriff's deed, except as a security for the sum he paid the said sheriff." And they say this after alleging in the sixth paragraph that the conveyance of March, 1838, was executed by the husband and wife "in the manner by law prescribed for the execution of such instruments."

Judgment.

There was this also in the transaction, that there was no treaty for a sale of land; the money advanced by *Kyle* was the amount of two executions in the hands of the sheriff not measured so far as appears by the value of the land.

I have looked at the transaction as it would have appeared upon the first dealing between the parties, and if there had been an effectual conveyance by the wife. I do not think that the aspect of the case is changed by the subsequent dealings between the parties; at least not changed unfavourably to the plaintiff's case. [His Lord-

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ship here stated the facts as above set forth.] There are, however, two circumstances of considerable weight which ought to be noticed. One is, that in the transactions of 1841, when, for the first time, the wife effectually conveyed her estate, *Monk* and his wife became bound for the repayment of the advances made by *Kyle*. This is a circumstance of great weight. It was so considered in *Bullen* v. *Renwick* (*a*), in this Court; and in other cases has been the turning point upon the question, which is the question between these parties upon this branch of the case. There [illegible] or may not have been an obligation to pay in 1838, but there is no reason to doubt that the transaction was of the same character in that year as in 1841, and also in the dealings between the parties in 1842.

In the latter year there was this further circumstance (which is set out in the tenth paragraph of the answer to the original bill), that *Monk* and his wife (it should probably be *Monk* alone) "having become further indebted" to *Kyle*, and mutual bonds being again exchanged, the amount of the further indebtedness was added to the sum expressed in the former bonds. The new bonds are in fact for a further sum; the sum named in former bonds being £341 1*s*. 8*d*.; in the new bonds being £476 7*s*. 6*d*., while the sum originally payable was £354 14*s*. 5*d*., being the amount paid to the sheriff with some expenses. (Appeal Book, page 13).

Judgment.

This transaction of 1842, looks to me much more like a charging with a further sum, lands already held in security, than a contract of sale. Again, these repeated dealings, these agreements to reconvey for varying amounts according to the amount of indebtedness on each occasion from *Monk* to *Kyle*, all agree perfectly

(*a*) 9 Grant, 202.

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well with the real transaction being, that the lands were held in security, but not with its being a purchase with an agreement to resell. If the latter there was a varying amount of purchase money, and varying, not according to the varying value of the lands sold, but according as the amount due varied upon each occasion.

It is true that in the bond of June, 1842, from *Kyle* to *Monk* and wife, it is recited that *Kyle* has bargained and sold to *Monk* and wife certain lots for a certain sum. But that ought not to be conclusive. It is the name by which the parties choose to call the transaction, but equity looks at the substance of the dealings of parties rather than at the form in which they put them. I do not infer that the recital to which I have just adverted was introduced for the first time in the bond of 1842: we have not the bond to convey of 1841. The bonds to pay of both years agree in their recitals: both recite bonds to convey, but not the recitals in the bonds to convey.

Judgment.

I do not think that anything turns upon the terms of *Kyle's* bond to convey upon payment, it is "to assign by relinquishment or quit claim deed" to *Monk* and his wife. It is inartificially expressed, but I take it to be intended that *Kyle* should divest himself of his estate in the premises in order to their revesting in *Monk* and in *Monk's* wife as of their former estate therein.

There is another term in the agreement which I have omitted to notice: it is that in case of default *Kyle* should retain all moneys paid on account as rent for the premises. This is, of course, by way of carrying out the recital as to bargain and sale, and is a circumstance in the same direction; but, I incline to think not sufficient to outweigh the various circumstances to which I have adverted.

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At the risk of repetition I must refer again to the position of the parties in 1838, and it must be borne in mind that according to the defendant's view of the case, not only did *Kyle* agree to resell, as distinguished from being redeemed, but that *Kyle* himself was a purchaser from *Monk* and his wife. In truth, he was not a purchaser at all of Mrs. *Monk's* remainder, and that part of his case therefore, and that an essential part, fails; he must say that he received a conveyance from Mrs. *Monk* of that estate, without any valuable consideration, and that as part of the same transaction he agreed to sell it back to her for a certain sum to be paid. As a purchase and an agreement to resell this is scarcely intelligible; as a security, the wife pledging her estate for her husband's debts, it is intelligible enough.

Judgment.

These transactions are of a very old date; but, to judge of them as they were, that circumstance should be put out of the case. Suppose a bill filed to redeem, soon after 1st August, 1843, the time limited for payment by the bonds of 1842, could redemption have been denied. I incline to think that it could not. I think the conclusion would have been that the transaction was one of advance of money, and security taken for its repayment. One naturally feels almost a prejudice against a stale demand; but it is proper to look at the case as it would have appeared if relief had been sought promptly, and then to consider whether there is any reason for refusing relief now.

The bonds being found in the possession of the defendants, and produced from their custody, is a circumstance referred to as some evidence of abandonment. The circumstance has a double aspect. If there was a purchase and resale, there was no object for *Kyle* to have then delivered up. If the transaction was a mortgage, these bonds being separate defeazances there was an object. Then if a mortgage, and these bonds in the

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hands of the mortgagee, if there were a mortgagor *sui juris*, and a mortgagee, the defeazance being in the hands of the mortgagee, would be some evidence of an agreement to abandon the right to redeem, but is evidence of much less weight where the defeazance would not be in the custody of the person against whom the circumstance of these being given up is sought to be used. In this case at any rate no abandonment is set up but "laches and delay" are, and the plaintiff is not called upon to meet a case of abandonment by her of her claim.

There remains the dry question whether the plaintiff is barred of her right to redeem by the Statute of Limitations. If the disability clauses, by reason of coverture, apply to mortgagors, she is not barred as she filed her bill within ten years of the death of her husband.

Judgment.

Upon this point I have not had time to look at the Statute or to consider it.

Per Curiam.—Appeal allowed; and bill in Court below dismissed with costs.

RYCKMAN v. THE CANADA LIFE ASSURANCE CO.

Trustee—Mortgage—Unauthorized transfer—Notice.

The trustee of a mortgage, who had no authority to transfer it, did nevertheless sell it to a third person.

Held, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust.

A bill having been filed on behalf of *cestuis que* trust impeaching the conduct of a trustee, a demurrer thereto because the *cestuis que* trust were not parties was overruled.

Ward Ryckman made his will on the 28th October, 1854, and thereby, after giving directions as to the payment of his debts, funeral expenses, legacies, and

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the management of his estate by his executors up to the time when his youngest child should arrive at the age of twenty-one years, or, in the event of the death of the youngest child before arriving at maturity, then up to the time his next youngest child should attain twenty-one years, authorized and empowered his executors to convert the said estate into money, and, after paying as directed in the will, to divide the residue of the estate equally among his children. And he appointed *George Marlatt Ryckman*, *Hamilton Ryckman*, and *James Kirkpatrick* his executors.

The testator died on the 7th November, 1854, leaving *Silence Ryckman*, his widow, and *Henrietta Matilda* (now the wife of *Samuel Augustus Hogeboom*), *Samuel Ward*, and *Maria*, his children.

George Marlatt Ryckman and *Hamilton Ryckman* obtained probate of the will, *James Kirkpatrick* having renounced.

Statement.

The executors having mismanaged and dealt improperly with the estate, a suit was instituted by the daughters against them, which resulted in the imprisonment of *George M. Ryckman;* and in order to obtain his release he gave in lands, mortgages, road stock, and notes,—what were considered to be of the value of $10,000,—to the son *Samuel Ward*, who executed a declaration of trust of that property, by an instrument made between himself, of the first part, *Silence Ryckman*, of the second part, *Henrietta Matilda*, and *Maria*, of the third part, and *J. H. Spohn*, of the fourth part, and declaring the trust to be, first, to pay to the party of the fourth part all claim he had or might have against the parties of the first, second, and third parts; second, to pay and indemnify the party of the first part for all costs and expenses he might be put to in connection with the trust; third, to hold the lands and property

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for the estate of the testator in accordance with the power and directions of his will.

Part of the property, thus vested in *Samuel Ward*, consisted of the west-half of lot number seven, in the first concession of Glanford.

Shortly after the execution of this declaration of trust *Samuel Ward* misapplied the money and securities, and sold the land in Glanford to *Diana* the wife of *William White* for $5000, receiving in money $3000 and taking a mortgage dated 11th April, 1867, to secure the remaining $2000.

A bill was then filed on the 26th April by *Maria*, one of the children, an infant, against *Samuel Ward*, praying that he might be ordered to account for all the money received by him as trustee; that he might be restrained from parting with the mortgage, and ordered to deliver it up for the benefit of those interested; and that he might be declared a trustee for the plaintiff of her share of the $10,000.

Statement.

On the same day a *lis pendens* was registered.

This bill was then filed against *The Canada Life Assurance Company*, *Samuel W. Ryckman*, *William White*, *Diana White*, and *Hamilton Ryckman*, as defendants, and stating what is above set forth, and that after the registration of the *lis pendens* a transfer of the mortgage to the Assurance Company was registered; and charging that under the circumstances and by virtue of the filing of the *lis pendens*, the Assurance Company had notice that *Samuel Ward* held the mortgage as a trustee for the plaintiff and others; that *Samuel Ward* had absconded from the country and resided in Chicago, and was wholly without means; that *George W. Ryckman* was dead, and *Hamilton*

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Ryckman was the sole executor of the estate; that the *Whites* were made parties to prevent their paying the mortgage money to the Assurance Company; and praying that the Assurance Company might be declared to hold the mortgage as trustee for the parties entitled to the mortgage and its proceeds, and might be ordered to give up the mortgage to the executor of the estate or to deposit it in Court for the benefit of the parties entitled; and that the defendants the *Whites* might be restrained from paying the mortgage except as directed by the Court.

The Assurance Company demurred because *J. V. Spohn*, *Silence Ryckman*, and *Henrietta Matilda Hogeboom* being *cestuis que trustent*, as well as the plaintiff under the declaration of trust, that they and *Samuel A. Hogeboom* were necessary parties to the bill.

Mr. *Blake*, Q. C., and Mr. *A. Bruce*, for the demurrer.

Argument.

As to the demurrer on record. The bill is not filed for the execution of a trust; and the Assurance Company is not a trustee within the meaning of the General Order, so as to dispense with the *cestuis que trustent* as parties: *Munro* v. *Munro* (*a*), *Lenaghan* v. *Smith* (*b*).

They also demurred *ore tenus* because notice was not sufficiently charged in the bill. The bill says that a former bill had been filed containing certain allegations, but does not say that these allegations are true. The *lis pendens* is not notice any further than the statements of the bill go; and no notice is charged except that arising from the *lis pendens*. The plaintiff is in this dilemma, either the former suit is terminated or it is not—if terminated, there is no *lis pendens*; if not, then that suit should be amended.

(*a*) 17 Grant 205. (*b*) 2 Ph. 301.

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They also argued that it appears on the face of the bill that another suit is pending seeking the same relief as sought in this.

Mr. *Proudfoot*, for the bill, cited *Osborne* v. *Foreman* (*a*), *Eades* v. *Harris* (*b*), Bishop of *Winchester* v. *Paine* (*c*), *Story* Eq. Pl. sec. 156, *Story* Eq. Jur. sec. 908.

Judgment.

STRONG, V.C.—I have come to the conclusion that the demurrer on the record must be overruled. The general order No. 61 in terms applies to such a bill as this, and that although the conduct of the trustee *Samuel Ward Ryckman* is impeached. This order is taken verbatim from the English Act 15 & 16 Vic. cap. 86, sec. 42, rule 9, and it contains a provision that "the Court may upon consideration of the matter *on the hearing* if it shall so think fit order such persons (the beneficiaries) to be made parties." Long previously to the Act it had been provided by the English order No. 30 of 26th August, 1841, that trustees who had power to sell and give receipts for purchase money should sufficiently represent their *cestuis qui* trust, and that order in the same words gave the Court power to exercise a discretion as to the addition of parties at the hearing. Under this last order in the case of *Osborne* v. *Foreman* (*d*) Sir *J. Wigram* held on the case being set down on an objection for want of parties—a mode of proceeding then in use which for all present purposes may be likened to a demurrer—that the order applied and the *cestuis qui* trust were not necessary parties, even although the bill impeached the conduct of the trustee as having amounted to a breach of duty. It was also decided in the same case that the direction to add further parties must be given at the hearing, and not on the argument of the objection. This applies still more strongly in

(*a*) 2 Hare 656.
(*b*) 1 Y. & C. C. C. 230.
(*c*) 11 Ves. at 199.
(*d*) 2 Hare 656.

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the present case of a demurrer which less resembles the hearing than the argument of the objection as to parties, which was a kind of preliminary hearing. On the whole I am clear that on the authority of *Osborne* v. *Foreman* I must overrule this demurrer for want of parties, a result which accords much more with the spirit of the present rules of pleading as to parties than an allowance of the demurrer would have done.

In addition, however, to the demurrer on the record, the defendants the *Canada Life Assurance Company* demurred *ore tenus* for want of equity upon two grounds: first; because as was contended the bill does not contain any sufficient allegation of notice: secondly; and as an alternative cause of demurrer, because it appears on the face of the bill that there is now another suit pending seeking the same relief as is sought in the present cause. I will consider these two causes of demurrer in the order in which I have mentioned them.

Judgment

In the first place I would observe that it appears as the proper legal conclusion from the allegations of fact contained in the bill that upon the land in question being conveyed by *George Marlatt Ryckman* to the defendant *Samuel Ward Ryckman* it became bound by the original trusts contained in the testator's will, and was thenceforth to be considered as forming part of the original trust estate. This would clearly be the legal consequence of the conveyance and declaration of trust stated in the bill, even if it were not as I think it was, however, the proper construction to be placed on the language of the declaration of trust, which was, that *Samuel Ward Ryckman* should "hold the said lands and property for the estate of the said testator in accordance with the power and direction of the said last will and testament of the said testator." Under this trust it is clear that *Samuel Ward Ryckman* could not exercise the powers of sale conferred by the

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testator on the trustees named in the will; he became a mere passive trustee for the beneficiaries under the will, having no right to exercise any power of disposition of the trust property. It follows that *Samuel Ward Ryckman* committed a breach of trust in selling the land, and a further breach of trust in dealing with the mortgage by assigning it to the *Canada Life Assurance Company*. The case is therefore entirely different from that which would have been presented if the sale, instead of having been by *Samuel Ward Ryckman*, had been made by the original trustees. The latter would have had by the terms of the will power to sell the lands and to transfer a security taken for the purchase money and it would have lain on a *cestui que* trust impeaching such a transfer, to shew that the transferees had notice of the fraud of the trustee in selling. But in the case before me *Samuel Ward Ryckman* had in the first place no authority to sell lands, and having sold them and taken the mortgage in question for the purchase money he had no power to assign it. In other words, if the demurring defendants claimed under an assignment from the original trustees, *mala fides* on the part of the trustees and notice to the *Canada Life Assurance Company* of that *mala fides* would have been essential in order to displace the *primâ facie* presumption which would have arisen, that the sale was in the due exercise of the power which the trustees undoubtedly possessed. But the case which appears on the record is that of a trustee who has not in any case authority to deal with the subject of the trust, selling in violation of his duty. The primary question for decision, therefore, is whether, on such a state of facts, the plaintiff (a *cestui que* trust) seeking to redeem the trust property is bound to allege notice to the purchaser. And for two reasons I am of opinion that she is not. Founding myself on the decision of Sir *J. L. Knight Bruce* in the case of *Moore* v. *Jervis* (*a*)

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(*a*) 2 Coll. 60.

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I determine in the first place that the assignee of a chose in action (as I hold the transferree of a mortgage to be) who acquires title by purchase from a trustee, takes subject to all the equities existing between the trustee and those for whom he holds beneficially, and the assignee is not entitled to shelter himself under a defence of purchase for value without notice. In the case I refer to the point was expressly raised and adjudged. The subject of the trust there being a promissory note not negotiable. In Mr. *Lewin's* book on Trusts, (3rd ed. p. 229), the law is also laid down in accordance with this view as follows: "And as to choses in action of which the legal interest is not transferable at law a purchaser whatever amount may have been paid by him cannot stand on a better footing than the trustee of whom he purchased, but must (in conformity with the established rule governing assignments of choses in action) hold it subject to precisely the same equities as the trustee;" and many authorities are referred to as supporting the doctrine thus enunciated. That a mortgage is to be considered on the application of this rule as a chose in action seems to be conclusively settled by authority: *Cockell* v. *Taylor* (*a*), *Fisher* on Mortgages (ed. 2) p. 696. For these reasons I think it was not incumbent on the plaintiff to allege notice in her bill and that the first ground urged in support of the demurrer *ore tenus*, therefore fails. But even if the subject of the impeached sale had been one to which the defence of purchase for value without notice was applicable, the bill would not in my judgment have been demurrable on the ground of an omission to allege notice. A plaintiff is only bound to state in his bill that which he is required to prove, and *primâ facie* he is in no case held to prove notice; he is only called upon to do so when the defendant sets up the equitable defence of purchase for value, and then as the plaintiff cannot give evidence

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(*a*) 15 Beav. 103.

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of notice without having put it in issue he must if he has not originally alleged notice in his bill, amend for the purpose of introducing a charge of notice by way of replication in avoidance of the defence.

For this last reason as well as for that first given I determine that it was not essential to the plaintiff's case that notice should have been alleged in the bill, and that the statements in respect of it may be disregarded as surplusage. It is not, therefore, material that I should express any opinion as to the sufficiency of the *lis pendens* as constituting notice.

It is clear that the statement of the former suit does not render the bill demurrable by the *Canada Life Assurance Company*, inasmuch as the relief sought by this bill is, as regards the last named defendants, relief which could not have been had in the former suit. I therefore overrule both the demurrer on the record and that *ore tenus* with costs.

Judgment.

HERVEY v. BOOMER.

Trust—Parol evidence.

A man conveyed land absolutely on a parol trust, and the trustee made large advances on account of the grantor and his family; they afterwards settled accounts, and it was agreed between the two that the grantee should retain a portion of the land conveyed at a specified price in satisfaction of the balance due to him; mutual releases were executed, and the relation of the parties terminated. After the death of the grantee the grantor's wife and children filed a bill alleging that the land so retained was held in trust for them; but the Court being satisfied from the whole evidence that this was not so, dismissed the bill.

The cause was brought on for the examination of witnesses at the sittings of the Court at Guelph, in the

Autumn of 1868, and heard at Toronto in the Spring of 1869. 1870.

Hervey v. Boomer.

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

Mr. *S. Blake*, for defendants *Boomer*.

Mr. *Cattanach* and Mr. *Moss*, for defendant *Davidson*.

SPRAGGE, C.—I have read carefully the very voluminous correspondence and the other documentary evidence put in, as well as the oral testimony given in this cause, and in my judgment they fail to establish a trust on the part of the late *Absalom Shade* in favor of the plaintiffs, or any of them.

The most that can be said is that the letters of Mr. *Shade* contain here and there a passage, which, taken by itself, might indicate the existence of a trust in favor of the plaintiffs, but looking at the whole of the correspondence—and it is all in *pari materia*—and at the position of all the parties, including Mr. *Hervey* himself, there is not sufficient to establish a trust in the plaintiffs' favor. September 1. Judgment.

Mrs. *Hervey*, a neice of Mr. *Shade's*, and in whom he took a great interest, was married to a thriftless and intemperate husband. Mr. *Shade* was a man of wealth and of careful and exact business habits. Mr. *Hervey* placed the arrangement of his affairs in his hands at the close of the year 1853. A general power of attorney for their management is put in, dated 17th December, 1853, and a second is put in, dated 21st November, 1857. They authorize Mr. *Shade* to enter upon the lands of *Hervey*, to make sale of, and to convey them; to bring actions, and the like. They contain no trust in favor of third persons. Under these powers *Shade* would be accountable to *Hervey*, and to him alone.

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Some mortgages and other securities were also placed in the hands of *Shade*. *Shade* from time to time made advances to both Mr. and Mrs. *Hervey*, and paid debts, and accounted for rents and for interest received by him. It is evident from the letters of all the parties that *Shade* took the management of *Hervey's* estate for the sake of Mrs. *Hervey*, and it is also evident that he devoted as much of it as he could for the benefit of Mrs. *Hervey* and her family—and indeed that it was principally with that object that the management of the estate was conferred upon him and undertaken by him. *Hervey* was himself an assenting party to all this.

Occupying such a position, it was perfectly natural that frequent communications should pass between *Shade* and Mrs. *Hervey* in reference to the estate and its management. She was in the habit of asking his advice also on personal and family matters. In some instances he gave his advice; in others he declined to interfere. During a considerable portion of the period of *Shade's* management of the estate *Hervey* was away, and *Shade's* communications in regard to the estate and its proceeds would, as a matter of course be, as they were, principally with Mrs. *Hervey*. But the communications on the subject of the estate and its management were by no means with Mrs. *Hervey* alone. I find in the correspondence put in, several letters between *Shade* and *Hervey*. From these letters, and from *Shade's* letters to Mrs. *Hervey*, and still more from his letters to Miss *Caroline Shade*, an elder sister of Mrs. *Hervey*, it is quite evident that while he took a warm interest in Mrs. *Hervey* and her family, his dislike to Mr. *Hervey* was very great; yet he never repudiated his accountability to him, or resented his interference in the management of the estate. In his letter to him of 18th June, 1858, he explains to him at some length the condition of its affairs.

Judgment.

At intervals during *Shade's* management he and

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Hervey came to an account in regard to it. These accounts, some, if not all of them, are put in. They are simply between *Shade* and *Hervey*, and four general releases, from time to time given by *Hervey* to *Shade*, are also put in. These dealings evidence that by both these parties the relation of principal and agent was regarded as existing between them—a relation that *Shade* would certainly not have recognized if he could have properly helped it, *i. e.*, if he had been trustee for Mrs. *Hervey* and her family, instead of agent for *Hervey*.

Some parol evidence to show a trust has also been given. The chief property in question is the *Kinnettles* farm. That became real estate during *Shade's* management, but it was a mortgage for purchase-money when he took charge of the estate. Putting the Statute of Frauds out of the case, and assuming parol evidence to be admissible, there is not sufficient to establish a trust. The parol evidence is that of Miss *Caroline Shade*, and her evidence is of conversations with her uncle, Mr. *Shade*, which she says took place in July and August, 1861, more than seven years before her evidence was given. She says that he told her that he had in his hands the *Kinnettles* farm, the *Kerr* mortgage, the property Mrs. *Hervey* lived on, scattering lots in *Kinnettles*, and a lot in Guelph; that he showed her a package which he said contained a deed of the farm, a deed of the property she lived on, a lot in Guelph, *Kerr's* mortgage, and a deed of gift in his own handwriting. She says: "I did not open and look at the papers. Written on the back of the deed of gift, in his handwriting, was '*Absalom Shade*, deed of gift to *Matilda Hervey*.' He told me he had obtained all these properties from *Hervey* by strategem for the benefit of *Hervey's* wife and family. He said he held it in trust for my sister. He said he had taken the property from *Hervey*, and had got a release from him, and that it would give her an income of $600 or $700 a-year." The evidence so

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given, and standing by itself, imports that *Shade*, in August, 1861, had in his hands the properties enumerated, holding them for the benefit of Mrs. *Shade* and her family, and in trust for them. I have no doubt that Miss *Shade* intended to speak truthfully, but what her evidence imports is so much at variance with the proved facts as they existed at the time, that the necessary inference is, either that she altogether misunderstood Mr. *Shade*, or that her memory was at fault. At the date at which she places this coversation *Shade's* management of the property had ceased. He held none of it at that time for the benefit of Mrs. *Hervey*. He and *Hervey* had come to a settlement in the December previous. *Shade* then retained the *Kinnettles* farm *as his own*, in satisfaction of his advances to *Hervey*, and the rest of the property enumerated he had conveyed to Mrs. *Hervey*. Yet he is represented as stating that all these properties were still in his hands for the benefit of Mrs. *Hervey*, and so placing them all—the *Kinnettles* property among the rest—upon the same footing; and this, too, after he had in a letter written by him to Mrs. *Hervey*, on the 7th of the previous February, informed her of his settlement with her husband, calling it "the final adjustment of all our matters," and explaining to her its terms. Another matter is, that neither the "deed of gift" nor its indorsement (the latter, too, not stated quite correctly by Miss *Shade*) is in the handwriting of *Shade*. The statement of income—$600 or $700—she probably confounded with an estimate made in a letter to her from *Shade* some years previously. It is impossible to say that Miss *Shade* was accurate, in apprehension and memory, when she represents *Shade* as stating that he held the property "in trust" for Mrs. *Hervey*. Nothing could be more unsafe than to fix a party with a trust upon such evidence.

Judgment.

The true relation of the parties I have no doubt was this: *Shade* was *Hervey's* agent to manage his property,

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Hervey assenting that the greater part of the proceeds should go for the benefit of his wife and children, for whom he had proved himself a very inefficient provider. *Shade* all the while acted under power of attorney from *Hervey*, until, in June, 1860, *Hervey*, by a formal instrument, revoked his authority, and the parties accounted together and came to a settlement in the December following. *Shade's* acting under a power of attorney—renewed, too, as it was in 1857—is a strong circumstance against his being trustee for Mrs. *Hervey*. He could not be at once the agent of *Hervey* and trustee for *Hervey's* wife in relation to the same property. The whole of the correspondence and the whole of the dealings of the parties is consistent with their relations to each other, being what I have taken them to be, and is consistent with no other hypothesis, and Mrs. *Hervey* herself seems to have regarded their relations in the same light; for when informed by *Shade*, in February, 1861, of his settlement with her husband, she made no remonstrance, though that settlement involved the alienation of a portion of what, according to the present contention, was a trust estate, and was in fact the most valuable part of that estate. Mr. *Shade* lived more than a year after this, and Mrs. *Hervey* made no complaint, and after his death she accepted a lease from his estate of this same *Kinnettles* farm. Her doing this without claim of right in herself is evidence that she did not consider that she had a right. I think this idea of a trust was an after thought.

Judgment.

Further, it is to be borne in mind that the creation of a trust for others involves, not merely the taking upon himself of a duty by the trustee, but the parting with dominion over the estate by the owner. Now all that is attempted to be shewn here is that *Shade* acted as a trustee, and spoke of himself as a trustee. It is not attempted to be shewn that *Hervey* parted with his dominion over his property. His empowering another to

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manage it, and his assenting to the application of its proceeds, prospectively or otherwise, in a particular way, is not a divesting himself of his property or of his dominion over it; and especially is this negatived when the manager accounts from time to time to the owner for his management.

In the reply in this case, not at an earlier stage of the argument, allusion was made to a mortgage made by *Hervey* to one *William Reynolds*, in December, 1854, to secure an annuity to Mrs. *Hervey* for the benefit of herself and her children. This mortgage was, as I understood, upon the *Kinnettles* farm, which farm was afterwards sold by *Hervey* to *Cannon*, *Cannon* giving back a mortgage for the purchase money, and this mortgage was, among other securities, placed by *Hervey* in the hands of *Shade* for the purposes that I have indicated. *Cannon* failed to pay his purchase money, and

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conveyed the land to *Shade*, who thereupon released *Cannon* from his mortgage. The land thereupon became revested, with this difference, that the legal estate was in *Shade*, who was *quoad hoc* trustee for *Hervey*. Upon this some nice questions might arise, but which, the question being raised in the manner I have stated, were not discussed at the bar. It was merely argued for the plaintiffs that the mortgage to *Reynolds* was not a voluntary settlement, because *Reynolds* had covenanted to execute the trusts; and on the other hand it was contended that after the sale to *Cannon* the previous settlement was void under the Statute of Elizabeth. So far I see no difficulty. I think the mortgage to *Reynolds* was a voluntary settlement, and so void as against a subsequent purchaser for value. But these questions were not discussed; whether the trusts of the settlement attached upon the purchase money and upon the mortgage given to secure it; and next whether upon the conveyance by *Cannon* to *Shade*, and the settlor becoming thereby equitable owner of the estate, the trusts attached

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again upon the land itself. Upon the first point there is the decree made in the old case of *Leach* v. *Dene*, in favor of the trust attaching upon unpaid purchase money, and the recent case of *Townsend* v. *Toker* (*a*), where the point was referred to without being decided, and in which it was said by Lord Justice *Turner*, referring to *Leach* v. *Dene*, that the later cases are so much the other way, both in point of decision and of *dicta*, that the Court would not, in his opinion, be justified in acting in opposition to them. Upon the other point, whether the trusts would reattach upon the land itself, my impression is that it would be drawing a thin distinction to hold that the trust would reattach upon the land if it did not attach upon the purchase money—the land being in fact repurchased from *Cannon*, the consideration being the unpaid purchase money.

Judgment.

Strictly, none of these questions arise upon the record, but I am asked to allow an amendment of the bill in order to make a case upon the points thus raised. There are one or two facts bearing upon this. *Shade*, in a letter to his niece, *Caroline Shade*, dated 20th December, 1855, refers to this *Reynolds* mortgage as in trust for the support of Mrs. *Hervey* and her children, and for their education, and speaks of it as "perfectly legal and secure, both in law and equity." I am not informed whether at that date *Cannon* was purchaser or had ceased to be purchaser. No question in relation to this settlement being raised by the bill their dates were not supposed to be material. Another point is that a certificate of the discharge of the *Reynolds* mortgage is indorsed upon it as of the 19th of March, 1856. By whom this discharge was given does not appear. It may be assumed, at any rate, that the trust, if it existed at the time, could not be destroyed in that way.

I have hesitated as to whether I ought to allow

(*a*) L. R. 1 Ch. App. 446.

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an amendment in order to the introduction of these facts upon the record. In the first place I incline to think that they are immaterial in point of law, though upon that point I desire to express no decided opinion. But assuming that a trust can now be fastened upon them in law, is it in furtherance of justice that this should be done? If this land is affected with the trust contended for, *Shade's* estate will lose that for which *Shade* paid, and the purchase money of which Mrs. *Hervey* and her family have had the benefit of. In the final settlement between *Shade* and *Hervey*, made on the 31st of December, 1860, the balance in favor of *Shade* was £1807 7*s*. 2*d*. One item in this account, just over £1000, was for a dwelling-house built by him for Mrs. *Hervey* and her family, and the other items were for expenditures almost entirely for their benefit, the exceptions being for the personal benefit of *Hervey*. This sum was paid by his retention, with the consent of *Hervey*, of the *Kinnettles* farm, and the payment to *Hervey* of a small sum of £9 2*s*. 10*d*.; and upon this settlement *Shade* conveyed to Mrs. *Hervey* the house and garden, the household furniture purchased by him at sheriff's sale, village lots on the plan of the village of *Kinnettles*, a lot in Guelph, and the *Kerr* mortgage for £750.

Judgment.

The amount allowed by *Shade* for the *Kennettles* farm was £1516 10*s*. It is not suggested that this was not the full value, and I have no reason to doubt that in all his dealings with the *Hervey* family he acted in perfect good faith. I do not know the terms of the conveyance to Mrs. *Hervey*. The bill does not complain that what was conveyed was not rightly conveyed. The effect of fastening a trust upon the *Kennettles* farm would be to give to Mrs. *Hervey* and her family about £1800 twice over, and I do not think it would be in furtherance of justice to aid in such a result.

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The settlement of December, 1861, has not been impeached, and of course cannot be impeached at the suit of these plaintiffs. The only question properly before me in this suit is, whether it is established that *Shade* was a trustee for the plaintiffs. In my judgment the plaintiffs have failed to establish this, and their bill must therefore be dismissed and with costs.

McLaren v. Fraser.

Setting aside sale—Improvements.

The holder of a mortgage having become himself the purchaser of the mortgaged property under a power of sale contained in the mortgage, and afterwards, under a sheriff's sale; sold and conveyed to a purchaser who went into possession and made permanent improvements. On his purchase being set aside, it was *held*, that his vendee was entitled to be allowed for his improvements.

Semble, the same rule would apply if the mortgagee himself had made the improvements.

After the dismissal of the appeal from the finding of the Master, as reported *ante* page 533, the cause came on for further directions.

Mr. *McLennan*, for the plaintiff.

Mr. *S. Blake*, for *Fraser*.

Mr. *Rae*, for the infant defendants.

Mr. *Moss*, for defendant *Mansell*.

Mr. *J. A. Boyd*, for defendants *Chamberlain* and *Price*.

October 3.

Judgment.

Strong, V.C.—I disposed of this case at the hearing for further directions with the exception of the claim to an allowance for improvements by the defendants

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Chamberlain and *Price*, and the further question of how such a charge if allowed was to be borne. For the present purpose the case may be thus stated: the defendant *Fraser* is the assignee of a mortgage in which the lands purchased by *Chamberlain* and *Price* are comprised, and which, admittedly, forms the first charge on the lands in question. This mortgage contained a power of sale. The plaintiff is also the holder of a mortgage on the same lands, and is placed by the Master's report second in order of priority. The defendant *Fraser* exercised the power of sale contained in his mortgage by improperly selling to his own clerk, who bought as agent for *Fraser* himself, to whom the purchaser subsequently conveyed. *Fraser* also under a judgment recovered in the names of the original mortgagees, caused the lands to be sold by the sheriff under a writ of *fi. fa.*, and became himself the purchaser. He then sold certain portions of these lands to *Chamberlain* and *Price*, who appear to have purchased *bonâ fide*, although they are not able to comply with the requirements of the defence of purchase for value without notice, established by the well known rule of the Court. The Master finds expressly that these defendants have made valuable and lasting improvements for which no allowance has been made them. The purchases made by *Fraser* have been set aside as against him by the decree, and of course those of *Chamberlain* and *Price* must meet with the same fate. At the argument I stated my opinion to be, that *Chamberlain* and *Price* were clearly entitled to be paid the value of their improvements, and this was but faintly objected to by the learned counsel for the plaintiff; but it was strongly insisted that if the allowance was made to *Chamberlain* and *Price*, *Fraser* ought to be decreed to make good the amount, inasmuch as his acts have led to the estate being burthened with the charge. The fair way to consider the question is to suppose the case of *Fraser* himself setting up a claim for the expenditure as having been made by him since his improper pur-

Judgment.

chase and before it was avoided. In such a case I think it clear on the authorities that he would be entitled to receive the allowance. The purchase made by *Fraser* under the power of sale was set aside upon the application of that politic rule of equity which forbids the purchase by a trustee for sale; and I apprehend that the sheriff's sale was set aside on similar grounds. In such cases it appears clear on the authorities that it is the rule to allow the offending purchaser for his improvements, and that the terms of the decree are such as to reinstate the parties in their original positions as nearly as possible. In the notes in *Tudor's* Leading Cases to the leading case on this head of equity, *Fox* v. *Mackreth* (*a*), it is so laid down in express terms, and a number of cases are cited in support of the proposition; and the case of *Bevis* v. *Boulton* (*b*), is to the same effect. Mr. *McLennan* contended that *Fraser* should be ordered to make good this charge, as having been guilty of fraud. But in the first place, it does not appear that *Fraser's* conduct has been fraudulent in any other sense than that term may be applied to any mortgagee who purchases under a power of sale in his own mortgage and so offends against the rule referred to. But even in cases of fraud properly so called it appears that the Court in setting aside a purchase make this allowance for improvements to the purchaser: *Donovan* v. *Fricker* (*c*), *Seton* on Decrees, page 646. Moreover if considered as a question of damages against *Fraser*, the rule at law in analogous cases would seem to shew that the liability for these improvements is too remote a consequence of *Fraser's* acts to fix him with the amount. The decree must declare that *Price* and *Chamberlain* have a first charge in respect of the value of their improvements, and they must be redeemed in respect of it as such first chargees: the amount paid to them being added by subsequent incumbrancers who may redeem in the usual way.

1870.

McLaren v. Fraser.

Judgment.

(*a*) Vol. p. 139, 2nd ed. (*b*) 7 Grant 39. (*c*) Jacob 165.

1870.

ALLAN v. CLARKSON.

Insolvent Act—Mortgages—Pressure.

In 1869 *C.* lent money to *N.* on an express agreement that it was to be secured by mortgage on certain property; and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent.

Held, that the mortgage was valid.

Appeal from the report of Mr. *Turner*, the accountant.

Mr. *Fenton*, for the appeal.

Mr. *Mulock*, contra.

October 3. Judgment.

STRONG, V.C.—I am of opinion that the report ought not to be disturbed. There is no doubt if the witnesses *Timothy Botsford*, *Bogert* and *Nelson Botsford* are to be believed—and I must accept the finding of the accountant as to their credibility as conclusive—that the money which the impeached mortgage was given to secure was actually lent and advanced in April, 1869, by *Charles Botsford* to the insolvent upon the express agreement that it was to be secured by this mortgage, which was subsequently given on the 3rd of July following. Further, this loan was made under such circumstances that it constituted a valid and subsisting legal debt due from *Nelson* to *Charles Botsford* at the date of the mortgage, and a legal debt unimpeachable upon any ground of equity, for whatever may have been the ultimate disposition of the money by *Nelson Botsford*, it was advanced upon a contract for the loan of money on the credit of *Nelson Botsford*, and in reliance upon obtaining the security of the mortgage.

I could come to no other conclusion upon the facts without contravening the judgment of the accountant as to the veracity of witnesses whom he saw examined.

1870.

Allan v. Clarkson.

Then there being this debt for money lent, contracted in April, on the 3rd of July the mortgage was given at the request of *Timothy Botsford* acting as agent for his brother *Charles*, and in fulfilment of the promise made at the time of the loan; and on the 2nd August, 1869, the insolvency followed. Upon this state of facts it is contended that this mortgage is void or to be avoided under some of the provisions contained in the subdivisions of section 8 of the Insolvency Act of 1864. I am clear that none of these enactments invalidate this mortgage. Under sub-section 4 of section 8 such a transaction as this taking place within 30 days next before the attachment, is to be presumed to be made in contemplation of insolvency; but this presumption is one which may be rebutted, and the cases of *The Royal Canadian Bank* v. *Kerr* (*a*) decided in this Court, and *Newton* v. *The Ontario Bank* (*b*) in the Court of Appeal, and *Bills* v. *Smith* (*c*) shew that an act which is the result of pressure on the part of a creditor is not to be considered as having been done in contemplation of insolvency. The evidence here shews clearly that there was sufficient pressure to take this case out of the 1st, 3rd, and 4th sub-sections of the statute. Further, if the law is correctly laid down in *Griffith & Holmes* on Bankruptcy, at page 1097, it would appear that the agreement to give this security upon the faith of which the money was lent relieves it from any taint of illegality, for it is there said: "If there is any contract to give security to a given creditor, or anything in the nature of a duty pre-existing, then the mere fact of impending bankruptcy will not render it fraudulent;" and the law is also so stated at page 431 of the same treatise. I have no hesitation, therefore, in determining that the giving of this mortgage was not with intent to defraud creditors, or in contemplation of insolvency within the meaning of the Act of Parliament.

Judgment.

(*a*) *Ante* p. 47. (*b*) 15 Gr. 283. (*c*) 11 Jur. N. S. 157.

1870.
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As to sub-section 2 of section 8, I am of opinion that it does not apply to such a case as the present, inasmuch as it cannot be said that this mortgage injures or obstructs creditors; but even if the clause were applicable, the Court in applying the very stringent provisions it contains would be at liberty to impose such terms as might seem just; and these, I think, would be simply that *Charles Botsford* ought to be redeemed.

I think the appeal must be dismissed with costs.

DEWHURST v. MCCOPPIN.

Injunction—Specific chattels.

Several persons united in purchasing a printing press and material for the establishment of a newspaper to advocate certain views, and agreed with a printer that he should establish the newspaper, and should have a legal transfer of the property purchased on paying to the several parties the sums they had respectively contributed. This agreement was acted on, and the printer paid some of the contributors accordingly. One of the parties, who claimed that he had not been paid, took possession of the press and material by means of a writ of replevin.

Held, that the printer was entitled to relief in equity, and an injunction was granted to stay proceedings in the replevin suit on security being given.

Mr. *Fitzgerald*, for plaintiff, moved on notice for an injunction to restrain the removal or sale of the printing press, type, and other material under the circumstances stated in the head-note and judgment.

Mr. *McLennan*, contra.

Nov. 23.

STRONG, V.C.—I am of opinion that the peculiar nature of the chattel which is the subject of this suit, and the dealings between the parties, attract the jurisdiction of the Court.

1870.

Dewhurst v. McCoppin.

It is well established that a Court of Equity will interfere to protect the property in, and enjoyment of, chattels by decreeing specific delivery and restraining undue interference when the chattel is one of a peculiar kind to which no market price can be attached, or when it is by reason of the use which the party seeking the relief makes of it, of peculiar value to him. The case of the *Duke of Somerset* v. *Cookson* (*a*) affords an instance of the first class of cases; *North* v. *The Great Northern R. Co.* (*b*) one of the second class. In respect of similar chattels the Court will decree specific performance. And whatever may be the character of the property in respect of which relief is sought, if any fiduciary obligation can be discovered on the part of the defendant, the case is held to be a proper one for equitable interposition. I think in this case that by the proper construction of the agreement or memorandum of the 15th December, 1863, the printing press and materials were vested in *McCoppin* upon trust to permit the plaintiff to use and hold possession until he purchased, and then upon payment to transfer the property to the plaintiff. Further, a contract of sale has been entered into, but that no legal property has passed to the plaintiff, nor will any pass until he has paid all the purchase money, which he has not yet done. Now applying the principles before stated as governing the Court in the exercise of its jurisdiction in cases like the present, to what I find to be the effect of the contract entered into by the parties, I have no difficulty in holding that the jurisdiction attaches here on more than one ground. In the first place as in *North* v. *The Great Northern R. Co.* the plaintiff is entitled to have the possession, which is assured to him by the agreement of December, 1863, protected by injunction: as the removal of the press would be destructive of the business in which he uses it. Then there is also, as regards the protection of the possession the distinct

Judgment.

(*a*) 3 P. W. 390.

(*b*) 2 Giff. 64.

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ground of fiduciary relationship which I must determine to exist between the parties. And lastly, the plaintiff is entitled to specific performance of the contract of purchase. Being in default, however, upon this last contract I ought not to protect the possession without affording some security to the defendant. I therefore only grant the injunction on the terms of the plaintiff giving a bond with two sufficient sureties that the press shall not be removed or injured pending the suit, and that the purchase money which may be due to defendant shall be paid to him, the plaintiff to have a fortnight to perfect this security. The writ of replevin to remain in force, but the possession not to be changed during this period.

Judgment.

The cause was subsequently heard before *Strong*, V.C., at St. Catharines, and a decree pronounced in favor of the plaintiff; referring it to the Master there to ascertain the amount due the defendant, which plaintiff was to pay.

CONANT v. MIALL.

Principal and agent—Vendor's lien—Purchase without authority—Adoption of contract.

A company was formed in England with limited liability for the purpose of carrying on business at Oshawa in this province; the majority of the directors were persons resident in England; the managing director at Oshawa, without authority, contracted for the purchase of some real estate for the use of the company at Oshawa, and signed the contract as "Managing Director;" for convenience the conveyance was made to the director personally, and he executed a mortgage for the unpaid purchase money, and went into possession and used the property for the purposes of the company. The purchase was immediately communicated by him to the English directors, and they disapproved thereof, but did no act repudiating the purchase; on the contrary, they directed the buildings to be insured:

Held, that this conduct was an adoption of the contract by the directors; that they had power to adopt it and had the power of binding the company, and that the company were liable to the vendor for the purchase money.

1870.

Conant v. Miall.

This cause was brought on for the examination of witnesses at Whitby at the Spring Sittings, 1869, and afterwards heard in the Autumn of 1870 in Toronto.

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

Mr. *Crooks* Q.C., for the defendants *Miall & Co.*

Mr. *Lyman English*, for the assignee of *Edward Miall*, jr.

Nov. 9.

Judgment.

SPRAGGE, C.—There are three questions raised in this case—one, whether on the contract of sale entered into between the plaintiff and *Edward Miall*, junior, the plaintiff agreed to sell and *Miall* agreed to purchase on his own behalf, or on behalf of the company, "*Edward Miall & Company, Limited;*" the second is, if the purchase was on behalf of the company, whether *Edward Miall* had authority to make the purchase; and the third, whether the purchase was ratified by the company or there was part performance of the contract. If the first and third of these questions are answered in the affirmative, it becomes unnecessary to decide the second.

The first of these questions must, in my opinion, be answered by holding that the purchase was on behalf of the company. The building to be put up on the same land was clearly for the use of the company, and the lease, which was to be made on the completion of the building, was to be to the company. This appears by the agreement of 1st April, 1867, the parties to which were the plaintiff and "the firm of *Edward Miall & Co.*, limited, *E. Miall*, junr., Managing Director, of Oshawa;" and the contents shew that the building was to be erected for the company, and expresses that the company agreed to rent the premises. The agreement to purchase was in substitution for this, and the convey-

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ance being made to *Miall*, and a mortgage taken from *Miall*, was to meet a conveyancing difficulty; as, the seal being in England, a valid mortgage could not be executed in Canada. The deed and mortgage are dated 2nd September, 1867, and a paper dated the 6th of the same month explains that the purchase was for the company, adding "the form of transfer having been made for the convenience of transfer, and not for any benefit to accrue to myself personally." This paper is signed "*Edward Miall*, junior, Managing Director of *Edward Miall & Company*, limited." Further, a note or notes in the name of the company were given on account of purchase money. Against this there is only the evidence of the solicitor by whom the deed and mortgage were drawn. His evidence is that it was originally proposed that the sale should be to the company, but after discussion "it was clearly understood that the sale was to *Miall* personally." He says he advised the parties

Judgment.

that *Miall* had not authority to make the purchase. He says, however, that the matter of the seal of the company was adverted to. I think his memory is at fault in the matter. The parties no doubt went to him, intending to have all the documents in the name of the company. The absence of the seal was adverted to, and their intention in that respect could not be carried out. But that their intention was changed otherwise is contradicted by the circumstances to which I have referred. A letter written by the solicitor to Mr. *Gibbs*, one of the Canadian directors, and dated 23rd April, 1868, in reference to this same purchase, contains this passage: "Nothing will save the company if *Miall* is allowed to retain the power of committing the company to any liability by a dash of the pen," implying that he had at any rate assumed to make the company liable; not that he had purchased for himself. And Mr. *Gibbs* appears to have so understood it, for in a letter dated the following day, written by him to an officer of the company in England, he says: "I regret very much to find that Mr. *Miall* has

bound *E. Miall & Co.* (limited), although he did not give the company's notes for the purchase of the property alluded to." All this is inconsistent with the present contention, that *Miall* made the purchase for himself, not for the company. In fact, with the agreement of the 1st of April in existence, it was impossible that he could purchase for himself. In the spring of 1868, the fact of this purchase being made was communicated to the head office in England, and it was communicated as a purchase on behalf of the company, and in the correspondence that ensued between the head office and the directors in Canada, and *Miall*, it was treated as a purchase made on behalf of the company—as objectionable, as an injudicious purchase, as well as being in excess of authority, but still as made on behalf of the company.

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Upon referring to the answers of the defendants (who answer separately), I find that they do not set up that the purchase was made by *Miall* on his own behalf. In his answer he says that he never intended to purchase the premises on his own account, nor did the plaintiff so intend to convey the same; and the company in their answer adopt that of *Miall*, stating that they believe the statements therein to be true. *Miall*, in his answer, is hostile to the plaintiff, making common cause with the company.

Judgment.

My conclusion is, that the purchase of the land in question was not made by *Miall* on his own behalf, but on behalf of the company.

Assuming for the present that the purchase made by *Miall* was in excess of his authority as managing director in Canada, the question is whether by reason of ratification, or on other grounds, the company can now be held bound to complete the purchase.

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The company was informed of this purchase before the 13th of March, 1868. In a letter of that date an officer of the company addresses *Miall* in a tone of remonstrance for having done so, but does not repudiate the purchase; on the contrary, he instructs *Miall* to insure the building on the premises, in order, as the letter says, to save the company from any further loss by fire. Some premises of the company, not on the land in question, had been burnt down not long before. *Miall*, in a letter to the head office, dated 30th May, 1868, excuses himself for having made the purchase without the assent of the Canadian directors, observing that, although it was made without their knowledge, the agreement for the lease was not; and he justifies it as a judicious act, and as more advantageous to the company than the intended lease. In another letter to the head office, dated 2nd September, 1868, he takes the same ground, and enters into a calculation to shew that the purchase was better for the company than the proposed lease. I do not find among the papers anything from which I can say at what date the company decided to repudiate the purchase, or when they communicated their repudiation to the vendor. One of the Canadian directors appears to have informed the plaintiff's father of the intention of what has been called the new company to do so. The agreement between the old and new companies is dated 10th September, 1868. So far as appears, no intimation of any kind was made to the vendor before September, 1868, of any intention on their part to repudiate the purchase.

Judgment.

All this time the company was in possession of the premises, and using them for the purposes of their business. They were put into possession, as appears by the evidence, at a date which was subsequent to that of the conveyance. They were, in fact, in as purchasers, though the fact of the purchase does not appear to have been communicated by the managing director either to

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the directors in Canada, or to the head office, before March, 1868. They learned then that the purchase had been made some time before. In the letter of 13th March, surprise is expressed on the part of the chairman that he had learned for the first time of this purchase, but Mr. *Gibb* knew of it from the Solicitor in April, and could easily have ascertained, if he did not know, when it was made. Neither the Canadian directors nor the head office informed the vendor that they even disapproved of the purchase. There was six months at the least after knowledge of the purchase, before it was repudiated, or even objected to; and not only so, but six months' use of the purchased premises by the company, with the knowledge that the purchase had been made, professedly on their behalf, by their agent in Canada, and they must have assumed that the vendor regarded them as purchasers.

Judgment.

It is observed by Mr. Justice *Story*, in his book on the Law of Principal and Agent (*a*), that "by far the largest class of ratifications of unsealed contracts arises by implication from the acts and proceedings of the principal *in pais;* for it is by no means necessary that there should be any positive or direct confirmation;" and the learned author refers to a case which in some respects resembles this, where a principal, on being informed of a purchase by his agent in the name of the principal, did not deny the agent's authority to make the purchase, but merely complained of the manner in which it had been exercised, and the principal was held bound. There is this principle, which has the support of American authorities, that, where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act; the presumption being less strong, and the fact of acquiescence being less cogent, where no relation of agency

(*a*) Sec. 253.

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exists between the parties. There is good sense in this. An acting in excess of authority is a different thing from an acting in the absence of all authority. The *extent* of the authority of an agent is often a nice question. It is contended in this case, as it was in *Wilson* v. *The West Hartlepool Railway Company* (*a*), to which I will presently refer, that, in this case a managing director, in that a general manager, had authority to buy and sell lands; and the title of the office would be apt to import to a layman a larger authority than is actually possessed by such officer. It is reasonable to require in such a case a prompt disavowal of the act of the agent, if the principal means not to acquiesce in it, and to hold, in the absence of disavowal, after the lapse of sufficient time for inquiry and reflection on the part of the principal, that he must be taken to have acquiesced; and even slight acts referrible to the contract should be deemed an adoption of it.

Judgment.

There is another reason for prompt action on the part of the principal—that where an agreement is entered into by an agent in excess of his authority, it is in effect an unilateral contract; the other party is bound, while the principal may adopt or repudiate the contract as he may think fit. If he elects to repudiate, he should make known his election promptly, so that the person with whom his agent has dealt may remain as short a time as possible subject to an unequal bargain. If he delays beyond the time which I have indicated as proper, his acquiescence ought, I think, to be presumed.

In this case, not only was a long time allowed to elapse without any disaffirmance of the contract by the company, but there have been dealings on the part of the company with that which was the subject matter of the contract. These dealings may properly be viewed

(*a*) 2 D. J. & S. 475.

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in two aspects—as acts of ratification of the act of their agent, and as acts of part performance, taking the case out of the Statute of Frauds. The two are, however, so closely united that it is not necessary to distinguish them. The agent of the company entered into a written contract for the purchase of the property in question. If he had had authority by parol it would have been sufficient. If his agency has been adopted by acts *in pais* since, it is, I apprehend, equally sufficient. In that case there is a written contract within the Statute of Frauds. But suppose the contract is to be taken to be by parol, there have been acts of part performance sufficient in the case of an individual to take the case out of the statute. I refer to acts after knowledge acquired of the contract entered into by *Miall*. There was the continued possession and continued actual beneficial use of the premises, which had been delivered into their possession under the contract of sale; there was the direction to their agent to insure them, in order to save the company from further loss by fire, implying that the premises had become theirs—that a loss in case of fire would be theirs—that the insurance would be payable to them. These are acts at once of ratification and of part performance of the contract, and they were acts whereby the position of the vendor was changed. The company was to have had possession without the contract of purchase, but possession in a different character; instead of receiving rent, he, the vendor, was to receive purchase money; and he would naturally regard himself as free from the responsibility attaching to ownership in regard to the premises—the payment of taxes, the seeing that the premises were insured and repaired, and that they received no detriment at the hands of the company, or otherwise. In fact the company might during all this time have denied the plaintiff's right to interfere with the premises at all, unless in regard to his equity for unpaid purchase money.

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I think these were sufficient acts of part performance to take the case out of the statute.

But, it is objected on the part of the company, that, assuming that if the principal were an individual he would be bound under such circumstances as exist in this case, the law is different in the case of a company; that the executory contract of a trading company having a seal must be under its seal. The same objection was taken in *Wilson* v. *The West Hartlepool Railway Company* (*a*), and was overruled on the ground that companies may be bound by acts of part performance. The tendency of modern decision is to place corporate bodies upon the same footing as individuals in the matter of acquiescence or other conduct. I will refer upon this only to the language of Lord *St. Leonards* in *The Eastern Counties Railway Company* v. *Hawkes* (*b*): "In the case of an ordinary purchaser who had conducted himself as these appellants have done, the Court would have enforced the contract against him without hesitation; and although a corporation can only contract under seal, yet I am of opinion that corporations are bound by their conduct and by the acts of their solicitors after their contract, just as an individual would be." I refer also to the American case of *The Episcopal Charitable Society* v. *The Episcopal Church in Dedham* (*c*).

Judgment.

The question remains whether the ratification has been by those competent to ratify, and whether knowledge of the circumstances to which I have adverted is traced to those whose knowledge is the knowledge of the company.

I am of opinion that the purchasing of the land in question was within the competence of the directors of

(*a*) 11 Jur. N. S. 124. (*b*) 5 H. L. C. at 376.
(*c*) 1 Pickg. 372.

the company. It was within the objects specified as those for which the company was established. The Companies Act, 1862, under which this company was formed, provides in effect that, in the absence of any provision to the contrary in the articles of association, the business of companies established in pursuance of it, shall be managed by the directors. The articles of association of this company make no provision on the subject, and the general provision of the act, (*a*) "The business of the company shall be managed by the directors," is, under section 15, to be deemed to be a regulation of the company, "in the same manner and to the same extent as if (it) had been inserted in articles of association." If it was competent to the directors to purchase, it was competent to them to ratify it, and if it was the rule of the company that its business should be managed by the directors, the knowledge of the directors and their conduct were the knowledge and conduct of the company.

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Judgment.

It has been assumed in argument that the correspondence with the head office of the company in England was with the proper officers of the company; and it is, I think, proper to assume—and it has not been questioned—that the communications from the managing director and the other directors in Canada on the subject of this purchase, were brought to the notice of the directors in England. It was the plain duty, and would be in the ordinary course of business, for the officers to whom these communications were directly addressed, to do this, and it it is to be presumed that it was done.

Then, were there any material facts not communicated? It is said that it was unknown to the company that they were in possession as purchasers. I do not see how that can be. When made acquainted with the

(*a*) Table A (55).

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two facts—the fact of possession and of the contract of purchase—the necessary inference was that they were in possession as purchasers; and it does not appear that they supposed, after they had been informed of the purchase, that they had ever been in possession in any other character. Further, it is said that they supposed that the building had been put up at their expense. They certainly never had any reason to suppose this; but if they ever were under such a mistake, it was corrected by Mr. *Gibbs's* letter of the 20th April, who speaks of the purchase as "the purchase of the *storehouse* at the station."

Judgment.

I am not prepared to say that the managing director in Canada had authority to make this purchase. I incline to think that he had not; but it is not necessary to decide that point, because I am of opinoin that on the ground of ratification and part performance the plaintiff is entitled to a decree. The decree will be with costs.

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LARKIN V. GOOD.

Specific performance—Lapse of time—Misrepresentation of vendor.

In 1846 the defendant contracted for the sale of a building lot in Toronto to the plaintiff's father (one of the defendant's workmen) for $500, payable in eight annual instalments: the purchaser went into possession and built two small houses on the lot. He died in 1856 intestate. The plaintiff, who was his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one *A.* to manage his affairs; he was not quite of age at this time: in February, 1859, the defendant brought ejectment, and *A.* in the following March filed a bill in plaintiff's name for specific performance of the contract; the defendant claimed that there was about $800 due thereon, and the claim appeared to be confirmed by a book produced by a book-keeper of the defendant who was examined as a witness; the value of the property at the time was about $700; *A.*, believing the defendant's representations, agreed with him to dismiss the bill without costs, which he accordingly did, and gave up possession to the defendant. Some years afterwards the plaintiff returned to the province and discovered that not one-half the amount so claimed by the defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance and proved this state of the account from entries in the books of the defendant and otherwise:

Held, in view of the misrepresentations of the defendant and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time.

The facts of the case sufficiently appear in the head-note and judgment.

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

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

SPRAGGE, C.—I have thought over this case a good deal. There are some considerations against decreeing specific performance, and some in favor of it. The contract of sale is of old date. It was made by the defendant with the plaintiff's father in 1846. Nov. 9. Judgment.

The father worked for a number of years—one of the witnesses says sixteen—with the defendant, an iron

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founder carrying on business on a considerable scale, and employing upwards of two hundred workmen. The sale was of a building lot in Toronto, the purchase money, $500, payable by eight equal annual instalments. The purchaser died in 1856, intestate, leaving the plaintiff, his only child, nearly of age. The son enlisted in the 100th regiment, and left Canada the same year, being then within seven months of attaining majority, leaving a power of attorney with one *Andrew Anderson* to manage his affairs. The father had in the meantime put up two small tenements on the purchased premises, and he had another house on other premises adjoining. After the plaintiff left Canada, *Anderson* received the rents, amounting, as appears, to somewhere between $100 and $150 a-year. Whatever he did with them, he did not apply them as he ought to have done, to paying off the purchase money due upon the premises.

Judgment.

In 1859, transactions occurred which have a very material bearing upon this case. In February of that year the vendor brought ejectment, and in March a bill for specific performance was filed against him by *Anderson*, in the name of the present plaintiff, alleging, as is alleged in the present bill, that it was agreed upon the sale of the premises that the vendor should retain the wages of the purchaser in payment of the purchase money. The defendant denied by his answer that there was any such agreement, and alleged that the whole or a very large proportion of the purchase money, and a large sum for interest, were still unpaid. In April a Mr. *Crawford*, who had been a book keeper of the defendant, was examined on behalf of the plaintiff, and a book called the men's ledger and marked A was produced. No other book appears to have been produced. On the 5th of May, *Anderson*, on the part of the plaintiff, and the defendant, with the assistance of their solicitor, came to an agreement that the bill should be dismissed, each party paying his own costs in that suit

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and in ejectment, and the defendant agreed "not to look to back rents received by *Anderson* for payment of any claim which he now has against *Michael Larkin*, deceased, or *Thomas Larkin*, his heir-at-law," and *Anderson* agreed "to make the present tenants attorn to Mr. *Good* at once."

This settlement was based upon the idea that as much as $800 was due to the defendant; and as *Anderson* thought the property worth only about $700, he considered it useless to proceed with the suit, and would leave it, as he told his solicitor, to the heir-at-law to fight the matter with *Good*, the vendor.

How the $800 was arrived at does not appear, but I have no doubt it was upon the assumption that the whole of the principal, if not the whole of the interest, was due, for the defendant says in his evidence now—"At the time of *Larkin's* death I contended he owed me the whole amount of both principal and interest. * * On the examination of Mr. *Crawford*, my book keeper, it appeared, as far as we went, that £200 was due." It may have been made up of the purchase money and six years' interest, adding £31 2*s.* 2*d.*, a balance stated against *Larkin* in a book now produced. This would make £201 2*s.* 3*d.* How this sum was arrived at is, however, not material, so long as it was upon the assumption, as it certainly appears that it was, that the whole of the principal was unpaid. That this was an untrue assumption is proved by entries in the account kept by the defendant with *Larkin* in the "men's ledger," not the one produced on the examination of *Crawford*, but a subsequent one. Under date of 4th June, 1852, is this entry: "To one year's interest on lot, £80. £4 13*s.*;" and on the same day of the following year there is precisely the same entry; the 4th of June is the day at which the purchase money and interest upon the purchase in question is made payable.

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The necessary inference from these entries is, that £80 was the amount of purchase money then due. The defendant's assertion that they were made by *Crawford* at the suggestian of *Larkin*, and that that was *Crawford's* explanation of them at the examination, I can only designate as idle, especially as he adds, "still Mr. *Crawford* was very correct—very."

The defendant ought to be able to shew that these entries are inaccurate, if they are so; but he produces no ledger of an earlier date. *Larkin's* account in this ledger commences 1st January, 1852, and is brought "from old ledger." The ledger produced is filled in two and a-half years. *Larkin's* account subsequent to his purchase runs probably through two or three earlier ledgers, one of which probably was the one produced at the examination of *Crawford*. I cannot assume that these ledgers, if produced, would not shew the purchase money reduced to £80, if brought into the general account. At any rate I must in their absence assume that these entries in the ledger that is produced are correct. The sum, then, that would be due at the date of the settlement with *Anderson*, looking at this ledger alone, would be £80, and something less than six years' interest, say £108. This would be besides the balance in the general account of £31 2*s*. 3d.

Judgment.

I am by no means satisfied that the purchase money was not still further reduced before the death of *Larkin*. There was a subsequent ledger to that produced: this appears by the entry in the produced ledger at the foot of *Peter Oulster's* account, p. 426: "To balance transferred to new ledger, fol. 26." It is not produced. *Larkin's* account closes 1st May, 1854, and at the foot of it have been entries of dates, items and sums, both of debit and credit, filling six or seven lines, the whole of which are erased. These are suspicious circumstances.

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The defendant says in his evidence that after 1st May, 1854, he paid *Larkin* his wages monthly, the same as the other men in his employ; and a book called the men's time book, commencing at that date, is produced. I have examined this book, and it shews entries in the case of *Larkin* different from those of any one of the other two or three hundred men employed. In May, June and July there is no difference. Opposite the name of each man is set the number of his days' work in the month, and the rate of his wages, and the amount is carried out in a third column. In August the like entries are made opposite the name of *Larkin*, but not opposite any other names. In September, October, and November, full entries are made opposite all the names. The same is the case as to the first five names in December; then follow some 150 names with the amount only carried out; then comes *Larkin's* name with a full entry; then some sixty more with the amount only, *Larkin's* being the only name opposite which there is a full entry. In January also *Larkin's* is the only name opposite which there is a full entry. In February, and in each succeeding month to the end of the year, the names of the men only are entered; no sums at all are carried out with the single exception of that of *Larkin;* opposite his name in each of those months is the full entry of number of days' work and rate of wages, and the amount is carried out. The same is the case in January, 1856. The number of names in that month was reduced to sixteen, and *Larkin's* work was only a portion of a day. In that year *Larkin* died, and there are no entries of men's time from January, 1856, to 1860. I do not say now what is the proper inference from all this. It may admit of explanation, but I will refer to some detached pieces of evidence that may have a bearing upon it. The defendant says, speaking of his practice after 1st May, 1854, that he always counted each man's money and put it in a paper, on which he wrote the man's name;

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and he says in a previous part of his evivence—"I told *Larkin* that he might leave a portion of his wages in my hands on account of purchase money and interest." *Peter Oulster*, a fellow workman, says—"I worked sixteen years with *Larkin* in *Good's* shop. When I was working there I would apply on Saturday night for my wages. Mr. *Good* would say, why do you not leave part of your wages like as *Larkin* does, in order to pay for his land, like a good, hardworking, honest man. I replied *Larkin* was able to do so, having cows and boarders from which he received money, while I had nothing but my day's earnings to support my family on: this passed more than once." And a young woman brought up by *Larkin* says that Mrs. *Larkin* kept cows, and chiefly defrayed the expenses of the house.

Judgment.

It is difficult to suppose that there was no reason for the marked difference in the entries in the men's time book in the case of *Larkin* from that of all the other men during a number of months. It could not be accidental. His case is treated as one entirely exceptional. One would expect to find the sums so, without exception, carried out in his case, carried to some account, and they may be, in the subsequent ledger or ledgers not produced, or the erased entries may have contained some account of them.

The bearing of all this now is to shew that the settlement with *Anderson* was made in the absence of material documentary evidence kept back by the defendant, and upon a representation by the defendant that the whole principal and interest was in arrear, when at the most £80 and six years' interest were due. This representation, and the keeping back material documents, it is fair to say, induced the settlement, and intercepted a decree for specific performance. Indeed the answer then put in, though it prayed a dismissal of the plaintiff's bill, made no case against specific perform-

ance, and it is probable that *Anderson* would have gone on with his suit, if he had not been misled by the defendant. The property was productive, and might probably have been made available for the payment of any sum that might have been found to be really due. It does not lie in the mouth of the defendant to say that it could not be. 1870. Larkin v. Good.

The short ground, then, upon which I come to the conclusion that the plaintiff is now, after the lapse of so long a time, entitled to specific performance, is that he was so entitled upon the bill filed on his behalf in 1859, and that he has a right to say that he would have obtained a decree in that suit but for the acts and conduct of the defendant, to which I have referred. I am not prepared to say that if the defendant had then obtained possession by ejectment or otherwise, and no suit had been brought on behalf of the plaintiff for specific performance, that he could have specific performance now; but I proceed upon this, that the defendant, by that which upon the evidence before me appears to have amounted to a legal fraud, intercepted a decree which the plaintiff has a right to say that he would otherwise have obtained in 1859. Judgment.

The case is a peculiar one. I do not recollect meeting with any case resembling it; but I think the principle upon which I proceed is a sound one, and therefore decree for the plaintiff. I give costs up to the hearing, reserving subsequent costs and further directions.

1870.

NEEDLER v. CAMPBELL.

Specific performance—Mistake of one party.

A., who was the lessee of a timber limit, had an interview with *B.* on the subject of the sale to him of part of the limit. *A.* offered to take $400, and letters passed which amounted to a contract at law to sell at that price. *A.*'s offer, however, had been made in contemplation of a reservation and condition which had been spoken of at the interview between the parties, but were not mentioned in the letters:

Held, that the purchaser was not entitled in equity to a specific performance without the reservation and condition.

Statement.

This was a suit for the specific performance of a contract by the defendants for the sale to the plaintiffs of the timber on certain land in the Township of Dysart. The land belonged to The Canadian Land and Emigration Company; and, under an agreement with that Company, and an assignment thereof to the defendants, the defendants had the right to cut the timber subject to the payment of certain dues to the Company. The defendants' right extended to the lots in four concessions; the sale or alleged sale was of the timber on the westerly twenty lots in the four concessions, "the defendants retaining their rights in respect of the remaining or easterly portion of the limit." Mr. *Sadler*, one of the plaintiffs, had an interview with Mr. *Campbell*, one of the defendants, on the 25th July, 1870, in which interview the sale was negotiated, but not concluded. In this interview Mr. *Campbell* named a price for the whole limit, but was not prepared to name a sum for the westerly portion by itself; he promised to name a price for that portion before Mr. *Sadler* should leave Peterborough that day for his own home, which was in Lindsay. The subject of the defendants taking their boom timber from the westerly portion was spoken of in some part of the same interview. The evidence at the hearing shewed, that about three hundred trees would be required for the boom timber needed for rafting the logs which the

easterly limit was expected to yield; that these three hundred trees, if cut into logs, would yield about six hundred small logs; and that the whole number of logs expected to be got from the westerly limit was about ten thousand. At the same interview an arrangement was discussed between the parties as to the defendants' driving the logs of both parties down the river in order to prevent any detention of the defendants' logs by those of the plaintiffs, should the former overtake the latter; and as to the defendants being compensated for this work in one or other of certain modes which were mentioned. Afterwards, and on the same day, Mr. *Campbell* handed to his clerk an unsigned memorandum which the clerk was to shew to Mr. *Sadler*, and which named $400 as the price of the timber on the westerly twenty lots. This memorandum was not alluded to in the plaintiffs' bill.

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There was no further communication between the parties until the 8th August, when the plaintiffs sent to the defendants the following telegram: "We accept your offer. Will write to-morrow." They did not write until the 11th August. Their letter of that date was to Mr. *Campbell*, and was as follows: "Sir, We beg to notify you that we accept your offer of the timber on the first four concessions of Dysart, commencing at the western boundary extending to the east as far as lot 21, for the sum of $400. We also make you an offer of $800 for the balance of the limit. You will please have the paper made out in the usual form, giving us every right to cut down and manufacture." This letter was received on the following day, and was replied to as follows: "We have your favour of the 11th inst., and shall have an assignment of our rights on lots 1 to 20, in the first four concessions of Dysart, made to you as soon as our solicitor returns. We cannot accept the sum you offer as an equivalent for the timber on the remaining part of the limit."

Statement.

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The plaintiffs by their bill set up these two letters as constituting a valid legal contract, of which they had a right to the specific performance. The defendants, on the other hand, insisted that the two letters did not contain the whole contract as intended by Mr. *Campbell*, and as Mr. *Sadler* was aware that Mr. *Campbell* had intended.

A few hours after writing the letter of the 12th August set forth in the bill, Mr. *Campbell* wrote to the plaintiffs another letter of the same date, and which went forward by the mail of the 13th. This second letter mentioned the particulars in controversy in the suit, and was as follows:—"Gentlemen,—In acknowledging your letter to-day we omitted to ask what course you would prefer in regard to the driving of your logs, as the terms might as well be embodied in the assignment, it being understood to be part of the arrangement that, when we had logs taken off the east end of the limit, we should drive your logs along with our own to the mouth of the Burnt River, where you would have to raft and take care of them. As we said, if you wish, we will do this for a proportion of the cost equal to the respective number of logs belonging to you and ourselves; or, as the amount will be difficult to arrive at exactly, we will do it for 7 cents a-piece for logs; boom and other timber in proportion; premising that no timber shall be over thirty-two feet in length. We also mentioned when we made you the offer, that we should probably wish to make our boom timber down near the boundary, to which you agreed. We do not yet know that we shall do so, but it should be in the agreement in case we do."

Statement.

There was no evidence to create a suspicion that anything had occurred between the two letters of the 12th August to change Mr. *Campbell's* views. The plaintiffs did not answer or otherwise notice either letter; but, on

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the 28th August, they wrote to the defendants as follows:—"Gentlemen,—Will you be kind enough to get the assignment of the timber we purchased from you made out to send us, and we will remit you draft for the amount made out." The defendants replied on the 2nd September, as follows:—"We have your favour of the 28th ult., which absence from home prevented our answering sooner. We have been awaiting reply to our letter of the 12th ult., in regard to the driving of the logs before getting transfer drawn. Please advise us at once, and we shall get the matter closed."

On the same day the plaintiffs' confidential clerk arrived in Peterborough with the $400, for the purpose of closing the matter without reference to the reservation and condition, not having been informed by the plaintiffs of the defendants' second and unanswered letter of the 12th August. The defendants declined to recognize the contract without the reservation and condition. On the 4th October, the bill was filed. The answer was filed immediately, and the cause came on by mutual arrangement for the examination of witnesses and hearing at the Autumn Sittings at Peterborough.

Mr. *Dennistown*, for the plaintiffs.

Mr. *S. Blake* and Mr. *C. Weller*, for the defendants.

Nov. 8.

Judgment.

MOWAT, V. C.—I assume that the two letters set forth in the bill are sufficient evidence of a legal contract; but it is not of every legal contract that Courts of Equity grant specific performance; and it is a general rule, that, if a written agreement happens to omit a term which one (*a*) of the parties understood to form part of the bargain, or

(*a*) Harris v. Peperell, L. R. 5 Eq. 1; Wood v. Scarth, 2 K. & J. 33.

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happens not to be in some other material respect what he intended to agree to, and understood that he was agreeing to, Courts of Equity will not enforce the written contract against him; as they hold it to be against conscience for the other party to take advantage of the omission or mistake. It is also the rule that parol evidence (*a*) is admissible to shew the omission or mistake, by way of defence to a bill for specific performance. This evidence must be clear and satisfactory; "must be such as to leave no fair and reasonable doubt upon the mind" (*b*). After giving my best attention to the direct and the corroborative evidence relied on in the present case, I am of opinion that it is sufficient, within the spirit and meaning of the authorities, to establish the defence. There had been no part performance of the contract before the filing of the bill.

Judgment.

I think it not immaterial to bear in mind, that the alleged contract is not contained in any formal document, but is contained in letters written with reference to a previous interview between the parties, in which interview the matter had been proposed, and had been discussed at considerable length; that it is by implication only that the first letter of the 12th August, affords the necessary legal evidence of the defendants' consent to a sale on the terms specified in the plaintiffs' letter; that neither letter refers to there being any sums which would be payable in respect of the timber to the owners of the land, and it is not disputed that the intention of the parties, though not expressed in the letters, was, that the plaintiffs, and not the defendants, should pay these; that the bargain, whatever its terms were, was to have been carried out at once by a proper instrument, and by payment to the defendants of the purchase money named; that the defendants'

(*a*) Alexander v. Crosbie, Lloyd & Gould, temp. Sugden, at 150.
(*b*) Fowler v. Fowler, 4 DeG. & J. at 265.

letter, mentioning the reservation and condition which Mr. *Campbell* understood to have been contemplated by both parties, was written on the same day as the letter which the plaintiffs produce in proof of the defendants' having agreed to a sale on the terms specified in the defendants' letter of the 11th, and was forwarded by the next mail; that I have no reason whatever for questioning the good faith of that second letter; that the plaintiffs allowed its statements to pass unnoticed until the 5th September, when the plaintiffs' solicitors addressed the defendants on the subject; that the reservation and condition were not unreasonable or improbable, but the contrary; that a sale without the reservation may involve the defendants in an expense of from $200 to $400 in getting their boom timber elsewhere, the latter sum being all that the defendants were to receive from the plaintiffs for all the timber on the westerly limit; and that the plaintiff *Sadler*, in his evidence for the defence, admitted that at the interview of the 25th July the defendants' taking boom timber from the westerly portion was mentioned in some part of the conversation, and that an arrangement for the defendants' driving the logs of both parties on some terms was discussed; though he denied that the reservation of the boom timber was mentioned in connexion with the proposed sale of the westerly portion, or that a definite agreement as to the driving of the logs was mentioned as a condition of the sale.

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Judgment.

The making of the reservation and condition in the negotiation of that day was distinctly sworn to by the defendant *Campbell*, and by his foreman, who was present and took part in the conversation. Both gave their evidence with every appearance of truthfulness. Looking at their evidence in connexion with all the circumstances of the case, I am satisfied that, in making the offer in July to take $400, and in standing by that offer when the first letter of the 12th August was written,

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Mr. *Campbell* understood, and contemplated as essential terms of the sale, that the boom timber was to be reserved, and that the plaintiffs were to accede to one of the modes mentioned in the second letter of the 12th August, for the defendants' compensation for driving the plaintiffs' logs.

At the same time, I am not prepared to hold that Mr. *Sadler* so understood the offer. He swore the contrary; and it is quite possible that he did not take in during the conversation the full import of what Mr. *Campbell* said or meant in regard to those matters; or that he did not afterwards, and does not now, recollect accurately what Mr. *Campbell* had then said. His evidence, like that on the other side, seemed to me to be given under the conviction that he was speaking the truth. But if the defendants' offer and subsequent assent contemplated the reservation and condition, the plaintiffs' misapprehension, or ignorance, or forgetfulness, does not preclude the defendants from resisting a suit for specific performance.

Judgment.

The result is, that I cannot decree specific performance of the agreement as stated by the plaintiffs; and the proper decree, according to the authorities in such cases, would be a dismissal of the bill without costs. But I understood counsel for both parties to say that, in case I should be of opinion that the plaintiffs were not entitled to a specific performance of the agreement as set up in the bill, the parties desired a decree to be pronounced for specific performance on such other terms as might be proper. In that case, the terms must be as understood and stated by the defendants; and the defendants will be entitled to their costs.

1870.

HOIG v. GORDON.

Resulting trust—Husband and wife—Dower—Fraud on purchaser.

A man and woman lived together as husband and wife, the man having a wife living at the time; and land purchased in the man's name was paid for by the woman out of money of her own:
Held, that there was a resulting trust in favour of the woman.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name—the real wife living in the neighbourhood and receiving from them her own support, it was held, that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser who bought in good faith, and without any notice of the real relationship of the parties.

The defendant in this case brought an action of dower against the plaintiff, who had purchased land from the defendant's husband and a woman living with him as his wife. The husband's name was *Gordon*, but in the spring of 1850, he assumed the name of *Lindsay*, and came from Liverpool to this country; where he and the woman lived until 1860, and went under the names of Mr. and Mrs. *Lindsay*, and had several children. Statement.

He was a laboring man with no means whatever; the woman had considerable money. In 1852, they purchased the property in question; the woman paying for it with her own hand, and the deed being made to the man.

In the autumn of 1850, the defendant, at the request of her husband, came to this country, and lived near him, under the name, during part of the time, of the Widow *McGarvey*. When she moved near the property in question she resumed her own name—*Gordon*; but by arrangement with her husband she continued to conceal from the public her relationship to him, and allowed him and the reputed wife to continue to live, and

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be regarded by the public, as husband and wife. From 1850 until 1860, the defendant and her children received their support from Mr. and Mrs. *Lindsay;* and she occasionally visited at their house as a friend, and drove in their carriage.

In 1856, the supposed Mr. and Mrs. *Lindsay* executed a declaration of trust in respect of the land in question, declaring that it had been bought with the money of the latter and in trust; that it was agreed that it should belong to them jointly for their lives, then to the survivor, with powers of sale and appointment. On the 14th September, 1860, they sold and conveyed under these powers to the plaintiff; and, as they were about to leave the country, the defendant made public her relationship to the man, and brought a suit against him for alimony. The *Lindsays* shortly afterwards went to Michigan; and they were both dead some time before the defendant brought her action of dower.

Statement.

The bill was to restrain the action, on several grounds. One was, that, the purchase money having been paid by the supposed Mrs. *Lindsay*, there was a resulting trust in her favour, that the man took no beneficial interest, and that the defendant therefore was not entitled to dower.

Another ground was, that the defendant having, for the ten years of their residence in the province, knowingly allowed her husband and his mistress to hold themselves out to the world as man and wife, under the assumed name in which the purchase was made, receiving from them her support all this time, she was precluded from setting up her own claim as against the plaintiff, who had bought in good faith, under the belief that *Lindsay* was the man's real name, and that the woman living with him as Mrs. *Lindsay* was his lawful wife, and who had no notice of the defendant's relationship to *Lindsay*.

The cause came on for the examination of witnesses and hearing at the Autumn Sittings of the Court at Cobourg, in 1870. 1870. Hoig v. Gordon.

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

Mr. *Ruttan* and Mr. *Moss*, for the defendant.

MOWAT, V. C., at the close of the argument for the defendant, adjudged both points in favor of the plaintiff, and granted the relief prayed. Costs were not asked. Judgment.

BECK v. MOFFATT.

Mortgage—Possession—Notice.

Possession by an adverse claimant is no notice of his interest, to a party parting with the estate.

A mortgagor sold one of the mortgaged parcels, and the purchaser went into possession; the mortgagees afterwards, having no notice of the sale, released the other parcels to the mortgagor, retaining the mortgage on the sold parcel; upon which the purchaser of that parcel filed a bill to have it declared that by the release his parcel was discharged from liability for the mortgage:

Held, that he was not entitled to such relief; and that, not having offered to redeem, his bill should be dismissed with costs: but, the defendants having prayed a foreclosure in default of payment, a decree to that effect was pronounced.

On the 2nd January, 1838, the Hon. *George S. Boulton* mortgaged certain lands to the Hon. *James Gordon* to secure £500. *Boulton* afterwards sold five parcels of the mortgaged lands, and conveyed the same to the purchasers; and then, viz., 31st December, 1851, he sold and conveyed a sixth parcel to the plaintiff, with a covenant against incumbrances. These sales did not comprise all the mortgaged lands. The mortgage having

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been assigned to the defendants *Lewis Moffatt & Co.*, they, on the 31st July, 1862, without the plaintiff's knowledge or consent, and without actual notice of his interest, released to *Boulton* all the mortgaged land except the parcel which *Boulton* had sold and conveyed to the plaintiff. *Boulton* in the following year sold and conveyed away another of the parcels released to him. All the deeds were duly registered shortly after they had respectively been executed; and at the time of the release to *Boulton*, the plaintiff was by his tenant in possession of the land which he had purchased. He was ejected in 1866. The plaintiff had no notice of the mortgage when he made his purchase.

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

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

Mr. *Moss*, for the defendants.

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Judgment.

MOWAT, V.C.—The contention of the plaintiff is, that he was entitled to have the mortgage paid out of the lands which Mr. *Boulton* had not sold at the time of the plaintiff's mortgage; that *Moffatt* and his co-assigns must by means of the registry and of plaintiff's possession be treated as if they had notice of the plaintiff's interest; and that, by releasing to *Boulton* to the plaintiff's prejudice, they released the plaintiff's land from liability in respect of the mortgage; and the prayer is accordingly.

That the registry is no notice for the purpose for which the plaintiff sets it up, was expressly decided by the present Chancellor in the *Trust & Loan Co.* v. *Shaw*. (*a*) His Lordship considered the enactment of the registry law as to notice to be applicable only to persons acquiring an estate.

(*a*) 16 Gr. 446.

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The reasoning which led to that conclusion seems equally applicable to the plaintiff's argument from possession. There seems no more reason why, in parting with an estate, a mortgagee should inquire whether any one in possession had an interest which would be injuriously affected by the transaction, than there is for his examining the registry to obtain the like information. Indeed, if for such a purpose registration is not notice, *a fortiori* possession must be no notice.

The plaintiff does not ask to redeem. The bill ought therefore to be dismissed with costs; but, the defendants asking foreclosure, a decree to that effect may go.

In Re Thomas Davis.

Purchaser at sheriff's sale—Preventing competition—Duty of executors.

A creditor obtained judgment against his debtor's executors, and issued thereon execution against the lands of the deceased, which had been devised to a minor. The creditor interfered to prevent competition at the sale, and then bought the property at one-half its value:

Held, that his purchase was not maintainable in equity.

Where an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or is not competent to look after his own interests, or is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale as a prudent owner would.

Statement.

This was an appeal on the part of *Robert Henry Davis*, a minor, from the report of Mr. *Turner* (referee), under the Quieting Titles Act, dismissing the claim of the appellant.

The petition for a Certificate under the Act was by *Thomas Davis*, and was dated 27th October, 1868. Both parties claimed under *George Davis* deceased, who

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was the father of the petitioner, and grandfather of the contestant (the now appellant). The petitioner claimed under a sheriff's deed, dated 9th July, 1868, and executed in pursuance of a sale made by the sheriff on the 6th June, 1868, under a writ of *venditioni exponas* issued on a judgment against *Jane Davis* executrix, *George W. Adams* and *Peter Bartleman*, executors of *George Davis*, in respect of an old debt claimed by the petitioner against his father's estate. The appellant's claim was under the will of the same *George Davis*.

Statement.

The question between the parties was as to the validity of the sheriff's sale. The appellant objected to the sale because of (amongst other things) certain conduct of the purchaser previous to the sale. This conduct appeared from the evidence of several witnesses. Among these was *Robert Clements*, who deposed before the late Chancellor, that the petitioner told him before the sale that he wanted to purchase the land, that he thought it was intended for him, and that he wished that *Clements* and other neighbors would not buy: the petitioner added that he had made the same request to others. *Wm. McRitchie* testified to the same effect: the petitioner asked him if he (*McRitchie*) would use his influence with any person wanting to buy, and tell them that he (the petitioner) wanted to obtain the land himself; and he expressed to this witness a desire to have the sale carried out quietly. The executor *Bartleman* deposed that he had heard the "rumor" that the petitioner had been asking persons not to bid.

The Court considered it clear from the whole evidence that the petitioner did endeavour to prevent competition; and that with that view he made it known, and it was known, that he desired to buy—that he considered he had a moral claim to the property—and that on the ground of that claim he hoped and wished others would abstain from bidding.

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Before the sale, viz., on the 20th February, 1868, the petitioner obtained from his father's widow, then fifty-nine years of age, and in bad health, a conveyance of her dower, upon a verbal promise, as he stated in his evidence, that he "would always do [by her] what was right." She deposed, and he in his evidence did not deny, that, to get her to give him this instrument, he told her that "such a deed must go to the sheriff to keep the people from bidding against him;" that "it was the only thing that would prevent people bidding against him." The referee held, on grounds not material to the appeal, that this conveyance and another conveyance obtained by the petitioner from his step-mother, were not binding on her; and the petitioner acquiesced in the decision.

Statement.

While the executrix executed a release upon the representation that it would prevent other persons from bidding, the executors appeared to have refrained from attending the sale; one of them had heard of the petitioner's proceedings, and remained quiescent; the other, it was stated by the petitioner, suggested to him a means of preventing the competition of *Clements*, whose competition was feared: the petitioner alleged that he did not act on the suggestion; but *Clements* did not bid.

The property consisted of two adjoining farm lots. There was a small dwelling-house on each. The two lots were put up as one parcel, which was knocked down to the plaintiff at $650. The sheriff stated that he thought there were two or three bids, but by whom or of what sums was not stated. The sum named covered the execution and sheriff's fees, and $35 more, for which sum the petitioner gave his promissory note to the executors.

It was not pretended that $650 was the value of the property. The plaintiff's own valuation was $1000

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or $1200. The Court, looking at all the evidence, considered that the cash value of the property, free from incumbrances, was about $1500; and that, allowing $250 for the widow's dower, the cash value would be $1250, or about twice the sum given at the sale; and that either lot, if sold separately, might not improbably have brought sufficient to pay the execution, had competition been secured instead of being prevented.

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

Mr. *Bain*, contra.

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Judgment.

MOWAT, V.C.—The question which I purpose considering is, whether the petitioner's purchase is, under all the circumstances shewn in the matter, maintainable in equity? Additional objections to the petitioner's title were argued on the appeal; but it is not necessary to remark on them.

In *Sugden* on Vendors (*a*) the rule is stated to be that, "as, on the one hand, a seller cannot appoint puffers to delude the purchaser, so on the other, if a person by his conduct deter other persons from bidding, the sale will not be binding (*b*).

Fuller v. *Abrahams* is referred to in support of that proposition. That case is reported in 6 *Moore* (*c*) and 3 *Broderip & Bingham* (*d*); but the former report alone shews the facts with sufficient distinctness. There at the sale of a barge by auction under an execution, a person present stated to the audience that he had built the barge for the defendant, and had not been paid for it; and he appealed to the company

(*a*) 13th Ed. p. 10.
(*b*) See also Addison on Contracts, 6th ed. p. 72.
(*c*) 316. (*d*) 116.

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not to bid against him. No one did bid against him; the barge was knocked down to him for £53 2s.; and he paid £15 deposit, in part of the purchase money. There was evidence that the barge was worth considerably more than the sum bid. The Court held that the purchaser's conduct was unfair and rendered the sale invalid. Mr. Justice *Burroughs* said, that what the purchaser did was worse than the employment of puffers by a vendor. With reference to the application of that case to the present, I may observe that a secret appeal to the feelings of possible bidders is in some respects much more dangerous than a public appeal; an open appeal may be counteracted by the persons whose interest or duty it is to get the best possible price; but a secret effort runs no such risk.

Judgment.

In *Twining* v. *Morrice* (*a*) specific performance was refused to a purchaser because, inadvertently, he happened to have employed, to bid for him, a person who was known to have been formerly solicitor for the vendor, and who was therefore supposed by the audience to be a puffer. There was no evidence that but for that circumstance the estate would have brought more. In *Rodgers* v. *Rodgers* (*b*) I had occasion to refer to that case, and to the observations upon it by Lord *Eldon* in subsequent cases.

In *Levi* v. *Levi* (*c*) it appeared that certain brokers were in the habit of agreeing together to attend sales by auction; and of agreeing that one only should bid for any particular article; and that the articles bought should be sold again among themselves. Baron *Gurney* in summing up observed: "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves of

(*a*) 2 B. C. C. 326. (*b*) 13 Gr. at 146 *et seq.* (*c*) 6 Carr & Payne 239.

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the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy."

Galton v. *Emuss* (*a*) and *Re Carew* (*b*) were cited in justification of the petitioner's course, but they are not sufficient for that purpose, and in fact have no application to his case. They were cases in which an agreement was made between two persons only, not to bid against one another. All that *Galton* v. *Emuss* decided was, that, where one party to a stipulation of that kind had got the benefit of it and purchased the property, he could not afterwards refuse at the suit of the other, to carry out the whole of the written agreement of which that stipulation was part. What *Re Carew* decided was, that "a mere agreement between two persons, each desirous to buy a lot that they will not bid against each other," is not sufficient to invalidate a sale to one of them.

Judgment.

It was said that there was no proof that the petitioner's proceedings had deterred any bidder. But no express proof to that effect was necessary. Bidders may have been deterred, and the sale damped, without its being possible to trace the fact to his proceedings. It cannot be known who would have bid but for the interference; the petitioner having endeavoured to prevent vent competition, and having afterwards bought without competition and at less than the value, it is not for him to demand that express proof should be given that the desired result was brought about by the efforts which he had made. In criminal law an attempt to commit a crime is itself a crime, though the attempt should fail.

The executrix and executors appear to have been under the idea that in the matter of the sale they owed no duty to the infant owner; and they therefore either

(*a*) 1 Colly. 243. (*b*) 26 Beav. 187.

assisted in preventing competition, or abstained from interfering with the petitioner's known endeavours for that object. But they had a duty to perform. The law regards the lands as being in the hands of executors for the purposes of an execution against the estate of their testator; and it follows that, if the heir is an infant, or not competent to look after his own interests, or if he is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale, as far as possible, as a prudent owner would. 1870. In re Davis.

On the whole case, I am of opinion that the petitioner's purchase was invalid in equity; that the purchase having been made in June, 1868, and the petition having been filed in October, 1868, it was competent for the infant contestant to set up the objection in opposition to the petition for a certificate; that the appeal should be allowed, and the petition dismissed with costs, including the costs of one notice of appeal and one hearing of the appeal; but not including the costs incurred on the inquiry as to the petitioner's debt. From these costs will be deducted $30 already advanced by the petitioner, and the costs of the day (September 7). I do not think it right to charge the infant with any other costs in favor of the petitioner. Judgment.

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HOLMES v. HOLMES.

Statute of Limitations—Possession, what constitutes in the case of joint ownership.

Two brothers were owners of land as tenants in common in fee; their father lived with them on the property and was maintained by them. One of the brothers died intestate and without issue, leaving his father his heir; the father continued to live with the surviving brother on the property, and to be maintained by him; the father did not affect to be owner of the property:

Held, that this living on the property was sufficient to prevent the Statute of Limitations from running against the father, as respected his undivided moiety.

Statement.

James Holmes, jr., and *Robert Holmes* were joint owners of the property in question in this case, and were in joint possession at the time of the death of *James* in 1841. He died intestate, and without issue, leaving his father, *James Holmes*, senr., his heir-at-law. The father died in 1853 intestate. *Robert* afterwards conveyed his interest in the south-west half of the lot to *Walter Holmes*, a defendant. The plaintiffs were two sons of the elder *James*; and the bill was for a partition and assignment to them of their shares in the property, or for a sale. The other children of *James Holmes*, senr., were defendants.

Robert Holmes claimed title by possession to the share of *James Holmes*, jr.; and the question at the hearing was, whether he was so entitled.

James Holmes, senr., was living on the property with his sons *James* and *Robert* previous to the death of *James*, and was maintained by them; and he continued until his death to live on the property with *Robert*, and to be maintained as before. It did not appear that during this period he had acted as owner, any more than previously.

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Holmes v. Holmes.

The cause came on for the examination of witnesses and hearing at the Sittings in Ottawa, in the Autumn of 1870.

Mr. *Lees*, for the plaintiffs.

Mr. *Fitzgerald*, for the defendants.

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MOWAT, V.C.—It is clear on the authorities, that the father's living on the property in the way in which he did was sufficient to prevent the Statute of Limitations from running against him. I refer to *Doe dem. Groves* v. *Groves* (*a*), and other cases cited in *McKinnon* v. *McDonald* (*b*).

Judgment.

On the part of the defendants reference was made to the doctrine, that the possession of one tenant in common is not the possession of the other, and to decided cases illustrating that doctrine. But the plaintiffs do not claim under *Robert's* possession; their claim is under the title and possession of their father himself.

The decree will be for a sale. The plaintiffs will have against the defendants *Robert* and *Walter Holmes* the costs up to the hearing, so far as they have been incurred or increased by the defence of the Statute of Limitations having been set up. Other costs to be paid in proportion to the respective interests of the parties, in the usual way.

(*a*) 10 Q. B. 486.

(*b*) 11 Gr. 432. See also Stone v. Godfrey, 5 D. M. & G. 992; Wood v. Thomas, 2 K. & J. 76; Pelly v. Bascombe, 4 Giff. 390; S. C. in Appeal, 11 Jur. N. S. 52.

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SIMMONS v. CAMPBELL.

Landlord and tenant—Adoption of lease—Defence of former suit and decree therein.

A person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant; one of the true owners shortly afterwards took an assignment of the instrument, and gave to the tenant notice of the assignment; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement:

Held, that the agreement was thereby confirmed and adopted, and was binding on the estate.

An agreement for a lease provided for the building of a barn by the tenant; the assignee of the owner, considering that a barn which the tenant had begun to build was not such as the agreement required, filed a bill for an injunction, and for specific performance of the agreement generally: the answers insisted that the barn was such as the defendant undertook to build; the Court, being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction, dismissed the bill:

Held, that this decree was no bar to a subsequent suit by the tenant for a specific performance of the agreement for a lease.

Statement. This was a suit for the specific performance of a contract for a lease to the plaintiff of certain land in the township of Hope, which he was in possession of; and for an injunction to stay an action of ejectment which the defendant had brought against him.

The plaintiff's claim arose under an instrument which is set forth in full in the report of the judgment of the Court in a suit brought against the present plaintiff by the defendant's father, under whom the defendant's title was derived; as reported *ante*, Vol. XV., p. 506. The instrument was dated the 3rd November, 18[illegible], and was made between *Elias D. S. Wilkins* of the first part, and the plaintiff of the second part. It purported to lease to the plaintiff for two years, at £80 a year, the lot of land specified therein, and comprising 200 acres; and contained the following further

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provision: "The party of the first part further agrees to lease to the party of the second part 100 acres falling to his share, for the term of ten years, at £50 per annum, payable as above; or the whole of the said lot, should he acquire it by purchase or otherwise, for the sum of £80 per annum. The party of the second part further agrees with the party of the first part to erect a barn, at the expiration of two years, 40 by 60, with 16 feet posts, and to be put upon a good stone foundation, and to erect the same upon that portion of the lot that may fall to the share of the party of the first part, free of all costs." This instrument was produced at the hearing from the defendant's custody. Its provisions implied that, at the time at which the instrument was entered into, Mr. *Wilkins* "was entitled to the whole for two years, and to an unascertained 100 acres afterwards, with a prospect of acquiring the residue" (*a*). But it appeared from the title deeds produced, that at the date of the instrument the farm belonged to Mr. *Wilkins's* two daughters, subject, as regarded an undivided half, to a mortgage executed thereon by one of them on the 10th January, 1860, in favor of the Hon. *Alexander Campbell*. On the 17th December, 1860, Mr. *Campbell* accepted from Mr. *Wilkins* an assignment of the instrument in the form of a power of attorney (prepared in Mr. *Campbell's* own handwriting), whereby Mr. *Wilkins* appointed Mr. *Campbell* his attorney irrevocably, to receive all rents which should grow due on the said lease, and to apply the same on Mr. *Campbell's* mortgage on the land.

Statement

The following memorandum was indorsed on the lease produced: "Tenant notified to pay rent to me, 26th December, 1860. A. C."

On the 31st October in the following year, the mort-

(*a*) Vol. XV., p. 510.

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gagor released to Mr. *Campbell* her equity of redemption in the undivided half.

On the 11th April, 1862, Mr. *Campbell* wrote to the plaintiff the following letter: "Dear Sir,—Your letter of the 5th reached me this morning. The lot is owned by a daughter of Mr. *Wilkins* and myself, jointly. No division has as yet been made. You will, I have no doubt, continue to be the occupant. I will try to purchase the other half next year. Anything due for arrears of taxes, if the land or anything upon the land is disturbed, I shall have to pay one-half of, and Miss *Wilkins* the other. You can go on safely under your lease. I may sell the lot, but your lease would remain binding upon the person who bought from me."

On the 7th February, 1863, the owner of the other undivided half mortgaged it to Mr. *Campbell;* and on a subsequent day she released to him her equity of redemption.

Statement.

On the 12th May, 1863, Mr. *Campbell* wrote to the plaintiff as follows: "Dear Sir,—Your letter of the 1st of this month reached me a day or two since. I am sorry that you cannot yet pay your rent, but hope that the present will be a favourable year for us all, and shall expect you to pay in full, with interest, after harvest. I now own the whole of the lot, so that you can exercise your own judgment as to the site of the barn."

On the 10th November, 1863, Mr. *Campbell* again wrote to the plaintiff as follows: "In accordance with your request, I beg to say that your rent hereafter may be paid on the 1st of April in each year, instead of the 1st of November as expressed in the lease. On the 1st of April next, you will have to pay the rent from 1st of November, 1862, to 1st April, 1864—a year and five months, at £80 a year."

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On the 28th December, 1866, Mr. *Campbell*, being then absolute owner of the whole lot, entered into a written agreement with one *Thomas Campbell*, the plaintiff in the former suit, for the sale of the property to him, subject "to the existing lease thereof to one *Symons*, still unexpired; and the current year's rent thereunder being payable to the said *Alexander Campbell*."

On the 2nd February, 1867, in pursuance of this agreement, the property was conveyed to *Thomas Campbell*, subject to the following provision: "Provided always, that the lease now outstanding in favour of one *Simmons* shall not be regarded as a breach of any of the above covenants; and that the year's rent thereunder accruing due in April next, is reserved by, and shall be paid to, the said *Alexander Campbell*."

Statement.

On the 7th November, 1867, the plaintiff paid *Thomas Campbell* $320, for which the latter gave a receipt in full of the rent for that year.

On the 11th March, 1868, *Thomas Campbell* procured the following notice to be sent by his solicitor, on his behalf, to the plaintiff: "I beg to inform you that I am instructed by Mr. *Thomas Campbell* to call on you to build the barn on lot No. 10, 6th concession Hope, according to the terms of your lease. The time for doing so having elapsed so long since, and there now being comparatively a short time of the term to run, he thinks it unreasonable that it should be further postponed. He therefore hopes that you will proceed with the work immediately. He is unwilling to put you to costs or trouble, but will be compelled to do so unless the agreement is fulfilled without delay."

In pursuance of this notice, the plaintiff, *Simmons*, commenced the erection of the barn. *Thomas Campbell*

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was not satisfied with the site which *Simmons* had selected, nor with the building he was erecting, and he therefore, on the 3rd July following, instituted a suit for an injunction in respect of the barn. This was the suit already referred to. After the dismissal of the bill in that suit, *Thomas Campbell* made a voluntary conveyance of the farm to the present defendant, and by him the suit in ejectment has been brought, which it was the principal object of the present suit to restrain.

The answer set up several defences. It insisted that *Elias D. S. Wilkins* was never the owner of the farm; that his contract gave the plaintiff no right thereto; that the acts of *Alexander Campbell* or *Thomas Campbell* gave the plaintiff no greater interest than a tenancy from year to year; that any acknowledgment which *Thomas Campbell* made to the contrary in the former suit and otherwise was made under a mistaken belief that *Elias D. S. Wilkins* had been owner when he entered into the contract; that the conveyances to *Alexander Campbell*, *Thomas Campbell*, and the defendant, respectively, were for value and were registered; that *Simmons* in the former suit resisted specific performance; and that on all these grounds he was not now entitled to relief.

The cause came on for the examination of witnesses and hearing at the Sittings in Cobourg, in the Autumn of 1870.

Mr. *Moss*, for the plaintiff.

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

Nov. 17.

Judgment.

MOWAT, V.C., [after stating the facts.]—It does not appear how Mr. *Wilkins* came to enter into the agreement in question. The deliberate and repeated recog-

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nition of it by the successive owners of the property from 1860 to 1868 is some evidence that either *Wilkins* was interested in the property in some way which is not now shewn, or was for some reason not now distinctly appearing entitled to contract respecting it with the plaintiff; or, the explanation may be, that the contract was so beneficial to the owners that, though not bound by it, they desired to have the advantage of it.

But, however that may be, the evidence demonstrates that the Honorable Mr. *Campbell* meant, to the extent of his estate and interest, to adopt and confirm the contract as a lease of the whole 200 acres; and not for the two years only, but also for the additional term which the writing specifies. A few weeks after the date of the instrument he took an assignment of it, and gave notice to the plaintiff to pay the rent to him. Then, in 1862, he wrote to the plaintiff, stating that the property belonged to him (Mr. *Campbell*) and one of Mr. *Wilkins's* daughters jointly, and that he intended to try to purchase her half. In this letter he proceeded to tell the plaintiff: "You can go on safely under your lease. I may sell the lot, but your lease would remain binding upon the person who bought from me." And when Mr. *Campbell* afterwards sold, he made the sale expressly subject to the lease. I have no doubt that by the word "lease," as thus used by Mr. *Campbell*, he referred to the whole instrument. The word is used in that sense in the assignment or power of attorney to Mr. *Campbell*. An agreement for a lease is a lease in equity; and the distinction between what constitutes a lease and what constitutes an agreement for a lease at law is often very thin. The Chancellor in his judgment in the former suit expressed a doubt whether the instrument of 1860 contemplated any future lease—whether the instrument itself was not intended to operate as a lease for the extended term (*a*).

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(*a*) 15 Gr. at 506.

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There is further evidence that Mr. *Campbell* had no idea of recognizing the instrument in part only. In 1863, he told the plaintiff that he (Mr. *Campbell*) had become the owner of the whole lot, and that the plaintiff might exercise his own discretion as to the site of the barn. From 1860, until he sold to *Thomas Campbell*, he recognized the plaintiff as tenant under the lease, of the whole 200 acres, at the rent of £80. In his contract in 1866, to sell to *Thomas Campbell*, he expressly recognized and excepted "an existing lease" to the plaintiff, and further described it as "still unexpired;" and in the conveyance made the following year in pursuance of the contract, he again recognized the lease as "then outstanding," and he stipulated that "the year's rent thereunder accruing due in April next" should be paid to himself.

Judgment.

Having meant to adopt the lease or agreement, as a lease or agreement affecting the whole for the extended term, and having induced the plaintiff to proceed on that footing, the lease or agreement was in equity as binding on Mr. *A. Campbell* as if he had entered into it himself; and it is manifest that he always so treated it.

Then, that gentleman having sold the lot, not only with notice to his vendee that the plaintiff held this claim, but expressly subject to the lease so claimed, it became binding on the vendee *Thomas Campbell*. Indeed, *Thomas Campbell's* own acts would have been sufficient to give the instrument like validity against him, for he not only bought with notice of the lease, and subject to it, but accepted the rent under it in respect of the whole lot, and through his solicitor called on the plaintiff to build the barn "according to the terms of your lease," and reminded him that there was "comparatively a short time of its term to run;" and the plaintiff did build the barn

accordingly. The defendant says, that, when these acts took place, *Thomas Campbell* was under the mistaken belief that *Elias D. S. Wilkins* had acquired the ownership of the lot. But if such a mistake would, under any circumstances, relieve him from the consequences of his acts, it would be impossible to give him the advantage of the defence in the present case, as he must be taken to have had notice of his own title as such title appeared by the deeds under which it was derived.

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As to the defence which the defendant founds on the Registry Law, I need only observe that it clearly appears, that he was not a purchaser for value; that he had notice of the plaintiff's claim; and that his grantor took both with notice of the claim and subject to it.

There remains for consideration the effect of the former suit as a defence to the present suit. The sole object of the original bill in the former suit was to obtain an injunction in respect of the barn. An amendment was made after answer, converting the bill, as the learned Judge observed (*a*), "into a bill for specific performance, but in very general terms. * * The only thing specifically pointed at as to be specifically performed" was, as his Lordship considered, "the building of the barn; the making of a lease was referred to, but only as being insisted on by the defendant, and possibly in the submission by the plaintiff to perform the agreement in all things on his part to be performed." His Lordship further held that the bill was "not framed for specific performance of any part of the instrument of 1860, other than the building of a barn," and that it was "certainly not framed to compel the defendant to take a lease." *Simmons's* answers suggested no question of *Campbell's* right to a specific performance of the agreement as to a lease; and both his answers were drawn

Judgment.

(*a*) p. 511.

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with reference to the relief asked as to the barn only. At the end of each answer was the usual prayer that the bill should be dismissed. Having in view the observations in the judgment, and the terms of the answers, I am clear that the decree of dismissal is no bar to the present suit.

I have mentioned the doubt which was expressed in the judgment, as to whether the instrument in question did not operate as a present demise for the extended term. But the plaintiff, *Thomas Campbell*, had alleged in his bill that *Elias D. S. Wilkins* became seized of the whole lot, and that his estate was then vested in *Thomas Campbell;* and there can be little doubt that it was in consequence of that supposed state of facts that *Simmons's* counsel did not ask for or desire a decree of specific performance in that suit. But it now appears that *Wilkins* had no legal interest to demise; and both parties admitted at the hearing before me that the instrument gave to the present plaintiff no legal interest.

Judgment.

A question was suggested but not argued, as to whether the ten years' term should include the two years' term. I think the two years' term is not included. The words of a lease are to be construed most strongly against the lessor; and I think that the intention to make the ten years' term to begin at the expiration of the two years is indicated by the fact that the parties certainly contemplated in one event a lease for ten years at £50; but the lease for two years was to be of the whole lot at £80; and to reconcile these two things an intention must be presumed that the ten years for the 100 acres at £50 were to commence after the conclusion of the two years at £80. I think it follows that the ten years' term, whether of the 100 acres or of the whole lot, must be taken to have commenced at the expiration of the two years' term.

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Simmons v. Campbell.

The decree will be as prayed, with an inquiry (if the defendant desires) as to whether the barn erected by the plaintiff complies with the plaintiff's agreement; and what, if any, damage the defendant sustains by its insufficiency. In making this inquiry there is to be no question as to the site selected. The costs of the inquiry will be reserved unless the parties agree otherwise. The other costs of the suit the plaintiff must receive.

SINCLAIR v. DEWAR.

Assignment of mortgage by administratrix—Power of attorney to creditor irrevocable—Parol evidence.

The administratrix of a mortgagee executed an instrument purporting, in consideration of $1, to assign the mortgage to the plaintiff who was her brother, and he executed a bond binding him to pay her one-half of the mortgage money as received:

Held, as between the plaintiff and the mortgagor, that this was a valid assignment.

A person intending to take out letters of administration to the estate of a mortgagee, executed a power of attorney authorizing the person therein named to receive mortgage money; letters of administration were subsequently obtained as contemplated:

Held, that the power was effectual with regard to sums received by the appointee after the issue of the letters.

In such a case the appointee was a creditor of the intestate, and the power was given upon a verbal agreement on the part of the administratrix that the appointee should pay himself out of any moneys he might receive, and the appointee accepted the power on that condition:

Held, that until the debt was paid the power was irrevocable.

Statement.

Examination of witnesses and hearing at London at Autumn Sittings, 1870.

Mr. *Barker*, for the plaintiff.

Mr. *Meredith* and Mr. *Rock*, for the defendant.

1870.

Sinclair v. Dewar.

Nov. 25.

Judgment.

SPRAGGE, C.—The mortgage for the foreclosure of which this bill is filed was made by the defendant to *Donald Sinclair*, deceased. The plaintiff is the assignee of the administratrix of the mortgagee. The first point raised is, whether the plaintiff has any *locus standi* in Court. The consideration expressed in the assignment is one dollar, and it is objected that it is a nominal consideration, and can pass no interest; that it is *a gift* of personal assets, which it is not competent for a personal representative to make. To prove consideration a bond is put in from the assignee to the administratrix, reciting in effect that she and one *Dugald Sinclair* were the sister and brother of the intestate mortgagee, and binding the obligor to pay to her one-half of the mortgage money as received. In this instrument it is assumed as of course that there were no debts to be paid, and the same was assumed in a power of attorney given some time before—14th March, 1868—by the same brother and sister to the same party, the plaintiff. The bond divests the assignment of the character of a gift of assets. It is an engagement to account to one of the next of kin for her proportion of assets received by him, and he would no doubt be bound to account for *all* that he should receive. It is an assignment for consideration, sufficient, I think, to pass an interest to the assignee, and give him a *locus standi* in Court.

The mortgage money in question is an instalment of mortgage money amounting to $140, payable 3rd January, 1869, with interest. An actual payment of $140 was made on the following day (the 3rd being a Sunday), by the mortgagor, to *Alexander Dewar*, a previous payment of $40 having been made by the same to the same party. I think these payments are established in evidence. The payments were made to, and were received by *Alexander Dewar*, as attorney of the administratrix, under a power of attorney dated 27th July, 1868. The letters

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Sinclair v. Dewar.

of administration had not been issued at that date, but were in contemplation, and the power authorized the attorney to receive the moneys that might be payable to the constituent as administratrix of the estate of the intestate. The power is sufficient in its terms to authorize the receipt of the mortgage money in question, and a payment of mortgage money under it would, I think, be a good payment against the administratrix, if the power were still in force. The letters of administration bear date 24th October, 1868—consequently after the giving of the power and before the payment of the mortgage money.

The assignment of the mortgage to the plaintiff was not made till after the payment of the mortgage money. The plaintiff's case is that the power of attorney to *Alexander Dewar* was revoked, and its revocation made known to the mortgagor, and to *Alexander Dewar* also, before the payment of the mortgage money. That the mortgagor was so informed (which is the material point) is established in evidence. There is less evidence as to the attorney being also so informed, but I think that also is proved. The question most discussed was whether there was an effectual revocation.

Judgment.

A paper is put in, which is in the form of an affidavit made by *Mary Baxter*, the administratrix, on the 2nd of October, 1868. The greater part of this paper is expressive of the regret of Mrs. *Baxter* at having believed representations of *Alexander Dewar*, injurious to the character of *Dugald Sinclair* the younger, who was, as the paper says, appointed by herself and her surviving brother, their attorney, to manage the estate of their deceased brother, *Donald Sinclair*, and at having been thereby induced to appoint him, *Dewar*, her attorney; and the paper concludes thus: "Which act I do deeply regret, and do now declare my said power to the said *Alexander Dewar* cancelled, and annulled to all intents

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and purposes whatsoever, fully ratifying and confirming the power by me granted to my said nephew." I think the execution of this paper, and that *Mary Baxter* understood it, are proved, and other papers are proved which confirm this.

It may seem strange that the mortgagor should persist in paying *Alexander Dewar* after being notified that the power to him was revoked, but it does not lead me to doubt that he was so notified. *Alexander Dewar* was his father, and claimed to be entitled to a considerable sum against the estate of the intestate on account of board and lodging. The intestate had lived with him, as he swears, for three years, at an agreed price for board of $2 a week, and he claims that $250 was still due to him. This will account for the payment, notwithstanding the notification of the power being revoked.

Judgment.

But the defendant contends that under the circumstances it was not competent to the administratrix to revoke the power; that it was a power coupled with an interest, and therefore not revocable; and in addition to this legal position taken by the defendant, he gives some evidence that he accepted the power, with the agreement, on the part of the administratrix, that he should pay himself out of any moneys he might receive. Mr. *Horton*, by whom the power of attorney was drawn, says that his claim was spoken of, and that he was to apply what money he collected first to pay off his own claim, and that "Mrs. *Baxter* consented to this arrangement;" and *Alexander Dewar* himself puts it more strongly; he says he accepted the power on these conditions, that he would have to pay Mrs. *Baxter* her own share of the money, and have full liberty to keep his share, his share being, as he explains, the debt of the intestate for the board and lodging of the intestate.

1870.

Sinclair v. Dewar.

Upon the point whether this is such a power, coupled with an interest, as is not revocable, I think the weight of authority is in favor of the defendant. The fact of the existence of the debt is confirmed by the evidence of the plaintiff himself; and taking the evidence of Mr. *Horton* and of *Alexander Dewar*, there was a valuable consideration for the giving to the latter, by Mrs. *Baxter*, authority to receive the money. A pre-existing debt is sufficient. This was the case in *Gaussen* v. *Morton* (*a*). A debtor executed a power of attorney to a Mr. *Forster*, one of his creditors, to sell certain of his lands and receive the purchase money, and it was held not revocable. Lord *Tenterden*, by whom the judgment of the Court was delivered, held that the power of attorney was not a simple authority to sell the premises, but "an authority, coupled with an interest, for *Forster* to apply the proceeds in liquidation of a debt due to himself and his partners," and his lordship adds, "and there are several cases in which it has been held that such an authority cannot be revoked." I would refer upon the same point to *Hodgson* v. *Anderson* (*b*), to *Metcalfe* v. *Clough* (*c*), and to the language of Lord *Truro* in *Smart* v. *Sandars* (*d*), and there are other cases more or less bearing upon the same point.

Judgment.

The principle is, indeed, analogous to that upon which this Court proceeds in the case of equitable assignments. In each case authority is given by a debtor to his creditor to receive from a third person, who is indebted to the debtor, the amount due from him. The form of the authority given is different, but otherwise the transactions are alike in character. It would not be contended, I apprehend, that an order operative as an equitable assignment would be revocable by the party giving it.

(*a*) 10 B. & C. 731.
(*b*) 3 B. & C. 642-51.
(*c*) 2 M. & R. 178.
(*d*) 5 C. B. 916.

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Sinclair v. Dewar.

I am referred by the plaintiff to the case of *Lepard* v. *Vernon* (*a*), before Sir *William Grant*, but the case is distinguishable in this, that the debtor died, and the same was the case in *Mitchell* v. *Eades* (*b*), and in *Watson* v. *King* (*c*). The decision in *Lepard* v. *Vernon* was placed upon this, that there was no appropriation of the debt; but in addition to this, it would appear from the decision that the death of the constituent would necessarily operate a revocation of the power, and the decision was put upon that ground in *Watson* v. *King;* see also *Shipman* v. *Thompson* (*d*). I would also refer to the able judgment of Chief Justice *Marshall*, in *Hunt* v. *Rousmanier* (*e*), where reasons are given why a power of attorney, unaccompanied by an assignment, though it may be irrevocable by the constituent in his lifetime, is necessarily revoked by his death.

Judgment

The principle upon which *Gaussen* v. *Morton* was decided appears, then, to apply to this case, unless it is differed by the circumstance of the constituent being a personal representative of the debtor's estate, and not the debtor himself; and that the power of attorney was general, to receive all moneys due to the estate, particularizing, however, the mortgage in question, together with some other debts. I do not think that these circumstances can take the case out of the general rule. There is no question of preference in the case. It is not suggested that the estate was not sufficient to pay all debts and leave a surplus.

A personal representative may give a power of attorney in a proper case, and he may deal with the assets. If the debt due to *Alexander Dewar* had been equal in amount to the mortgage debt due by *John Dewar*, it

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(*a*) 2 V. & B. 51.
(*b*) Prec. in Chy. 125.
(*c*) 4 Camp. 272.
(*d*) Willes, 103.
(*e*) 8 Wheaton, 202.

would have been competent to the administratrix to deliver the mortgage to *Alexander* in satisfaction of his debt; and, *pari ratione*, his debt being less than the mortgage debt, to authorize him to receive it and to apply it *pro tanto* to the discharge of his debt. If doing this would be within the scope of her authority, I conceive that her act would bind herself and the estate and would not be revocable where the like act by an individual debtor would not be revocable. It was not contended, indeed, that the power, if it were irrevocable in case it were given by an individual debtor, would not be so where given by a personal representative to a creditor of the estate, and I see no reason for any difference. 1870. Sinclair v. Dewar.

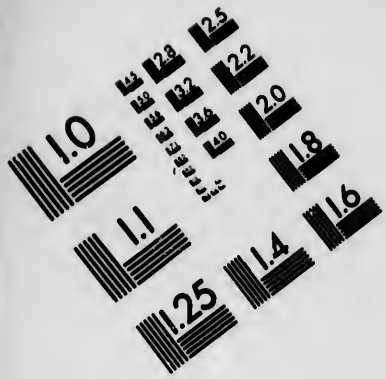
The only instalment that had fallen due upon the mortgage was the one in question. If that was rightly paid the defendant was in no default, and there was no ground for filing the bill. I think the instalment was rightly paid, and that the bill should be dismissed, and it must be with costs. Judgment.

Brant v. Willoughby.

Appointment of receiver—Appeal.

Although the appointment of a receiver by the proper officer of the Court should not be lightly disturbed, still in a case where it appeared that there was personal ill-feeling between the person appointed by the Master and some of those interested, and that a person who had been proposed by other parties to the cause was, owing to his business habits, likely to be better qualified to discharge the duties of receiver, and was entirely unexceptionable, the Court vacated the appointment made by the Master, and ordered the other to be appointed.

Appeal from the order of the Master at Walkerton appointing a receiver.



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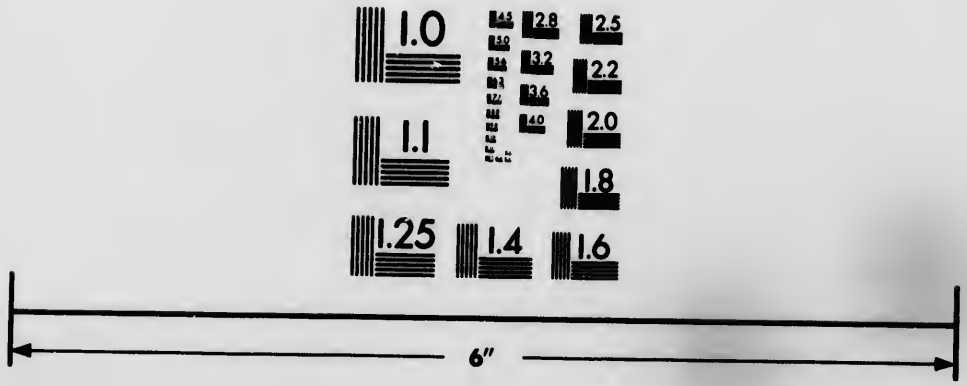

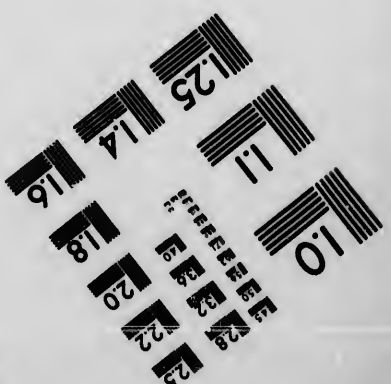

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Brant v. Willoughby.

Mr. *Bain*, for the appeal.

Mr. *Bethune*, contra.

Nov. 23. SPRAGGE, C.—I have read carefully the affidavits and other papers placed before me upon this appeal. From what is disclosed by them, I should, if making the appointment, have felt no hesitation in appointing Mr. *Totten* in preference to Mr. *Hall*. I say this without impugning, in the slightest degree, the integrity or the perfect respectability of Mr. *Hall*, or, in the abstract, his fitness for the office. I think that an appointment made by the proper officer of the Court should not be lightly disturbed; but it seems to me that some considerations are entitled to more weight than the Master appears to have given to them.

Judgment. A considerable portion of the affidavits is devoted to the relative merits of the two gentlemen proposed, in regard to their fitness for the office, and the manner in which they would discharge its duties. Upon that point the weight of evidence appears to me to be in favor of Mr. *Totten*, inasmuch as those who speak to his fitness are more competent judges of such matters than those who speak to the fitness of Mr. *Hall*. Men of business, merchants, bankers, official assignees, are, as a rule, more competent judges of business capacity than farmers.

I do not know, however, that I should upon that ground alone disturb the finding of the Master. But there are other circumstances. There has been personal ill-feeling between the creator of the trust and Mr. *Hall*. It may be without reason, still it is better *ceteris paribus* to appoint a person between whom and all who are interested in the trust estate a good feeling prevails. It is more likely to promote a harmonious and satisfactory execution of the trusts.

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According to some of the evidence there has been more than ill-feeling. Threats, it is alleged, of leaving nothing of the estate to come to *McVicar*. This, in its ordinary meaning, would import that he would so manage the estate as to exhaust it in paying *Bruce*, the first mortgagee, and the plaintiffs. This may admit of explanation; his meaning may have been misunderstood; but when he was before the Master, on the 13th of October no denial appears to have been made or explanation offered in regard to it.

Some exception is taken to his former management of the trust—that he took insufficient security. That may be a matter of opinion. It is also objected that upon the sale of a number of parcels of the trust estate he so dealt in regard to certain lots purchased by Mr. *Bruce*, that the estate was a loser. This also is left unexplained.

Judgment.

Mr. *Hall's* experience in his former management is urged as a reason for his appointment now. I scarcely think that it is a good reason. He threw up the management in 1862, for what reason, or whether for any reason, does not appear. His previous management does not seem to have been satisfactory to all the members of the Township Council, for one of that body, who now makes an affidavit in support of his appointment, only says that a majority of the Council were then willing to retain Mr. *Hall* if he were willing to continue trustee. As to his experience, it cannot count for much, for the estate has been out of his hands since 1862.

His throwing up of its management has been the occasion of trouble, and probably of delay, and has, moreover, occasioned this suit. Why he should seek now what he then abandoned, or why Mr. *Bruce* should now propose him, is not explained. I think his having thrown up the management in 1862 is a reason against his appointment now.

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Mr. *Hall's* appointment was proposed and pressed by *Bruce*, the first mortgagee; Mr. *Totten's* by the plaintiff. The latter would seem to have a greater interest in the due and careful execution of the trust. If, indeed, there were reason to fear that Mr. *Totten* would make unreasonable delays, in order to realize, for the benefit of the plaintiffs, as much as possible out of the estate, and that so Mr. *Bruce* would be prejudiced, that would be an objection; but it is not said that this is apprehended.

It is necessary for the Court in a proper case to review the discretion exercised by the Master in making these and the like appointments. I refer to the judgment of Lord Justice *Turner* in *In re Tempest* (*a*), for an exposition of the principles upon which the Court proceeds in such cases. In this case I think Mr. *Totten* should have been appointed instead of Mr. *Hall*, and I

Judgment.

will take the course that was taken in *In re Tempest*, and make an order for his appointment, and for the vesting of the estate in him. In giving the preference to Mr. *Totten* over Mr. *Hall*, it is not necessary to say, nor do I mean to say, that he has been guilty of the mismanagement of the estate imputed to him. It is apparent from the affidavits that his future management would be viewed with doubt and suspicion by some, who are interested in the proper management of the trust. I have thought it better that one should be appointed who is entirely unexceptionable.

In regard to costs, the hearing of this appeal was followed immediately by the hearing of a petition by the plaintiff, which was opposed by *Bruce*, and which I thought ought not to be granted; and I said that I would fix the amount of costs to be paid to *Bruce*. Upon the appeal which I have just disposed of the

(*a*) L. R. 1 Chy. App. 487.

plaintiffs are successful. It is not necessarily a case for giving costs, being an appeal from the Master; but as each is successful in one of these applications, and unsuccessful in the other, I will leave the parties to pay their own costs in each.

1870.

Brant v. Willoughby.

BARKER v. ECCLES.

Mortgages—Purchase of equity of redemption—Priority.

There were two mortgages on the property in question: *O.* bought the first mortgage, and subsequently the equity of redemption:

Held, that the second mortgage did not thereby acquire priority over the first mortgage by the circumstance of the instrument executed by the first mortgagee having been in form a mere grant and release to *O.* of the mortgagee's estate at law and in equity in the property;

Nor by reason of the purchaser having given a mortgage on the property to secure a portion of the purchase money which he was to pay for the first mortgage;

Nor by reason of his subsequently conveying portions of the property to his sons, in terms subject to such mortgage.

Statement.

This was an appeal from the report of the Master at London, dated 28th June, 1870, made in pursuance of the decree drawn up on the judgment reported *ante* page 277. The appeal was by *Thomas Pettiman*, an incumbrancer, by virtue of a mortgage dated 15th January, 1862, who contended that he was entitled to priority over the defendant *Henry B. Ostrander* who, though an incumbrancer under a mortgage dated 12th October, 1860, had lost his priority by reason of his having bought up the equity of redemption and conveyed portions of the estate to two of his sons, subject to *Pettiman's* mortgage.

The other facts are fully set forth in the judgment.

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Barker v. Eccles.

Mr. *English*, for the appeal.

Mr. *Ferguson* for *Ostrander*, contra.

Nov. 23.

SPRAGGE, C.—I think that the proper conclusion, from the evidence, as to the order in which the *Connolly* mortgage, of which *Pierce* was the holder, and the equity of redemption, were acquired by *Ostrander*, was, that the equity of redemption was acquired first. They were both acquired on the same day, and on the same occasion, the owner of the equity of redemption, *McSloy*, as well as *Pierce*, being present with *Ostrander*. In *Ostrander's* narrative of what occurred he states first his dealing with *Pierce*, and proceeds: "I then gave *McSloy* about $100 for what share he had in the place; I supposed for any interest in the place." *Ostrander* was cross-examined, but not upon that point.

Judgment.

I incline to think that it makes no difference which is first; but taking the fact to be that *Ostrander* became assignee of the mortgage before he purchased the equity of redemption, the case is brought directly within our statute, which in terms enables a prior mortgagee or his assignee to acquire the equity of redemption "without thereby merging the mortgage debt as against any subsequent mortgagee."

I have examined the authorities to which I have been referred, and some others, and the inclination of my opinion is that, independently of the statute, the law is now settled by authority, as the statute settles it. Unless, therefore, there is something in this case to take it out of the general rule, *Ostrander* is entitled to hold the *Connolly* mortgage, retaining its priority over the subsequent mortgage to *Pettiman*.

One circumstance relied upon by counsel for *Pettiman* is this, that *Ostrander* made a mortgage to *Pierce* for a

portion of the purchase money of his mortgage; and *Tyler* v. *Lake* (*a*) is referred to. That case was peculiar in its circumstances. It was not a mere question between a prior and subsequent incumbrancer, and it was decided expressly upon the ground that if a charge created by a former owner were allowed as still subsisting, it would be a fraud upon an insurance company, to whom a tenant in common, who upon partition had obtained a portion of the land, had created a mortgage. In this case, on the contrary, is would be a fraud upon *Pierce* if he were postponed to *Pettiman*.

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Another ground taken is, that conveyances made by *Ostrander* to two sons, to each a portion of the land in question, were made in terms subject to the mortgage to *Pierce*. *Ostrander* swears that at the time of making these conveyances he was not aware of the existence of the mortgage to *Pettiman*; but if he had known of it, the conveyances would still have been in the same shape. It is plain from the evidence that it was the intention of himself and of *Pierce* that he should have the same position and rights in regard to the mortgaged premises as *Pierce* had, subject only to his mortgage to *Pierce*; and the conveyances to his sons transmitted to them the same position and rights, together with what he had acquired from *McSloy*, and were appropriate for that purpose. I see nothing in these conveyances to shew that *Ostrander*, when he acquired the mortgage from *Pierce*, intended to merge it in the equity of redemption, or that he had such intention when he acquired the equity of redemption, nor do I see that they can have any such legal effect.

Judgment.

I do not think there is anything in the circumstance that the instrument by which *Pierce*, as holder of the *Connolly* mortgage, transferred it to *Ostrander*, is in

(*a*) 4 Sim. 351.

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the form that it is. It is not in terms an assignment of a mortgage, but purports, in consideration of $1500, to grant, release and quit-claim all the estate, right, title, interest, claim and demand, both at law and in equity, or otherwise howsoever, of *Pierce*, of, in, to, or out of, certain premises therein described, and which are in fact the premises previously mortgaged to *Connolly* and *Pettiman*. It is not denied that the instrument was effectual to pass the legal estate, and as was said 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." The argument is that the form of the instrument is an indication of the intention of the parties to it that the mortgage should not be kept alive. I do not agree that it is so; but at any rate the evidence negatives any such intention. *Pierce*, in his evidence, says, "In this transaction it was my intention to place Mr. *Ostrander* in the same position with regard to the mortgage as myself, viz., to transfer all my rights to him; so Mr. *Eccles* (*Pierce's* solicitor) advised me. The mortgage was handed over to him to carry out that intention." It appears by the evidence that it was not a mere speculative purchase on the part of *Ostrander*, for he paid the whole mortgage debt, principal and interest, to *Pierce*. It amounted to $1762. He paid to *McSloy* $100, or, as he corrects himself, $180 odd, and he puts the value of the place at $2000. It is probably true, as he states, that he was ignorant of the *Pettiman* mortgage. He made the purchase, as he says, for his sons, and it is certain, I think, from the evidence, that it was not, as suggested by Mr. *English*, a purchase made up of the amount of the two mortgages and a certain sum beyond their amount, the aggregate being

Judgment.

(*a*) 9 Ves. 411.

the agreed value or purchase money of the land. If it were so, it might admit of other considerations. A purchaser attempting to keep alive a prior mortgage under such circumstances would be doing a dishonest act, and the Court would, I apprehend, in such a case, certainly not presume such an intention. It would be, as put by Sir *Roundell Palmer*, in *Davis* v. *Barrett* (*a*), "to raise a presumption in favor of his interest at the expense of his honesty, and equity would infer that he did what he ought to have done."

1870.

Barker v. Eccles.

I do not think myself that notice has anything to do with the case, though a passage in the notes to *Forbes* v. *Moffatt*, in *Tudor's* Leading Cases (*b*), implies that it has. 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 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. In the case before me there is, indeed, no actual notice, but only the constructive notice with which registration affects a subsequent purchaser; but even actual notice would, I apprehend, make no difference. I do not see how it would stand in the way of a party doing that which the statute expressly authorizes him to do.

Judgment.

The appeal is dismissed with costs.

(*a*) 14 Bea. 552.

(*b*) P. 856.

1870. In same case in XVIII Grant 684.

McKINNON v. ANDERSON.

Mortgage—Suit to redeem—Costs.

A first mortgagee is entitled as against the owner of the equity of redemption to add to his debt the costs necessarily incurred in a suit to redeem, which was brought by a second mortgagee, and was dismissed with costs for the default of the plaintiff therein.

But where a first mortgagee had taken a decree for dismissal on the plaintiff's default, instead of giving to the owner of the equity of redemption a day to redeem under the General Order (466), and a second suit became necessary in consequence, he was held not to be entitled to the extra costs thereby occasioned.

Examination and hearing at the Autumn Sittings of 1870, at Belleville.

The bill was by *Lachlan McKinnon* against *William Anderson*, one of the defendants to the suit of *Grahame* v. *Anderson*, reported *ante* vol. xv. p. 189. The facts sufficiently appear by that report.

Mr. *English*, for the plaintiff.

Mr. *Hodgins* and Mr. *Dougall*, for the defendant.

Nov. 30. Judgment. MOWAT, V. C.—The order drawn up under my judgment in *Grahame* v. *Anderson* provided that, in case the plaintiff therein and *Hime* did not redeem *Anderson*, the bill should be dismissed with costs. The Consolidated Order (*a*) enables a mortgagee, defendant in a suit for redemption, to take a decree for foreclosure against the plaintiff, and for the proper relief as against his co-defendants, as in case of a foreclosure suit. But the order is permissive only; and *Anderson* had a right to have the bill dismissed on the plaintiff's default, instead of availing himself of the privilege which the general order gave him. *Grahame* and *Hime*

(*b*) No. 466.

1870.

McKinnon v. Anderson.

did not redeem him; and the order for dismissal in consequence of the default was taken out. *McKinnon* has since tendered to *Anderson* the amount found in that suit to be due by *McKinnon* for principal and interest; but *Anderson* declined receiving it, claiming, amongst other things, to be entitled to the costs of that suit, which he had been unable to recover from the plaintiff therein; and to the two per cent. additional interest which *Anderson* had unsuccessfully claimed in that suit. *McKinnon* has in consequence filed the present bill. The only question is, whether *Anderson* was entitled at the time of the tender to the additional sums which he then claimed, and still claims, against *McKinnon*.

If, instead of an order of dismissal being taken on the plaintiff *Grahame's* default, *McKinnon* had had a day to redeem, my judgment as reported would have entitled *Anderson* to charge *McKinnon* with the whole costs; and on his default to foreclose him. A first mortgagee is always entitled, as against the owner of the equity of redemption, to costs necessarily or properly incurred in defending his title, or in enforcing his security. The effect, and only effect, of a mortgagee's not taking advantage of the General Order, and of his thus occasioning another suit, seems to be that he may not be afterwards entitled to more costs against the other parties than if he had taken such a decree as would have rendered the second suit unnecessary.

Judgment.

McKinnon assumed that after *Anderson* had taken an order dismissing the bill with costs against *Grahame*, all that he (*McKinnon*) was liable for was his debt and interest; and he therefore tendered the amount and no costs. I cannot say that that tender was sufficient.

I think that *Anderson* cannot reopen the question as to the two per cent. He raised it in that suit, first before the Accountant, and then on further directions;

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McKinnon v. Anderson.

and it was disallowed. The adjudication of that point is the only benefit which *McKinnon* got from the suit the costs of which *Anderson* claims against him.

As *Anderson* alone had a right to have the decree in the form authorized by the Consolidated Order (*a*), I must presume, in the absence of evidence to the contrary, that it was at his instance that that course was not taken. If it had been taken, the questions discussed in the present suit would not have arisen, and the suit itself would have been saved. The defendant has also set up various claims by answer which have not been substantiated. I think that he should have no costs of this suit.

Judgment.

Usual redemption decree, except as to costs. Amount to be paid—$600.26, with interest from the 30th October, 1869,—as I presume there has been no change in the account since that amount was ascertained.

Heenan v. Dewar.

Nuisance—Acquiescence.

In 1861, while defendant was engaged in erecting buildings for a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged the defendant to proceed with his project; the buildings were proceeded with, and business in them was commenced the same year; in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining:

Held, that by his conduct he had debarred himself from relief in equity, on the ground of a tannery being a nuisance.

This cause came on for examination of witnesses and hearing at the Autumn Sittings of 1870, at Ottawa.

(*a*) No. 466.

1870.

Heenan v. Dewar.

Mr. *Cattanach* and Mr. *Driscoll*, for the plaintiff.

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

Nov. 30.

MOWAT, V.C.—The bill in this cause (filed 18th June, 1869) states, that the plaintiff owns a certain lot No. 12 (therein specified) in the Town of Pembroke; that he resides thereon, and that he carries on business thereon as a general store and shop-keeper; that the defendant occupies an adjoining lot, and carries on the business of tanning leather thereon; that the atmosphere in the vicinity of the defendant's business is,—(1) by reason of the odors emitted in the process of tanning; and (2) the storing of hides in a state of partial decomposition and otherwise; and (3) by reason of the defendant's throwing the horns attached to the hides on his premises,—so polluted that (1) the plaintiffs property has become very much impaired in value, and that (2) the lives and health of himself and his family are so endangered and impaired that the plaintiff or his family cannot live on the premises with comfort and safety.

Judgment.

The bill further states, that the impurity of the atmosphere, caused as aforesaid, (4) prevents persons from doing business with the plaintiff who would otherwise do so; that the plaintiff has not in any way acquiesced in the nuisance created by the defendant's business, but, on the contrary, has frequently requested the defendant to abate and discontinue the same; and that on the 20th April, 1869, he served the plaintiff with a written notice to the same effect, threatening also an immediate application to this Court. The bill further states, that the plaintiff owns other lots, numbered 17 and 18 and described in the bill; that on these lots houses have been erected; and that the defendant causes and permits the waste and polluted waters used in his business to overflow part of those lots. The prayer is for an injunction, restraining the defendant from continuing his business;

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and from overflowing the plaintiff's premises to the detriment and injury of the plaintiff and his property; or from interfering with the plaintiff in the enjoyment of the said property; and for other relief.

I stated at the close of the argument, that the plaintiff's evidence had failed to make out his case as to the alleged overflowing of Nos. 17 and 18.

Having since read over and considered the evidence repeatedly, I am further of opinion that, of the three causes to which the plaintiff's bill ascribes pollution of the atmosphere at No. 12, the evidence (which is contradictory) proves one only to be well founded, viz., the odours emitted in the process of tanning. These odours are not shewn to have been ever perceived at the plaintiff's shop, or within his house or outbuildings; but are, I think, shewn to have been perceived in his yard, and on his verandah which faces the defendant's premises. These odours are incident to tanning operations; and it does not appear that there is any way of preventing them. The bill greatly exaggerates their effect. They have not injured the plaintiff's business; and I am not satisfied that they have lessened the value of his property. They are not proved, either, to be dangerous or injurious to life or health at the plaintiff's premises; but, so far as perceived there, they are disagreeable, and therefore may be said to affect the comfort of those who reside there and perceive them. What I have to consider is, whether, under all the circumstances, that entitles the plaintiff to relief in this Court?

Judgment.

The plaintiff alleges in his bill, that he "has not acquiesced in any way in the (alleged) nuisance created by the defendant's business." The defendant on the other hand alleges by his answer, that he was encouraged by the plaintiff to commence the business, and that the plaintiff sold to him a quantity of hides to be tanned at the

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tannery. It appears that the plaintiff was in the personal occupation of No. 12 before the defendant commenced the erection of the tannery buildings on the adjoining land; he admitted in his evidence that he had known of the tannery being put up, but he named the wrong year of this being done. I am satisfied that the tannery was built and some business done in it in 1861; that the last additions to the buildings were made in 1863; that the business has been carried on continuously since it was begun; and that until 1868 the plaintiff made no complaint to the defendant about it. A person who had been in the plaintiff's employment for four years, terminating in the Spring of 1865, deposed that until a municipal election to which he referred, he had never heard the plaintiff complaining of smells from the defendant's premises. It seems that the defendant voted against the plaintiff as Reeve in January, 1867, and January, 1868; and it is one or other of these elections to which the witness referred. I am satisfied, from the whole evidence at the hearing, that it was not until this period that the plaintiff professed to anybody that he had any grievance to complain of in connection with the plaintiff's premises. But the commencement of the complaints then may have been a mere coincidence; the plaintiff may in 1861 have considered the establishment of the tannery to be for his own interest; but the progress of Pembroke, and perhaps his own increasing wealth, may naturally have led to a different view six or seven years afterwards.

Judgment.

The defendant in his evidence (which was given with every appearance of conscious truthfulness) stated that while the tannery buildings were being erected in 1861, the plaintiff encouraged the defendant in his project; told him that it was the best thing he could do; that it was a money-making business; and that certain persons named and known to both, had made their first rise in that business.

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Before the defendant gave his evidence, the plaintiff had been examined on his own behalf; and he had made on cross-examination the following statements: "I recollect no conversation before 1867; I don't think I had any before that, about the buildings or the nuisance. I believe I did not say to Mr. *Dewar* that I was glad the tannery was going up, or to that effect. I think I can swear to that; I did not express approval of the tannery going up." On being recalled in reply, he said positively that no such conversation occurred as the defendant had sworn to. I think, however, that it may have occurred, and the plaintiff may have nine years afterwards forgotten it (*a*). Pembroke was a village at the time the conversation is sworn by the defendant to have taken place; defendant and plaintiff were neighbours; they owned and carried on business on adjoining lots, the plaintiff as a general shop-keeper, and the defendant as a shoemaker; and they were extremely likely to have had some conversation about buildings which the one was erecting so near the property of the other. If any conversation did occur, it was likely to be of encouragement and approval on the plaintiff's part; for the plaintiff does not appear to have for six or seven years afterwards either made or felt any objection to the near proximity of a tannery; and his objection does not seem to be now participated in by the other neighbours. I think that I should accept the defendant's statement of the conversation as in substance and effect true and correct.

Judgment.

Bankart v. *Houghton* (*b*), decided in 1860, related to works erected for the manufacture of copper. In the reduction of copper ore noxious vapors are liberated, and these exhalations and the deposit produced are highly injurious to vegetation, and to animals which feed on the pastures within their influence. The tenant through whom the defendant claimed saw the buildings

(*a*) See ex parte Danks, 2 DeG. McN. & G. 940. (*b*) 27 B. 425.

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while in course of erection, and took no steps to prevent the erection. Lord *Romilly* held that on these facts the defendant had debarred himself from any right to relief in equity, and was left to his remedy at law. His Lordship was of that opinion, though he was "satisfied on the evidence that the defendant did not know what the injurious consequences would be to his crops and flocks." (The party had erected additional works of the same kind, in which additional works the other had not acquiesced; the suit was by the party guilty of the nuisance, and was for an injunction against legal proceedings by the other: that relief the Master of the Rolls refused to give.) The opinion of Lord *Romilly* is thus against the plaintiff's contention, that his passive acquiescence, without express proof that he knew the effect which a tannery would have in producing disagreeable smells, is not material. I refer also to *Dann* v. *Spurrier* (*a*), and *Rochdale Canal Company* v. *King* (*b*).

Judgment.

But, however that may be where there is passive acquiescence only (*c*), I think that, as in the present case there was express, and not merely passive, encouragement, while the first buildings were being erected, and as no complaint or objection was made by the plaintiff for nearly seven years afterwards, nor until four years after important additions had with his knowledge and acquiescence been made and put in operation by the defendant—the plaintiff has debarred himself of the right to relief in equity.

I have thus disposed of the matters raised by the pleadings. Some evidence was given on charges which the bill does not make. As to some of these I stated at the close of the argument, that I was of opinion the

(*a*) 7 Ves. at 235, 236.
(*b*) 2 Sim. N. S. at 88; S. C. 16 Beav. at 633, 634.
(*c*) Radenhurst v. Coate, 6 Gr. 139.

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weight of evidence was not with the plaintiff. I refer to the statements made in the evidence of the plaintiff and of some of his witnesses, that putrid liquid matter is carried to the plaintiff's well and yard from the defendant's premises. Evidence was also given that an offensive smell is produced by the hair which the defendant has been in the habit of spreading on a shed adjoining the plaintiff's property. That is not mentioned in the bill, and is a matter of small moment as compared with the relief sought. I think that the defendant has no right to subject the plaintiff to this smell; and he will do well to avoid henceforward this cause of complaint; but, as the plaintiff has failed to make out his right to relief in equity in respect of the principal matters in question, I cannot properly make a decree in respect of this minor matter of which the bill makes no complaint. The plaintiff's principal witness complained of a nuisance to the witness by the discharge of the waste water of the defendant's tannery drain near the witness's house. That is 250 feet from the plaintiff's premises, and the nuisance at the witness's property does not in any way affect the plaintiff; but the defendant, for the sake of his own interest, and of those whom the nuisance there does affect, should see to its being immediately remedied.

Judgment.

The bill must be dismissed with costs.

1870.

THE COUNTY OF FRONTENAC v. BREDEN.

Principal and Surety—Lapse of time—Destroyed bond—Municipal corporation—Application of payments

One of the sureties for the treasurer of a municipal corporation being desirous of being relieved from his suretyship, the treasurer offered to the council a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds, the withdrawing surety should be relieved; no further act took place on the part of the council, but the treasurer and his new surety (omitting the second surety) joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect; the clerk on receiving these gave up to the treasurer the old bond, and the treasurer destroyed it; eight years afterwards, a false charge was discovered in the accounts of the treasurer of a date prior to these transactions:

Held, that the sureties on the first bond were responsible for it.

The mortgage was on property which the treasurer had previously mortgaged to the sureties for their indemnification; the mortgage to the sureties had not been registered, but had been left with the clerk of the council for safe keeping; on receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both:

Held, that the old sureties were entitled to a first charge on the property for their indemnification in respect of the newly discovered defalcation.

A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts.

The fact of the treasurer having become reduced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety.

The jurisdiction of equity in the case of lost bonds, exists also in the case of bonds which have been destroyed.

The rule, that general payments are appropriated first to the earliest items on the other side of an account, does not entitle a surety to claim that a concealed item, which, from its not being known, the debtor had not been charged with, should be deemed to have been satisfied by the moneys which had from time to time been paid by the debtor, and which had when so paid been charged by both parties against the other sums received by the debtor on behalf of the creditor.

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County of Frontenac v. Breden.

On the 15th November, 1846, the municipal council of the United Counties of Frontenac, Lenox, and Addington passed a by-law appointing the defendant *William Ferguson* to be their treasurer "to have, hold, execute, and enjoy the said office of treasurer until (they should) select and appoint another person to fill the same office according to law." The defendant *John Breden* and one *James Williamson* (since deceased) became the treasurer's sureties, and with him executed a bond, *Ferguson* in £2,000, and each of the sureties in £1,000, conditioned for the due performance of the treasurer's duties. *Ferguson* entered on his office shortly afterwards, and continued to be or act as treasurer until 1867. On the 22nd November, 1852, he got discounted, for the benefit of the corporation, an accommodation note made by the warden for $1000, which was intended for the use of the corporation; but the treasurer did not account to the corporation for the proceeds. On the 23rd February, 1853, when the note became due, he charged the corporation with the note as having been paid by him for the corporation. The error was not discovered by the corporation or its officers until after Mr. *Ferguson* had ceased to be treasurer, and there was an investigation of accounts in the Master's office in another suit. In 1860, the plaintiffs' clerk gave up to *Ferguson* the bond which *Breden* and *Williamson* had signed as sureties, and it was destroyed. The object of the present suit was, to have *Ferguson* and *Breden* declared liable for the amount of the note, notwithstanding the destruction of the bond.

Statement.

The cause was brought on for the examination of witnesses and hearing at the sittings of the Court in Kingston in the Autumn of 1870.

Mr. *Snook*, Mr. *Walkem*, and Mr. *Ryan*, for the plaintiffs.

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Nov. 30.

Mr. *Blake*, Q. C., Mr. *O'Reilly*, Q. C., and Mr. *J. McLennan*, for the defendants.

MOWAT, V. C.—[After stating some of facts as above]—The principal defence is by *Breden*, and the chief ground taken by his answer is, that in 1860, when the bond was given up by the clerk, the defendant was released of all liability under his bond. *Ferguson* in that year verbally communicated to the council that *Breden* wished to be relieved of his suretyship. *Breden* had expressed to *Ferguson* that desire, putting it on the ground of his age and his business arrangements. He did not then suspect that *Ferguson* was insolvent, and on the contrary believed his circumstances to be good. The members of the council were (no doubt) of the same opinion, and all had great confidence in the treasurer. The treasurer proposed to the council that *Breden* should be relieved, and one *Isaac Hope* accepted in his stead. The council thereupon (8th June, 1860) passed the following resolution; "Resolved that *Isaac Hope* be received as surety for the County treasurer (Mr. *Ferguson*); that upon the completion of the necessary bonds, *John Breden* be relieved from his obligation as surety for such treasurer."

Judgment.

Shortly afterwards, viz., on the 16th June, 1860, *Hope* and *Ferguson* executed a new bond for the due performance of the treasurer's duties from that time forward. There had for some years before this been lying in the clerk's office an unregistered mortgage which *Ferguson* had executed for the indemnification of his sureties *Breden* and *Williamson*, and which he had delivered for them to the clerk. On the property embraced in this mortgage, *Ferguson* executed a new mortgage to the County, bearing date the 20th November, 1860, and registered on the 30th January following. This mortgage recites that the council had considered it advisable that *Ferguson* should furnish further security as

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treasurer, and that he had agreed to do so; and the mortgage is declared to be given for better securing the performance of the several matters mentioned in the condition of the bond executed by *Ferguson* and *Hope*. The clerk (probably after receiving from *Ferguson* the new bond and mortgage registered) delivered up to him the old bond and mortgage, and *Ferguson* destroyed them. There was no resolution or by-law of the council delegating to anybody the office of approving of "the necessary bonds;" no resolution or by-law authorizing the release of *Williamson*, or the acceptance of the mortgage; and the resolution of the 8th June, certainly did not contemplate releasing *Breden* for the past without getting other security for the past. (The council of 1869, in a suit of *Ferguson* against the present plaintiffs, raised a question as to whether that was the construction of the language employed, and the Chancellor decided, 26th May, 1869, that it was). The resolution was not technically binding, for it was not under seal; and if it had been binding, it would not have sanctioned what was done by the clerk; no resolution or by-law was afterwards passed confirming and adopting what he had done; nor does the answer set up any other subsequent act or proceeding of the corporation as having that effect. It seems clear, therefore, that what took place between the clerk and the treasurer did not bind the corporation as a release of the liability of the surety.

Judgment.

It was contended with much force on the plaintiff's part, that even if what took place had amounted to a release, it would not be binding with respect to a default of which they had not then any notice; and *Schofield* v. *Templar* (*a*) was cited as bearing on the point. The Court of Exchequer had occasion to point out in *Lyall* v. *Edwards* (*b*), that it was a principle long sanctioned

(*a*) 4 DeG. & J. 429. (*b*) 6 H. & N. 347, 348.

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in Courts of Equity, that a release is not to be construed as applying to something of which the party executing it was ignorant; and *Schofield* v. *Templar* and other cases (*a*) indicate, that the release of a surety does not in such a case stand on a different footing from the release of a principal.

The answer further sets up, that the accounts of the treasurer were duly audited and passed every year, and that the auditors for 1852 and 1853, if they had used reasonable diligence, would have discovered the wrong now complained of. The authorities which I had occasion to cite in *Peers* v. *Oxford* (*b*), shew that such a defence is not sustainable.

The answer further insists that, the bond having been destroyed, this Court has no jurisdiction; and that there is a distinction between the case of a bond lost and a bond destroyed. No authority for such a distinction was cited; and *Cross* v. *Bedingfield* (*c*) is a direct authority the other way.

Judgment.

The answer further sets up the Statute of Limitations as a bar, but that defence was not urged at the hearing.

Some points were taken at the hearing which were not taken by the answer. It was argued that, by the effect of the Statutes (*d*), the bond ceased to be in force on the 1st January, 1850, if not at an earlier date; that the tenure of the office was changed by the Act of 1849 (*e*); that there was no proof of *Ferguson* having been reappointed by by-law since that Statute; that a by-law was necessary; and that on these grounds *Breden* had

(*a*) See Irwin v. Freeman, 13 Gr. 465; Teed v. Carruthers, 1 Y. & C. C. C. 31; Eyre v. Burmiston, 10 H. L. 90.

(*b*) *Ante*, p. 472. (*c*) 12 Sim. 35.

(*d*) 9 Vic. ch. 40, sec. 7; 12 Vic. ch. 80; *ib.*, ch. 81, secs. 171, 206.

(*e*) Sec. 171.

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never been responsible in respect of the matter in question. Mr. *Ferguson* was appointed in 1846 to be treasurer until the council should "select and appoint another person to fill the same office according to law;" the defendant's bond having been wrongfully delivered to, and destroyed by, one of the obligors, it may fairly be presumed to have been expressed in like terms; and the Act of 1849 (*a*) substituted the corporations thereby created for those existing under the repealed Act, and preserved to the new corporations all obligations contracted in favor of the old corporations. No re-appointment of *Ferguson* by by-law is shewn, but he continued to be recognized and to act as treasurer—to be treasurer *de facto*—without a further appointment, until 1867, when another person was appointed in his place. *Breden's* answer throughout implies that *Ferguson* was treasurer, and that *Breden* was his surety, until *Breden* was discharged (as he contends) by the proceedings of 1860. If the enactments referred to afford ground for an argument that such was not the real position of the parties according to the facts in proof, I think that it must be presumed that such other facts had occurred as would be an answer to the argument; and that the point, not having been suggested by the answer, and being inconsistent with both the answer and the defendant's conduct, was not open to him at the hearing. I have, therefore, not further considered the effect of the enactments relied upon.

Judgment.

It was further contended at the hearing, that the treasurer's subsequent payments more than satisfied the sum in question, and that they were applicable thereto according to the rule in *Clayton's* case (*b*); but that rule has no application to an unknown or a concealed item which the debtor had never been charged with in account, and where the moneys from time to time paid by the

(*a*) 12 Vic. ch. 81, sec. 175. (*b*) 1 Mer. 585.

debtor had, when paid, been appropriated and charged by both parties against the debtor's other receipts.

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It was argued that the proof of the alleged default is insufficient. But the fact is so clear that it is undisputed in the answers or in the evidence. No explanation is even attempted; but if the defendants desire a reference on the point, I shall treat the matter as proved sufficiently for that purpose only, and shall direct an inquiry to be made as to whether the treasurer ever accounted to the corporation for the proceeds of the note, and an account to be taken of what, if anything, is now due to the plaintiffs in respect thereof.

It was contended that, by taking and registering a mortgage on property on which the sureties had the unregistered mortgage for their indemnification, the plaintiffs had so altered *Breden's* position, that he could no longer be made liable as surety. That mortgage does not appear to have been taken with the legal sanction of the corporation; when taken, and until long afterwards, the default in question was unknown; and the registered mortgage is still held by the plaintiffs. I can perceive no ground for holding the taking or registering of the mortgage to be a bar to the plaintiffs' claim; but if *Breden* is to answer for the default, he appears entitled to the benefit of his mortgage (which in that event is claimed by his answer), and to hold the lien or charge in priority to the claims of the plaintiffs under their mortgage; for I do not understand how I can hold that the bond though destroyed is effectual against him, and that the mortgage, which was destroyed at the same time and as part of the same transaction, is not also effectual. The surety sets up that *Ferguson's* circumstances have changed since 1852; that is no bar to the plaintiffs' suit; but it would be hard if the surety should also lose the security which he had against such a contingency.

Judgment.

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The decree, therefore, as against *Ferguson*, will be for the full amount of the note with interest and costs, subject to the reference already mentioned if desired. Against *Breden*, the decree will be for the deficiency, if any, after the proceeds of the sale of the property are deducted from £1000 (the penalty of his bond). The effect of this deduction will be, to relieve *Breden* from either the whole or the greater part of the liability with which the plaintiffs sought by their bill to charge him; but I have decided against him the points raised as a bar to the plaintiffs' suit; and it seems proper, therefore, that the decree as respects *Breden* should be without costs to either party.

Judgment.

McDonald v. Ferguson.

Mistake—Reforming deed.

The plaintiff was entitled to a conveyance from the defendant of half a lot of one hundred and sixty acres; the defendant wished to give fifty acres only; a friend of both, who was aware of their mutual rights, was requested by the plaintiff to obtain the deed as claimed by him; this person procured the defendant to execute a deed which conveyed fifty acres only, and which the defendant executed in that belief as this person knew; but he thought that it really conveyed the half lot or eighty acres to which the plaintiff was entitled; he took the deed to the plaintiff, telling him that it conveyed the eighty acres, on which the plaintiff accepted the deed: the plaintiff was not then aware of the difference of which the defendant had in signing it:

Held, that the plaintiff was entitled to have the deed corrected, and made to embrace the eighty acres to which he was entitled.

Examination of witnesses and hearing at the Autumn Sittings of 1870, at Peterborough.

It appeared that in and previous to 1851, the defendant *James McDonald* was in possession of the west half of a lot in Dummer, such west half contain-

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ing one hundred and sixty acres, under a contract of purchase from the Crown, on which contract a considerable sum was due and unpaid. He had also a yoke of oxen, some cows, and a few farming implements. He was then (and up to the hearing continued to be) a bachelor. In 1851, his only brother, the plaintiff *John McDonald*, came to this country with his wife, son, and two daughters; the daughters being seventeen and fifteen years old respectively. The plaintiff brought with him £20 sterling, some provisions, and a large supply of clothes which lasted for several years. *James* induced the plaintiff and his family (except the son) to go to his farm, to live on it and work it with him, and to share their respective means. In 1852, a very informal memorandum was signed, mentioning in part the agreement relating to the land, as follows: "Dummer, 9 Aug., 1852. I do here agree to give the one half of the lot to *John McDonald* on the 3rd concession Dummer. I promise to pay one half the money at first cost, with interest.

Statement.

(Signed) "JAMES MCADONALD.
" "JOHN MCADONALD."

It was further agreed, that they should share their other means, even (it seemed) the clothes which the plaintiff had brought out for himself, and that they should work the farm together for their joint benefit. This arrangement was acted upon until 1866. During that period the plaintiff seemed to have worked more than *James*; and he was a sober man which *James* was not always. The plaintiff's wife did the housework while she lived, one of her daughters assisting her, the other taking employment elsewhere; and after the death of the wife, one of the daughters did the whole housework until both daughters were married. All that the plaintiff and his brother had was put into a common stock; they lived together, and worked together, paid what remained due for the lot from the produce of the

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farm, had but one purse between them, and kept no account of the separate advances, labor, or expenditure of either. After the land had been paid for, the patent was issued to *James*, and they began to desire a division of their means. A division was made in 1866. The Court considered that, on the evidence, they must be taken to have been then equally interested in the land and chattel property; and that whatever the original agreement contemplated that the plaintiff should pay, had been satisfied. It seems to have been understood, from a very early period, that the plaintiff was to have the north half of the lot, though it was of less value than the south half.

On the 19th April, an equal division between them was made of the chattel property, and *James* executed to the plaintiff a deed of part of the land. After this division, the plaintiff and defendant continued to live together in the same house for two years; but they used different barns, and worked separate parts of the lot, each retaining the produce of the portion worked by himself.

Statement.

The deed described the parcel conveyed as "containing by admeasurement fifty acres, be the same more or less, and being composed of the north part of the" lot (describing it). The bill alleged that this description was erroneous, and asked for a declaration that the plaintiff was entitled to half the land; for a direction that the deed might be reformed so as to give to the plaintiff half; and for other relief.

Both parties at the hearing construed the deed as conveying fifty acres only.

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

Mr. *Fairbairn*, for the defendant.

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MOWAT, V.C.—I am satisfied that for some time before the execution of the deed, *James* had insisted that the plaintiff should have fifty acres only, and should not share the surplus sixty acres of the lot; that *James* executed the deed believing that it conveyed fifty acres only, and that but for that belief he would not have executed it. I am satisfied also, that the plaintiff had always insisted that he was entitled to half of the one hundred and sixty acres; that he accepted the deed on the assurance of the friend through whom it was obtained, and in the belief on the plaintiff's part, that the deed gave him the quantity which he claimed; and that but for that assurance and belief the plaintiff would not have accepted the deed. Immediately after receiving it, he had the lot surveyed, and his half, or eighty acres, marked off; and he has been in possession accordingly ever since. *James* was not satisfied with these proceedings, but he took no step to interfere with the plaintiff until lately (31st May, 1870), when he contracted for the sale to the co-defendant *Ferguson* of the southerly one hundred and ten acres, including thirty of which the plaintiff is in possession, and to which he claims to be entitled. The bill was filed on the 18th June, 1870.

Judgment.

It was contended for the defendants that an error as to the legal effect of the language employed in the description is not such an error as the Court can correct. But I am clear that that is not so.

It appears that the gentleman through whose instrumentality *James* was induced to execute the deed, believed that, by reason of the expression "more or less" in the description, the deed would convey the whole north half or eighty acres, but he induced or allowed the defendant to execute the deed under the impression and belief on his part that it conveyed fifty acres only; and it was contended on the defendant's behalf, that this conduct on the part of one who should be regarded as the

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plaintiff's agent, must be treated as the act of the plaintiff himself, and that it is a bar to any relief from the injurious consequence to himself of the ruse practised to obtain the defendant's signature. The plaintiff was not present when the deed was executed, and it is clear that he was no party to the ruse; that he did not authorize it, and was not aware of it when he accepted the deed. The brothers are persons of little education, though both are able to sign their names. The deed was twice read over to the defendant before he signed it; the plaintiff accepted it without hearing it read, but on the assurance that it gave him half the lot. No authority was cited to shew that such an unauthorized act of an agent as is alleged, deprives the principal of his right to maintain a suit; and I apprehend that it has no such effect. The person designated as the plaintiff's agent is perhaps not improperly so called, for it was the plaintiff who had asked his interference; but

Judgment.

he was the friend of both brothers; he had for many years had dealings with both; he had long known from both what their mutual relations were; he appears to have acted without any rémuneration, and for the sole object of effecting a settlement which would be according to their mutual rights; and his respectability was vouched for by counsel on both sides. Under these circumstances, I will merely say that the course which he took, however well meant, is not to be commended.

I think that the plaintiff is entitled to a decree; but without costs, except so far as his costs have been increased by having had to make *Ferguson* a defendant. The defendants, I understand, are agreed as to the decree to be made between themselves.

1870.

McDONALD v. ROSE.

Specific performance—Father and son—Personal services—Pleading—Mistake in writing.

A father and son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; and the son agreeing that he would, during his father's life, work, till, and improve the farm in a good and farmer-like manner; and would consult his father in all things reasonable; quarrels took place afterwards; the son treated his father badly, though he did nothing which at law would be a breach of the condition of his bond; and ultimately the father left the farm, the son retaining the possession until ejected at the father's suit;

Held, in a suit by the son against his father, that the contract should not be enforced against the father.

Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged.

Examination of witnesses and hearing before Vice Chancellor *Mowat*, at the Cornwall Sittings in the Autumn of 1870.

Statement.

On the 9th November, 1865, the plaintiff and his father, *Donald McDonald*, entered into mutual bonds. The father's bond was subject to the condition, that before his death he would, upon the reasonable request and at the cost of the son, his heirs, executors, administrators, or assigns, execute a conveyance of the father's farm to the son in fee simple, free from incumbrances, and with all the usual covenants. The condition of the bond given by the son was, that in consideration of his father's bond, the son should, during the natural life of the father, work, till, and improve the farm in a good and farmer-like manner, so far as the son's means would allow without incumbering himself with any debts; also, that he would consult the father in all things reasonable. The bill referred to this bond, which was in the defendant's possession, as shewing the consideration of the bond which his father had executed; but the bill stated

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the consideration to be, that the plaintiff should support and maintain his father in a decent and comfortable manner during his life on the said farm, and that just before his father's death, his father should give him a deed conveying to him the land in fee simple. The bill prayed for a declaration that, subject to the said support and maintenance, the plaintiff was equitable owner in fee simple in possession, or that he was equitably entitled in fee simple in remainder expectant on his father's death; for an injunction to prevent the cutting or removal of the timber; for an account of what had already been cut by the defendants; and for possession of the farm to be restored to him; or that, if he was not entitled to the specific execution of the said contract, damages should be awarded to him for breach thereof; and for general relief.

Statement.

At the hearing, the plaintiff offered parol evidence that the consideration which he had agreed to give was as stated in the bill, and that the bond which he had executed did not state the same correctly. The Vice Chancellor held that, the bill not having expressly charged that the bond did not express the true agreement, the parol evidence was inadmissible without an amendment of the bill. The Court was willing to allow an amendment; but, the defendants swearing (amongst other things) that they were not prepared to meet such a case, and would not be prepared until next sittings, the Vice Chancellor said that, if the amendment were made, the plaintiff must pay the costs of the day, and the case must stand adjourned until the next sittings. The plaintiff declined to accept these terms, and the hearing proceeded without any amendment being made.

Mr. *Bethune*, for the plaintiff.

Mr. *Fitzgerald*, and Mr. *D. B. McLennan*, for the defendants.

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MOWAT, V. C.—I am of opinion that the contract as shewn by the bonds (or as the plaintiff wished to prove it by parol evidence) is not such as under the circumstances this Court should enforce. I have no doubt that the intention of the parties was, that the plaintiff should give his personal services in the work of the farm, instead of his father, a very old man, having to depend on any stranger whom he might be able to hire. That is the view which was acted upon. I do not consider that the defendants have proved anything which would amount at law to a breach of the condition by the plaintiff. But the arrangement did not work well. There did not exist between the parties the mutual affection which a father and son should cultivate; and the son allowed himself, from time to time, to use towards his parents, and towards his sister, who lived with them, language shockingly bad. On the 4th May, 1869, they left the farm, the plaintiff remaining in possession; and the plaintiff has since been ejected at his father's suit.

Judgment.

Now, it is contrary to the rule of the Court to enforce a contract the consideration for which is personal services to be rendered; and, apart from that consideration, the Court, as a matter of discretion, would never, in the lifetime of the parties, enforce such a contract as the present, especially after its execution had been interrupted by quarrels, and after the son had permitted himself to treat his father in so vile a way as the evidence establishes against this plaintiff.

The defendant *Donald McDonald*, by his answer, asks that the bond may be delivered up to be cancelled. I think that the unfilial and unbecoming conduct of the plaintiff has prevented the arrangement from being carried out; and that the cancellation of the bond is reasonable, and may be ordered, especially in view of the prayer of the bill. But the son may have a

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reference to inquire whether any and what sum should be allowed to him beyond what he has received, in respect of his services since the date of the bonds. The defendants are entitled to the costs of the defence. From the defendant *Donald McDonald's* share of these costs, anything which the plaintiff may, on the reference, be found entitled to should be set off, and *vice versa*.

OAKES v. SMITH.

Solicitor and client—Conveyance to Solicitor—Lapse of time.

Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence, that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of.

Where these obligations are neglected, the suit of the client must be brought within the statutory limit of twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were *held* entitled to relief.

The cause came on for examination of witnesses and hearing at the sittings of the Court in Kingston, in the Autumn of 1870.

Statement.

On the 7th June, 1850, Mrs. *Eleanor Talbot*, the mother of the plaintiff *Martha P. Oakes*, and of Lady *Smith*, the principal defendant, executed to Sir *Henry Smith*, her son-in-law, a conveyance in fee of lot No. 59, in the City of Kingston, free from incumbrances, for the expressed consideration of £600, therein stated to have been paid at or before the execution of the instrument; and on the 18th December following, the same grantor executed to Sir *Henry* a like conveyance of lot No. 31 in Kingston, subject to a mortgage to the Kingston Building Society, and to a lease of the lot given on the

1st April, 1840. Both deeds were in Sir *Henry's* handwriting. The bill alleged, amongst other things, that Sir *Henry* was Mrs. *Talbot's* solicitor; that the deeds were executed upon his advice, in order that he might manage the property for her so as to pay all her debts, including what she owed to himself, and that he might, if necessary, sell part of the property for that purpose; and the plaintiff stated, that what should remain after the purposes of the trust were accomplished was to be re-assigned to Mrs. *Talbot*. The bill alleged, that Lady *Smith*, in whom the property was vested under a late Act of the Ontario Legislature (*a*), claimed that Sir *Henry* was a purchaser of the property for value, and that the deeds were executed in pursuance of such purchase; and the plaintiff charged that, if any value were paid, the sum paid was inadequate, and that, from the relations existing between the parties, &c., the sale, if such were made, should be set aside. The other co-heirs of Mrs. *Talbot*, with the exception of Lady *Smith*, had conveyed to the plaintiff. The prayer of the bill was, that the conveyances might be declared to be only securities for Sir *Henry's* advances, and that the plaintiff might have the relief which such a declaration involved.

1870.

Oakes v. Smith.

Statement.

The answers of the contesting defendants claimed the property absolutely, as having been purchased for value. As to Sir *Henry's* professional relation to Mrs. *Talbot*, Lady *Smith's* answer stated that, "Sir *Henry* did at times, at the solicitation of the said *Eleanor Talbot*, assist her in pecuniary matters when in difficulties," but that these matters were "plain matters of business." With reference to these difficulties, the answer set forth that, the defendant's brother *Philip* being desirous of commencing business, Mrs. *Talbot* assisted him therein; that she also assumed liabilities on his account; that all this was done against Sir *Henry's* advice; that *Philip*

(*a*) 32 Vic. ch. 74.

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afterwards failed; and that, to pay his debts, Mrs. *Talbot* incumbered her property, and became involved in difficulties; that she applied to Sir *Henry* to assist her in freeing herself from the position in which she was placed; that in order to save her from embarrassments he agreed to purchase from her the property in question; that the consideration was, £600 already advanced by Sir *Henry*, and his promise to pay off and discharge a mortgage (amount due about £700) held by one *Sutherland* on the lot described in the first of the two deeds, and to pay Mrs. *Talbot* an annuity of £50 for her life.

Statement.

At the hearing, Lady *Smith* was examined as a witness for the defence; and on cross-examination she stated as follows: "I never recollect being present when Sir *Henry* and my mother spoke on business. She scarcely ever spoke to me about her business matters. She used to send for Sir *Henry* when she wanted him. Sir *Henry* said she had sent for him about the property when she was in difficulty; and when she did so he always went. He was to pay off the mortgages and allow her an annuity. It kept Sir *Henry* poor paying out these moneys, and for the buildings. When he came home in the evenings, Sir *Henry* told me if he had been at Mrs. *Talbot's*. I cannot remember the dates when she sent for him. I think it was about a year after my father's death that she began to send for Sir *Henry*. * * Sir *Henry* often told me that he was assisting my mother to get out of her difficulties."

Sheriff *Corbet* was a witness for the plaintiff. He stated that there were executions in his office against Mrs. *Talbot* as early as 1845. Speaking of the executions against her between that date and 1850, he said: "Sir *Henry* appeared to take all the interest that was taken. He appeared to discharge his duty towards Mrs.

Talbot as her lawyer. I have no recollection of any other lawyer attending to Mrs. *Talbot's* interest. * * Sir *Henry* frequently got the executions arranged, and paid me my costs. * * I think no other lawyer came to see me about the executions. I used to write Mrs. *Talbot*, and Sir *Henry* came to see me about them." 1870. Oakes v. Smith.

No advances were shewn to have been made by Sir *Henry* to Mrs. *Talbot* previous to the 12th October, 1849. On that day she executed to him a mortgage on her furniture for £334, payable on the 20th July following. That sum appeared to have been made up of (1) £79 3*s.* 8*d.*, paid on the same day to the sheriff in full of four executions against Mrs. *Talbot;* (2) £250, which was to be paid for the redemption of part of lot 59, which Mrs. *Talbot* had, in December, 1846, conveyed absolutely to one *Samuel Chesnut*, receiving from him a bond conditioned for a reconveyance of the property on the repayment of that sum with legal interest in three years; and (3) cash for balance. On the same 12th October, 1859, Mrs. *Talbot* executed an absolute assignment of this bond to Sir *Henry* for the expressed consideration of £5. It was admitted at the hearing, that the object of this assignment was, to further secure the debt for which the chattel mortgage was given. The chattel mortgage was in the handwriting of Sir *Henry;* the assignment of the bond was in the handwriting of his partner Mr. *Henderson*. Statement.

There was some proof of other professional business performed by Sir *Henry* for Mrs. *Talbot* before the execution of the deeds in question. The first was, in defending an action against her, and her sister Mrs. *Atkinson*, on a lease of some property which with other property they had inherited, and which on a partition was assigned subsequently to Mrs. *Atkinson*, in pursuance of a verbal agreement made before the suit. In October, 1845, Sir *Henry* drew the partition deed between

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the two ladies, and charged Mrs. *Talbot* with a share of the costs. On the 8th November, 1847, he prepared on her behalf a deed of some property in favor of one *Martin*, and he charged her therefor. On the 11th September, 1850, three months before the execution of the second of the impeached deeds, he entered a defence to gain time for her in an ejectment suit, brought by the Building Society on their mortgage upon the property afterwards conveyed by that deed; and the costs were charged to her on the 31st December, 1852, two years after the execution of the deed. It further appeared that, to gain time, Sir *Henry* put in a defence for her in another ejectment suit brought against her by the mortgagee of the house in which she was living; and charged her with the costs. This mortgage was subsequently foreclosed.

Statement.

As to these defences and conveyancing charges, Mr. *Henderson*, Sir *Henry's* partner, gave the following evidence: "I do not recollect ever seeing Mrs. *Talbot* in the office; nor even in the street. She seldom went out. Any instructions must have been received from her at her house, or at Sir *Henry's*. * * The instructions in regard to the partition deed must have been given to Sir *Henry* himself."

In 1850 and 1851, Sir *Henry* paid to or for Mrs. *Talbot* various other sums, out of a sum of £200 which he had received for her from a Mr. *Hill* on the sale of a piece of land to him. The last payment was on the 17th September, 1851, and then Sir *Henry* took from her a receipt for the sums so paid, in full of the £200.

Lady *Smith*, in her evidence on her own behalf, deposed, that she had found amongst Sir *Henry's* papers the draft of a letter to Mrs. *Talbot;* that she recollected Sir *Henry's* reading to her this letter, or a letter to the same effect, about the date of this draft; and

that she recollected her mother's afterwards acknowledging to her that she had received this letter. It did not appear that the letter itself had been found among Mrs. *Talbot's* papers. The following is a copy of the draft:

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"Rose Lawn, 15th August, 1862.

"My Dear Madam,

"Mary (*a*) has told me that you want an advance by cheque on the bank for the annuity which I am obliged to pay you, and which is one-half of *Deykes & O'Reilly's* ground rent. I regret extremely that it is not in my power to grant the request in the manner you desire, but I enclose my note for £25 at the U. C. Bank, which Mr. *Hinds* will discount, and on which you must put your name. At the same time I feel it to be my duty to inform you that it will not be in my power to pay in advance in future. I derive (*b*) less than common interest for the amount I have paid (*c*), and am still liable to pay for the property (*d*). Besides I have bound myself to pay for *Chesnut's* house; and I fear that whoever may own the corner buildings will not be disposed to take a new lease from me on favourable terms. Under these circumstances I am bound to tell you, that it is utterly impossible for you to keep house, even if you live rent free. Taxes, fuel, and supporting *Philip* and much of the time *Martha*, increase the expenses of your establishment, and I could point out other things did I think it proper so to do. Having foreseen for years past the result which has come to pass, I always suggested to *Mary* the only course left for you, and which, from feelings of tenderness, I suppose, she has never mentioned; that is, you must make up your mind to live with *Betsy* in some quiet family where you will be comfortable and retired, and by which means your expenses will be reduced to

Statement.

(*a*) Lady Smith.

(*b*) Or 'desire.' The writing would answer for either word; and counsel for the plaintiff contended that the correct reading was 'desire.'

(*c*) The word 'paid' is interlined, being a substitution for the word 'advanced,' which was first written.

(*d*) The words 'for the property' were interlined.

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something not much more than I am to pay you. I leave for Quebec to-morrow, and hope that this letter will be received by you in the same kindly spirit which actuates me in writing it.

"Very faithfully yours."

Statement.

At the time of the impeached transactions (1850), Mrs. *Talbot* was fifty-eight years old. Her husband had died five years before, leaving no property of his own except his furniture, but owing no debts. Mrs. *Talbot* had had considerable property in her own right. They had five sons and three daughters then living. The eldest daughter had been married to Sir *Henry* in 1836; the other two daughters were unmarried at their father's death; one is still unmarried; and the other was the plaintiff, who had become a widow. These two daughters, and all the sons except the eldest named *William*, lived with their mother from the time of their father's death, and were dependent on her. *William* had been blind for eighteen years before the institution of the suit. The next son *Robert* had studied law, and was admitted an attorney, but he was dissipated, and he had never practised. He died in his mother's house in the interval between the two deeds, viz., on the 9th October, 1850, being thirty years old. *Philip*, already named, had gone into business after a year's training as a clerk. He died in 1864. Mrs. *Talbot* died on the 31st August in the same year, leaving to her family no property except her furniture. Sir *Henry* died on the 18th September, 1868. The bill was filed on the 8th July, 1869.

Mr. *James McLennan* and Mr. *Snelling*, for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *Walkem*, for Lady *Smith*.

Mr. *George Kirkpatrick* for an infant heir of Sir *Henry Smith*.

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In addition to the cases mentioned in the judgment, *Dickinson* v. *Burrell* (*a*), *Prosser* v. *Edmonds* (*b*), *Mason* v. *Seney* (*c*), *Cockell* v. *Taylor* (*d*), *Davies* v. *Otty* (*e*), *Hume* v. *Cook* (*f*), *Smith* v. *Matthews* (*g*), *Wood* v. *Midgley* (*h*), *Jerdein* v. *Bright* (*i*), *Barkworth* v. *Young* (*j*), were referred to.

Dec. 24.

MOWAT, V.C.—The bill sets up, that the purpose of the deeds of 1850 was, management and security for advances; not a sale; and the bill charges, that if there was a sale it was void. This alternative mode of presenting the case was objected to on the part of the defendants; but there is no doubt that it is quite regular, and in accordance with the cases (*k*).

Judgment.

There is no direct evidence of what the transaction was, in pursuance of which the deeds were executed. It is quite certain that the deeds themselves do not state the transaction correctly. That both parties assert. The plaintiff's counsel argued, from various circumstances appearing on the evidence, that the transaction intended was what the bill states; but, the onus of proving what the transaction really was being on the defendants if Sir *Henry* was at the time the solicitor or adviser of Mrs. *Talbot*, or occupied towards her any other relation of confidence or trust, it is convenient to examine at the outset how the case stands in that respect, both on the evidence and on the law of this Court; and I may say here that, in regard to neither do I find any room for doubt.

(*a*) L. R. 1 Eq. 837.
(*b*) 1 Y. & C. Ex. 481.
(*c*) 11 Gr 447.
(*d*) 15 Beav. 103.
(*e*) 33 Beav. 540, affirmed on Appeal, 12 W. R. 896.
(*f*) 16 Gr 84.
(*g*) 3 D. F. & J. 139.
(*h*) 2 S. & Giff. 145.
(*i*) 2 J. & H. 325.
(*j*) 4 Drew. 1.
(*k*) See Denton v. Donner, 28 B. 285; Pearson v. Benson, 28 B. 598; &c.

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Oakes v. Smith.

It is clear that Sir *Henry* was Mrs. *Talbot's* attorney, and was the only attorney whom, from the time of her husband's death, she had had anything to do with. She consulted no one else about the transactions in question or any other. Whatever little legal business she had in the way of defending suits or preparing legal documents, was done by him. He took the instructions for them from her from time to time, at her own house or at his. When she got into difficulties from her imprudent payment or assumption of her son *Philip's* debts, it was for Sir *Henry* that she sent, to advise or assist her. This commenced about a year after her husband's death, and continued until after the deeds in question were executed. It was to Sir *Henry* that she referred when the sheriff applied to her from time to time respecting the executions which came into his hands; Sir *Henry* arranged divers of the executions for her; and, in a word, did for her whatever in her position a lawyer was needed to do, or was useful in doing. The very transaction which is impeached took place, as is admitted, in consequence of her application to him "to assist her in freeing herself from the position in which" her pecuniary difficulties had placed her. In fact, her losses and embarrassments placed her in his hands much more than clients are usually in the hands of their solicitors or attorneys.

Judgment.

Being a woman Mrs. *Talbot* needed professional and other experienced advice and aid much more than a man would have done (*a*). She had been left a widow at the age of fifty-two, knowing nothing of business, so far as the evidence shews. Her affection for her children had already brought on her the greatest difficulties, partly through what she had done for *Philip*, and partly from allowing them all to live with her and

(*a*) See Cooke v. Lamotte, 15 Beav. at 246; Lloyd v. Atwood, 3 DeG. & J. 614.

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Oakes v. Smith.

on her means, instead of compelling them to leave her and to shift for themselves; and, in fact, she manifested nothing but helpless weakness in the management of her property, so far as we learn anything of it. In five years from her husband's death, she got through all she had, except what her interest was worth in the property now in question, after paying the incumbrances and debts; and she was thereby reduced from what appears to have been comparative affluence to a pittance of £39 (or £50) a year, assuming the defendants' case to be made out. Then, Sir *Henry* was an able, and experienced lawyer, who had been successful in his business, and as a public man; for fourteen years he had been her son-in-law; he was to all appearance the only male relation or intimate friend whom she had, except her children; and her children, instead of being experienced, prudent, and competent advisers, were themselves the acknowledged cause of all her pecuniary troubles.

Judgment.

That she in fact placed confidence enough in Sir *Henry* to have made to him at his suggestion in 1850 absolute deeds upon a parol trust, further appears, from her having in the previous year assigned to him absolutely *Chesnut's* bond, and having permitted Sir *Henry* to take the reconveyance a few days afterwards (1st November, 1849,) in his own name; from her conveying to him the property in June, 1850, free from incumbrances, though there were outstanding leases and an outstanding mortgage of the property; from her accepting in that transaction, according to the case of the defendants themselves, Sir *Henry's* verbal promise to pay off *Sutherland's* mortgage and to pay the annuity for her life; from her not obtaining from Sir *Henry* a release of the chattel mortgage, though it had been satisfied by the alleged sale; and from her going into all these transactions with Sir *Henry* without taking the advice or having the assistance of any other person.

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But it would be a great mistake to suppose that anything like as strong a case as these facts present, is necessary in order to establish a relation which shall throw the burden of proof on the defendants. In *Barnard* v. *Hunter* (*a*) Lord *Cranworth* held the case of a purchase by a solicitor from a client who was "a man of business habits, * * able to protect himself," as falling within the rules evoked here on the part of the plaintiff. His Lordship said: "We cannot look into these cases minutely as to the particular competency of the particular man. The rule is a general rule, that where there is the relation of solicitor and client, the solicitor, if he deals with the client, must, whether that client was more or less a man of business, shew that he had due professional and other assistance to put him on his guard" (*b*).

Judgment.

The observations of the Lord Chief Baron in *Goddard* v. *Carlisle* (*c*) shew that, when the relation of solicitor and client exists, it is not necessary to make out the professional character of the business shewn to have been actually transacted by the attorney. His Lordship observed: "The whole question in this case turns entirely, in my view of it, on the relative situation of the parties. Now it is clear that *Sloper* (the solicitor) was most intimately connected with the plaintiff. There subsisted between them a very particular degree of private friendship and intimacy, and the plaintiff was constantly received at the house of *Sloper*, more as one of the family than as a guest, where he was always treated with great kindness and hospitality, and that until three years after the young man came of age. * * But the most material feature in this case is, that *Sloper*, during his connection with the plaintiff, was his solicitor; that is, the young man does not appear to have had any other professional

(*a*) 2 J. N. S. 1213. (*b*) See also Nanney v. Williams, 22 Beav. 457.
(*c*) 9 Pri. 180.

adviser; and *Sloper*, being an attorney, and so connected in friendship and general association with the plaintiff, it must be taken, even if he could not be shewn to have acted professionally for him in any particular business, unless some other solicitor had been his legal adviser, that *Sloper* was the person to whom *Goddard* naturally looked for legal assistance."

The case of *Waters* v. *Thorn* (*a*) also may be referred to. That was the case of a purchase by a solicitor (Mr. *Bowker*) from a widow who had employed him just before the transaction in question to draw her will. The property was out of repair, the rent was a year in arrear, and she had some difficulty in collecting the rent. She in consequence offered to sell the property to Mr. *Bowker* in consideration of an annuity; and the sale took place accordingly. She subsequently confirmed the sale by her will; and she confirmed the will by two codicils. She died four years after the transaction. The bill was filed by her representatives eight years after her death. I make the following extracts from the judgment:—

Judgment.

"It was suggested in the argument, that Mr. *Bowker* could hardly be called her solicitor, and that, in fact, she had none, and required none; but this argument cannot be maintained. The greater or less occasion which a client may have for the services of a solicitor does not affect the question; the only question, apart from the exercise of undue influence, is this:—did the relation exist at the time of the transaction? That the relation existed here is certain. On the death of her husband, the testatrix consulted Mr. *Bowker* as her solicitor; she employed him to prepare her will; she consulted him relative to this very property; and she consulted no other person. All the consequences, therefore, that flow from the relation of solicitor and client exist in the present case. These are thus expressed by Lord *Eldon* in *Gibson* v.

(*a*) 22 B. 547.

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Jeyes (*a*): 'An attorney buying from his client can never support it, unless he can prove, that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger.' That must be the rule; and the burden of proving this lies on the solicitor. This, therefore, is the test by which this transaction on the first part of the case is to be examined. * * It is a matter of no slight moment, that Mr. *Bowker* does not appear to have offered the house to any one in Winchester when Mrs. *Church* desired to sell it. He expresses the reluctance with which he became the purchaser, but he does not appear to have endeavoured to obtain another purchaser, or a better price from any one else, or to have made known generally, in Winchester, that the house could be bought for a sum of money, or for an annuity on the life of this old lady. If he had done so, and if after this had been generally known, no one had offered a sum over £400, or an annuity of $65 per annum, the case, on the question of value, would have stood in a very different position from that in which it now comes before me.

Judgment.

"The question of value, however, is not the only matter to be regarded in this transaction. The purchase money, viz., the regular payment of the annuity, was secured simply by the personal security of the purchaser. This appears to me to be a serious objection to the validity of this transaction. In fact, this matter has rather been passed over by the counsel for the defendant than answered. It is said, that the annuity was regularly paid to the testatrix until her death, and that therefore no question arises on it; but I am not to judge of the propriety of this transaction by the event."

These cases afford an answer to (amongst other things)

(*a*) 6 Ves. at 271.

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the observations of the learned counsel for the defence as to the unimportant character of the business for which Sir *Henry* made charges against Mrs. *Talbot*. But I may remark further, that there is no warrant anywhere for an argument which would make the consequences of the relation depend on whether it was a paid relation or not. Similar rules apply to trustees and others who receive no compensation.

It was suggested, that these rules are founded on the assumption of a larger confidence being reposed by clients in England and Ireland than is usually done by clients in this country. But the authorities do not justify any distinction on that ground; and it would be extremely difficult and unsatisfactory to apply such a distinction. Persons of large inherited wealth are more numerous in the old country than here; and they probably do, in general, place their affairs more entirely in their solicitors' hands than ordinary clients do in Canada; but I greatly doubt if men of business in England are more in their solicitors' power than men of business here. That implicit and unquestioning confidence is not uncommon in Canada, we have all of us had personal knowledge; and it may be assumed, with little hazard of error, that an inexperienced woman, a widow at the age of fifty-eight, occupies in either country pretty nearly the same situation towards her solicitor. The rules which govern transactions between solictor and client are in substance applied to trustees, agents, and others, as well as to solicitors; and in none of these instances are they confined to cases where the confidence and influence are greater than Canadians are in the habit of reposing, or are obliged to repose, in parties occupying towards them like relations (*a*.)

Judgment.

Assuming, then, the relation of solicitor and client, or

(*a*) Davis v. Hawke, 4 Gr. 394.

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any other relation of trust or confidence, to have existed between these parties, the rules of equity impose on the solicitor or his representatives, in order to the maintenance of the alleged sale, the onus of proving, that the transaction was as stated in the written instrument; that it was so understood by the client; that the price was adequate; and that the transaction was in all respects fair, and such as an independent solicitor who had performed his duty, would have advised the client to enter into (*a*). Any modification which this statement requires where another solicitor is employed, I need not observe upon.

Judged by these settled rules, the defendants' claim, to hold the property as a valid purchase, is open to several insuperable difficulties.

Judgment.

One of these difficulties is, that, supposing the considerations named in the deeds to be the true considerations, or to be the only considerations which the defendants can set up, they are confessedly inadequate.

Another of the difficulties is, that the defendants have not proved the payment of the considerations mentioned in the deeds. In *Gresley* v. *Mousley*, on further directions (*b*), it was expressly held, that, in the case of a purchase by an attorney from his client, it is incumbent on the attorney to prove the payment of the purchase money by some other instruments than the conveyance or the receipt indorsed on it, where there is such a receipt (which in the present case there is not, though on one of the deeds there is a printed form for a receipt; such form not having been filled up or signed.) I may note here, that Lord Justice *Turner*, in the

(*a*) See cases cited *ante* and *post;* also 1 W. & T. Leading Cases, 3rd ed., p. 149.

(*b*) 3 DeG. F. & J. 442, 443.

case cited, denied that it was "any hardship upon the attorney to require such proof" as I have referred to; he further observed that it was no less the duty than the interest of the attorney to preserve the evidence of his dealings with his clients, and that he was by no means inclined to fritter away the principle on which the decision proceeded, as he believed it to be both just and sound. The principle thus approved of by the learned Judge, as it has been by every other Judge who has remarked upon it, may sometimes operate hardly where a transaction has taken place in ignorance of the rule; but of course that is so with all rules, and yet they must be, and are, held binding, even on those who are not lawyers.

I have said that the defendants have not proved the payment of the considerations named. The deeds acknowledge the payment in the way usual for expressing a contemporaneous payment; it is admitted that no such contemporaneous payment was made; but it is said that the true consideration is not correctly stated in the deeds; that the true consideration consisted of, certain moneys paid and satisfied to Mrs. *Talbot* by Sir *Henry Smith*, amounting to about £600; and of Sir *Henry's* (verbal) undertaking to pay off *Sutherland's* mortgage on the property conveyed in June, 1850; the Building Society's mortgage on the property conveyed in December; and an annuity of £50 for Mrs. *Talbot's* life. This defence is not available to the defendants for several reasons. Judgment.

An untrue statement of the consideration is always to be disapproved of; but no doubt it does not, in general, and in the absence of fraud, invalidate a deed between parties who do not occupy towards one another a fiduciary relationship of any kind. That has been held in many cases, and, amongst others, by Lord *St. Leonards*

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in *Bowen* v. *Kirwan* (*a*). But the rule is otherwise in the case of a deed by a client to his solicitor; as was held by the same learned Judge in the subsequent case of *Ahearne* v. *Hogan* (*b*). The question there was as to the validity of an assignment of some policies, which assignment had been obtained by a medical man from his patient; the consideration stated in the assignment was an antecedent debt of £20 for professional services; the proof offered was of a debt of £9 only, and of money paid £11. Lord *St. Leonards* said: "In any case which may come before me, as long as I sit in this court, in which one party may exercise an influence over the other, whether the relation be that of guardian and ward, solicitor and client, trustee and *cestui que trust*, doctor and patient, or the like; whenever there is a dealing between two parties, one of whom is subject to the influence of the other, I shall expect to find a fair and correct statement of the transaction upon the face of the deed itself; and if such parties mean to uphold their dealings in this court, they must state the nature of them fully and fairly upon the face of the deeds themselves. In this case it is admitted that the statement upon the face of the deed is not true. Upon that ground alone I should be prepared to act." * * The decree was against the deed. I refer also to *Gibson* v. *Russell* (*c*), *Harvey* v. *Mount* (*d*), and *Morgan* v. *Higgins* (*e*).

Judgment.

In such a case, even the giving of a separate instrument stating the exact truth, does not wholly relieve the case from difficulty (*f*). But it is not pretended that, in the present case, any writing was given at the time

(*a*) L. & G. Sug. 47. See also Gale v. Williamson, 8 M. & W. 405; Pott v. Todhunter, 2 Collyer, 76; Harrison v. Guest, 8 H. L. 491; Cameron v. Sutherland, 17 Gr. 286.

(*b*) Drury. at 326. (*c*) 2 Y. & C. C. C. 104. (*d*) 8 B. 450.

(*e*) 1 Giff. 230, 231; see also Watt v. Grove, 2 S. & L. 502.

(*f*) Holman v. Loynes, 4 D. M. & G. 276, 277.

setting forth the alleged obligations of Sir *Henry*. If he assumed them, it was done orally and privately; and Mrs. *Talbot* had no means of proving them if Sir *Henry* had afterwards chosen to dispute them, or if he had died before they were fulfilled. That is fatal to a transaction between solicitor and client; because of the "principle which runs through all the cases on dealings between attorney and client—that the attorney dealing with his client is bound to give the client, at least the same protection as he would be bound to give him if dealing with a stranger." It would have been the clear duty of Sir *Henry* to see that Mrs. *Talbot*, if she had been selling to a stranger, had clear proof of the alleged obligations; to see that the conveyance of June, 1850, was expressed to be subject to the leases which were on the property, and to the *Sutherland* mortgage; that the chattel mortgage was released; and that Mrs. *Talbot* had security for the annuity which it is said that she was to receive; and Sir *Henry* or his representatives cannot maintain a sale to himself in which these matters were neglected (*a*). In *Huguenin* v. *Baseley* (*b*) Lord *Eldon* observed, that he could not "find, in any of the cases in which a deed had been affected on account of undue influence, that the Court has ever attended to anything, supposed merely to oblige the parties, if not expressed;" and I have found nothing of the kind in the cases since decided.

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Judgment.

The letter from Sir *Henry* to Mrs. *Talbot*, in 1852, was relied on as having then put into her hands sufficient evidence of the bargain. That letter recognises an obligation on the part of Sir *Henry* to pay Mrs. *Talbot* "an annuity," not of any fixed sum, but of "one-half of *Deykes* and *O'Reilly's* ground rent;" and does not say for how long this was to be paid by Sir *Henry*.

(*a*) See 8 DeG. F. & J. 443, 444; Waters v. Thorn, ante.
(*b*) 14 Ves. at 301.

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Nor does the letter make any allusion to the other conditions which, according to the answer of the defendant, formed part of the bargain. What answer Mrs. *Talbot* made to the letter we do not know. So far as the letter gives any clue to the intention of the transaction, it does not correspond with the case now set up by the defendants.

Further: the defendants have failed to prove that the consideration agreed to (if any) was as set forth in the answers. Thus, instead of there being a debt of £600 due to Sir *Henry* in 1850, the amount was £334 3*s.* 8*d.* only, with a year's interest; instead of *Sutherland's* mortgage, which the answer says that Sir *Henry* was to pay, being £700, the amount was only about £500; and instead of the Building Society mortgage (which also the answer says that he was to pay) being £700, it was but little more than half that sum. As to the alleged annuity, Sir *Henry* allowed £39 only, up to the 1st May, 1854, say for three years and-a-quarter; and, though he paid £50 a year after that date, he expressly insisted in a letter to *William Talbot*, dated 7th August, 1866, that all which his mother had been entitled to was £39. There is no evidence before me now, except these two letters from Sir *Henry* himself, that he had ever agreed to pay any annual sum, unless an agreement is to be inferred from the mere fact of his making the payments; and it is obvious that the nature of the agreement, if any, under which the payments were made, or the period for which they were to continue, cannot be inferred, except by the sheerest conjecture, from the mere fact of payments having been made.

Judgment.

Had the other difficulties as to the alleged sale and alleged consideration had no existence, it would be material to consider whether the defendants had proved the adequacy of the consideration now alleged to have been paid. The burden of making this out by clear evidence

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rests on the defendants. If in such a case there is a conflict of testimony, it is not sufficient to make out, as in ordinary cases, that the preponderance of proof is with the defendants. "From the general danger, the Court must hold, that, if the attorney does mix himself with the character of vendor, he must shew to demonstration (for that must not be left in doubt) that no industry he was bound to exert would have got a better bargain." That was the strong language of Lord *Eldon* in *Gibson* v. *Jeyes* (*a*). *Grosvenor* v. *Sherratt* (*b*) was the case of a lady who had executed a lease to two relations on the suggestion and advice of her father's executor, a gentleman in whom, as the Court found, "she placed the greatest confidence, whose judgment she esteemed and whose opinion she followed." He was not a solicitor. The Master of the Rolls said that, "of course the obligation fell on them to shew that by no possibility could more be obtained" for the property. The preponderance of evidence as to value was in favour of the transaction; fourteen or fifteen persons swore that it was a fair lease; "but that will not support it in this Court, unless you also shew, that by no possibility could more have been obtained for it. * * It is not sufficient for the lessee to say, in the confidential situation of near relations, 'I will do what is fair between the parties.'" His Lordship further observed: "I will, however, do them the justice to say, that I believe, and my belief is founded on a careful perusal of the evidence, that they intended to act fairly by her, and that being desirous to get the lease for themselves, they settled the terms of it at what they thought would be fair, as between herself and the lessees, and such as they supposed any person desirous to take the property would give. But this is not enough. She was entitled to have the utmost that could have been got, not what they thought, or any indifferent person thought, would be fair between the

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(*a*) 6 Ves. 271.

(*b*) 28 Beav. 659.

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parties. Accordingly, the whole of the evidence of fourteen or sixteen gentlemen, stating that the terms are fair, and that these are usual terms, and such as property of that description would be let for in that neighbourhood, amounts, in my opinion, literally to nothing. Two persons are found who say that they would have given more, and that the minerals are worth more; but even if not, she was entitled to the most that could have been got for them."

Having given my best attention to the evidence of value, I am unable to say that the defendants have proved in the way required that the sums said by the defendants to have been paid by Sir *Henry* in respect of the property, assuming that these constituted the consideration for the deeds, were the full value of the property.

Judgment.

On the various grounds thus stated, the defendants have failed to maintain the alleged purchase as a transaction which, as between an attorney and client, is valid in equity; and this view renders it unnecessary for me to consider the evidence from which counsel for the plaintiff contended that it sufficiently appeared that the transaction was in fact intended as a mortgage or trust, and not a sale.

It was suggested that the bill had been filed too late. It was filed within twenty years after the execution of the deeds in question, that is about nineteen afterwards. It was not contended that the Statute of Limitations afforded a defence; but the argument was, that, in the case of a sale by a client to an attorney, the Court refuses relief after a lapse of less than the statutory period.

Viewing the transaction as an intended mortgage or trust, as (for reasons already stated) I must do, it is clear that relief could not be refused if sought within twenty years; and, if the case were shewn by the

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proofs which a solicitor is required to produce to have been, in the intention and by the agreement of the parties, a sale, the lapse of time would not, under the circumstances, be a bar. Less than twenty years is only a bar in such cases where the delay "has not been satisfactorily accounted for (*a*)." Where there had been a delay of seventeen years, and "no species of excuse or explanation for the delay," relief was refused (*b*). The nature of the excuse or explanation which the Courts recognise as sufficient is thus stated in *Gregory* v. *Gregory* (*c*): "In all the cases in which length of time has not been allowed to operate against the title to relief, it has been shewn that there has been a continuance of the circumstances under which the transaction first took place, as of the distress of the parties, *or* of the improper influence used, or of some other circumstance." There "the parties were independent of the purchaser or his bounty;" and, there having been a delay of eighteen years, the bill was dismissed. Sir *James Wigram* in *Roberts* v. *Tunstall* (*d*) stated the rule in the same way. He mentioned, as one of the cases in which the delay was no bar, a case "where the vendor is dependent on the bounty of the purchaser." He observed that in such cases, "the Court considers that the right of the vendor to rescind the sale exists, without the imputation of laches, until such time as it is shewn that he was released from the position in which he was placed by those circumstances. The poverty of the vendor added to the other circumstances, is also a material ingredient in such a case;" poverty alone is no bar, "where none of the special grounds of complaint [which the learned Vice Chancellor enumerated] exists," and "where there is no

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(*a*) Champion v. Rigney, 1 R. & M. 539.
(*b*) Baker v. Read, 18 Beav. 400.
(*c*) Geo. Coop. 204; Affd. Jac. 601.
(*d*) 4 Hare at 267.

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dependency of the seller on the purchaser (*a*)." Here that dependency existed up to the death of Mrs. *Talbot*.

There are other circumstances which bear on this question. Accustomed, until after her husband's death, to comparative affluence, she had nothing to live upon, after the year 1851 until her death, but the paltry sum of £50 a year which Sir *Henry* allowed her; and for even that sum she had no security or even written undertaking from Sir *Henry*. In November, 1859, she had a paralytic stroke, and she partly lost her speech. The debts were not all paid by Sir *Henry* before 1855; and she had no means of paying them. He is proved to have acted as her only solicitor up to 1852, and she had no other solicitor afterwards. His house and that of a widowed sister are the only houses at which she is known to have visited. There is no time at which either the professional or other confidential relationship can be said to have ceased up to her death (*b*). Their intercourse became less cordial a year or so after the deeds, and the plaintiff's sister ascribes this in part to his having then got the conveyance of the property. But there seems no just foundation for that suggestion. He was against the plaintiff's marriage and against Mrs. *Talbot's* continuing to allow her children to live with her and at her expense. She appears not to have had the heart to adopt his prudent counsels in regard to these matters, and a comparative coolness was the result:—"estrangement," the learned counsel called it in his examination of the witnesses,—but it made no difference in the business relations of the old lady and Sir *Henry*, nor did she cease to go to his house as before.

Judgment.

(*a*) See Roche v. O'Brien, 1 B. & B. 342; Hillary v. Waller, 12 V. 266. Gowland v. De Faria, 17 Ves. 25; Byrne v. Frere, 2 Moll. at 178; Oliver v. Court, 8 Pri. at 167, 168; Gresley v. Mousley, 4 DeG. & J. at 98.

(*b*) Rhodes v. Bate, L. R. 1 Ch. Ap. at 260; Gresley v. Mousley, 4 DeG. & J. at 96.

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In *Gresley* v. *Mousley* (*a*), a purchase by a solicitor from his client was set aside at the suit of the devisee of the latter on a bill filed two years after the death of the solicitor, and nearly eighteen years after the death of the client. Relief has frequently been given in such cases after the death of the parties (*b*): the long established rule being, that where a solicitor makes a purchase from his client he assumes the burthen of sustaining it by clear evidence "if the purchase should be impeached, at least within twenty years of its date;" and must "be taken to have been all along conscious (*c*)" of that obligation. He is required to have, and to preserve with the same care as his title deeds, the evidence of those facts which are necessary in equity to sustain a purchase by a solicitor from his client.

Judgment.

It is further to be remembered on this question of time, that the time counts from the date of the client's knowledge of his right to set aside the transaction. The defendants should have been able to prove that the transaction was a sale; that Mrs. *Talbot* so understood it; and that, at the date from which time is to count, she knew that she had the right to set the sale aside (*d*). The letter of 1852 does not necessarily imply that Sir *Henry* claimed to be purchaser; and is consistent with his having taken the conveyances for the purpose and on the terms stated in the bill. If the letter, critically examined, could be construed as consistent only with the position of a purchaser, the letter certainly is not so expressed as to bring home to the mind of an unsuspecting old lady, nearly connected with the writer, that he was assuming the property to be his own, if the letter was the only notice she had had of such a claim.

(*a*) 4 DeG. & J. 78.

(*b*) Gresley v. Mousley, 4 DeG & J. Barnard v. Hunter, 2 Jur. N.S. 1213. Topham v. Exham, 10 Ir. Ch. 440, and other cases *ante* and *post*.

(*c*) Per Lord Justice Knight Bruce, 4 DeG. & J. at p. 91.

(*d*) Vide 1 W. & T. Lead. Ca. 157, 158, &c.

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On every ground, therefore, it is plain that I cannot hold the lapse of time in the present case to be a bar to relief.

I have not found Sir *Henry* to have been guilty of any intentional wrong towards Mrs. *Talbot,* and I do not wish anything which I have said to be construed in that way. It has occurred to me that the absence of a writing to shew her right, whether as mortgagor, *cestui que* trust, or annuitant, may have arisen from a desire to prevent her from disposing of her interest, whatever it was, for the maintenance or assistance of her children, instead of applying it for her own support. Such a conjecture may account for the absence of a writing and, in a measure, for the privacy of Sir *Henry's* dealings with Mrs. *Talbot;* but the possible correctness of the conjecture does not affect the way in which the matter must be dealt with in a Court of justice.

Judgment.

I have discussed the case at considerable length, partly under the idea that I might perhaps thereby contribute to stop litigation between these two sisters. I am sure that it will be for the comfort and interest of both, as well as of the family generally, that they should come to some friendly arrangement. I expressed a hope at the hearing that they would relieve the Court from the necessity of pronouncing a decree; and I regret very much that my recommendation has been ineffectual. I renew the recommendation of a friendly arrangement still, with a view to saving such near relatives from the further irritation of a reference and prolonged litigation.

Declare, that Sir *Henry Smith* took the conveyances as trustee for Mrs. *Talbot*, subject to the re-payment of what should be due to him by Mrs. *Talbot* for his advances. Reference to the Master to ascertain what

was due to him from her at the time of the conveyances and for his advances subsequently. The plaintiff will have the costs up to decree. Subsequent costs and further directions will be reserved until after report.

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Interpleader—Deposit receipt.

An interpleader suit must be dismissed, with costs, if the plaintiff does not establish, at the hearing, a case making interpleader proper.

A condition, on a bank deposit receipt, that the receipt should, on payment, be given up to the bank, may not be void, but it does not entitle the bank to retain the money, in case the receipt is not forthcoming; the depositor is entitled, on proof of loss and indemnity (if required), to relief in equity.

Rehearing.—The case was originally heard before the Chancellor. His judgment is reported *ante* page 313. His Lordship held that the plaintiffs had not established a case entitling them to file such a bill; and ordered them to pay the money to the defendant entitled to it, with costs. The re-hearing was at the instance of the plaintiffs.

Mr. *Palmer*, for the plaintiffs.

Mr. *McGregor*, for the defendant *Little*.

The bill was *pro confesso*, against *Culligan*, the alleged claimant.

Spragge, C.—I prefer, to any language of my own, in the way of defining what is necessary to give a right to file a bill of interpleader, the language which I find to have been used by learned Judges in England.

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What Lord *Cranworth* (*a*) says is: "Now the foundation of the right to file a bill of interpleader, is that there is a conflict between two or more persons claiming the same debt or obligation." Lord Justice *Turner*, in *Myers* v. *The United Guarantee Co.* (*b*), speaking of the disposition of the costs, says he doubts very much whether the case was a proper one for interpleader, "since (he says) the money might have been safely paid" to certain persons whom he names. In *Cochrane* v. *O'Brien* (*c*), Lord *St. Leonard's*, while referring to *The East India Company* v. *Edwards*, says: "Yet the Court is bound to see that there is a question to be tried." And in *Toulmin* v. *Reid* (*d*), Lord *Romilly* propounded a clear opinion "that a defendant in an interpleader suit may, at the hearing, submit to the Court that it is not a proper case for interpleader." In *Jew* v. *Wood* (*e*), this was the language of Lord *Cottenham*: "The question, therefore, is whether the facts stated in the pleadings, or rather the observations of Sir *M. Wood*, shew that there is a substantial question to be tried, upon that ground, between Sir *M. Wood* and the plaintiff; for the mere fact of such a claim being made, and such a question being raised, cannot avail, unless it appears to the Court that there is a real and substantial question to be tried."

Judgment.

It has, no doubt, been said in more cases than one, that a claim is sufficient; but this has been said where it was contended that *the bringing of suits* against the stakeholder was necessary; and it was said in cases where it appeared that the claims made were real and substantial.

I observe that in the Equity Draftsman, by *Van Heythueysen* (*f*), after setting out the nature of the

(*a*) 5 D. M. & G. 455.
(*b*) 7 D. M. & G. 127.
(*c*) 2 J. & L., at 389.
(*d*) 14 Beav., at 500.
(*e*) C. & P. 193.
(*f*) Vol. I. p. 250.

adverse claims, and after declaring the willingness of the plaintiff to pay to the party entitled, the pleader proceeds thus: "And by reason that all the defendants persist in the several adverse claims before mentioned, and threaten and intend to proceed at law against plaintiff, for the recovery of the said rent, plaintiff is advised that he cannot with safety pay the same to any of the defendants, but that they ought to interplead," &c.

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The language, in some of the cases, as to the right of a person in the position of a stakeholder to file such a bill, is certainly very wide; but they are cases where a serious claim was actually made by some party other than the one that appeared *prima facie* entitled. There surely must be a reasonable doubt as to which of the rival claimants is entitled, otherwise it would be allowing a stakeholder to file a bill without having a reasonable cause for doing so.

Judgment.

Now all that the plaintiffs allege in this case, is that one *Culligan*, whom they make a defendant, did in August, 1869, give them notice that he was the holder or assignee of the deposit receipt given to *McDonald*, and that he claimed from the plaintiffs the moneys thereby secured. It is not alleged that *Culligan* was the holder of the receipt, nor is there any proof of what is alleged. For all that is *proved*, no claim may have been ever made by any one.

But suppose that *Culligan* did have the receipt, and claimed to have the deposit paid to him, it is not suggested that it was in any other position than as agent for *McDonald*: and if it were in his own right, he must have taken it at a time when *McDonald's* right to it had become divested; all which, as is proved in the case, was well known to the plaintiffs. Further, no claim was pressed by *Culligan*, supposing such a man to have existed, and to have had the deposit receipt. The

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objection to his claim was reasonable. The plaintiffs are not in the position of those referred to by the present Lord Chancellor, when commenting upon the unreasonableness of asking stakeholders to defend suits brought against them. There was no suit by *Culligan*. He got his answer from the plaintiffs, whatever it was, and we hear no more of him. All this, is supposing the plaintiffs' allegation to have been established in evidence. If it were, I should still think the plaintiffs would have been quite safe in paying over the deposited money to the assignee in insolvency of the depositor. There being no proof in support of that allegation, the claim of the assignee to the money was uncontested by any one; and the sole ground for filing the bill would be, that the deposit receipt is not produced: upon that I said all that I have to say, when the case was formerly before me. The case to which I referred upon that point, was a case of interpleader.

Judgment.

There is also this practical difficulty in allowing that the plaintiffs have made out a case for interpleader. It is the right of the plaintiff, in a proper case, to deduct his costs from the amount he has to pay to the party found entitled, and it is the right of the party entitled to have them over, together with his own costs against the party making the unfounded claim. But how could that rule be applied in this case? The bill is *pro confesso* against *Culligan;* but he only confesses that in August, 1869. he gave notice to the plaintiffs that he was then the holder of the deposit receipt, and claimed the amount deposited. I cannot see how his doing this, an act which may have been perfectly innocent and right, should subject him to the payment of these costs. It is not even alleged that the plaintiffs explained to *Culligan*, *Little's* position as assignee in insolvency, and that he still persisted in his claim.

But it is contended, that assuming that the plaintiffs' case failed as a case for interpleader, I should at most

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have dismissed their bill, and not have decreed relief actively against them; and several cases in England are cited to shew that I went too far in directing the plaintiffs to pay over the money. The English rule is thus shortly stated by Lord *Romilly*, in *Toulmin* v. *Reid* (*a*): "I am of opinion that it is not competent for the Court, in cases of this description, to make any hostile decree against the plaintiffs, compelling them to account in respect of the various matters stated in the bill. No point is better established, than that a defendant cannot have active relief against a plaintiff, unless he himself files a bill for that purpose." All this applies exactly, unless our General Order, No. 126, which provides that a defendant may claim, by answer, any relief against the plaintiff which such defendant might claim by a cross-bill, stating the case entitling him to relief, and praying such relief as he may think himself entitled to, makes a difference. I think the only question here is, whether the defendant has, by his answer, sufficiently prayed for cross-relief, and whether cross-relief can be given in such a case.

Judgment.

The plaintiffs, by their bill, declare themselves ready and willing to pay the money in question to such one of the defendants as may be entitled thereto, and offer to bring the same into Court, to be paid to either of the defendants as this Court may direct: but this is upon the assumption that they make by their bill, and establish in evidence, a proper and sufficient case for interpleader.

By the General Orders of 1867, the cases in which a defendant may claim relief by answer, is confined to those in which he might claim relief by a cross-bill; by which, of course, is meant what is technically a cross-bill. We are all of opinion that the payment of money in the hands of a person in the position of a stakeholder,

(*a*) 14 Bea. 505.

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cannot be the subject of a cross-bill. I think, upon reflection, that I was in error in ordering payment of the money to the assignee. We express no opinion as to the right of the assignee in insolvency to maintain a suit against the Bank, either at law or in equity. We decide only that the Bank has established no case for interpleader, and that we cannot give active relief to the assignee. The plaintiffs' bill will be dismissed with costs. The deposit, on rehearing, will be returned to the plaintiffs, and the money paid into Court by the plaintiffs will be repaid.

Judgment.

MOWAT, V. C.—I concur in the opinion that the bill should be dismissed with costs, unless the defendant *Little* is prepared to accept the terms offered by the plaintiffs. I think that the condition as to the deposit receipt being given up to the Bank on payment, if required, is not a void condition; but where the deposit receipt has been lost or destroyed, or for any other reason is not producible, I do not suppose that the Bank is entitled to retain the money. I presume that there may in such a case be relief in this Court, as in the case of any other security, lost, destroyed, or not forthcoming, and on like terms. But on the motion for decree, the answer had to be taken as true; and, looking at the allegations of the bill, and also comparing these with the answer, I agree with the Chancellor that a case of interpleader was not sufficiently made out; and I concur in the argument that the result of that is, that the bill should be dismissed with costs.

STRONG, V. C., concurs.

1871.

SILLS v. LANG.

Dower—Consent, relief against after delay.

The plaintiff claimed dower; a decree was made less extensive than she claimed; the Master made his report in pursuance of the decree; the solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent; these terms were in accordance with the decree and report; they provided also that, in lieu of dower, plaintiff should be paid a certain annual sum named; the decree was not drawn up, but the agreement which it embodied was acted on for eight years:

Held, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her.

This was an application by the plaintiff on petition to vary a consent signed by the solicitors of the parties; or for a direction to the Registrar to draw up a decree on further directions embodying certain variations suggested by the petition and which are set forth in the judgment. Statement.

The plaintiff was the widow of *William Lang*, to whom she had been married on the 5th October, 1853. Shortly before that date *Robert Lang*, *William's* father, had assigned all his interest in a lot of land (which he had contracted to purchase from the Crown) to *William* in consideration of *William's* forthwith executing a "life-lease" to *Robert* of the south half of the lot at the nominal rent of one shilling, and of a covenant to be therein contained for the maintenance of his mother, or the payment to her of £20 annually for her life in case she should survive her husband, the said *Robert Lang*. A life-lease with such a covenant was thereupon executed. *William* predeceased his father, intestate and without issue, leaving his father his heir. The plaintiff, *Robert's* widow, thereupon claimed dower in equity out of the lot; and for that purpose filed a bill against *Robert Lang*. On the 26th November, 1861, the Court made

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a decree, declaring the plaintiff entitled to dower in the south half of the lot; directing the Master to take an account of the arrears of dower in respect thereof; declaring the plaintiff chargeable with one-third of the interest on the sum paid to the Government by the defendant after the husband's death in respect of the north half; and with one-third of one-half of the £20 payable to the wife of *Robert;* and directing an account of the same. The decree gave no costs up to decree, and reserved subsequent costs. On the 1st October, 1862, the Master made his report; and on the same day the solicitors for the parties signed a consent to the following decree on further directions being made in this cause; namely, that £37 17*s.* 6*d.*—being the amount of arrears of dower, less one-third of arrears of interest on purchase money, as found by the Master—should be paid to the plaintiff by the defendant; that the plaintiff should be declared entitled for life to the annual sum of £6 13*s.* 4*d.* in lieu of her dower; that from that sum £1 5*s.* should be deducted annually for the plaintiff's share of the interest on the purchase money; that the balance, or £5 8*s.* 4*d.*, should be paid to the plaintiff on the 1st October in every year during the joint lives of the plaintiff and defendant, by depositing the same to plaintiff's credit in the Commercial Bank, at Port Hope; that on the death of *Robert*, this sum should be reduced to £2 1*s.* 8*d.* during the joint lives of the plaintiff and *Robert's* wife; and that after the death of *Robert's* wife, the amount should again be £5 8*s.* 4*d.* during the remainder of the plaintiff's life. The consent said nothing of costs; the defendant's solicitor made an affidavit stating that the reason of that was, that it was not considered by the parties that the plaintiff was entitled to the costs.

Statement.

Mr. *George Kerr*, for the motion.

Mr. *J. Bethune*, contra.

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January 11.

MOWAT, V. C.—The decree as to the south half of the lot seems clearly right. The existence of an outstanding life-estate in another prevents dower from attaching unless such life-estate terminated during coverture (*a*). The death of *Robert Lang* since decree is therefore immaterial.

The plaintiff claims that the dower should be free from the incumbrance of the covenant for the maintenance of the widow of *Robert*. The lands which descended to *Robert* as heir were perhaps first applicable to the discharge of the covenant, on the principle stated in *Parke* on Dower (*b*), as cited by the late Chancellor in *Sheppard* v. *Sheppard* (*c*). But I am not aware that that point was suggested at the hearing of the cause, and it was not on that ground that the plaintiff's right to freedom from the covenant was put in argument before me. I think that the contention is not sustainable on any other ground.

Judgment.

But both of the points to which I have adverted were in effect decided by the decree, and the plaintiff, strictly speaking, could get the benefit of them only by rehearing the cause, or appealing from the decree, and having it varied. The consent, however, seems a bar to the plaintiff's claims on either point and also as to the costs, even if her present contention as to all these were well founded. By the consent, it was agreed more than eight years ago, amongst other things, that a fixed annual sum should be paid in lieu of dower; and the plaintiff has been receiving the payments ever since. She does not allege any want of authority on the part of her then solicitor to make such an arrangement, or that she was ignorant of it, or did not sanction it. All that she says is, that until

(*a*) See cases Shelford's Real Property Statutes, 7th Ed. p. 438.
(*b*) p. 351. (*c*) 14 Gr. at 176.

1871. Sills v. Lang.

recently she had no "knowledge of the effect of the consent, or the principles or basis upon which it was entered into; but merely understood from her solicitor that the amount of her dower had been agreed upon." The decree having decided against the plaintiff the claims which she now sets up, except as to the costs subsequent to the decree, she could only get relief by having the decree varied on a rehearing or an appeal, and she is too late for either, except on special leave. The only ground on which the claim for relief against the agreement embodied in the consent can be put is, that the decree is less favourable than she is now supposed to have been entitled to. It would be very difficult after such a lapse of time to grant an order for leave to rehear or appeal if there had been no agreement in the way; but it is impossible on any such ground to permit her to get rid of an agreement, entered into on the basis of that decree, whereby she consented to accept a fixed annual sum in lieu of one-third of the land; or impossible that she can now claim a larger sum than was agreed to, and than has for so many years been paid. It is not disputed that this agreement gives her as much as under the decree she would have been entitled to, except that it is said that the Court might have given her costs subsequent to the decree. But the practice, as the law then stood, seems not to have been to give such costs (*a*).

Judgment.

The facts which are before me were, as I understand, a short time ago before the Chancellor on motion; and he directed the petition to be filed. To save unnecessary expense, I may therefore perhaps, under the general prayer, make an order (if the plaintiff desires it) to the effect of the consent, inserting any place or manner of paying the annual sum which she may desire instead of its being paid into the Commercial Bank, at Cobourg, and

(*a*) See Seton's Decrees, 676 *et seq.*

reserving liberty to apply in case of default. I think that the plaintiff is entitled to those variations of the strict terms of the consent, no decree having yet been drawn up upon it. If the plaintiff does not accept such an order, the petition must be dismissed. In either case, the defendant must have the costs of and incidental to the petition (of course as between party and party). No costs to either party prior to the petition.

1871.

Sills v. Lang.

KNAPP v. BOWER.

Mortgage—Tender.

In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it; the onus of proof as to such use is on the mortgagee; but on his giving such proof, the subsequent interest is chargeable.

Statement.

The plaintiff, being remainderman in fee of certain cultivated land adjoining the defendant's farm, mortgaged his interest to the defendant. The defendant afterwards obtained a lease from the tenant for life, and went into possession. The tenant for life died on the 15th April, 1865; and on the 16th November following, the plaintiff tendered to the defendant a sum of money which the plaintiff considered sufficient to cover the amount due on the mortgage. The defendant refused the tender; and some years afterwards the plaintiff filed a bill to redeem, setting forth the tender. The cause was heard before the Chancellor at Brockville, and he made a decree containing the directions usual in decrees for redemption, and a direction also, that the Master there should ascertain and report the amount due on the mortgage at the time of the tender; further directions and costs were reserved.

1871. The Master made his report, and the cause came on for argument on an appeal by the defendant from that report.

Knapp v. Bower.

Mr. *English*, for the appeal.

Mr. *Moss*, contra.

January 11. MOWAT, V. C.—The amount found by the Master to have been due at the time of the tender, is less than the amount tendered, and the Master has in consequence held that the plaintiff is not liable to subsequent interest. The contention on the part of the appellant is, that the plaintiff is not exempt without proof that his money has lain idle ever since. The point does not seem open to the defendant under the decree.

Judgment. It is clear that no such evidence as the appellant contends for would be necessary at law, though at law the plea of tender must contain an allegation that the plaintiff was *touts temps prist* (*a*); nor would evidence be receivable there to shew that the debtor had used the money. But it is the rule in equity, that, if it is proved that he has used the money, he is liable for interest subsequent to the tender. The question is, is he liable in the absence of any proof on the subject? is the *onus* on a mortgagor of proving that he had kept the money idle? I find no sufficient authority for so holding. In *Coote* on Mortgages (*b*), to which I was referred on the part of the appellant, the rule is thus stated: "The mortgagor should also, it is said, be ready to make oath, that the money has always been ready, and no profit made of it, which fact may be controverted by the mortgagee, who may prove the contrary, in which case the interest will run on." In *Fisher* on Mortgages (*c*) it is said that, "it ought

(*a*) Hume v. Peploe, 8 E. 168; &c. (*b*) 3rd ed. p. 441.
(*c*) 2nd. ed. p. 941, sec. 1691.

to appear, that from the time of the tender the money was kept ready by the mortgagor, and that no profit was afterwards made of it; upon proof of the contrary whereof the interest will still run."

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Knapp v. Bower.

In both books two cases are referred to in support of the text. The whole report of *Sutton* v. *Radd* (*a*), the first of these, is as follows: "A deed in nature of a mortgage, and covenant to reconvey on payment: the money was tendered at the day and place, and refused: decreed the money without interest from the time of the tender, and to reconvey; though that the plaintiff ought to make oath that the money was kept, and no profit made of it." In *Gyles* v. *Hall* (*b*), the other case referred to, the following observation was made by the Lord Chancellor: "In this case it ought to appear that the mortgagor from that time [viz., the time of the tender,] always kept the money ready; whereas the contrary thereof being proved, that the mortgagor was not ready to pay it, the interest must run on."

Judgment.

These cases do not establish that interest will run in the absence of proof by the mortgagor that he kept the money idle; in the latter of the two cases there was express proof to the contrary; and the text writers cited evidently considered such proof to the contrary to be necessary.

The statement of a tender as given in *Van Heythuysen's* Equity Draftsman (*c*), or *Whitworth's* Equity Precedents (*d*), or *Lewis's* Equity Drafting (*e*), does not contain any allegation that the money was kept idle thereafter. This shews the course of practice on the point; for a party cannot be bound to prove what he is not bound to allege.

(*a*) 2 Ch. Ca. 206. (*b*) 2 P. W. 378. (*c*) P. 138.
(*d*) P. 423. (*e*) P. 263.

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Knapp v. Bower.

I think, therefore, that the rule of the Court must be taken to be, that *primâ facie* a tender stops the interest, and that proof of the money being kept idle is not necessary to exempt the debtor from subsequent interest. But, on the other hand, where the mortgagee shews, by the oath of the mortgagor or otherwise, that the mortgagor used the money, and made a profit on it, the interest is chargeable. This defendant did not choose to call for the plaintiff's oath on the subject; and I do not know whether he desires to do so now. But I am of opinion, on the whole, that—considering the form of the decree; the omission of the defendant to call for the plaintiff's oath, either before decree or in the Master's office; and the small amount of the subsequent interest (less than $50)—I should not reopen the matter.

Judgment.

The second matter argued was, that the Master should have made certain allowances for improvements, most or all of which were made by the defendant while in possession under the tenant for life. The evidence is conflicting as to whether the estate has been enhanced in value by these improvements; and sufficient does not appear to interfere with the opinion of the Master on the subject, he having heard the witnesses give their testimony. Independently of this consideration, a tenant for life cannot claim to be allowed by the remainderman for his improvements (*a*).

The third point urged against the report was, that, in taking the account of what was due at the time of the tender in November, the Master has charged the defendant with a full year's rent, $30, though less than a year had elapsed since the death of the tenant for life, (which had taken place in the previous April) and though the defendant as her lessee was entitled to emblements. No

(*a*) Dixon v. Peacock, 3 Drew. 288.

evidence was read to me to shew that there were any crops in the ground at the time of the death; and it is said that the objection was not taken before the Master, that there should be any deduction, on the ground of the defendant's right to emblements, from what would otherwise be a fair rental. The Master appears to have been satisfied that the defendant had the full benefit of a year's occupancy at the time the tender was made; and I do not see that he was wrong in that. 1871. Knapp v. Bower.

Appeal dismissed with costs.

BRADY v. WALLS.

Vendor and purchaser—Evidence of title—Registered title.

In case of a registered title, a purchaser is in this country entitled to require the registration by his vendor of all the instruments through which the title is derived.

On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the Court, it is not usually necessary to prove the execution of deeds produced.

Affidavits are admissible for some purposes on such an investigation; where, however, an affidavit was offered to prove the loss of a will, which had been proved in a Surrogate Court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence.

Appeal from report of Master at Cobourg, under the circumstances appearing in the head note and judgment. Statement.

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

Mr. *Crickmore*, contra.

1871. Brady v. Walls. January 11.

MOWAT. V. C.—This is an appeal, by a purchaser under the decree, against the report of the Master at Cobourg in favor of the title. The title was derived under a will, bearing date 21st December, 1852, giving to the wife of the supposed testator power to sell his real estate. Shortly after the testator's death his wife, accordingly, sold and conveyed to the present vendor. The will was filed in one of the Surrogate Courts of the State of New York, on the 5th day of September, 1853; and had been lost. The evidence of the loss was the affidavit of an American gentleman connected with the law, who had searched for it in the Surrogate Court.

Judgment

It was contended on behalf of the appellant, that the due execution of the various instruments by which a title is made out, as between vendor and vendee, must be proved *viva voce*, and by the same evidence as would be necessary in an action of ejectment against an adverse claimant. But that would be requiring of a vendor more than the practice warrants. In *Lee* on Abstracts (*a*) it is said, that "the rules of evidence relating to conveyancing, and the proving a title between vendor and purchaser, are very different from the strict rules of evidence laid down by the Courts as between party and party in a suit; so that a purchaser may often be compelled to complete a contract upon evidence which would not enable him to recover the estate in an adverse suit against a hostile party in possession." After giving several illustrations of this, the learned author further observes, that "the practice of the profession has sanctioned the admissibility of this kind of evidence, and the Courts have confirmed the practice. In cases of conveyancing which arise in Court, and also in cases before the Masters in Chancery upon a reference as to title, the Courts themselves recognise and adopt those rules of practice."

(*a*) 23.

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Thomson v. *Miles* (*a*) was an action on the case brought against a purchaser for not completing his purchase. To prove the plaintiff's title he produced his deeds; and it was objected that he must make them evidence by producing the subscribing witnesses. "Lord *Kenyon* ruled it not to be necessary. He said he would never allow it, that, where the question was respecting a title, the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected, in making out a title in any case of a purchase, more particularly where possession had accompanied them; he therefore admitted them without proof of the execution."

Judgment.

Lord *St. Leonards*, in the last edition of his book on Vendors (*b*), is equally distinct: "A vendor, unless some special ground for it be laid, is never called upon to prove the execution of the title deeds. And even if the seller bring an action, yet the title deeds need not be proved." Mr. *Dart* thinks that the point, as to an action at law, is doubtful.

As to the use of affidavits in such cases, Lord *St. Leonards* pointed out in *Scott* v. *Nixon* (*c*), that "Courts of Equity frequently compel an acceptance of a title resting on affidavits; for instance, on questions of identity;" and I do not think that the enactment in the Chancery Act as to *viva voce* evidence made the rule otherwise in this country. The evidence on motions has always been on affidavit; any other practice would have been exceedingly inconvenient and injurious to the interests of suitors. So, examinations of witnesses out of the jurisdiction are usually on interrogatories, as formerly. The enactment does not

(*a*) 1 Esp, 184. (*b*) 14th Ed. p. 488, ch. 2, sec. 4, pl. 19, 20.
(*c*) 3 Dru. & War. 402.

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in terms affect the practice which dispenses ordinarily with proof of the execution of instruments of title; and where the evidence of witnesses is required in such a case, I think that the Master has still, when acting in a case within the general jurisdiction of the Court (as he certainly has when proceeding under the Act for Quieting Titles), a discretion to receive evidence by affidavit, of the facts of which some evidence is necessary to make out a title. But the Master, in the exercise of that discretion, must proceed with caution, as the Lord Chancellor pointed out in the case from which I have already quoted. "The Court must of course in such cases act with great caution, and ought to be satisfied before it compels a party to take such a title, that the facts are such as to sustain the title in the event of any adverse claim being set up." The title there depending on adverse possession, his Lordship said, that, if the party had chosen to have a more solemn mode of establishing the facts, he could have required it; the purchaser was not bound to accept the affidavits in proof of these facts. He might have insisted upon having a regular examination of witnesses, in the usual manner in which any other question of fact is proved in the Master's office.

Judgment.

Here, the evidence makes it probable that such a will was duly executed, and was the testator's last will, but it does not shew that legal evidence of this exists. If no further evidence can be given than the evidence which the affidavit of the solicitor affords, there is reasonable ground for an apprehension, that the will may not be capable of proof against an adverse party; and that would be a fatal objection to the title. It is true that even *viva voce* depositions would not be evidence afterwards against a claimant not a party to the suit; and that part of the evidence on which the title depends may be lost through the death of witnesses and other causes not within the purchaser's control; these dangers

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are unavoidable; but it is quite another matter if legal evidence of any important link in the title is not shewn to be in existence at the time of the investigation. Considering that this will seems to have been that of a foreigner, and to have been made in a foreign country; that the supposed witnesses were residents of a foreign country, and are supposed to be dead; that the will, if in existence, is now in a foreign country; that the means are not shewn of the purchaser's being able to prove the signatures of the witnesses, or the signature of the testator; and considering that the will has never been registered or proved in this country, and that it has been now lost, no one seems to know how—I think that the affidavit filed did not shew all that the purchaser was entitled to demand (*a*); independently of the argument founded on the case of *Kitchen* v. *Murray (b)* in the Court of Common Pleas.

Judgment.

In that case it was unanimously held by the Court, (adopting the opinion of Chief Justice *Draper*, then of the Queen's Bench), that in case of a registered title, a vendor can not make out a good title unless all the deeds are registered. I am not aware of that having been laid down in England, but it is certainly in the spirit of the legislation of this country in regard to the Registry Laws. The effect of it may be, in a case like this, to compel the vendor either to quiet his title under the Act for Quieting Titles, or to obtain a conveyance from the heirs-at-law. In England, a purchaser from a devisee was under circumstances held, in one case, to be entitled to require the devisee, as a condition of specific performance against the purchaser, to establish the will against the heir (*c*), though the general rule is otherwise; and in another case of a

(*a*) See Bryant v. Busk, 4 Russ. 1; Lee on Abstr. 347.
(*b*) 16 U. C. C. P. 69. (*c*) Grove v. Bastard, 2 Ph. 619.

1871. purchase of real estate, the vendor was required to prove a codicil in the Ecclesiastical Court (*a*).

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The title here being a registered title, and the will being an essential link in the title, I think that, following the case in the Common Pleas, I should hold that the vendor must procure the will to be registered; or must procure and register a deed from the heirs; or must quiet the title under the Act.

Judgment. Appeal allowed, with costs to the purchaser out of the fund in Court.

(*a*) Weddall v. Nixon, 17 Beav. 160.

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TO THE

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described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially), to convey these properties to *S.* The testatrix contracted with *S.* for the sale to him of one only of these lots; but *E.* alleged a verbal bargain by the testatrix to sell the lot to him; there was no writing as to such bargain, and no part performance. After the death of the testatrix, *E.* induced the plaintiff, who was not of age, to execute a conveyance to *S.* of the two lots:

Held, that the alleged bargain with *E.* was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by *E.*

Archer v. Scott, 247.

ACQUIESCENCE.

See "Nuisance."

ACT 29 VIC., CH. 28, SEC. 28.

[CONSTRUCTION OF.]

See "Insolvency," 2.

ADMINISTRATION SUIT.

1. The next friend of infants filed a bill, against the mother of the infants—their guardian appointed by the Surrogate Court—and her husband, alleging certain acts of misconduct which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of the defendants. The Court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party.

Hutchinson v. Sargent, 8.

2. Executors in this province have no right to leave the administration of the estate to this Court without some special necessity, where the expense of the suit would be disproportionate to the amount of costs.

McGill v. Courtice, 271.

3. In such a case, where the only important difficulties in the administration of the estate were created by a large claim of the executors which they failed to make good, and a claim of their father's which he had made at their persuasion and against his own wish; and the executors had more money in their hands than was required to pay all other claims against the estate, they were charged with the costs of an administration suit brought by a creditor.—*Ib.*

4. Where the judgment on an appeal from the Master's report enunciates a principle which is applicable to other parties and other points, the Master should so apply it in the further prosecution of the reference.

Denison v. Denison, 306.

5. Three parties made purchases before suit, and two of them only being charged by the Master with compound interest in respect of their respective purchase money, they appealed unsuccessfully against the charge, and they afterwards appealed against the charge of simple interest only to the third party:
Held, that such appeal was regular.—*Ib.*

6. Where the estate to be administered was large, requiring great care, judgment, and circumspection in its management for a number of years, the Court sustained an allowance of $1500 to the principal executor and trustee, and $1500 to the others jointly,—*Ib.*

7. Where a legacy is given to executors as a compensation for their trouble, they are at liberty to claim a further sum under the Statute if the legacy is not a sufficient compensation.—*Ib.*

8. Where the executor has power under a will to sell real estate for the payment of debts and legacies; and there was available in money more than enough to pay the debts, the Court, considering a suit for administration unnecessary, refused the executor the costs, and also his commission.

Graham v. Robson, 318.

9. In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the Master's office: to entitle them to such costs some sufficient reason must be shewn for their being represented by a separate solicitor.

Gorham v. Gorham, 386.

See also "Interest on Over Payments."

ADMINISTRATRIX.

[ASSIGNMENT OF MORTGAGE BY.]

The administratrix of a mortgagee executed an instrument purporting, in consideration of $1, to assign the mortgage to the plaintiff, who was her brother, and he executed a bond binding him to pay her one-half of the mortgage money as received:
Held, as between the plaintiff and the mortgagor, that this was a valid assignment.

Sinclair v. Dewar, 621.

ADOPTION OF CONTRACT

See "Principal and Agent," 6.

ADOPTION OF LEASE.

See "Landlord and Tenant," 2.

ADVANCES TO TRUSTEES.

A party making advances to trustees for the benefit of a trust estate, and which advances are applied to the purposes of the trust, is entitled to stand *pro tanto* in the place of the trustees as against the trust estate.

Mills v. Cottle, 335.

AGENCY.

See "Vendor and Purchaser," 1.

AGENT.

[LIABILITY OF.]

See "Principal and Agent," 4.

AGREEMENT NOT UNDER SEAL.

See "Railway," 3.

ALIMONY.

1. In a suit for alimony the wife must prove herself aggrieved, otherwise there is no foundation upon which the Court can proceed to pronounce a decree for alimony. The defendant, in his answer to an alimony suit, denied the acts of cruelty charged against him by the bill, and no evidence was given to establish the charges of cruelty, but at the hearing the defendant consented to a decree being made for alimony; the Court, on the grounds of public policy, refused to interfere.

Gracey v. Gracey, 113.

2. In such a case the parties could attain the object they had in view, of effecting a separation, by arrangement out of Court; the objection to pronouncing the decree sought was, the Court doing that without proof of necessity for its intervention, which it can only properly do upon proof of such necessity.—*Ib.*

ALTERED DEED.

See "Husband and Wife."

AMENDMENT AT THE HEARING.

See "Practice," 4.

ANNUAL PROFITS.

[MAINTENANCE—CHARGED ON.]

See "Will," 1.

ANNUITY.

[INTEREST ON.]

No interest is allowable in respect of arrears of an annuity.

Goldsmith v. Goldsmith, 213.

ANTECEDENT DEBT, MORTGAGE FOR.

A mortgage was obtained by pressure from an insolvent person (a miller) three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforcible for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him, by pressure, a mortgage on his chattels used in his business: this mortgage was held void against the assignee in insolvency.

McWhirter v. The Royal Canadian Bank, 480.

APPEAL.

See "Receiver, Appointment of,"

APPROPRIATION OF PAYMENTS.

A township treasurer had in his hands a large balance belonging to the township when he gave to the corporation new sureties: *Held*, that subsequent payments by the treasurer were applicable first to the discharge of that balance.

The Municipal Corporation of the Township of East Zorra v. Douglas, 462.

The rule, that general payments are appropriated first to the earliest items on the other side of an account, does not entitle a surety to claim that a concealed item, which, from its not being known, the debtor had not been charged with, should be deemed to have been satisfied by the moneys which had from time to time been paid by the debtor, and which had when so paid been charged by both parties against the other sums received by the debtor on behalf of the creditor.

The County of Frontenac v. Breden, 645.

ASSIGNEE.

[OF TRUSTEE FOR SALE.]

See "Trustee for Sale."

ATTACHMENT OF DEBTS IN EQUITY.

A judgment creditor cannot attach or garnish, by means of a suit in equity, any debt for which he has not obtained an attaching order at law.

Blake v. Jarvis, 201.

ATTORNEY AND CLIENT.

An attorney took a conveyance of certain property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:

Held, that this agreement was binding on the attorney, though not in writing.

After the making of the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default:

Held, that the judgment was no bar to a suit by the client for specific performance of the agreement.

Fleming v. Duncan, 76.

BOND.

[CONSTRUCTION OF.]

See "Municipal Law," 4.

BREACH OF INJUNCTION.

See "Injunction," 6.

CANAL.

[INTERSECTION OF, WITH ROAD.]

An Act of Parliament having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge over and across the canal; and the bridge having, after being erected, become unsafe through the default of the canal company, an incorporated road company which had acquired the road, was held to be entitled to build a bridge across the cut, though the navigation was thereby impeded; but that, on the restoration of the canal company's bridge, their right to the free navigation of the channel revived, and was enforcible in equity by mortgagees of the canal company, subject to such terms as justice to the road company required.

The Town of Dundas v. The Hamilton and Milton Road Co., 31.

[Reversed on appeal. See *post*, Vol. xviii.]

[RESTRAINING SALE OF.]

Injunction granted, at the suit of the creditors of a canal company who had a lien on the canal, against a sale thereof under a subsequent execution.

The Town of Dundas v. The Desjardins Canal Company, 27.

CERTIFICATE, EVIDENCE AGAINST.

See "Married Woman's Deeds," 3.

CHARITABLE GIFTS.

[OUT OF SPECIAL FUND.]

See "Will," 6.

Chattel mortgage. £4.80. Mr. Shirley's Pocket Bk.

CIRCUIT.

[HEARING ON, INSTEAD OF MOVING FOR DECREE.]

See "Practice," 2.

COLLATERAL RELATIONS.

See "Deed, Sons to Father."

COMPENSATION.

[TO TRUSTEES AND EXECUTORS.]

See "Administration Suit," 6, 7, 8.
"Trustees and Executors," 1, 2.

CONDITION AS TO VACANCY OF PREMISES.

See "Insurance," 3.

CONSENT, RELIEF AGAINST—AFTER DELAY.

See "Dower."

CONSIDERATION NOT CORRECTLY EXPRESSED.

See "Setting aside Deed."

CONSIDERATION FOR DEED.

[PAROL AGREEMENT AS TO.]

See "Deed, 2."

CONTEMPT.

See "Injunction," 2.

CONTRIBUTION.

Accommodation indorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controlled by contract; but such a limitation if stipulated for is binding.

Mitchell v. English, 303.

A note, indorsed by *B.* and *C.* for the accommodation of the maker, being overdue, the maker, to provide funds for taking it up, procured another person, *D.*, to indorse for his accommodation a new note, and on his applying to his former indorsers for their signatures untruly stated that he had sold goods to *D.*, who would be in funds to take up the note at maturity. The note was taken up by *D.*, who was the first indorser:

Held, that he was entitled to contribution.

McKelvey v. Davis, 355.

D.'s suit for contribution was not brought for five years, nor until *C.* had become insolvent:

Held, that *B.* must share with *D.* the loss; that he might have had his liability ascertained, and might have paid the amount before *D.* sued.—*Ib.*

CONVEYANCE TO SOLICITOR,

See "Solicitor and Client."

COVEYANCE AND AGREEMENT TO RE-SELL.

In 1838 *A.* having a life estate in certain land, his wife having the remainder in fee, *A.* being also owner in fee of property adjoining, and executions against his lands at the suit of *B.* and others being in the sheriff's hands, *A.* and his wife agreed verbally with *B.* that *B.* should purchase at sheriff's sale; that they also would execute a conveyance to *B.*, and that he should re-sell to them. Accordingly *B.* bought at the sheriff's sale; and *A.* and his wife executed a conveyance to *B.*, but the wife was not examined before magistrates until 1841. At the same time that this omission was supplied, two bonds were executed, one by *B.* for reselling the property to *A.* and his wife, on payment of the money (the amount of the executions); and the other by *A.* and wife for payment of the money; they agreeing that in case of default they would give up possession, and that any intermediate payments should be retained by *B.* as rent. In 1842 new bonds to the same effect were exchanged, naming a larger sum in order to cover some further advances which *B.* had meanwhile made to *A. A.* and wife remained in possession until default and were then ejected. After *A's* death his widow filed a bill to redeem, claiming that the parties were in effect mortgagors and mortgagee. Chancellor *VanKoughnet* so held, and made a decree for redemtion, but the decree was reversed in Appeal. [SPRAGGE, C., dissenting.]

Monk v. Kyle, 537.

CORPUS—LEGACIES CHARGED ON.

See "Will," 1.

COSTS.

1. Where a plaintiff claiming under a will, insisted on a construction which was decided against her, whereby her claim was considerably reduced, she was, nevertheless, under the circumstances of the case *held* entitled to the costs of the suit.

Goldsmith v. Goldsmith, 213.

2. An administration suit by a person interested to an amount less than $200 in an estate which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, was *held* not to be within the equity jurisdiction of the County Court.—*Ib.*

3. The rule which charges the costs of taking partnership accounts on both parties is not to be applied where it would be tantamount to the denial of any remedy.

Woolans v. Vansickle, 451.

CO-SURETIES.

COUNTY COURT.

COUNTY TREASURER.

CREDITOR, MORTGAGE TO.

DECREE ON PRÆCIPE.

DEED

and which was worth $4200 cash, procured the defendant to raise the money and to pay it to the Society; whereupon the Society conveyed the land to the plaintiff, and the plaintiff conveyed it to the defendant. The defendant a few days afterwards sold the lot for $4200 cash, to a person with whom the plaintiff had been previously negociating. The defendant admitted that after the sale he intended to give plaintiff the difference, less his own expenses and $200 for his trouble. There was great inequality between the parties, and some evidence of confidence between them, and the negociations between the two were private. The Court inferred from the whole evidence that the intention had been expressed during the negociations between the plaintiff and defendant, and that the plaintiff had conveyed on the strength of it; and

Held, that it constituted an agreement which the Court would enforce.

McLeod v. Orton, 84.

[Reversed on appeal, 12th January, 1871; but as the decision turned entirely on the question of fact and the view taken of the evidence, and the judgments were lengthy, it is not intended to print them.]

See also "Municipal Law."
"Reforming Deed."
"Setting aside Deed."

DEFICIENCY OF ASSETS.

See "Foreign Fire Insurance Co.," 2.

DEMURRER.

1. The trustee of a mortgage, who had no authority to transfer it, did nevertheless sell it to a third person.

Held, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust.

Ryckman v. The Canada Life Assurance Co., 550.

2. A bill having been filed on behalf of *cestuis qui trust* impeaching the conduct of a trustee, a demurrer thereto because the *cestuis qui trust* were not parties was overruled. —*Ib.*

[FOR UNCERTAINTY.]

See "Railway," 4.

DEPOSIT, DISTRIBUTION OF.

See "Foreign Fire Insurance Co.," 1.

DEPOSIT RECEIPT.

A condition, on a bank deposit receipt, that the receipt should, on payment, be given up to the bank, may not be void, but it does not entile the bank to retain the money, in case the receipt is not forthcoming; the depositor is entitled, on proof of loss and indemnity (if required), to relief in equity.

Bank of Montreal v. Little, 685.

DESTROYED BOND.

The jurisdiction of equity in the case of lost bonds, exists also in the case of bonds which have been destroyed.

The County of Frontenac v. Breden, 645.

See also "Principal and Surety, 11."

DEVISE OF LANDS CONTRACTED FOR.

A testator devised all his estate, real and personal, to his wife. At the time of making the will he was lessee, with a right of purchase, of certain lands on which, after the execution of the will, he paid the balance of purchase money due and obtained a conveyance thereof from the lessor.

Held, that the subsequent acquisition of the fee was not a revocation of the devise, and that the widow was beneficially entitled to the land so purchased; but that the legal estate therein had passed to the heirs at law.

Sinclair v. Brown, 333.

DISTRIBUTION OF DEPOSIT.

See "Foreign Fire Insurance Co.," 1.

DOWER.

The plaintiff claimed dower; a decree was made less extensive than she claimed; the Master made his report in pursuance of the decree; the solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent; these terms were in accordance with the decree and report; they provided also that, in lieu of dower, plaintiff should be paid a certain annual sum named; the decree was not drawn up, but the agreement which it embodied was acted on for eight years:

Held, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her.

Sills v. Lang, 691.

DOWER.

[SUBJECT TO THE EQUITABLE INTERESTS OF OTHERS.]

Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion:

Held, that the widow of the grantee had no right to dower out of this portion during the life of the grantor; and an action by her therefor was restrained.

Slater v. Slater, 45.

See also "Husband and Wife," 5.

DOUBLE MAINTENANCE.

See "Will," 2.

DYING WITHOUT ISSUE.

See "Will," 8.

EQUITABLE DOWER.

A widow having by her conduct parted with her right to equitable dower, in favour of her son, a subsequent creditor of hers, was *held* not entitled to have her dower set out, and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it.

Cottle v. McHardy, 342.

EQUITY OF REDEMPTION.

[IN PARTS AFTERWARDS SOLD.]

See "Mortgage," &c., 5.

[PURCHASE OF.]

See "Mortgage," &c., 7.

ERROR IN PROCEEDINGS AT LAW.

See "Practice," 2.

EVIDENCE OF TITLE.

On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the Court, it is not usually necessary to prove the execution of deeds produced.

Brady v. Walls, 699.

2. Affidavits are admissible for some purposes on such an investigation; where, however, an affidavit was offered to prove the loss of a will, which had been proved in a Surrogate Court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence.—*Ib.*

EXCLUSION.

See "Injunction," 3.

EXECUTION.

See "Equitable Dower."

EXECUTORS.

1. Executors have power, in the exercise of a prudent discretion, to accept land in payment of an execution debt.

McCargar v. McKinnon, 525.

2. Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the Master may, without taxing the bill, moderate it by deducting charges which appear not to be proper.—*Ib.*

3. In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debt is proper to be taken into account.—*Ib.*

[DUTY OF.]

Where an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or is not competent to look after his own interests, or is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale as a prudent owner would.

In re Thomas Davis, 603.

See also "Trustees and Executors."

EXECUTORY DEVISE OVER.

See "Will," 5.

FAMILY ARRANGEMENT.

See "Equitable Dower."

FATHER AND SON.

A son who had purchased property for his father, and had taken the conveyance in his own name, afterwards induced his father while in a state of mental depression to enter into a contract that the son should retain the property on certain terms which were hard and unfavorable to the father:

Held, that the contract was not valid in equity, and that the father was entitled to a conveyance, on payment of the sum which the son had paid on the contract.

Johnston v. Johnston, 493.

See also "Specific Performance," 5.

FOREIGN FIRE INSURANCE CO.

1. The deposit required to be made by Foreign Fire Insurance Companies is intended for the security of Canadian policy-holders; and on the insolvency of any such Company the general creditors of the Company are not entitled to share the deposit with the policy-holders.

In re The Ætna Insurance Co. of Dublin, 160.

2. In case of a deficiency of assets, the costs of creditors proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts.—*Ib.*

FOREIGN LANDS.

See "Principal and Agent, 1."

FORFEITURE.

See "Insurance," 2.

FORMER SUIT AND DECREE THEREIN.

[DEFENCE OF.]

An agreement for a lease provided for the building of a barn by the tenant; the assignee of the owner, considering that a barn which the tenant had begun to build was not such as the agreement required, filed a bill for an injunction, and for specific performance of the agreement generally; the answers insisted that the barn was such as the defendant undertook to build; the Court, being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction, dismissed the bill:

Held, that this decree was no bar to a subsequent suit by the tenant for specific performance of the agreement for a lease.

Simmons v. Campbell, 612.

FRAUD ON PURCHASER.

See "Husband and Wife," 5.

FRAUDS, STATUTE OF.

See "Attorney and Client."

FRAUDULENT CONVEYANCE.

[SETTING ASIDE.]

1. Where a creditor simply seeks to have a deed made by his debtor declared fraudulent and void, it is not necessary to allege that the creditor had carried his claim to judgment.

Longeway v. Mitchell, 190.

2. In such a case, however, the creditor must sue on behalf of himself and all the other creditors.—*Ib.*

GENERAL PRAYER.

A person having a second charge on land, filed a bill against the holder of a prior mortgage, and the owners of the equity of redemption, praying redemption and general relief:

Held, that the absence of a specific prayer as to the latter defendants did not disentitle the plaintiff to relief against them.

Long v. Long, 251.

GIFT BY PAROL.

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage and death of the son. [*Per* MOWAT and STRONG, V.CC., SPRAGGE, C., *dissenting*.]

Long v. Long, 251.

GOOD WILL.

[SALE OF.

The defendant sold to the plaintiff the good will of the business of an innkeeper which he was carrying on in London in this province under the name of "Mason's Hotel," or "Western Hotel:"

Held, that the sale of the good will implied an obligation, enforcible in equity, that the defendant would not thereafter

resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel;" and would not resume or carry on the business of an innkeeper, under any name or in any manner, in the premises in question; and would not hold out in any way that he was carrying on the business formerly carried on by him under the said names, or either of them.

Held, also, that the plaintiff's removal to other premises, fifteen months before the expiration of the term, in consequence of the burning down of the stabling, did not relieve the defendant from his obligation.

On the removal of the plaintiff, the owner of the property induced the defendant to accept a new lease and to resume business, and agreed to save the defendant harmless in respect of his obligation to the plaintiff; the new lease was made on the 1st October; and between that date and the 17th November, the defendant provided new furniture; the plaintiff had some knowledge of the defendant's intention to resume business, and of his proceedings for that purpose; on the 19th November, the plaintiff filed a bill to enforce the defendant's obligation:

Held, that the lapse of time was not such as to be any defence.

Mossop v. Mason, 360.

[This case has since been argued in the Court of Error and Appeal, and stands for judgment.]

HEIRS.

See "Will," 5.

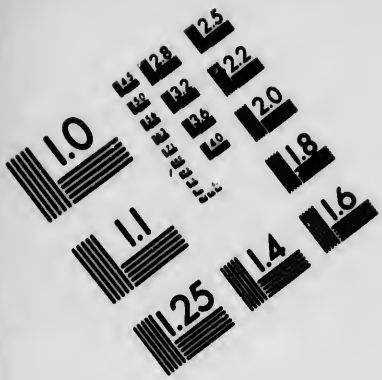
HUSBAND AND WIFE.

1. A mortgage, or alleged mortgage, of property of a married woman, was sued upon by an assignee of the mortgagee some years after the death of the husband; the alleged mortgage was a patched document, and the alterations or attached parts were not referred to in the attestation clause, or otherwise authenticated; the widow by her answer impeached the mortgage; and at the hearing swore that she had never to her knowledge executed it, and had never meant to do so, or been asked to do so; the Court believed her evidence; and, the only evidence offered by the plaintiff being as to the genuineness of the signatures, the Court held this evidence insufficient to prove the execution of the mortgage in its then state, and dismissed the bill with costs.

Northwood v. Keating, 347.

[This cause has been reheard, and is now standing for judgment.]

[redacted]



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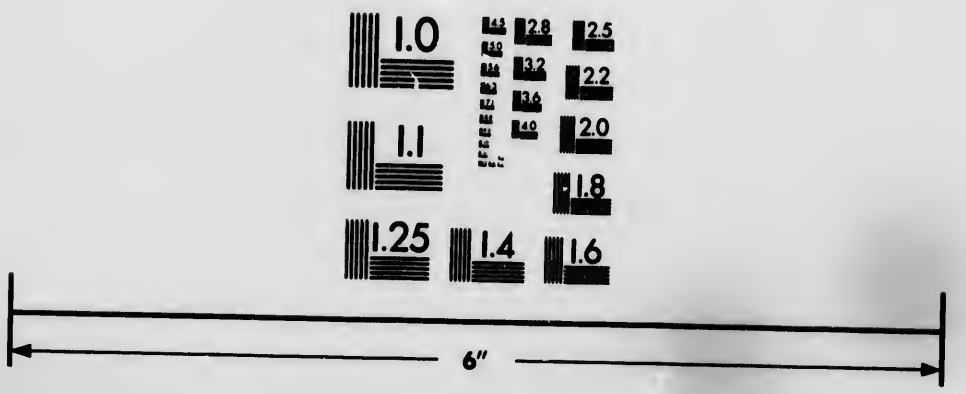

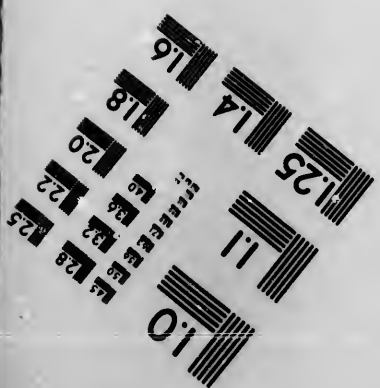

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INFRINGEMENT.

See "Patent of Invention, 3."

INJUNCTION.

1. A defendant is bound to obey an injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service.

Stewart v. Richardson, 150.

2. Where a breach of an injunction was sworn to by a single deponent, and was denied by the defendant, and there was no corroborative evidence, the Court refused a motion to commit.—*Ib.*

3. Where the defendant, being part owner of a schooner and in sole possession, excluded therefrom the plaintiff, who was the other part owner, and the plaintiff did not allege that there had been any dispute as to the employment of the vessel, an injunction to restrain the defendant's proceedings was refused.

Baker v. Casey, 195.

4. The equity of redemption in mortgaged premises was sold under execution at law, and a conveyance thereof was executed by the sheriff purporting to convey the same to the purchaser, who subsequently paid off the mortgage; obtained from the mortgagee a statutory discharge thereof, which he caused to be registered; and went into possession of the mortgaged property. In a proceeding at law, the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he assumed to sell:

Held, that the purchaser was entitled to restrain an action of ejectment brought by the mortgagor to obtain possession of the mortgaged premises.

Howes v. Lee, 459.

5. Injunctions must be obeyed according to the spirit as well as letter.

Bickford v. The Welland Canal Co., 484.

6. Where defendants were enjoined against removing from their premises certain iron rails to which the plaintiff claimed to be entitled, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States:

Held, that they had committed a breach of the injunction.—*Ib.*

See also "Canal."
"Goodwill."
"Specific Chattels."
"Trade Mark."
"Waste."

INSOLVENCY.

1. A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed $50,000, to advance them $15,000 more; and, in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors:

Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency.

The Royal Canadian Bank v. Kerr, 47.

2. Where certain creditors of a deceased insolvent sue executor, recovered judgment, and sold his real estate, got paid in full:

Held, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed *pro rata* under the Act 29 Victoria, chapter 28.

Bank of British North America v. Mallory, 102.

3. An insolvent compounded with his creditors, and had his goods restored to him; he thereupon resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors:

Held that they were entitled to be paid out of his assets in priority to the former creditors.

Buchanan v. Smith, 208.

[This decree was affirmed on rehearing, and defendant ordered to pay costs. See *post* Vol. XVIII.]

See also "Antecedent Debt."
"Foreign Fire Insurance Co."
"Set off," 2.

INSOLVENT ACT.

In 1869 *C.* lent money to *N.* on an express agreement that it was to be secured by mortgage on certain property; and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent:

Held, that the mortgage was valid.

Allan v. Clarkson, 570.

INSURANCE.

1. Conditions in a policy for avoiding the same have, in case of a breach, the effect of avoiding the policy, not *ipso facto*, but if the Insurance Company so elect.

The Canada Landed Credit Co. v. The Canada Agricultural Insurance Co., 418.

[The proper name of the defendants was, "The Canada Farmers' Mutual and Stock Insurance Company."]

2. Where breaches of such conditions had occurred before loss, and the Insurance Company, after being notified of such breaches, took no notice thereof, but called for the proofs of loss which were required on the footing of the policy being a subsisting instrument; and these were furnished; the Insurance Company was held to have precluded themselves from afterwards setting up the forfeiture.—*Ib.*

3. A condition provided that in case the premises became vacant or unoccupied, the fact should be communicated to the Company, and that unless such notice was given, and the Company consented to retain the risk, the policy should be void:

Held, that the insured had a reasonable time to give the notice; that three days was not too long a delay, the property being at Owen Sound, and the office of the Company at Hamilton; and, a fire having occurred on the third day, the Insurance Company was bound to make good the loss.—*Ib.*

4. An Insurance Company cannot set up, in discharge of their liability, that the preliminary proofs were defective, where they did not make the objection to them when furnished, or until after a suit had been instituted for the loss.—*Ib.*

INTEREST.

See "Mortgage," &c., 3.
"Tender," 2.
"Will," 6.

[ON LEGACY TO MINOR CHILDREN.]

See "Will," 11.

[ON OVER PAYMENTS.]

Where the widow of the testator had received more than her proper share of the personal estate, the Court charged her with interest on the excess in administering the estate.

Davidson v. Boomer, 509.

INTERPLEADER SUIT.

M. deposited a sum of money with the plaintiffs, and soon afterwards absconded. The bank had given him a receipt, stating the money was payable on the production of that document. A writ of attachment issued against the depositor's property as an absconding insolvent debtor, under the Insolvency Acts; and the defendant *Little* was appointed official assignee. The latter then demanded the money, without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of the appointment of *Little* as assignee. The assignee then sued the plaintiffs for the money. Proceedings in the action were restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant *Little* and another claimant of the money, whose claim accrued after the attachment to interplead. The Court, under the circumstances, *held*, that, the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it, with the costs occasioned to the estate by their refusal.

Bank of Montreal v. Little, 313.

[Reversed on rehearing.—See post page 685.]
See also "Practice," 5.

INVESTIGATION OF TITLE.

See "Evidence of Title," 1.

JOINT-TENANT.

Although the general principle is that one joint-tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate.

Lassert v. Salyerds, 109.

JUDGMENT CREDITOR.

A judgment creditor cannot attach or garnish by means of a suit in equity any debt for which he has not obtained an attaching order at law.

Blake v. Jarvis, 201.

LACHES.

See "Goodwill."
"Specific Performance," 2, 3.

LANDLORD AND TENANT.

1. A tenant absconded leaving rent in arrear, whereupon the landlord levied upon the goods of the tenant under a landlord's warrant, but before selling, the tenant sent to the landlord, a power of attorney, authorizing him to dispose of the property; and by a letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof and of the claim of the plaintiff to remit the balance to the tenant. Upon receipt of this power the landlord abandoned proceedings under his warrant, and disposed of the property under the power of attorney. In a suit brought by the plaintiff, it was *held* that the landlord by his proceeding under the power of attorney had not waived his right to payment of the rent due by the absconding tenant, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power.

Tyrrell v. Rose, 394.

2. A person assuming to have an interest in property, though he had none, executed a lease, or an agreement for a lease, to a tenant; one of the true owners shortly afterwards took an assignment of the instrument, and gave to the tenant notice of the assignment; and successive owners d nded and received rent reserved by the instrument, insiste the building of a barn which the agreement provided fo nd otherwise recognized the existence of the agreement:

Held, that the agreement was thereby confirmed and adopted, and was binding on the estate.

Simmons v. Campbell, 612.

LAPSE OF TIME.

See "Principal and Surety," 13.
"Solicitor and Client," 2.
"Specific Performance," 2, 6.

LEASE, ADOPTION OF.

See "Landlord and Tenant," 2.

LEGACIES CHARGED ON CORPUS.

See "Will," 1;

[TO EXECUTORS.]

See "Administration Suit," 7.

LIEN FOR PURCHASE MONEY.

See "Railway," 1, 2.

LIMITATIONS, STATUTE OF.

1. In a partnership suit, it was held that the defence of the Statute of Limitations could not be raised under the common decree directing an account of the partnership dealings and transactions.

Carroll v. Eccles, 529.

2. Two brothers were owners of land as tenants in common in fee; their father lived with them on the property and was maintained by them. One of the brothers died intestate and without issue, leaving his father his heir; the father continued to live with the surviving brother on the property, and to be maintained by him; the father did not affect to be owner of the property:

Held, that this living on the property was sufficient to prevent the Statute of Limitations from running against the father, as respected his individual moiety.

Holmes v. Holmes, 610.

LIVING PERSON.

[GIFT TO HEIRS OF.]

See "Will," 9.

MAGISTRATES INTERESTED.

See "Married Woman's Deeds," 2.

MAINTENANCE, CHARGED ON ANNUAL PROFITS.

See "Will," 1.

[DOUBLE.]

See "Will," 2.

MARRIAGE SETTLEMENT.

A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage:

Held, that the provision could not be defeated by a sale for value by the settlor.

McGregor v. Rapelje, 38.

MARRIED WOMAN.

[DEEDS BY.]

1. The solicitor of the husband being city recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land. [SPRAGGE, C., *dubitante.*]

Romanes v. Fraser, 267.

2. Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified.—*Ib.*

3. Where, after the decease of one of the Justices of the Peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the Court gave credit to the certificate notwithstanding the evidence.—*Ib.*

[MORTGAGES BY.]

4. Two mortgages on property of a married woman executed by her and her husband, in manner required by the statute in that behalf, were impeached by her for want of the evidence necessary in equity to sustain gifts:

Held, that as the mortgages had been given for valuable consideration, and the mortgagee had been guilty of no fraud in obtaining them, they were valid securities.

Mulholland v. Morley, 293.

MASTERS' REPORTS.

Masters are bound to see that their reports are not of unnecessary length.

McCargar v. McKinnon, 525.

MISREPRESENTATION.

See "Vendor and Purchaser," 2.

[BY VENDOR.]

See "Specific Performance," 3.

MISTAKE.

See "Pleading," 5.
"Reforming Deed."

[OF ONE PARTY.]

See "Specific Performance," 4.

MIXED FUND.

See "Will," 10.

MORTGAGE, MORTGAGOR, AND MORTGAGEE.

1. A mortgagor who desires to stay an action brought against him by the mortgagee, cannot insist on the mortgagee's taxing his costs and staying the suit meanwhile, on the promise of the mortgagor to pay the amount when taxed.

Nixon v. Hunter, 96.

2. Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the master should tax, it was *held* that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer.—*Ib.*

3. A parol agreement to add two per cent. to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment, was held insufficient to charge the extra interest upon the land.

Totten v. Watson, 233.

4. The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:

Held, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage.

Long v. Long, 251.

5. The owner of lots *A.* and *B.* sold *A.*, but the conveyance was not registered; he afterwards mortgaged *A.* and *B.*, and the mortgagee registered the mortgage without notice of the prior deed; the mortgagor subsequently sold *B.* in portions by three successive sales:

Held, in a suit by the assignees of the mortgage for a sale that the decree should be for the sale first of *B.*; and that if a

sale of part of *B* produced enough, the portion last parted with by the mortgagor should be first sold.

Barker v. Eccles, 277.

6. A mortgagor sold one of several mortgaged parcels, and the purchaser went into possession; the mortgagees afterwards, having no notice of the sale, released the other parcels to the mortgagor, retaining the mortgage on the sold parcel; upon which the purchaser of the parcel filed a bill to have it declared that by the release his parcel was discharged from liability for the mortgage:

Held, that he was not entitled to such relief; and that, not having offered to redeem, his bill should be dismissed with costs: but, the defendants having prayed a foreclosure in default of payment, a decree to that effect was pronounced.

Beck v. Moffatt, 601.

7. There were two mortgages on the property in question: *O.* bought the first mortgage, and subsequently the equity of redemption:

Held, that the second mortgage did not thereby acquire priority over the first mortgage by the circumstance of the instrument executed by the first mortgagee having been in form a mere grant and release to *O.* of the mortgagee's estate at law and in equity in the property;

Nor by reason of the purchaser having given a mortgage on the property to secure a portion of the purchase money which he was to pay for the first mortgage;

Nor by reason of his subsequently conveying portions of the property to his sons, in terms subject to such mortgage.

Barker v. Eccles, 631.

8. A first mortgagee is entitled as against the owner of the equity of redemption to add to his debt the costs necessarily incurred in a suit to redeem, which was brought by a second mortgagee, and was dismissed with costs for the default of the plaintiff therein.

McKinnon v. Anderson, 636.

9. But where a first mortgagee had taken a decree for dismissal on the plaintiff's default, instead of giving the owner of the equity of redemption a day to redeem under the General Order (466), and a second suit became necessary in consequence, he was held not to be entitled to the extra costs thereby occasioned.—*Ib.*

See also, "Administratrix."
"Conveyance and Agreement to Re-sell."
"Demurrer."
"Insolvent Act."
"Tacking."
"Tender," 2.

MUNICIPAL CORPORATION.

See "Principal and Surety," 10, 11, 12.

MUNICIPAL LAW.

1. On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain non-resident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available; its supposed existence had been an element in determining the amount to be paid:

Held, that the corporation to which the money was to be paid, was not entitled to have the agreement altered so as to make the money payable to the other absolutely.

Arran v. Amabel, 163.

2. At a meeting of a township council the Reeve who was in the chair refused to put a motion which had been duly made and seconded, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favor of the motion:

Held, that the Reeve had no right to refuse to put the motion, and that the vote was proper and effectual.

The Municipality of the Township of Brock v. The Toronto and Nipissing Railway Company, 425.

3. A municipal by-law for issuing debentures which had been submitted to the rate-payers and approved by them, contained a clause stating that the debentures were to be signed by the Reeve;

Held, that the council had power to appoint another person to sign the debentures in place of the Reeve.—*Ib.*

4. A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a Railway Company, the Company executed a bond to the township reciting that the township had agreed to give the bonus on condition (amongst other things) that sixty continuous miles of the road should be built within two years; that the debentures should not be disposed of by the Company until the contracts had been let and the work commenced: and that if the road were not commenced and built as mentioned, the debentures should be returned to the municipality; and the condition of the bond was, that in case of failure the Company would, on demand, pay over to the township the sum of $50,000, or return the debentures. The contracts having been let and the work commenced as stipulated:

Held, in view of the whole instrument, that the Company should not be restrained from disposing of the debentures before the completion of the work.—*Ib.*

MUNICIPAL TREASURER AND HIS SURETIES.

See "Account."

MUTUAL RIGHTS.

See "Canal."

NEGLIGENCE.

See "Solicitor."

NOTICE.

See "Demurrer," 2.
"Possession."

NOVELTY.

See "Patent for Invention."

NUISANCE.

In 1861, while the defendant was engaged in erecting buildings for a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged the defendant to proceed with his project; the buildings were proceeded with, and business in them was commenced the same year; in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence: and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining:

Held, that by his conduct he had debarred himself from relief in equity, on the ground of a tannery being a nuisance.

Heenan v. Dewar, 638.

ONUS OF PROOF.

See "Husband and Wife," 1.

PAROL EVIDENCE.

See "Absolute Deed."
"Mortgage," &c., 3.
"Power of Attorney," 2.
"Trust."

PAROL TRUST.

In a suit to enforce a trust, the 7th section of the Statute of Frauds not being set up by the answer, it was *held* that the trust might be shewn by parol, and might be shewn to be different from the trust stated in the answer.

Shaw v. Shaw, 282.

PARTIES.

See "Pleading," 1, 2, 3, 4.
"Railway," 4.

PARTNERSHIP SUIT.

In a partnership suit, the reference embraced private as well as partnership transactions; there were no partnership assets; the suit did not involve the administration of a partnership estate; the defendant claimed a large balance to be due to him, while the result had been a report for $418.74 in favor of the plaintiff; and there were no special circumstances in favor of the defendant: the court charged him with the costs of taking the account.

Woolans v. Vansickle, 451.

See also "Limitations, Statute of," 1.

PART OWNER.

See "Injunction," 3.

PATENT FOR INVENTION.

1. The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines; and the gearing was a considerable improvement; but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to threshing machines,—it was *held* that the novelty was not sufficient under the statute to sustain the patent.

Abell v. McPherson, 23.

2. The plaintiff introduced into a drum stove in addition to a spiral flue, which had been previously in use, a centre pipe closed at the sides and open at both bottom and top as a means of producing a greater amount of heat, and obtained a patent for "the spiral flue in connection with the pipe in the centre."

Held, that the plaintiff's improvement did not involve any new principle or new combination, and that the patent was void.

North v. Williams, 179.

3. During the existence of a license the licensee cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another.

Whiting v. Tuttle, 454.

PERSONAL SERVICES.

See "Specific Performance," 5.

PERSONAL TRUST.

See "Will," 8.

PLEADING.

1. A party entitled, as a residu[illegible] devisee, filed a bill, against one of three persons named [illegible]xecutors and trustees, praying to have the trusts of the will carried out; alleging that the other two persons named as executors and trustees had renounced probate of the will and had never acted in the matter of the trusts thereof. The defendant's residence was unknown to the plaintiff, and service had been effected by advertisement, under the General Orders; the bill was taken *pro confesso*, and there was no evidence, other than such admission of the defendant, as to the other parties having renounced or refused to act. The Court, on this state of facts, refused to make any decree in the absence of the co-executors.

Lane v. Young, 100.

2. The fact that a person, interested in the subject matter of a suit, is resident out of the jurisdiction of the Court, is not a sufficient reason for not making such absent person a party.

Munro v. Munro, 205.

3. Where a devisee of land subject to a charge, mortgaged the devised property, the mortgagees were held to be proper parties to a suit for the realization of the charge.

Goldsmith v. Goldsmith, 213.

4. The trustees of the Bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders.

Brooke v. The Bank of Upper Canada, 301.

5. Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged.

McDonald v. Rose, 657.

See also, "Fraudulent Conveyance," 2.
"Mortgage," &c., 6.

POSSESSION.

Possession by an adverse claimant is no notice of his interest, to a person parting with the estate.

Beck v. Moffatt, 601.

[WHAT CONSTITUTES IN CASE OF JOINT OWNERSHIP.]

See "Limitations, Statute of," 2.

POWER OF ATTORNEY.

[TO CREDITOR—IRREVOCABLE.]

1. A person intending to take out letters of administration to the estate of a mortgagee, executed a power of attorney authorizing the person therein named to receive mortgage money; letters of administration were subsequently obtained as contemplated:

Held, that the power was effectual with regard to sums received by the appointee after the issue of the letters.

Sinclair v. Dewar, 621.

2. In such a case the appointee was a creditor of the intestate, and the power was given upon a verbal agreement on the part of the administratrix that the appointee should pay himself out of any moneys he might receive, and the appointee accepted the power on that condition:

Held, that until the debt was paid the power was irrevocable. —*Ib.*

POWER OF SALE.

See "Will," 2.

PRACTICE.

1. Where a party to a cause is dissatisfied with the manner in which the Registrar takes the account between the parties and desires to have the decree drawn up by the officer on *præcipe*, varied, it is not necessary to rehear the cause; the proper mode is to present a petition to the Court for that purpose.

Nelles v. VanDyke, 14.

2. In a partnership suit the defendant's answer stated the terms of the partnership. The plaintiff, not accepting the statement, took the case to a hearing, instead of moving for decree, and he proved a slight difference, which involved a further charge of £4 only against the defendant:

Held, that plaintiff should pay the extra costs occasioned by the hearing.

Woolans v. Vansickle, 451.

3. So long as a judgment at law, although irregularly entered up, remains a record of the Court in which it has been recovered, and neither fraud nor collusion in obtaining the judgment is alleged, a bill to impeach it in this Court, on the ground of irregularities, will not lie.

Tait v. Harrison, 458.

4. Parties cannot appeal against mistaken findings of the Master which are not of practical importance to them, though they may affect other parties *inter se*.

McCargar v. McKinnon, 525.

5. An interpleader suit must be dismissed, with costs, if the plaintiff does not establish, at the hearing, a case making interpleader proper.

Bank of Montreal v. Little, 685.

See also "Pleading," 5.

PRÆCIPE DECREE.

[APPEAL FROM.]

See "Practice," 1.

PREFERENCE.

[ILLEGAL.]

See "Insolvency," 1.

PRELIMINARY PROOFS.

See "Insurance," 4.

PRESSURE.

See "Insolvent Act."

PREVENTING COMPETITION.

See "Purchaser at Sheriff's Sale."

PRICE OF LAND.

[AGREEMENT OMITTING.]

See "Vendor and Purchaser," 3.

PRINCIPAL AND AGENT.

1. Where a trustee of lands situated in a foreign country is resident within this province, the Court will decree an execution of the trust.

Smith v. Henderson, 6.

2. A principal filed a bill against his agent for an account of his dealings, and the agent claimed by his answer that the principal was indebted to him. On taking the account, however, a balance was found against the agent of $282. The Court ordered the defendant to pay the costs of the suit.—*Ib.*

3. It is the duty of an agent to defend an action improperly instituted against his principal: where therefore an insurance company had been carrying on business in this country, and, having ceased to do so, paid off a clerk who was immediately employed by a firm of which the agent of the company was a member; notwithstanding which the clerk sued the company for his salary, and the agent allowed judgment in the action to go by default, and paid to the plaintiff in the action the amount of the judgment:

Held, that the agent was not entitled to credit for the amount so paid on taking an account of his receipts and payments on behalf of the company: that the utmost to which he could be entitled to credit was the excess of the salary at which the clerk had been engaged by the company over and above what he received in his new employment.

Jay v. McDonell, 436.

Where on an insurance company relinquishing business a quantity of office furniture was in the possession of the agent which was not forthcoming, it was *held*, that it was the duty of the agent to have made proper entries shewing what had become thereof; and in the absence of such proof that his estate was properly chargeable with its value.—*Ib.*

5. A paid agent whose duty it is to receive from other agents moneys due to the principal, is bound to take steps for the recovery thereof, unless he shews that had he taken proceedings to enforce payment, or that there was reasonable ground for believing that if proceedings had been taken, they would have proved ineffectual.—*Ib.*

6. A company was formed in England with a limited liability, for the purpose of carrying on business at Oshawa in this province; the managing director at Oshawa, without authority, contracted for the purchase of some real estate for the use of the company at Oshawa, and signed the contract as "Managing Director;" for convenience the conveyance was made to the director personally, and he executed a mortgage for the unpaid purchase money, and went into possession and used the property for the purposes of the company. The purchase was immediately communicated by him to the English directors, and they disapproved thereof, but did no act repudiating the purchase; on the contrary, they directed the buildings to be insured:

Held, that this conduct was an adoption of the contract by the directors; that they had power to adopt it, and had the power of binding the company, and that the company were liable to the vendor for the purchase money.

Conant v. Miall, 574.

PRINCIPAL AND SURETY.

1. Two persons became bound for the due appearance of a person confined in gaol on a criminal charge and the recognizance was prepared, as if the accused and his two sureties were to join therein; but the magistrate discharged the prisoner without obtaining his acknowledgment of the recognizance:

Held, that this had the effect of discharging the sureties.

Rastall v. The Attorney General, 1.

[Reversed on appeal, 18th March, 1871. See post Vol. XVIII.]

2. On the rehearing of this cause, it was held by SPRAGGE, C. [MOWAT, V. C., *dubitante*] that time given by a creditor to his principal debtor after judgment recovered against the surety, did not discharge the surety; and also that, independently of that ground, the debtor having stipulated to obtain the surety's consent for time, the agreement for time was thereby made conditional on such consent being given, and that the surety was not discharged.

Duff v. Barrett, 187.

3. A creditor, by mistake, executed an absolute release to his debtor, but the agreement was that the creditor's right against a surety should be reserved:

Held, that the surety was not discharged, and that the creditor was entitled to a decree in equity to that effect.—[Spragge, C., dissenting.]

Bank of Montreal v. McFaul, 234.

4. A surety cannot get rid of his liability on the ground of having become surety in ignorance of material facts, unless he can shew that information was fraudulently withheld from him.

The Municipal Corporation of the Township of East Zorra v. Douglas, 462.

5. Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety.—*Ib.*

6. A township council tacitly permitted the treasurer of the township to mix the township money with his own:

Held, that this conduct was wrong, but did not discharge the treasurer's sureties.—*Ib.*

7. A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties.—*Ib.*

8. To invalidate a bond given by sureties on the ground of material facts having been concealed from them until after they had executed the bond, it must appear that the concealment was fraudulent.

Peers v. Oxford, 472.

9. A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way; in this state of things he had occasion to give to the corporation a new bond with two new sureties, shortly after giving which, it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the Court, being of opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, *held* the bond to be valid.—*Ib.*

10. One of the sureties for the treasurer of a municipal corporation being desirous of being relieved from his suretyship, the treasurer offered to the council a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds, the withdrawing surety should be relieved; no further act took place on the part of the council, but the treasurer and his new surety (omitting the second surety) joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect; the clerk on receiving these gave up to the treasurer the old bond, and the treasurer destroyed it; eight years afterwards, a false charge was discovered in the accounts of the treasurer of a date prior to these transactions: *Held*, that the sureties on the first bond were responsible for it.

The County of Frontenac v. Breden, 645.

11. The mortgage was on property which the treasurer had previously mortgaged to the sureties for their indemnification; the mortgage to the sureties had not been registered, but had been left with the clerk of the council for safe keeping; on receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both:

Held, that the old sureties were entitled to a first charge on the property for their indemnification in respect of the newly discovered defalcation.—*Ib.*

12. A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts.—*Ib.*

13. The fact of the treasurer having become reduced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety.—*Ib.*

PRIORITY.

See "Mortgage," 7.

PROFITS, REPAYMENT OF.

See "Vendor and Purchaser," 1.

PUBLIC POLICY.

See "Alimony 1, 2."

PURCHASE WITHOUT AUTHORITY.

See "Principal and Agent," 6.

PURCHASER AT SHERIFF'S SALE.

A creditor obtained judgment against his debtor's executors, and issued thereon execution against the lands of the deceased, which had been devised to a minor. The creditor interfered to prevent competition at the sale, and then bought the property at one-half its value:

Held, that his purchase was not maintainable in equity.

In re Thomas Davis, 603.

RAILWAY.

1. The statute 19 Vic., ch. 21, incorporating the Buffalo and Lake Huron Railway Company with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company.

Paterson v. Buffalo and Lake Huron Railway Co., 521.

2. The old company was held to be a necessary party to a suit by a land-owner to enforce a lien for purchase money in respect of land sold to the old company before the transfer of the railway to the new company; it not appearing that the old company was interested in the question to be litigated—*Ib.*

3. An agreement, not under seal, for the sale of land to a railway company, for the purposes of the railway, no price being agreed on, in pursuance of which agreement the railway company was allowed to take, and did take, possession—is enforcible in equity.—*Ib.*

4. A bill alleged that the defendants *A* had taken from their co-defendants *B* their "line of railway for a certain number of years yet unexpired, and under the said agreement the defendants *A* claim to hold, run, and operate, as they are now doing, the said line of railway." A demurrer on the ground that these statements did not state sufficiently the title of the defendants *A*, was overruled.—*Ib.*

RECEIVER, APPOINTMENT OF.

Although the appointment of a receiver by the proper officer of the Court should not be lightly disturbed, still in a case where it appeared that there was personal ill-feeling between the person appointed by the Master and some of those interested, and that a person who had been proposed by other parties to the cause was, owing to his business habits, likely to be better qualified to discharge the duties of receiver, and was entirely unexceptionable, the Court vacated the appointment made by the Master, and ordered the other to be appointed.

Brant v. Willoughby, 627.

RECITALS.

See "Municipal Law," 4.

RECOGNIZANCE.

See "Principal and Surety," 1.

RECTIFYING DEED.

See "Municipal Law," 1.

REDEMPTION.

See "Mortgage, &c," 4, 8, 9.

REEVE.

[DUTY AND POWERS OF.]

See "Municipal Law," 2.

REFORMING DEED.

1. A conveyance may be reformed by inserting additional parcels on clear parol evidence that the omission was by mutual mistake.

Forrester v. Campbell, 379.

2. The plaintiff was entitled to a conveyance from the defendant of half a lot of one hundred and sixty acres; the defendant wished to give fifty acres only; a friend of both, who was aware of the mutual rights, was requested by the plaintiff to obtain the deed as claimed by him; this person procured the defendant to execute a deed which conveyed fifty acres only, and which the defendant executed in that belief as this person knew; but he thought that it really conveyed the half lot or eighty acres to which the plaintiff was entitled; he took the deed to the plaintiff, telling him that it conveyed the eighty acres, on which the plaintiff accepted the deed; the plaintiff was not then aware of the different belief which the defendant had in signing it:

Held, that the plaintiff was entitled to have the deed corrected, and made to embrace the eighty acres to which he was entitled.

McDonald v. Ferguson, 652.

REGISTERED TITLE.

In a case of a registered title, a purchrser is in this country entitled to require the registration by his vendor of all the instruments through which the title is derived.

Brady v. Walls, 699.

REGISTRATION.

The Registry Act of 1865 (section 66) does not avoid an equity against a subsequent instrument which is registered, but was taken with notice of the adverse claim.

Forrester v. Campbell, 379.

RELEASE OF PRINCIPAL DEBTOR BY MISTAKE.

See "Principal and Su[illegible]" 3.

RESULTING TRUST.

See "Husband and Wife," 4.

RIPARIAN PROPRIETORS.

Where it appeared that the defendants had backed water on the mills of the plaintiffs, and overflowed their land; but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants:

Held, that it was sufficient for the Court to declare the rights of the parties, and to enjoin any further backing or overflowing by the defendants; and that the Court should not proceed to define the alterations in their works which the defendants should make.

Dickson v. Burnham, 261.

SALE, SETTING ASIDE.

See "Setting Aside Sale."

SEPARATE SOLICITOR FOR SEVERAL RESIDUARY LEGATEES.

See "Administration Suit," 9.

SERVICE.

See "Injunction," 1.

SET-OFF.

I. A testator who owed debts to an amount exceeding his personal estate, devised his land to one of his sons, whom he also appointed an executor; the devisee paid debts to an amount exceeding the personal estate, and left but one debt unpaid; the devisee became surety for the creditor to whom the debt was due, for an amount exceeding the debt so due by the testator; and the devisee subsequently gave a mortgage on the land devised to secure the amount he was surety for:

Held, that the debt due by the testator was to be applied towards the discharge of the sum for which the devisee had become surety.

Goldsmith v. Goldsmith, 213.

2. In a partnership suit the partnership was found indebted to the defendant, and, on the other hand, the defendant was liable to certain costs. The defendant having become insolvent, it was *held* that the plaintiff was entitled, notwithstanding the insolvency, to set-off the costs against the debt.

Brigham v. Smith, 512.

SETTING ASIDE DEED.

A man deliberately and with legal assistance executed to his son-in-law a deed of his farm, subject to a life-estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, and to indemnify him against certain mortgages; there was no fraud or pretence of undue influence, and the grantor fully understood the meaning and effect of what he was doing: but quarrels subsequently arose and the son-in-law left the farm; whereupon the father-in-law filed a bill to set aside the deed on the ground that the conveyance incorrectly mentioned a consideration of $2000, and that the true consideration was not in writing; but as it appeared that the solicitor had recommended a writing, and that the grantor had voluntarily preferred to dispense with it, the Court declined to cancel the transaction.

Cameron v. Sutherland, 286.

SETTING ASIDE SALE.

The holder of a mortgage having become himself the purchaser of the mortgaged property under a power of sale contained in the mortgage, and afterwards, under a sheriff's sale; sold and conveyed to a purchaser who went into possession and made permanent improvements. On his purchase being set aside it was *held* that his vendee was entitled to be allowed for his improvements.

McLaren v. Fraser, 567.

Semble, the same rule would apply if the mortgagee himself had made the improvements.—*Ib.*

SHERIFF.

[SALE BY, UNDER INVALID WRIT.]

See "Injunction," 4.

SIMPLE CONTRACT, CREDITOR.

See "Fraudulent Conveyance," 1.

SOLICITOR.

It is the duty of a solicitor before commencing a suit to examine the instrument on which the suit proceeds; or, in case of its loss, to use due diligence in resorting to the means of information which are open to him, and to which he is referred by the client.

Roe v: Stanton, 389.

Where this duty has been omitted, and the instument sued upon had in consequence been set forth so incorrectly in the bill, that the proceedings were useless, and had to be abandoned after decree, the solicitor (though he had acted in good faith) was held not to be entitled against his client to the costs of the suit.—*Ib.*

SOLICITOR AND CLIENT.

1. Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of.

Oakes v. Smith, 660.

2. Where these obligations are neglected, the suit of the client must be bronght within the statutory limit of twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were *held* entitled to relief.—*Ib.*

SPECIFIC CHATTELS.

Several persons united in purchasing a printing press and material for the establishment of a newspaper to advocate certain views, and agreed with a printer that he should establish the newspaper, and should have a legal transfer of the property purchased on paying to the several parties the sums they had respectively contributed. This agreement was acted on, and the printer paid some of the contributors accordingly. One of the parties, who claimed that he had not been paid, took possession of the press and material by means of a writ of replevin.

Held, that the printer was entitled to relief in equity, and an injunction was granted to stay proceedings in the replevin suit on security being given.

Dewhurst v. McCoppin, 572.

SPECIFIC PERFORMANCE.

1. The owner of land granted to a railway company the privilege of crossing his property, in consideration of which the Company agreed, amongst other things, to pay him $400 a year, to carry flour for him on certain favourable terms, and "to bottom out his present mill race from its present unfinished point:"

Held, that this was a contract such as this Court should not decree a specific performance of, or damages for breach of it; but leave the plaintiff to sue upon it at law.

Dickson v. Covert, 321.

2. A contract in writing for the sale of land had not been acted on during the vendor's life; possession was afterwards taken by the vendee, but no improvement was made. In a suit for specific performance brought by the vendor's heirs against the vendee's heirs after the latter had come of age, evidence was given which threw considerable doubt on the contract:

Held, that the doubt was sufficient to prevent the contract being enforced.

Kelly v. Sweeten, 372.

3. In 1846 the defendant contracted for the sale of a building lot in Toronto to the plaintiff's father (one of the defendant's workmen) for $500, payable in eight annual instalments; the purchaser went into possession and built two small houses on the lot. He died in 1856 intestate. The plaintiff, who was his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one *A.* to manage his affairs; he was not quite of age at this time: in February, 1859, the defendant brought ejectment, and *A.* in the following March filed a bill in plaintiff's name for specific performance of the contract; the defendant claimed that there was about $800 due thereon, and the claim appeared to be confirmed by a book produced by a book-keeper of the defendant who was examined as a witness; the value of the property at the time was about $700: *A.*, believing the plaintiff's representations, agreed with him to dismiss the bill without costs, which he accordingly did, and gave up possession to the defendant. Some years afterwards the plaintiff returned to the province, and discovered that not one-half the amount so claimed by the defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance and proved this state of the account from entries in the books of the defendant and otherwise;

Held, in view of the misrepresentations of the defendant and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time.

Larkin v. Good, 585.

4. *A.*, who was the lessee of a timber limit, had an interview with *B.* on the subject of the sale to him of part of the limit. *A.* offered to take $400, and letters passed which amounted to a contract at law to sell at that price. *A's.* offer, however, had been made in contemplation of a reservation and condition which had been spoken of at the interview between the parties, but were not mentioned in the letters:

Held, that the purchaser was not entitled in equity to a specific performance without the reservation and condition.

Needler v. Campbell, 592.

5. A father and son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; and the son agreeing that he would, during his father's life, work, till, and improve the farm in a good and farm-like manner; and would consult his father in all things reasonable; quarrels took place afterwards; the son treated his father badly, though he did nothing which at law would be a breach of the condition of his bond; and ultimately the father left the farm, the son retaining possession until ejected at the father's suit:

Held, in a suit by the son against his father, that the contract should not be enforced against the father.

McDonald v. Rose, 657.

SUBSEQUENT CREDITORS, PRIORITY OF.

See "Insolvency," 3.

SUITS FOR TRIFLING AMOUNTS.

The rule and policy of the Court is to discourage suits for trifling amounts, or brought vexatiously: where, therefore, a bill was filed in respect of a sum not exceeding $10, including interest, the Court at the hearing, without reference to the merits of the demand, dismissed the bill; but, without costs, as the defendant ought, under the circumstances, either to have demurred, or moved to take the bill off the files.

Westbrooke v. Browett, 339.

SUIT TO REDEEM.

See "Mortgage," &c., 8, 9.

SURETY, DISCHARGE OF.

See "Principal and Surety," 6, 8, 9.

TACKING.

[JUDGMENT AGAINST DEVISEE.]

A mortgagor's devisee held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the Registry Act forbids.

McLaren v. Fraser, 533.

TAX SALES.

1. The warrant for the sale of land for taxes described the lands as "all deeded:"
Held, sufficient.

Cook v. Jones, 488.

2. The statutory provision requiring certain rates to be kept separate on the collector's roll is directory only; and where the direction had not been observed, a sale for non-payment of the taxes was held valid notwithstanding.—*Ib.*

3. In a suit to impeach a sale of land for taxes, it appeared that about 20 acres of the lot were cleared and a barn was erected thereon, into which hay, made on these 20 acres by a person occupying the adjoining lot, was stored in winter, no one residing on the 20 acres; the owner being resident out of the county, and never having given notice to the assessor of the township to have his name inserted on the roll of the township.
Held, that this was not such an occupancy of the 20 acres as exempted the lot from being assessed as the land of a non-resident.

Bank of Toronto v. Fanning, 514.

[See this case on Appeal, post Volume XVIII.]

TENDER.

1. A tender held sufficient, though money not actually produced.

Long v. Long, 251.

2. In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it; the *onus* of proof as to such use is on the mortgagee; but on his giving such proof, the subsequent interest is chargeable.

Knapp v. Bower, 695.

THIRD PERSON.

[SUIT BY.]

Land having been conveyed in consideration of the grantee's agreeing to convey a certain portion to a third person who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion.

Shaw v. Shaw, 282.

TRADE MARK.

A cigar manufacturer, to distinguish his cigars from others, called them "Cable Cigars," and afterwards adopted a method of stamping on each cigar, in bronze, an elliptical figure, with the name "S. DAVIS," and the word "CABLE" within the same. A rival firm, two years afterwards, adopted the same method, using for the purpose a trade-mark identical with this, except that they substituted their initials, "CPR&C" for the other's name, and the word "CIGAR" for the word "CABLE." It was proved that persons had bought these cigars supposing them to be the cable stamped cigars:

Held, that the manufacturer of the cable cigars was entitled to an injunction to restrain the other parties from using the trade-mark which they had so adopted.

Davis v. Reid, 69.

TRUST.

A man conveyed land absolutely on a parol trust, and the trustee made a large advance on account of the grantor and his family; they afterwards settled accounts, and it was agreed between the two that the grantee should retain a portion of the land conveyed at a specified price in satisfaction of the balance due to him; mutual releases were executed, and the relation of the parties terminated. After the death of the grantee the grantor's wife and children filed a bill alleging that the land so retained was held in trust for them; but the Court being satisfied from the whole evidence that this was not so, dismissed the bill.

Hervey v. Boomer, 558.

TRUSTEE AND CESTUI QUE TRUST.

Money was recovered by the administratrix of a person killed by a railway accident, and the shares alotted to her children were deposited by her with her brother who was fully cognizant where the money came from, and to whom it belonged:

Held, that he was liable to account to the children as their trustee.

Secord v. Costello, 328.

The administratrix was afterwards sued by her brother for a debt alleged to have been due by her husband, and judgment was recovered by him in the action, and subsequently a reference was made to arbitration in respect of other moneys come to the hands of the administratrix for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys and the debts of the estate were to be considered and dealt with together; but the infants were not represented before the arbitrators:

Held, that the infants were not bound by the award made under such circumstances.—*Ib.*

See also "Demurrer."
"Trust Fund."

TRUSTEES AND EXECUTORS.

1. A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default.

Bald v. Thompson, 154.

2. The rule of the Court is to allow compensation to trustees of real estate under a will, as well as to executors.—*Ib.*

3. Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver, on the ground of the executor becoming embarrassed, and having lately sold a valuable farm belonging to the estate to his own son at an undervalue, without advertising the same, or communicating with the *cestuis qui* trust under the will, and of his having taken a mortgage for the payment of the purchase money, in his own name individually and not as trustee; and the circumstances were such as to justify alarm on the part of the *cestuis qui* trust: the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver.—*Ib.*

See also "Advances to Trustees."

TRUSTEE FOR SALE.

The title of a trustee for sale being liable to be impeached by creditors of a former owner, the former owner being also entitled to the residue under the trust, the trustee bought at a discount a judgment recovered against such former owner.

The trustee was at the same time a debtor to the trust in a sum greatly exceeding the amount paid for the judgment:

Held, that he could not retain the profit on the purchase, and that his *cestuis qui* trust were entitled to it.

After his purchase the trustee assigned the judgment: *Held*, that his assignee took subject to the same equities as affected himself.

Hewson v. Smith, 407.

TRUST FUND MISAPPLIED BY ONE TRUSTEE.

Trust funds which stood in the names of two trustees (*A.* and *B.*) were paid out on the cheques of the two; got into the hands of one (*A.*) who was the acting trustee, and were misapplied by him without the knowledge of the other trustee (*B.*) The primary *cestui que* trust was a married woman; the trust deed contained a clause in restraint of anticipation; there was a trust over with a limited power of appointment. *B.* insisted that he was not liable, as he had become trustee at the request of the lady and her husband, and it had been represented to him that his name only was wanted; that his co-trustee (*A.*) was to do the business part of the trust, and that he (*B.*) was to have no trouble about it:

Held, that these representations did not exempt *B.* from the duty of seeing that the trust money was properly applied.

Mickleburgh v. Parker, 503.

UNAUTHORIZED TRANSFER.

See "Demurrer," 1.

UNCERTAINTY,

[DEMURRER FOR.]

See "Railway," 4.

VENDOR'S LIEN.

See "Railway," 1, 2.
"Principal and Agent," 6.

VENDOR AND PURCHASER.

1. A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and was to have a certain time to accept. The purpose was to form a company

to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters parties would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market. The Court of Appeal (reversing the order of the Court below in this respect) held that it was too late to rescind the purchase; but, that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties. —[SPRAGGE, C., and MOWAT, V.C., dissenting.]

Lindsay Petroleum Oil Company v. Hurd, 115.

[This case has been carried to the Privy Council.]

2. *A.* and *B.* had each a lot of wild land, and they negotiated for an exchange. *A.* claimed that his lot was worth $900; *B.* that his lot was worth $800; they ultimately agreed to exchage, *B.* to pay $100 in money. Neither had any knowledge of the other's lot, but the truth was, that *A.'s* lot was worth $400 only: *Held*, that the doctrine *caveat emptor* applied, and that *A.* was entitled to enforce the contract.

McRae v. Froom, 357.

2. Where a writing provided for the conveyance of land on payment of the balance of the principal, not naming any amount, under a penalty of $100, and there had been no part performance: *Held*, that the writing was insufficient for not naming the price, and that it could not be made binding on the vendor, by the subsequent consent of the vendee's heirs to treat the penalty as the price.

Kelly v. Sweeten, 372.

See also, "Evidence of Title,"
"Registered Title."

VERBAL AGREEMENT.

See "Setting aside Deed."
"Trust Fund."

VOID SALE.

See "Father and Son."

[BY SHERIFF.]

In a suit setting aside a purchase made by a mortgagee at a sheriff's sale, and giving the parties interested in the equity of redemption liberty to redeem, the Court while granting that relief, refused actively to enforce the sale by requiring the mortgagee to give credit for the purchase money in reduction of his debt.

McLaren v. Fraser, 533.

WAIVER.

See "Insurance," 2.

WASTE.

See "Joint Tenant.'

WILL—CONSTRUCTION OF.

1. A testator devised a portion of his real estate to his widow and his eldest son *James*, jointly, and his heirs, "my wife *Jane* to have and to hold the aforesaid premises as long as she remains my widow for my wife's *Jane Clark's* support and my small children's support, to be accepted by her in lieu of dower; and after her death my wife's part will belong to my son *James Clark*, aforesaid. * * * My son *James Clark*, aforesaid, will pay to my daughters [naming them] two hundred dollars each when they become the age of twenty-one years, that is, each as she becomes the age of twenty-one years." The testator then devised other real estate to his four younger sons, and proceeded to direct that his five sons should "remain on the old farm (the land devised to the widow and eldest son) and work together, and the proceeds of their work, except what is necessary for the maintenance of the family, that is, for food and clothing, is to pay for the land already purchased * * * and if any of my sons aforesaid does not conform to this proviso * * * then the property I have given and devised to him or them shall be sold by my executors hereinafter named, and the proceeds of the sale aforesaid shall be paid upon the land I have willed to those of my sons who fulfils this last provision:"

Held, that *James* took an estate in fee in one moiety of the land devised to him and his mother; that the widow took an estate during widowhood in the other moiety, with remainder

to *James* in fee, the whole being charged with the maintenance of the testator's widow and such of the children as continued to live on it; and with the payment of the purchase money payable on the lands devised to the sons who remained on and worked the farm: both charges being on the annual profits, not on the *corpus; James*, however, being entitled to insist that the lands devised to any of the sons who abandoned the farm should be sold and the produce applied in payment of lands devised to those who remained, and that any surplus of the produce not required for maintenance, and to pay off purchase moneys, was divisible between *James* and his mother in equal moieties:

Held, also, that the legacies to the daughters were payable out of the *corpus* of the estate devised to *James*.

Clark v. Clark, 17.

2. A testator by his will devised as follows: "Also it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children, and to the support of my wife, so long as she remains my widow;" and by a subsequent clause named certain persons executors of his will; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will."

Held, that under these provisions the executors had full power to sell and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary party to the conveyance.

Glover v. Wilson, 111.

3. A testator (amongst other things) devised certain lands to each of his two younger children, and directed that the rents should be and remain to his widow or executors for the education and up-bringing of the devisees respectively until they were twenty-one, &c.; and he also left all the dividends and profits of his bank stock, &c., to his widow and executors for the same purpose. The residue of his estate was to be divided equally amongst all his children. The rents of the lands devised to one of the younger children were alone more than sufficient for his education and maintenance:

Held, notwithstanding, that he was entitled to a share of the dividends bequeathed; that, the whole income derived from the stocks being given, the gift could not, in favor of the residuary legatees, be construed as conditional on being needed for the purpose specified.

Denison v. Denison, 219.

[Affirmed on re-hearing. See post vol. xviii.]

4. A testator gave to his wife $50 a year in lieu of dower, and directed that, if she should have a child to the testator,

the annuity should be increased to $100 so long as both lived and as the annuitant remained the testator's widow. In a subsequent part of the will he directed that if such child should live till fourteen he should be put to trade "and pay stopped when of age, shall $100":

Held, that the widow was entitled to the annuity of $100 absolutely until the child was twenty-one, provided the child lived so long and the widow remained unmarried; and that in case the child should die before twenty-one, or in case the widow should marry, the amount was to be reduced to $50 a year for the remainder of her life.

Bateman v. Bateman, 227.

5. The testator devised his farm to *G*, and directed that if *G* should die without heirs, the land should be sold and legacy paid; and if the testator's widow should die or marry before *G* should have paid $2,000, the balance should be equally divided amongst the testator's heirs. In a subsequent part of the will the testator directed that *G* should pay $2,500:

Held, that the estate intended for *G* was the fee simple, with an executory devise over in case he should die without issue living at his death.

Held, also, that the word 'heirs' in the bequest of the balance, did not include the widow; and the same construction was put upon the word 'heirs' in a residuary clause contained in the subsequent part of the will.—*Ib.*

6. Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realized; and from and out of the same, when so realised and invested in the whole, and thus available for division, and not before, to pay certain legacies:

Held, (1) That until the whole was realized the legatees were not entitled to interest.

(2) That mortgages properly secured, which the testator held, should, for the purposes of the will, be deemed to be realized and invested immediately after the testator's decease.

(3) That the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realized; and

(4) That the trustees could not prolong the period by selling the real estate on time.

Smith v. Seaton, 397.

7. The testator gave £3000 to Trinity College, and £1000 to Trinity Church, both to be paid out of certain gas stock. By a codicil he reduced the latter bequest to £500, and gave to two other churches a further sum of £500:

Held, that this sum was to come out of the gas stock—*Ib.*

8. A testator devised certain real estate to his granddaughter; and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of such sales, and from such other of his property as might be then remaining in their hands, he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:

Held, that these provisions shewed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the grand-daughter's death.

Re Chisholm, 403.

9. A testator gave one-fifth of his residuary estate, real and personal, to the heirs and assigns of *A.* and his wife, who were both living:

Held, that *A.* or his wife took no interest or power of appointment, but that their children living at the testator's death were entitled absolutely.

Levitt v. Wood, 414.

10. Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency.

Davidson v. Boomer, 509.

11. A testator, after giving certain personal estate to his wife, and devising his lands to his two sons and his daughter (all minors), subject to a life-estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one; and he further directed that if any of his children should die before attaining that age, then his or their share should be equally divided among the survivors; and if all should die he gave the whole on his wife's death to other relatives, whom he specified:

Held, that the two sons were entitled to the interest on the residuary personal estate for their maintenance during minority.

Spark v. Perrin, 519.

See also "Acknowledgment of Bargain by a Will."

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