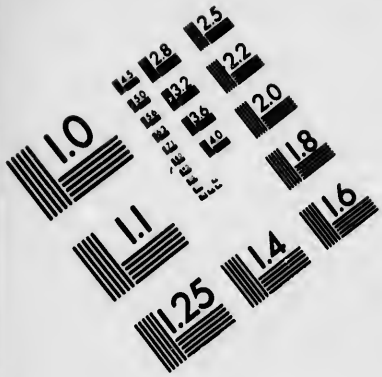

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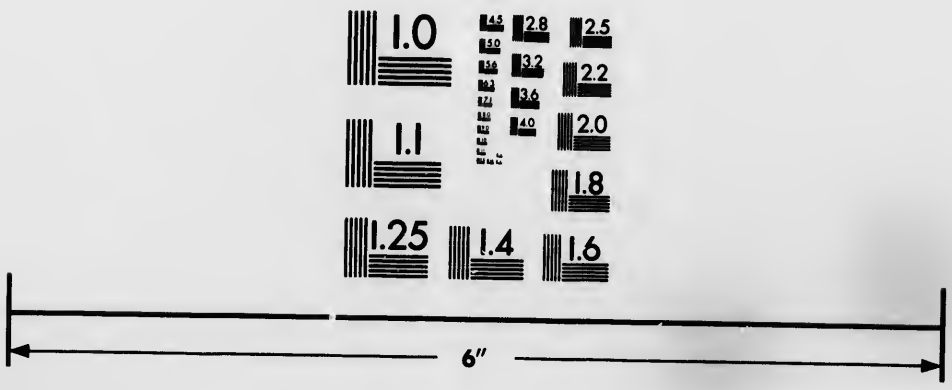

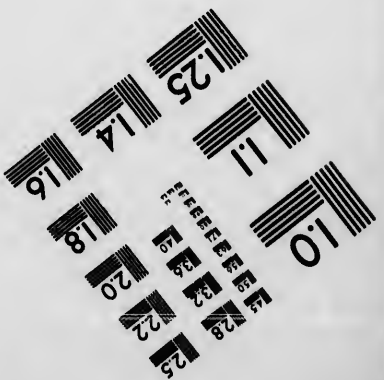

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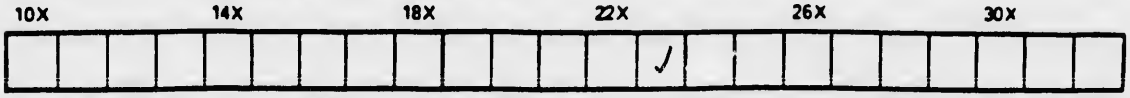

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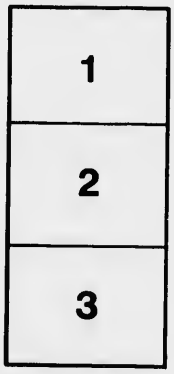

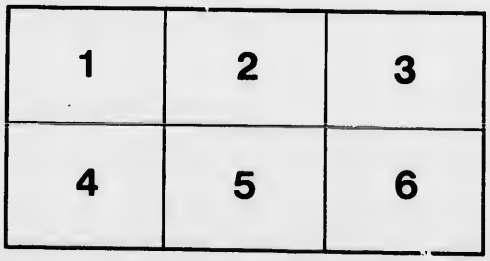

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,
REPORTER TO THE COURT.

VOLUME XXVII.

TORONTO:
ROWSELL & HUTCHISON.
1880.

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

THE HON. JOHN GODFREY SPRAGGE, *Chancellor.*

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

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

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY,

OF

ONTARIO.

DURING PORTIONS OF THE YEARS 1879 AND 1880.

MORPHY v. WILSON.

Fraudulent conveyance—Pleading—Demurrer—Suit on behalf of all creditors.

Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect.

This was a bill by *George Morphy* and *Henry B. Morphy*, against *Thomas L. Wilson* and *Ellen Wilson* his wife, setting forth that *Thomas L. Wilson* being indebted to several persons determined to delay, hinder, and defeat his creditors and prevent them from recovering their claims against him, and with that view resolved to put all his property, real and personal, out of his hands; and in pursuance of such fraudulent intent, and to deprive his creditors of their just dues and remedies, he purchased with his own moneys certain lands (which were particularly mentioned) in the city of Toronto, and had the conveyance thereof made and taken in the name of his said wife, and she received such conveyance in her own name

Statement.

1879.

Morphy v. Wilson.

well knowing the fraudulent intention of her husband, and with the design of aiding and abetting him in preventing his creditors from recovering their just debts. The bill further stated that the plaintiffs had recovered against the said *Thomas L. Wilson* a judgment in the County Court of the County of York for $367.83, the whole of which sum remained due and owing by him; and the said defendant had not any property other than that before mentioned to satisfy the debt. The bill further stated that by indenture of mortgage of 5th May, 1875, duly registered, the said defendants mortgaged all their right and title in the said lands to one *Michael O'Donnell* to secure $1,200 and interest, which said mortgage was then outstanding and unpaid and formed a charge on said lands. The bill further alleged that the plaintiffs were apprehensive that unless restrained the defendants would dispose of the said lands, and receive the purchase money therefor, and apply the same otherwise than in paying the debts of the defendant *Thomas L. Wilson*, and that the plaintiffs and other creditors of said *Wilson* would lose the amount of their claims. The prayer of the bill was, that *Thomas L. Wilson* might be ordered to pay to the plaintiffs the amount due them: that defendants might be ordered to pay off the said mortgage to *Michael O'Donnell;* that the deed to *Ellen Wilson* might be declared fraudulent and void as against creditors, or that she might be declared a trustee of said land for the plaintiffs and other creditors; that the said lands might be sold, and the proceeds applied in payment of the plaintiffs and the said other creditors of said *Wilson*, together with the costs of the suit; that the defendants might be restrained from disposing or further incumbering said lands; and for further and other relief.

Statement.

The defendant *Thomas L. Wilson* demurred for want of equity, on the grounds (1) that "the plaintiffs do not sue upon behalf of themselves and all

other creditors of the said *Thomas Laverick Wilson*, and they have not an execution in the hands of the sheriff of the county wherein the lands are situate against the lands of the defendant *Thomas Laverick Wilson*, and (2) because the plaintiffs' remedy, if any, is under section 10 of chapter 49 of the Revised Statutes of Ontario, and not by bill in this Court."

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Mr. *Foy*, for the demurrer. The plaintiffs having no *fi. fa.* in the hands of the sheriff against the debtor's lands cannot sue except on behalf of *all* creditors, on the authority of *Longeway* v. *Mitchell* (*a*), *Reese River Silver Mining Co.* v. *Atwell* (*b*). See also *Smith* v. *Hurst* (*c*).

Mr. *Monkman*, contra. The objections to the bill are threefold (1) because plaintiffs do not file the bill on behalf of themselves and all other creditors, (2) because no *fi. fa.*, is in the hands of the sheriff, and (3), because the remedy is at law under the Administration of Justice Act. The first objection is decided against the defendant by the case of *Abell* v. *Morrison* (*d*). See also *Knox* v. *Travers* (*e*), *Sawyer* v. *Linton* (*f*). As to the other grounds raised; by the Administration of Justice Act the plaintiffs are entitled to obtain an order for payment of their judgment, and to a declaration that the defendant *Ellen Wilson* is a trustee merely of the lands, and for equitable execution against the property in question. The property having been conveyed to Mrs. *Wilson* by a stranger, the plaintiffs would not be aided in obtaining their debt by having the deed set aside, as they could not make anything by a *fi. fa.* at law, the husband having no apparent legal title, and in fact no title that could be sold under execution at law. The deed as between

Argument.

(*a*) 17 Gr. 190.
(*b*) L. R. 7 Eq. 347.
(*c*) 10 Hare 30.
(*d*) 23 Gr. 109.
(*e*) 23 Gr. 41.
(*f*) 23 Gr. 45.

1879.

Morphy v. Wilson.

the defendants is good, and if set aside there is no title in him; the only remedy of the plaintiff therefore is to have the wife declared a trustee as is prayed. A large number of cases in the American Courts shew that where the conveyance has been made to an appointee no *fi. fa.* is necessary. *McCartney* v. *Bostwick* (*a*). They also shew that relief will be granted if the plaintiff has done all that he can to realize the judgment, and that it is sufficient for that purpose to shew that the execution has been returned unsatisfied. Here the plaintiffs say that there are no other lands out of which the money can be made, and this is admitted by the demurrer. If there is other property to satisfy an execution that fact should be set up as a defence. *Goldsmith* v. *Russell* (*b*), *Bump* on Fraudulent Conveyances (*c*), were also referred to.

Argument.

Mr. *Foy*, in reply. The fact of the lands having been conveyed to the defendant *Ellen Wilson* not by her co-defendant, but by another person in consideration of money alleged to have been paid by the husband makes no difference. In either case the deed is good as between the parties, and the remedy is precisely the same, namely, equitable execution. In such case the plaintiffs cannot by suing on their own behalf alone obtain priority over other creditors unless they have a lien on the lands. *Adames* v. *Hallett* (*d*), *Shea* v. *Denison* (*e*), *May* on Fraudulent Conveyances (*f*).

Nov. 12th.

Judgment.

SPRAGGE, C.—This is a bill under the Statute of Elizabeth by two creditors who had recovered a joint judgment against the male defendant, who it is alleged purchased lands with his own moneys, and appointed them to be conveyed to his wife.

The demurrer is on the grounds that the plaintiffs do not sue on behalf of themselves and other creditors.

(*a*) 32 N. Y. Rep. 53.
(*b*) 5 DeG. M. & G. 547.
(*c*) pp. 509, 514.
(*d*) L. R. 6 Eq. at p. 476.
(*e*) 14 Gr. 513.
(*f*) p. 467.

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They do not allege any thing beyond judgment, there being no allegation as to execution; and therefore it is contended that the remedy is under the Administration of Justice Act.

Smith v. *Hurst* (*a*), which has been followed by numerous cases in this Court, shews that the bill should contain an allegation of execution having been sued out.

Then came the case of *Reese River Silver Mining Co.* v. *Atwell* (*b*), followed in this Court by *Longeway* v. *Mitchell* (*c*).

The result of the later cases is, that the issuing of execution need not be averred; but if not, then that plaintiff must sue on behalf of himself and all other creditors. It may be that this Court would go further than in *Reese River Silver Mining Co.* v. *Atwell*, under the Administration of Justice Act, but that is not material to the question here.

The reason given by *May* (*d*), for requiring the bill to be on behalf of the plaintiff and other creditors where the plaintiff has not a lien, is the absence of a lien on the property so as to give him a right to set aside the deed for his own benefit as against other creditors and he puts the case of a bill impeaching a deed made to defeat the plaintiffs particular debt (*e*). It is objected that a *fi. fa.* at law was useless, because if the debtor had any estate it was an equitable one, and therefore a case for equitable execution; and *Shea* v. *Denison* shews what is required to be done before filing such a bill (*f*). See also what is said by Lord *Cranworth* in *Goldsmith* v. *Russell* (*g*), his ground being that there could be no charging order against the stock there in question.

Judgment.

Mr. *Monkman's* reference to American authority, *Bump* on Fraudulent Conveyances (*h*), is against him.

(*a*) 10 Hare 30.
(*b*) L. R. 7 Eq. 347.
(*c*) 17 Gr. 190.
(*d*) p. 466.
(*e*) See p. 467.
(*f*) 14 Gr. 513.
(*g*) 5 D. M. & G. at p. 552.
(*h*) p. 514.

1879.

JACK v. GREIG.

Fraudulent conveyance—Father and son—Money lent by son.

A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a distance, it being agreed between them that he should remit to his father from time to time so much of his earnings as he did not require for his support, and that the same should be repaid by the father after the son attained majority, as the son should want it. Accordingly remittances were alleged to have been made to his father, which, on the son coming of age, amounted to $600 and upwards, when he found his father was unable to repay his advances. It was arranged that the son should make further advances, and that unless the father paid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement in 1877 it was ascertained that the father's indebtedness amounted to $1600 and upwards, which it was then agreed should be the consideration for the purchase of the equity of redemption of the father in the premises, the conveyance of which was impeached by a judgment creditor of the father under 13 Elizabeth.

The Court being satisfied of the *bona fides* of the dealings between the father and son, and that the sums claimed had really been advanced (although the only evidence of the dealings was that of the father and son) dismissed the bill; but, under the circumstances, without costs.

Statement. The bill in this case (filed 6th May, 1878) was by *James Jack* against *John Greig* and *John Alexander Greig*, setting forth that the defendant *John Greig* had obtained from the plaintiff a loan of $250, for which he gave a promissory note in which one *Annie Greig* joined as surety, but which was not paid, and in consequence the plaintiff instituted proceedings thereon and recovered judgment in the County Court of the county of Bruce for $271 debt and $14.38 costs on the 23rd day of April, 1878, for which he placed an execution in the hands of the proper sheriff, but the same was returned unsatisfied: that *John Greig* was then in insolvent circumstances, and unable to pay his debts, and this was well known to his son, the other defendant: that *John Greig* was a farmer in the

county of Bruce, and when the said note was given was possessed of fifty acres in the township of Bruce and of no other real estate or other means wherewith to pay his debts; and that by deed bearing date the 4th day of March, 1878, the defendant *John Greig* conveyed to his son *John A. Greig* the said parcel of land for an alleged consideration of $1600. The bill charged that the conveyance so made was with the fraudulent purpose and intent of defeating and delaying the plaintiff and the other creditors of *John Greig*, and prayed relief accordingly.

The defendant *John A. Greig* answered, denying all fraudulent intention in taking the conveyance to himself, and alleging that the same was given in satisfaction of $1617 advanced and lent by him to his father at different times between the years 1868 and 1878; and that the moneys so advanced exceeded the value of the equity of redemption in the said fifty acres, which were subject to a mortgage in favour of the Huron and Erie Loan and Savings Society for $900; and that the agreement to give such conveyance and the taking thereof by him had been entered into and carried out in perfect good faith. Statement.

This defendant was examined upon his answer before the Master at Walkerton in December, 1878, in the course of which it appeared that the father had left this country and was then resident in Michigan. The defendant also stated that his occupation was that of school teacher, which he had commenced in 1868 and continued ever since, with the exception of six months in 1877 and six months in 1878, and during those periods he was attending school in Sydenham and Toronto: that he had kept a diary for the first four years he was teaching, but this had been burned up in his father's house, which was destroyed by fire in 1877, whilst he was at Sydenham, and this diary was the only book in which he had made any entries of business transactions: that in 1872 and 1873 he

1879.

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taught school in Tiverton, during which time he boarded in his father's house; but did not pay him for his board. He further stated:—

"I gave my father all the money I earned for the first nine years I taught over and above necessary expenses; got no written acknowledgment for the moneys I paid him; I did not enter the moneys I gave him down in my book at the time, but at the end of the year I entered what moneys I expected him to return. In the spring of 1868 I borrowed $25 for him and sent it to him; I was sixteen years old at the time. About December, 1868, I gave $67 to him; this was all that I gave him in 1868. In the summer of 1869 I gave him some money, but can't say how much; I don't charge him with any. About Christmas, 1869, I sent him $125 from Port Elgin * * In 1870 I gave him $150—part in the summer and part in the winter: I gave him about $25 in the summer and the balance in the winter. I gave him the same amount the next year—about $25 or $30 in the summer and the balance in the winter. In 1872 I gave him $250. I was living at home this year and gave him everything I got. I gave him money in small sums just as he asked it. In 1873 I gave him $250 in the same way. I gave him a sum of $110 in one sum in 1872. I did not charge him with the moneys till the end of the year. In 1874 I gave him $200. I took up a number of his notes for him this year, and paid part of this $200 in that way. I paid for him about $100 in taking up his notes. I can't say what notes I took up in 1874; I took up notes for him in 1874 and 1875. I paid him in 1876 over $200 and charged $200; I paid him some money and took up notes with the balance. There were two notes in the Merchants' Bank at Kincardine for about $40 each: I took these up in 1874 and 1875. I also took up one that *Baird* held against him for about $34. Money was sent away either by myself or by my father to *Williams* of Toronto, to apply on a note: it was my money that was sent. There were other notes taken up, but I cannot remember them. I gave him $150 in 1876 at different times. I gave him about $50 in April: don't think I gave him any more until the end of the year: I gave him about $100 at the end of the year. About

Statement.

December, 1877, I gave him about $50. I did not enter this $50, but I charge him with this amount; did not enter the moneys in any book in 1876; did not enter the money I paid in 1875 in any book; did not enter any money in any book after 1872. * * When I was at home I used to write his letters for him; knew the state of his business pretty well until the end of 1876; after 1876, I did not know the true state of his affairs—I had some knowledge. He was a farmer, and did not carry on any other business. The deed of the farm in dispute was made on the 4th of March, 1878; I was going to school at the time. *Chesly*, of Tiverton, drew the deed; my father instructed him to draw it; it was sent to me after it was registered by my father. My father paid *Chesly* for the drawing of the deed; he did all the business for me; I had not been in Tiverton between the Christmas holidays and the 4t'. of March, 1878; had corresponded with my father between the Christmas holidays and the 4th of March, 1878; nothing was written in the letters about this deed or the land that I am aware of. There was mention made during the Christmas holidays, when I was up, about the land. He wanted me to indorse his note for more money, and I declined. He agreed to get the writings drawn, and send them to me. There was more said, but this is the substance of the conversation: there was nothing said about suing. Nearly every time I gave him any sum of money he told me that if he could not pay me back he would either give me the land or sell it, and give me the money. I told him frequently I would have to get the money back; I told him that in the Christmas holidays before I got the deed. The land is worth about $2,500. There is a new dwelling house upon it; my father put it up in 1877, and I will have to pay for it; I have given my note for the amount of the lumber; I did the painting of it in the summer holidays of 1877. * * The amount due on the mortgage amounted to about $900 when I got the deed. * * I was to pay off the mortgage. I had advanced to my father about $1625. I knew the plaintiff * * at the time I got the deed. I did not know my father was indebted to him. I knew that he was indebted to a firm of *Evans & Co.* on a note held by the Merchants' Bank; can't say that

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Jack v. Greig.

Statement.

1879. I knew he was indebted to others * * did not ask him. He wanted me to indorse to pay the note in the bank at Kincardine; the note in the bank was about $80. I knew he owed one *McEwan* $100; I have heard since that he owed other accounts. My father never paid me back any of the moneys. In making up the $1625 I do not give my father credit for any board for 1872 and 1873. I worked the farm these years besides teaching school. The note I gave for the lumber I gave after I got the deed: I gave it in August, 1878. After my father asked me to indorse for him in the Christmas holidays, before I got the deed, and I declined, we had a talk about his giving me a deed of the farm. When he agreed to give me a deed I indorsed the note for him, but the note was not used."

Jack v. Greig.

The cause came on for the examination of witnesses and hearing at the Autumn Sittings at Walkerton in 1879, when the defendant *John Alexander Greig* was called as a witness, when he gave substantially the same evidence as he had done when examined on his answer, and which was corroborated to some extent by his father and his mother, who were also called as witnesses.

Mr. *Meredith*, Q. C., and Mr. *Robertson*, for the plaintiffs.

Mr. *J. A. Boyd*, Q. C., and Mr. *O'Connor*, for the defendant *John A. Greig*.

The bill as against *John Greig* was taken *pro confesso*.

Nov. 12th. Judgment.

SPRAGGE, C.—This suit is by a judgment and execution creditor under the statute of Elizabeth, to set aside a conveyance of land made by a father to his son. The defence is, that the conveyance was *bonâ fide*, and for value. The case is, in one of its aspects, a peculiar one.

The son's case is, that in 1868, being then sixteen

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years of age, he, with the assent of his father, who was a farmer, left his father's house; and at a town at some distance became a school teacher: that it was agreed between his father and himself that he should remit to his father from time to time so much of his earnings as he should not need for his support; and that the same should be repaid by the father after the son should come of age, as the son should require it, from time to time, for his support and education at a college or high school: that he did accordingly make remittances to his father in various sums which he enumerates in his evidence, which when he came of age amounted to something over $600. His case further is, that when he came of age he found his father not of ability to repay his advances, (and that he was not of ability is proved by other evidence,) and that it was then agreed that the son should continue to make advances, and that unless the father repaid them he was to have the farm conveyed to him, subject to certain mortgages that were upon it: that the son accordingly continued to make advances, and that upon an accounting between them on the occasion of the son being at his father's during the Christmas vacation of 1877, the aggregate of the advances made was found to be a few dollars over $1,600, and that it was then agreed that that sum should be the consideration, not the nominal but the real consideration, for the purchase of the equity of redemption of the father in the premises in question. The conveyance which is impeached in this suit was made in the March following.

Judgment.

The bill puts it that any remittances and payments made by the son to the father were by way of gift. At the hearing the contention of counsel for the plaintiff was, that the father was entitled to the earnings of the son during his minority; and counsel questioned the facts alleged, that it was agreed that the remittances from the son to the father should constitute a debt between them.

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I have since looked into the law, upon the point of law raised; and the weight of authority (of which indeed there is but little), is against the position taken by the plaintiff's counsel, Mr. *Simpson*, the latest writer upon the subject (p. 164), says he has been unable to find any case in the books bearing directly on the subject; but, he adds, such a right, *i. e.*, the right of a father to the earnings of his children, seems inconsistent with the right of an infant to sue for wages; and inconsistent also with the case of *Ex parte Macklin (a)*, before Lord *Hardwicke*.

Mr. *Simpson* in his work, at the page mentioned, thus summarizes this case:—"In that case a daughter lived with, and was maintained by, her father, and he received from the managers of theatres her earnings as an actress. On his becoming bankrupt she claimed as creditor of the estate what he had thus received, offering to deduct what he had expended on her maintenance. Lord *Hardwicke*, after some hesitation, directed an inquiry, how much the father had received to the daughter's use, unless as to so much as was a covenant with the daughter herself; but to avoid the expense of an account she was admitted as creditor for an agreed sum. There is nothing in the report to explain the nature of the covenant alluded to in the judgment."

Judgment.

The case of *Plume* v. *Plume (b)*, if, as assumed by Mr. *Simpson*, the case of an infant is an authority in the same direction. The answer to the defendant's claim in that case would have been a very plain one, if in law the father were entitled to the son's earnings, and needed not the special grounds upon which the answer to it was placed by Lord *Eldon*.

In the United States the law is in favour of the right of the father to the earnings of his children, and that he is the proper person to sue for them, unless, as

(a) 2 Ves. Senr. 675.

(b) 7 Ves. 258.

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put by Mr. *Simpson*, and in the cases cited by him, the son is emancipated, or the father has consented to his receiving the wages earned by him; circumstances of which I have no doubt in the case before me. I have examined the American cases cited by Mr. *Simpson*, and find them bear out his text.

The English authorities, though perhaps less explicitly than the American cases, warrant the position that a child earning wages for himself, and receiving them himself with the assent of his father, is entitled to those wages as his own, and that they are not the property of the father. If he remit a portion of them to his father it may be by way of gift, or it may be by way of loan: to establish it as a gift something more than the mere fact of remitting must be shewn, though less, I apprehend, would be sufficient than would be necessary between strangers. In this case there is some evidence of agreement from the first that the money remitted was by way of loan; but such evidence I take to be unnecessary. There is no evidence of the remittances being intended, or understood to be, by way of gift. It follows that upon the son coming of age, and indeed before he came of age, the father stood indebted to him for the moneys from time to time remitted.

Judgment.

The evidence given of agreement after the coming of age, that unless advances were repaid the son should have the land, was not necessary to the defendant's case, if in truth the advances were made, and the conveyance made and taken in good faith; for if in truth the father stood indebted to the son in the sum of $1,600, and that was the value, or about the value of the land, there was nothing to prevent the conveyance of the land in satisfaction of the debt, without any previous agreement.

Then as to the fact of the advances being made as charged. No regular account was kept; but, as is stated in evidence, the father and son met, and about once a

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year summed up what had been sent and received. I have no doubt, from the evidence, that remittances were made from time to time, and to a considerable amount. *What* remittances were made rests almost entirely upon the evidence of the defendant himself, not supported by any vouchers or books of account; but that there were annual accountings, and a final accounting at Christmas, 1877, is shewn by the evidence of the father and the mother, and there is some confirmatory evidence shewing the stipend of the defendant as a teacher, his saving habits, and some other circumstances tending to shew his ability to make the remittances that he claims to have made, and the probability that he did in fact make them. His own evidence is very distinct as to the several sums remitted, and it did not impress me unfavourably.

It is not made a point that $1,600 was less than a fair price for the interest of the father in the farm, and I do not think it a circumstance of much weight against the *bona fides* or the reality of the transaction, that the father and family of the defendant continue to reside on the place.

Judgment.

Upon the whole I cannot hold the transaction successfully impeached; but the case is of that peculiar nature, the dealings so loose, and the evidence of actual advances so much less satisfactory than it might have been, as to invite investigation. I therefore dismiss the bill, without costs.

CLEMOW v. BOOTH

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Purchaser of part of mortgage estate—Party seeking equity must do equity—Costs.

The rule that "he who comes for equity must do equity" considered and applied.

Where a purchaser of a portion of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money, on a bill being filed by the vendor's assignee to compel payment by the purchaser, the Court refused to give such relief except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the Court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due.

In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers, upon indemnifying him against costs.

The plaintiff by his bill did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the Court could not grant. The Court, on pronouncing a decree, refused costs to either party.

Statement.

This was a suit instituted by *Francis Clemow*, assignee of the estate and effects of one *Alanson H. Baldwin*, against *Levi Young*, to compel the defendant to pay one-tenth part or share of $14,000 principal money, and $4,081.08 interest accrued thereon, together with the costs of suit. It appeared that the said *Baldwin* and one *Thomas McDonagh Blasdell* were the owners of lots 35 and 36 in the broken front concession of the township of Nepean, subject to a mortgage, dated 12th July, 1870, in favour of their vendor, *Nicholas Sparks*, for securing the said sum of $14,000, balance of purchase money, and interest at seven per cent, per annum, payable half-yearly on the 1st day of May and 1st day of November in each year, the principal sum of $14,000 being to become due and payable on the 15th of June, 1880; that on the 18th of March, 1874, *Baldwin* sold and conveyed an undivided one-

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fifth of his interest in these lands to the defendant for the sum of $3,600, the defendant, by the deed conveying to him such one-fifth, covenanting that he would "well and truly pay or cause to be paid unto the administrators of the personal estate and effects of the said *Nicholas Sparks*, now deceased, or his assigns, one-tenth part of the moneys so due on, or to grow due on, and mentioned in the said indenture of mortgage, from the said party hereto of the first part [*Baldwin*] and the said *Thomas McDonagh Blasdell* and *Charlotte Blasdell*, to the said *Nicholas Sparks*, and save and keep harmless and indemnified the said party of the first part, his heirs, executors, administrators, and assigns, and his and their lands and tenements, goods, chattels, and effects, of, from, and against the same and every part thereof."

Statement.

The bill further stated that in January, 1877, *Baldwin* having become insolvent, the plaintiff was appointed his assignee; that default having been made in payment of the interest due on the said mortgage since the 1st day of May, 1875, one *Charles Magee*, on the 19th of January, 1879, as administrator of *Nicholas Sparks*, filed his bill of complaint against the plaintiff and the defendant, and other parties interested in such equity of redemption, and that in that suit a decree was pronounced directing, amongst other things, that in the event of default being made by the defendants therein in payment, the said lands should be sold and the purchase money applied in payment of the amount found due and costs of that suit.

The defendant, by his answer, alleged that he had "always been ready and willing, and had on divers occasions offered, and is still ready and willing to pay to the said administrator of the personal estate and effects of the said *Nicholas Sparks* one-tenth of the interest payable on the said mortgage, if the said administrator would receive the same as such one-tenth, but the said administrator had refused and still

refuses to receive the said one-tenth as such, or to recognize any right in the defendant to specially appropriate any payment made by him;" and submitted that his covenant was a covenant of indemnity only, and that as neither the said *Baldwin* nor the plaintiff had paid any part of the moneys and interest payable by the said defendant under the covenant in his conveyance, the plaintiff had not any right to institute this suit. This was the principal question discussed at the hearing, which took place at the Autumn Sittings at Ottawa, 1879.

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Mr. *Fitzgerald*, Q.C., and Mr. *Christie*, for the plaintiffs, contended that the creditor, *Magee*, not only had a right to sue, but did sue, and in June last obtained a decree against all the owners of the equity of redemption, who were parties, and the whole principal and interest by the terms of that decree were due before the bill was filed, and the defendant was therefore bound by that decree. Besides, a sum of interest was, in the strictest sense, due before the bill was filed. Not one of the defendants in that suit could possibly have stayed the proceedings therein, as any sum he had individually to pay was too small in amount to affect the rights of the mortgagee (*Magee*) in any way. The mortgagee did not refuse to exercise his right to proceed against the several purchasers, but did so, and thus he obtained the decree mentioned. He always had that right, but in addition the Administration of Justice Act applies to his case. The surety is entitled to be fully indemnified against all loss, and how can that be obtained except by granting the decree now asked. *Wallace* v. *Gilchrist* (*a*), *Heward* v. *Lovegrove* (*b*), *Adams* on Equity, page 270, and *Antrobus* v. *Davidson* (*c*), establish that the plaintiff, under the circum-

Argument.

(*a*) 24 U. C. C. P. 40. (*b*) L. R. 6 Ex. 63.
(*c*) 3 Mer. 577.

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stances appearing in this case, has a clear right to sue. But, aside from all these considerations, it is to be borne in mind that the defendant gave his absolute unconditional covenant, thus giving the plaintiff an additional positive right over and above that of a simple surety. The mere position of suretyship would have given the plaintiff these rights, but the covenant referred to gave him an additional unqualified right.

Mr. *Bethune*, Q.C., for the defendant. If, as is contended for on the part of the plaintiff, he stands in the position of a surety, then upon the authorities he has no right to file a bill to be discharged from his liability, unless the creditor has a right to sue the principal debtor, and refuses to exercise that right. His only remedy in other cases is to pay the debt, and then sue the principal: *Padwick* v. *Stanley* (*a*), and see *DeColyar* on Suretyship, page 308, Am. ed. And a surety cannot even accelerate the liability of his principal by voluntarily paying the debt before it is due: *DeColyar*, 311; *Addison* on Contracts, 6th ed., p. 574.

The other facts and points raised appear in the judgment of

Nov. 12th. Judgment.

SPRAGGE, C.—The plaintiff is assignee in insolvency of one *Baldwin*, who was a joint purchaser with one *Blasdell* from one *Sparks*; and the two purchasers joined in a mortgage for unpaid purchase money, and covenanted for its payment. The defendant is a purchaser from *Baldwin* of a one-fifth interest of that to which *Baldwin* by his purchase was entitled. *Baldwin* sold other fifths to three others besides this defendant, and retained one-fifth himself. He made a conveyance to each of the four purchasers of one undivided fifth part of the undivided estate and interest of himself,

(*a*) 9 Hare 627.

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subject to certain leases and sales not material to the case, and subject to the payment of one-tenth part of the moneys due or to grow due on the mortgage to *Sparks*; and the conveyance to each contained qualified covenants that he had the right to convey with the limitations aforesaid, and that the grantee should have quiet possession "free from all incumbrances, save as aforesaid;" and each grantee covenanted on his part that he would pay one-tenth part of such mortgage moneys to the personal representative of *Sparks*, and indemnify the grantor against the same. This bill is filed to compel the defendant to pay the one-tenth of the mortgage money to *Magee*, personal representative of *Sparks*; and similar bills are filed against the other three purchasers from *Baldwin*. In one of these suits a decree has been made. In this suit, and in two others now before me, a decree is resisted, except upon terms. The one-tenth of the mortgage money, payable by *Baldwin* himself has not been paid.

Judgment.

The terms contended for are: 1st. That the plaintiff, representing *Baldwin*, should do what he was bound to do, *i. e.*, pay to *Magee* one-tenth of the mortgage money. 2nd. That he should procure payment by the other purchasers of their respective one-tenths of the mortgage money.

Baldwin and the four purchasers from him were tenants in common of an undivided moiety of the land purchased from *Sparks*. Upon the first contention of the defendant I will put the case, as a more simple one, of a sale by a vendor of his equity of redemption in land, in an undivided moiety, with a covenant by the purchaser to pay to the mortgagee one-half of the mortgage debt, and the vendor filing a bill against the purchaser to compel him to make such payment, he being himself in default to the mortgagee for the half of the debt payable by him. There would be much reason in the purchaser taking the position, that he was prepared to pay his proportion, but that the vendor

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ought at the same time to pay his; because, upon his doing all that as between himself and his vendor he was bound to do, the default of the vendor himself would leave him, the purchaser, in default to the mortgagee. I cannot conceive that the vendor could in a Court of equity set up that he was not bound to pay his share, while compelling the purchaser to pay his. It is no answer to the purchaser that there is a covenant by him to pay, and no covenant by the vendor that he will pay. It results from the very nature of the transaction between them that it is his duty, as between himself and his purchaser, that he should pay. Each owes the same duty to the other, though only the performance of one is secured by covenant, but the other is not less a duty though not so secured.

Judgment.

This contention of the defendant may be rested upon the rule that a plaintiff coming for equity must do equity. Since the argument of this case I have referred to the very instructive case of *Gibson* v. *Goldsmid* (*a*), before the Lords Justices *Knight Bruce* and *Turner*; and although that which was contended for by the defendant was held not to be within the rule, the rule itself was much discussed and its application illustrated and exemplified. There was a covenant by and to each contracting party, and the point discussed was whether the plaintiff could ask for the specific performance of the covenant to himself while he had failed to perform the covenant he had given to the defendant. It was held that he could, the covenants being independent and not intended to be performed simultaneously, Lord Justice *Knight Bruce* observing, "That unity of subject, or connection between subjects, which calls it (the rule that a plaintiff coming for equity must do equity) into operation, is here, I think, wanting." And Lord Justice *Turner*, speaking of the

(*a*) 5 D. M. & G. 756.

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same rule, says, "The true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters in respect of which that assistance is asked," and he quotes the judgment of Sir *James Wigram* in *Hanson* v. *Keating* (*a*), as summing up the law upon the point with great accuracy. Sir *James Wigram* says: "The rule, as I have often had occasion to observe, cannot *per se* decide what terms the Court should impose upon the plaintiff as the price of the decree it gives him. It decides in the abstract, that the Court giving to the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the suit."

The term first asked falls within all the definitions of the learned Judges from whom I have quoted. It is, indeed, so reasonable and just that it commends itself to one's common sense as a term that ought to be required between these parties; and I am satisfied it falls within the rule I have cited: a rule, as was said by Sir *George Turner*, favoured in this Court.

Judgment.

The other term which the defendant asks to be imposed presents more difficulties. If *Baldwin* had sold to one, one-fifth of his interest, retaining four-fifths himself, I should make his payment of four-fifths a condition of requiring payment of the one-fifth; but he has sold four-fifths, and three of the four grantees each asks that the grantor be required as a condition precedent to his being called upon to pay, to compel the others of them to pay at the same time. I am not informed whether the sales were contemporaneous, or in what order they were; but each has given an independent unconditional covenant to pay off a certain proportion. There is no undertaking, express or implied, that the vendor will compel other vendees to

(*a*) 4 Hare 5.

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pay their proportion, or himself pay them. There are express covenants by the vendor, but the mortgage to *Sparks* is expressly excepted in them. What I am asked to do is to make an unconditional covenant, conditional upon something being done or compelled to be done by a third person. I am unable to say that the vendor would have sold upon the terms of accepting such a conditional covenant. I am clear that he is bound to do himself what he calls upon the defendant to do, by reason of the reciprocal obligation existing between them; and it may be that if he sold any of these one-fifth shares after the mortgage money accrued due in respect of them, he may be bound to pay the then arrears upon it before, or contemporaneously with, calling upon previous vendees to pay their proportion; but I give no opinion upon this, as the facts are not sufficiently before me.

It is urged that none of these defendants can compel other of them to pay the mortgage moneys payable under their respective covenants; but I think that any of them paying what is payable by other of them would be entitled to stand as to that other *pro tanto* in the place of the mortgagee, and I think that it will not be an unreasonable term to impose that any defendant paying shall be at liberty to use the name of the plaintiff against defaulting purchasers, upon indemnifying the plaintiff against costs.

Judgment.

Probably, however, counsel may have asked that this second term may be imposed only because he conceived it to be his duty to do so. The defendants by their several answers submit to pay each his proportion of the mortgage money, and professes himself ready to pay it. If each does this, and the plaintiff pays, as I hold him bound to do, the proportion payable by *Baldwin*, there will be no real difficulty, unless it arise from non-payment of the proportion payable by *Blasdell*. With that I have nothing to do; and as to that this Court cannot, that I see, render any assist-

ance, unless it may be in the suit instituted by the representatives of *Sparks* upon their mortgage. I think this is a case upon which no costs should be given to either party. The plaintiff does not submit to do what he on his part was bound to do as the price of the relief that he asks; and the defendant by his answer, and at the bar, asks too much.

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CANNON V. THE TORONTO CORN EXCHANGE.

Incorporated society—By-law—Expulsion of member—Arbitration of questions arising between members.

The Toronto Corn Exchange was empowered to pass by-laws for the proper government of the body. One of the by-laws enabled the society to expel any of its members for flagrant breaches of the rules of the body, and a refusal to submit a question arising between members to arbitration was declared to be a flagrant breach thereof. One member claimed against another (the plaintiff) a balance of $1.06 for purchase money of grain, a sum of $397 for freight on the same grain, and which, it appeared, the purchaser had been compelled to pay, and did pay under protest, before obtaining the grain, and which amount the purchaser insisted the plaintiff was bound to pay; and also a sum for costs incurred in an action brought by the purchaser to recover back the freight so paid. The first item the plaintiff paid, the second he admitted and offered to arrange, but disputed the last and refused to arbitrate as to any other item of the account than the last, whereupon the council of the defendants passed a vote of expulsion against the plaintiff, and did expel him from the benefits of the association. On a bill filed to set aside such order of expulsion and reinstate the plaintiff in his rights of membership, the Court granted the relief prayed, with costs; and, *Quære*, whether either of the items was such a claim as the statute contemplated being the subject of a reference between members of the association.

The by-laws of an association provided that notice of a meeting for the expulsion of a member must be given:

Held, that a notice of "a meeting to take into consideration the conduct of a member" was not a compliance with such provision, but should state distinctly what the object of the meeting was.

The defendants were incorporated by an Act, 35 Vict. ch. 45, C., for, among others, the purposes of compiling, recording and publishing statistics, and acquiring and

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distributing information respecting the produce and provision trade, in order to maintain uniformity in the business customs and regulations among those engaged in the above trades. They were empowered to pass by-laws and "to adjust, settle, and determine controversies and misunderstandings between persons engaged in the said trades, or which may be submitted to arbitration" That the president, vice-president, secretary-treasurer, and seven or such other number of managers as might be provided by by-law, should together constitute "the committee of management": that they might appoint members of the association arbitrators "to hear and decide controversies, disputes, or misunderstandings relating to any commercial matter which may arise between members of the association or any persons whatsoever claiming by, through, or under them, which may be voluntarily submitted for arbitration by the parties in dispute." The Act also provided that "The corporation may admit as members such persons residents of Canada as they see fit, and may expel any member for such reasons and in such manner as may be by by-law appointed." The Act also gave a form of bond of submission.

Statement.

The association passed several by-laws, amongst others the following:—

1. All questions of dispute or misunderstandings which may arise between members of the association may be submitted for settlement to the committee of arbitration, at the request of one or both parties made in writing, addressed to the president or secretary-treasurer of the association.

2. Should either party in the dispute refuse to submit to arbitration, the case shall be referred, in writing, to the committee of management by the party deeming himself aggrieved, who shall produce evidence to the satisfaction of such committee that he has just grounds for his complaint, when the committee of management shall require both parties to submit their difficulty or misunderstandings to the committee of arbitration.

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3. If, after such decision has been given by the president and committee of management of this association, the defendant in such case shall still continue to refuse to submit his case to the board of arbitrators for their decision, such determination on his or their part shall be considered a flagrant breach of the constitution and by-laws of this association, and shall be deemed sufficient grounds for suspension or expulsion from this Exchange, provided always that such expulsion shall be decided on after the case shall have been submitted to a full meeting of the association, and the same agreed to by a two-thirds vote of all the members present, due notice having been first given to the party or parties that such a meeting will be held, when an opportunity will be given them of being heard.

4. It shall be the duty of the secretary, immediately after the association shall have passed a resolution for the expulsion of any member, to inform such member of their decision in writing, and forward to him at same time a copy of said resolution, and also to take the necessary steps to prevent such member from partaking in any way of the privileges of this association. Parties in dispute availing themselves of the arbitration powers granted to the association must communicate with the secretary or assistant secretary, sign the act of submission in due form before him, therein name the arbitrators, and insert a clear statement of the case.

Statement.

The plaintiff was one of the original corporators and a member at the time the transactions complained of took place.

In June, 1877, the plaintiff was carrying on the business of produce merchant in Uxbridge, and sold to Messrs. *Weatherston & Co.*, of Toronto, who were also members of the association, about 9,000 bushels of wheat, which were to be delivered at Toronto, the plaintiff paying the freight. The wheat was shipped, but the freight was unpaid, and on its arrival in Toronto was stored in the warehouse of Messrs. *Gooderham & Worts*, who refused to give it up until the freight was paid. *Weatherston & Co.* paid the freight under protest, and afterwards brought an action against *Good-*

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erham & Worts to recover back the freight paid, but were unsuccessful in the action, and had to pay the costs.

The plaintiff, in August, 1877, gave *Weatherston & Co.* notice not to sue *Gooderham & Worts.* On the 28th February, 1878, *Weatherston & Co.* rendered to the plaintiff an account made up of three items: $1.06 balance on sale of wheat, $397.41 freight and inspection, and $307.82 costs paid and incurred in the suit against *Gooderham & Worts.* On the 2nd of March, 1878, the plaintiff sent a post office order for $1.06 to *Weatherston & Co.*, and in the letter in which this sum was enclosed he repudiated his liability for the freight and costs.

On the 5th of March, *Weatherston & Co.* sent the same account to the association, and requested that they would call on the plaintiff to arbitrate as to the same. The secretary communicated with the plaintiff and required him to arbitrate. On the 26th of March the plaintiff wrote the association in terms declining to arbitrate, and submitting that the matter was not one within the jurisdiction of the association. On the 29th of March a resolution was passed by the committee of management, "that there are sufficient grounds for arbitration, and that the matter be proceeded with at once," which was communicated to the plaintiff. On the 20th of April the plaintiff put before the committee of management a written statement, in which he informed them that he had paid the $1.06: that he admitted his liability for the freight and interest; and that he was willing to give *Weatherston & Co.* his note for the same, as he was not then in a position to pay the amount; and that he was not liable for the costs.

Statement.

At a meeting of the committee of management, held on the 29th of April, a resolution was put and carried, "That Messrs. *Weatherston & Co.* have sufficient ground for arbitration, and that Mr. *Cannon* be called upon to

name an arbitrator at once." An amendment, "That as Mr. *Cannon* acknowledges the original debt, the costs incurred are not a fit subject for arbitration," was lost. The resolution which was passed was communicated to the plaintiff.

On the 14th of May a special meeting of the association was held, at which a resolution was moved, that the plaintiff should be expelled, because he had refused to submit to arbitration. This resolution was not carried, because, as stated in the minutes, the plaintiff agreed at the meeting to "submit the matter to arbitration."

In the meantime a bond of submission was prepared by the secretary and submitted to the plaintiff to sign. The recital was, "Having a difference as to our rights in a case touching a claim, have agreed and bound," &c. This the plaintiff refused to sign, but tendered one in the same form, but having this recital. "Having a difference as to our rights in a case touching a claim for the costs of a suit of *Weatherston & Co.* against *Gooderham & Worts*."

Statement.

At a meeting held on the 10th of June, a resolution was passed that the bond should read as follows: "In a matter of a claim for freight and costs incurred in the same." An amendment to the resolution, to the effect that the words desired to be added by the plaintiff should be put in the bond, was lost. On the 11th of June the plaintiff wrote to the association a letter, in which he stated that "there is no misunderstanding between *N. Weatherston & Co.* and myself in relation to the original liability," and also that he denied the right of the association to say in what manner he should pay his debts.

At a meeting of the committee of management, held on the 14th of June, a resolution was passed, that a general meeting should be called for the 18th of June, at which a report of the matter should be presented and the plaintiff's letter of the 11th of June be read.

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The only notice of the meeting to be held which was sent to the plaintiff was, that a meeting would be held "on Tuesday next, the 18th instant, at 12:30 o'clock, to receive a report from the committee regarding the conduct of a member of the association, and other business."

A special meeting of the association was held on the 18th of June, at which a report of the committee was read, in which it was stated: "The board of management has made every exertion to endeavour to get Mr. *Cannon* to sign the bond, but unsuccessfully, and therefore no alternative is left but to refer the matter back to this meeting, so that they can decide upon what shall be done." A resolution of expulsion was moved, as also a resolution, "That as Mr. *Cannon* is willing to arbitrate on the question of law costs claimed by Mr. *Weatherston*, consequently this meeting does not consider that he should be expelled for refusing to arbitrate on a matter which he does not dispute, namely, the freight, which he says he is willing to pay as soon as he is able." Neither the resolution nor amendment was put to the meeting, but the meeting was adjourned to the 25th of June.

Statement.

On the 21st of June, at a meeting of the committee of management, it was decided to add to the bond the following words: "A claim for balance of account for wheat, amount of freight on said wheat, and interest and costs in connection with same, in which the defendant has since admitted his liability in the items of balance $1.06 and freight $397.41."

At the meeting held on the 25th of June, the bonds, as originally prepared by the association and by the plaintiff, were read. A resolution was then passed, that the bond should be amended as suggested by the committee on the 21st of June. It was then moved, "That Mr. *Cannon* be allowed five minutes' consideration to sign the bond."

The plaintiff having refused to sign the bond, a

resolution of expulsion was moved and carried. An amendment, in the terms of the one proposed at the meeting of the 18th June, was moved, but was lost.

The plaintiff was present at the meetings of the 18th and 25th of June, and at the latter meeting read a letter, in which he stated that he had paid the $1.06, that he admitted his liability for the $397.41, and was willing to submit the question of costs to arbitration.

The plaintiff filed the present bill against the association, and set out the above facts, and submitted that the only matters the association had power to deal with were those which might be *voluntarily* submitted: that the matter in dispute between him and *N. Weatherston & Co.* was not a commercial matter, and that the question of liability as to the costs was not a proper subject for arbitration, nor one within their jurisdiction: that he was not bound to submit the two items of $1.06 and the freight to arbitration; and that as he had offered to submit the matter of costs to arbitration, the association had no right to expel him: that the bond submitted by the association did not contain a clear statement of the matters in dispute; and that he was illegally expelled, because no notice was given to him that at the meeting of the 25th of June he would be expelled, or that at such meeting an opportunity would be given him to be heard, and because the meeting of the 25th of June was not specifically called for the purpose of expelling him. And the plaintiff prayed that the resolution of expulsion might be rescinded, and for an injunction and damages.

Statement.

The defendants by their answer contended that they had no right to go into the question as to what matters were in dispute: that *Weatherston & Co.* claiming that the three items were in dispute, the plaintiff could not by paying one and admitting another claim that the remaining item was the only subject for arbitration; that as the committee of management had determined that the three items were matters for arbi-

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tration, the plaintiff must submit the whole of them; that the plaintiff was bound to obey such determination, and that this Court had no power to reconsider such determination or to allow an appeal from the same; and that they were entitled to oblige all members not only to arbitrate on matters voluntarily submitted, but "are authorized to adjust, settle and determine controversies and misunderstandings between persons engaged in the produce and provision trades."

The cause came on for hearing at the sittings in Toronto, on the 8th day of November, 1879.

Argument.

Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, for the plaintiff. There was no fair exercise of judgment in the matter on the part of the defendants. Admitting they had the right to require the plaintiff to arbitrate, still they must exercise a reasonable judgment in the matter, and not require a member to obey their orders whether reasonable or not. It was the duty of the committee to ascertain what was in dispute, and after the plaintiff had paid one item of the claim and admitted another, they should not have required these two to be included in the reference. There was no object in so doing, and the only benefit to be gained was, by these means obtaining an award, and thereby a judgment for the amount. The words used are "misunderstandings or disputes." There would be neither the one nor the other in respect of these items. The Court may not interfere where there has been a *bonâ fide* exercise of judgment; but there was not such here. The bond was not in the form prescribed by by-law. There was no plain statement of the facts. The action of the committee of management was not conclusive, nor was it acted upon by the association. The committee merely referred the matter back, and the association afterwards endeavoured to arrange the matter and made changes in the bond; so the case depends on what was done by the association in June.

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The plaintiff was under by-law 3 entitled to notice of a meeting to be held for the purpose of expelling him. The notice given for the 18th of June was no notice. No member is referred to in particular. Then, again, no conclusion was come to previous to the 25th of June, for on that day the bond was changed, and the matter was thus entirely open, and the defendants had no power to expel him on that day; but another meeting was necessary, and the plaintiff was entitled to express notice of it, and of the purpose for which it was called. The Act did not contemplate that the defendants should require members to arbitrate on such claims as the one in question, and the by-laws only mean to require members to arbitrate on the questions contemplated by the Act.

Argument.

Mr. *Ferguson*, Q. C., and Mr. *Bain*, for the defendants. No question of *ultra vires* arises here, as all parties agree that the defendants had a right to pass the by-law they did pass; and we contend the defendants were not in a position to split up the claim of Merssrs. *Weatherston & Co.*, and say that one item of this account is admitted and that other items are disputed. The defendants had a right to insist on the claim of *Weatherston & Co.*, going before the arbitrators as a whole; and the plaintiff could not defeat the arbitrators by saying that he admitted one or more items of the account. Here the claim to be referred was communicated to the plaintiff, and the claim as advanced by *Weatherston & Co.* before the committee should have been submitted. We submit, therefore, on a view of the circumstances connected with this matter, that the act of dismissal or expulsion was properly passed according to the by-laws of the association. It is shewn distinctly that there was a refusal by plaintiff to arbitrate, at all events on the whole claim. *Weatherston & Co.'s* account is in reality one claim, although composed of several items. The committee of management found there was a proper claim to be arbitrated upon,

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and it was not for the plaintiff to set up his own individual. and of course biased, opinion against the views of the committee. On the 2nd of March the evidence shews that the plaintiff denied his liability beyond $1.06; whereupon the committee of management decided that an arbitration should take place, and this decision was that on which the defendants were to act and did finally act; and the defendants doubtlessly on the 25th of June, treated the refusal to sign the bond simply as a refusal to arbitrate. The by-laws provide expressly the mode of procedure to expel a member, and the evidence shews that the steps necessary and proper in such a case were all regularly taken. Section 3 of Article 4, requires notice to be given to the party or parties only, and the notice here given, it is submitted, was sufficient. It is shewn that the defendants did all they could in reason be called upon to do in order to induce the plaintiff to refer the matter in question to arbitration; they yielded to suggestions made by plaintiff from time to time, and made additions to the bond to remove his objections in order to obtain an amicable settlement of the differences between himself and *Weatherston & Co.*, but all to no effect. When a matter of this kind is referred to the committee of management their finding upon the point is final, and not subject to be reviewed by the council, and the discretion of the council subsequently was properly exercised; although it may be that, after the course pursued by the plaintiff, and the resolution of the committee, it was not necessary that they should exercise any. When at the meeting on the 25th of June the plaintiff was allowed five minutes within which to sign or refuse to sign the bond of submission, the matter under discussion was then old, well known and understood by all parties concerned, and the time limited, though in ordinary cases it might be considered short, was ample for the plaintiff to make up his mind one way or another: indeed, the plaintiff did not on the

Argument.

occasion of the resolution being passed object that the time was too restricted. On the whole, we submit the plaintiff has wholly failed in shewing such a state of things as calls for the interference of this Court, and that the bill should be dismissed, with costs. 1879. Cannon v. Toronto Corn Exchange.

Amongst the authorities referred to and commented on by counsel were: *The People ex rel.* v. *The Merchants' Saving, &c., Company of Chicago* (*a*), *The Commonwealth* v. *The Pike Beneficial Society* (*b*), *The Society for the Visitation of the Sick* v. *The Commonwealth* (*c*), *The People* v. *The Medical Society* (*d*), *The People* v. *The Board of Trade of Chicago* (*e*), *Blisset* v. *Daniel* (*f*), *Wood* v. *Woud* (*g*), *Hopkinson* v. *Lord Exeter* (*h*), *Wright* v. *The Monarch, &c., Society* (*i*), *Gardner* v. *Freemantle* (*j*), *Lyttleton* v. *Blackburn* (*k*), *Cuthbert* v. *The Commercial Travellers' Association* (*l*), *Evans* v. *The Philadelphia Club* (*m*), *Smith* v. *Mules* (*n*), *Clarke* v. *Hart* (*o*), *Watson* v. *Eales* (*p*), *Richmond's Case* (*q*), *Harris* v. *The North Devon R. W. Co.* (*r*), *Prendergast* v. *Turton* (*s*), *Catchpole* v. *Ambergate, &c., R. W. Co.* (*t*), *Angell* and *Ames* on Corporations. sec. 421. Argument.

PROUDFOOT, V. C.—It was suggested, but not argued, that the by-laws on the subject were *ultra vires*. It is not necessary to consider this subject further, for I assume in favour of the defendants that the by-laws were not *ultra vires* under section 7, or that the plaintiff by signing them is bound by them. Judgment. Nov. 11th.

(*a*) 30 Ill. 434.
(*b*) 8 Watts & S. 447.
(*c*) 52 Penn. 125.
(*d*) 24 Barb. 571.
(*e*) 45 Ill. 112.
(*f*) 10 Hare, 493.
(*g*) L. R. 9 Exch. 190.
(*h*) L. R. 5 Eq. 63.
(*i*) L. R. 5 Ch. D. 726.
(*j*) 19 W. R. 256.
(*k*) 33 L. T. N. S. 641.
(*l*) 39 U. C. R. 578.
(*m*) 50 Penn. 107.
(*n*) 9 Hare, 556.
(*o*) 6 H. L. C. 633.
(*p*) 23 Beav. 294.
(*q*) 4 K. & J. 305.
(*r*) 20 Beav. 384.
(*s*) 1 Y. & C.C.C. 98.
(*t*) 1 E. & B. 111.

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The defendants say that their duty under the by-law, under such circumstances as appear here, was simply to see that the person applying to them had, on his own shewing, a claim of dispute with another; and that the reference made upon such *ex parte* statement cannot be impeached or objected to: that their discretion is absolute and uncontrollable, and that any defence the party may have, is to be brought before the arbitrators.

In this case it is not necessary to decide whether that is the true construction of the by-law or not, where the subject is within the terms of the by-law; for their power expressly extends only to *matters in dispute*. If there are matters in this account which are not in dispute, then the act of the defendants in insisting upon the reference of these matters was in excess of the powers conferred upon them by the by-law. And I am of opinion that the first two items were not in dispute. The first was actually paid, the second was acknowledged to be due, and this was well known to the defendants from the 20th of April at least, and in fact appears in the bond prepared by them. The defendants rely upon the resolution of the 29th of April, although at that time they had the letter of the 20th of April. To insist then upon referring such matters could have had no object unless to enable *Weatherston & Co.* to recover the freight in a speedier manner than by suit or by the offer of the plaintiff, or to base penal proceedings against the plaintiff.

Judgment

In one sense it is true this account might be considered entire, so that probably a payment in part would have prevented the Statute of Limitations from running as to all. But it was not an integral whole, so that it could not be severed within the meaning of this special legislation; and I quite agree with the argument that the Legislature did not mean to constitute this association a tribunal for the speedy recovery of debts.

If by insisting upon the reference of undisputed matters it was intended to invite a refusal, or a persistence in a refusal, by plaintiff to submit them, then it was not a fair exercise of the powers under the by-law.

But, assuming that the whole account was a proper subject for reference to arbitration, have the defendants exercised it with a due regard to the interest of the plaintiff?

Powers of this kind are capable of being made use of so much to the injury of a member of the body that the law requires them to be exercised with the most perfect good faith and fairness, and in strict conformity with the stipulations and provisions of the by-law. An unjust and improper exercise of them may, in some kinds of social associations, result in loss of social standing, of the respect of friends and companions: in companies of this kind for commercial purposes the result may be great pecuniary loss, as it has been here. It is the interest of every member to watch narrowly the exercise of such powers, for what is the plaintiff's case to-day may be his to-morrow. And if he does not, then it is the duty of the Court to see that the party has been expelled in strict accordance with what he has agreed to submit to.

Judgment.

The notice of the meeting of the 18th of June given to the plaintiff was, to receive a report regarding the conduct of a member and other matters. That might have been any member, and was no notice to the plaintiff that his case was to be the subject of consideration. Now I do not think that was a proper notice of the intention to proceed to the extremity of expulsion; and at that meeting the defendants had not finally decided upon what they were ultimately to insist upon the plaintiff doing in order to avoid expulsion, and the meeting was adjourned till the 25th. Meantime the council had passed their *ultimatum*, but no general or special meeting had approved of it. When

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the meeting of the 25th met, it was an adjourned meeting to consider the conduct of a member, and it was only then that the plaintiff was finally called upon to say aye or no to the demand to sign the bond, *Five minutes were given to him to decide.* It is true he had had the bond on the previous day, but he had a right to assume that he might be able to convince the general meeting that the Council were requiring him to do something that was harsh and unjust, and that they would modify it. He had no notice before this that failure to comply would be followed by expulsion. He had been advised by counsel that he was not bound to execute such a bond. The *five minutes* for consideration was not a reasonable time for him to consider the act required and the threatened consequences, whether he would submit to what he believed to be, and had been advised was, an injustice, or would permit the vote for expulsion to be put, and rely upon an appeal to the Courts to protect him. The committee of management only decided upon the form of the bond on the 21st of June, and if the plaintiff's expulsion is to rest on his refusal to sign that bond, then under the rules a full meeting of the association was to be held of which notice had to be given, but no notice was given after the 21st of June of any meeting; that of the 25th was an adjournment of the meeting of the 18th, and could do nothing they could not have done on the 18th. But on the 18th the form of the bond was not decided upon, and the plaintiff could not be then expelled for not signing it.

Judgment

I have come to the conclusion therefore that this resolution of expulsion must be cancelled, and the plaintiff restored to his position as a member of the Corn Exchange.

Having been improperly expelled the plaintiff is entitled to damages if he has sustained any. There will be a reference on that subject to the Master.

The plaintiff will have his costs to the hearing, subsequent costs will be reserved.

It is quite clear that the case of the plaintiff was properly brought before the meeting of the 18th of June in the amendment, for the purpose of requiring him to arbitrate only as to the costs claimed by *Weatherston & Co.* The defendants ultimately rejected his claim to an arbitration on the only matter in dispute, which I think he was entitled to have, and on that account, if for no other reason, the costs must follow the decision.

The Attorney-General v. The International Bridge Company.

Demurrer—Parties—Nuisance.

An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was, "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge;" and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the foot-way of the said bridge at their will and pleasure on the payment of lawful tolls," or preventing them from using in the same manner the foot-paths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated in the Act of Incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge so far as it was built, and which had been so built in accordance with the provisions of their Act of Incorporation, the Court allowed a demurrer for want of equity; but, in so far as the information shewed an unlawful exclusion of the public from the use of the foot-paths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party.

To such an information a railway company who had become lessees of the bridge were held to be proper parties.

Statement.

This was an information by *The Attorney-General* of Ontario at the relation of *Robert George Barrett*

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against *The International Bridge Company* and *The Grand Trunk Railway Company* setting forth substantially the same facts as are stated in the report of this case, *ante* vol. xxii., page 298, with the additional circumstances that the time for completing the structure had elapsed, that the same was completed without any carriage-way being provided, and that although a foot-way was constructed, which was used by their servants and employés, the defendants refused to allow the public to have access to or use the same; and that the defendants had abandoned all intention of constructing, and refused to construct the bridge so as to admit of the passage of persons in ordinary carriages or of cattle, and that the intention of the defendants was, to maintain the bridge as a railway bridge only. The prayer of the bill was, that the defendants might be ordered to abate the nuisance, and remove the structure from the navigable waters of the river, unless made to conform to the requirements of the Act of Parliament, or that the defendants might be restrained from hindering the public from using the foot-paths of the bridge on payment of lawful tolls.

The defendants demurred for want of equity.

Mr. *Boyd*, Q. C., and *W. Cassels*, for the demurrer.

Mr. *Maclennan*, Q. C., contra.

The points relied on appear sufficiently in the judgment of

Sept. 13th.

Judgment.

BLAKE, V. C.—For the reasons assigned in *Attorney-General* v. *Niagara Falls Bridge Company* (*a*), I am of opinion that it is proper that this information should be filed by the Attorney-General of this Province. The main question argued was discussed in a cause in this Court, which was heard and reheard, and in which the rights of these same defendants were brought into question four years ago. In that case it was held that this Court could not properly interfere to give the

(*a*) 20 Gr. 34.

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relief asked by the removal of this bridge. The decision in that case was based to a great extent on *Attorney-General* v. *Birmingham, &c., Railway Company* (*a*). There the Lord Chancellor says: "The question is, whether the defendants have failed in the performance of their duty, and, if so, whether the non-performance of such duty gives the Attorney-General the power to come to this Court, and in effect, to compel a specific performance of an Act of Parliament. * * * Undoubtedly, the Attorney-General has a right and represents the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief; and in the course of the argument, several authorities were cited to shew that such interference is recognized in equity; but the informations in all those cases were directed to the repression of acts which the parties had no legal right to do, and which were not only not authorized to be done, but were, in fact, acts of public nuisance." I then thought and still think that it is out of the question that this Court should interfere where that which has been done, has been so great a work as the construction of this bridge, where the work done accomplished a great part of that which the statute contemplated, and which so far as it has been completed, has been done in accordance with the requirements of the Act. It is, I think, out of the question that this Court should interfere, because a subsidiary or collateral work has not been finished, and order the destruction of that which, so far as it goes, answers the demands of the Act of incorporation.

Judgment.

Paragraph 15 of the bill alleges that "Said bridge so constructed and completed as aforesaid, is adapted to the passage of railway trains and foot passengers." The defendants, it is said, in paragraph 17: "Prevent persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided

(*a*) 4 DeG. & S. 490.

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by the said Act." In paragraph 18, it is stated that the defendants' intention is, "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge." By paragraph 24, it is submitted that the defendants should be restrained "from preventing Her Majesty's subjects from using the footway of the said bridge at their will and pleasure on payment of lawful tolls;" and by the 3rd paragraph of the prayer, it is asked "that the defendants may be restrained from hindering or preventing Her Majesty's subjects from using the foot paths of the said bridge, at their will and pleasure on payment of lawful tolls." There seems to be no reason on the face of the bill why persons desiring it, should not be allowed to cross this bridge on the footway, which it is alleged exists, and is used by some. I cannot take for granted that the persons entering the bridge would be precluded from crossing it completely, and I do not know that even if this were the case, that I should prevent such user as can be made of the bridge being had. I think as to this matter, a case for relief is made by the information. I do not think the information is demurrable, on account of the relief sought. It asks that this nuisance be removed, or that the bridge may be so constructed as to answer what was contemplated by the Act incorporating the company. There is but the one state of facts, and on it the informant asks, as I conceive he is entitled to do, for alternative relief.

Judgment.

I cannot either say that it is improper to add *The Grand Trunk Railway* as defendants. They have a lease of the bridge and have a right to shew by their answer and in evidence that the permitting of foot passengers to use the bridge, may interfere to their detriment. They may have as good or better reasons for defending the position taken than even the Bridge Company. I think the demurrer filed, should be overruled, except as to this point, and that, under the circumstances, there should be no costs of the demurrer to either party.

BEILSTEIN v. BEILSTEIN. 1879.

Will, construction of—Devises of lands at certain valuations and on certain conditions—Bequests to widow durante viduitate—Valuation and distribution of estate, real and personal, on death or marriage of widow—Dower—Election.

A testator devised and bequeathed to his wife during widowhood all his household goods, furniture, &c., together with an annuity of twenty dollars, and also the free use, during the same time, of the homestead lot, together with the several dwellings and other buildings thereon. Two parcels of his real estate he devised to his two sons, upon which he placed certain fixed valuations—found by the Master to be the full values—and directed one of the sons to pay three-fifths of the interest computed on the valuation of his lot to the three daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead and the other portions of his real, as also his personal estate, the testator directed to be sold and the proceeds divided at the death or marriage of the widow.

Held, that there was not in these directions any indication on the part of the testator of an intention to exclude the widow from claiming dower in addition to the provisions of the will in her favour, and that the direction to sell the lands was not sufficient to put her to her election.

Statement.

The bill in this case was filed by *Maria Beilstein*, widow of *William Beilstein* the elder, who died at Berlin, (Ontario,) on the 5th September, 1876, against *William Beilstein* the younger, a son of the testator, and *Christian Uinerschmidt*, his executors, duly appointed under his will bearing date the 2nd September, 1878, which it was shewn had been prepared by a non-professional person, and had been proved by the defendants in the Surrogate Court of the county of Waterloo, on the 2nd of October, 1876.

After directing that all his just debts, funeral, and testamentary expenses should be paid by his executors, the testator disposed of his real and personal estate, as follows:—

"1. I bequeath and devise unto my beloved wife *Maria* [the plaintiff,] all my household goods, furniture, plate, linen, china, and provisions, for the term of her natural life and as long as she remains

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my widow; also an annuity of twenty dollars, to be paid to her by my executors, annually, during her widowhood out of my estate. Also, I give and devise to her my said wife the free use of my present homestead lot, together with the several dwelling houses, outbuildings, lands, and premises thereto belonging, being composed of a part of lot number one, on the east side of Frederick street, and on the south side of Weber street, in the town of Berlin aforesaid, to hold to her, my said wife, during the term of her natural life, and so long as she remains my widow. Provided, that if at any time while my said wife remains my widow, that is, before she again marries, she desires my executors either to lease or sell the said homestead lot, or any part thereof, my will then is, that my executors comply with such desire and do lease or sell the said homestead lot or any part thereof, in compliance with the desire of my wife expressed to my executors; and that in such event my executors do pay over unto my said wife, during the time she remains my widow, all the proceeds of such lease or sale in half yearly payments. But should it happen that my wife again marries, then the above mentioned annual supply of cordwood shall cease, and the above mentioned homestead lot, if not already sold as above provided, shall be sold by my executors, and the proceeds thereof, or in case said lot has then already been sold then the proceeds remaining in the hands of my executors at the time of such marriage of my wife, shall be applied as hereinafter provided. Secondly, I give, devise, and be-

Statement.

queath unto my son *Philip Beilstein* lot numbered eight in the fifth concession of the township of Bentinck, in the County of Grey, containing one hundred and two acres, more or less, held by me under a Crown Land deed, recorded 5th March, 1864, Liber J. X., folio 169, to hold to him, his heirs and assigns for ever, subject to the hereinafter mentioned conditions, which said lot number eight I give unto my said son *Philip* at a valuation of one thousand two hundred and sixty dollars of lawful money of the Province of Ontario, as a part of his share of inheritance, and which conditions are as follows, that is to say, that my said son *Philip* do pay upon the said valuation sum of one thousand two hundred and sixty dollars unto my executors the annual interest at the rate of six per cent. per annum, from the first day of July one thousand eight hundred and sixty-eight up to the time of the decease of my said wife, or in the event of my said wife again marrying, then up to the date of such marriage: Provided that any receipt which he my said son *Philip* may produce to my executors as being duly signed and acknowledged by me for such interest as having been paid to me during my lifetime and after said first day of July, shall be accepted by my executors in part payment of so much interest as such receipts may express. Thirdly, I give, devise, and bequeath unto my son *William Beilstein* my old farm, being composed of lot number one, on the north of Snider's road, the township of Wilmot, in the county of Waterloo, containing by admeasurement one hundred and ninety-five acres, more or

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less, to hold to him, his heirs and assigns for ever, subject to the conditions hereinafter mentioned; which said lot number one, in the township of Wilmot, I hereby set down at a valuation of seven thousand dollars of lawful money of the Province of Ontario, and from which seven thousand dollars shall be deducted the one-fifth of the aggregate of the proceeds of all my real and personal estate, which aggregate is to be ascertained as hereinafter more particularly set forth, and which one-fifth thereof I give unto my said son *William*, as his full share of inheritance; and which last mentioned conditions are that my said son *William* do deliver, or cause to be delivered to my said wife at her residence in the said town of Berlin, during the term of her natural life, and as long as she remains my widow, annually four cords of good hard firewood, and also that my said son *William* do pay over all the remainder of the said aggregate of the proceeds of all my real and personal estate, after deducting from said aggregate the said one-fifth as his full share of inheritance, unto the other of my several legatees hereinafter named or mentioned, and in manner as stipulated in the fourth clause of this my last will and testament, and for which remainder of such aggregate the said lot number one, in the township of Wilmot, shall be a security, and the remainder shall be a lien and incumbrance thereon. Fourthly, my will is further: that upon my decease, and after payment of my just debts, (if any), funeral and testamentary expenses, my executors do make a valuation of all my real and personal estate then remaining, and not heretofore given to my said wife, except the said homestead lot, that is to say the said sum of one thousand two hundred and sixty dollars, with interest then remaining unpaid, the said sum of seven thousand dollars, and the amount of money securities for money and all other real and personal estate not heretofore excepted or given to my said wife. That upon one-fifth of the sum ascertained by such last mentioned valuation, my said son *William* do pay annually unto my daughter *Margaretha*, the wife of *Werner Weppler*, during the term of her natural life, the interest at the rate of six per cent. per annum as her legacy. That upon a like fifth of such valuation sum my son *William* do pay annually unto my daughter *Christina* the wife of *Ottomar Illing*, during the term of her natural life the interest at the same rate as her legacy. And that upon a like fifth of such valuation sum my said son *William* do pay annually unto my daughter *Catharina*, the wife of *Heinrich Jung*, during the term of her natural life the interest at the same rate as her legacy. And that upon the decease of my said wife, or if she marries again, then upon such marriage, my executors shall make a final valuation of all my real and personal estate including the proceeds of said homestead lot, and the proceeds of the sale of any other real and personal estate sold by them by virtue of this will, and such final valuation shall be the aggregate mentioned in the third clause of this will, which aggregate shall be equally divided among and between my said five children, *Phillip*, *William*, *Margaretha*, *Christina*, and *Catharina*, share and

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share alike, in manner following, that is to say: My son *Philip's* share, after deducting therefrom the said sum of one thousand two hundred and sixty dollars shall be forthwith paid over to him by my executors, but of such proceeds my son *William's* share shall be deducted from said seven thousand dollars, as in the third clause of this my will. And the share of each of my said daughters shall be held by my executors in trust for the benefit of the respective children of my said daughters, and shall be paid over to such children, share and share alike, upon the decease of their respective mothers, and upon their said children's respectively attaining the age of twenty-one years. The funds applied for the payment of the same shall be, first, the balance in the hands of my executors remaining after my son *Philip's* share, and second, the balance of said seven thousand dollars after deducting therefrom my son *William's* share. Fifthly, I hereby give and bequeath all my real and personal estate unto my executors in trust, to manage the same or to dispose thereof and to apply the proceeds thereof in accordance with this my last will and testament, and I hereby empower my said executors to grant a deed or deeds for any and all of my real estate in fee simple in as ample a manner as I could do were I living."

Statement.

After reciting substantially the terms and conditions of the will, the plaintiff averred that the provision made for her in the will was inadequate for her support, and, in addition to such provision, claimed dower out of the whole of the testator's lands, of which he died seized, or to which he died entitled. It was also averred that the defendants were, under the will, the tenants of the freehold of the testator's lands, and, for the purposes of the suit, sufficiently represented the interests of the other persons mentioned in the will. A case was also set up in the bill for the rectification of a mortgage of the "old farm" of 200 acres mentioned in the will, from the defendant *William Beilstein*, the younger, to his father, the testator, as having been made by the mutual mistake of all the parties; and for the payment of the interest on the principal sum of $4,000 to the plaintiff during her life. This part of the case, however, was not pressed. The defendants by their answer "submit that, on the face of the will, and according to its true construction, the said plaintiff is put to an election between her dower and the provisions under the will." They also alleged "That the

values placed upon the property by the said testator were the full values without deducting any claim for dower, and that, if the said widow is to have her dower as well as the provisions under the will, it will be contrary to the intention of the said testator."

The cause came on for hearing before the Chancellor, at the sittings of the Court at Stratford, on the 18th of May, 1878, when a decree was made referring it to the Master at Berlin to inquire, and state (1st) what real estate the testator was seized of or entitled to and the value thereof at the time of the making of his will; and (2nd) what real estate he died seized of, or entitled to, and the value thereof at his death. Further directions and costs were reserved until the Master made his report, and all questions of law as to the true meaning and construction of the will were to be then argued.

The Master, by his report, found that, on the 2nd September, 1868, when the testator made his will, he was seized of or entitled to all the lands mentioned therein, and that these were of the following values respectively:

Statement.

1. Part of lot 1, north of Snyder's Road, in Wilmot, 193 acres $7,000 00
2. West $\frac{1}{3}$ of rear $\frac{3}{4}$ of lot 3, north of Snyder's Road, in Wilmot, 50 acres... 1,000 00
3. Lot 8, 5th concession Bentinck, county of Grey, 102 acres..... 1,100 00
4. The homestead lot, Berlin..... 1,000 00

The Master also found that, on the 5th September, 1876, when the testator died, he was seized of or entitled to the parcels above mentioned, which were then of the following values respectively:

Parcel 2. .... $1,000 00
" 3. .. .. 2,000 00
" 4. .... 1,000 00

And that he had also three small lots in Grange's

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survey, Berlin, of the gross value of $300, and parts of lots four and five on the west side of Frederick street, Berlin, of the value of $2,000. All these lots were acquired after the making of the will. Parcel No. 1, above mentioned, had been sold by the testator on the 27th May, 1874, to the defendant *William Beilstein*, the younger.

The cause came on for hearing on further directions on February 12th, 1879.

Mr. *Moss*, and Mr. *John King* (Berlin), for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *Alexander Miller* (Berlin) for the defendants.

Kerr v. *Leishman* (*a*), *McGregor* v. *McGregor* (*b*), *Chalmers* v. *Storil* (*c*), *Roberts* v. *Smith* (*d*), *Herbert* v. *Wren* (*e*), *Patrick* v. *Shaver* (*f*), *Laidlaw* v. *Jackes* (*g*), *Whately* v. *Whately* (*h*), were referred to by counsel.

Judgment. March 5th.

PROUDFOOT, V. C.—I have read this will with some attention, and have endeavoured to follow all the devises and provisions made by the testator for the disposition of his estate. I am not certain that I fully comprehend them, but the only question at present before me is whether there is anything contained in it that compels the widow to elect between her dower and the provision made for her by the will.

There is no express clause putting her to her election. And if she is to be compelled to elect, it must arise from the dispositions of the will being plainly at variance with the assertion of her right.

(*a*) 8 Gr. 435.
(*b*) 20 Gr. 450.
(*c*) 2 V. & B. 222.
(*d*) 1 S. & S. 513.
(*e*) 7 Cranch 370.
(*f*) 21 Gr. 12.
(*g*) 25 Gr. 293.
(*h*) 14 Gr. 430.

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The will was made in 1868, when the testator's real property was valued at about $10,000. At the time of his death, in 1876, this was diminished through a sale of a portion, (though some had been purchased in the meantime,) to $6,300.

There was some personal estate which was all disposed of by the will.

The provision for the wife consisted of the use of his household goods and furniture for her life or widowhood; an annuity of $20, to be paid by his executors for the same period; four cords of wood annually, to be provided by one of his sons; and the use of the homestead lot and dwelling-house and buildings, for the same period. This property was valued at $1,000. It might be sold and the proceeds divided in annual grants to the widow; which I suppose to mean the interest for same period. So that the provision for the wife is of very moderate amount.

The devise to *Philip* is in fee, and the condition is to pay interest on $1,260, the value fixed by the testator, to the executors till his wife's death or marriage. This is given to him as his share of the *inheritance*. And if any inference is to be drawn from the use of this word, it would be that *Philip* took it as he would take an inheritance, subject to the dower of the wife.

Judgment.

The devise to *William* is also in fee; a certain portion of it to be his full share of the inheritance; and he was to pay interest upon the value beyond his share to his sisters for their lives and to give four cords of wood to the widow.

The direction for sale upon the death or marriage of the wife could not affect this question.

The lot devised to *William* was valued at $7,000 by the testator, and at the date of the will amounted to seven-tenths of his estate. He sold this in his lifetime.

The after-acquired estate would pass by the will, and

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under its provisions would be sold at the death or marriage of the wife, and the proceeds divided.

I am unable to find in these provisions any indication of an intention on the part of the testator that his widow should be excluded from dower. There is nothing to shew that the lands were to be occupied in a manner inconsistent with the dower; and the direction to sell is clearly not enough to put her to her election.

Declare accordingly. Costs of all parties out of the estate

GOWAN v. PATON.

Unpaid valuator—False representations—Erroneous statements.

The defendant, by a certificate signed by him as Reeve of the township, stated he had personal knowledge of property belonging to one *A. M.*, and occupied by him, which the defendant believed to be worth $2,000, and would readily sell at a forced cash sale for $1,600: that about fifteen acres were cleared and ready for or under cultivation, &c., setting forth further favourable particulars as to buildings on the land and the nature of the soil, all of which proved to be erroneous; in fact the defendant had not any personal knowledge of the premises, which were almost worthless; and the particulars as given had been communicated to him by *A. M.* himself. The defendant was aware that the plaintiffs were about to advance money by way of loan on the security of this property, and had called for his certificate, by which they said they would be guided in making such advance. The Court, under these circumstances, *held* the defendant answerable for the loss sustained by the plaintiffs in consequence of having acted on his certificate, although no fraud was attributable to him, and his services were gratuitous.

This was a suit by *James Robert Gowan* and *William D. Ardagh*, against *Robert Paton*, to compel the defen-

dant to make good to the plaintiffs the amount of loss sustained by them by making an advance of $1,000 to one *Archibald McNeil*, upon the certificate of value given by the defendant, and upon which the plaintiffs had advanced the money, and on proceeding to enforce payment of the loan, the property sold for $400, leaving a balance of about $810. The certificate given by the defendant was that he knew the land offered as security, and he believed the same to be worth $1,600, cash, and would readily sell for that sum; that there were fifteen acres cleared and ready for cultivation, a log house and outbuildings on the premises, and that the land was a good farming clay loam soil.* It was shewn that the defendant knew the purpose for which the certificate was required, and the money was advanced wholly on the faith of the certificate, which the plaintiffs contended, had been given either fraudulently or so grossly negligently as to amount to fraud. Statement.

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* The certificate given by the defendant was on a blank form furnished by Messrs. *Ardagh & Strathy*, the solicitors of the plaintiffs, and was as follows :—

"*I certify* that I have personal knowledge of the north half of lot number one in the 14th concession of the township of Sunnidale, in the county of Simcoe, the property of Mr. *Archibald McNeil*, and occupied by him, and believe the same to be worth, on the usual credit terms, $2,000, and that the said property would readily sell on cash terms, at a forced sale, for $1,600. There are about fifteen acres cleared and ready for or under cultivation. It has also a log hewed dwelling house and outbuildings erected thereon. The soil is of clay loam quality, and is what is commonly called a good farming soil.

Dated February 19th, 1877.

(Signed,) "ROBERT PATON,
Reeve of Sunnidale.
"*Valuator.*"

"*N. B.*—A loan will be made on the basis of above valuation, and we would particularly request that the true value of the land should be given by the valuators. *A. & S.*

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The cause came on for the examination of witnesses and hearing, at Barrie, on the 16th October, 1878.

The testimony of all the witnesses established clearly the gross overvalue of the property.

Henry W. Selby, a provincial land surveyor, swore that he had been over the lot in question (north half of lot 1, in the 14th concession, Sunnidale), in company with one *Neelands*, for the purpose of valuing the property, and walked over it—the north end was all sand, there was a clay loam for about ten or fifteen acres which appeared like a wet deposit, as if from a creek, the rest of the lot was nothing but sand; that there was no clearing on the lot, no buildings whatever on the lot; and had never been occupied, except for lumbering purposes—only ten or fifteen acres could be farmed—only fit for pasture. Witness had been engaged valuing lands for three years, and considered $200 the outside value of the property, and that no one would buy it for cash; no portion of the lot was fenced. The south half of the lot he said was much better; that there were twenty-five or thirty acres cleared on it, and also buildings. This witness did not think the south half worth $2000, but did not think a person would be far astray if he called it worth $1,600 or $2,000.

Statement.

Hamilton Neelands, a farmer, and *Henry Purdy*, a land and loan agent, also proved having examined the lot in question, and corroborated substantially the testimony of the witness *Selby*.

James O'Reilly, a farmer, who resided near the lot, swore he knew it well; went over it and shewed Mr. *Selby* the line; he said: "The north half is not much, the land is poor; not worth anything unless the man on the south half wants it; not worth $200; no one ever resided on it, neither is there any clearing or building on it, although there may have been a lumbering shanty at one time."

The defendant, who was sworn on his own behalf, stated that he resided about twelve miles from the lot:

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was a farmer and lumberman, and had known *McNeil;* he was, at the time of giving the certificate, in the Council, the defendant being Reeve of the Township; that he and *McNeil* happening to be in that part of the township, and while going through No. 14, witness asked *McNeil* who owned it, when he answered he did. Witness then remarked it was a good lot; that he took particular notice of the timber on it; that *McNeil*, about six months afterwards, said to witness that he wanted a valuation: I said, is it the lot with the buildings on? he said yes; I then thought I was valuing the north half of lot 1 in the 14th concession; I had seen the clearing; I signed the certificate then; I then believed the certificate was true; I thought the soil was as I described it; I gave what I thought was a true valuation; I found out afterwards that I had not valued the right lot; I did not find this out until when I went to find out evidence; I had never gone to the lot in the meantime; I always thought I had made a fair valuation; the south half is worth what I said, $1,600 or $2,000; I had no interest in the loan, and derived no benefit whatever from it. On cross-examination, he stated that he had signed the certificate as Reeve of Sunnidale, and was asked to do so; that he thought *McNeil* wanted to borrow m[illegible]ney on the lot; that he had found out he had been led astray in the valuation; that he had not attended the sale, though notified of it, and would not himself give $400 for the land sold.

Statement.

Mr. *V. B. Wadsworth*, a provincial land surveyor, valuator, inspector of lands, &c., was examined on the part of the defendant, and stated that he had valued the north half of the lot in the month of June, 1877. "I went over the south part of the north half; I did not go through it; I valued this at $1,200, I supposed this to be the value; lands are not worth so much now as at that time; they have depreciated very much within the last two years; I just got to where the

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little swale was; I think this land worth more than $200." One *Jonas Tar Bush* was also called for the defence, and proved that he had told Mr. *Strathy*, who had acted for the plaintiffs in effecting the loan, more than a year before it was made, that the north half of lot 1, in the 14th concession Sunnidale, was situate in the Sandhills, and was not worth much.

Mr. *H. S. Strathy*, and Mr. *Ault*, for the plaintiffs, insisted that the carelessness and negligence here was so great that fraud would be inferred, and where circumstances are stated as facts which it is shewn are false, there the party giving the certificate will be held liable. Where a mere matter of opinion is stated there a person will not be responsible for any error; but where facts on which the person asking for a statement which is to guide him are misrepresented there he is answerable. Here the defendant had certified that he had personal knowledge of the land; that it was occupied by *McNeil*; was worth $1,600 or $2,000; that fifteen acres were cleared and ready for or under cultivation; a log-hewed dwelling house and out-buildings erected thereon; that the soil was of clay loam quality, and was what was commonly called a good farming soil. Now these were all incorrect statements, and such as should clearly render the defendant liable to make good the loss. *Reese River Mining Co.* v. *Smith* (*a*). *Barry* v. *Croskey* (*b*), *Cook* v. *The Royal Canadian Bank* (*c*), *French* v. *Skead* (*d*).

Argument.

Mr. *Lount*, Q. C., for the defendant. The facts are conceded that the land here was not worth the amount advanced, and that a loss has resulted from the loan, but this affords no reason for making the defendant answerable for the loss, so long as the facts stated were

(*a*) L. R. 4 E. & I. App. 79.
(*b*) 2 J. & H. 1.
(*c*) 20 Gr. 1.
(*d*) 24 Gr. 179.

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not known by the defendant to be untrue. The representation here made was so made *bonâ fide*, this it is admitted is the true basis of all the cases. The certificate was given in perfect good faith, and no bad faith is shewn all through. *Benn* v. *Kemble* (*a*), *Milne* v. *Marwood* (*b*), *Irving* v. *Merrygold* (*c*), *Shrewsbury* v. *Blount* (*d*), *Rawlings* v. *Bell* (*e*), were referred to.

At the close of the case:

BLAKE, V. C.—I think that in this case the defendant made representations of fact which are untrue: that these representations were called for by the plaintiffs, who told the defendant that they would act on such certificate; and that this loan has resulted in a loss to the plaintiffs. I think that defendant must make good the amount of the loss with interest thereon, together with costs of the suit. Under the circumstances of the case, and looking at the valuation and the result of the sale, the plaintiffs, if entitled to any relief, are certainly entitled to it to this extent.

Judgment.

(*a*) 7 C. B. N. S. 260.
(*b*) 15 C. B. 779.
(*c*) 3 U. C. R. 272.
(*d*) 2 M. & Gr. 475.
(*e*) 1 C. B. 951.

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McLennan v. McLean.

Mortgage—Mortgagee and mortgagor—Discharge of mortgage.

A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgage premises, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute.

The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the plaintiff as the person paying, or to execute a reconveyance in his favour, the plaintiff offering to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The Court, on a bill filed for that purpose, ordered the mortgagee to execute the reconveyance, and pay the costs of the suit.

Statement.

This was a suit by *Murdock McLennan* against *Isabella McLean*, for the purpose of compelling the defendant to execute to the plaintiff a reconveyance of parts of lots numbered 48 and 49 on the north and south banks of the river Aux Raisins, in the township of Charlottenburgh, on which were erected a grist and saw mill on said river at the village of Williamstown, in the county of Glengarry, together with other lands in the said township, and on which the defendant held a mortgage security for $3,000 and interest, created by one *McGillis* on the first day of January, 1871, and which had been subsequently paid off by the plaintiff, he having purchased the equity of redemption therein from *McGillis*, and who, on the 9th day of September, 1872, duly conveyed the said mortgage premises to the plaintiff for the price or sum of $11,000, subject to the morgage so held by the defendant; and the conveyance thereof to plaintiff was duly registered in the proper county; and that plaintiff notified the defendant of his purchase and applied to her to accept payment of the said principal money and interest so secured by

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McLennan v. McLean.

the said mortgage which she did receive, and, nothing remained due upon such security in respect of either principal and interest or costs, charges and expenses; after which the plaintiff applied frequently to the defendant to execute a reconveyance of the mortgage premises to him, but this she refused, and persisted in refusing to do; but instead thereof she prepared and sent to plaintiff a certificate of discharge of mortgage expressing that the mortgagor, *John McGillis*, had paid the mortgage money, which discharge, however, plaintiff declined to accept, the statement contained therein not being in accordance with the fact, and calculated in the event of his accepting the same to be prejudicial to the plaintiff; and in consequence plaintiff had caused to be prepared and tendered to the defendant for execution a proper reconveyance of the premises to the plaintiff, but which she refused to execute, although the plaintiff was ready and willing and offered to produce such evidence as would satisfy her that he was the person entitled to such reconveyance. The defendant also refused to execute a discharge of mortgage expressing that the plaintiff was the party paying, insisting that all she was bound to do was, to execute the certificate of discharge already furnished to the plaintiff.

The cause came on for hearing at the sittings of the Court, at Toronto, on the 5th of November, 1879.

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

Judgment. Nov. 10th.

PROUDFOOT, V. C.—The R. S. O. ch. 111, secs. 67, 72, consolidating previous legislation, empowers the Registrar to record a certificate of discharge of mortgage, and gives to it the effect of reconveying the estate to the mortgagor or his assigns. There is nothing in the statute compelling the mortgagor or his assigns to take such a certificate or depriving him of

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McLennan v. McLean.

the right he had to a reconveyance. The effect in this case of the certificate, when registered, would probably be to vest the estate in the plaintiff, and as at present advised, I do not see that the receipt specifying the money to have been received from the wrong person could operate to the prejudice of the plaintiff, as it would not be evidence against him in any proceeding in which it might be necessary to shew who paid the money. But the mortgagor is entitled to a covenant from the mortgagee, if he choose to ask it. The statement that the person executing the release was entitled to receive the money, might perhaps suffice to maintain an action, if by the act or wilful default of the mortgagee he were not so entitled, if it were sealed; but in that case a difficulty might arise as to who was entitled to maintain the action—the person from whom the money is said to have been received, or the owner of the estate? But here it is not sealed, and at most it would only amount to an assertion, upon which the owner of the equity is not bound to rely. *Carrick* v. *Smith* (*a*), only discusses the effect of a release as to revesting the estate: it decides nothing as to what kind of reconveyance the owner may require.

Judgment.

In this case the result of the evidence shews that a reconveyance was tendered for execution. The defendant says she left the matter entirely in the hands of her brother, and the indentures of reconveyance reached his hands at all events, and he returned them without submitting them to his sister. He says he assumed to have, and did have, power to act in the matter.

He says evidence was not given of the plaintiff's right to ask for a reconveyance; but he treated the plaintiff as the owner, demanded payment from him, and received payment from him of the mortgage. The facts are recited in the reconveyance, and he was

(*a*) 35 U. C. R. 348.

informed that any information required would be given to him. He asked none. 1879.

I think the plaintiff entitled to a decree for a reconveyance, and with costs. McLennan v. McLean.

HOWEY v. HOWEY.

Alimony—Desertion—Exclusion.

In consequence of a wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, and locked the door.

Held, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony; independently of the fact that during such exclusion of the wife the husband entered into a formal marriage with another woman, with whom he continued to live until after the institution of this suit; and,

Quære, whether adultery *per se* by the husband is not a ground entitling the wife to alimony.

Hearing at the sittings at London, in the Autumn of 1879.

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

The facts are clearly stated in the judgment.

SPRAGGE, C.—This bill is for alimony under rather peculiar circumstances. The parties were married in February, 1872, each having been previously married, and each having children, issue of their previous marriages. They lived together only about six months, when they parted. Nov. 12th Judgment.

The wife upon her marriage took to her husband's house a quantity of household effects and some farming stock, and four children by her former marriage. Disputes occurred between them in regard to the

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Howey v. Howey.

children, and also in regard to the wife visiting at the houses of two of their neighbours.

In August the wife sent away her children, or they were turned away by the husband. She sent away the greater part of the effects she had brought to her husband's house and a portion of the farm stock, apparently for the use of her children, who had already left, the husband making no objection to this, and being willing and consenting that the whole should be sent away. The wife retained at her husband's house her own bed and bedding and a chest.

Before this the parties had got to be on very bad terms. Criminations and recriminations were of frequent occurrence; and it culminated in this, that the husband told her that if she went to the house of one *Jamieson*, the husband's brother-in-law, she need not return. She did go, notwithstanding, and after a short absence—she says about twenty minutes—she returned and found the house locked against her, and her bed and bedding and chest outside. This must be regarded as an act of exclusion. She was wrong to go to *Jamieson's* under the circumstances; but her doing so did not, in my opinion, warrant the husband in committing acts which amounted to an expulsion from his house. She does not appear to have made any application or offer to return, and no offer appears to have been made on his part to receive her back. They were already on bad terms, and this appears to have grown into mutual dislike, with no wish on either side for a renewal of cohabitation.

Judgment.

After they had parted a child was born; and it is not questioned that it was the child of these parties. The child has been supported by the mother ever since.

About nine months after the parting the defendant went through the form of marriage with one *Susannah Davis;* has had children by her, and continued to live with her till after the filing of the bill. He excuses

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this by saying, in his answer, that he believed at the time that his wife was dead; that he had been informed by letter from a daughter of his that she had died of typhoid fever. This turns out to be untrue; as it is proved that he went through the form of marriage with *Susannah Davis* before he received the letter informing him, mistakenly, that his wife had died.

The suit then is rested upon two grounds. The exclusion by the defendant of his wife from his house, which I think is sufficiently made out as a case of legal desertion; and the adulterous and bigamous cohabitation with *Susannah Davis*.

I had some doubt at the hearing whether it was not the duty of the wife to offer to return under the circumstances, but upon reflection I think that the turning of her bedding and chest outside the house, and directing the doors to be locked, were acts of so significant a character that she was warranted in interpreting them as an intimation on his part that he refused to receive her; and I think, that in order to set himself right with her after those acts, if he desired to do so, it lay upon him to offer to receive her back. Judgment.

Having at the hearing the doubt that I had, I asked Mr. *Meredith* to refer me to authorities upon the other ground upon which the case was rested, and I have since examined the authorities to which he has referred me, those to which I was referred by Mr. *Boyd*, and some others.

Under the Imperial Act 20 & 21 Vict. c. 85, adultery by the husband is a ground for judicial separation; and has been so held in several cases. It was so intimated in *Smith* v. *Smith* (*a*), and was so held in *Knight* v. *Knight* (*b*), and in *Cowan* v. *Cowan* (*c*). That Act is not in force in this Province, but the provision I have quoted appears to be only an enactment

(*a*) 1 Sw. & T. at p. 362. (*b*) 4 Ib. 103.
(*c*) Ib. 164, 173.

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Howey v. Howey.

in definite language of the same rule of law as prevailed in regard to divorces *a mensâ et thoro, i. e.*, so far as adultery in the husband is made a ground of suit. This is shortly explained in *Stephen's* Commentaries on Blackstone (*a*), and Mr. *Bishop*, in his Book on Marriage and Divorce, says (*b*): "The recent English statute of 20 & 21 Victoria, chapter 85, retains substantially the old law of divorces from bed and board in cases of adultery, calling them now judicial separations."

It is not indeed necessary in this case to decide whether adultery *per se* by the husband is a ground for decreeing alimony; for, besides the exclusion to which I have adverted, the husband living in adulterous intercourse with a woman in his own house rendered that house an unfit place for the habitation of his wife, and amounted to legal desertion.

Judgment.

There are some points in the case which I have not thought it necessary to notice. In my opinion the plaintiff is entitled to alimony, and the Master in fixing the amount will have regard to the circumstance that the child of the parties is with the mother, and I hold her to be the proper party to have the continued custody of the child.

(*a*) Vol. ii., p. 277. (*b*) Vol. i., sec. 704.

1879.

WHITE v. THE LANCASHIRE INSURANCE COMPANY.

Insurance agent--Liability of company.

The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. And the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company.

In this case one *McWhirter* was the agent of the defendants' company, and after issuing an interim receipt in his own favour for an insurance, became insolvent, and the plaintiff was appointed his assignee. The company having refused payment of the amount of insurance, the present suit was instituted in order to compel payment.

The cause came on for hearing at the sittings of the Court at Woodstock, in the Spring of 1879.

Mr. *Boyd*, Q. C., and Mr. *Ball*, for the plaintiff.

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

BLAKE, V. C.—In this case there was not originally an insurance binding on the company. *McWhirter*, as agent, had power to represent the company in dealing with others. He could not make a contract in which he acted directly for the company and for himself. For the company it was his duty to obtain the best risks and the highest rates of premium that could reasonably be charged; for himself he would naturally undervalue the danger and diminish the premium. It was necessary therefore when the application for insurance was presented that the company itself should pass upon it, and no acceptance binding on the company could be had by the agent. It was a risk in which steam was used, and therefore one which, by the rules of the

Sept. 17th.

Judgment.

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company, could in no case be accepted by the agent, but must be approved by the company. On the 1st of February, the application was prepared. On the 2nd it was sent to Toronto, where it was received in due course; and on the 3rd of February there was a complete destruction of the property. The company never passed upon this risk. It is true it had a risk on the same property, but, although willing to take one risk on what is generally considered a hazardous insurance, it does not follow that a second would be accepted. After the loss the premium was sent down, and proof papers were forwarded to the company, and the agent saw the parties interested in the insurance and investigated the loss. I am unable to conclude that what was done amounted to more than an investigation of the circumstances connected with the property, the loss, and the insurance; and a desire, natural on the part of the company to settle the loss, if it could be arranged for at a reasonable amount, rather than have litigation about it. As there was no binding insurance at the time of the loss, the company had the right to acquaint itself with all the circumstances that surrounded the matter, and if it pleased make an offer of compromise without binding itself, in case no arrangement were finally made. *Mc Whirter*, the agent, ran the risk of the acceptance or rejection of the proposal for insurance. So short a time elapsed between the making of the application and the loss, that no opportunity was given for considering the proposal, and notifying its acceptance or rejection. The result of this accident must be borne by the person seeking insurance, and not by the company.

Judgment.

The following authorities deal more or less with the points argued: *Stickney* v. *The Niagara District Mutual Ins. Co.* (*a*), *Mason* v. *Andes Ins. Co.* (*b*), *Fair* v. *The Niagara District Mutual Ins. Co.* (*c*), *Williams* v. *North*

(*a*) 23 C. P. 372. (*b*) 23 C. P. 37. (*c*) 26 C. P. 398.

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China Ins. Co. (*a*), *Bently* v. *Columbia Ins. Co.* (*b*), *New York Central* v. *National Ins. Co.* (*c*) *Sentance* v. *Hawley* (*d*). *Evans* on Principal and Agent, pp. 65, 70.

The bill must be dismissed, with costs.

FRASER v. GUNN.

Dower—Statute of Limitations—Agreement in lieu of dower.

The widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term:

Held, that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower.

Appeal from the report of the Master at Hamilton, under the circumstances set forth in the judgment.

Mr. *Beverley Robinson*, for the appeal.

Mr. *Teetzel*, contra.

PROUDFOOT, V. C.—At the argument of this case, I thought the question depended upon a similar point to that involved in the case of *Laidlaw* v. *Jackes* (*e*), which has been reheard, and is now standing for judgment*, but upon further reflection I think there are facts in this case which take it out of the operation of *Laidlaw* v. *Jackes* so that whatever the decision in that case may be, it would still leave this to depend on its own circumstances.

Sept. 4th.

Judgment.

(*a*) L. R. 1 C. P. Div. 757. (*b*) 19 Barb. 595; *S. C.*, 17 N. Y. 421.
(*c*) 20 Barb. 460. (*d*) 7 L. T. N. S. 745.
(*e*) 25 Gr. 293.

* Judgment has since been given, affirming the previous decision, except as to the right of the widow to claim dower in the descended lands, for the future.

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Fraser v. Gunn.

This is an appeal from a ruling of the Master at Hamilton, by which he held that *Barbara Stewart* was entitled to dower in the lands in question, the appellant contending that her right has been barred by the Statute of Limitations.

The facts are, that in 1864, *James Stewart* being seised in fee of the lands in question, died intestate, leaving *Barbara Stewart*, his widow, and *Catharine Jane Fraser*, the wife of *Peter Fraser*, his only child and heiress-at-law.

A verbal arrangement was soon after made between *Barbara*, and her daughter Mrs. *Fraser*, with the concurrence of her husband, by which *Barbara* was to receive one-third of the net rents of the land in question, in lieu of her dower. In pursuance of this arrangement, *Barbara*, *Catharine* and her husband, joined in making a lease on the 1st of April, 1865, to one *McMonies*, of the land, for ten years, determinable at the end of five years at the option of the lessee, at

Judgment.

a rent of $250 a year; and a clause was inserted in the lease that it was mutually agreed between the parties to the lease that one-third of the rent or a sum equal to $83.33⅓ should be yearly paid to *Barbara* by *McMonies*, and the remainder to *Catharine* and *Peter Fraser*. *McMonies* occupied the property during the whole term, and *Barbara* received her one-third of the rent.

On the 14th December, 1870, Mr. and Mrs. *Fraser* conveyed the property to *Richardson* and others as trustees in fee upon trust, upon the decease of Mrs. *Fraser*, (who has since died), to convey to *Peter Fraser*, her husband, in fee, charged with the maintenance and support of the children of the marriage.

On the 4th May, 1872, the trustees conveyed to *Peter Fraser*, subject to the charge in favour of the children. *Fraser* afterwards made mortgages of the property, and then became insolvent. The bill is by the children against the assignee in insolvency and the mortgagees.

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The land has been sold under the decree of the Court, and the purchaser objects to the title that *Barbara* is entitled to Dower.

In *Laidlaw* v. *Jackes*, the question is, whether a widow entitled to dower, remaining in possession of the land subject to dower, and paying herself, or considered as paying herself from year to year a proportion of the rent in lieu of dower, is, after the lapse of the statutory period, barred from asserting her right in the proceeds of the property sold under the decree of the Court.

In this case, however, there is added this further and, as it seems to me, material fact, that the proportion of the rent in lieu of dower was received by the dowress under an agreement with the heir-at-law; and the title which has been sold, is practically that of the heir-at-law.

It was contended that, R. S. O. ch. 108, secs. 4 and 15, the Real Property Limitation Act, applied to an action for dower. These sections provide that no person shall bring any action or suit to recover any land or rent but within ten years after the right to bring the action first accrued, and that at the close of that period the right shall be extinguished. Judgment.

In *Laidlaw* v. *Jackes*, I thought it doubtful if similar provisions in the statute of Wm. IV. applied to an action for dower, as a later act specially relating to dower contained a clause fixing the period for bringing such an action; and as this clause contained nothing to shew that the right was extinguished, that it was probable only the remedy was barred. The R. S. O. ch. 108, seems to have taken this out of the region of doubt and reduced it to a reasonable certainty, as section 25 expressly provides a limitation applicable to actions for dower, which only applies to the remedy. I cannot imagine that this clause would have been placed in the Act had the 4th section applied.

It seems also doubtful whether the Act applies

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except when the dowress is bringing an action, but I have nothing to add on this subject to what I have said in *Laidlaw* v. *Jackes*.

But I apprehend that it is quite competent for the heir and dowress to agree to assign dower, or an equivalent for it, contrary to common right, or the actual assignment of one-third of the lands. The law is so stated in *Park* on Dower (*a*), and it seems also (*Ib.* p. 269) that neither livery nor writing is essential to such assignment. The estate is not created and does not pass by the assignment, but the dowress is in, by her husband, paramount to the title of the heir, and the estate is merely suspended till the assignment. This view of the law was acted on in this Court, in *Leach* v. *Shaw* (*b*), by the late Vice Chancellor *Esten*.

The Dower Act, ch. 55, R. S. O., by sec. 5, provides that the dowress and the tenant of the freehold *may*, by an instrument under seal, agree upon the assignment of dower, or upon a yearly sum, or sum in gross in lieu of dower, but it does not say they *must* use writing and seals, and contains no abrogation of the common law;—the object is sufficiently apparent from the rest of the section providing for the registry of the document, and giving power to distrain for or sue for the sum agreed upon. I do not think this puts an end to the common law right.

Judgment.

It is quite clear upon the evidence that the dowress and the heir agreed upon the mode of assigning dower that I have mentioned. The lease was executed in pursuance of that agreement, and the rent apportioned giving one-third to the dowress. The lease to *McMonies* might not of itself be a substitute for the dower, as it was only for ten years, and the assignment it is said cannot be for a less estate than the life of the dowress: *Park* 264. But the agreement between the parties was prior to the lease, which was made in pursuance

(*a*) Page 262. (*b*) 8 Gr. 497.

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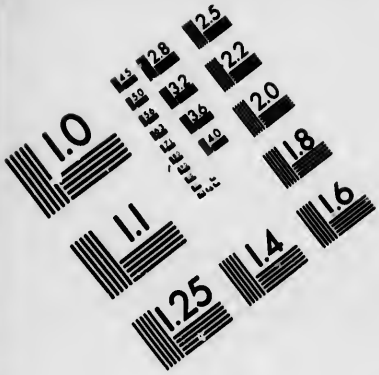
and part performance of the agreement. There was ample consideration for this agreement, for "all the books testify that if a woman accepts an assignment of dower by word against common right, *she* is bound by it, and cannot afterwards demand her dower to be assigned to her in the strict manner:" *Park* 270 ; she is thus bound, if she abandons a legal right agrees to take something in lieu of it, there can be no question that this forms a sufficient consideration for the promise.

Acting upon this arrangment she has received her dower or its equivalent down to 1874, and is not barred by the Statute of Limitations.

Even if the assignment were not perfect without writing, yet the Court would not permit the heiress, or those claiming under her, to set up the Statute, as it was from an agreement with her that the legal right was not insisted on. So far as she is concerned the Statute was suspended. See *Leach* v. *Shaw*, per *Esten*, Vice Chancellor.

Judgment.

I think the ruling of the Master was correct, and dismiss the appeal, with costs.



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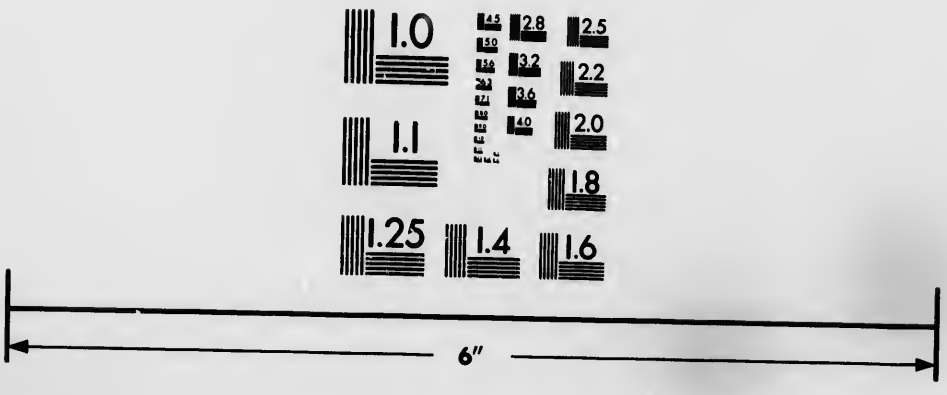

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DOMINION LOAN AND SAVINGS SOCIETY v. DARLING.

Mortgages—Varying written instrument by parol—Weight of evidence—Costs.

The plaintiffs were mortgagees of two town lots in Windsor, described as being "73 × 85 feet deep to a lane," in front of which were two water lots and dock property on the river side, which the evidence preponderated in establishing as having been verbally agreed and intended to be included in the security, although the documentary evidence tended the other way. The Court refused to reform the instrument on parol evidence, although satisfied that the plaintiffs ought to have succeeded had the case been one depending on the weight due to such evidence, and had the bill only asked for that relief would have dismissed it with costs: but as the bill contained a prayer for foreclosure that relief was afforded the plaintiffs, subject to the payment of such costs as the defendant—an assignee in insolvency—had incurred in resisting a rectification of the mortgage.

Statement.

This was a suit instituted by *The Dominion Savings and Investment Society* against *Thomas Darling*, assignee of the estate and effects of *John Dougall* and *Francis J. Dougall*, under the Insolvent Act of 1875, the bill in which set forth, (1) That under a mortgage dated 27th May, 1876, made by the said *J.* and *F. J. Dougall* to the plaintiffs they became mortgagees of certain freehold property therein comprised, situate in the town of Windsor, being composed of lots numbers 6 and 7, on the west* side of Sandwich street, according to a plan and survey made by *P. S. Donnelly*, P. L. S., for the heirs and devisees of *Francois Baby*, in 1853, save and except five feet in front, by the depth of the lot, sold to one *Pulford*, from off the westerly side of said lot No. 6, the part intended to be included therein having a frontage on Sandwich street of seventy-three feet, by a depth on Ferry street of eighty-five feet, for securing payment of $16,000 and interest; (2) that the water lots and dock property in front of said lots

* This evidently should be "*north*."

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on the Detroit river were intended to have been included in said mortgage, and were supposed to be included therein, except a part thereof owned by The Detroit and Windsor Ferry Company; (3) That under another mortgage dated 29th May, 1877, made by said *Dougalls*, the plaintiffs were mortgagees of the said lands and premises for securing $1,000 and interest; (4) That said water lots were also intended to be included in such second mortgage; and both of such mortgages provided that in default of payment of any instalment, the whole principal money and interest should become payable.

The bill further alleged that by reason of default in payment of several instalments, the whole principal and interest of said mortgages, amounting to $22,500, had become payable; that the descriptions in the mortgages by error excluded or rendered it doubtful if the water lots and dock property were included therein, and submitted that it should be declared that the said water lots and dock property were included therein; and if necessary amended accordingly, and prayed relief in accordance with these allegations.

Statement.

The defendant answered the bill, alleging that he had not any personal knowledge of the facts stated in the bill; that he was not aware that the mortgages were intended to comprise the dock property and water lots, and left the plaintiffs to prove the same as they might be advised.

The cause came on for hearing at the sittings of the Court at London, in September, 1879.

Francis J. Dougall, one of the mortgagors, was examined as a witness for the plaintiffs, but he swore that according to his understanding of the arrangement it was not intended to put the water lots into the mortgage, although his brother and the manager of the company arranged the matters principally, and he intended to carry out whatever his brother agreed to with the plaintiffs; but that the water lots he

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understood were to be sold in order to make certain payments on the plaintiffs' mortgage. He stated, however, in the course of his examination before the Master: "I remember speaking to the plaintiffs' manager in Windsor last Saturday. I did not know then but that the mortgage covered the whole ground. * * I think this property was returned [*i. e.*, in the insolvency proceedings] as parts of lots 6 and 7, on which there was a mortgage to the plaintiffs. It has always been considered by me as parts of lots 6 and 7. * * 'The Bordage Road' marked on the plan, is a lane used by teamsters, and it is partly built on; and the Crawford House is built over it on the opposite side of the street. This lane is open for about 175 feet west of Ferry street. This road or lane is only used for access to the wharves and *Pulford's* property and our own." The lane here spoken of was shewn on the plan of the property as a roadway about 20 feet wide running in rear of the lots described in the mortgages, and between them and the water lots or dock property in question, the latter being about 90 feet deep from the northerly side of the lane to the river, and about 18 feet in width upon the said lane.

Statement.

Mr. *S. Peters*, a director of the plaintiffs' company, swore that he had examined the property previously to the loan, and pointed out to *Dougall* that the property had not all a water frontage, there being a wharf belonging to the Wharf Company on a part of it; that he recommended the loan for $16,000, but he would not have done so had not the water lots been intended to be included.

Mr. *Leys*, the manager of the plaintiffs' company, was also examined, and swore that it was the intention to have the water lots included in the mortgage; that there was nothing on the ground indicating the existence of a lane, and that he would not have recommended the loan being made had these lots not been intended to be included; that *Dougall* spoke of the

property as being 73 feet wide on Sandwich street, and running to the low water mark or channel bank, and spoke of the wharf as being worth $5,000.

Mr. *John Dougall*, the other mortgagor, was also examined in the cause, and he swore that the only property intended to be included in the mortgage was 73 feet by 85 feet, and on this buildings were to be erected by means of the loan he proposed to obtain and did obtain from the plaintiffs.

In the course of Mr. *Leys's* evidence, he stated that the *Dougalls* had applied to other offices to effect the loan, and that on the occasion of his visiting Windsor to see the property, he saw one *Bullen*, acting on behalf of The Ontario Loan Society, and who was there about the loan, at the office of Messrs. *Dougall*.

Indorsed on the application for the loan, was a certificate signed by Mr. *Peters*, who acted as appraiser for the plaintiffs, and who had accompanied Mr. *Leys* on the occasion of his visiting the property. This was written on a blank form made use of by the company, and was evidently intended for valuing farm properties. The memorandum ran as follows:—

Statement.

73 *Land* × 85 to a lane, *acres cleared at* $160 *per* [*acre* struck out] foot, $11,680. — *uncleared at* $— Old stores to be utilized [written over the words "Dwelling house" in print], $1,000.

3 New Stores [written over "*Barns*"] on Sandwich street,
2 " " on side street,
Stables,
Offices, 2 Upper Stores to east,
} $16,000

Total, $28,680.

[The words here italicised were all printed.] And accompanying the application was a letter written by Mr. *Wilkinson*, dated the 6th of April, 1876, addressed to Mr. *Leys*, in which he writes: "I called upon *Dougall* this morning the first thing, and obtained his promise that he would not accept the other proposition until he

1879. had conferred with me upon the subject, and as soon as I received your telegram I again called upon him and took an application with me, which I got him to sign with his brother, and the matter is now settled."

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

Mr. *Bain*, for the defendant.

Judgment. [Nov. 12th.

SPRAGGE, C.—This bill is by mortgagees against the assignee in insolvency of the mortgagors to rectify a mortgage.

The land is described in the mortgage as lots 6 and 7 on the west side of Sandwich street, less five feet in front by the depth of the lot, sold to *Pulford*. They are described as lots according to a registered plan, and the registered plan has been produced. Upon inspection of the plan, apart from evidence, I judge them to extend towards the river only as far as the street laid out on the plan as Water street.

The land in question—dock property—is situate between Water street and the river. In the conveyance to the mortgagors that property is described as water lots. The plaintiffs' case must then rest on proof of mutual mistake. The plaintiffs' evidence shews rather a case of fraudulent representation.

Francis Dougall rather thinks that the water lots are covered by description of lots 6 and 7. In this I think him mistaken. He says that the water lots were not intended to be included in the mortgage. *Peters* and *Leys* give evidence of his having declared otherwise. There is nothing in the *Pulford* five feet extending as far as the water, because if the true lots 6 and 7 only were conveyed, it would be described as it is.

There is a good deal of evidence given on the part of the plaintiffs tending to shew that what was represented as the subject of the intended mortgage com-

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prised not only lots 6 and 7 named in the mortgage, but the wharf property north of those lots; and the principal witnesses for the plaintiffs, *Peters* and *Leys*, say that the wharf property was pointed out by *John Dougall*, the partner by whom the negotiation for the loan was conducted, and that it was stated by him that the property was to be included in the mortgage. This representation and pointing out by *John Dougall* was very explicitly and emphatically denied at the hearing by *John Dougall*. I am obliged to attach less weight to his evidence than I otherwise should do, in consequence of his having had during last spring an attack of paralysis; and being asked if such an attack does not usually affect the brain, he answered in the affirmative. In giving his evidence he appeared nervous and excited. I did not think him intentionally untruthful.

I may say in regard to the parol evidence on both sides, that I think that on the part of the plaintiffs preponderates. If that were the only question, and the documentary evidence out of the case, and this only an ordinary case depending upon the weight due to parol evidence, the plaintiffs ought to succeed. But this is a bill to reform a written document, and the evidence required for that purpose is something more than a mere preponderance of testimony.

Judgment.

What is necessary is very clearly put by Mr. Justice *Story* (*a*): "Relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. It is true, that this, in one sense, leaves the rule somewhat loose as every Court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice, for in many cases Judges will differ as to the result and weight of evidence; and, consequently, they

(*a*) Sec. 157.

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may make different decisions upon the same evidence. But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all Judges, and it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions. [The proof must be such as will strike all minds alike, as being unquestionable, and free from reasonable doubt. The distinction here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases; or that distinction which is expressed by a fair preponderance of evidence and full proof.] * * But the rule as to rejecting parol evidence to contradict written agreements, is by no means confined to such cases. It stands as a general rule of law, independent of that statute. It is founded upon the ground that the written instrument furnishes better evidence of the deliberate intention of the parties than any parol proof can supply. And the exceptions to the rule, originating in accident and mistake, have been equally applied to written instruments within and without the Statute of Frauds."

Judgment.

Then in section 160 reference is made to that which is to my mind the most material ingredient in the evidence before me: "There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memorandums of the agreement. The danger of public mischief, or private inconvenience, is far less in such cases than it is in cases where parol evidence is admitted. And, accordingly, Courts of equity interfere with far less scruple to correct mistakes in the former than in the latter. Thus, marriage settlements are often reformed and varied, so as to conform to the previous articles; and conveyances of real estate are in like manner controllable by the terms of the prior written contract."

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In the case before me, so far are the preliminary written papers from making out or tending to make out the alleged mistake, that they are in favour of the document sought to be reformed being in conformity with the real agreement of the parties.

The mortgage describes the land as lots 6 and 7 on the west side of Sandwich street, according to a plan or survey made by *P. S. Donelly*, Provincial Land Surveyor, for the heirs and devisees of *Francois Baby*, A. D. 1853, save and except five feet in front by the depth of the lot sold to one *Pulford*, on the westerly side of lot 6, and adds, "the part intended to be included herein having a frontage on Sandwich street of 73 feet by a depth on Ferry street of 85 feet."

A part of *Donelly's* plan is put in, shewing a street to the north of a range of lots, of which 6 and 7 are two, marked "Water street or Beach Road," and to the north again of that street another range of lots: those opposite 6 and 7 being the wharf property in question. The plaintiffs' contention is, that this wharf property, though separated, as appears by the plan, from lots 6 and 7 on Sandwich street by a road, is yet part of those lots 6 and 7.

Judgment.

But there are papers that have a more immediate bearing upon this question of alleged mistake. These are the papers which were before the plaintiffs and their agents during the negotiations for the loan:

1. A letter from the plaintiffs' Windsor agent [The Chancellor here read the part of letter above set forth], together with the description of the property and its dimensions, and the application.

2. The application itself, also giving the dimensions of the property, the material part being the depth, 85 feet on Ferry street.

3. The certificate of valuation (paper D. on same paper as application); this being by an officer of the plaintiffs' company, *Samuel Peters*, giving the depth 85 feet to a lane. *Peters* is a surveyor.

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The entire depth from Sandwich street to the north boundary of the wharf property is about 200 feet. Could a surveyor have taken that distance for 85 feet? Then 85 feet to a lane (if that be the word, which is not denied by *Peters*,) indicates the lane as the boundary in that direction. The conveyance to the *Dougalls* of these and other lots in the same range is of lots on Sandwich street, "together with the water lots in front of the said lots and the wharves thereon." It will be seen, therefore, that all the documentary evidence is against the plaintiffs' case.

As to the pointing out of the wharf property as being to be included: all that passed, except the alleged verbal declaration that it was to be included in the mortgage, is consistent with its not being included, because a lane in the rear, and on the other side of the lane a wharf on the river Detroit, were advantages which enhanced the value of the property.

Judgment.

The case then is reduced to parol evidence of a verbal statement that this property was to be included in the mortgage. This evidence, it is to be observed, is all from officers of the plaintiffs' company. It was urged in argument that unless promised it would have been demanded, and that therefore this property should be included. That is only a surmise, and scarcely to be inferred. Both parties are loan companies, and were probably rivals in procuring investments in Windsor. (See first passage in letter from Mr. *Wilkinson* to Mr. *Leys*.)

The evidence is weak, and only parol evidence in favour of the plaintiffs' case. The documentary evidence is all against it, and is not evidence of that clear, satisfactory, and convincing character which the law requires in order to *reform* a written document.

I have dealt with the question argued at the hearing, and if the only relief asked had been that which I have discussed, I should dismiss the bill, with costs; but it is pointed out to me that the bill prays for fore-

closure. To this the plaintiffs are entitled as to the premises comprised in their mortgage, upon the usual terms. The defendant's costs so far as they have been incurred in resisting the case made by the plaintiffs for a rectification of the mortgage, are to be paid by the plaintiffs.

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Dominion Loan Society v. Darling.

In the Matter of a Solicitor.

Practice—Calling solicitor to shew cause.

Where at the hearing matters are brought to the notice of the Court which affect the character of one of the parties—a solicitor—the Court will of its own motion, and without being applied to by any other party, call upon such solicitor to shew cause why he should not be called upon to answer these matters.

At the hearing evidence was given in a cause which tended to shew that the plaintiff, a solicitor, was attempting to enforce payment of a judgment recovered against one of the defendants after it had been paid off.

Sometime after judgment was delivered in the suit, the question affecting the solicitor was disposed of by

Judgment.

Spragge, C.—This cause was heard before me on circuit on the 25th of May last, and feeling that the defendant Mrs. *Thompson* ought not to be detained in Court longer than was necessary, I gave judgment in the suit in vacation on the 19th July. I felt at the same time that it was proper that some matters which were disclosed in evidence, affecting the character of the plaintiff, a solicitor of this Court, professionally

1879. and otherwise, should receive further investigation. I have referred to these matters in my judgment, and I think they are of so grave a nature that the plaintiff should be called upon to answer them, or at least to shew cause why he should not. I abstained from giving any direction as to this at the time, because I desired to consider, and to search for precedents as to the form in which a solicitor should be called to account.

Re Solicitor.

I desire now, in the first place, to take such course as will leave it open to the plaintiff to take any objection that he can properly take to his being called to account, and therefore before putting him to answer the matters disclosed in the evidence taken in this cause, the order which I now make will be, that he shew cause why he should not answer them. The order will be, that the plaintiff do shew cause why he should not answer the matters contained in the evidence in this cause so far as he was concerned therein, and why he should not answer to the Court for the use by him made of the judgment recovered in the name of *Zimmerman* against the defendant *Archibald Thompson*, in this suit or otherwise.

Judgment.

I have entertained no doubt as to the propriety, and indeed the duty of the Court to call upon solicitors, whose conduct appears to the Court to have been improper, to answer in respect of that which, is *primâ facie* at least, misconduct, although the parties to the suit may make no application against the solicitor. *Goodwin* v. *Gosnell* (*a*), before Sir *J. Knight Bruce*, was a case of that character. I cannot do better than quote the language of the learned Judge: "Not one of the parties interested has made any application against him (the solicitor) except by the institution of this suit. As it is, however, unfortunately the case has come before the Court: it is now judicially before me, and my understanding of the duty, which I owe to

(*a*) 2 Coll. 460.

this profession, and to society, prohibits me from treating it as not containing anything beyond mere matters of civil litigation": *Wheatley* v. *Bastow* (*a*). *In re Collins*, before the Lords Justices *Knight Bruce* and *Turner*, was another case of the same nature. The Lord Justice *Knight Bruce* observing at the close of it: "It should be known that, however personally painful it may have been to us to perform this duty, it has not been prompted or moved by any one but ourselves. We ordered the proceedings from a sense of public duty, and they are directly and solely attributable to us." 1879. Re Solicitor. Judgment.

The solicitor subsequently filed affidavits in answer, explaining in some measure the matters referred to; and the result was, that no further proceeding was considered necessary.

(*a*) 7 D. M. & G. 261, 558, 662.

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BURNHAM v. GARVEY.

Easement—Prescriptive title—Statute of limitations—Legible writing—Costs.

Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months.

The propriety of such a rule in the towns of this province remarked upon and questioned.

The case of *Flight* v. *Thomas*, 11 Ad. & E. 688, and 8 Clk. & F. 231, considered and followed.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decypher, the Court refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him.

Statement.

This was a suit by *Elias Burnham*, the proprietor of an hotel and outbuildings in the town of Peterborough, and *Thomas George Choat*, his tenant, of the said premises, against *John Garvey* and *James Dolan*, seeking to restrain the defendants from darkening certain windows in the outbuildings and closets attached to the said hotel, and which windows were adjacent to and overlooked the premises owned by the defendants, and by and through which alone such outbuildings derived light and air. It appeared that the defendants had only obtained title to a portion of the lands adjoining the said hotel and outbuildings in December, 1878, and to the other portion thereof in March, 1869, their vendors having had continuous possession thereof respectively for a period of thirty or forty years, and upwards, and who were well aware of the fact of the plaintiff *Burnham* erecting the said structures, which had been commenced as early as June, 1859, and finally finished and occupied as a first-

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class hotel and outbuildings, not later than the 11th day of October of that year.

The affidavits further shewed that in June, 1879, the defendant *Garvey* requested *Burnham* to sign an undertaking allowing him to close up the said windows, which request the plaintiff refused to comply with, whereupon *Garvey* said he would close them up, and shortly afterwards the same were completely closed up by the authority of the defendants, the effect of which was "a great and permanent injury to both the said building [outhouses and offices] and the said hotel. The halls leading to the said water-closets, each upwards of fifty feet in length, are totally darkened, and the said water-closets, as well as the said halls, are deprived of pure air and ventilation, and are thus unfit for use: and this my said tenant informs me is working a serious injury upon the character and popularity of the said hotel, which is a first-class hotel. * * The damage arising to my said building, and hotel, and property, by reason of the closing of the said windows as aforesaid cannot but be very serious, and my said property must be greatly injured and deteriorated in value in consequence thereof. * * Except by means of the said windows of the said building there is no other way by which to obtain light and air, to and for the said halls, as well as for the proper ventilation" thereof.

Statement.

After notice of motion for injunction had been served the defendants removed the boards from in front of the said windows, and an affidavit was made by them to that effect. No offer, however, was made to pay the costs incurred by the plaintiffs in the suit. A motion was therefore made in pursuance of such notice on the th day of November, 1879, by

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

Mr. *Moss*, contra.

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The grounds relied on for relieving the defendants from payment of costs are stated in the judgment of

Dec. 23rd.

SPRAGGE, C.—It is clear from the facts in this case that at the date of the filing of this bill the plaintiff had, under our Real Property Limitations Act, R. S. O. ch. 108, a right of suit, inasmuch as he had enjoyed the use of the lights, the interruption of which enjoyment was the cause of suit, for the full period of twenty years before suit brought, and the interruption had not been such as to take the case out of the statute under the 37th section of the Act.

Primâ facie then the plaintiff is entitled to his costs; but Mr. *Moss* says, that what was done by the defendant in the month of June was a lawful act, and that the plaintiff did not put the defendant in the wrong before filing his bill. Mr. *Boyd* denies, that the interruption in June was a lawful act. I do not think that it is necessary to decide whether it was so or not.

Judgment.

The statute makes the time of limitation run back from the time of suit being brought; and if the interruption made in June had been continued by the defendant and acquiesced in or submitted to for a year before suit brought, the right which he had when he did bring his suit would have been barred. The bringing of the suit at some time within the year was therefore necessary in order to preserve the right which had accrued to him, and which would have been divested out of him, if he had delayed bringing it beyond the year.

There is no general rule making it incumbent upon a party to notify his opponent of his intention to file a bill against him, and there was no special reason for it in this case. The obstruction of June was continued after the plaintiff's right of action had accrued, it may be inferred, in the hope that it would be submitted to long enough to divest the plaintiff of his right. The defendant had made the obstruction in June under

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claim of right, and he had not abandoned that claim when this suit was brought. The plaintiff had a right inconsistent with the continuance of the obstruction. Its continuance by the defendant was a practical denial of his right. I cannot say that the plaintiff was in the wrong in bringing this suit when he did.

The plaintiff is entitled to his injunction and to his costs of suit. As the plaintiff's right of suit is not denied, I suppose it is not intended to carry the litigation further, and therefore the costs may properly be disposed of at this stage of the suit.

I regret to have to put upon the statute the construction that has been put upon it in the case of *Flight* v. *Thomas* (*a*). I express no doubt of its correctness, but its effect is to reduce the time of limitation from twenty years to nineteen years and a day; an effect that must be a surprise upon owners of property, and an effect that could scarcely have been contemplated by the framers of the Act. Lord *Wensleydale*, then Baron *Parke*, when the case was in the Exchequer Chamber, certainly described this provision of the Act in fitting terms. He said: "My opinion at Nisi Prius was founded on the wording of the clauses. I should have been glad if the absurdity arising upon them could have been got rid of. * * The more reasonable provision would have been, that any interruption acquiesced in should suffice, as that would conclusively rebut the supposition of a grant."

Judgment.

Upon the question of costs. The defendant does not bring himself within any of the instances mentioned by Sir *Richard Kindersley* in *Wallis* v. *Wallis*, where a defendant may be excused from the payment of costs, nor within the principle of any of them.

I will quote two of the instances put by the Vice-Chancellor. The first, where a defendant will not be excused from the payment of costs; the second, where

(*a*) 11 A. & E. 688; 8 Cl. & F. 231.

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he may be excused. "Suppose, a plaintiff, having a demand against the defendant, has insisted on it, and the defendant disputing his right, the plaintiff files a bill. If the defendant then concedes the claim of the plaintiff, it does not lie in his mouth to say, 'Although I have now conceded, I still dispute the justice of your claim, and will not pay costs.' He may, come of course, with an application to put an end to the suit on doing what the plaintiff requires and payment of costs. * * Suppose a party, without any dispute having been raised by the defendant, files a bill. Then the defendant may well say, 'I never disputed your right; why did you not apply to me before you filed a bill? You have filed a bill merely to make costs.' In such a case the Court, without going into the merits, would stop the suit, without costs, on the ground, extrinsic to the merits, that the plaintiff ought never to have filed a bill at all."

Judgment.

In this case the defendant did not concede the plaintiff's right till after he had been served with notice of application for injunction; and in the affidavit that he has put in, stating that he was not served with notice before the filing of the bill, he does not say that if he had been served with notice he would have removed the obstruction. Besides, I cannot ignore what passed between the parties in relation to the obstruction in June last. I must, therefore, give the plaintiff the general costs of the cause. I except, however, out of these costs, the costs of the affidavits used on this application. I do so because those put in to be read by me are scarcely legible; many words it is difficult to decipher, and they can hardly be made out except by reference to the context. This is in direct contravention of General Order 67, which I will cause to be transcribed in order to remind practitioners that there is such an order in existence.

Order 67.—All pleadings and other proceedings are to be written "or printed neatly and legibly on good

paper, of the size and form heretofore in use; and, if printed, the same are to be printed with pica type, leaded; and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this order; and the Clerk of Records and Writs, or Deputy Registrar, is to refuse to file the same."

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The plaintiff is not to be entitled to *any* costs of these affidavits. I notice that in one of the plaintiff's affidavits he makes a great grievance of his having been disturbed in the use of windows to his hotel, which, having regard to the rights of the owner of the neighbouring land, he ought never to have placed where they were.

I give him an injunction because upon the construction put upon the Imperial Act, which is similar in its terms, in *Flight* v. *Thomas*, I cannot do otherwise. The strange effect of the enactment can only be remedied by legislation. I may be permitted to add, that it is worth consideration whether any such provision as is made by sec. 36 of our Act is suitable to the conditions and exigencies of a Canadian town. It would scarcely ever be applicable except in towns; and in towns the normal conditions are growth and extension. Section 36 interferes with the use which the owner of the soil ought, as a matter of right, to be allowed to make of it; and does this to give a right to a neighbouring proprietor to use windows which he ought never to have placed there, otherwise than temporarily and subject to the right of the owner of the adjoining land to use it for building purposes. The effect is to nullify the ordinary common law right of the owner of the land to use it for his own purposes.

Judgment.

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BLAKE v. KIRKPATRICK.

Contract of hiring—Manager of works—Right to rescind contract—Ground for rescinding.

The plaintiff induced the defendant to enter into a written agreement to employ him for six years as manager of a tannery, representing himself to the defendant to be a practical tanner; and that he had a secret process of tanning which he would impart to the defendant and to be used in the tannery, but which he was not to use after their agreement should be terminated; and the defendant was to have the right to stop the business at the end of any year if the net profits did not amount to $3,000; the defendant to furnish capital to stock and work the tannery to its fullest capacity. After carrying on the work to a limited extent for about seven months the defendant gave notice to the plaintiff discharging him from being manager of the tannery, assigning, amongst others, the following reasons: (1) that the plaintiff was not a practical tanner; (2) not using the secret process, and not disclosing it, and that it was fictitious; (3) that it would be ruinous to the defendant to continue plaintiff as manager; and (4) deceit as to process, and as to alleged profits, and misrepresentation of facts in connection with the tannery. The evidence given bore out the grounds of objection stated in such notice. The Court, under these circumstances, dismissed, with costs, a bill filed to compel the defendant to carry out the agreement, or for payment of the damages alleged to have been sustained by the plaintiff by reason of the refusal to continue the engagement.

The objection that the defendant had never asked knowledge of the alleged secret process to be imparted to him was no answer to his alleging that as a ground of dismissal; though had he been proceeding against the plaintiff for not communicating such secret to him it might have been necessary to shew a demand therefor.

The facts are fully stated in the judgment. The cause came on for hearing at the sittings in Toronto, in November, 1879.

Mr. *W. Cassels*, for the plaintiff.

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

Nov. 11th. PROUDFOOT, V. C.—The parties entered into an agreement dated the 10th October, 1878, but subsequently modified, and which both parties agree was to take

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effect from the 4th of January, 1879. It recited that the plaintiff was a practical tanner, and had proposed to the defendant to act as his manager of a tannery in Niagara, upon the understanding that the defendant would put capital in the business, and allow the plaintiff remuneration as specified in the agreement. And it witnessed that *Blake* agreed to obtain a lease of the premises in *Kirkpatrick's* name for a term of six years, (the owner was *Blake's* mother,) at a rent of $500 per annum, *Kirkpatrick* to pay the rent quarterly out of *Blake's* share of the profits, and upon the determination of the agreement the lease was to become void; and *Blake* covenanted to act faithfully and diligently, and to give proper time, attention, and attendance necessary to the efficient manufacture of leather, to be carried on in the said tannery, according to his secret process, during the period of six years. And *Kirkpatrick* covenanted to devote the necessary time and attention to the business in buying and selling stock and leather, and in the management of the financial affairs of the said business, *Kirkpatrick* to have the right to stop the business at the end of any year if the net profits did not amount to $3,000. *Kirkpatrick* agreed to employ *Blake* as such manager for six years, and to put into the business sufficient capital to work it to its full extent, and to allow *Blake* in lieu of salary half the profits after deducting the rent, *Blake* to have the right to draw the same to the extent of $1,200 a year, monthly; all expenses were to be charged to the business. And any money that *Kirkpatrick* might pay to the former tanners at the tannery for improvements, including the engine and boiler, were to be repaid to him out of *Blake's* share of the profits within two years from date, and a roller then in the building was to be put in working order, and the expense to be paid out of *Blake's* share of the profits in the same time. And it was agreed that *Blake* would disclose to *Kirkpatrick* a certain secret process of tanning as used by

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him in the tannery theretofore, which *Kirkpatrick* was not to use after the termination of the agreement. The agreement was made under the provisions of 36 Vict. ch. 25.

A few days after the agreement was finally concluded *Kirkpatrick* had a fit of apoplexy, and was also partially paralysed, his physician upon his partial recovery warning him that to engage in business or any mental labour would be at the imminent hazard of his life.

Notwithstanding the warnings of the physician *Kirkpatrick* did endeavour, by his own efforts and those of his son, a physician, to carry out the agreement, procured some hides and ordered and paid for some materials for the tannery. But the state of his health preventing him from attending efficiently to his duties under the agreement, on the 12th of May, accompanied by his solicitor, he met *Blake* at Niagara, and endeavoured to induce *Blake* to get some one to take his place. *Blake*, by his solicitor's advice, objected to this, and insisted upon the agreement being carried out by supplying the materials to its full capacity to see if a profit would not result.

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Finally *Kirkpatrick* gave notice to *Blake* on the 5th of August, discharging him from being manager of the tannery, assigning the following reasons:

1. That he was not a practical tanner.

2. Disobedience of orders in using hemlock bark for tanning.

3. Not using the secret process, and not disclosing it, and that it was fictitious.

4. Spoiling leather then in the vats through his incompetence.

5. Causing loss, &c., through incompetence.

6. That it would be ruinous to *Kirkpatrick* to continue him as manager.

7. Deceit as to process and as to alleged profits, and misrepresentation of facts in connection with the tannery.

8. That no money could fairly be made in the tannery in the way he carried it on. 1879.

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Blake has filed this bill praying for the specific performance of the agreement, or for damages.

A great quantity of evidence was given as to the competence of *Blake* as a tanner, the quality of the leather manufactured at the tannery, and in regard to *Blake's* intoxication, which was set up in the answer besides the other grounds specified in the notice of dismissal.

Upon the argument it was conceded that specific performance of an agreement of this kind could not be enforced, which was indeed obvious, and the plaintiff asked relief in damages for breach of the agreement.

I think it clear, upon the evidence, that *Kirkpatrick* did not fulfil his part of the agreement, that he did not put in sufficient capital to work it to its full extent, and did not buy stock sufficient to fill the capacity of the tannery; and I do not think that his illness and inability from that cause to perform his contract is any answer to the express covenant he has chosen to enter into. Nor does it seem to me that the nature and terms of the agreement bring it within those cases where a partnership will be terminated if it appear that it cannot be carried on with advantage. This is not a partnership, and he has chosen to covenant without qualification to furnish the material, &c.

Judgment.

It remains to be seen whether *Kirkpatrick* had any sufficient ground for dismissing *Blake*, and whether *Blake* is in a position to complain of *Kirkpatrick* not having performed his part of the agreement. The instances of *Blake's* intoxication do not seem to me important enough to warrant a dismissal on that ground. It is not shewn that the business was affected by them, although in one instance, at least, he is said to have been incapacited from attending to any business, in the office and early in the day; followed by some days' confinement to the house.

Some of the other grounds of dismissal have been

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the cause of very much conflicting evidence. There is no doubt, I think, that *Kirkpatrick* intended to embark in an enterprise in which the tanning should be effected by means of oak bark. Numerous witnesses testify that leather produced by the use of a portion of hemlock, and in fact every kind of leather tanned by other means than hemlock bark, is known as oak leather, though not a particle of oak is used in its preparation, and leather dealers do not seem to object to leather sold as "oak," because it is not "oak" in reality. Opinions also vary much as to the comparative value of the products of the different processes; some think hemlock leather as good as oak; but the weight of evidence is much in favour of the real oak bark tanning. Two sides of leather prepared at the tannery were in Court and exhibited to the witnesses, most of whom thought them specimens of good leather, and so they were, for they were prepared, not according to any secret process, but in reality with real oak bark for the exhibition in Toronto. The other hides purchased by the defendant for the tannery are, to a considerable extent, still in the vats. Some have been tanned but have not been sold, and are still in the tannery. I do not intend to decide the case upon the ground that the leather might not be considered a fair sample of what seems to be "oak" leather, however much I may regret that the custom of the trade should sanction such a variation from the ordinary rules of morality.

Judgment.

There are two of the objections, however, that seem to me sufficient to justify the course taken by the defendant, and they go to the basis of the agreement, and without them it is not probable that it would have been entered into.

One is, that the plaintiff represented himself to be a "practical tanner," the other, that he was to tan according to a certain secret process of his own, and to disclose it to *Kirkpatrick*.

There is no doubt as to the fact of *Blake* representing

himself to be a "practical tanner," for it is recited in the agreement. The evidence, I think, establishes that he is not a practical tanner. I am not certain that I fully comprehend all the advantages of having a manager who is a practical tanner, above one who is not. But the parties evidently attached importance to it, and introduced it into the contract. And I can readily conceive that a man who is familiar with all the operations of tanning, from the purchase of the hides to the completion of the sole, from having laboured at them himself, would be much better qualified to determine if the workmen he employed did their duty in an efficient and economical manner, than if he only derived his knowledge from books, and was obliged to depend for the success of his enterprise on the honesty and good faith of workmen whose interest might induce them to slur their work. *Kirkpatrick* was not himself a practical tanner, although he had owned a tannery, and been in partnership in the ownership of another. It was not unnatural that while agreeing to entrust *Blake* with the use of a large capital he should seek to find in him the qualities necessary for an efficient and economical management of it, which he did not himself possess. Now *Blake* was not familiar with the process of tanning from having actually performed the work himself. He seems, indeed, to have mixed liquors for the vats in some instances from theoretical knowledge derived from books on the subject, and as one of the witnesses expressed it he had some very good views he had gathered from reading. An attempt was made to shew that *Kirkpatrick* was very well acquainted with *Blake*, had known him for years, and must be taken to have known he was not a practical man in the sense I have indicated. I cannot infer that from the facts. *Blake's* account of himself is, that he has been a tanner for ten years, at first alone, with *Fulmer* for foreman, who turned out to be a shoemaker, then he was with *Thorne & Parsons* under a similar agree-

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ment to that with *Kirkpatrick*, and had *Hughes* for a foreman, &c.

The other ground refers to the secret process. *Blake* says, he has a process of his own for making leather, and told *Kirkpatrick* he had. His process increased the tannin in the leather, one part of it was calculated to bleach the leather, but that was not the chief thing: his process would have disguised the colour of "hemlock leather" and made it look like "oak." Assuming that a process of this kind was legitimate, the evidence fails to convince me that it was a secret process, or, if there were a secret process, that it was ever used. In *Fulmer's* time, *i. e.*, when he was employed by *Blake*, there is evidence going to shew that *Blake* did nothing but keep the books, and that they had an altercation because *Fulmer* would not teach *Blake*. But as this witness was an enemy of *Blake's*, I do not rely upon him. That there was some process used by *Fulmer* is proved by the defendant, who objected to it, and that

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Blake said it had been played out, and he would not use it, but that this was not his secret. The evidence of *Hughes* I place confidence in. He has been a tanner and currier all his life. He was foreman under *Blake*. *Hughes* considered he had the control of the tannery, judged of the hides, examined them and reported on them to *Blake*, put the hides in the vats. There was no unusual process used, no secret process employed. He prepared the liquors or gave the directions to the men. This man was in the habit of taking a spree, as he called it, occasionally, but he was very intelligent and thoroughly familiar with the whole process of tanning—a practical tanner—and I think honest, and intended to tell the truth. *Blake*, when examined [illegible] the examiner, had stated that *Hughes* knew his secret process, and repeated it two or three times; but in his examination before the Court he corrected this by saying that *Hughes* only knew the ingredients but not the proportion.

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Take it either way, *Hughes* tells us what the ingredients were that were employed for *plumping* and *bleaching*; sulphuric acid, japonica, salt, and sugar of lead: that the use of sulphuric acid for plumping is usual in sole leather tanning, the effect being to distend the pores of the hides and render them more susceptible of the action of the tan. The leather was bleached to make it resemble oak; it does not improve the leather, it draws the colour out, draws the tannin out. This process was dipping the hides after they were tanned in a hot liquor containing sulphuric acid and sugar of lead. It is not a secret. *Hughes* acted on his own judgment, not under *Blake's* direction, nothing was used of which he was not aware. That the bleaching process is injurious was shewn by a number of witnesses, and also that it was not new; that it had been used for twenty years; that it is not a process of tanning the leather, but employed after the tanning is completed; and the defendant says he supposed the secret process to be some new process of tanning, not bleaching.

Judgment.

I think the result of the evidence is, to shew that *Blake* either had no secret process, or, if he had, that he did not use it. Whether the secret process would be an advantage or not I cannot tell, but the parties chose to embody it in their agreement, and the defendant is entitled to what he contracted for, which he has not got.

But the parties not only stipulated for the hides being tanned by this secret process, but that it should be communicated to *Kirkpatrick*. *Blake* has never done so. There is no time specified for communicating it, but it appears to me to be an item at the basis of the contract going to the whole consideration, and that the plaintiff cannot recover without shewing he has fulfilled the agreement in this respect. As we have seen, there had been a process employed by *Fulmer* while foreman to *Blake*, which was objected to by *Kirkpatrick*. It was therefore a matter of importance

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to *Kirkpatrick* to be in possession of the secret to enable him to ascertain whether it might not be but a use, it might be with colourable variations, of *Fulmer's*. While it remained in *Blake's* breast he was at his mercy. It is true *Kirkpatrick* did not demand it. I did not think a demand was necessary in resisting a suit by *Blake*, whatever it might have been had *Kirkpatrick* been suing.

When *Kirkpatrick* terminated the contract the lease ended, and the estate is restored to the lessor increased in value by the machinery which has been paid for by the defendant, and he has incapacitated himself from any remedy for their cost, as they were to be paid for out of the share of *Blake* in the profits for the first two years, which, by his act, cannot now be made.

But in one respect *Blake's* conduct is indefensible. When *Kirkpatrick* terminated the agreement there were sides of leather tanned, (120), now hanging in the tannery, and 440 were in the vats. *Kirkpatrick* sent a man to finish them, but he was prevented from entering on the work by *Blake*, who took strong measures to keep him out, and these hides have been left in the vats, in an incomplete state of preparation, for want of material to complete them. They are the property of *Kirkpatrick*. The business was his. The hides were paid for with his money. *Blake* was his hired manager, and has no right to them. *Kirkpatrick* has had materials ready to complete the tanning, which he thinks he cannot safely entrust to *Blake*, and which he is not permitted by *Blake* to use himself. I think *Kirkpatrick* entitled to these hides and sides of leather, and if *Blake* refuse to give them up that he must account for their value. It is very probable that, with regard to the hides in the vats, *Kirkpatrick* has no right to insist upon completing their tanning there, but if he wish it they must be delivered to him; and as to the sides of tanned leather they also must be given to the defendant, who, by the agreement, was to have the

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selling of them; as it is clear that the amount that may be realised from them will not cover the outlay of *Kirkpatrick*, there will be no profit to divide with *Blake*. Perhaps some arrangement can be come to by the parties in regard to them,

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This bill is dismissed, with costs; and if no arrangement can be come to, I declare the defendant entitled to have the hides and skins delivered to him on demand.

Cameron v. Wellington, Grey, and Bruce Railway Company and The Great Western Railway Company.

Railway — Farm-crossing — Specific performance — Varying deed — Adding to consideration of deed by parol evidence.

The engineer of a railway company in arranging for the right of way across a party's farm agreed that if it were necessary a second farm crossing should be made; whereupon the owner executed a deed of the land for the railway in consideration of $130, "the company to make and maintain a farm-crossing, with gates at the present farm lane." By reason of the accumulation of snow in this crossing the same was useless during the winter, and the company having refused to construct or allow the owner to construct another crossing, he filed a bill to compel the specific performance of the agreement in respect of such second crossing:

Held, that this was not a varying of the deed by parol, but simply an addition to the expressed consideration of another not at variance with that stated, and decreed specific performance, with costs; (but)

The lessees of the road having been made parties to the bill the Court, under the facts stated in the case, refused relief against them, with costs to be paid by the lesser company.

Held, also, that under the above agreement the Railway Company was bound to give the owner such a crossing as would be reasonably passable at all seasons of the year, or if rendered impassable by the accumulation of snow, that they would make it passable by clearing it; that is, they were bound not only to make the crossing, but maintain it in a fit state to pass from one portion of the farm to another.

Hearing at sittings at Guelph in the Autumn of 1879.

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Cameron v. Wellington, Grey, and Bruce R. W. Co. and Great Western R. W. Co.

Mr. *Boyd*, Q.C., and Mr. *K. McLean*, for the plaintiff.
Mr. *Bethune* for the defendant.

The facts giving rise to the suit, and the points raised by counsel, appear in the judgment of

Dec. 16th

Judgment.

PROUDFOOT, V. C.—The plaintiff in this case seeks to compel the making of a farm-crossing that would be available in winter, the one that has been made by the *Wellington, Grey, and Bruce R. W. Co.* crossing the railway at a deep cutting, and being liable to be blocked up with snow so as to be practically useless in winter.

It appeared that Mr. *Ridout*, the engineer of the *Wellington, Grey, and Bruce R. W. Co.*, had been employed to procure the right of way for the road, and had negotiated with *Donald Cameron*, the plaintiff in the original bill, for the right of way across his land. He had found a good deal of difficulty in dealing with him, as he wanted two crossings; the one proposed opposite the lane, the usual entrance to his premises, would require to be cut down to the level of the road and would be not available in winter except at a very great expense in keeping it clear of snow. *Ridout* then applied to Dr. *Clarke*, of Guelph, the physician who attended *Cameron's* family, and in whom he had confidence, to go with him to *Cameron* and persuade him to execute the deed. He went with *Ridout*, and tells us what took place. He says: "*Cameron* wanted two crossings, one that would be open at all times, in winter as well as in summer. *Ridout* only objected on principle as others would want the same, but he said if it was necessary they would get it, *i. e.*, the second crossing, and the deed was signed upon that understanding. * * *Ridout*, I think, said something about having no power to insert such a clause in the deed on account of his want of authority. *Ridout* stated, however, that the crossing was to be made if necessary. * * I only know that *Donald Cameron*

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signed upon the understanding I have mentioned, and without that it would not have been signed."

This evidence is fully confirmed by the evidence of *Duncan Cameron*, the son of *Donald* and the plaintiff in the revived suit.

It appears, also, the negotiations were going on from March till August, *Cameron* always insisting on the two crossings. At the point where the crossing has been made the railway is four feet below the level of the land, and the road to the crossing slants down to it for sixty feet. The house, barn, and outbuildings, are on one side of the railway, the wood and two-thirds of the farm are on the west side, and a crossing that can be used in winter is a necessity, for hauling wood and manure;—in winter the present crossing is impassable till the snow is shovelled out. The crossing could be protected from the snow by a shed at a cost of probably $200. But a winter crossing could be made on the level at a short distance to the north, and would not cost $10, and the plaintiff has in fact offered to make it himself, which *The Great Western R. W. Co.* will not permit him to do.

Judgment.

The deed that *Ridout* took with him for execution, and that was signed, grants the land for a road way, 2 $^{6}/_{100}$ acres, to the *Wellington, Grey, and Bruce R. W. Co.* in consideration of $130, "the company to make and maintain a farm-crossing with gates at the present farm lane, the fence at crossing to be retained as much as possible."

The reception of the parol evidence of the agreement was objected to as being at variance with the deed, and had it contradicted anything in the deed the objection would probably have been fatal. But it does not contradict anything in the deed, it adds an additional consideration to that stated, a consideration that is not at variance with the one stated in the deed; and I understand the rule to be, that in such a case parol evidence is admissible to prove the true consideration.

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It was further argued that the Court cannot make a decree to compel the making of a crossing: that the only remedy is in damages. *Sanderson* v. *The Cockermouth, &c., R. W. Co.*, (*a*), decided that upon an agreement to sell lands required by the company, "subject to the making of such roads, ways, and slips for cattle as might be necessary," the Court would decree specific performance, and referred it to the Master to determine what roads, &c., were necessary. And in the case of *Wallace* v. the now defendants, (*b*), it was held competent for the Court to compel the maintenance of a station, a matter of much greater complexity than making a crossing, the Chief Justice observing that "this case is entirely distinguishable from one in which the Court refuses to undertake the superintendence of the execution of works."

Judgment.

It is also contended that the company have not complied with their agreement to make and *maintain* the crossing mentioned in the deed. They have made the crossing, but refuse to keep it passable in winter by cleaning the snow from the cut leading to it. It cannot reasonably be considered that the crossing is confined to the road bed, it must comprehend the approaches to the road bed as well as the road bed itself, and the parties must be assumed to have had in their contemplation that the land owner should have the means of communication with the portions of his severed land upon all necessary occasions or whenever he saw fit. If that is not afforded to him, he does not have a crossing maintained. It is a mere mockery to say the agreement has been complied with when this trench has been dug twelve feet wide, four feet deep at one end and sloping for sixty feet to the surface, while during a considerable portion of the year it is impassable from accumulations of snow which would not have found a resting place but for the cutting made by the

(*a*) 11 Beav. 497, 2 H. & T. 327. (*b*) 3 App. 44.

company. That such a contract is capable of specific performance is evident from the *Wallace* case, and the authorities upon which it rests. And cases were cited from the American Courts holding in accordance with, what seems to me, sound reason that a crossing embraces not only the road bed, but the approaches to it: *Hayes* v. *New York Central and Hudson R. R. Co.* (*a*).

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The next point is to determine whether *The Great Western R. W. Co.* is liable upon the agreement. The relation of the two defendant companies is stated in the *Wallace* case (*b*), and the same facts in every respect are in evidence in this case. *The Great Western R. W. Co.* claim to be purchasers for value without notice of any agreement for a winter and summer crossing when they took the lease, &c. In the *Wallace* case notice was proved of the liability. Here there is no such notice. It is, besides, to be observed that in the agreement between the two companies of the 15th of June, 1869, it was stipulated that the railway should not be deemed to be complete until, among other things, "the purchase and payment of the right of way taken and required." And as I have held that the making of the winter crossing was part of the consideration for the right of way, it would seem the *Wellington, Grey, and Bruce R. W. Co.* are alone liable to make it; and the same reasoning would apply to the *maintenance* of the summer crossing, unless a distinction can be made by reason of this part of the consideration being a continuous one. I do not think such a distinction effectual to impose this liability upon the *Great Western R. W. Co.* Their lease was made on the 15th of June, 1869,—the deed containing the stipulation as to a crossing was not executed till the 23rd of August, 1869, and no notice is proved to the *Great Western R. W. Co.* of the negotiation that had been going on from the March previous. But even if notice were proved, it does not seem

Judgment.

(*a*) 16 N. Y. Sup. Ct. Rep. 63. (*b*) 3 App. 44.

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to me that it would vary the matter, for they stipulate they are to have the road free from claims for right of way. Nor does it alter this that the lease has been construed to make the *Great Western R. W. Co.* in effect owners of the line, for the lease only makes them owners after the right of way has been acquired. And the maintenance of this crossing is not a part of the line of railway that the *Great Western R. W. Co.* agree to maintain and work, as the station was in the *Wallace* case.

The effect of the consideration for this part of the right of way being in part continuous and consisting in maintaining the crossing, there must be a power retained by the *Wellington, Grey, and Bruce R. W. Co.* to enter and maintain, and the *Great Western R. W. Co.* would be bound to permit them to do so.

The result is, that the bill must be dismissed as against the *Great Western R. W. Co.*, with costs, and a decree made against the *Wellington, Grey, and Bruce R. W. Co.*, with costs, to make the winter crossing on the level, and to maintain the summer crossing; and damages being also prayed, there will be a reference to ascertain what damages the plaintiff has sustained by reason of not making the winter crossing and not maintaining the summer crossing, and the *Wellington, Grey, and Bruce R. W. Co.* ordered to pay the amount in a month after date of report. The *Wellington, Grey, and Bruce R. W. Co.* to pay the *Great Western R. W. Co.'s* costs of suit.

Judgment.

LAIDLAW V. JACKES. 1879.

Dower—Election—Statute of Limitations—Devised and descended lands.

The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children, during widowhood; and after her death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received by the widow, and a partition of descended lands:

Held, on rehearing [in this affirming the order of *Proudfoot*, V. C., reported *ante* volume xxv., p. 293,] that the widow was not bound to elect between the provision made for her by the will and her dower, and that notwithstanding the lapse of time, she was entitled, out of the devised lands, to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against the claim made by the plaintiff, the amount which she was entitled to have received thereout as dowress. [*Proudfoot*, V. C., dissenting, who considered the widow entitled to the same relief in respect of these as of the lands devised.]

This was a rehearing at the instance of the plaintiff, of the order pronounced by *Proudfoot*, V. C., on an appeal from the Master's report, as reported *ante* volume xxv., p. 293, where the facts sufficiently appear.

Mr. *Bain* for the plaintiff.

Mr. *Maclennan*, Q.C., and Mr. *George Murray*, contra,

SPRAGGE, C.—The after-acquired lands do not pass by the will, and there can, therefore, be no question that as to them the widow is entitled to dower. Judgment. Dec. 11th.

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As to dower in the devised lands, if the question were *res integra*, I should be inclined to think that the widow was not entitled; but upon the cases, which are reviewed in the judgment of my brother *Proudfoot*, I think that he has come to a correct conclusion.

A leading question in the case is, whether a widow's title to dower is extinguished upon the lapse of twenty years from the death of her husband, or whether only her "right of action of dower" is barred upon the lapse of that time.

The Canadian Real Property Act, 4 Wm. IV., ch. 1, following the legislation in England of the previous year, 3 & 4 Wm. IV., ch 27, gave to the lapse of time the effect of extinguishing title in the cases to which it was made to apply. This was introducing a new feature in the law relating to the limitation of actions, and the law relating to prescriptions, as put by Messrs. *Darby* and *Bosanquet* in their treatise on the subject (*a*). "The principle introduced by this section is a change from the principle of the old law. The Statute of James only took away the remedy, leaving the title to the estate to the owner who was out of possession." The estates and interests in land to which the statute was made to apply were extinguished at the determination of the period prescribed by the Act for making entry or distress or bringing suit, and the like provision is made in our Act. Any estates or interest to which these statutes, taking them separately, do not apply, remain upon the old footing, the statute of James taking away the remedy only, leaving the title to the estate in the owner. The question is, whether the widow's right to dower is, within our Act.

Judgment.

It was held in *Marshall* v. *Smith* (*b*), to be within the Imperial Act, or rather Sir *John Stuart*, while making the great lapse of time without claim the ground of his judgment, expressed a decided opinion that title to

(*a*) 389. (*b*) 34 L. J. Chy. 189.

dower was within the Act, basing his opinion upon the interpretation clause; which enacts that the use of the word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever * * And also to any share, estate, or interest in them, or any of them," and he held dower to be an interest in land, and therefore within the definition in the interpretation clause, and Mr. *Brown*, in his book on the Statute, as well as *Darby* and *Bosanquet*, quotes this case as authority for the position, that title to dower is within the Act.

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But I find upon comparing the interpretation clause of our Act with that of the Imperial Act, that ours contains no such general term as that upon which Sir *John Stuart* founded his judgment. The word land is made to comprehend messuages, and all other hereditaments, whether corporeal or incorporeal, and money to be laid out in the purchase of land (and chattels and other personal property transmissible to heirs), and also any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any "other interest capable of being inherited."

Judgment.

Dower is not an estate for life, for it is not an "estate" at all. It is indeed an interest in land, but the clause confines interests in lands to interests "capable of being inherited," and as I read the clause, the words "right or title of entry or action" are limited in the same way. Further, the clause in relation to the time or occasion when the right to bring suit, &c., shall be deemed to have first accrued enumerates five classes of cases; to none of which, as will be found upon examining them carefully, does the title to dower apply, so that there is no date or occasion given by the Act from which time should begin to run against the dowress, a strong reason to my mind for thinking

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that the Act cannot be construed as applying to title to dower; and a reason, I confess, for leading me to doubt the soundness of the opinion of Sir *John Stuart*, in *Marshall* v. *Smith*: the clause in the Imperial Act in relation to first accruer of right being in much the same terms.

The Canadian Dower Act, 32 Vict. ch. 7, contained, in my opinion, the first limitation as to time for bringing suit for dower. Section 22 says simply: "No action of dower shall be brought but within twenty years from the death of the husband of the demandant." Its being put in that shape is an indication of its being a limitation of a right which theretofore was unlimited, just as before the Imperial Act 3 & 4 Wm. IV, the period for bringing suit for arrears of dower, or for damages for such arrears, was unlimited (*a*).

This limitation in the Dower Act has, I apprehend, the same effect, neither more nor less, than the provisions of the Statute of James, viz., to bar the remedy and to leave the title as it was before. I do not see how we can import into it a provision that it shall extinguish the title.

Judgment.

In this case the widow has been in possession for over twenty years after the death of her husband, under, as it appears, a mistake of title, as to the descended lands; she, and the heirs also assuming that these lands passed under the will. She has been in actual possession with the heirs of a portion of the descended lands, and in receipt of the rents and profits of the residue. The decree directs her to account for rents and profits received. It is in these terms "an account of rents and profits of the said testator's real estate, whether acquired before or after the making of the said will received by the said executrix and executor, or either of them, or by any person or persons for their use, or by their order." Her only right as to these descended lands was to dower. Assuming that she re-

(*a*) Brown 439.

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ceived, as no doubt she did receive from them, more than one-third, she is brought to account for all that she did receive. I have myself no doubt that in accounting she is bound only to account for the excess beyond what she was entitled to receive as dowress; and I find that that very point has been decided in *Graham* v. *Graham* (*a*). Indeed, the only question there was, whether the widow was entitled to the like allowance for the future. The case is thus stated: that the widow "trustee for her son coming into possession of the estate whereof she was dowable, was in receipt of the profits; and being now to account, claimed an allowance for the profits of her dower." It was objected that though she might be entitled thereto under the head of just allowance in the account, yet as to future profits she could not come into equity. Lord *Harwicke* said: "I cannot deny the plaintiff an allowance on taking the account, of so much of the profits as she had a clear right to for her dower:" and then proceeded to decree also in her favour as to future profits.

Judgment.

Her title then would appear to be clear, certainly to retain for dower for the first twenty years after her husband's death. Her title to retain when accounting for rents and profits would continue after that period, unless her title was extinguished. If not extinguished it continued to subsist for some purposes, and if for any purpose, then to receive what came to her hand and to retain, what Lord *Hardwicke* styled, so much of the profits as she had a right to for her dower.

As to the devised lands she has still less, if any, difficulty to encounter, for her possession with her co-devisee and trustee has always been rightful, and is so still, inasmuch as it was to continue as long as she was living and unmarried. As dowress certainly she was not entitled to possession; but she was so entitled under the will. We cannot sever the possession. Being

(*a*) 1 Ves. Sen. 262.

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in possession and being entitled under the will to two-thirds of the profits jointly with her co-devisee, and to one-third as dowress, and receiving the whole with the assent of the co-devisee, the legal intendment would be that it came to her hands as to two-thirds impressed with a trust; as to one-third, if in law entitled in her own right, then as to that third beneficially, not as a trustee, and if no trust, there could be no *cestui que trust* to call her to account. It can of course make no difference, whether or not she believed herself dowable of the devised lands. If in law she was dowable her own opinion, if she was of opinion she was not, (as I rather gather from the 14th paragraph of her answer), cannot prejudice her title.

The decree directs a partition of the after-acquired lands "having regard to the dower, if any," of the widow. Granting that her title is still subsisting, as I think it is, I do not see what the Master can do, in the way of giving her dower, under this direction. He cannot allot less in severalty to each heir, because the widow is entitled as to each to dower. If she claims dower against the whole before partition, or against the parcels allotted in severalty, then her position is that of a demandant, and the parties can set up, or omit to set up, the limitation prescribed in the Dower Act.

Judgment.

If, in proceeding under this direction in the decree, the widow is notified, and appears in the Master's office, the plaintiff would, as I judge from the course taken in this cause, object that she was barred by the statute, while the other heirs would probably make no such objection.

As to the descended estates, could the widow have obtained an assignment of her dower? The lands were in mortgage; she having as to her dower joined in the mortgage. As between herself and the mortgagees and the heirs, the assignment would have been subject to the paramount right of the mortgagees, if the existence of the mortgage would not have been a bar.

Then would it have been a bar? I do not see that it would have been.

There can of course be no assignment of dower unless there be a tenant of the freehold; but if dower may be assigned in mortgaged lands not devised, the heirs are equitable tenants of the freehold; and the heirs were so in this case in law, though the widow, and it appears also the adult heirs were under a mistake in that respect.

Can the mistake of the dowress avail her? She could have brought her action of dower against the heirs and have had dower assigned to her; and the fact of her being in possession, would not, that I see, have been a bar to her suit.

Then it may be said as to the heirs not of age she was in possession as guardian in socage. I doubt if the case in *Wilson*, Doe *Newman* v. *Newman* (*a*), is authority for that position. It was observed by Mr. Justice *Gould* that there was no fact stated in the case "to shew in what way the widow claimed to keep possession, and take the rents and profits; whether to compel assignment of dower, or to maintain her son and the daughters of her late husband, or as guardian in socage to her son." Judgment.

In this case it does appear in what way the widow took possession and received the rents and profits of these lands, not as guardian in socage, but as a joint tenant by devise in trust; mistakenly, it is true, as there was no devise as to these lands; but that was the character in which she had possession and the perception of rents and profits. In her own right she was entitled to dower, and she was entitled to enforce her right, if necessary, as against the heirs, whether minors or not; and it would appear that dower may be assigned by minors without suit (*b*), *Gore* v. *Perdue* (*c*).

(*a*) 3 Wils. p. 516.
(*b*) 1 Roll. Ab. 137 681.
(*c*) Cro. Eliz. 309.

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It cannot therefore be said that any essential to the assignment of dower was wanting, and if so the conclusion would be that there was nothing to prevent the running of the statute from the death of the husband.

Graham v. *Graham* (*a*) does not appear to me to be any authority for making any future allowance by way of dower in the descended lands. When that case was decided there was no limitation of time for bringing suit for dower, and therefore no reason for not allowing it for the future. With us it is otherwise; twenty years have elapsed from the death of the husband, and her position in now claiming would be that of a demandant.

As to the devised lands, the title of the widow remains the same until her death, unless she should marry again, the only change being upon the children coming of age, in the appropriation of certain rents and profits; but her title remains the same, she and her co-trustee being the only hands for receipt of rents and profits, and for possession. She continues, and will until her death continue (putting her possible marriage out of the case), to be entitled to receive rents and profits. Unless her dower be extinguished, and I think it is not, she will continue to be entitled to apply rents and profits *pro tanto* to what she is entitled to as dowress, and be liable only to account for the residue.

Judgment.

BLAKE, V. C.—I am unable to come to the conclusion that the widow is, under the will in question, bound to elect between the provisions thereby made for her and dower. I cannot say that the case is brought within the rule laid down by Vice-Chancellor *Kindersley* in *Gibson* v. *Gibson* (*b*), that it is "clear and beyond reasonable doubt * * that there is a positive intention to exclude her from dower, either expressed or clearly implied." The case is not brought within the rule,

(*a*) 1 Ves. Sen. 262.

(*b*) 1 Drew. 42, 52.

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"that the intention to exclude the wife from dower must be apparent on the face of the will." The testator disposes of the whole of his property, but this does not embrace the interest which the wife has—her dower. He makes an ample provision for the wife, but he may have desired so to do, and while supporting her amply out of his estate be willing to leave her in addition the provision which the law gives her. The mode of dealing with the estate allows the wife to enjoy the same with the children until the coming of age of the eldest, when provision is to be made, which does not interfere with the enjoyment of the wife as dowress, of such part of the estate as would come to her in that capacity. The division of the estate amongst the children as tenants in common is not to take place until the death or marriage of the widow, when such arrangement could be carried out without difficulty, and if the widow married again her share could easily be assigned to her. I do not find on the will the distinct intention which, under the authorities, is made requisite in order to deprive the widow of the right which is not lightly to be taken from her.

Judgment.

By her answer the defendant *Catharine Jackes* claimed that under certain circumstances she was entitled to dower in some of the land in question in the suit, and by the tenth clause of the decree it was referred to the Master to make "inquiry as to whether the defendant *Catharine Jackes* is entitled to dower out of any, and if so, out of what lands of the said testator, and the amount of the same." Upon this decree being made each person or party to it becomes an actor, and presents the claim to which he may consider himself entitled. As to this claim so presented he occupies the position of the plaintiff in a case. It does not seem to me that we can hold that this is not pursuing her remedy as the means of acquiring the right of dower by the defendant claiming as dowress. The remedy has been barred by lapse of

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time under the authorities referred to by my brother *Proudfoot*. It is to be observed that, in this case, the only possession of the widow was that which arose from her jointly with the co-trustee and co-devisee under the will from time to time leasing portions of the property of the estate, or dealing therewith jointly with him under the supposition they had power to do so. It would not be reasonable to trace such dealing with the estate to the widow as dowress, so as to prevent the Statute of Limitations running against her. I think that what was asked by the answer was the remedy, that this was given to her by the decree, and that she was actively enforcing that which the statute says she has lost by effluxion of time. Amongst other cases which deal with the principle involved are: *Mason* v. *Broadbent* (*a*), *Edmunds* v. *Waugh* (*b*), *Ford* v. *Allen* (*c*), *Re Stead* (*d*).

Judgment

I think, however, it is reasonably clear that where the plaintiff claims an account of rents and profits against *Catharine Jackes*, she can set off against this charge the amount of the rents and profits properly attributable to her claim for dower. In *Hamilton* v. *Mohun* (*e*) the Lord Chancellor says: "There ought to be an allowance of the third part of the profits for dower to the mother, or her representative. * * And as to the want of a formal assignment of dower, that is nothing in equity; for still the right in conscience is the same; and if the heir brings a bill against the mother for an account of profits, it is most just that a Court of Equity should, in the account, allow a third of the profits for the right of dower." On this principle this Court has acted frequently when taking accounts such as the present. I think it is founded on authority, and should be followed here. I concur in the conclusion at which my brother *Proudfoot* has arrived on the other points

(*a*) 33 Beav. 296. (*b*) L. R. 1 Eq. 418. (*c*) 15 Gr. 565.
(*d*) L. R. 2 Ch. Div. 718. (*e*) 1 P. W. 122.

argued before us. I think the order made should be modified in the manner above indicated, and that the costs of the rehearing should be paid by the estate, also the costs of the appeal from the Master. 1879. Laidlaw v. Jackes.

PROUDFOOT, V. C.—I do not propose to add anything to what I said upon the hearing of the appeal from the Master's report, except upon the subject of the Statute of Limitations.

In the report of the case, 25 Grant 293, the several statutes limiting the right for recovery of dower were referred to, and my impression was that the 4 Wm. IV. ch. 1, assuming it to be applicable to dower, had been superseded by the 32 Vict. ch. 7, secs. 22, 42, O., so that the remedy only was barred without extinguishing the right. The course pursued by the revisers of the Ontario Statutes seems to favour this view. The Rev. Stat. Ont., ch. 108, sec. 4, prohibits bringing an action for the recovery of land or rent but within ten years from the accruer of the right of entry, and by sec. 15, the right is extinguished if no action is brought within that time. But the same limitation is imposed upon an action for dower without providing for the extinction of the right. It may fairly be assumed therefore that the action of dower is not one of the actions contemplated by sec. 15, and that though there may be no means of actively enforcing it, the right remains unaffected. And with regard to equitable estates, the same limitation is applied to suits in equity by sec. 29. Judgment.

That there was sufficient reason for the enactment of a special limitation in respect of actions for dower, will be obvious to any one who peruses the judgments in *German* v. *Grooms* (*a*,) and *McDonald McIntosh* (*b*), with the remarks upon them in *Leach* v. *Shaw* (*c*), and the harshness, not to say the absurdity, of the consequences of rigidly applying the statute, under the

(*a* 6 U. C. R. 414. (*b*) 8 U. C. R. 388. (*c*) 8 Gr. 494.

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circumstances of this case, relieves me from any hesitation in putting a strict construction upon its language.

The property that was acquired by the testator after making his will, and that did not pass under it, consisted of two valuable farms, (sold recently under the decree in this cause, one for $14,600, and the other for $12,900,) and were incumbered by mortgages made by the testator, in which, as I understand, the wife joined to bar her dower.

After the death of the testator the widow resided upon one of these farms, at Eglinton, which was the homestead for many years, and the eldest son, one of the executors, also resided there. The younger children also lived with the widow, and the homestead farm seems to have been worked for the general benefit of the family. The rents of the other farm and of the devised property were collected by the executor and handed by him to the widow, the executrix, who applied them for the purposes of the estate. The youngest child only attained majority in 1873.

Judgment

To apply the statute at all it must appear not only that the dowress was not in possession of her dower, but that some one else was in possession; for it is a general rule that the "statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute:" *Smith* v. *Lloyd* (*a*), *Lloyd* v. *Henderson* (*b*). In the present case the dowress was an executrix and her son an executor of the will of the testator, and they were in possession of the devised estates as trustees under the will down to the filing of the bill in this cause, for after the youngest child attained twenty-

(*a*) 9 Exch. 562. (*b*) 25 U. C. C. P. 25[illegible]

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one the executors were still to retain possession, and after making ample provision for the support of the widow, the executors were to pay the remainder of the annual income and profits to the children (*a*). But, if my conclusion is correct that the dowress was not put to her election, all that the testator intended to devise was the estate subject to her dower, and she retained her dower paramount to his will. As executrix or trustee she had a joint possession with her son of the devised estate, *i. e.*, subject to her dower. Neither she nor the executor were in possession of the dower under the will. But the whole estate was possessed by them, and it has recently been held by the Chancellor in *Foley* v. *Foley* (*b*), that where two persons interested in an estate reside upon it, though one only exercises sole control as to renting and working the property, that the possession will be ascribed to the persons having, or according to, the title. The application is obvious. The dowress and her son were in possession of the devised estate as trustees, while the dowress was solely in possession of the dower.

Judgment.

It is said, however, that she could not be in possession as dowress until the dower was assigned to her, as was held in *McDonald* v. *McIntosh* (*c*). That seems to be so when she is proceeding in an action at law; but in *Hamilton* v. *Mohun* (*d*) it is said, "as to the want of a formal assignment of dower that is nothing in equity, for still the right in conscience is the same." And that, and other decisions following it, allowing the widow to deduct one-third of the rents of the estate of which she has been in possession, really acknowledge that she has been in possession of one-third as dowress, although the dower had not been technically assigned. It is not a set-off of a debt due from the estate to her, for there is no such debt. The

(*a*) 22 Gr. 172.
(*b*) 26 Gr. 463.
(*c*) 8 Gr. 388.
(*d*) 1 P. W. 122.

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estate owes her nothing. Her right is superior to that of the heir, devisee, or alienee. And she was only held liable to account for the rents, less her dower, her own right. She must, therefore, in this Court, be deemed to be in possession of her dower, *qua* dowress, all the time.

The possession of a trustee is the possession of those beneficially entitled, as against third parties, but it would be pushing that principle to an extent I never before heard to be contended for, and so far as I know is not supported by a single authority, to say that it is the possession of the beneficiaries as against the trustee himself, where he has an interest not comprised in the trust. If the testator had assumed to devise the estate so as not to be subject to dower, and the dowress had accepted the trust, there might be ground for argument that she had waived her right. But that is not the case here. Nothing passes by the will at all interfering with her right, and to say that her possession is to have

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the effect of extinguishing her right, by vesting it in her as trustee, is a conclusion that I do not accept.

In regard to the properties of which the testator died intestate, the trustees took nothing under the will, though they were in possession of them, and they assumed to treat them as if they had passed, and as they supposed they had passed, by the devise. The legal effect of the possession of the executor would be that of one tenant in common, so far as his share was concerned. And so far as the dowress was concerned she would be a trespasser, unless her possession could be referred to some legitimate title. And the case of Doe v. *Newman* (*a*) is a conclusive authority that in such a case, in the absence of anything to shew the contrary, she will be assumed to have been in possession as guardian in socage of the minor children. Under our present law of inheritance it is probable

(*a*) 3 Wils. 516.

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that the mother would not be considered as the guardian in socage of her infant children where the inheritance comes through her, because she may now be entitled to the inheritance as their heir, and the guardians can only be of those "*qui conjuncti sunt jure sanguinis, et non jure successionis.*" (*a*) But where the inheritance comes through the father as here, the mother could only take an estate for her life, which would form no objection to her being guardian. And this guardianship, though it may end when the minor attains fourteen, yet, unless another guardian be appointed by election of the minor or otherwise, it will continue during minority (*b*). But the estate descended subject to her dower, and as an assignment of dower is of no consequence, as we have seen in this Court, her possession would also be ascribable to her character as dowress. And, in like manner, as regarded the devised estates, her constructive possession of the estate for the infants can by no fair reasoning be considered to have extinguished her own title. What she possessed for the heirs was the estate subject to her dower, and if she possessed the whole estate she possessed the remainder in her own right, as dowress.

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I conclude, therefore, that both as to the devised and descended estates, the heirs or devisees were not in possession in such a manner as to bring the statute into operation.

The statute in terms only limits the time when an action or suit is brought by the dowress. The cases at law that were cited, and many more that I have referred to, were all cases where the dowress was out of possession, and was suing for her dower against the person in possession, and so were within the express terms of the statute. The statute would not appear to apply to the case of a dowress brought unwillingly before the Court. It might properly be held to apply

(*a*) Bract. lib. 2, ch. 37, sec. 6. (*b*) Harg. Co. Litt. n. 88*b*.

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where the dowress is a defendant, if according to the practice of the Court she is to be considered as actively asserting rights against the testator's estate. Here she is doing no such thing. The cases where the Court stays actions at law after a decree for administration are, in my judgment, no authority for considering her as bringing an action. The principle is, that the decree is in the nature of a judgment for all creditors: *Paxton* v. *Douglas* (*a*); and if the decree be not such as to enable the creditor to prove his claim, he will not be restrained: *Rush* v. *Higgs* (*b*). The decree in this case was for administration of the devised estates and for partition of the descended estates. What could the dowress have proved under such a decree so far as the administration was concerned? There was no debt due to her from the estate of her husband. Her right was paramount to the will. For any arrears her claim might be against the heirs or devisees, in possession, if they had been in possession, but not against her husband's estate. In regard to the partition, it has never been held, I think, that the rule applies. Under the Partition Act she might have filed a bill for partition, R. S. O., ch. 101, sec. 49, and notwithstanding being made a defendant in such a suit, she might have instituted proceedings of her own, with no apprehension of being stayed by an injunction. But at all events this only applies to the descended estates.

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In *Edmunds* v. *Waugh* (*c*), it was held by *Kindersley*, V. C., that where mortgaged property was sold under a power of sale by the trustees of the mortgagee and the money paid into Court in a suit for the administration of the mortgagee's estate, and the trustees petitioned for payment out of the fund, the trustees were entitled to more than six years arrears of interest, and that the petition was not a suit to recover the arrears within the Limitation Act. In *Ford* v. *Allen*

(*a*) 8 Ves. 520. (*b*) 4 Ves. 638. (*c*) L. R. 1 Eq. 418.

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(*a*), following that case, it was held that a mortgagee selling under his power of sale might retain for more than six years interest.

Re Stead's Mortgaged Estates (*b*), requires somewhat more consideration. Mortgaged property was taken by the corporation of Leeds, and, being unable to get a title from the owner of the equity of redemption by reason of the mortgagee having possession of the title deeds, they paid the money into Court. The mortgagee petitioned for payment of principal and interest for more than six years. *Malins*, V. C., held that the petition was in the nature of a suit to recover principal and interest, and, therefore, that only six years arrears were recoverable; but entirely approved of *Edmunds* v. *Waugh*. The case before him was the case of an equitable mortgage by deposit of title deeds, and the mortgagee could not have sold—could not have obtained possession without a suit. The money paid in under the Lands Clauses Act retained the character of land, and the mortgagee was equally powerless to get hold of it without a suit, as if it had not been taken by the corporation.

Judgment.

None of these reasons apply to the case before us. The dowress is not petitioning. She, indeed, claims dower in her answer. But that is only for the purpose of shewing what was to be administered, that the testator's estate was subject to dower. She did not require to take proceedings to get possession; she was already in possession. All she wanted or asked in effect was to be let alone; if the property was to be sold, that it should be sold subject to dower; or if sold free from dower, that her right should be recognized. The principle of *Edmunds* v. *Waugh* therefore applies.

I hesitate to acquiesce in that part of the judgment in *Re Stead's* Mortgaged Estates, where the Vice-Chancellor, admitting that the petition was neither a distress,

(*a*) 15 Gr. 565.

(*b*) L. R. 2 Ch. D. 713.

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action, nor suit, yet held that as at the time the Act passed there was no other proceeding possible than those mentioned, and all were enumerated, it must be assumed that if this particular course could then have been taken it would have been mentioned. The true rule appears to be that stated in *Edmunds* v. *Waugh*, that the Act takes away existing rights and must be construed with reasonable strictness. The intention of the Legislature was, that if a man chose to let interest run in arrear for more than six years, and then come into a Court of Justice to recover the interest, he should only be entitled to recover six years' interest. All this applies to the present case. The dowress has allowed nothing to run in arrear, she has been allowed to account as if she had deducted annually her dower. And it must be taken she did deduct annually. She does not come into Court seeking actively to enforce any right. There seems to me no reason, therefore, for applying the principle of *Re Stead* to her case.

Judgment.

I think, therefore, that the dowress should not be considered in any sense an actor in the proceedings. All she asks the Court to do is, to abstain from interfering with her right in the devised estates—to permit her to remain in possession, and as was done by Lord *Hardwicke* in *Graham* v. *Graham* (*a*), where a dowress was in possession as trustee for her son, and in receipt of the rents and profits, by allowing her not only to deduct one-third as her dower for the past, but declaring her entitled to make such a deduction for the future. And as to the descended estates that they should be partitioned subject to her dower; or that all that descended to the heirs, and that alone, viz., the estates subject to her dower, should be allotted to them.

But the Statute of Limitations does not begin to run until there is some person in existence against whom an action can be brought. And an action for dower

(*a*) 1 Ves. 262.

must be brought against the tenant of the freehold. It was argued, and I think correctly, that the executors or trustees took a fee in the devised estates, and the dowress was one of these trustees. She could not bring an action against herself, nor against herself jointly with the other trustee. She could not assign the dower to herself. As to the descended estates; having barred her dower in the mortgages, she could bring no action against the mortgagees or the tenants of the freehold until the mortgage was paid off. And if she could have brought a suit in this Court in regard to her dower in the equitable estate the execution of the decree must have been suspended till the same period, and the statute could not be held to apply to a suit which could not receive effect immediately upon judgment being given. But being in possession as guardian in socage, she was under the same disability as in regard to the devised estates. Doe v. *Newman* (*a*), establishes this in regard to an action at law, and I apprehend the same rule is equally operative in equity. The statute would not, therefore, seem to have begun to run at all as to the devised estate, and not until a period within the prescribed limit as to the descended estates.

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Among the civilians it was much disputed whether it was the *dominium directum* or the *dominium utile* that was affected by the laws on the subject of usucaption or prescription. But there was no doubt that whatever interest was affected was not only extinguished, but transferred to the possessor who had occupied for the legal period. He became the *dominus* or owner of the property under the express language of the texts. (*Warnkönig* Comm. Jur. Rom. Priv. 1, 404; *Savigny*, Traité de Droit Rom. 5, 376.) Our statute has no equivalent expression: *Gray* v. *Richards* (*b*). The right of action may be barred, the estate may be extin-

(*a*) 3 Wils. 516.

(*b*) 2 Sup. C. R. 431.

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guished, but there is no transfer of it to any one. In this case, as to the descended lands it is true, if the right of the dowress be extinguished, the heirs would probably be entitled to the land unaffected by it. It would not be extinguished unless the heirs had been in possession, but the only possession that could be ascribed to them was of the character already remarked upon, and not of such a nature as to bring the statute into operation. If the remedy only is barred, then something more than possession is required to give to the heirs the right of the dowress, and by selling the estate and dividing the proceeds among the heirs, they get something to which they have no title.

Judgment.

Under the circumstances of this case, I think that the Statute of Limitations has not the effect of putting an end to the right of dower. Upon the other matters discussed, I retain the opinion already expressed in the report of the case, and therefore think the order should be affirmed, with costs.

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GREET v. CITIZENS' INSURANCE COMPANY.

Fire insurance—Incendiarism—Answers by applicant for insurance—Mortgagee—Covenant to insure—Assignment of receipt or policy—Obscure notice.

A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance when effected. Therefore where a mortgagor enters into such a covenant it is not necessary, in the interest of the mortgagee, that an assignment of the policy or interim receipt should be actually made; it is sufficient if the insurers in case of loss have notice of the fact before settling with the mortgagor; and if after being notified of the rights of the mortgagee they pay over the insurance money to the mortgagor or a transferee of the receipt or policy, they do so at their peril; and such payment will be no answer to a suit at the instance of the mortgagee.

In effecting insurances the applicant is bound to make true answers to the questions put by the company; if he does not and misrepresents the risk in any way, it will invalidate the policy.

The owner of a mill had received an anonymous letter threatening to burn the mill, which was attributed to a worthless drunken character who had made threats against the owner, and who was in the habit of threatening people, but whose threats no one heeded, so that the owner took little or no notice of either the threats or letter; and on applying for insurance one of the questions put by one company was, "Have you any reason to believe that your property is in danger from incendiaries," and by another company, "Have you any reason to suppose, &c.," and the answer to each was in the negative.

Held, not an untruthful answer, or such a misrepresentation of the risk as could vitiate the policy. (But)

Where the question put by a company was, "Is there any incendiary danger threatened or apprehended," and the answer to that was also in the negative:

Held, that this was such a misrepresentation as avoided the policy, although the answer was given with no fraudulent intention, and in the honest belief that no such danger did exist.

In the application for insurance prepared by the company there was inserted, in very small type, a notice that the estimated value of personal property and of each building to be insured "*must be stated separately*," &c., which had escaped the notice of the applicant, and such separate valuations, &c., were not given. The Court being of opinion that although this provision might not have been framed in order to elude observation, it was certainly calcu-

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lated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favour.

Riach v. *The Niagara District Mutual Insurance Co.*, 21 U. C. C. P. 464, referred to and approved of.

Thomas T. Greet, William Smith, Thomas Worswick, and *John Crowe,* as liquidators of the Worswick Engine Company, (limited,) instituted proceedings in three separate suits against *The Citizens' Insurance Company of Canada, The Royal Insurance Company,* and *The Mercantile Insurance Company; John Brodie* being also added as a defendant. The material facts and circumstances, with the exception of that mentioned in the judgment as to *The Mercantile,* were the same in each case; the bill in each praying that it might be declared that the plaintiffs, by reason of the covenant for insurance contained in the mortgage mentioned in the judgment, were entitled to a lien upon the insurance moneys mentioned in the interim receipt issued by each company.

Statement.

The Citizens' Insurance Company and *The Royal Insurance Company,* in addition to the defence set up by the other company, alleged that *Brodie* had assigned the money due under the interim receipt granted by them to the Dominion Bank, to whom, as stated in the judgment, the amount agreed upon to be paid in discharge of their liability was paid by the company.

Brodie, in his answer, in each of those cases swore that when he settled with these defendants he did so under pressure, and told the managers of the companies that he accepted payment of the sums offered under protest.

The causes having been put at issue, came on for the examination of witnesses and hearing at the sittings of the Court at Guelph, in the Spring of 1879.

Mr. *Ferguson,* Q. C., Mr. *K. McLean,* and Mr. *W. Cassels,* for the plaintiffs.

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Mr. *Moss*, Mr. *Rae*, and Mr. *Barwick*, for the defendants, *The Citizens*, and *Royal Insurance Companies*.

Mr. *Moss* and Mr. *Miller*, for the defendants *The Mercantile Insurance Company*.

Dec. 23rd.

SPRAGGE, C.—The plaintiffs are liquidators of the Worswick Engine Company. The property insured was a steam grist mill. The insurance was by *John Brodie*, owner of the mill. The sum insured with the defendants was $2,000; the aggregate of the sums insured with the defendants and other offices was $12,000. The value of the property insured was stated in the application to be $20,600. The bill is filed on an interim receipt, dated 25th February, 1878, insuring the premises provisionally until the 25th of March in the same year. The premises were burnt down on the 10th of March. No policy was ever issued. The defendants have no statutory conditions to their policies.

Judgment

The machinery, engine, and boilers, used in the mill were furnished by the Worswick Engine Company, and $8,000, a portion of the price, was secured to the company by mortgage on the mill and machinery, dated 13th of December, 1877. The mortgage contains a covenant "that the mortgagor will insure the buildings on the said lands to the amount of not less than $8,000 currency," and it is claimed by the plaintiffs that under the Short Form of Mortgage Act, R. S. O., ch. 104, the plaintiffs are entitled to call for an assignment of policies, if policies have been issued, and of right to demand policies or the payment of the sum insured to the extent of the mortgage—that in equity they are assignees of the insurance money.

The plaintiffs allege that the Worswick Engine Company did, on the day after the fire, inform the defendants of the fire, and that they claimed the insurance money under their mortgage.

The defendants deny that they had any notice of

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the claim of the Worswick Engine Company to the insurance money, and allege that on the 16th of December next after the fire, they paid to the Dominion Bank, as assignee of *Brodie*, a sum agreed upon in satisfaction of his claim for loss; and it appears in evidence that the defendants did compromise with him, and pay to his order a sum agreed upon.

I infer from the evidence that this payment was made in forgetfulness of a notice received by the defendants immediately after the fire. A notice, dated Guelph, 11th March, 1878, was written to them in the following terms:—

CITIZENS' INSURANCE COMPANY, Montreal.

GENTS,—We are sorry to have to inform you that the flouring mill belonging to *John Brodie*, Esq., Moorefield, lately built by us, and upon which we hold a mortgage and claim upon the insurance in your company, was destroyed by fire on the morning of the 10th instant.

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Yours truly,

WORSWICK ENGINE COMPANY.

W. H. BAIFEUILLET, *Secretary.*

And that they received this letter, is proved by their sending it on to their Toronto agent in a letter from their head office, Montreal, dated the following day.

It will be observed that this notification is not from *Brodie*, but from the company; in itself an intimation that they were interested in the claim for loss; and they state their interest thus, "upon which (the mill) we hold a mortgage and claim upon the insurance in your company." It does not state that the mortgage contained a covenant by the mortgagor to insure, but it does state the fact of a mortgage, and that the mortgagees claimed to be entitled to the insurance money. The notification, though less formal than it might have been, was sufficient to warn the defendants not to pay the money to *Brodie;* and if it turned out, as it does turn out, that the claim of the Worswick Company was

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a valid one to the extent of their mortgage debt, the parties receiving the notice disregarded it at their peril. It is not proved that the Worswick Company authorized *Brodie* to receive the insurance money. Their communications with him were only in the way of inquiry, and it does not appear that the defendants were even informed of them. They seem to have treated directly with *Brodie*, ignoring, and probably forgetting the claim made by the Worswick Company, I think they did so in their own wrong, and that their payment to *Brodie* is no bar to the plaintiffs' suit.

These defendants, *The Citizens' Insurance Company*, made no objections or inquiry, (as did *The Royal Insurance Company*) upon being notified of the claim of the *Worswick Company*. If they had, they would, no doubt have received the same information as was given to the "*Royal*" in answer to the inquiries from that company. The Worswick Engine Company receiving no letter of inquiry from *The Citizens*, would naturally assume that the company needed no further information. It was unreasonable and wrong to pay *Brodie* after being notified as they were.

Judgment.

Then as to the title of the mortgagees to receive this insurance money. The case of *Watt* v. *The Gore District Mutual Insurance Company* (*a*), was decided before the passing of the short forms of Mortgages' Act, and in that case the late Vice-Chancellor *Lsten* said "I think, and it is conceded that the covenant to insure created a lien on the insurance moneys in favour of the plaintiff (a mortgagee) to the extent of his debt." The Act amplifies the short form, *inter alia*, thus: "and will on demand, assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators, or assigns, the policy or policies of assurance, receipt or receipts thereto appertaining." It is in evidence that *Thomas Worswick*, on behalf of the mortgagees

(*a*) 8 Gr. 523.

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did, shortly after the fire, demand from *Brodie* more than once an assignment of the interim receipts; it was not refused, but the receipts were not forthcoming. The mortgagees placed themselves in the right, and were in the same position as if the interim receipts had been actually assigned to them.

I think the principles laid down in the American cases cited by Mr. *Cassels* are good law. *In re Sands Ale Brewing Company* (*a*), there was a covenant in a mortgage to insure, and to cause the insurance money in the event of loss to be made payable to the mortgagee. The insurance was effected, but not assigned, nor made payable to the mortgagee. The Court asks "Can this make any difference?" and quotes with approval from Mr. *Parsons's* book on Contracts, a passage which I think states correctly the right of a mortgagee in such a case as this: "that when a mortgagor is bound by the mortgage contract to keep the premises insured for the benefit of the mortgagee (which is clearly the effect of our Act), and does in fact keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee nevertheless has an equitable interest in, and a lien upon the proceeds of the policy, which a Court of Equity will enforce for his benefit." And the Court said, I think correctly: "Equity made the assignment the moment the insurance was effected, if the mortgagor did not do it."

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Cromwell v. *The Brooklyn Fire Insurance Company* (*b*), is a case to much the same effect, as is also the case of *Garden* v. *Ingram* (*c*), before Lord *St. Leonards*. In *Carter* v. *Rockett* (*d*), Chancellor *Walworth* expressed himself thus: "The assured by an agreement to insure for the protection and indemnity of another person, having an interest in the subject of the insurance, may

(*a*) 3 Bissell, 175.
(*b*) 44 N. Y. 42.
(*c*) 25 L. J. Chy. 478.
(*d*) 8 Paige, 437.

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unquestionably give such third person an equitable lien upon the money due upon the policy to the extent of such interest." I think it clear that the covenant, interpreted by the Act does give such equitable lien, and that whether there be an actual assignment of the policy or interim receipt or not.

Another objection to the plaintiffs' claim is, that in the application the property is over-valued. The words of the application upon this point are "The value of the property being estimated by the applicant." We find how, in the judgment of the Common Pleas, such an estimate of value is to be judged of, in *Riach* v. *The Niagara District Mutual Ins. Co.* (*a*). *Hagarty*, C. J., says of it: "I think all we can hold the plaintiff to here is that the present estimated value is his honest estimate at the time, not that it is warranted to be absolutely true." Mr. Justice *Gwynne's* language is: "I cannot think that an estimate, if morally and sincerely made in a belief of its truth, is to avoid a policy because a jury cannot be got to concur with the owner in the estimate he puts upon the property;" and he concurs in granting a new trial for the purpose of enabling a jury to express their opinion whether or not the estimated value stated by the plaintiff was a fair estimate, honestly made with a reasonable belief in its truth entertained by the plaintiff."

Judgment.

In the application the estimated value was apportioned as follows:—

	Valuation.	Sum to be Insured.
On building.....	$ 4,000	$ 444 33
On machinery, exclusive of boiler and engine...	12,000	1,333 34
On boiler and engine...	4,600	222 33
		$2,000 00

This estimate of value is sustained by the evidence of *Brodie*, also of *Thomas Worswick* of the Worswick

(*a*) 21 C. P. 464.

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Engine Company, and of *Daniel Hunter* who had tendered for the making of the same machinery. There is also the evidence of two others, *Runciman* and *Gill*, who were appointed to make an estimate together. *Runciman's* own estimate was $18,203, which he calls a very low estimate; but he says he reduced it to $17,466, to meet the views of *Gill*. I was not favourably impressed with the evidence of *Gill;* and other evidence confirmed my unfavourable impression. *Runciman* says that he, *Gill*, had made omissions in his estimate which *Runciman* pointed out to him and convinced him of his errors; and *Hunter* says that *Gill* told him he was not there to settle with *Brodie*, but was there in the interest of the insurance companies. I thought the estimate of *Gill* entitled to less weight than that of any of the other witnesses upon this point.

But Mr. *Rae* makes this point; that supposing the aggregate valuations not to be excessive, still an excessive valuation of any item would avoid the policy, and he points to the following words in the application:— "The estimated value of personal property, and of each building to be insured, and the sum to be insured on each, *must be stated separately.* When personal property is situated in two or more buildings, the value and amount to be insured in each, *must also be stated separately*, and the same description should also be given of the building containing the property as when insurance is wanted on the building itself. Two-thirds only of the actual value to be insured."

Judgment.

Now, I ran my eye twice over the application before I discovered these words. I found them at last in very minute type under the head "Agency application No.," and below the words cited, in conspicuous German or old English characters, come the words "application of *John Brodie*," &c.

I refer, without repeating it, to what I said, in *Butler* v. *The Standard Ins. Co.* (*a*), as to the legislation in

(*a*) 26 Gr. 341

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respect of dealings between insurance companies and those insured by them, as indicating that the latter were to be regarded as a class generally wanting in care and circumspection, and needing the protection of the Legislature; and I refer now to the careful provision made in the statutes on this subject, that where the insurance company desires to vary from the statutory conditions it must be done in conspicuous type, and in ink of a different colour. Broadly, this means that the insured ought not to be bound by anything in his contract that is not fairly brought under his notice. This provision in the small type is, I will not say framed in order to elude observation, for that might be unjust to the framer; but it is certainly calculated to elude observation; and, I think, eluded the observation of the leading counsel for the defence. It would certainly escape the notice of any but a very vigilant applicant for insurance, and the absence of vigilance is a characteristic of the class. In my opinion, the defendants are not entitled to the benefit of the provision in question, if, indeed, it would operate to their benefit, and turn the scale against the insured.

Judgment.

But after all it amounts only to this, that in Mr. *Rae's* calculation the value of the machinery would have to be taken at about $13,000, instead of $12,000, the sum set out in the valuation. I think it by no means clear that, adding to the value of the machinery furnished by the Worswick Engine Company the value of that furnished by *Brodie* himself, and the hardware and scales and the freightage, the value of the machinery might not be over $13,000. I am not sure that I rightly apprehended Mr. *Rae's* calculation, but I feel clear that if it should appear that there was an over-valuation of the machinery, it does not appear that it was not an honest estimate of its value; and that, under the case in the Common Pleas, is all that is necessary.

Another defence is, that in stating insurances in other offices, there was an omission of an insurance in

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the Phœnix. I think the evidence does not sustain this defence. What appears upon the evidence is, that there was a temporary provisional insurance in the Phœnix, but that it was not subsisting at the date of the application to the defendants.

Another defence is, that an untrue answer was given to question 21, which is put thus: "Incendiarism: Have you reason to believe that your property is in danger from incendiaries?" The answer is, "No."

Evidence is given to contradict this. There is evidence of threats having been uttered to burn the mill; of an anonymous letter or letters (I think only one is made out) having been received by *Brodie*; of persons supposed to be tramps having been seen about the mill; of *Brodie's* enjoining the watchman to be very careful and furnishing him with cartridges; of his enjoining *James Bugg*, upon the occasion of his hiring him, to be very careful whom he admitted into the engine house, and how he left the furnaces at night, and telling him at the time that he had received an anonymous letter.

Judgment.

The threats appear to have been uttered by one *Peter Robb*. I think, from all the evidence respecting this man and his threats, that both are probably well described by *Martin Fox*, who says that *Robb* drinks a good deal, and adds, "He is in the habit of threatening people; no one would pay any attention to his threats, knowing what quarter the threats came from." *John Robinson* says he agrees with this, and adds, that for his part he would pay no attention to his threats. My conclusion is, that threats from such a quarter would not give a man reason to believe that his property "was in danger from incendiaries."

Besides the threats of *Peter Robb*, an anonymous letter was received by *Brodie*, whether from *Peter Robb* or from whom does not appear, and probably could not be traced. It does not appear very clearly when this letter was received — whether before or after the

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insurance; if after, it would not be material to the point; and if before, it may be that he might still truly answer that he had not reason to believe that the mill was in danger from incendiaries.

Some unknown persons, supposed to be tramps, were seen about the mill at night, and were fired upon by the watchman. With what object they were there no one could tell. It was surmised that it might be to steal, or it might be to set fire to the building. There was nothing to indicate their purpose. *Brodie's* increased vigilance upon this was natural and proper to guard against possible danger from theft or incendiarism. Assuming that this was before the insurance was effected, he might truthfully answer in the negative to this written question.

I do not attach much importance to what *Brodie*, said after the fire (assuming it to be admissible against his mortgagees) as to his opinon that the fire was the work of incendiaries. Men are apt, upon the occasion of a fire, to attribute it to incendiarism without much, if any, reason for it. He was downhearted and despondent: he spoke of having received an anonymous letter without saying when, and upon being asked why he did not advertise, he said he did not because he did not believe it. I am inclined to think that in this he answered truly. To the neighbours it was a great object to have and to preserve the mill. Only one person, *Peter Robb*, was known to have uttered threats; and he was the one person, so far as appears, known to entertain ill-feeling towards *Brodie*, and threats from that quarter appear to have been universally regarded as idle talk, unworthy of attention. Then it is to be considered that this answer is not given in a conversation between individuals, when an ingenuous man would probably say, I have heard threats uttered by *Peter Robb*—and then describe *Peter Robb* as the witnesses have described him—and I have received an anonymous letter or letters, as the

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case may be, I do not know from whom. Some tramps were at one time about the place; but I am particularly careful to guard against fire, and I conscientiously believe that the mill is not in danger from incendiaries. He might truly append this conviction to his statement of circumstances. The question upon the application makes no inquiry as to circumstances. It is a bald question: "Have you reason to believe?" And if he had not reason to believe in the danger asked about, he might, although he had heard of *Robb's* threats, and although he might have received an anonymous letter, truly answer that he had not reason to believe in the existence of such danger.

I say this, assuming for the moment that these threats of *Robb*, and the receipt of this anonymous letter, were prior to the insurances in question. The witnesses were examined particularly as to the dates; and most of them were unable to say whether they were before or after the date of the insurances being effected. From the evidence of *Brodie* himself, I conclude that he had heard of threats by *Robb* before that date. *Brodie* denies the receipt of any anonymous letter threatening incendiarism; but the weight of evidence is against him upon that point: *i. e.*, as to the receipt of one such letter. The evidence of *James Bugg* is, that *Brodie* told him on the occasion of his hiring him in December, 1877, that he had received an anonymous letter, not saying what about. (Several witnesses speak to the fact of *Brodie*, after the fire, speaking of having received an anonymous letter, but none of them speak of the date when he said he had received it.) *Harrington*, the watchman, says, that *Brodie* gave him cartridges to load his gun with, after he, *Harrington*, had reported to *Brodie* that he had seen some persons hanging about the mill; and *Baifeuillet* fixes the date of this in December or January before the insurances. *Baifeuillet* speaks also of his hearing of an anonymous letter having been received, he is

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uncertain whether from *Brodie* or from *Worswick*, and speaks as if not sure that it was from either.

My conclusion from the evidence is, that an anonymous letter (I cannot say more than one) was received by *Brodie*. *Bugg's* is the only evidence that proves such letter to have been received before the insurances; but then *Bugg* is unable to say what the letter was about. The inference, however, is, that it was about the mill, as what *Brodie* said was upon the occasion of his hiring *Bugg*, and from what he told him. Then is what he told him, and what he instructed him to do, evidence that the letter pointed to danger from incendiarism: he desired him to be careful whom he admitted into the engine house, and how he left the furnaces at night. I find from other evidence that persons supposed to be tramps were about, and that *Brodie* suspected they might mean mischief: the witnesses who speak to his mention of them are uncertain whether he spoke of danger of their stealing, or of their setting fire to the mill. *Brodie's* instructions to *Bugg* may have pointed to his guarding against danger from tramps, and is consistent with the anonymous letter he spoke of being a warning against that class.

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If, however, what *Brodie* said in relation to the fire immediately after it occurred, and to his having received an anonymous letter, is admissible as against these plaintiffs, it removes all doubt that the anonymous letter he had received was in relation to incendiarism, and both *Fox* and *Robinson* say that *Brodie* spoke of it as a threatening letter.

Granting all this in favour of *The Citizens' Insurance Company* and *The Royal Insurance Company*, I am still not satisfied that *Brodie's* answer in the negative to the question put by these companies in relation to incendiarism, was an untrue answer. I think the answer he gave to *Fox*, when he asked him why after receiving the letter he did not advertise, that he did not believe it, was a true answer. The threats of *Peter Robb* were

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regarded as idle threats unworthy of attention, and this threatening letter he regarded also as idle, at most making him additionally careful, but not leading him to believe, with his care and caution, that his mill was in danger from incendiaries. My conclusion is, that that defence is not supported in the cases against the *Citizens'* and the *Royal Insurance Companies.*

The question as to apprehended incendiarism in the application to the *Royal Insurance Company* is to the same effect as in that to the *Citizens'*. The only difference being in the use of the word suppose instead of believe. "Have you any reason to suppose," &c. My conclusion is the same, that the policy is not on that ground avoided.

The *Royal Insurance Company*, as well as the *Citizens'*, object that there was no sufficient notification of the interest of the Worswick Company in the insurance. There was correspondence between the insurers and the Worswick Company. The insurers, after being notified of the fire, object by letter of the 13th March, that they had no record of assignment to the Worswick Company "to protect mortgage or other interest."* A statement of the grounds of the claim is promptly given by letter of the 16th of the same month.† To this the insurers reply by letter of

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* This letter which was addressed to Mr. Baifeuillet, was as follows :—

MONTREAL, 13th March, 1878.

Policy 1836526, Brodie.

DEAR SIR,—We have your favour of the 11th inst., advising [of] the destruction by fire of the property insured by the above policy, but we have no record of assignment to your company to protect mortgage or other interest.

Yours truly,

ROUTH & TALEY,
Chief Agents.

† GUELPH, Ont., March 16th, 1878.

Messrs. The Royal Insurance Co., Montreal.

GENTS.—In reply to yours of the 13th instant, we beg to say, we contracted with Mr. Brodie, of Moorefield, to build him a mill, and

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the 20th.‡ [The Chancellor read these several letters.] The letter from the Worswick Company of the 16th ought to have been entirely satisfactory. The insurers chose to consider that it did not shew a title in the Worswick Company to receive the insurance money; and to act upon their own view of the law. The letter of the 16th informed the insurers of facts which gave the Worswick Company a title to receive insurance money to the extent of their mortgage debt. The insurers disregarded the information at their peril.

I have already given my reasons for holding the Worswick Company entitled; and I am now only dealing with the question whether the *Royal* was sufficiently notified. I hold that it was.

In the case of *Brodie's* insurance with *The Mercantile Insurance Company*, the question put to the applicant in relation to incendiarism is more pointed than in the applications to the *Citizens'* Company and the *Royal*. It is: "Is there any incendiary danger threatened, or apprehended?" An answer in the negative where there is one or the other, is untrue. If the evidence

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he gave us a mortgage to secure the payment, and covenanted to insure the property for our protection as well as his own, and we presume the policies would have been assigned to us on their arrival here.

Trusting this explanation will be satisfactory.

We remain, Sirs,

Yours truly,

WORSWICK ENGINE CO.
Per T. W.

‡ MONTREAL, 20th March, 1878.

Worswick Engine Company, Guelph.

Re Policy, 1836526, Brodie.

GETNLEMEN,—We are in receipt of your favour of the 16th inst., contents of which have attention.

We understand the position you are placed in so far as you have related it to us, but as already advised, we have no record of any transfer of our policy to your company by Mr. Brodie, nor does the application for the insurance bear that it was intended for other protection of interest than his own.

Yours truly,

ROUTH & TALEY,
Chief Agents.

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to which I have referred be admissible, *Brodie* regarded the letter of which he spoke to *Bugg* as threatening incendiarism, danger from incendiarism was the meaning that any one would attach to the words "incendiary danger threatened." An answer in the negative would be an untrue representation. I cannot accede to Mr. *Ferguson's* argument, that the question meant to be asked is, whether the threat or threats of incendiarism were such as to involve danger, looking at the quarter from which they came. The question is to the bare fact whether threats of incendiarism have been made, and to that they were entitled to an answer, in order that they might, with that fact before them, judge of the risk. The applicant might have properly added any such circumstance, if true, as would shew that the threat involved no real danger; but whatever his own opinion might be upon that point, he was bound to answer truly as to the fact upon which he was interrogated.

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There is no doubt upon the evidence that *Robb's* threats were known to *Brodie* (some of them, I gather, were made to him personally,) before the insurance with the Mercantile was effected; and however lightly he might regard them, he was bound to state the fact in answer to the question put. If the evidence of what was said by *Brodie* after the fire, as to the character of the letter he received, be admissible as against these defendants, his answer to this question would be proved to be all the more untrue; but the fact of *Robb's* threats is sufficient to establish the untruthfulness of the answer.

In my opinion this answer avoids the insurance with *The Mercantile Insurance Company*, and that the bill against that company must be dismissed, and with costs.

ROGERS v. ULLMANN. 1879.

Principal and agent—Master and servant—Partners.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-third of the losses to the extent of $3,000, all losses above that amount to be borne by the defendant, and he agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the *bona fides* of a settlement which he had been induced to make with the defendant, acting through an agent, and the Court being satisfied that the settlement had been secured by the fraudulent misrepresentations of such agent, *held* the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the Statute 36 Vict. ch. 25, s. 1 (R. S. O. ch. 133, sec. 3).

In Nov., 1876, the plaintiff, *James H. Rogers*, entered into an agreement with the defendant *Ullmann*, an extensive fur dealer in Germany, by which the former agreed to purchase furs for the latter with money advanced to him by the defendant for the purpose. The plaintiff had the option of forwarding the goods to *Ullmann's* place of business in New York or Leipsic, the defendant to sell them to the best advantage, and, after deducting expenses and interest on the advances, to share the net profits with *Rogers; Rogers* was also subject to losses which might occur to the amount of $1,000. One *Stearne* was a party to the agreement, but there was no joint interest between him and plaintiff, and each was liable only for the money advanced to himself. After the business had been carried on on this basis for some time *Ullmann* empowered *Stearne* to effect a settlement with plaintiff, which was done, *Rogers* receiving $500 for his share of the profits of the enterprise. *Rogers* was prevailed upon by *Stearne* to accept this sum by representations that the operations of defendant had been most disastrous; that by reason of the depression in the fur trade it would be impossible for *Ullmann* to dispose of the

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stock of furs, except at a great sacrifice. The plaintiff having subsequently obtained information that matters had been pictured much worse than they were in reality, and that he had been deceived into the settlement of his claim, instituted proceedings against *Ullmann* to recover further sums which he claimed had been gained during the time the connection had subsisted. He claimed also that he had a right to a statement of the accounts of the business, so that he might know really what his position was in the matter.

Ullmann denied this right. He said that the fur market had been affected disastrously by the Turko-Russian war, and that having settled the matter with the plaintiff, and held the furs at his own risk, he had a right to any profits accruing.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Toronto, in November, 1879. In the course of the evidence it appeared that *Stearne* had made false representations as to the profits of the venture to the plaintiff in order to secure a settlement, and had told him that he had taken $500 for his share of the profits, whereas it appeared from *Ullmann's* evidence that the agreement entered into between them a few days before the agreement with plaintiff, was, that *Stearne* should receive $4,000 for entering upon the venture, whatever might be the results.

It appeared also that in his instructions to *Stearne* to settle with *Rogers*, *Ullmann* had expressed his willingness to pay $1,000 or even somewhat more to have the affair closed.

Mr. *Rose* and Mr. *J. H. McDonald*, for the plaintiff.

Mr. *Moss* and Mr. *Rae*, for the defendant.

January 7th, 1880.

PROUDFOOT, V. C.—In November, 1876, the plaintiff entered into an agreement with the defendant, by which he agreed to purchase furs for the defendant

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with money advanced to him for the purpose. The plaintiff had the option of forwarding them to the defendant at his house in New York, or in Leipsic; and the defendant agreed to sell and dispose of the goods to the best advantage the market afforded, and, after deducting expenses, and interest on advances, to share the net profits and interest. One *Stearne* was a party to the agreement, but there was no joint interest between the plaintiff and *Stearne*, and each was only liable for money advanced to him, and the agreement, though in one instrument, is, I think, a separate agreement with each.

The plaintiff authorized *Stearne* to make a settlement for him with the defendant, which he did for $500; and the plaintiff has received or got the benefit of this sum.

I determined at the hearing that the consent of the plaintiff to this settlement was obtained by the defendant and his agent through fraud and misrepresentation, and that it should not be permitted to stand in the way of the plaintiff asserting his rights, whatever these may be. Judgment.

But it was contended that the plaintiff had no right to an account; that the agreement was affected by the R. S. O., ch. 133, sec. 3, by which it is provided that an employer giving to one in his employment a share in the profits in lieu of remuneration, the employed shall have no right to investigate the accounts or interfere in the management of the business, and the account stated by the employer shall not be impeached upon any ground whatever.

The statute has not been pleaded, and it is perhaps open to the objection that unless pleaded it cannot be relied upon as a defence.

But assuming that it may be relied on, I do not think this case comes within it.

The statute purports to regulate agreements between masters and workmen. The plaintiff is an extensive

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fur merchant here, and he can scarcely be considered as coming under the denomination of a workman, but the language of the third section is probably wide enough to include him as a person employed in a business. There is a stipulation however in this agreement, from which it may be inferred that it was not to be under the provisions of the Act, as provided by the fourth section; and that is the provision that the plaintiff should share one-third of the losses up to $3,000, beyond that sum the defendant was to bear them alone. Now a master may agree with the persons employed by him to pay them a share in the profits in lieu of other remuneration, but the statute does not seem to contemplate a case where the employed are to indemnify the employer for a share of his losses. In such a case it could never have been intended to bind the employed, by a unilateral account, not only not to get anything, but also to be liable to pay a share of the losses, to compel them to rely on the simple statement of loss, with no means of ascertaining if any had actually been sustained. The agreement stipulates that it shall not constitute a partnership, but the terms of it do really form a *quasi* partnership, a partnership with a limited liability of one party in respect of losses. I think the agreement not affected by the statute.

Judgment.

It was then argued that if not within the statute the suit was one for the enforcement of a legal right, being a suit by an agent against his principal, and that the evidence not establishing any amount for damages, and the defendant having given some evidence that by his own mode of making out the account the plaintiff had been overpaid, there could only be a verdict or decree for the defendant; and that I had no jurisdiction to have the damages ascertained by a reference to the Master.

Falls v. *Powell* (*a*), seems to me to establish all

(*a*) 20 Gr. 454.

these questions in favour of the plaintiff. That case was argued before the Administration of Justice Act came into force, and the Court, after a careful examination of the authorities, came to the conclusion (p. 464), that it cannot now be contended that in order to a party being entitled to have an account taken in this Court, it is necessary to shew either that there are mutual accounts, or that the accounts are complicated, that is, in the sense of being complex, mixed up or intricate; and (p. 465) that being matter of account the jurisdiction of a Court of Equity is concurrent with that of a Court of Law, and the question in each case is, which Court is best fitted by its constitution and machinery to deal with it; and (at pp. 466-7), it is plainly a case in which there would be at law either a voluntary or compulsory arbitration, but the question is not between arbitration and the Master's office, but between a jury trial and the Master's office, and it is obviously not a fit case for a jury. At the conclusion of the judgment he notices the Administration of Justice Act, and thought it would have at once decided the case had it been in force.

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All that is strictly applicable to the present case. The jurisdiction at law and in equity is concurrent, without, or at all events with the statute, and the mode of taking the account is in the usual mode provided by the orders of the Court.

It might suffice to rest the case there, but even upon the more limited grounds upon which many of the cases have been decided, there is reason here for invoking the aid of this Court. A settlement of accounts had taken place, and unimpeached this would have been an answer to an action. It was necessary to come to this Court to set it aside, and having seisin of the case for this purpose, it is the province of the Court to give relief throughout, and not turn the plaintiff back to enforce his rights in another Court, or upon another principle.

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In addition there is also in this case a trust reposed in the principal, which attracts the jurisdiction. The reason why, in some of the cases, it was held that the agent could not file a bill for relief was that the principal trusted the agent, but the agent did not trust the principal. But where the reason ceases the rule ceases. Mr. *Addison* (Contracts, 6th ed., 595,) states the rule to be that the fiduciary character existing between a principal and an agent, authorized to receive money and bound to keep an account of his receipts, gives the principal a claim in equity to an account as against his agent; but the agent has no corresponding claim in equity against his principal, unless he can show that the contract between them required the keeping of mutual accounts, and imposed that duty upon them. That I think was the case here. The goods were to be sold by the defendant at the best market price, the net profits were to be divided, and losses to the amount of $1,000 might have been required to be made good by the plaintiff. This necessarily involved the keeping of accounts, and a covenant to do so may, if necessary, be implied. It could not be supposed that the plaintiff was, not only to suffer the amount of his remuneration to depend upon the *ipse dixit* of the defendant, but to subject himself to contribute to losses, without an opportunity of ascertaining if the defendant had performed his duty.

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It may be, as the defendant says, that he has no fear of the account, and it may result as he alleges in shewing the plaintiff to have been overpaid; but there is the fact that he has paid *Stearne* $4,000 for his share of the profits, or for a bribe to procure an advantageous settlement with the plaintiff, and that the settlement with the plaintiff was really effected for less than half that the defendant was willing to pay him. But with this I have nothing to do. The plaintiff takes the account at his own risk.

The plaintiff is entitled to a decree for an account with costs to the hearing. The subsequent costs reserved. Reference to the Master in Ordinary.

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BURRITT v. BURRITT.

Executors—Discretion given by will.

The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in United States securities. By his will he named one resident of the United States (his brother-in-law), and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares stocks or securities of any bank incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares, and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said *W. E. C.*, my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and re-investment thereof, or the permitting of the same to be and remain as they are, until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby."

Held, that this did not authorize the re-investment of moneys realized on the sale, or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator.

Argument.

Examination of witnesses and hearing at the sittings of the Court at Toronto, in November, 1879.

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

Mr. *Applebe*, for defendant *Currier*.

Mr. *W. Cassels*, for defendant *Burritt*.

The defendant *Case*, against whom the bill was taken *pro confesso*, did not appear.

The facts appear in the judgment.

January 7th

PROUDFOOT, V. C.—*Henry Osgoode Burritt*, in his lifetime a resident of Ottawa, in this Province, which was his domicile, though temporarily residing in the city of New York at the time of his death, died on the 15th of October, 1874, seised and possessed of real and personal estate in this Province, and possessed of personal estate invested in certain securities in the United States.

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By his will, made on the 23rd of May, 1872, he bequeathed all his personal estate unto *Alexander Burritt* of Ottawa, *Watson E. Case* of the city of New York, and *Joseph M. Currier* of New Edinburgh, whom he appointed executors of his will, upon trust, as soon as conveniently might be, to sell, call in, and convert into money, such part of his estate as should not consist of money, and out of it (and out of other funds provided by his will) to pay his funeral and testamentary expenses, and debts and legacies, and should invest the residue of the said moneys in the names or name of the said *Alexander Burritt*, *Watson E. Case*, and *Joseph M. Currier*, in or upon any of the public stocks or funds of the Dominion of Canada, or of the Province of Ontario, or upon Canadian Government or real securities in the Province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid; or in or upon the shares, stocks, or securities of any bank incorporated by Act of the Parliament of Canada paying a dividend, with power

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for the trustees or trustee (the executors or executor) to vary the said stocks, funds, debentures, shares, and securities, at their or his discretion. After making various provisions, not now material to be noticed, he proceeded: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said *Watson E. Case*, my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal, and reinvestment thereof, or the permitting of the same to be and remain as they are until maturity thereof; and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby. The said *Watson E. Case* has duplicate keys of my safe, in which such securities are, in the Mercantile Loan and Warehouse Co., Equitable buildings, Broadway, city of New York."

The executors took probate of the will.

Part of the personal estate of the testator in the United States consisted of certain bonds of the Western Union Telegraph Co., which were redeemed by the company in December, 1875. To obtain the money on these bonds *Burritt* went to New York, and he and *Case* received the money due under them, $51,600, and it was left under *Case's* control, who has employed it in making loans to brokers in the city of New York and has made investments in bonds of the Chicago, Milwaukee, and St. Paul Railroad, and nds of other companies, telegraph, gas, railroad, and North-West gold bonds;—of companies which are all located in the United States. Other part of testator's personal estate in the United States consists of railroad bonds, State bonds, &c., in the United States, which have not been sold, called in, or converted into money, and upon some no interest or dividends have been received. But it does not appear that these have matured.

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The bill has been filed by those interested in the estate against the executors, for an administration. The executors in Canada do not object to an admin-

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istration, and to [illegible] being appointed, the of property in Canada [illegible] *Watson E. Case*, the executor in New York, has suffered the bill to be taken against him *pro confesso*, and it becomes necessary to consider whether an order ought to be made for a Receiver of the property in *Case's* hands. This will depend upon whether he has committed a breach of trust under the provisions of the will.

The general rule is clear, that a trustee cannot lend on personal security: *Walker* v. *Symonds* (*a*). It was said by Baron *Hotham*, in *Adye* v. *Feuilleteau* (*b*), that lending on personal credit for the purpose of gaining a larger interest was a species of gaming. And Lord *Kenyon* observed that no rule was better established than that a trustee could not lend on mere personal security: *Holmes* v. *Dring* (*c*). But of course he may do so when expressly empowered by the instrument creating the trust. No such authority is communicated by a direction to place out the money

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at interest at the trustee's discretion: *Pocock* v. *Reddington* (*d*), or on such good security as the trustee can procure, and may think safe: *Wilkes* v. *Steward* (*e*). In this case the nature of the securities is specified with considerable precision: government securities, real securities,—*i. e.*, on real estate,—municipal debentures, and in shares or stock of a bank incorporated by Act of the Parliament of Canada paying a dividend. The power to vary the securities, at the discretion of the executors, following the direction to invest, would not give a larger power than if the discretion had in terms applied to the original investment, and that we have seen would not sanction an investment on personal securities. Nor does the Ontario statute, R. S. O. ch. 107, sec. 28, extend the powers given by this will, as

(*a*) 3 Sw. 80, note *a*.
(*b*) 1 Cox 25.
(*c*) 2 Cox 1.
(*d*) 5 Ves. 794.
(*e*) Coop. temp. Elder, 6.

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it sanctions investments by executors, where not expressly forbidden, in stock, debentures, or securities of the Government of the Dominion of Canada, or of this Province, with power to vary any such investment for others of the same nature.

Smith v. *Smith* (*a*) does not govern this case. The direction there was, "to be by my said executors invested or otherwise disposed of by them to the best advantage of the children, at the discretion of my executors." One investment impeached was the purchase of a lot of land adjoining the trust estate, which it was apprehended would be requisite for the use of a mill site on the trust estate. This was supported as being a proper investment, honestly made for the benefit of the children. The decision does not touch the case of an investment on personalty. Another investment was in building a house upon a part of the property; and this, though an investment on real estate, seems only to have been supported by the acquiescence and approval of the beneficiaries. The power applies to "otherwise disposed of," a much larger scope than that in this case.

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In *Lewis* v. *Nobbs* (*b*), the authority was to invest in or on any funds or securities whatsoever, which was held to justify an investment in Russian railway bonds. But that has no application where the securities to be invested in are specified.

In *Bethell* v. *Abraham* (*c*), the Court would not permit, trustees in a case where infants were concerned, to exercise a power of investment at their discretion, by investing in American railway stocks and securities.

It is also another general rule that trustees cannot, without express authority, make investments in foreign securities of any kind. So stringent was this rule, that an Act of Parliament had to be passed in England

(*a*) 23 Gr. 114, in App.
(*b*) L. R. 8 Ch. D. 591.
(*c*) L. R. 17 Eq. 24.

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to justify investments on real securities in Ireland (*a*). And where infants are interested that can only be done by the authority of the Court of Chancery in England. We have no such statute here, and such investments are therefore a breach of trust.

And executors are guilty of a *devastavit* if they permit money to remain on insufficient or unauthorized securities, though they may have been invested by the testator himself, where by the will he directed them to get in his estate as soon as conveniently might be after his death: *Bullock* v. *Wheatley* (*b*).

The question then turns upon the interpretation to be placed on the clause as to the American securities. From the relationship between the testator and *Watson E. Case*, and the expression of his confidence in his judgment and integrity, it is quite possible he may have intended to give him as ample a power as he himself had as to dealing with these securities. To call in, re-invest, and manage them in any way he pleased. But this is a very extensive power, and one that will not be inferred except from plain language, or from necessary implication. I cannot ascribe to a testator an intention to make his executor an *alter ego*, to place his estate at his mercy, to leave the fortunes of his children at the risk of investments among brokers in Wall Street, unless the language clearly and plainly leads inevitably to that conclusion. He gives him a discretion as to permitting his investments to remain as he left them till they matured, and as to the sale, disposal, and re-investment of them, and in this respect there seems to have been no failure of duty, as it is not shewn that those not got in have matured. He does not authorize, however, an investment in securities like those in which he left them. He had already made provision as to how the whole of the estate was to be invested after it was got

Judgment.

(*a*) 4 & 5 W. 4 ch. 29. (*b*) 1 Coll. 130

in, and specifies the kind of securities in which he desired the investments to be made. There was nothing to prevent him, if he had so pleased, to authorize re-investments in the United States, but he has not so expressed himself. The discretion as to re-investments must therefore, I think, be confined to the securities he has specified. Among these there is ample scope for the exercise of a discretion, and I must conclude that he had these in his mind. In making the investments otherwise, I think Mr. *Case* has violated the provisions of the will, though I have no reason to suppose he did it from any motive but the presumed benefit of the estate; and as the executor has failed in his duty, a Receiver ought to be appointed (*a*).

1879.

Burritt v. Burritt.

The American executor not having appeared to answer the bill, I have not heard any argument from him against the relief sought by the bill. Counsel for the other executors raised some questions in favour of his absolute and uncontrolled discretion to do as he pleased with the American securities, which I have just disposed of. No doubt was suggested that the forum of the domicile was the proper forum in which to apply for relief. The legatees are all resident here, and the suit is brought by them. There is no suggestion that there are any debts of the testator still unpaid in the United States. It is not stated that probate has been granted in New York, but I assume it has, and Mr. *Westlake*, at p. 300 of his treatise, lays down the rule as follows: "The administration of the assets to which each local representative is bound, refers to the payment of the debts of the deceased; for the principle is, that until these are satisfied the property will be retained within the jurisdiction, but that the surplus then remaining is transmissible to the deceased's domicile, to be distributed by that forum among his heirs and legatees." Circumstances calling

Judgment.

(*a*) Story's Equity Jurisdiction, sec. 836; Lewin on Trusts, 6 Ed. 870

1879.

Burritt v. Burritt.

for a modification of this rule as in *Shaver* v. *Gray* (*a*), do not exist here, and I do not doubt that the American Court will give effect to the decree.

There will be the usual administration decree, and an order for a Receiver.

HYNES V. SMITH,

Mechanics' lien—Registration—Postponing lien.

In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the same during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but registered prior to such lien. [PROUDFOOT, V. C., dissenting.]

Statement.

In or about December, 1879, the plaintiffs *William* and *Patrick Hynes* contracted with one *Beaty* to perform certain work on some houses owned by *Beaty* in Toronto; and they accordingly entered upon the execution of the work. *Beaty* subsequently, and while the performance of the work was being proceeded with, created two mortgages on the property, one of which was registered on the 31st of May, the other was registered on the 8th of June, 1878. The plaintiffs having completed the work contracted for, registered a lien under the act against the property, on the 18th of June, 1878; and on the 28th of August following instituted proceedings in this suit against *Smith*, as the assignee in insolvency of *Beaty*.

On the 20th of November a decree was made directing the Master to take an account of what was due the plaintiffs, inquire as to incumbrances other than prior mortgages, and settle their priorities.

(*a*) 18 Gr. 419.

1879.

Hynes v. Smith.

In proceeding under the decree the Master refused to make the holders of the two mortgages above mentioned parties in his office, on the ground that they had priority over the lien of the plaintiffs.

From this ruling of the Master the plaintiffs appealed, which came on for argument before The Chancellor, who affirmed the finding of the Master, as reported in the 8th volume of the Practice Reports, at page 73.

The plaintiffs thereupon reheard their appeal before the full Court.

Mr. *Boyd*, Q.C., for the plaintiff, contended that the subsistence of the plaintiffs' lien did not depend upon the effect of registration; but was created by the mere fact of commencing the work, and no provision in the Registry Law gives to a subsequent mortgage in point of time priority over the lien, simply because it happens to be registered before it, provided the mechanic registers his claim within thirty days after the completion of his work.

Mr. *Marsh*, for the mortgagees.

Dec. 11th.

Judgment.

BLAKE V. C.—On the 8th of June, 1878, the mortgage in question was registered. Prior to that date work had been done on the premises covered by the mortgage by the plaintiff as contractor, in respect of which a claim was registered on the 18th of June, 1878. It is perfectly true that in this case, by doing the work, the contractor obtained a lien on the premises, which he could, if he pleased, have registered. It is equally clear that under section 4 a statement of the claim might be filed "before or during the progress of the work." By sub-section 3: "When such statement is so registered, the person entitled to said lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act." By this means a charge on the premises is created in favour of a contractor,

1879.

Hynes v. Smith.

and such contractor is enabled to protect his interest, and to bring himself within the benefits of the registry laws. I take it, that under such circumstances, if he does not register, he is not brought within the protective provisions of the Registry Act, and although the lien may attach for a time as against the owner of the premises, the provisions of the Registry Act which, if duly invoked in his favour, might have preserved his priority, when neglected serve to postpone his claim to those who have brought themselves within its operation. I agree in the conclusion arrived at by The Chancellor, and think the order he made should be affirmed, with costs.

PROUDFOOT, V. C.—Assuming that the case is to be determined upon the provisions of the Rev. Stat. O., ch. 120, I do not think the lien required to be registered to take priority over a mortgage made subsequent to the commencement of the work.

Judgment.

The statute gives the mechanic a lien from the commencement of the work (sec. 3), and by sec. 2, subsecs. 1 & 3, it binds the property in the hands of persons who acquire any right in it after the commencement of the work. But liens claimed merely by virtue of the employment in doing the work cease thirty days after the completion of the work, unless proceedings are taken to realize them (sec 20). If the mechanic desires to preserve his lien beyond the thirty days up to ninety days, or till expiration of credit, without suit, he must register (sec. 21). A special provision enables him to effect this registry (sec. 4, sub-sec. 3), and declares that when registered the lien holder shall be a purchaser *pro tanto*, and within the provisions of the Registry Act. The registry is permissive under the operation of these enactments for twenty-nine days after the completion of the work: it is optional with the mechanic to do so or not. It is more accordant with the spirit of this special legislation in favour of

1879.

Burritt v Burritt.

mechanics, that the lien should arise and be preserved *ipso jure*, when the work has been contracted for and entered upon, than that the workman should from the commencement be compelled to guard and fence himself round with legal formalities. And it seems to me that the Legislature, in these enactments, have manifested this intention. Some meaning must be attached to every clause of the Act, and unless with the view of protecting workmen against liens that might be created to their prejudice, I do not see what object was aimed at by the section 26, which enacts that except as otherwise provided in this Act, the Registry Act should not apply to liens arising under this Act. By the section 4, when the lien is registered the Registry Act applies, and by this 26th section until registered it does not apply.

The provisions of the section 4 are not simply idle, or useless formalities; they have their effect and significance when the mechanic desires to extend the time for payment beyond the thirty days from the completion of the work; they then become vitally essential to the preservation of his lien.

Judgment.

I think the appeal should be allowed.

1879.

MEREDITH v. WILLIAMS.

Separation deed—Renewed cohabitation—Second separation.

Semble, that a provision in a deed of separation that the maintenance secured to the wife for life, and her children during their residence with her, should continue notwithstanding a renewal of cohabitation, and that in the event of the parties again separating for any the like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation:

Therefore, where a deed after reciting an agreement for separation between husband and wife; that she was to have the custody of the children until twelve years old, and that he, in consideration of her releasing her dower in his lands, had agreed to pay her a certain sum for her own and the children's maintenance, secured to the wife for her separate maintenance a yearly sum of $600, and a further yearly sum of $200 for the maintenance of each of the children so long as they should continue in her custody, and provided, that in the event of a reconciliation taking place the annuity for the wife and allowance for the children should not be thereby defeated or revoked; and in case of any future separation of the parties for any of the same causes, (which were such as to justify a separation,) the whole of the provisions of the deed should be revived and be in full force.

Held, that such deed, upon a fair construction of it, was not open to objection as providing for a future separation; and,

Semble, if it had provided for such separation for the causes mentioned, it would not have been void.

Statement.

This was a suit instituted by *Henry Howard Meredith* against *Charles Hervey Aston Williams* and *Henry Alfred Ward*, seeking to foreclose or sell certain lands owned by *Williams*, and conveyed by him to the plaintiff, and the defendant *Ward* for the purpose of securing an annuity, agreed by deed of separation to be paid to the wife of the defendant *Williams*, of $600 during her natural life, or until she should refuse to release her dower in any of the lands of her husband, and also certain annual amounts for the support and education of her children, and amongst other matters the deed of separation, "Provided further, that in the event of the said *C. H. A. W.* and the said *A. R. W.* becoming reconciled and living together again, the annuity hereby

provided for the said *A. R. W.* and for the said children shall not be defeated or revoked, but the same shall be continued and maintained, subject however to the limitations and conditions herein expressed of and concerning the same; and in case of any future separation thereafter of the said parties for any the like causes aforesaid, the whole of the provisions of this indenture shall be thereby revived, and shall be in full force and virtue."

1879.

Meredith v. Williams.

The cause came on for hearing at the Sittings of the Court in Toronto, in November, 1879. The points involved are sufficiently stated in the judgment.

Mr. *Boyd*, Q. C., and Mr. *W. Cassels*, for the plaintiff.

Mr. *Bethune*, Mr. *Moss*, and Mr. *W. Barwick*, for the defendants.

Jan. 7th. 1880.

Judgment.

PROUDFOOT V. C.—The bill prays for the foreclosure or sale of certain mortgaged lands and for the delivery of certain chattels, or for an account of those that have been removed.

The mortgage was made by the defendant *Williams* to the plaintiff and the defendant *Ward*, trustees of a separation deed made on the 17th April, 1874, between *Williams* and his wife, in pursuance of its provisions; and the chattels were assigned pursuant to the same deed.

The answer sets up that the separation deed secures $600 a year to the wife, so long as she remained apart from her husband, for her own support; the sum of $300 towards completing the furnishing of a house, and the sum of $200 a year to be paid to the wife for a certain term for the maintenance and education of each of the three children of the marriage: that under the deed the payments ceased on subsequent cohabitation, and that they subsequently cohabited, and upon the second separation of the parties she acquired no right under the deed to any further payments; that the deed was void as providing for a future separation.

1879.

Meredith v. Williams.

It was established to my satisfaction that the wife was perfectly justified in withdrawing the second time from the society of her husband. Indeed the husband offered no evidence, although in the most reprehensible manner he wrote a letter to his wife, and requested a copy of it to be read in Court, saying what dreadful things he could prove against her were he so inclined.

The argument for the defendant was rested entirely upon the ground that the deed provided for a future separation and was void. It became necessary therefore to examine its provisions. If these agree with the statement of them in the answer, it is probable that, so far as the allowance to the wife is concerned, the deed may be open to the objection made to it. And if a limited term for the maintenance of the children is appointed, which has expired, there may be no remedy upon the mortgage at all.

This last consideration was not urged in the argument for the defendant, and I must assume therefore that there is a remedy so far as the allowance for the children is concerned, and it might, perhaps, suffice to base a decree for an account, leaving the amount to be ascertained by the Master, any objections to the sum to be raised by appeal. But as the question has been argued, it will be more satisfactory and afford a speedy solution of the question to determine it now rather than upon appeal.

Judgment.

The deed—after reciting the agreement for a separation, and that the wife was to have the custody of the children till twelve years old, and that the husband, in consideration of the wife releasing her dower in his lands and for the maintenance of herself, had agreed to pay her a yearly annuity of $600, and for the maintenance and education of the children $200 each, and that an indenture of the same date as the separation deed should be executed by the wife releasing her dower—provided for the execution of the mortgage in question with other securities, and declared the trusts

1879.

Meredith v. Williams.

to be to keep the money invested, and out of the income to pay to the wife for her own separate maintenance and support the yearly sum of $600 during the term of her natural life, and until she should refuse to release her dower in any of the lands of the husband, and to pay to her the further yearly sum of $200 for the maintenance and education of each of the children so long as they should continue in the custody of the wife, and when that custody was ended or changed to pay to the persons having the custody of them, and on their attaining 21 or marrying to pay them the principal in equal shares, or all to the survivor. It was provided that the wearing apparel of the wife in the dwelling house and all other estate and effects, real or personal, save the dower in the lands to which she was as of her separate estate or might become entitled, should become and remain to and for her sole and separate use. And it was provided that in the event of the husband and wife being reconciled and living together again, the annuity for the wife and children should not be thereby defeated or revoked, but the same should be continued and maintained subject to the limitation and conditions therein expressed. And in case of any future separation thereafter of the parties for any the like causes aforesaid, the whole of the provisions of the deed should be revived, and be in full force and virtue.

Judgment.

It will be observed that the deed provides absolutely for the payment of the annuity to the wife for her life, and not, as said in the answer, during separation; and for the absolute payment of the allowance for the children during their minority, and upon that event for payment to them of the principal, and not for a limited time as said in the answer.

It had been decided in *Walker* v. *Walker* (*a*), and the cases upon which it rests, that an unqualified

(*a*) 19 Gr. 37.

1879.

Meredith v. Williams.

covenant in a separation deed for payment of an annuity to the wife for life is not avoided by the subsequent reconciliation of the parties. It was endeavoured to distinguish the present from that case, because the deed says the annuity is for the separate maintenance of the wife, and that when she returned to her husband it was no longer required for her separate maintenance, and that the payment for the children was while they remained in the custody of the wife, which terminated upon the reconciliation. And that the covenant that the provisions of the deed should revive in case of a future separation was an illegal agreement, contrary to the policy of the law, and void.

To construe the provision for separate maintenance in the way the defendant desires would be to hold out a premium to remain separate; if the wife could only have the annuity by remaining apart from her husband it would hold out an inducement to remain apart. That would be inconsistent with the policy of the law, and such a construction should not be placed upon it, if it be susceptible of one to make it legal. The covenant that the allowances should not terminate upon a reconciliation is an express statement of the intention of the parties that there should be no obstacle to a reconciliation on that ground, and puts conclusively upon the instrument the construction that it seems to me properly to bear without it. If the amount was not necessary for her maintenance, if, for instance, she had been maintained by her father, the allowance would still be paid, and she might accumulate it for a time when it might be required. And so, if maintained in her husband's house, she could still control the allowance. And she seems to have done so with the assent and at the request of her husband, for upon her reconciliation she directed the allowance to be paid by the trustees to him.

Judgment.

The only thing that lends countenance to the argument of the defendant is the provision that in the event

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of a subsequent separation the provisions of the deed should revive. The phrase is not happily chosen, but is susceptible of an explanation that will prevent it from rendering the deed void. It will be noticed that it is immediately preceded by the provision that the annuity should be paid notwithstanding a reconciliation, and it is difficult to imagine the parties intended the immediately succeeding sentence to cancel this. But this last provides that in the event of a subsequent separation the *whole* of the provisions of the deed are to revive. As if the parties had said, we have provided for the continuance of the annuity, but there are several of the covenants that may be affected by the reconciliation—such as those of the trustees—during the reconciliation they will be in effect suspended, but we intend they shall not be extinguished, and when the occasion requires they shall remain in force. At all events, a clear and unqualified covenant to pay during life is not to be cut down by a doubtful implication, that because the language is *revive* that the parties said it should previously cease, which is at direct variance with the express covenant that it should not cease.

Judgment.

But I am not prepared to say that a provision of the kind in this document is at variance with any rule of public policy, even if it had clearly expressed an intention that the annuity should cease on resumption of cohabitation.

Separation deeds are in themselves valid instruments, and their provisions will be enforced by the Courts. It is a provision of the law itself that if a wife is treated with cruelty she may have a decree for maintenance apart from the husband, and what she would be entitled to in the absence of any agreement, there seems no reason why she should not make an agreement about: *Besant* v. *Wood* (*a*), *Wilson* v. *Wilson* (*b*), *Hunt* v. *Hunt* (*c*), *Marshall* v. *Marshall* (*d*). And therefore an

(*a*) L. R. 12 Ch. D. 605, 623.
(*b*) 1 H. L. C. 538.
(*c*) 4 D. F. & J. 221.
(*d*) 27 W. R. 379.

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injunction will be granted to restrain a wife from suing for restitution of conjugal rights contrary to her agreement: *Flower* v. *Flower* (*a*), *Rowley* v. *Rowley* (*b*). It is treated as a contract throughout, and binding on the wife as well as on the husband. It may well be that an agreement providing for a separation at the will and caprice of the parties is void as contravening public policy, but where, as here, the right to separate was to be for any the like causes that induced the first parting, it is only providing for what the law itself would have given without the agreement, and it is not at variance with any rule of public policy.

The deed has in several respects more similarity to a settlement than to a separation deed, and it is based upon a valuable consideration, as the wife barred her dower in all the lands she was asked to bar it in at the time of the execution of the deed, and has subsequently barred it in others whenever required, and there are the trustees' covenants for indemnifying the husband. It

Judgment

was said to be decided in *McArthurs* v. *Webb* (*c*), that the bar of dower was not a sufficient consideration, and that where she had so done compensation might be given to her. But all that the late Chancellor decided was that he would not set aside the deed at the instance of the husband, but leave him to his remedy at law. When the case came up before the Common Pleas, 21 C. P. 358, that Court relied upon the bar of dower as being part of a valuable consideration to support the deed.

Besides, there is the provision for the children, and assuming the settlement to be voluntary, it would still, both as to wife and children, be valid against the husband.

Upon the whole, I think the plaintiff is entitled to a decree, with costs. There will be the usual mortgage decree and an order for the restoration of the chattels removed by the defendant, and if not restored then, an inquiry as to their value, and an order to pay it.

(*a*) 20 W. R. 231. (*b*) L. R. 1 H. L. Sc. 63. (*c*) 13 Gr. 305.

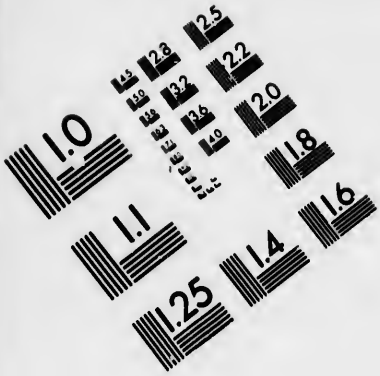
EARLS v. MCALPINE. 1879.

Will, construction of—Devise on condition—Restraint on alienation.

Testator devised his farm to his two sons in equal moieties, subject to certain legacies to daughters, and also a comfortable support for his wife, or the sum of ten pounds to be paid by each of the sons annually during her life; and directed that the devisees should not sell or transfer the said property during the lifetime of the wife without her written consent. One of the devisees, without obtaining the consent of the widow, mortgaged his portion of the estate. *Held*, that this operated as a forfeiture of the estate which the devisee took under the will.

The bill in this case was filed by *Jane Earls* and *Mary Grey* against *Alexander McAlpine, Ernest Dunsford Orde, Ophra D. Crawford, William Armstrong* and *Eleanor Armstrong*, setting forth (1.) That *Henry Armstrong* died in 1853, seized in fee of the south half of lot 19, in the 2nd concession of Ops, leaving his widow *Eleanor Armstrong* and *William Armstrong, Anne Armstrong* (now *Anne Workman,*) *Henry Armstrong, Ellen Armstrong, Sarah Armstrong*, and the plaintiffs his children, and only heirs and heiresses-at-law, him surviving. (2.) *Ellen* and *Sarah Armstrong* died intestate and unmarried since the death of their father, who made his will in the words and figures following: Statement.

"I, *Henry Armstrong*, considering the uncertainty of this mortal life, and being of sound mind and memory, blessed be Almighty God for the same, do make and publish this, my last will and testament, in manner and form following, that is to say: First, I will that all my lawful debts be paid; second, I will that my wife *Eleanor* do have the use and control of all my property, real and personal, until my two sons, *William* and *Henry*, are of the full age of twenty-one years, or until the said property is disposed of, as hereinafter mentioned, that is to say: third. I give and bequeath to my oldest son *William* the north half of lot number nineteen, in the second concession of the said township of Ops, to be possessed by him when of the full age of



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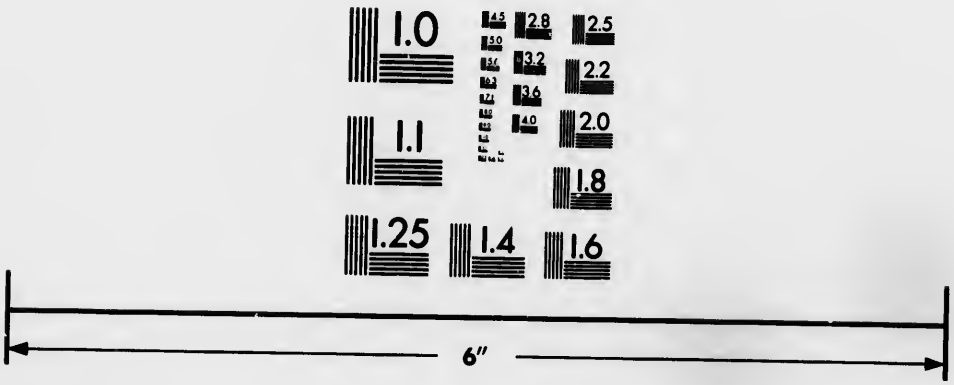

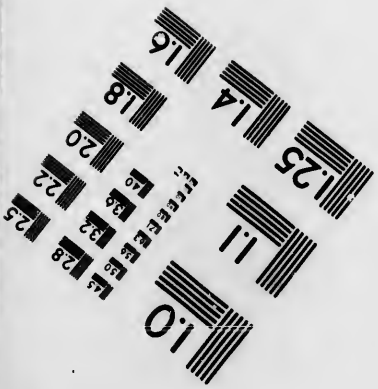

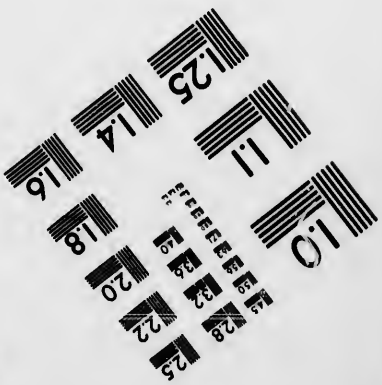

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1879.

Earls v. McAlpine.

twenty-one years; fourth, I will and bequeath to my oldest daughter *Jane*, the sum of twenty pounds, to be paid by my said son *William* one year after his possessing said property; fifth, I will and bequeath to my second daughter *Mary*, the sum of twenty pounds, to be paid by my said son *William* two years after possessing said property; sixth, I give, or will and bequeath, to my third daughter, *Sarah*, the sum of twenty pounds, to be paid by my said son *William* four years after possessing said property; seventh, I will and bequeath to my second son, *Henry*, the south half of said farm, to be possessed by him when of the full age of twenty-one years; eighth, I will and bequeath to my fourth daughter, *Anne*, the sum of twenty pounds, to be paid by my son *Henry* one year after possessing said property; ninth, I will and bequeath to my youngest daughter, *Eleanor*, the sum of twenty pounds, to be paid by my son *Henry* two years after possessing said property. Also, my two sons, *William* and *Henry* above named, give to my beloved wife a comfortable support, or the sum of ten pounds each annually, during her natural life; said support or annuity to commence at the time my said youngest son *Henry* possesses his share of said property.

Statement.

"I also will that my above-named sons, *William* and *Henry*, do not sell or transfer the said property without the written consent of my said beloved wife *Eleanor* during her life."

Which said will was duly registered on the 16th of April, 1853. (4.) The defendants *Eleanor Armstrong*, who is the widow of the said deceased, and *Henry Armstrong* have been in sole possession of the south half of said lands for the last seven years up to which time other members of the family had resided thereon. (5.) Within the last few years the defendant *Henry Armstrong* mortgaged the said lands to the defendants *Crawford* and *McAlpine* without the knowledge or consent of the defendant *Eleanor Armstrong*, who is still surviving and residing on said land, but the plaintiffs did not know of the making of the said mortgages till quite recently. (6.) The said mortgagees had full notice and knowledge of the conditions of

said will at the time of the making of said mortgages and well knew that the said defendant *Henry Armstrong* could not make a valid mortgage or conveyance of said lands without the consent of his mother. (7.) That *Henry Armstrong* having made default in the payment of the moneys secured by the said mortgages, the defendant *McAlpine* caused the lands to be sold, and the defendant *Orde* purchased the same, well knowing the state of the title, and merely acted in the purchase thereof as the agent of *McAlpine*, who was the actual purchaser. (9.) The plaintiffs submit that the defendant *Henry Armstrong* forfeited his title to the said lands under the said will, by creating the said mortgage, and that the estate devised to him devolved upon the heirs of the testator, and that the only estate conveyed by said mortgages was that vested in *Henry Armstrong*, as one of the heirs of his father. The bill prayed a declaration that *Henry Armstrong* had forfeited his title under the will, and for a partition of the estate.

Statement.

The defendants, other than *McAlpine*, *Orde*, and *Crawford*, answered the bill, admitting substantially the statements in the bill, and submitting their rights to the Court.

The other defendants answered, admitting the purchase for *McAlpine* as stated in the bill, and insisting that the condition in the will—as to alienation—was repugnant to the devise in fee and should be declared void.

The cause came on for hearing at the Autumn Sittings of 1879, at Lindsay.

Mr. *O'Leary*, for the plaintiff.

Mr. *Hudspeth*, for the defendants *McAlpine*, *Orde*, and *Crawford*.

Mr. *McIntyre*, for the other defendants.

1879.

Earls v. McAlpine.

Pennyman v. *McGregan* (*a*). *Daniel* v. *Ubley* (*b*). *Re Macleay* (*c*), Doe *Gill* v. *Pearson* (*d*), *Renaud* v. *Tourangeau* (*e*), *Simonds* v. *Simonds* (*f*), were referred to by counsel.

January 2, 1880.

BLAKE, V. C.—The same question that is now raised in this case I disposed of some months since, in *Armstrong* v. *McAlpine* (*g*). The counsel engaged in that case desired the opinion of the Court, not on the question of parties, as to which there could be no doubt, but as to the construction of the will, which, when given, bound those who were parties to the suit, and served as a guide to others interested in the estate. No objection for want of parties having been taken by the answer, or raised at the hearing, the opinion of the Court was then given to those asking it. I then thought, and still am of opinion, that the condition in this will as to alienation is a reasonable one—not repugnant—and one which could be supported as intended to benefit the wife in further securing the provision made for her under the will. I considered it reasonably clear on the authorities, that a condition not to alien to a particular person or for a particular time is good; and also that where the condition could be traced, not to the mere whim of the testator, but to the desire to secure a legacy, or benefit a beneficiary under the will, there the Court would sustain the condition, for any such purpose, inserted in the will. The case of *Daniel* v. *Ubley* (*h*), followed in Doe *dem Gill* v. *Pearson* (*i*), supported this view. It is true that *Attwater* v. *Attwater* (*j*), *Gallinger* v. *Farlinger* (*k*),

Judgment.

(*a*) 18 U. C. C. P. 132. (*b*) Sir Wm. Jones's R. 137.
(*c*) L. R. 20 Eq. 186. (*d*) 6 East 180.
(*e*) L. R. 2 P. C 4. (*f*) 3 Mer. 558.
(*g*) Reported in Appeal, 4 App. 256. (*h*) Sir Wm. Jones, p. 137,
(*i*) 6 East 173. (*j*) 18 Beav. 330.
(*k*) 6 U. C. C. P 512.

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and *Renaud* v. *Tourangeau* (*a*), seem to restrict the right of limiting the power of alienation as permitted by the earlier cases.

But it is to be observed, that in the case of *Renaud* v. *Tourangeau*, in the judgment of Mr. Justice *Meredith*, which was concurred in by the judicial committee, there is the following language: "These provisions being altogether at variance with our own law on the subject, it is plain that the observations of *Troplong* and *Demolombe* must be read by us with great caution, and bearing this in mind, it appears to me that all that *Troplong* and *Demolombe* are to be understood as saying in the passages relied on by the appellant is simply, that a prohibition to alienate in a donation or a will, if made for a short time and from reasonable motives, is not absolutely null, even under the provisions of the *Code Civile*. These learned writers shew that such a provision can be enforced if made in the interest of the donee or legatee, or of a third party, and that if accompanied by a penal clause the penalty may be enforced in the event of a violation of the prohibition to alienate."

Judgment.

In re Macleay, (*b*), Sir *George Jessel*, in considering whether a devise "to my brother *J.*, on the condition that he never sells out of the family," was valid or not, says: "It has been suggested, however, that it is void as being repugnant to the quality of the estate, that is to say, that you cannot restrict the right of an owner in fee, of alienating in any way in which he he may think fit. If that were the law the condition would be plainly void. But, with the exception of one authority, a case decided by my immediate predecessor, I am not aware that the law has been ever laid down in that way." Then after dealing with the earlier writers, he thus sums up his conclusion from them. "So that according to the old books, *Sheppard's* Touchstone being to the same effect, the test is, whether

(*a*) L. R. 2 Pri. Co. 4.

(*b*) L. R. 20 Eq. 186.

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the condition takes away the whole power of alienation substantially; it is a question of substance, and not of mere form"; and he there held that there was but a limited restriction upon alienation, and that the condition was good.

The widow of the testator was entitled to a comfortable support or the sum of ten pounds annually during her natural life. It is true that this would be a charge on the property, but the testator might well have thought that that which is clear, so long as the property remains with his sons, might be defeated or rendered doubtful, or impeded if it be sold; and, in order to prevent this result, he not unreasonably added the clause, which he conceived would prevent any such result, by retaining the property in the hands of the sons until the annuity ceased, unless the wife chose to assent to an alienation of the estate at an earlier day. The cases which have not infrequently come before this Court, in which, owing to the want of such a clause, the property which was to have been primarily preserved for the support of the wife, has passed into other hands where, encumbered, the widow has for years remained without her annuity, and when realised it has been obtained by the lengthy and expensive process of a suit in this Court, lead me to the conclusion that, in place of this being a repugnant or vicious condition, it is but a reasonable restriction, added for the benefit of the annuitant, and the benefit of which she should be entitled to claim. I think that, by the mortgage given by *Henry*, he has forfeited the estate he took as devisee, and that the parties are entitled to this declaration and to the consequential relief, with costs against *Henry*. See *Pennyman* v. *McGrogan* (*a*), *Re Dickson's* Trusts (*b*), *Harvey* v. *Aston* (*c*).

Judgment.

(*a*) 18 U. C. C. P. 132.
(*b*) 20 L. J. Ch. 33.
(*c*) 1 Atkyn, 361.

SANDS v. THE STANDARD INSURANCE COMPANY.

1879.

Fire insurance — Alienation — Mortgage — Unjust and unreasonable condition.

By a condition in a policy of insurance additional to the statutory conditions, it was provided that "When property insured * * or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company."

Held, [affirming the decree of PROUDFOOT, V. C.] (1) that such condition was not just or reasonable, and that it was not binding; and (2) that the fourth statutory condition did not apply to an alienation by way of mortgage, but only where there was an absolute transfer of the property.

Quære, whether the additional condition in this case was so printed as to comply with the statute.—See judgment of *Proudfoot*, V. C., *ante* volume xxvi, at page 115.

This was a rehearing at the instance of the defendants, of the decree of *Proudfoot*, V. C., as reported *ante* vol. xxvi, p. 113, where the facts are sufficiently stated.

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

Mr. *Moss*, for the defendants.

SPRAGGE, C.—I agree in the judgment which my brother *Blake* has prepared and will read. I think the cases cited by my brother *Proudfoot* in his judgment fully sustain his conclusion, that the making of a second mortgage in this case did not vitiate the policy. Sept. 11th.

I confess I should not think it unreasonable if the law were otherwise. Whether it would [illegible]e an enactment of the Legislature, or whether it would be competent to the assurers to provide to that effect in a condition added to the statutory conditions, it is not necessary to determine. The fifth additional condition to the policy now in question is, I agree, not just and

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reasonable, as is pointed out by my brother *Proudfoot* in his judgment.

BLAKE, V. C.—Certain property under mortgage having been duly insured was again mortgaged, without the consent of the insurance company, which dealing with the property the subject of insurance, it is said, vitiates the policy. For this contention the defendants rely, first, on the fourth of the "statutory conditions," which reads as follows: "If the property insured is assigned without a written permission, indorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title) by succession, or by the operation of law, or by reason of death." It is reasonably clear, on the authorities, that in cases, other than those governed by the Mutual Fire Insurance Companies' Act, an "alienation" of the property insured by way of mortgage is not covered by a clause providing simply against an alienation of the premises. It seems to my mind perfectly clear, that if the word "alienation" does not, in such a condition, cover a dealing with the property by way of mortgage, the word "assign" cannot be held to do so. I concur with the conclusion arrived at by my brother *Proudfoot* on this point.

Judgment.

I agree in the judgment of the Court below as to the fifth clause of the "Additional Conditions." I am of opinion that this condition is, for the reasons there assigned neither just nor reasonable, and therefore it does not bind the plaintiff.

I think that the decree should be affirmed, with costs.

PROUDFOOT, V. C., retained the opinion expressed by him on the original hearing.

Decree affirmed with costs.

SEATON v. LUNNEY. 1879.

Trustee and cestui que trust—Lease by cestui que trust to trustee—Statute of uses—Operation of short form deed of conveyance under R. S. O. ch. 102.

L. and *S.* were appointed by the Court trustees for the plaintiff, a married woman, upon a written consent purporting to be signed by them agreeing to act. Subsequently *L.* obtained from the plaintiff a lease of the trust estate to himself, at what was alleged to be an inadequate rental. Some years afterwards, and after the death of her husband, the plaintiff instituted proceedings to have the lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by the plaintiff in the execution thereof, and the fiduciary relation towards herself which *L.* had assumed. Under the circumstances the Court [*Per* SPRAGGE, C.] granted the relief asked, notwithstanding *L.* swore that he was not aware that he had been appointed trustee; that he never signed the consent to act as such, and that his conduct throughout had been *bonâ fide*, it being shewn that he had effected an insurance upon the buildings situate upon the premises, the application for which he had signed as trustee, and there being reason to believe that if he had not signed the consent himself he had authorized the husband of the plaintiff to affix his signature thereto; but gave *L.* the option of accepting a new lease of the property to be settled by the Master; which decree was affirmed by the full Court on rehearing.

The operation of an ordinary deed of bargain and sale under the Short Forms Act—R. S. O. ch. 102—conveying lands to trustees, considered and acted on.

THIS was a rehearing, at the instance of the defendant *Lunney*, of a decree made by the Chancellor at the sittings at Toronto in June, 1877, setting aside a lease made by the plaintiff to the defendant *Lunney*, and for the appointment of new trustees, giving *Lunney* an option to accept a new lease, and in the event of his availing himself of this option, referring it to the Master to settle the terms of a lease from the plaintiff to him, and for payment of the costs of the suit by *Lunney*. Statement.

The facts giving rise to the suit were shortly as follows:

Alice Seaton, the plaintiff, as legatee under the will of one *Jacob Turner*, was entitled to a sum of $4,000,

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which had been paid into Court. By an order made in Chambers, in the matter of the trusts of the will, it was ordered that the money should be invested in the purchase of a farm, and that the property so to be purchased should be conveyed to two trustees to be appointed with the approbation of the Referee in Chambers, who was to approve of the purchase and settle the conveyance to the trustees, who were to hold the land upon trust to permit the plaintiff to receive the rents and profits for her own use and benefit during her life, free from the control and liabilities of her husband, and after her death in trust for such persons as she should by will appoint, and in default of appointment for her next of kin. In pursuance of this order a farm was purchased, and upon an application to the Court to approve of trustees, a consent was filed purporting to be signed by both the defendants, *William Lunney* and *Robert John Stanley*, consenting to act as trustees. Thereupon a conveyance was made

Statement.

by the vendor to the trustees, under the Short Forms Act, granting the land to them, to hold to them their heirs and assigns forever, upon trust to permit the plaintiff to receive the rents and profits for her own use and benefit during her life.

Shortly after the making of this deed, and on the 11th of March, 1872, the plaintiff and her husband made a lease of the land to the defendant *Lunney* for twenty years, reserving rent at $150 a year, payable to the plaintiff. *Lunney* took possession under the lease and paid the rent regularly to the plaintiff. The plaintiff's husband died in 1874. In 1877 the plaintiff filed the present bill impeaching the lease, alleging as the chief grounds for so doing, that the transaction was improvident: that she had had no competent advice: that *Lunney* was her trustee, and thus disqualified from accepting a lease of the trust estate.

In his examination *Lunney* swore that he did not sign the consent as to trusteeship; that he never was

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asked to consent, and never did consent to become trustee—never acted as such, and was not aware that he had been named in the deed as a trustee. The subscribing witness to the consent also swore that plaintiff's husband brought the paper to the witness and asked him to be the witness, and that the plaintiff's husband wrote *Lunney's* name: that *Lunney* was not present. On the other hand there was evidence that *Lunney* had got the buildings insured, and had signed the application for the insurance as *trustee*. By his answer, and also at the hearing, it was contended on behalf of the defendant *Lunney* that the fact of his being a trustee was unknown to him when he took the lease; that the legal estate in the land was not in the trustees, but passed to the plaintiff for life under the Statute of Uses; and, if vested in the trustees, that they had no duties to perform, and that for these reasons it was competent for *Lunney* to deal with the plaintiff as a stranger, and take the lease from her.

Statement.

The Chancellor found on the evidence, that if *Lunney* had no knowledge of the trusteeship, there was at least sufficient to put him on inquiry, and that he must be treated as having the knowledge; that as a trustee he had duties which brought him within the rule that the *cestui que trust* was entitled to protection, and he made a decree in the terms above mentioned.

Mr. *Fitzgerald*, Q. C., and Mr. *Arnoldi*, for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *Spencer*, for the defendant *Lunney*.

Jones v. *Higgins* (*a*), *Hughes* v. *Wells* (*b*), *Kerr* v. *Stripp* (*c*), *Wagstaff* v. *Smith* (*d*), Doe *d. Noble* v. *Bolton* (*e*), *Williams* v, *Waters* (*f*), *Barker* v. *Greenwood* (*g*),

(*a*) L. R. 2 Eq. 538.
(*b*) 9 Ha. 772
(*c*) 24 Gr. 198.
(*d*) 9 Ves. 524.
(*e*) 11 A. & E. 188.
(*f*) 14 M. & W. 166.
(*g*) 4 M. & W. 429.

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Nayler v. *Winch* (*a*), *Wretshire* v. *Robits* (*b*), *Baker* v. *White* (*c*), *Whiteside* v. *Miller* (*d*), and *Lewin* on Trusts, 6th ed. 187, 422, 755, were amongst the authorities referred to, and commented on by counsel.

August 27, 1878.

BLAKE, V. C.-- I have read the evidence in this case, and do not think that this Court can interfere with the conclusion arrived at by the Chancellor. The evidence of the plaintiff, of the defendant *Lunney*, and of *McNally*, the insurance agent, when carefully perused, is unsatisfactory in the extreme. It is hard to know what value should be placed upon the testimony of these witnesses. The Judge of first instance, taking into consideration the demeanour and manner of giving their evidence, important elements in determining the weight to be attached to their stories which we have not, believed the story of the plaintiff. All the probabilities are in its favour. The plaintiff wanted a trustee, there is no reason why the defendant *Lunney* should not have accepted the office. To find otherwise is to convict *William Seaton*, deceased, of forgery and perjury, in a case where, without any thing to be gained thereby, he indulged in these crimes. The manner in which *Lunney* applied to effect the insurance on the property, corroborates strongly the direct evidence as to his having accepted the office of trustee; and all this coinciding with the plain probabilities of the case, I think we are bound to find it proved that *Lunney* agreed to become, and that he did become, trustee for the plaintiff of the property in question.

Judgment.

But, it was strenuously argued by Mr. *Boyd*, that if *Lunney* became a trustee it was only for the purpose of passing the estate to another; he took no beneficial interest; he had no duties to perform, and was but a conduit pipe through which the

(*a*) 1 S. & S. 567.
(*b*) 14 Sim. 76.
(*c*) L. R. 20 Eq. 166.
(*d*) 14 Gr. 393.

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estate, beneficial and otherwise, passed to others; and this being so, *Lunney* had a right to deal with the estate as a stranger. It may be that the language of the conveyance to *Stanley* and *Lunney* as trustees is such as to warrant this conclusion; but even granting this to be the proper construction of the instrument, I do not think it determines the question raised. The consent given by *Stanley* and *Lunney* is, "to accept the office of trustees under the order made in this matter." This order directed "that the property so to be purchased be conveyed to two trustees, to be appointed with the approbation of the Referee of this Court, who is to settle the conveyance, investigate the title of the said property, and approve of the said purchase; such parties to hold the said lands and premises upon the trusts following, that is to say, to permit the said *Alice Seaton* to receive the rents and income and profits thereof during her life, free from the control and liabilities of her husband, with power to the said *Alice Seaton* to appoint by will and in trust, for the person or persons in whose favour the said appointment shall be made, and in default of such appointment, then in trust for the next of kin of the said *Alice Seaton*."

Judgment.

It is evident from this consent and order that what the Court ordered, and *Lunney* assented to, was the appointment of two men as trustees for Mrs. *Seaton*, who were to guard her interests while alive, and after, if the appointees or the next of kin were infants, to perform the like duties for them. There is nothing in this order to warrant the conclusion that the parties interested, or the Court, thought that the trustees were merely to be used as a means of passing the estate to the plaintiff. They were to hold the estate on certain trusts. Unfortunately in the trust deed, language was used which is open to question, but such language appearing in the order is not open to the question to which it is open when it appears in an instrument, to

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the phrascology of which a peculiar and technical construction is given. The trustees named accepted the duties of trustees in respect of this property, and while holding this office the defendant *Lunney* entered into an arrangement touching such property injurious to the plaintiff and beneficial to himself. I do not think there can be any doubt but that she did not comprehend fully what was being done. There was no explanation to her, she had no advice or protection during the negociations and the making of the arrangements which resulted in the impeached lease. I think the decree should be affirmed.

Judgment.

PROUDFOOT, V. C.—The cases cited of Doe *d. Noble* v. *Boulton* (*a*), *Baker* v. *White* (*b*), *Doe* v. *Riggs* (*c*), *Whiteside* v. *Miller* (*d*), do not decide the point that the use was here executed in the *cestui que trust*. All these were cases of wills, and the estate was vested in the trustees by the devise to them. But a devise of the estate to trustees does not operate under the Statute of Uses; of course uses may be declared upon the estate devised which will be executed by that statute, but the estate in the trustees requires no aid from the statute. The estate passes to them by the will as effectually as by a feoffment and livery of seisin. A use declared upon a devise would be executed by the Statute of Uses, if it were a simple use, and not a trust, and the real question decided in the cases cited was, that in the circumstances of these cases the trustees had no duties to perform to prevent the use being transferred into possession.

The real difficulty arises in ascertaining how this conveyance to trustees under the statute for short forms of conveyances operates. If it is to operate as a bargain and sale, then *Gamble* v. *Rees* (*e*), establishes

(*a*) 11 A. & E. 188.
(*b*) L. R. 20 Eq. 166.
(*c*) 2 Taunt. 109.
(*d*) 14 Grant 393.
(*e*) 6 U. C. R. 396.

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that the first use is executed in the trustees, and the subsequent uses can only have effect as trusts, and are not executed in possession.

It was there objected that the use was executed. *Robinson*, C.J., says, p. 404, "That objection is grounded on a peculiarity in the second deed, viz., that it does not express in the *habendum*, that the bargainees are to hold the land '*to their use.*'" P. 406, "It is superfluous in any deed of bargain and sale to express that the land is to be held to the use of the bargainee, and the omission of any such declaration is no defect; for there can be no other limitation of the use than to the bargainee, neither is there any danger t... where it is omitted the use will be executed in any other person, in trust for whom the land is to be held by the bargainee, for that would be to limit an use upon an use, which is not admitted."

Our statute, (R. S. O., ch. 98, sec. 2, p. 948,) enacts that all corporeal hereditaments shall, as regards the immediate freehold, be deemed to lie in grant as well as in livery. The short forms Act R. S. O., ch. 102, in the form in the schedule, uses only the word *grant*, and there is no *habendum* at all.

Judgment.

A grant was before this the proper form of conveyance for transferring incorporeal hereditaments, and reversions, &c., of which no livery could be had. They pass merely by delivery of the deed. The Statute of Uses did not operate on them so as to pass the estate. They were considered equivalent to a feoffment: 2 Bl. 317.

In the case before us the deed was drawn under the short forms Act, and granted the land to the trustees, their heirs and assigns; to have and to hold to the trustees, their heirs and assigns, for ever, upon trust to permit, &c. The deed was prepared pursuant to an order of the Court, which directed that the trustees were to hold the lands and premises upon the trusts afterwards declared in the deed (in favour of a married woman, &c).

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If the deed is to be construed as was contended for, this appointment of trustees would be almost nugatory, as the estate would pass out of them *eo instanti* that it vested in them. The land was purchased for a married woman under the order of the Court, and to be conveyed to trustees, and to be held by them in trust for her. It never could have been the intention of the Court that these trustees should be mere conduit pipes. One would have sufficed, none need have been employed, if it had been intended that the estate should vest in the *cestui que trust*. The consideration for the deed was the price of the land, $4,000, paid out of money in Court.

If the deed is to be construed without the recitals, I think its operation would probably be similar to that of a grant of reversion; the title passes by the delivery of the deed and requires no aid from the Statute of Uses, and the trust declared, under the cases cited, would be a use which would be executed by the statute.

Judgment.

But the construction of deeds is to be upon the whole instrument, and they are to be construed so as to effect the intention: *Benignæ sunt faciendæ*, &c., Shep. Touch. 86.

In conveyances the use of many operative technical words such as grant, bargain, sell, alien, &c., was, that if it would not operate in one way it might in another, and if a deed of grant be made by the words *dedi et concessi*, it may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender, (*Heyward's* Case, 2 Rep. 35 *a*), or as a bargain and sale, if on a pecuniary consideration: *Leith's* R. P. Stat. 101. And it is said in *Heyward's* case that the person to whom it is made shall have his election which way to take it. But that must mean the person for whose benefit the deed was made, not that a trustee should have the right to adopt any construction that would tend to exonerate him from liability. For there is another rule "that the construction be such as the whole deed and every

part of it may take effect, and as much effect as may be to *that purpose for which it was made*: Shep. Touch. 87. 1879.

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There can be no question that the Court intended the grantees to be trustees in fact, and not in name only. The "grant" can be construed to operate as a bargain and sale so as to effect this intention, and I think that ought to be the construction of it. The use was therefore executed in the grantees, and the subsequent trust was only a trust not a use.

With regard to the question of fact I do not feel disposed to interfere with the finding of the Chancellor. There seems to be sufficient evidence to establish that *Lunney* either signed or authorized his signature to be affixed to the consent to become a trustee; and there was a subsequent act, in signing the application for insurance, which is to my mind the most cogent evidence that could be given, not only of the character he filled, but of his own knowledge of it. Nothing that was said on the argument has overcome the effect of this, or explained it in a satisfactory way, if he were not a trustee. Judgment.

I think the decree should be affirmed.

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LOVELACE v. HARRINGTON.

Sale of land—Covenants against incumbrances—Concealed incumbrance, deduction from purchase money of amount of.

Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances; and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the Court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage.

This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself.

Statement.

This was an action for an injunction to restrain proceedings in an action at law, brought by the defendant *Harrington* against the plaintiff *Levi Lovelace*, to recover the amount of a mortgage executed by himself and his wife to secure an amount of purchase money due in respect of land sold, and which contained a covenant on the part of *Lovelace* to pay the amount.

The circumstances under which the present bill was filed, and authorities cited, are clearly stated in the judgment.

Mr. *Cassels*, in support of the motion.

Mr. *Moss*, contra.

Jan. 28th, 1880.

SPRAGGE, C.—*Susan Deming*, wife of the defendant *Herbert V. Deming*, conveyed six acres of land (her own land, as it appears) to *Jane Lovelace*, *Herbert V. Deming* joining in the conveyance, the consideration being $1,500. The conveyance to *Jane Lovelace* seems to have been by the appointment of her husband, *Levi Lovelace*. The land sold was, and was known to be

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subject to a mortgage for $200. That mortgage was allowed on the down payment, and a mortgage for $1,000 was given for the balance of purchase money in which *Lovelace* and his wife were the mortgagors, to *Susan Deming*; and *Levi Lovelace* covenanted in the mortgage for payment of the mortgage debt. The conveyance from the *Demings* contains a covenant by the grantors, that they had done no act to incumber the lands, save and except the $200 mortgage.

In fact, *Susan Deming*, with her husband, had made a mortgage to one *Watson*, in December, 1868, to secure payment of $1,200. *Herbert Deming* swears that it was made to secure payment of composition notes given on his insolveney; and that the notes are paid. There is no other evidence of this, and the mortgage stands upon the registry undischarged.

I take it, upon the evidence, that the *Lovelaces* had no notice of this prior mortgage, and that its existence was a breach of the covenant of the *Demings* against incumbrances, and is at least a cloud upon title. It may be more. It may be still an incumbrance upon the land.

Judgment.

Susan Deming is dead, having made an assignment of the *Lovelace* mortgage to *John Harrington*, whom I take, upon the evidence, to be a volunteer; and *Harrington* has sued and recovered judgment against *Levi Lovelace* for default in payment of mortgage money according to his covenant. This application is to restrain a sale of the defendant's goods in execution.

Harrington, being a volunteer, I take to be in the same position as *Susan Deming* would have been if the action had been by her; so that the point decided in *Egleson* v. *Howe* (*a*) does not arise. It was assumed in that case, as well as in the judgment of *Strong*, V. C., in *Henderson* v. *Brown* (*b*), and in the earlier case of *Tully* v. *Bradbury* (*c*), that if the question had been

(*a*) 3 Ap. Rep. 566.
(*b*) 18 Gr. at 95.
(*c*) 8 Gr. 561

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between the original vendor and purchaser, the purchaser would have had an equity to apply unpaid purchase money to the discharge of a mortgage made by the vendor, and not disclosed to the purchaser.

I do not think that it displaces that equity that the covenant in this case against incumbrances is to the grantee, the wife of the covenantor, to pay purchase money, not to the covenantor himself. It was not an indication of intention by any of the parties that the balance of purchase money should be paid, irrespective of prior incumbrances, as was put in *Egleson* v. *Howe*, where there was notice of the prior incumbrance. Here there was no notice, and the inference would rather be that *Levi Lovelace* intended to make a settlement upon his wife to the extent of the consideration money, and he took upon himself that burthen, and that may be taken to have been understood by the grantors. To impose a further burthen upon him would be inequitable, and therefore any equity that the wife might have as grantee and as covenantee should enure to the benefit of the husband.

Judgment.

There is no innocent purchaser to intervene in the equities subsisting between the parties, and it does appear to me plainly inequitable for a grantor who has concealed an incumbrance from a purchaser, and covenanted against the existence of such incumbrance, to attempt to compel the payment of purchase money without deducting what may be due upon the concealed incumbrance.

The plaintiffs are late certainly in coming to this Court, but they offer to bring into Court the money recovered by the judgment. Upon their paying that money into Court, together with any further moneys that the sheriff may be entitled to levy, an injunction should go to the hearing.

I do not agree that it is the business of *Lovelace*, not of *Deming*, to have the mortgage of 1868 formally discharged. Its existence is contrary to the covenant

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of *Deming*, and it is a cloud upon the title of the grantee *Lovelace*, which it is inequitable in *Deming* to allow to remain.

There is, I believe, no controversy upon the facts. The better course will be, instead of going to a hearing, to rehear or appeal from this order, if the defendants *Harrington* and *Deming* do not acquiesce in my view of the law.

Judgment

If the plaintiffs are right, they should have their costs of this suit; but as they have not come promptly, I shall give them no costs at law. If either party shall choose to go to a hearing, the costs will be reserved.

McKellar v. Henderson.

Sheriff's fees—Deputy Sheriff—Demurrer.

The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, and neither the representatives of the late, nor the newly appointed sheriff has any right or claim thereto.

In such a case where fees had been received by the deputy, and which the bill alleged he had in error paid over to the executors of the late sheriff, and the deputy subsequently voluntarily assigned all his right and claim to such fees to the newly appointed sheriff, who filed a bill to compel repayment of the amounts to him, the Court allowed a demurrer for want of equity.

This was a bill by *Archibald McKellar* against *James Henderson*, *Elmes Henderson*, and *Catharine Elizabeth Kerr*, setting forth that on the 1st August, 1875, the plaintiff had been duly appointed sheriff of the county of Wentworth, and having taken and subscribed the usual oaths of office, and given the necessary security, entered upon and had discharged the duties of such office; that on and prior to the 15th of

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May, 1875, one *Edward Cartwright Thomas* in his life held such office, and discharged the duties thereof under a valid appointment, and while holding such office he duly appointed one *Richard G. Dampier* his deputy, who held the said office of deputy from such appointment until the appointment of the plaintiff; that *Thomas* died on 15th May, 1875, having by his will nominated one *John Young*, who predeceased him, and one *Thomas Cockburn Kerr*, since deceased, his executors, which will was duly proved by *Kerr*.

The bill further alleged that on the death of *Thomas*, *Dampier* continued to discharge the duties of such deputy until the appointment of the plaintiff, and in that capacity collected and received large sums of money on account of the fees of such office, which were demanded by the executor (*Kerr*) from *Dampier*, who paid the same over to *Kerr*, believing him entitled to demand the same.

Statement.

The bill further stated that *Thomas* by his will devised all his lands to his executors as trustees thereof upon certain trusts, and empowered them to appoint other trustees in their room or stead, in pursuance of which power *Kerr*, as surviving executor and trustee, appointed the defendants *James* and *Elmes Henderson*, trustees of said estate and duly assigned and conveyed the trust estate to them, and paid over to them the moneys collected and received by him from *Dampier* and from other persons in respect of outstanding accounts for services performed by *Dampier* during the period between the 15th day of May and 1st day of August. The bill further stated that *Kerr* departed this life in November, 1878, having first appointed the defendant *Catharine Elizabeth Kerr* executrix of his will, and she duly proved the same.

The bill further set forth that (15) "thereafter, and on or about the 29th day of October, in the year 1878, the said *Richard G. Dampier* by deed of assignment, made by him and under his hand and seal, duly

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assigned, transferred, and set over to the plaintiff absolutely for his own sole use, benefit and advantage, all the right, title and interest of the said *Richard G. Dampier* as such deputy sheriff in and to the fees and emoluments of the said office of sheriff, earned or received by him as such deputy sheriff, and payable for or in respect of the duties performed by him and his bailiffs and servants under him and in his employment from the date of the decease of the said late *Edward Cartwright Thomas* up to the date of the appointment of the plaintiff to the said office of sheriff, and all the claims and demands of the said *Richard G. Dampier*, as such deputy sheriff, against all persons whomsoever in respect thereof. (16.) The plaintiff submits that he is by virtue of his appointment to the office of sheriff and his present tenure of such office, entitled by law, and under the provisions of R. S. O. ch. 16, entitled 'An Act respecting the office of sheriff,' to all of the said moneys so received and collected by the said late *Thomas Cockburn Kerr* as such executor aforesaid, or by the defendants from the said *Richard G. Dampier*, and from all persons whomsoever for and in respect of all work done and services performed by the said *Richard G. Dampier*, as such deputy sheriff, and by his bailiffs and others in his employment from the date of the decease of the said late *Edward Cartwright Thomas* up to the date of the appointment of the plaintiff to the said office of sheriff. (17). The plaintiff further submits that if it shall appear to this honourable Court that he was and is not so entitled to the said moneys in the last paragraph mentioned in his own right as such sheriff, he is at all events so entitled as assignee of the said *Richard G. Dampier*, under the said deed of assignment hereinbefore referred to. (18). The plaintiff has caused frequent application to be made both to the said late *Thomas Cockburn Kerr*, as such executor during his lifetime, and also to the defendants *James Henderson* and *Elmes Henderson* for payment of said moneys, but they, although, as is the fact, they do not dispute but admit the receipt by them of the said moneys, have neglected and refused to pay the same over to the plaintiff, and pretend that the said moneys belonged of right to and formed a portion of the lawful assets of the estate of the late *Edward Cartwright*

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Thomas. (19). The plaintiff submits and charges that the said defendants should be ordered to account for the said moneys so received in respect of the premises, and should be ordered to pay over the same to the plaintiff."

The prayer of the bill was, that it might be declared by the decree and order of this Court that the plaintiff was entitled as such sheriff to the whole of the moneys so received by the said late *Thomas Cockburn Kerr*, as such executor, and by the defendants *James Henderson* and *Elmes Henderson* in respect of the premises; that the said defendants might be ordered to account for all of such moneys so received, and might be ordered forthwith to pay the same over to the plaintiff, with interest from the time the same were so received; and for further and other relief.

The defendants demurred for want of equity, and misjoinder of the defendants *Henderson*.

Mr. *Attorney-General Mowat* and Mr. *Small*, for the demurrer.

Mr. *J. White*, contra.

Feb. 2nd, 1880.

Judgment.

BLAKE, V. C.—By sec. 43 of ch. 16 R. S. O., it is enacted that "In case a sheriff dies, resigns his office, and his resignation is accepted, or is removed therefrom, the deputy sheriff by him appointed shall nevertheless continue the office of sheriff, and execute the same and all things belonging thereto in the name of the sheriff so dying, resigning or being removed, until another sheriff has been appointed and sworn into office; and the said deputy sheriff shall be answerable for the execution of the said office in all respects and to all intents and purposes whatsoever, during such interval as the sheriff so dying, resigning or being removed, would by law have been, if he had been living and continuing in office," &c. By this clause

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the deputy seems to be put in the place of the sheriff; he is to be "answerable for the execution of the said office in all respects and to all intents and purposes whatsoever." No provision is made for his payment unless he takes the fees usually received by the sheriff, and the receipt of such fees is considered as appurtenant to the office for the time held "to all intents and purposes," by the deputy. This point appears to me to be further elucidated by section 46: "Upon the removal of any sheriff from his office or upon his resignation of the same, or upon the appointment of his successor, the out-going sheriff or, in the event of the death of any sheriff, the deputy sheriff shall forthwith make out and deliver to the new and incoming sheriff a true and correct list and account, under his hand, of all prisoners in his custody, and of all writs and process in his hands not wholly executed by him, with all such particulars as shall be necessary to explain to the said incoming sheriff the several matters intended to be transferred to him, and shall thereupon hand over and transfer to the care and custody of the said incoming sheriff all such prisoners, writs, and process, and all records, books, and matters appertaining to the said office of sheriff." In this clause, although minute instructions are given to the deputy sheriff as to what is to be done on the appointment of the sheriff, the deputy is not thereby instructed to make out an account of the fees received or to hand them over to the estate of the deceased sheriff, or to the incoming sheriff.

Judgment.

This appears to be the view taken by the pleader, for in the sixth paragraph there is the following language: "In *his said capacity of deputy sheriff, and while so executing the office of sheriff* of the said county, during the period aforesaid, *the said Richard G. Dampier collected and received large sums of money on account of the fees and emoluments of the said office, and the services performed by said Dampier as such deputy sheriff, while executing the same*, and in said capacity

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performed other services appertaining to the said office for which *large sums of money became and were payable to him as executing said office of* sheriff." The allegation is that the fees were payable to *Dampier*, and that they were payable to him because he executed such office. I think this is a correct statement of the position of *Dampier*. As deputy sheriff he became entitled to the fees allotted to the office of sheriff, which office he for the time held. Paragraph eight of the bill places the sheriff in the same position. "The said late *Thomas Cockburn Kerr*, as executor of the last will of the late *Edward Cartwright Thomas*, demanded from the said *Richard G. Dampier*, and he accordingly paid and delivered to the said *Thomas Cockburn Kerr* as said executor, the moneys so collected and received by him, *Richard G. Dampier*, as aforesaid as such deputy sheriff, and the unpaid accounts * * in his capacity as such deputy sheriff, and in the execution of the said office and the duties thereof since the decease of the said *Edward Cartwright Thomas*." Paragraph 14 of the bill states that "the said moneys and accounts so paid and delivered over by the said *Richard G Dampier*, were so paid * * upon the representation * * that the said moneys belonged to *Edward Cartwright Thomas*, and the said *Richard G. Dampier* believed such representation to be true, and on the faith thereof, and without any consideration whatever * * the said *Richard G. Dampier* so paid and delivered over the same to the said *Thomas Cockburn Kerr*." The bill does not ask to set aside this payment thus made as being fraudulent or void or otherwise one that cannot stand, but it proceeds to state that subsequently *Richard G. Dampier* assigned to the plaintiff all his right to the fees earned or received by him as such deputy. The plaintiff then submits he is entitled to the fees either as sheriff or as assignee, and in the prayer he asks that it may be declared that he is entitled to all these fees as sheriff.

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I do not think he is entitled to anything as sheriff. If he is, I presume he is *primâ facie* entitled to such claim against *Richard G. Dampier* the *locum tenens* during the period of the vacancy of the office. If he claims as assignee, I presume he must pray for relief as assignee—he must properly impeach the transaction whereby the claim was settled between *Richard G. Dampier* and the estate of *E. C. Thomas*, he must have the proper parties before the Court to d probably must shew, if he be at all entitled to succeed, that he is something more than a mere volunteer, whose only claim is as assignee without consideration to file a bill to set aside a transaction which *Richard G. Dampier* is willing to allow to stand.

Judgment.

I allow the demurrer.

DUMBLE v. LARUSH.

Statute of Limitations—Amendment.

Although according to the ruling in *Adamson* v. *Adamson*, *ante* vol. xxv, page 550, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet where by error in the conveyance the *west* instead of the *east* half of the lot was conveyed, it would seem [per l'ROUDFOOT, V. C.,] that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. But the bill having been amended in one part of it in this respect, leaving the erroneous description of the land in the earlier part of it.

The Court on rehearing held that the suit had not been instituted with regard to the east half so as to prevent the defence of the Statute of Limitations being set up, and affirmed the decree of BLAKE, V. C., as reported *ante* volume xxv, page 552.

This was a rehearing of the decree of Vice-Chancellor *Blake*, reported *ante* vol. xxv, page 552, where the facts giving rise to the suit appear.

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Dumble v. Larush.

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

Mr. *Bethune*, for the defendants.

Sept. 11th.

SPRAGGE, C.—It would seem that the Statute of Limitations did not commence to run against *Isabella McGregor* until the expiration of the four months, mentioned in her evidence, that she remained on the place after the death of *Christina*, when she left the place, and only visited it occasionally afterwards. I should hardly say that possession could be attributed to occasional visits, or that *Larush* could be said in consequence of them to be tenant at will to her. These visits were different in character from the visits of the heir-at-law in *Groves* v. *Groves* (*a*). In that case the heir after leaving resided occasionally on the property, his mother and stepfather, and after his mother's death his stepfather, being the ordinary residents of the place; and the mortgage given by the heir at the instance of the stepfather gave a character to the occasional residences. Here in the case of *Isabella* there was nothing of the kind; her visits were visits only, and were to see a child, a cousin of her own, the son of her aunt, whose husband claimed to own the place against her. There was no occasional residence by her as was the case in *Groves* v. *Groves*. In giving her evidence she was asked if she stayed there several days, the answer was incomplete, broken, "No—not to say." I think there was no possession by her after she left about four months after the death of *Christina*. Up to that time the statute, I apprehend, would not run against her. I had occasion to consider the point in *Foley* v. *Foley* (*b*).

Judgment.

That would bring her possession up to some time in 1860, and as the twenty years would not expire till 1880 the question arises whether the record of this bill was in such a shape when the late Limitations' Act

(*a*) 10 U. C. R. 436. (*b*) 26 Gr. 463.

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came into force, 1st July, 1876, as would bring into question the title to the land before that date.

The land to which *Isabella* had title was the east half of a certain lot. The bill alleges title in the west half of the same lot, tracing it from *Thomas Bailey*, the grantee of the Crown, from whom *Andrew Robertson*, the father of *Isabella*, purchased; and *Isabella*, with her husband, made conveyance of the west half to the plaintiff by deed of 18th June, 1875; and the bill was filed on the 13th March, 1876, mistakenly setting forth title to the west half of the lot. In the bill as filed no notice was taken of the east half of the lot, the parcel in which *Andrew Robertson* had title. The mistake was discovered and was rectified so far as title was concerned by a conveyance by *Isabella* and her husband, of the east half, on 12th June, 1876, and on the 20th of the same month the bill was amended by stating in the 12th paragraph that the former conveyance by error described the land in question as the west half, it being intended to convey the east half, and that the land in question is in fact the east half. The allegation of title in the father in the west half, and the tracing of title from him to *Isabella* in the same half remained unaltered in the bill, through oversight no doubt, but still the allegation did so remain and was not amended till September of the same year, so that at the date of the coming into operation of the new Limitations' Act the record stood as I have described it, *i. e.*, it alleged title in *Isabella* in the west half; that she bargained with the plaintiff and intended to convey to him the same half, *i. e.*, the said lands, and that it was an error to describe the west half, as it was intended to convey the east half; but if her title was to the west half there was no error in the description, and the intention to convey the east half was an intention to convey a piece of land other than that to which she had alleged title. Then comes the allegation that the land in question

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is in fact the east half, but it is difficult to see how that can be, when all the allegations in regard to questions between the parties are not in relation to that parcel, but to the west half.

Reading the pleadings, and seeing the allegations in the 12th paragraph are by amendment, one can scarcely fail to see that the incongruity in the pleadings has arisen from omitting to amend the first paragraph, so as to state title in the east half instead of the west half; and if the question were only one of amendment I should feel no difficulty. My difficulty is in seeing that the record, as it stood on the 1st of July, 1876, was of a suit bringing into question the title to the east half of the lot, to which alone the plaintiff, and those under whom he claims, had title, and this difficulty appears to me insuperable.

In my opinion the decree should, on this ground, be affirmed.

Judgment.

BLAKE, V. C.—I at first did not arrive at the conclusion adopted by the Chancellor on the question of pleading. After consideration I concur in the view he has taken. I think that by the amendment the pleader states that the land in question in the cause is the east half of the lot, and that this is claimed by the plaintiff. He does not, however allege that the defendant is interested in this land, but states he claims the west half of the lot. By his pleading therefore, while claiming the east half of the lot, he brings before the Court no person to litigate its title with him, but makes the defendant a person claiming the west half. I think there was not on the allegations in the bill a suit properly constituted and pending at the time of the passing of the recent Statute of Limitations, and that it is not a case in which any amendment should be made to aid the plaintiff.

I think the decree should be affirmed, with costs.

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PROUDFOOT, V. C.—The bill was amended on the 20th of June, 1876, by stating in the twelfth paragraph that the land in question in the suit was the east half of the lot, and not the west half, as erroneously set forth in the original bill. By some carelessness, the first paragraph of the bill, which mentioned the land as the west half, was allowed to remain as it originally stood.

It seems that the same mistake existed in the deed to the plaintiff, which was corrected by another deed, dated the 12th of June, 1876. And it is contended that, the bill having been filed on the 13th of March, 1876, it was not competent for the plaintiff to amend by stating a title acquired after the filing of the bill, as determined in *Adamson* v. *Adamson* (*a*), and that class of cases. The rule laid down in these cases is not, in my opinion, infringed by what was intended to be done here. No doubt where the plaintiff has no title when the bill is filed, or if the possession of the legal estate is necessary to the relief sought, the title acquired after the bill is filed cannot regularly be brought upon the record. But there is no new title here. When the bill was filed the plaintiff's title was a title to the east half, though, by mistake, the deed described it as the west half. After the execution of the deed correcting the mistake, the plaintiff did not hold under that deed, but under the original one. There is no essential difference between a mistake or error, corrected in this manner by the voluntary act of the parties, and when corrected by the decree of the Court; and the effect of a decree is to place the parties in the same situation as they would have stood in, if the error to be corrected had not been committed (*b*).

Judgment.

I agree with the conclusion my brother *Blake* arrived at upon the evidence, that *Peter Robertson's* position in regard to the land was a fiduciary one, and that the real owners, when the payment of the purchase money was completed, were the heirs of *Alexander Robertson;*

(*a*) 25 Gr. 550.

(*b*) *Kerr* on Fraud 348.

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and the possession of *Peter*, if he is to be deemed in possession, was for them; he could not have claimed the benefit of the statutes of limitations as against his *cestuis que trust*. Any person, whether a relative or a stranger, but not being in the position of a legal guardian, entering upon and receiving without authority the rents and profits of the estate of an infant, is, during the minority of the infant, *quasi* guardian (*a*). *Peter*, therefore, could acquire no title as against the the infant owner, *Isabella Robertson*, under whom the plaintiff claims.

Isabella came of age in 1860, and would have had twenty years within which to assert her title against the persons in possession claiming under *Peter* with notice of the title of *Isabella*, but for the R. S. O. ch. 108 limiting the period to ten years. The Act, as applicable to the parties to this suit, came into force on the 1st of July, 1876. The bill was filed on the 8th of March, 1876, and, as has been stated, sought relief in regard to the wrong half of the lot. An amendment was made in June, which I was at first inclined to suppose was sufficient, but after repeated consideration I have felt constrained to arrive at the same conclusion as the Chancellor, that it failed to bring in question the title to the right half of the lot.

Judgment.

I do not think the objection of Champerty on Maintenance applies. It was not a purchase of a right of action but a transfer of an interest in property, to which a right of action might pass as incident. The evidence fails also to establish any contract or agreement of a champertous nature. *Isabella* says her agreement with the plaintiff was, to get a lot in Peterborough for her interest in this property; "and when this would be settled, that I might have more." There was no promise of any specific sum, nor of any proportionate sum, and indeed no promise to pay anything. The utmost

(*a*) *Browne* on Limit. 285.

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it amounted to was an understanding that if the plaintiff succeeded in recovering the property, and felt liberally inclined, he might give a gratification to the vendor. But there was no liability to do so. See the cases on the subject collected in *Watson's* Compendium of Equity, vol. 1, p. 82.

Judgment.

In my opinion the decree should be affirmed, with costs.

ROSEBATCH v. PARRY.

Administration suit unnecessarily brought—Groundless charges against executors—Costs—Practice—Certificate by Master after report.

Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby much unnecessary costs and trouble, the Court being satisfied with the conduct of the executors, refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit.

After the closing of his report, a Master should not certify as to any matters before him in the course of the inquiry upon which he has reported, unless called upon to do so by the Court. After report any certificate, unless called for by the Court, is irregular and improper.

Hearing on further directions and as to the question of costs.

The bill had been filed by *Dorah Rosebatch*, a daughter and legatee of the testator *Robert Hall*, against *Thomas Parry*, *George Canning* and *James Henry Stannard*, executors, and *Ann Whitmore*, *Thomas Hall*, and *Samuel Sharpe Hall*, other children

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of the testator, and also beneficiaries under his will, praying an account and administration of the estate, and a decree had been pronounced on the 23rd day of November, 1878, referring it to the Master at Hamilton to take and make the usual accounts and inquiries; in pursuance of which the said Master made his report, dated the 28th day of June, 1879, finding, amongst other things:

"1. That the personal estate specifically bequeathed * * come to the hands of the defendants *Thomas Parry, George Canning*, and *James Henry Stannard*, * * to the 27th day of June, 1879, and wherewith they are chargeable, amounts to the sum of $1,438.77, and that they have properly paid out * * $1,080.29, leaving a balance due from them, on that account of $358.53.

Statement

"2. The rents and profits of the testator's estate received by the said executors, or with which they are chargeable, amount to the sum of $1,422.50, and they have properly paid out, or are entitled to be allowed thereout, the sum of $938.90, leaving a balance due from them on that account of $483.60.

"3. The real estate which the said testator was seized of or entitled to, consists of town lot No. 31, in the angle of Caroline and Napier streets in the city of Hamilton, and some tenement houses thereon, much dilapidated and out of repair at the time of the testator's death.

"4. There are no incumbrances upon or affecting the testator's estate.

"5. The debts of the said testator owing at the time of his decease, amounted to the sum of $56.72, and they have been paid by the said executors, and allowed to them, and are included in the said moneys paid out and disbursed by them.

"6. The funeral expenses of the said testator amount to the sum of $56.75, which have been also paid by the said executors, and allowed to them, and are also included in the said moneys paid out and disbursed by them.

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"7. The only legacy specifically bequeathed by the said testator by his last will, was a legacy equal in amount to what should be realised from a life assurance policy then subsisting on his life, which amount he bequeathed and ordered to be paid to his daughter, the now plaintiff, as a marriage portion, on the day of her marriage, which legacy amounted to the sum of $469, and was paid by the said executors to the said plaintiff on the day of her marriage, and the amount has been allowed to the said executors, and is included in the moneys so paid out by them as aforesaid.

"8. The only personal estate of the said testator now outstanding consists (1st) of a promissory note made by one *C. Howard*, to the testator, on which a balance remains unpaid of about $19.

"9. And I find that the plaintiff is indebted to the said testator's estate in the sum of $26.67 besides interest thereon from the 13th of December, A. D., 1875, for the use and occupation of a portion of the said real estate after her mother's death, as tenant thereof to the said executors, for which the said executors hold her promissory note, dated the 10th day of August, 1875, payable four months after date; which sum, with interest, is chargeable against the plaintiff's share of the testator's estate, and is to be deducted from her said share on the final division and distribution of the said estate.

Statement.

"10. I certify that Schedule A, annexed to this my report, is a true copy of the testator's last will.

"11. And in respect to the inquiry directed by the said decree, as to who are the proper parties entitled to share in the real and personal estate of the said testator, I find that the persons so entitled are such of the children of the testator as shall be living when the defendant *Samuel Sharpe Hall*, his son (now an infant) shall arrive at the full age of twenty-one years, and they are entitled to equal shares, the said children at present consisting of the plaintiff, and the defendants, *Mary Ann Whitmore*, *Thomas Hall*, *Robert Hall*, and the said *Samuel Sharpe Hall*.

"12. And at the request of the plaintiff I certify the following facts, viz.:

"I have allowed to the defendants, in their account,

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C, of disbursements on account of the testator's real estate the first item, amounting to $124.92, which was objected to on the part of the plaintiff;

"And I further certify in respect to the said item that it was proved before me to my satisfaction, that the said item was for certain repairs to the testator's houses, then in a very dilapidated condition, which the defendant *Parry*, and one *Charles Hill*, his partner, did and made immediately after the death of the testator, which said repairs the defendant *Parry* and his said partner had contracted with the testator in his life-time to do and perform, and which repairs they made under the belief that they were legally bound and obliged to do the same after the death of the testator by force of their said contract. And I further certify in reference to the said item that $74.90 (part of the said $124.92) consisted of money actually paid out by said *Parry* and *Hill* for lumber and other material purchased by them for and actually used by them in making said repairs; that the sum of $50.02 (residue of the said $124.92) was charged for their men's wages, at the rate of $1.87½ per day, the price actually paid by them being $1.75 per day, and the profit usually charged on the men's wages being 25c per day; that the difference of twelve and a half cents per day between the amounts so charged, and so paid as aforesaid, went exclusively to the said *Charles Hill*, the said defendant *Parry* receiving no part thereof, nor any gain or profit whatsoever for or on account of said repairs; that the only sum charged in the defendants' accounts in respect to which the defendant *Parry* received any profit was in item 88 in the said account C, of disbursements on account of the real estate, amounting to $4.86, which item I disallowed *in toto*, for that reason. And I further certify that it was proved before me, to my satisfaction, that the whole of the repairs done to the said houses from time to time by the said defendant *Parry*, were done at rates below the ordinary prices then usually charged for such work."

Statement.

After the cause had been set down for further directions the said Master granted, at the instance of the plaintiff, a certificate in the words following:

"On the application of the plaintiff I certify to this

honourable Court, that I do not find any evidence in the depositions taken in this cause, except the evidence of the defendant *Parry*, directly proving the contract between the testator and the defendant *Parry* and his partner *Hill*, for doing the repairs to the testator's property mentioned or referred to in the accounts filed herein and in my report, dated the 28th day of June last. But I further certify that all the parties concerned in the proceedings before me seemed to be aware of such contract having been made, or to take it for granted: that the defendant *Parry* and his partner *Hill* were both sworn and gave evidence before me on taking the accounts herein, as well as also certain other witnesses, which evidence was taken in presence of the solicitor of the plaintiff, who cross-examined said witnesses at great length, but did not inquire or ask a question of any of said witnesses as to the existence or making of such contract."

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The other facts appear in the judgment.

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

Mr. *Plumb*, for the infant defendant.

Mr. *Rae*, for the defendants *Robert Hall* and *Mary Ann Whitmore*.

Mr. *Watson* and Mr. *Haslitt*, for the other defendants.

SPRAGGE, C.—The Master's report in this case was made on the 28th of June last, and the cause not having been set down on further directions and costs by the plaintiff, it comes before me upon being set down by the executors.

January 28, 1880.

Judgment.

The bill charges misconduct by the executors. The report does not shew misconduct; but it was contended for the plaintiff that the executors had not invested the moneys of the estate as they were directed to do by the will; and in order to clear up the point, I directed that a certificate should be procured from the Master, (counsel for all parties assenting,) shewing how the moneys of the estate had been invested by the executors.

1879.

Rosebatch v. Parry.

The direction in the will is: "I, the said *Robert Hall*, do hereby direct my executors to lay out and invest my estates to the best of their discretion and judgment, for the benefit of my wife and children," &c. The Master's certificate is: [The Chancellor here read the portions of the report bearing on this point.]

The executors appear, therefore, to have been guilty of no wrong in this respect, and, as far as appears from the report, they have administrated the estate faithfully, and to the advantage of those beneficially interested.

This is one of those cases where a party interested in an estate has come into Court without first making those careful inquiries which it behoved him to make into the conduct and dealings with the estate of those entrusted with its administration; and groundlessly charges them with misconduct. In short, the suit has been instituted unnecessarily.

Judgment.

The expense has to be borne by some one. Certainly the executors must have their costs. All those interested in the estate, with the single exception of the plaintiff, are satisfied with the administration by the executors. It is not just that they should bear the expense, or share in the expense, of proceedings not desired by them, and to which they are unwilling parties, and from which they derive no benefit. The proper conclusion from this is, that the costs of this unnecessary litigation should be borne by the party who unnecessarily occasioned it, *i. e.*, the plaintiff.

The decree will be accordingly.

I am not sure that in *Moodie* v. *Leslie* (*a*), I was not over lenient to the plaintiff.

I see no reason for taking the further administration and winding up of the estate out of the hands of the executors; the effect would, of course, be to diminish the fund to which all are entitled.

(*a*) 12 Gr. 537.

1880.

Rosebatch v. Parry.

A certificate (not, of course, the one to which I have referred,) has been brought in along with the papers, which ought not to have been granted by the Master. After the closing of a report the Master should not certify as to any matter before him in the course of the inquiry upon which he has reported, unless called upon to do so by the Court. While the matter is still before him he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court; and all parties interested are then before him to present their views, both as to the substance and form of the special matter reported. After report, a certificate, unless called for by the Court, is irregular and improper.

Judgment.

Re Davis.

Will, destruction of—Registration of will—Notice—Redemption.

The widow kept possession of the will for eleven months after the death of the testator, when she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will—an estate for life—and the only child professed to convey, as heir-at-law, to one *R.*, who created a mortgage, under which the property was sold to *D.*, a *bonâ fide* purchaser without notice, who afterwards agreed to sell to *R.* for the amount of his purchase money, interest, and costs.

Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore *D.* was entitled to the protection of the registry laws (R. S. O. ch. 3, sec. 75), as against the infant devisees: but it appearing that *R.* had notice of the will when he purchased from the widow and heir-at-law, the Court declared the infants entitled to redeem.

This was a proceeding under the Act for quieting titles, upon the petition of *Frederick Davis*. In proceed-

1879.

Re Davis.

ing before the Master at London, that officer, on the 2nd of November, 1878, made an order in the terms following:

"Upon reading the petition filed in this matter, and the affidavits and papers filed in support thereof, and the claim filed on behalf of the infants *Charles Wilson* and *Eggleston Wilson*, by Mr. *John Hoskin*, their guardian *ad litem*, I direct this matter to be set down for examination of witnesses and hearing at the ensuing sittings of this honourable Court, at London, in order that the questions of law and fact between the petitioner, *Frederick Davis* on the one part, and the said infants on the other part, may be then and there heard and disposed of, upon the following issues:

"1. The petitioner alleges, and the said infants deny, that to the extent of the right secured to him under the agreement between him and the said *Robert Ritchie*, dated on the 28th of January, 1878, he is a purchaser for value without notice of the rights of the said infants as devisees of *Abraham Blomfield*, and entitled to the protection of the registry laws.

Statement.

"2. The said infants allege, and the said petitioner denies, that he and *Laura Georgina Adams*, through whom he claims title, each had before and at the time they severally acquired their respective estates and interests in the said lands actual notice and knowledge of the rights of the said infant defendants as devisees as aforesaid.

"3. The said infants allege that *Abraham Blomfield*, through whose heir-at-law the petitioner claims title, departed this life on or about the 15th of April, A.D., 1870, seized in fee simple of the said lands, leaving his last will and testament, in writing, duly executed according to law in the manner required for passing real estate, whereby he devised the lands in question herein to his widow, *Mary Ann Blomfield*, with remainder to them, the said infants, in fee simple; that the said will was destroyed after the death of the said testator, by the said *Mary Ann Blomfield*, without the knowledge or consent of the said infants, who never had possession or controul of the said will, and never were in a position to register the same, and that the petitioner is therefore not entitled to the protection of

the registry laws. And the petitioner, without admitting the truth of the said allegations, denies that, even if true, they affect his right to the protection of the registry laws.

"4. The infants claim, that before and at the date and execution of two conveyances, bearing date respectively the 27th day of February, 1872, and the 19th day of March, 1872, and made by *Richard Swanton* and *Mary Ann Blomfield*, and by *James Wilson* and *E. M. Wilson* respectively, to the said *Robert Ritchie*, he, the said *Robert Ritchie*, had full notice and knowledge of the said will and of the contents and destruction thereof, and of the rights and claims of the said infants, and that in any event they are entitled to the rights of the said *Robert Ritchie* in the said lands referred to in the second paragraph of schedule "A." annexed to the petition in this matter, and to redeem the petitioner.

"5. And I further direct, that with reference to that part of the issue contained in the fourth paragraph hereof, as to notice and knowledge by the said *Robert Ritchie* of the said will and of the contents and destruction thereof and of the rights and claims of the said infants, and their being, in any event, entitled to the rights of the said *Robert Ritchie* in the lands referred to, the said *Robert Ritchie* be served with a copy of this order and the issue directed, and with notice of setting down the same for hearing as hereinafter directed, and that such services are to be so effected without the intervention of the petitioner, and at least ten days before the hearing Term."

Statement.

In pursuance of this order, the matter came on for hearing before *Proudfoot*, V. C., at the sittings at London, in the Autumn of 1878, when it appeared that *Davis* had purchased for value, without notice of the will, at a sale effected by Mrs. *Adams* under a power contained in a mortgage created by *Ritchie*, and that *Davis* subsequently executed an agreement to sell to *Ritchie* for the amount he *(Davis)* had paid for the purchase money of the property, together with interest and costs. The effect of the evidence adduced appears in the judgment.

1879.

Re Davis.

Mr. *Street*, for the petitioner.

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

March 26th. PROUDFOOT, V. C.—There were several issues in this quieting title matter:

1st. If petitioner was a purchaser for value without notice of the right of the infants.

This I determined in favour of the petitioner.

2nd. Whether *Laura G. Adams*, through whom petitioner claims, had notice.

This, also, I decided in petitioner's favour.

3rd. The petitioner claiming through the heir-at-law of *Abraham Blomfield*, who died on the 15th April, 1870, the infants claim as devisees under his will, and say they were subject to an inevitable difficulty in registering the will, by its having been destroyed, and are therefore protected from the operation of the Registry law.

Judgment. It seems that *Abraham Blomfiel l* died on the 15th April, 1870, having made his will about six weeks previously. The contents of the will were proved by sufficiently satisfactory evidence as giving the land to the widow for life, and then to be divided equally between two grandsons, the infant sons of the testator's only daughter, Mrs. *Wilson*. About eleven months after testator's death, the widow burnt the will so as to enable her to borrow money on the place. The mother subsequently sold her life interest to one *Ritchie*, and Mrs. *Wilson* professed to sell her estate as heir-at-law to him.

The deed from the widow was made on the 19th of March, and registered 28th March, 1872, and that from the daughter on the 27th February, registered 8th March, 1872. The will has not been registered.

The only question is, whether the destruction of the will eleven months after it was made, is such an inevitable difficulty, as to excuse the registration under R. S. O. ch. 111, sec. 75.

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Re Davis.

McLeod v. *Truax* (*a*), shews that infancy is not such an inevitable difficulty; and here the will was in existence for eleven months after testator's death—and there was no difficulty in having it registered. To render a difficulty of that kind inevitable, it would need to be one extending over the whole period of twelve months named in the statute. There was no concealment of the will; it was drawn by a conveyancer, who witnessed its execution. Both he and the other witness to the will are alive, and were examined as to its contents. The mother of the devisees knew of the will and read it; another witness saw it, and read it in September, 1870, five months after testator's death.

The effect of our registry law on the subject of wills and the difference between it and the English law, is discussed at some length in *McLeod* v. *Truax*. In some respects ours is more favourable to the devisee, as if there be an inevitable difficulty he is not bound to register the difficulty as required by the English law. And our law allows the devisee the benefit of the excuse so long as the difficulty lasts, which is otherwise under the British Acts.

Judgment.

Had the will in this case been concealed, or suppressed, or destroyed immediately upon the testator's death, it is quite possible that the devisees would be unaffected by the failure to register. And if the difficulty were of such a nature as not to admit a memorial of it being entered on the register, it is probable that even the British Acts might not apply; but some of these Acts after the lapse of various terms—three years in some, five years in others—protect the purchaser from the heir even though the difficulty should not be overcome: *Chadwick* v. *Turner* (*b*). And see *Stephen* v. *Simpson* (*c*). I therefore hold that the petitioner is entitled to the protection of the Registry laws.

(*a*) 5 O. S. 455, 459. (*b*) L. R. 1 Chy. 310. (*c*) 15 Gr. 594.

1879.

Re Davis.

There is another question depending, I suppose, upon the fact whether *Ritchie*, the grantee of the widow and heir-at-law, had notice of the will. This issue I do not think was alluded to upon the argument; but, if necessary, I find that he had notice. The evidence seems to me quite clear. The effect, I suppose, will be, to give the infants a right to redeem.

HUNTER v. BIRNEY.

Judgment binding on parties—Estoppel—Trespass.

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of lands not plaintiffs and *liberum tenementum*, is not a complete estoppel, preventing the defendant in another suit, from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed.

The plaintiff was the holder of a complete paper title to lot No. 3 in the 11th concession of Monaghan. The defendant was the owner of lot No. 4 in the same concession, the two lying side by side.

In 1876, the plaintiff commenced an action of trespass against the defendant, and in his declaration described the lands trespassed upon as the whole lot. The defendant pleaded (amongst other pleas), that the lands described were not the plaintiff's lands, and that they were the freehold of the defendant.

Statement.

Issue being joined, the action was tried, and a verdict was found for the plaintiff upon the issues, and final judgment entered against the defendant.

Sometime afterwards the plaintiff filed his bill against the defendant, setting out that since the judgment the

defendant had been committing further acts of trespass upon the said lot, and insisting that the effect of the judgment at law was to estop the defendant from questioning the plaintiff's title to any part of the lot, and praying for a declaration to that effect and to be quieted in his possession, and for an injunction against further trespasses. 1879. Hunter v. Birney.

The defendant set up in his answer that many years before the action at law there had, by agreement between the then respective owners of lots 3 and 4, been a boundary line run and marked by blazes for nearly the entire length of the lots to the edge of a cedar swamp; that this line had been acted upon and acquiesced in for many years; that in recent years the true boundary line was run, and it was then ascertained that the conventional line above mentioned was really some distance in upon lot 3; that at the trial of the action at law it was proved that defendant had cut some cedar trees on a part of lot 3, north of the termination of the conventional line, and thereupon the verdict and judgment was entered for plaintiff; that defendant and those through whom he claimed had been in possession of that part of lot 3 east of the conventional line for more than twenty years; that the finding upon the issues aforesaid and the entry of the judgment were not a determination or a conclusive termination that at that time no part of lot 3 was the property of the defendant, that question not having necessarily been brought into controversy; that he still remained in possession of the portion of lot 3 east of the conventional line, and that this was the trespass now complained of by plaintiff: and submitted that, under the circumstances, the defendant was entitled to shew his title to the portion of which he was so in possession; and that he was not estopped by the judgment so obtained against him from claiming title to such portion. Statement.

By agreement, the question of estoppel was, on the

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25th day or February, 1879, argued before Vice-Chancellor *Blake*, it being arranged that if he determined adversely to the plaintiff's contention, the cause should be taken down for examination of witnesses as to defendant's alleged title by possession.

Mr. *Bethune* for the plaintiff. The question involved in this controversy is simply whether or not the judgment in the action of trespass mentioned in the bill is binding on the defendants in this suit as to all the lands mentioned or described in the writ at law, although in that action a verdict might go for the plaintiff upon proof that a trespass had been committed upon only a small portion of the property. In strictness, the defendant should have limited his pleading according to the facts of that case. It is true the defendant objects that the precise point was not raised in the action; that is, whether the plaintiff was the owner of lot number three and, if so, whether the defendant had been guilty of trespassing on it. The defendant should have expressly confined his plea to the portion of the land upon which he had committed the acts complained of as trespasses.

Argument.

Mr. *W. H. Scott*, Q.C., for the defendant. The question really in issue is, did the right to this land come in question? or, in other words, was the subject matter in litigation the same? that is, is it the same cause of action that is now sued for? Was not the point then raised whether the defendant had actually trespassed on a portion of lot No. 3, and was the part so trespassed on the land of the plaintiff? It could not possibly involve the question as to who was the proprietor of the other portion of that lot. One mode of testing the question is, would the evidence in the action at law have been sufficient to sustain the plaintiff's present claim? The evidence then adduced was only as to that portion of the lot actually trespassed on; none as to the other portions.

1879.

Hunter v. Birnie.

In addition to the cases cited in the judgment, *Craven* v. *Smith (a)*, *Needham* v. *Bremner (b)*, *Wightman* v. *Fields (c)*, *Irwin* v. *Grey (d)*, *Weaver* v. *Hendricks (e)*, *Smith's* Lead. Ca. 782-3, 789. were referred to.

March 10th.

BLAKE, V. C.—In *Tapley* v. *Wainwright* (*f*), the Chief Justice says: "It appears, therefore, to us, that in this case the plaintiff ought to recover *pro tanto*. No doubt the parties will agree to apportion the damages found for trespasses upon the whole space, and to reduce the amount, so as to be a fair compensation for the trespasses to the part enclosed for twenty years. This will avoid the necessity for a new trial. If the defendant requires it, the verdict will be entered for the plaintiff as to part, and for the defendant as to the other part of the close, in which, &c." So that it is possible to enter the judgment in such a manner as to prevent the question being raised which is presented in the present case. In *Smith* v. *Royston* (*g*), which was an action of trespass for breaking and entering a close of the plaintiff, there was a plea of *liberum tenementum*, and the position of the parties on such a record is thus stated by Baron *Alderson*: "By this plea, therefore, he undertakes to prove two propositions—first, that some part of the described close belongs to him, and secondly, that it is on this part of the close that the acts complained of have been done. If he does this, he is entitled to the verdict, if not, the plaintiff must succeed." The Court then proceeds to consider the effect of such a verdict. "It was urged that the effect of the finding upon this plea in future will be to conclude the right of the soil of this Buck Leap as

Judgment.

(*a*) L. R. 4 Ex. 146.
(*b*) L. R. 1 C. P. 583.
(*c*) 19 Gr. 559.
(*d*) 19 C. B. N. S. 585.
(*e*) 37 U. C. R. 1.
(*f*) 5 B. & Ad. 400.
(*g*) 8 Mee. & W. 381.

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belonging to the defendant. But this is not so. If the rule we have laid down as being the true rule deducible from the authorities be correct, the only effect of this record, if given hereafter in evidence between the parties to it, or those claiming under them, will be to shew conclusively that some part of the Buck Leap belonged to the defendant; and further, if the party giving the record in evidence can shew where the trespass in the declaration was actually committed, the record will be conclusive that such part of the Buck Leap belonged to the defendant. But the record will prove no more than this, and a proof to this extent is only in full conformity with principle and justice." In *Bassett* v. *Mitchell* (*a*), the Chief Justice uses this language: "It is said that the record, under these circumstance will not be decisive evidence in a future action, nor will it, as to the whole land in question; but either side may shew by evidence what part it was that was affected by the result of this cause;" and *Littledale*, J., on the same point, says: "The record would be evidence of a former decision as to part of the place in dispute, and it must be shown by proof which part that was. If this imposes any hardship on a plaintiff, it may as well be said, on the other hand, that a defendant is subjected to hardship because a plaintiff may recover by proving a trespass committed in any part of the close mentioned in his declaration; since that declaration, unexplained by evidence, would be conclusive, against the defendant afterwards as to the whole close." *Whittaker* v. *Jackson* (*b*), does not lay down a different rule. There it is plain the land in the first and second suits actually in question was identical. This appears from the judgment of *Pigott*, B.: "I think this was a good estoppel. The question is, what was the land really in litigation in the former action, and what land did the jury then find to be the land of the defendant? My reading of the

Judgment.

(*a*) 2 B. & Ad. 104. (*b*) 2 H. & C. 933.

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Hunter v. Birney.

pleadings in that action is, that the defendant there contended that not only the land on which the wall was built was his, but also the land on which the cornice was built, and that the jury so found" *Bebee* v. *Elliott* (*a*), shews that the Court may go outside the record to ascertain the subject matter in litigation. "The record must shew that the same matter might have come in question, viz., the boundary line between R. H. 1 and Watts's tract. That the record does shew, and the fact that it did come in question was shewn, as it might be, by proof *aliunde*." Mr. *Taylor* says (*b*), "In order that a judgment should bind parties and privies, it must have directly decided the point which is in issue in the second suit, and, therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to say on the record, or at the trial, that it has not settled the rights of the parties as to the same cause of action which is now in controversy; and the question of identity thus raised must be determined by the jury upon the evidence adduced." Mr. *Broom* (*c*), gives this summary as to conclusiveness of judgment *quoad* subject matter. "Upon the whole, it seems that we may fitly sum up these remarks upon the conclusiveness of a judgment of a Court of competent authority, *quoad* the subject matter in respect whereof such judgment is relied upon as a bar to future litigation, in the words of a learned Judge, who in a case below cited thus expresses himself: 'It is, I think, to be collected, that the rule against reagitating matters adjudicated is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are

Judgment.

(*a*) 4 Barb. S. C. at 459 (*b*) Tay. on Ev. 6th ed. p. 1451, sec. 1507.
(*c*) Legal Max. p. 341.

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not all necessarily established conclusively between the parties, and that either party may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object.' This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority."

It is no doubt true that a "judgment is final only for its proper purpose and object." In the action at law the plaintiff alleged that the defendant entered certain land of the plaintiff, being lot three, and trespassed thereon. The defendant denied the trespass and alleged that "the said lands" were not the plaintiff's, and that "at the time of the alleged trespass the said lands were the freehold of the defendant." The real question between the parties was, has a trespass been committed on the lands of the plaintiff? It made no matter whether the balance of lot three belonged to the plaintiff, so long as it was established that the part trespassed on belonged to the plaintiff. The Court would not have allowed the defendant to go into the question of the ownership of the remainder of lot three, on the plaintiff ceasing to give evidence as to a trespass on such portions. It might have been possible for the defendant to have had the judgment so limited as that on its face it would have shewn the premises in respect of which the verdict had been rendered, but although this has not been done, I think the only effect of the judgment as it stands at present is to bind the parties in respect of the portions of the lot on which it was proved that the defendant had trespassed; as to this, the judgment is conclusive both as to the title and as to the fact and nature of the trespass. The judgment is not, in my opinion, binding to any greater extent than above indicated.

Judgment.

FERGUSON V. FREEMAN. 1879.

Sale for taxes—Evidence of warrant—Erroneous description—Warden and Treasurer.

Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed, and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the Court House, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed.

Held, sufficient evidence to authorize the Court in admitting secondary evidence of its contents; which on being taken established satisfactorily the existence and contents of such warrant: and, on rehearing, an objection being raised which had not been taken at the original hearing, that the township or county clerk should have been called to produce or negative the existence of a duplicate of such warrant:

Held, that, if such proof were necessary, affidavit evidence to shew what was the fact should be received.

The premises intended to be conveyed by a deed were described therein as 180 acres of the east halves of two lots, "commencing at the front east halves of said lots, taking the full breadth of each half respectively, and running *Northwards*, so far as required to make ninety acres of each east half:"

Held, that "Northwards" might be rejected, being evidently a mistake for westward.

Quære, per SPRAGGE, C., whether the provisions of section 155 of the Assessment Act of 1869 apply where a sale of land took place before the Act, but the deed was not executed until after; or whether it applies only to a case where both were before or both after the enactment.

The proper officers to execute the deed of land sold for taxes are the Warden and Treasurer at the time the deed is demanded, not the persons holding these offices at the time of the sale.

This was a rehearing by the defendant of a decree pronounced by Vice-Chancellor *Proudfoot*, at the sittings at Kingston, in the spring of 1878. It appeared that the plaintiff had become a purchaser of the lands in question at a sale thereof for taxes in 1874, the deed for which from the officers of the county of Frontenac to the plaintiff, was executed in December, 1875, and registered in the month of January following. At that

Statement.

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time the lands were in a state of nature; but plaintiff went into possession by his tenant. On the 11th December, 1877, one *Abraham Lloyd*, the former owner; executed a deed professing to convey to the defendant *Freeman* the lands in question. The title being a registered one, the bill claimed that *Lloyd*, at the date of his conveyance, had not any title which he could validly convey to *Freeman*, but the fact that the deed from *Lloyd* formed a cloud upon the title of the plaintiff gave the plaintiff a right to come to this Court for relief.

Statement.

Freeman, by his answer, set up that the sale for taxes was invalid and the land described in the deed to the plaintiff was not that described in the deed to the defendant: denied the fact of possession by the plaintiff, and asserted that he, *Freeman*, was in actual possession.

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

Mr. *G. A. Kirkpatrick*, for the plaintiff.

The points discussed appear sufficiently in the judgment.

Sept. 11th.

Judgment.

SPRAGGE, C.—Assuming the sale for taxes, which took place in 1867, and the deed from the Warden and Treasurer, which is dated 7th of December, 1875, to be still open to question, there seem to be these questions raised by the defendant; the first, whether there is evidence of taxes being in arrear for the requisite number of years; the second, whether there was sufficient evidence of the warrant; the third, whether the discription in the deed is sufficiently certain; and a fourth, which is dealt with in the judgment which my brother *Blake* has prepared.

As to the first, it appears by the note made by my brother *Proudfoot* in his book, at the hearing, that the treasurer's book shewing taxes due as early as 1853 was produced, and there is no entry or other evidence of the taxes being paid.

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As to the second objection there was evidence of the warrant being in the Court House at the time that a large portion of the edifice was burned, and of the probability that it was consumed on that occasion; sufficient evidence for the exercise of the judgment of the presiding Judge to admit secondary evidence of its contents. The learned Judge ruled that a case was made for the admission of secondary evidence, and a good deal of secondary evidence was given, proving satisfactorily, I should say, the existence and contents of the warrant. Mr. *Britton*, in his reply, stated that the county or township clerk would in the ordinary course, have had a duplicate of the warrant, and that he should have been called. I do not know how that may be, and Mr. *Britton* did not point to any statutory provision shewing this, nor does he say that the point was made at the hearing, when the omission, if it be one, to call that official might have been supplied. But however that may be, I take this to be a case in which the power of the Court to admit affidavit evidence of a fact may properly be exercised.

Judgment.

It was held in *Hutchinson* v. *Collier (a)*, that it was necessary to prove the warrant "as the foundation of the authority to sell," *Hagarty*, C. J., observing, "The proof of a warrant either by production or reasonable secondary evidence, could rarely involve any difficulty."

I should certainly, speaking for myself, not turn the plaintiff out of Court upon such an objection, if the omission, assuming that there was an omission, can be supplied.

I think there is nothing in the objection to the description in the deed from the warden and treasurer to the plaintiff. A similar objection was made in *The Corporation of Welland* v. *The Buffalo & Lake Huron R. W. Co.* (*b*). In that case one of the courses was

(*a*) 27 U. C. C. P. 249, 253, 254. (*b*) 30 U. C. R. 147.

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given south when it should have been north, and the effect, if read just as it was, and if there was nothing else to enable the Court to give the course in question a northerly direction, would be to exclude the land from the plaintiffs' deed. Mr. Justice *Wilson*, by whom the judgment of the Court was delivered, said: "I think that the point to which the line is to be carried being the northern limit of the lot, the course given as south half a degree east, which leads in the opposite direction, may be rejected * * In no other way can the general grant of sixty-eight acres of land be made effectual." In the description in the deed before us we have a course northward, when it should be westward; taken just as it is it would exclude the land in question altogether; but we have enough on the face of the description itself to shew that a course northward would be an erroneous description, and that a course westward must be intended; and we have enough if we reject the word northward without substituting any other word for it. The description is as follows: "All those certain parcels or tracts of land and premises being composed of one hundred and eighty acres of the east halves of lots number three and four, in the ninth concession of the township of Palmerston, in the said county; which said one hundred and eighty acres may be known and described as follows: commencing at the front east halves of said lots three and four in the ninth concession of the township of Palmerston, taking the full breadth of each east half respectively, and running northwards so far as required, in order to make ninety acres of each east half respectively."

Judgment.

We see from this that there are 180 acres; that they are parts of the east halves of lots three and four, that there are ninety acres of each half lot; that they commence on the east front of each half lot, and take the full breadth of each half lot; and run *in some direction* so far as required to take ninety acres of each half lot.

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The conclusion is inevitable that that direction must be westward; that "northward" is obviously a mistake and should be rejected.

I have thought it well to dispose of the objections raised, because I doubt whether the limitation clause, sec. 155, of the Assessment Act of 1869, applies to such a case as this; where the sale took place before the passing of the Act, and the deed was made after its passing. It applies to a case of both being before, and to a case of both being after the passing of the Act, and if it does not apply to such a case as this, it is a *casus omissus*; but the language to my mind leaves it doubtful; and I have therefore dealt with the points raised as if unaffected by the limitation clause.

In my opinion the decree should be affirmed.

Judgment.

BLAKE, V. C.—The evidence to my mind is clear to shew there were taxes in arrear for such a period prior to the sale as would warrant the sale under the Acts then in force. The evidence of *John Irvine*, and the production of the treasurer's books, shew that there were taxes due for many years preceding the sale, and so far back as the year 1853. It is also proved that there was in fact a sale, and that a deed issued to the purchaser. By section 150 of 29 & 30 Vict. ch. 53, "If the land be not redeemed within the period so allowed for its redemption, being one year, exclusive of the day of sale as aforesaid, then on the demand of the purchaser, or his assigns, or other legal representative, at any time afterwards, and on payment of one dollar, the treasurer shall prepare and execute with the warden, and deliver to him or them, a deed in duplicate of the same land." Under this clause I think the proper officers to execute the conveyance to the purchaser are the treasurer and warden at the time the deed is demanded. It could scarcely be that the persons intended were the treasurer and warden at the time of the sale. The frequent changes in these officers would make it

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inconvenient, and it would be unreasonable, that those in office at the period of the sale should be the parties to execute the deed to the purchaser. Sec. 7 of cap. 19 of 37 Vict. simply states that which, without this clause, is the effect of the statute. The conveyance to the purchaser in this case was executed by the persons bound to perform this duty. As there were taxes in arrear for the period prescribed and a deed was duly issued, I think the party claiming thereunder is entitled to the protection of section 131 of 29 & 30 Vict., cap. 53. The sale having been fairly and openly conducted, and there having been no redemption in a year thereafter, the same "shall be final and binding * * it being intended that all owners of land shall be required to pay the arrears of taxes due thereon within the period of five years, and redeem the same within one year after the treasurer's sale thereof." I entirely agree in the judgment of the Chancellor as to the description of the property being sufficient for the reasons he has given, and I concur in his conclusion that the decree should be affirmed, with costs.

Judgment.

PROUDFOOT, V. C., retained the views expressed by him on the original hearing.

Decree affirmed, with costs.

SWIFT v. MINTER. 1879.

Mortgage—Immediate sale—Infants.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the Court will, under special circumstances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor.

THIS was a suit instituted to enforce payment of a mortgage security held by the plaintiff *Edward Swift*, which had been executed by *Edward Minter*, deceased, against the widow and infant children of the mortgagor. On the 7th of May, 1879, a decree was made, directing the usual accounts and inquiries to be taken and made by the Master at Walkerton, who, in pursuance thereof, made his report on the 27th of November, 1879, whereby he found due to the plaintiff, for principal, interest, and costs, subsequent interest and subsequent costs, up to the 27th day of April, 1880, the sum of $946; and to one *David Jackson*, made a party in the Master's office, upon a judgment held by him up to the same date, the sum of $92.95, and appointed these sums to be paid to the respective parties entitled on the said 27th day of April. Statement.

On the 27th of February, 1880, and before the time appointed for payment by the Master's report, Mr. *Boyd*, Q.C., moved, on notice, for an order for immediate sale of the mortgage premises, on the affidavit of the plaintiff, setting forth that the mortgage premises, the east half of lot No. 2, in the 4th concession of Bentinck, was not worth $800, and would not realize that sum at a sale on the usual terms; that the west half of this lot was sold about a year before for $800 —$200 cash, and the balance on time; the west half being at the time worth more than the east half, which during the past year, had been occupied by the defendants, the widow and children, but the same had been left uncultivated by them, except as to about

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three acres; that the widow and her father had, during the prior six months, felled about fifty trees, and had taken the bark therefrom, and carried the same from the premises, thereby greatly reducing the value of the premises; that the fences around the orchard and around the premises generally, had been allowed to get out of repair, and the same had become a common and open to the cattle in the neighbourhood, and that some of the trees in the orchard had, during the spring of 1879, been sold by Mrs. *Minter*. The deponent further swore that *The Stratford and Huron Railway Company* were then constructing their line of railway, which ran within sixty rods of the mortgage property, and deponent verily believed the same would sell for a better price then than it would six months later, as the purchaser would be in a position to sell a large portion of the timber on the premises for the construction of the railway; that the land was deteriorating, and becoming less valuable every month; that the widow and children were unable to cultivate the land, and had no stock wherewith to work the same, and if not sold would remain uncultivated next year. The deponent further swore that he was upwards of seventy years of age, and had no other means of support than what he would receive from the sale of the mortgage premises, and, being unable to labour, had borrowed money to maintain himself, until he could receive the money found due to him out of the proceeds of the land in question. Other affidavits were produced, corroborating in several respects that filed by the plaintiff. The defendant, Mrs. *Minter*, also made an affidavit, in which she swore that she considered "it most advisable, in the interest of said infant defendants, that the land in question in this cause be forthwith sold, and I am desirous that the same be forthwith sold." After having made this affidavit, however, Mrs. *Minter* refused to permit it to be used on the motion.

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Mr. *McPherson*, for the infants, opposed the application, on the ground that, as they were residing on the premises, it was not in their interest that the sale should be expedited.

Rigney v. *Fuller* (*a*), *Newman* v. *Selfe* (*b*), were cited in support of the motion.

Judgment.

BLAKE, V. C., under the circumstances, granted an order for immediate sale. Costs of the infant defendants to be paid by the plaintiff, and added to his claim. No costs to any of the other parties. Terms and conditions of the sale to be settled by the Master in the usual manner.

(*a*) 4 Gr. 198.

(*b*) 33 Beav. 522.

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KIELY v. SYMTH.

Street Railway—Voluntary transfer of shares—Transfer of shares to qualify director.

The stock of an Incorporated Street Railway Company consisting of 2,000 shares, was owned exclusively by two brothers (*G.* & *W.*). The charter of the company required that there should be a Board of Directors consisting of not less than three members, each of whom should hold stock to the amount of not less than $100. It having become necessary to raise funds for the purpose of carrying on the business of the company, the two brothers agreed that they should convey to *M.* (their father) one share each in order to qualify him as a director, and which they did accordingly assign; the father from thenceforth acted as the third director, and the funds for the construction and improvement of the road, were obtained and expended thereon. By his will the father bequeathed these two shares to his daughter, *S.*, who, after the death of her father, continued to exercise when necessary, the functions of director. After some time *G.* became dissatisfied with the manner in which *S.* discharged her duties as director, alleging that she acted simply as the nominee of *W.*, and finally asserted that the shares had been originally assigned to the father for the avowed purpose of qualifying him to act, but in reality as trustee for *G.* & *W.*, and that he had not power to dispose of them by will, and filed a bill seeking to have it declared that *M.* had, during his lifetime, and that *S.* since his death had held these shares simply as trustee of *G.* & *W.*, and that *S.* might be ordered to reassign them. The Court under the circumstances dismissed the bill, with costs.

The charter of the company provided that the stock "shall be transferable in such way as the directors shall by by-law direct": *Held*, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth.

Upon the facts stated below, *Held*, that a transfer was sufficiently shewn. And, *Semble*, that the plaintiff, one of the directors, should be estopped from alleging that *M.* was not properly qualified as a director, the effect of which would have been to injuriously affect the value of bonds of the company, to the issue of which the plaintiff was a party.

Held, also, that the transfer to *M.* was not without consideration, the agreement by the two brothers with each other to make it being sufficient.

Statement. THE bill in this cause was filed by *George Washington Kiely* against *Elizabeth Grattan Smyth* and *William*

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Thomas Kiely, setting forth that by Act of the Legislature of the Province of Canada, passed in the 24th year of Her Majesty's reign, chaptered 83, the Toronto Street Railway Company was incorporated, with power to construct and make a street railway in the city of Toronto; and that by another Act of the same Legislature, passed in the 36th year of Her Majesty's reign, the plaintiff and the defendant *William Thomas Kiely*, and such other persons as might become shareholders in the said company, were constituted as a body corporate and politic, by the name of "The Toronto Street Railway Company," and by the last mentioned Act the plaintiff and the defendant *William Thomas Kiely*, and one *Maurice Kiely*, their father, were declared to be the first or provisional directors of the said railway; the capital stock of which was thereby declared to be $200,000, in shares of $100 each; and the plaintiff and the defendant *William Thomas Kiely* were, at the time of the passing of such Act, the proprietors of such railway in equal shares.

Statement.

The bill further stated that the company having become embarrassed, an Act was passed by the Legislature of Ontario authorizing the sale of the railway, which was accordingly sold at the instance of a mortgagee thereof, and the defendant *William Thomas Kiely* became the purchaser thereof, but in reality as trustee for himself and the plaintiff.

That in the year 1875 the plaintiff and the defendant *William Thomas Kiely* were desirous of qualifying *Maurice Kiely* to be a director of the company for certain temporary purposes, and thereupon each of them agreed to transfer to him one share of the capital stock of the company, and they accordingly did transfer to the said *Maurice Kiely* one share each of such stock.

In the course of the suit it was shewn that the principal object in qualifying *Maurice Kiely* was to enable the company to effect a loan of money from the Toronto

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Savings' Bank, wherewith to carry on the works on the said railway, which loan was in fact effected.

It further appeared that *Maurice Kiely* had bequeathed these two shares to his daughter, the defendant *Elizabeth Grattan Smyth*, and that the plaintiff having, or supposing he had, reason to be dissatisfied with the manner in which she exercised the rights she possessed as owner of these shares, instituted the present suit in order to have it declared that she held such shares as trustee for the plaintiff and the defendant *William Thomas Kiely*.

The other facts appear in the judgment.

The cause came on for hearing at the sittings in Toronto, in November, 1878.

Mr. *Blake*, Q. C., Mr. *Boyd*, Q. C., and Mr. *W. Cassels*, for the plaintiff.

Mr. *Attorney-General Mowat*, and Mr. *Biggar*, for the defendant *Kiely*.

Mr. *Bethune* and Mr. *Meek*, for the defendant *E. G. Smyth*.

Argument.

For the plaintiff it was contended that the only object the two brothers had in view was to make the directorate full and complete, as only shareholders were empowered by the charter to issue bonds; and although *Maurice Kiely* was one of those named in the statute as a provisional director, it was not considered that he had authority to act in respect of pledging the credit of the company; that the evidence established that the brothers were each to be at liberty to draw upon the funds of the company for their current expenses and both did so, but it is not suggested nor is it shewn *Maurice Kiely* ever did so, or claimed to be entitled to do so; there is no such provision in the articles of partnership as to him, and he never received or claimed to be entitled to any share of the profits. If the transaction was intended to be one of gift, it had

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never been perfected, and nothing could be assumed or inferred from the circumstance of *Maurice* having acted as a director; the fact must be proved *aliunde*.

The Act of incorporation contains nothing precluding the possibility of one shareholder being trustee for others; under such circumstances the party would be entitled to all the rights and privileges of a stockholder, although not beneficially entitled. The Act does not require the party to be a *bonâ fide* holder of the stock: *Gott* v. *Gott* (*a*), *Beech* v. *Keep* (*b*), *Bridge* v. *Bridge* (*c*), *Davidson* v. *Grange* (*d*), *Milroy* v. *Lorde* (*e*), *Moffatt* v. *Farquhar* (*f*), *Warriner* v. *Rogers* (*g*), *Field* v. *Lonsdale* (*h*).

Plaintiff's counsel consented to dismiss the bill as against *William T. Kiely*.

For the other defendant, counsel insisted that it was at the time of the transfer to Mrs. *Smyth* a matter of interest for both the sons that the shares should be actually transferred to and accepted by their father, and even if made verbally, without any writing, it would be a perfectly valid transfer: what was contemplated and desired by the provisions of the Act was, that the stock should be paid for. Argument.

The entries in the minute book of the company shew expressly who are the parties interested. This must be taken as a solemn declaration by all the three that they were the only persons interested in the enterprise, and the extent to which each was interested; and where the interests of the public may be concerned, as here, parties will not be allowed to assert that their acts were not done in good faith, or that their interests were other than the parties stated them to be: *Bradley* v. *Holdsworth* (*i*), *Bligh* v. *Brent* (*j*), *Ward* v.

(*a*) 9 Gr. 165.
(*b*) 18 Beav. 285.
(*c*) 16 Beav. 315.
(*d*) 4 Gr. 377.
(*e*) 4 D. F. & J. 264.
(*f*) L. R. 7 Ch. D. 591.
(*g*) L. R. 16 Eq. 340.
(*h*) 13 Beav. 78.
(*i*) 3 M. & W. 422.
(*j*) 2 Y. & C. Ex. 294.

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Turner (*a*), *Hoagland* v. *Bell* (*b*), *Viet* v. *Viet* (*c*), *Queen* v. *Carter* (*d*), *Pickard* v. *Sears* (*e*), *Angell & Ames*, 560; *Redfield*, on Railways, 110, were, in addition to the cases mentioned in the judgment, referred to by counsel.

March 12th.

SPRAGGE, C.—The question in this case is, whether the defendant is entitled beneficially to two shares in the Toronto Street Railway Company, bequeathed to her by the will of her father *Maurice Kiely*. No question is raised as to the sufficiency of the will to pass these shares, and there is no sufficient evidence of the defendant agreeing to accept these shares in trust. The real question is, whether the shares were the property of *Maurice Kiely*.

The evidence of the plaintiff that no transfer other than a colourable one from himself and *William Kiely* to their father *Maurice Kiely*, was intended, is rebutted by the evidence of *William*, and of Mr. *Ferguson*, Q.C., and the presumption would be, that it was intended to be real, in order to qualify him as a director under the Act; a colourable transfer would be an evasion of the Act.

Judgment.

What passed on the occasion of the making of the father's will has, in one aspect, somewhat the appearance of its being assumed by the brothers that the question of the disposition of these shares was one which they had a right to decide; as if the father was only the channel by which they were to be conveyed to such person as they might appoint. They each felt interested in the disposition of these two shares, not on account of their value, but on account of the influence it would give to the legatee in the management of their enterprise. They were adding something from their own funds to the amount which their father

(*a*) 2 Ves. Sen. 431.
(*b*) 36 Barb. 57.
(*c*) 34 U. C. R. 104.
(*d*) 13 U. C. C. P. 611.
(*e*) 6 A. & E. 469.

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had of his own to dispose of by will; that and the disposition of these shares were spoken of between them at the same time; and there was the fact that their father had paid them nothing for the shares. These circumstances may have led them to think that they had, or at least ought to have, a voice in the disposition of the shares. However, what they thought or said or did has no value beyond its effect upon the evidence of *William* as to the reality of the transfer to the father. The sons do not appear, either of them, to have attempted to influence him in his disposition of them by will; and, as appears by the evidence of Mr. *Ferguson*, by whom the will was drawn, he treated them and disposed of them as his own; and this appears further by the circumstance that, having a short time before placed in the hands of the defendant the sum of $100 as a present, she asked him to leave her the two shares in question instead; and gave him back the money, which he accepted and retained. There is this further circumstance in favour of the intention of the parties being a real and not a merely colourable transfer of the shares: Mr. *Ferguson* was their professional adviser in the matter of the Act of the 29th March, 1873, passed, under his advice, to give legislative sanction to their acquisition of the road, and to facilitate its future management, and he advised them also as to what was necessary in order to qualify *Maurice Kiely* to be a director, as the holder of a certain number of shares. I gather from his evidence that he understood the intended transfer to be a real one, and that he so understood it, is evidenced by his taking instructions from *Maurice*, and from him alone, as to the disposition of them by will.

Judgment.

I may add that there would, as it appears to me, be nothing at all extraordinary in these two men making this gift to their father. He had assisted them with advances of money as well as with his services; he along with them was a provisional director under the

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statute; it was necessary upon the expiry of the term of the provisional directorate that there should be a board of directors of not less than three or more than seven each of whom should be a stockholder to an amount of not less than $100. The two brothers were desirous that there should be no foreign element in the management. The capital stock was $200,000, in shares of $100 each, and they were considered worth considerably less than par. They both preferred their father, in fact thought of no one else as third director. What more natural than that each of them should, out of his thousand shares, transfer one to his father to qualify him for an office that was necessary to their corporate existence. I have really no doubt, notwithstanding the evidence of the plaintiff, that it was intended that there should be an absolute gift of two shares of stock, one by each to their father, and that they each believed that such gift was made effectually and absolutely; and that their father understood the transaction in the same light.

Judgment.

But it is not sufficient that the parties intended this to be an absolute transfer, and that they believed their intention to have been effectually carried out. Being a gift (as for the present I consider it to be), it is necessary that it should be a perfected gift, and if anything remains to be done, without the doing of which it would not be a perfected gift, no property passes to the intended donee. The subject of the intended gift here was incorporeal personalty, a chose in action, or as it is called in some of the cases, a *quasi* chose in action. A very large number of cases has been cited to me. I have referred to them and to some other authorities. Some of those cited were cases of chattels capable of manual or symbolical manual delivery; others, and they are nearer to the point, were cases of intended transfer of government securities, or of stock in incorporated companies. I do not refer to them in detail, because they only establish what I think is clear

law, that if by statute or articles of association or by-law—where by-law is authorized by statute or articles—something is required to be done in order to the perfecting of a purchase or transfer of stock, and that something has not been done, no property in the stock passes. There are indeed cases where parties have been estopped by conduct from setting up irregularities in the transfer of stock, but the general rule is as I have stated it.

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In the statute to which I have referred, of March, 1873, there is this short provision as to the transfer of stock in this company, that it "shall be transferable in such way as the directors shall, by by-law direct." The directors have passed no by-law on the subject.

What then is the consequence? If the statute had been silent as to transfer of stock, it would clearly be transferable in any mode by which property of that nature could be transferred at Common Law. Then is the effect of this provision in the statute to prevent the transfer of stock, unless or until a by-law should be passed; or, to leave it to rest upon the Common Law until some mode beyond what is required at Common Law, should be fixed by by-law. My view is this, that the Legislature has thought fit to leave it to the company by its directors to prescribe any mode of transfer (not being an unreasonable one) that the directors might think fit; that it is an enabling provision, committing to the directors powers which the Legislature itself does often exercise when creating Joint Stock Companies, *i. e.*, powers to prescribe something which is not required by the Common Law, but without which there should be no transfer; that until this something further is prescribed, the right of transfer, which is an incident of property, remains, and may be exercised in any mode in which it could be effectually exercised at Common Law

Judgment.

At Common Law a transfer of property of this nature could be made by "word of mouth." *Williams* on Personal Property, p. 32; by *Strong*, V. C., in *Long*

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v. *Long* (*a*), and there is a great deal of other authority to the same effect. All that is necessary is a gift by the donor, and an acceptance by the donee, and I think we have both in this case.

Mr. *Ferguson's* evidence establishes that the plaintiff as well as *William Kiely* in his presence agreed, each with the other, to give—the father, however, not being then present: that, I assume, would not by itself be sufficient. But we find, besides, records of proceedings in a minute book of the company, after *Maurice Kiely* had ceased to be a provisional director under the statute, at which he and the plaintiff and *William* were all present, in which the three are styled "the shareholders" of the company, this was on the 15th October, 1873. At a meeting held on the 20th of the same month, also headed "Meeting of Shareholders," the same three are noted as present, and all as acting as shareholders in the election of directors; it is recorded that the three were elected directors, and the names of the three are signed by themselves at the foot of the record of these proceedings. It appears by the minutes of another meeting, headed like the others, held 11th May, 1874, that all three were present when the stock held by them respectively is noted; that by *Maurice* as follows: "*Maurice Kiely*, senr., holding stock to the amount of two shares." The plaintiff and *William Kiely* are noted as each holding 999 shares. The proper inference from this, I should say the irresistible inference, is, that the plaintiff and *William Kiely* had each done, it may have been by word of mouth, what each had, in the presence of Mr. *Ferguson*, agreed with the other that he would do, *i. e.*, transfer one share of stock to *Maurice Kiely*.

Judgment.

The rule is not inflexible, that all the rules prescribed for the transfer of stock should be observed; a continued course of practice in disregard of a rule will in some

(*a*) 17 Gr. 266.

cases estop parties from insisting upon a rule. *Bargate* v. *Shortridge* (*a*), was an instance of this.

In another case, *The Cromford and High Park R. W. Co.* v. *Lacey* (*b*), the great wrong that would be done to parties dealing with a company, if they could set up their own irregularities as invalidating their acts, is dwelt upon, as a reason for estopping them from setting up their irregularities. In the last meeting of the company to which I have referred, it was moved by the plaintiff and seconded by *Maurice Kiely*, and carried, that bonds of the company should be issued to the amount of $100,000, and a large sum of money was advanced by the Toronto Savings Bank upon these bonds. Senator *Frank Smith*, President of the Savings Bank, says in his evidence that he was present at the meeting last referred to, and was careful to see that the Street Railway Company was validly organized; and he says that both the plaintiff and *William* stated that *Maurice Kiely* was the owner of two shares; and he and Mr. *John Severn* were present as witnesses to the fact, that the three *Kielys* held the shares as recorded in the minutes of that meeting; and *Severn* in his evidence says the same.

Judgment.

I take it to be very clear that in any question between a bondholder and the company, or any then member of the company, neither of the latter could be heard to allege any fact that would invalidate the bonds, or any fact that would bring their validity into question. In this suit it is true that no bondholder is directly interested, but I am asked by the plaintiff in this suit to find that to be a fact, which is at variance with his own distinct statements, upon the faith of which these bonds were issued.

By the original Act of Incorporation, 24 Vict. ch. 83, with which the subsequent Act to which I have referred is incorporated, it is provided that the affairs of the

(*a*) 5 H. L. C. 297. (*b*) 3 Y. & J. 80.

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company shall be managed and conducted by a board of directors, not less than three nor more than seven; the qualification of a director is the holding of stock to a certain amount; and each of the two Acts enables the directors to issue bonds and debentures. The plaintiff now asks me to find as a fact that which would shew that one of the three directors had not the necessary qualification, and that the board of directors was not validly constituted. It is not necessary for me to say that the bonds would, supposing that an established fact, be invalid. It may be that he was a director in fact—though that is attended with difficulty to the plaintiff—and that being so the bonds issued are valid; but still if a decree of this Court finds as true that he was only nominally, not really, a stockholder, and so not qualified to be a director, it is obvious that the market value of the bonds would be depreciated. Nothing can shew this more plainly than the care taken by Senator *Smith* to see that the directorate was properly constituted: that each director held the necessary stock qualification. The question now is, whether as a matter of justice and public policy the plaintiff should not be held estopped from alleging that which would depreciate the value of the bonds, to the issue of which he was a party. I incline to think that he should.

Judgment.

There is another aspect of the case (which I think was not presented at the Bar) was this transfer of stock to *Maurice Kiely* without consideration? If without consideration, was it a gift? It is not necessary that there should be any consideration moving from the person upon whom the benefit is conferred; the consideration may come from a third person. To apply this to the case before me. If the plaintiff, for a money consideration paid by *William*, or agreed to be paid by *William*, had agreed to transfer to *Maurice* one of his shares of stock, the transfer would not be a gift from the plaintiff to *William*, and the plaintiff's

promise would be for valuable consideration. Here there was no *money* consideration, but they were advised and each agreed that a directorate of three was necessary in order to raise money by the issue of bonds. In order to constitute the directorate, a third stockholder was necessary, and each agreed with the other, as I have already stated. Take first the consideration moving from *William* to the plaintiff for the promise that the plaintiff should transfer one share to *Maurice*. It was that *William* should transfer one share to *Maurice*, that he should divest himself of one share, should cease to be the owner of it; and a promise by *William* to do this would itself be a valuable consideration, and it was not necessary that such transfer was, or would be of any benefit to the plaintiff; but it was a benefit, for it enabled him, with *William*, to raise funds which were a necessity to them. The consideration from the plaintiff to *William* was of course the same. Assume for the moment that such an agreement had been carried out on one side by one of the parties making a complete and perfect transfer of one share to *Maurice*, he would have paid his consideration; and if the other failed to do the same, he could compel him, or recover damages. It seems to me that these considerations take this transaction out of the category of gifts; and if so, then, although there may have been no perfected transfer, the plaintiff cannot have the aid of this Court to get back the one share of stock which he agreed, as I find upon the evidence, to transfer to *Maurice Kiely*, whether he made a perfect transfer of it or not.

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Judgment

My conclusion therefore is, that the plaintiff fails in his suit, and that his bill should be dismissed, with costs.

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The Grand Trunk Railway Co. of Canada v. The Credit Valley Railway Co. of Canada and The Northern Railway Co. of Canada.

Railways—Ordnance lands—Government lands.

The Ontario, Simcoe, and Huron Railway Company, (afterwards changed to "The Northern Railway of Canada," in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter entered upon and took possession of certain Government lands held by The Principal Officers of Her Majesty's Ordnance for Ordnance purposes, and proceeded to construct their road thereon. Afterwards negociations were offered between the company and The Principal Officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the Ordnance Department, from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was compensation for the land taken. Subsequently all these lands were, by the Imperial Government ceded to the Government of Canada, and in the year 1875 it was ascertained that the sum for which the Government held a lien upon the road amounted to about £600,000; and by an Act of the Legislature of that year that claim was compromised by the Government for £100,000 sterling, which was paid. In the year 1856 or 1857, this company agreed with *The Grand Trunk Railway Company* for the use of a portion of this land for the purposes of the line of the latter Company, who it was shewn had entered upon and continued in the use of this land until 1879, when *The Credit Valley Railway Company*, with the view of obtaining an entrance into the City of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by *The Grand Trunk Railway Company* an interlocutory injunction was granted to restrain the further construction of The Credit Valley Railway until the hearing, when the injunction was made perpetual: the Court being of opinion that the Northern Railway Company, under their dealings with the Board of Ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any lien in respect thereof.

This cause came on for the examination of witnesses and hearing at the Sittings at Toronto, in November, 1879.

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Grand Trunk R. W. Co. v. Credit Valley R. W. Co.

The facts are stated in the report of the rehearing of the motion for injunction, reported *ante* volume xxvi., page 572, and the judgment.

Mr. *Blake*, Q. C., Mr. *Bell*, Q.C., and Mr. *W. Cassels*, for the plaintiffs.

Mr. *Hector Cameron*, Q. C., Mr. *C. Moss*, and Mr. *G. D. Boulton*, for *The Northern Railway Company*.

Mr. *Ferguson*, Q. C., Mr. *McCarthy*, Q. C., and Mr. *Wells*, for *The Credit Valley Railway Company*,

January 7th, 1880.

PROUDFOOT V.C.—The evidence that was supposed to be in existence when the motion for the injunction was made has been sought for, and the search has resulted in the discovery and proof of a large mass of documents, establishing the actual position of the Ordnance Department, the original owners of the land in question, in regard to *The Northern Railway Company*, and the action of the Department upon the application of the company for the acquisition of the right of way.

Judgment.

There is a voluminous correspondence between the various officers of the Ordnance here and in Britain, references from one officer to another, notes by the persons to whom they were addressed, minutes of the Board, matters brought under the notice of the Secretary at War, and of the Secretary for the Colonies, communications from the Inspector General of Fortifications, and from the Military Superintendent of Pensioners—all valuable as shewing that the application of the Railway Company had received the fullest and most intelligent consideration, that the possible effect upon the military defences, and the injury that might result to the just claims of the pensioners, had all been carefully weighed, and that the final action of the Department was based upon a perfect comprehension of the facts, and with the deliberate intention of doing what appears in the correspondence.

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With these observations I shall not think it necessary to refer further to much of the correspondence, and shall only notice what appears to me most material for the decision of the matters now at issue between the companies.

The nature of the suit and of the pleadings appears in the report upon the application for an injunction, and of the re-hearing of the order made on it, to be found in 26 Gr. 572. The Bill has, however, been amended since the hearing of the motion by stating the license relied upon by *The Credit Valley Railway Company*, and stating reasons why it should not affect the position of the plaintiffs; and by setting out in detail the particulars of the title under which the plaintiffs claim, through the dealings with the Ordnance Department, and under the statutes of the Province.

I shall not repeat what was held by this Court upon the re-hearing of the motion, viz:—That *The Northern Railway Company* are affected by the General Railway Act, and that the Company was authorized by the statutes to take Ordnance lands.

Judgment.

On the 27th October, 1851, Mr. *Boulton*, the then President of the Ontario, Simcoe, and Huron Railroad, now represented by *The Northern Railway Company*, applied by letter "for certain portions of the Military Reserve in Toronto, which the Company require as well for a portion of their line, as for convenient sites for stations, workshops, and other appurtenances necessary for so important a work." And Mr. *Boulton* also stated that "the Company propose on their part to offer to your honourable Board as a consideration for the accommodation sought, to transport in all time coming Ordnance and all other military stores along the whole line of road to Lake Huron, at the lowest rate at which the heaviest and most bulky articles will be carried, and Her Majesty's troops at the lowest rate which will be charged for any passengers." He then referred to the sections of the Company's charter, authorizing the acquisition of the property, though belonging to the Crown

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or otherwise, and added a suggestion as to the obvious importance of the road in a military point of view.

After much correspondence between different officers of the Ordnance Department and others, the Master-General and Board of Ordnance authorized a letter to be written by the Secretary, Mr. *Butler*, on the 9th January, 1852, to Mr. *Merivale*, for the information of Earl *Grey*, which I quote at length as containing the final conclusion of the Department :—

"WAR OFFICE, 9th Jan., 1852.

"SIR,—I have the honour, by command of the Master-General and the Board of Ordnance, to acknowledge the receipt of your letters, dated the 12th and 27th ult., relative to the appropriation of a part of the Ordnance Reserve of Toronto, to the purposes of the Toronto, Simcoe, and Lake Huron Railway Company, and I am to acquaint you for Earl *Grey's* information, that reports on the subject have also been received from the Inspector-General of Fortifications, the Commanding Officer of the Engineers in Canada, and the respective officers at Montreal. The Master-General and Board have also availed themselves of the assistance of the Ordnance solicitor, and of Mr. *Elliott*, the Ordnance storekeeper at Montreal, now in this country serving on the Commissariat Committee at the Treasury, and the Inspector-General of Fortifications. The reports of these parties are herewith transmitted, Nos. 1, 2, and 3. Judgment.

"It seems from these reports there is no doubt that under the provisions of the 10th clause of the Act to incorporate the Toronto, Simcoe, and Lake Huron Railway the company cannot be considered to have acted illegally in entering upon the reserve without previous consent, and that the Department can only insist upon compensation in the manner prescribed by the Company's Act, which will be to demand of the company such a sum as may be considered the fair value of the land taken, and, if refused, to have the price fixed by the Chairman of the General Quarter Sessions and the Justices as provided by the 17th section of the Railway Act, allowing whatever sum may be so recovered to be paid into the military chest to

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the public credit, and leaving it to Her Majesty's Government to decide what proportion of the money should be granted as compensation to the pensioners by improvements upon the adjoining allocations, in which proposition the Master-General and Board request the acquiescence of the Secretary of State, and through his Lordship of the Secretary of War.

"I have, &c.,

"G. BUTLER."

The report of the Ordnance soliciter referred to in that letter is dated December 31, 1851, which I also quote at length:

[51 M 1,736 Received 31 S .]

5 1,012

OFFICE OF ORDNANCE,

31st December, 1851.

Judgment.

"SIR,—By the 10th section of the Act to Incorporate the Toronto, Simcoe, and Lake Huron Railway, the Company are empowered to enter upon lands of the Queen's Majesty and all other persons, and to appropriate the same to the making a railroad, and the 16th and 17th sections prescribe the mode of ascertaining the value, if the parties disagree.

"By the 7th Vict., cap. 11, passed the 9th Dec., 1843 (The Canada Vesting Act), the 15th section provides that nothing in that Act shall prevent or restrain the Parliament of the Province from authorizing the construction of any canal or railway over lands set apart for military purposes.

"It appears to me, that the only course to be taken is to demand of the Company such a sum as may be considered the fair value of the land taken, and if refused, to have the price fixed by the Chairman of the General Quarter Sessions and of the Justices, as provided by the 17th section of the Railway Act.

"I have read over the papers with Mr. *Elliot*, the Ordnance storekeeper at Montreal, now in England, serving on the Commissariat Committee at the Treasury. He has made the minute which I enclose, in all of which I agree, excepting the recommendation in par. 6—that

the Ordnance should at once take steps to restrain or eject the Company. 1879.

"On pointing out to Mr. *Elliott* the clause in the Railway Act, he agrees with me that his suggestion cannot be adopted Grand Trunk R. W. Co. v. Credit Valley R. W. Co.

"I am, Sir, Your obedient servant,

"THOMAS CLARKE,

"31 December, 1851. "*Solicitor Ordnance.*"

"Submit to the Master-General:"—

"The Board regret to have occasion to trouble his Lordship so frequently on this subject, but at the moment they were about to act upon his minute of the 29th inst. (E. 1,813), Mr. *Merivale's* letter dated the 27th (S 168) came to hand, the reference upon which to the Ordnance Solicitor has led to this report from him.

"The Board, therefore, propose to acquaint the Secretary of State (explaining the nature of their intended communication to him on the Master-General's Minute above-mentioned), with the purport of the Solicitor's report, and to request, if it met his (Lord *Grey's*) concurrence, that the Secretary of War may be apprised of the facts and suggestions submitted by Mr. *Clarke* and by Mr. *Elliott*, so far as they agree, with a view of obtaining the acquiescence of both those authorities in the mode of proceeding, which appears to be the only alternative left. Judgment.

"C. F."

"The M.-G. concurs.

"C. P., Jan. 5, 1852."

C.

"9th January, 1852.

"Ordered, that the communication contemplated by the foregoing Minute be now made to the Secretary of State.

"C. F.

"Wrote Mr. *Merivale*, 12th.

A part of the report of Mr. *Elliott*, the Ordnance storekeeper in Montreal, then in England, has been preserved, in which he says:—"It seems to me a point of doubt whether, under the provisions of the 10th

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clause (of the Company's Act) the Company can be deemed to have acted illegally in entering upon the reserve without previous consent, but I apprehend the reservation of Her Majesty's rights provided in the 52nd clause would enable the Ordnance under the Vesting Act, 7 Vict. c. 11, to restrain or proceed against the Company for trespass. If the Department have no such power, then it can only insist upon compensation in the manner presented by the Company's Act." And the part of the letter objected to by Mr. *Clarke*, the Solicitor, is this, "I think the better course would be, for the Ordnance at once either to take the necessary steps for restraining or ejecting the Company, if it be deemed advisable not to concede the ground," or, on the other hand, to claim compensation.

From these papers it appears that the Board of Ordnance had adopted the opinion of their Solicitor, although it is stated as doubtful by Mr. *Elliott*, that the Company were acting within the powers conferred upon them by their Act, and that all the Department could require was compensation for the land taken.

Judgment.

Before this decision had been arrived at, the Respective Officers of the Ordnance in this Province became aware that the company had taken possession of the land, and not only commenced operations by grading, but persisted in proceeding with the work, notwithstanding repeated remonstrances from officers of the department; and they instructed Mr. *Kirkpatrick*, their solicitor in Kingston, on December, 15, 1851, to take immediate action to compel the railway company to desist from their trespass, and also asked his opinion as to the right of the parties to take such steps.

On the 24th December, 1851, Mr. *Kirkpatrick* gives his opinion upon the question submitted to him, and expressed it to be "from a perusal of all the Acts, that the Ordnance land in question is not exempted from the operation of any Acts which may have passed the Provincial Legislature, authorizing the construction

of railroads, provided the companies take the necessary legal steps to procure the land or make compensation therefor." He also says that by their Act, in the first instance, the company have only the right to enter upon and survey the lands and mark out what is required for the work * * and the company must agree with the owners, and in case of disagreement, lodge the supposed value in the Court of Chancery before they can take possession of the lands for the purpose of making the railroad.

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On the 6th January, 1852, the Respective Officers at Montreal report to the Board of Ordnance the proceedings they had directed to be taken and transmit copies of the correspondence, and trust the Master-General and Board will approve of the instructions given to the solicitor for the assertion of the Ordnance rights and for resisting to the utmost the encroachments of the company.

The Board of Ordnance on the 2nd February, 1852, having before them Mr. *Kirkpatrick's* opinion and the letter of the Respective Officers, of the 6th January direct the Respective Officers to be informed that the Board approved of their proceedings, but to apprise them at the same time of the purport of the Board's communication of the 9th January, to the Secretary of State in answer to a reference from his lordship on the subject. This was accordingly done by a letter of 2nd February from the Secretary of the Board, and he enclosed an extract of the letter of the 9th January.

Judgment.

Meantime, on the 27th January, the Respective Officers at Montreal transmit copies of a further correspondence with Mr. *Kirkpatrick*, and as the company had engaged to discontinue their operations until the arrangement was effected with the Ordnance Department, all further proceedings were stayed for the present, and the Respective Officers were awaiting the decision of the Board upon the company's application. This was received by the Board on the 16th February, and

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The Board has thus twice confirmed its action of the 9th January, after becoming aware of the proceedings taken to assert the rights of the department and to restrain what was considered the high-handed proceedings of the company in taking possession, without permission, of the land for the road. They had before them the opinion of Mr. *Kirkpatrick*, that until compensation was made the company had no right to appropriate the land, but they do not think proper to interrupt the progress of the work until the amount be ascertained and paid. They, indeed, approve of the course of the Respective Officers in taking proceedings to assert the rights of the department, *but* refer them to their letter of the 9th January. This approval, so far from implying a direction to the Respective Officers to prosecute such proceedings, as it has been argued, when coupled with that significant *but*, seems to me to amount to an approval of what had been done before a decision had been arrived at—now that the decision had been made, they should cease.

Judgment.

The only further record, I think, in regard to the compensation, is an extract from the Treasury Minute of 17th December, 1852:

"And lastly, they should take immediate steps (to recover) from the Toronto, Simcoe, and Lake Huron Railway Co., the value of the thirty four acres of the reserve with the buildings upon it, which that company appropriated under the local Act."

This was sent to the Board of Ordnance by the Secretary to the Treasury on the 20th December, 1852. But there is no evidence to shew that any action was taken upon it. To this further period it seems, then, that the only claim the Board considered they had, was one for compensation.

It is said the Board were acting under a mistake of

the law—that the company could acquire no right, and did not acquire any, because the payment of the compensation was a condition precedent to acquiring it—and that the Acts of Parliament did not authorize the taking of ordnance lands at all. 1879. Grand Trunk R. W. Co. v. Credit Valley R. W. Co.

This latter point scarcely seems open for my consideration since the opinions given on the rehearing of the motion. Were it still open, I see nothing to induce me to alter the view I took when the motion was before me, and which coincides with that held by the solicitor of the Ordnance, by Mr. *Kirkpatrick*, and by this Court on the rehearing.

In regard to the former, that payment was a condition precedent, I think I may assume for the purposes of this case that *Johnson* v. *The Ontario, Simcoe, and Huron R. R. Co.* (*a*), correctly states the law as to the powers of this railroad company, and that an owner of an estate might prevent the company from taking possession until compensation was made, although if an occasion should call for it, it may be found necessary to consider what effect the General Railway Act, to which this company was also subject, may have upon it—a subject not noticed in that case, nor in the opinion given by Mr. *Kirkpatrick*. But the Board had the conflicting opinions of Mr. *Clarke* and Mr. *Kirkpatrick*, and the doubt of Mr. *Elliott* before them when they came to the decision of the 2nd February. They must, therefore, have known that it was at least doubtful if the company had the right they were asserting, yet they deliberately adopt the view that the company could enforce this right, and leave them only the subject of compensation to deal with. Now, a condition precedent is not an iron rule forming an insuperable obstacle not only to the action of one, but of both parties to a transaction. When found in a contract it can be waived, modified, or treated as non-existent by Judgment.

(*a*) 11 U. C. R. 246.

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the person in whose favour it is inserted. And when found in a statute it is inserted for the benefit of those affected by the enactment, and they may equally abandon its protection. It is an elementary rule that *Aliquis potest renunciare juri pro se introducto*, or, as it is otherwise expressed, *Licet cui juris persecutionem, aut spem futuræ perceptionis, deteriorem constituere, Dig.* 2, 14, 46, or *Omnes licentiam habere iis quæ pro se introducta sunt renuntiare*, Cod. 2, 3, 29. The rule that private persons may not agree to anything derogatory to the public interest, *Priavtorum conventio juri publico non derogat*, D. 50, 17, 45—1, has no application here, for two reasons: Because one of the parties was a public body, having the care of the public interest, and because it was after considering the interest of the public and being satisfied it would not be prejudiced, that the resolution was adopted. In so far as the right to the money was concerned, there was no act of the Board of Ordnance derogating from the right of the public to recover it,—if not paid, a lien for it remained; and if it has been abandoned it rests upon the action of a body whose acts I have no right to call in question, the Parliament of the Province.

Judgment.

The company proceeded with the work in the spring of 1852. The evidence is not very clear as to whether the company then had a copy of the letters of the 9th January and 2nd February. The company's offices were destroyed by fire and their papers burnt, but Mr. *Cumberland* says he believes there was among them a letter from the Ordnance Board of the 9th January or 2nd February; recollects a paper of the Master-General to the effect of the order of the Board of Ordnance. They are quite familiar to him. They were in the custody of *Sladden*, the secretary. It was always regarded as an express assent of the Ordnance to the proceedings of the company. Taking that in connection with the agreement of the company not to

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proceed with the work till the decision of the Board was arrived at, and which would naturally be presumed to be communicated to the company, I have no difficulty in determining, as a matter of fact, that the letters of the 9th January and 2nd February, or the purport of them, were in the possession of the company in the spring of 1852, and that the work was prosecuted under that sanction. During the progress of the work it was frequently inspected by officers of the Ordnance Department in their official capacity. They were witnesses to the fencing it off from the rest of the Ordnance property, to the expenditure of large sums of money, in the construction of the road, and I must assume that they performed their duty in keeping the department informed of what was being done on their property—though it is scarcely necessary to assume it, as the board knew what the company wanted—that they only stayed work until the decision of the Board should be made, and when that was made that the work would be resumed and prosecuted. Before this the action of the company was resisted, after it all opposition was withdrawn, and the company were allowed to go on and perfect their work in peace. That being so, I apprehend the Board would not be permitted to prevent the occupation of the land by the company, that they would be restrained from doing more than realize their lien.

Judgment.

I now proceed to consider the Act 19 Vict., ch. 45 transferring the reserve at Toronto to the Province. The 6th sec. enacts that the lands in the second schedule, which had been vested in the Principal Officers of her Majesty's Ordnance, and which had been used or occupied for the service of the Ordnance department, or for military defence, shall be and become absolutely vested in her Majesty the Queen for the benefit, use, and purpose of the Province, * * but subject, nevertheless, to all sales, agreements, lease or leases, agreement or agreements for leases, already

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entered nto with or by the Principal Officers. And the 7th section enacts that the Act should not affect the rights of any parties claiming any of these lands. The Act was assented to on the 19th June, 1856. On the 5th November following a schedule was prepared by Mr. *Walkem* and Mr. *Pilkington*, and sent to the Inspector-General of Fortifications on the 15th of November, shewing more distinctly, than the schedule to the statute, the several properties transferred to the Provincial Government. This schedule states that the Ontario, Simcoe, and Huron, or Northern Railway, had been permitted to occupy a portion of the reserve, but that no deed had been executed to them. And on the 5th December, 1856, in reply to inquiries of Colonel *Coffin*, the Ordnance Land Agent of the Provincial Government, Captain *Galway*, of the Royal Engineers Department, informs him that the Ontario, Simcoe, and Huron company took possession under authority of their charter, 12 Vict. ch. 196, and the legality of the proceedings was recognized by the Master-General and Board order of 2nd February, 1852. These documents are only a repetition of what has already been established, but are valuable as a recognition of the right of the company down to that period, and a notice of it given to the Provincial Government. And it seems to me of little importance what Captain *Galway's* powers were, for, without any authority to do so, he could have notified the government of the existence of the right, which is established by other evidence, and if this were done in answer to an application by the agent of the government, they could not complain of his having no authority to give them the information they sought. I think that *The Northern R. W. Co.* had an equitable right, at least, under their dealings with the Board of Ordnance, and that the government took the land subject to that right.

Judgment.

I have not forgotten the argument resting upon 7 Vict., ch. 11, sec. 15, that the power of the Parliament

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to authorize the construction of railroads upon any lands which may have been reserved or set apart for military purposes, applied only to such reserved lands, and that it was not proved that these lands were so reserved. But the evidence does seem to me to establish that they were reserved, not purchased. The title is deduced on the map prepared by Mr. Fleming—the very name of the "garrison reserve" indicates it—the action of the Board of Ordnance recognizes it—and during the whole course of the correspondence on the subject there is no hint, no suggestion, of any doubt that the lands were such as the Parliament could deal with.

By the Act of 1859, 22 Vict., ch. 89, the road and line of *The Northern R. W. Co.* were vested in the Crown; and by the Act of 1860, 23 Vict., ch. 105, the whole was re-vested in the company, upon conditions which have been complied with or waived. By a clause in the Order in Council, recited in this Act, the Governor in Council reserved the complete control and direction of the station and other grounds in the city of Toronto occupied by the company, as well as of the alignment and disposition of the track of the railway leading into and within the city, with the view of completing such arrangements as might be deemed expedient by the government for effecting proper connections with the other provincial railways in the city. It appears that for some years proceedings had been pending before the railway commissioners on the application of the officers of the several railways coming into the city, with the view of enabling *The Grand Trunk R. W. Co.* to connect the eastern and western sections of their road, and of definitely settling the allowance of the three railroads passing into and through the city. These resulted in a report of the commissioners to the Governor in Council in 1858, in which they recommended that *The Grand Trunk R. W. Co.* should make all the necessary arrangements with the

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two other roads, without charge to the government, for a more convenient approach to the city, &c., and that so much of the garrison reserve as was then occupied by the three roads should be surrendered to the government for the purposes there indicated. The companies had not yet acted upon this. *The Grand Trunk R.W. Co.* was straitened for means, and could not then conveniently carry out the arrangement. Knowing these facts, the circumstances existing when the Act was passed, it is probable that the reservation in the Order in Council was intended to apply to the existing roads to enable the pending arrangements for the location of the lines to be finally adjusted. The language seems to refer to existing roads, and betrays no design to embrace future undertakings. Whether it is permissible to have regard to these circumstances in limiting the operation of the Act, when the Interpretation Act (*a*) says, that the law is to be considered as always speaking, and whenever anything is expressed in the present tense, the same is to be applied to the circumstances as they arise—I shall not stop to inquire, as the Act was repealed in 1875, as we shall immediately find. Within a month after the passing of this Act, the three railway companies agree to carry out the recommendations of the commissioners, with some modifications. The work was placed under contract, and completed at a cost of about $70,000. This contract is described by the witnesses as being the outcome of what took place before the commissioners—though all that was recommended in their report was not carried out. It was contended that the action of the commissioners was in excess of their powers—that they only had authority to deal with crossings. I am not prepared at present to assent to this limitation of their powers, but it is not necessary to decide the general question, for I think that to deal properly with crossings in a complicated network

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(*a*) 31 Vict. ch. 1, s. 6, ss. 2.

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of railways entering a populous city, the proper location of crossings may, and in this instance did, involve the alignment of the roads within the city, and that it was within the powers of the commissioners. A perusal of the proceedings before the commissioners satisfies me that the chief matter before them was that of the crossings, and that anything further was dealt with as incidental to that subject. The commissioners recognized the right of *The Northern R. W. Co.* to their location on the reserve, and in recommending that it be surrendered, implied that they had the estate to surrender, and the statute of 1860, by reserving a right in the property revested in the company, implies that everything not reserved is granted. From 1860 till the present time, the arrangements then made have been carried out, the government has never sought to interfere with them, the railway company have been publicly using and enjoying the rights then acquired, and if any assent of the Government were required to render them unassailable, that assent ought to be implied. *The Corporation of Welland* v. *The Buffalo and Lake Huron R. W. Co.* (*a*), is an authority for this.

Judgment

It is said, however, that though the government may be bound not to disturb *The Grand Trunk R. W. Co.* in the use of the 27 feet assigned to them by the arrangements of 1860, there was still land enough left upon which again to exercise this reserved power in favour of *The Credit Valley R. W. Co.* But the Order in Council was repealed by the Act of 1875, four years before the license to *The Credit Valley R.W. Co.* This Act, it is argued, being a private Act, could not affect the rights of the Crown. The right of the Crown in this instance was created by an Order in Council, confirmed by an Act of Parliament (1860), and the same power that had the authority to confer the right, had

(*a*) 31 U. C. R. 539.

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the power to put an end to it. It can be done either by a public or a private statute—and where a prerogative of the Crown is concerned, it may be effected, not only by the express words of the Act, but by necessary implication. And, assuming the exercise of this authority to be a prerogative, or in the nature of a prerogative, it could only be extinguished by express language or by necessary implication; there appears to me to be that necessary implication here. The authority was reserved to the Governor in Council by an Order in Council. When the Parliament repealed the Order in Council, what stronger indication of intention could there be that this power should no longer be exercised. Sir *Peter Maxwell* (*a*), says: "The Crown, however, is sufficiently named in a statute within the meaning of the maxim, when an intention to include it is manifest."

Judgment.

The rule commented on by Sir *Peter Maxwell* is, "that the Crown is not bound by a statute unless named in it." The Interpretation Act (*b*), says that no provision in any Act shall affect in any manner the rights of her Majesty, unless it is expressly stated therein that her Majesty shall be bound thereby. The rule is more specific than the law, for it says *named;* but to take a case out of the rule necessary implication suffices, and so it should to take it out of the law. *Webster*, under the verb "to express," explains it to mean to utter, to declare in words, to speak, and also to shew or make known, to indicate—a downcast eye or look may *express* humility, shame or guilt. Whence it would seem that if the intention may be inferred from the terms used, the language of the Act would be complied with, or as it has been stated "*Expressum dicitur quod conjecturis colligitur*," and "*illud est expressum quod continetur mente legis, quod evidentibus signis colligitur.*"

(*a*) Interp. of Stat. 116. (*b*) 31 Vict. ch. 1, sec. 7, sub-sec. 33.

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The only distinction between public Acts and local or personal enactments, applicable to this subject, seems to be, that the latter are to be construed more strictly when they confer privileges and powers interfering with the property or rights of others: *Maxwell* 268. But where the intention of the Legislature is clear, it does not matter whether it be expressed in a public or private Act.

In 1875 the lien of the Government upon the road amounted to nearly £600,000 sterling, and by the Act of 1875 ch. 65, passed to re-arrange the capital of the company, and to consolidate the various Acts relating to it, the undertaking of the company is declared, sec. 26, to consist, among other things, of "its main line of railway as the same now exists." And by another Act of the same session, ch. 23, the Government compromised its lien for £100,000 sterling, which has since been paid.

When the ordnance property was transferred by the Act of 1856, subject to any agreement, &c., that phrase was for the benefit of the persons who had agreed with the Ordnance Department, it did not mean to reserve to that department the benefit of the agreements, that benefit was transferred to the Province, and therefore any lien for purchase money that existed passed to the Province.

Judgment.

When, therefore, in the Act of 1875, ch. 23, it was recited that the lien of the Dominion on the railway and property of *The Northern Railway Co.* amounted to the sum of £570,000, that must be taken to include all the claims of the Dominion in whatever manner they might have accrued, and to have been settled by the compromise. It would be impossible to hold that any lien was retained—it would have been a breach of faith with the creditors of the company, and there is no difficulty in supposing that when parting with £470,000, they would not hesitate to extinguish the comparatively trifling sum which represents the value

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of the thirty-four acres of this reserve nearly thirty years ago.

I conclude, therefore, that *The Northern Railway Co.*, under the dealings with the Board of Ordnance, and under the various statutory enactments noted above acquired a title, free from any lien for purchase money to the thirty-four acres of the reserve taken by them.

The estate that a railway company takes in the land required for its road, is not of the absolute untrammelled nature of the fee simple of a private individual, it is obtained for a particular purpose; and while that purpose is served, it will not be permitted to assert rights that a private owner might; and that is the effect of the decisions to which I was referred, of *Bostock* v. *North Staffordshire R. W. Co.* (*a*), *United Land Co.* v. *Great Eastern R. Co.* (*b*), *Norton* v. *London and North Western R. W. Co.* (*c*), *Mulliner* v. *Midland R. W. Co.* (*d*). But there is nothing in these cases to establish that another railway company, on account of this peculiar quality of the title, may treat it as if no title existed and take possession for its own purposes of the location of the line, with no better right than that of the strong hand. By their charter *The Northern R. W. Co.* had a right to take 120 feet in width. They only took 99. And under the General Railway Act other railway companies were empowered to use the line if before 30th June, 1858, without, and if after, with, the assent of a department of the Government. And if that could be done contrary to the wish of the owner of the line, it certainly might be done by the agreement of the parties. The Chancellor has expressed his opinion to this effect in the judgment upon the re-hearing, to which I then assented, and now assent. Such an arrangement is

Judgment.

(*a*) 5 DeG. & S. 584, 3 S. & G. 291, 4 E. & B. 798.
(*b*) L. R. 17 Eq. 158, 10 Chy. 589.
(*c*) L.R. 9 Ch. D. 623. (*d*) L. R. 11 Ch. D. 611.

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wanting in the characteristics of an ordinary alienation or abandonment, because it was not needed for railway purposes. The first arrangement between these companies was as early as 1856 or 1857. It had expired before the 8th January, 1858, and on that day a new agreement was made for the use of the track of *The Northern Railway Co.* by *The Grand Trunk Railway Co.*, for a part of the distance, and for laying a separate track for the remainder, to continue for a year, but in view of a permanent location of *The Grand Trunk Railway* tracks on the rear line laid down on a plan exhibited by Mr. *Fleming*. The permanent location was not made, I think, till 1860, but ought to be treated as made in pursuance of this agreement of January, 1858, and therefore not requiring the assent of the government. If it is to be considered as made later than June, 1858, then under the circumstances already detailed, and upon the principles enunciated in *The Corporation of Welland* v. *The Buffalo and Lake Huron R. W. Co.* (*a*), the assent of the Government ought to be presumed, and especially considering the long time that the user under the agreement has been permitted without interruption, and its recognition in various ways by the government. But this answer of *The Credit Valley Railway Co.* is not an information for intrusion at the suit of the Crown—the Crown has taken no steps to have the right declared forfeited for abandonment or alienation—the license of *The Credit Valley Railway Co.* was made under an Order in Council expressly reserving the rights of the other companies, and it is not competent for *The Credit Valley Railway Co.* to intervene and claim a forfeiture. Besides, if the alienation or agreement between *The Grand Trunk Railway Co.* and *The Northern Railway Co.* was an improper use of the right of ownership, the result would not necessarily be forfeiture; it might have the

Judgment.

(*a*) 31 U. C. R. 539.

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effect of depriving *The Grand Trunk Railway Co.* of the use of the line, and restore *The Northern Railway Co.* to their old dominion. In that case it would not benefit *The Credit Valley Railway Co.* But it would be impossible for the Crown, after all that has occurred, to treat the permission to *The Grand Trunk* as a thing that ought not to have been granted. It would be bound by its acquiescence, by its recognition of the existence of the actual condition of the companies, and by its endeavours to secure a proper connection over this 99 feet for the sections of *The Grand Trunk*.

Judgment.

And further, *The Northern Railway Co.* are parties to the suit, and pray for the same relief as the plaintiffs, Indeed, I do not see why they may not be treated as plaintiffs; they have throughout contested the right of *The Credit Valley Railway Co.*, and all the evidence affecting the questions now attainable having been given, there can be no injustice done in treating them as plaintiffs, or administering relief as between co-defendants. *The Northern Railway Company* do not contest the right of the plaintiffs, they admit it and seek its enforcement, as well as the enforcement of their own.

I think the plaintiffs entitled to a decree restraining *The Credit Valley Railway Co.* from trespassing on the lands in question, and to a declaration that no title passed to them under the license of occupation, and to an inquiry as to the damages sustained by the trespass, with costs.

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WATSON v. LINDSAY.

Crown lands—Mortgage on unpatented lands—Statute of limitations—Estoppel—Sale under power in mortgage.

The R. S. O. ch. 25, sec. 26, declares that any mortgage or lien created by the nominee of the Crown on lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had, before the execution of such instrument, been issued in favour of the grantor:

Held, (1) that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves that they would have had, had the freehold been actually vested in the mortgagor; (2) that the mortgagor was entitled to set up the defence of the Statute of Limitations against any one claiming under such mortgage; (3) that the fact of the mortgagee having exercised the power of sale contained in his mortgage had not the effect of stopping the running of the statute; and (4) that the fact that the Commissioner of Crown lands before the issuing of the patent had made a memorandum in his "ruling" upon the claims of the parties that the sales made to them were "not intended to cut out the right, if any, Dr. *Dickinson* may have as such mortgagee," had not the effect of estopping the mortgagor or those claiming under him from claiming the benefit of the statute. [SPRAGGE, C., dissenting.]

THE bill was filed by *James Watson* to sell lot No. 17, in the 2nd concession of the township of Finch, containing 200 acres, under a mortgage, bearing date the 12th of March, 1877, and made by the defendant, *Alfred Jarvis Lindsay*, to the plaintiff.

Statement.

The land in question was, in 1860, in possession of one *Donald Cameron*, as original nominee of the Crown. In 1865, *Donald Cameron* died, leaving his widow, the defendant *Mary Cameron*, and his son, the defendant *Angus Cameron*, him surviving. The widow and son claimed to represent the father, and were recognized by the Crown Lands Department as entitled to the patent, after payment of the amount due thereon to the department.

Being unable to raise the amount necessary to pay off the Crown, the defendants, the *Camerons*, sold and

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conveyed their interest in the north half of the lot to the defendant *Campbell*, who paid the amount due to the Crown in 1865, and on the 30th day of April in that year patents issued to the defendants, the *Camerons*, for the south half, and to the defendant *Campbell* for the north half of the lot.

Donald Cameron, prior to his death, however, namely, on the 24th of April, 1860, executed two mortgages of $500 each: the one on the north half, and the other on the south half of the lot, to one *Angus R. McMillan*.

These mortgages were registered in the proper registry office on the 26th of April, 1860.

On the 30th of December, 1870, *Angus McMillan* assigned to the defendant *James J. Dickinson*.

On the 12th day of April, 1876, the defendant *Dickinson* sold the lands, under the power of sale contained in the mortgages, to the defendant *Lindsay*.

Statement.

The defendant *Lindsay* mortgaged the land to the plaintiff on the 12th of March, 1877, for the purpose, nominally, of securing the sum of $700, but in reality securing the sum of $540 and interest only.

The defendant *Lindsay* subsequently executed a mortgage of the same lands to the defendant *McGee*, and then re-conveyed to the defendant *Dickinson*.

The defendants, the *Camerons* and *Campbell*, set up that they did not claim title through the original nominee of the Crown, but from one *John B. Maclennan*, who purchased the lands at a sheriff's sale, under a writ of *fi. fa.*, in a suit in Her Majesty's Court of Queen's Bench, of *Archibald* against *Donald A. Cameron*. That, in fact, they claimed adversely to *Cameron*.

The defendants also set up the Statute of Limitations as a bar to the plaintiff's right to succeed.

The cause came on to be heard at Toronto, before the Chancellor, on the 11th of November, 1878.

Mr. *Black* for the plaintiff. It is proved by the papers produced by the Commissioner of Crown Lands,

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that the defendants, the *Camerons*, derived their title to these lands through *Donald A. Cameron*, the original nominee of the Crown. If so, the mortgage dated the 24th of April, 1860 was as against them, as well as against the defendant *Campbell*, who claims through them, a valid charge on the lot in question. See R. S. O. ch. 25, sec. 26; also, R. S. O. ch. 111, sec. 78; *Vance* v. *Cumming* (*a*); *Holland* v. *Moor*. The Statute of Limitations does not run until after the issue of the patent. The patent issued on the 30th of April, 1875: *Jamieson* v. *Hawkins* (*c*), *Dowsett* v. *Cox* (*d*).

Mr. *Bethune* for the *Camerons* and *Campbell*. The plaintiff should have filed a bill to set aside these patents: so long as they stand he cannot succeed. The Statute of Limitations does run, as it was in the power of the plaintiff to realize on this mortgage, even though the estate was in the Crown; and his laches and delay disentitle him to relief. The defendant *Campbell* is, in any event, entitled to succeed, on the ground that his payment to the Crown was in the nature of salvage. *McIntyre* v. *Shaw* (*e*).

Statement

Mr. *Francis* appeared for the defendant *McGee*.

Mr. *Munro* appeared for *Dickinson* and *Lindsay*.

SPRAGGE, C.—A principal defence by the defendants *Angus* and *Mary Cameron*, and *Wm. A. Campbell*, is the provision in the Real Property Limitation Act applying to mortgages. Sec. 23 in the R. S. O., runs thus: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage * * * but within ten years next after

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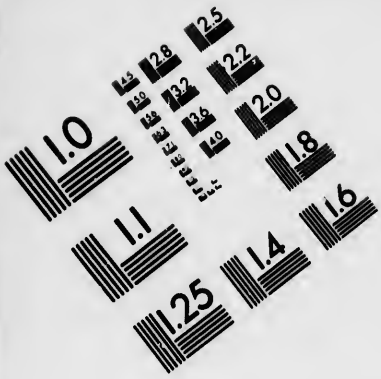
(*a*) 13 Gr. 25.
(*b*) 12 Gr. 296.
(*c*) 18 U. C. R. 590.
(*d*) 18 U. C. R. 593.
(*e*) 12 Gr. 295.



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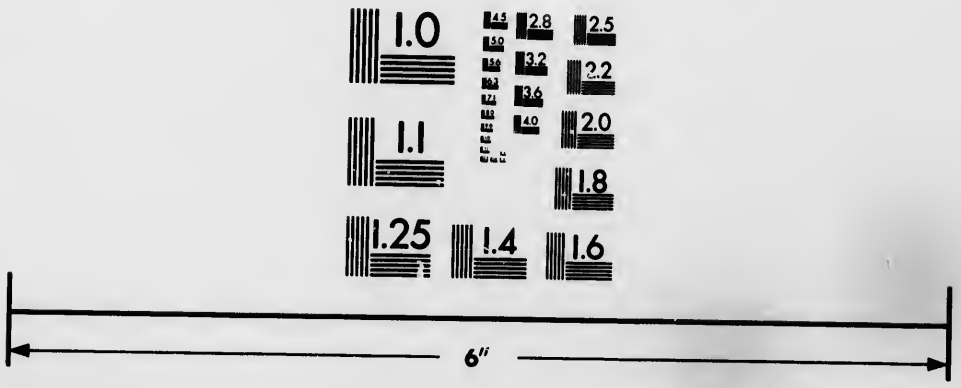

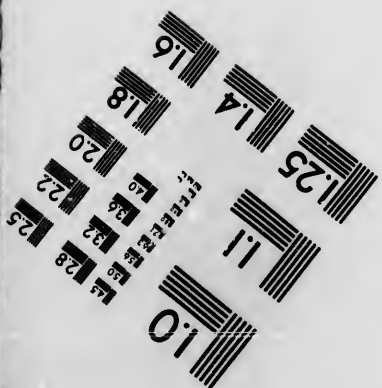

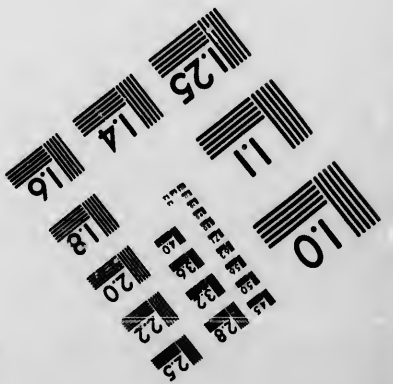

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a present right to receive the same accrued to some person capable of giving a discharge for, or release of, the same, unless": then follow exceptions where there has been payment on account, or written acknowledgment.

The plaintiff claims through a purchaser under powers of sale contained in two mortgages made by one *Donald A. Cameron* to *Angus R. McMillan*, in 1860, and payable, the one in 1861, the other in 1862. Both mortgages were duly registered. *Cameron* was, at the time, a nominee of the Crown under contract to purchase from the Crown the land mortgaged; and section 26 of chapter 25 of the Revised Statutes places a mortgage made by a person in that position upon the same footing as a mortgage made by a patentee of the Crown.

Donald Cameron died in 1865, leaving the defendant *Angus Cameron* his heir-at-law, and *Mary Cameron* his widow surviving him. Patents issued in 1875, for a portion of the land, to the defendant *Campbell*, and for other portions to the defendants the *Camerons*, under the circumstances stated in the pleadings. The bill was filed 3rd June, 1878.

Judgment.

It is contended for the plaintiff that the Statute of Limitations did not commence to run against the mortgagee until after the issue of the patent, and for this position *Jamieson* v. *Harker* (*a*), and *Dowsett* v. *Cox* (*b*), are cited. The question in those cases was upon another section of the statute, that relating to the possession of land, and it was held that in that case the statute did not begin to run until the issue of the patent, and the *ratio decidendi* shortly was, that possession held under leases from the Crown, could not affect the title to the freehold, while the title was still in the Crown; that the rights of the Crown were not affected by such possession, or as it is put in the latter case, "the defen-

(*a*) 18 U. C. R. 590. (*b*) Ib. 590.

dant, by holding out the lessee of the Crown, could not, by lapse of time, acquire any right against the Crown."

The *ratio decidendi* of those cases does not, that I can see, apply at all to the case of a mortgage. The mortgage was a contract for the loan of money on the one side, and a pledge of the interest of the nominee of the Crown on the other, to secure repayment. It was not accompanied by possession, and the rights of the Crown were in no way affected by the transaction.

The language of the Act relating to such mortgages (R. S. O. ch. 25, sec. 26,) would not have its full effect if the Statute of Limitations did not apply to them. The making of such mortgages and their registration are made "subject to the same conditions, and with the same effect and no other, and shall in law and equity have the same force and effect, and no other, as if letters patent had previously issued."

Since penning the foregoing, I have called for and have seen the ruling of the Commissioner of Crown Lands upon which the patents have issued. It is dated 5th June, 1874, and is as follows: "It being stated that *Dr. Dickinson* is assignee of a mortgage given by above named *Donald A. Cameron*, which mortgage is registered against the lot in the County Registry Office, it is to be understood that the sales of the west half and east half, made respectively in the names of *Mary Cameron* and *Angus Cameron*, widow and son of said *Donald A. Cameron*, are not intended to cut out the rights, if any, Dr. *Dickinson* may have as such mortgagee." This ruling refers only to the sales to be made to *Mary* and *Angus Cameron*, to whom patents were issued of the two halves of the south half of the lot. It does not refer to the sale and intended patent to *Campbell*; probably for a reason which I will refer to presently. I desired to refer to the "ruling" to see whether it was made a condition of the sales to the *Camerons*, that the mortgage therein referred to should

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be paid. It is not made a condition, but it was evidently intended to leave the rights of the mortgagee, whatever they might be, unaffected by the patent; this is made the more clear by the words "if any" being interlined. The Dr. *Dickinson* named in the ruling was at its date the holder of the two mortgages.

The statute then placing mortgages made before patent issued upon the same footing as mortgages made after the issue of the patent, the question arises what was the position of the plaintiff at the time he filed his bill, 3rd June, 1878. At the date of the issue of the patents, 30th April, 1875, fourteen years had run against the holders of the mortgages as to one of them, and thirteen as to the other. The Real Property Limitation Act, the 23rd section of which I have quoted, was passed 21st December, 1874, and came into operation 1st July, 1876, so that if the mortgages had not been realized by sale of the mortgaged property, the rights of the mortgagees would have been barred at the latter date.

Judgment.

Before that date, however, *Dickinson* exercised his power of sale, and by deed of 12th April, 1876, conveyed the mortgaged lands to the defendant *Lindsay*, and the question is, whether this did not extinguish the rights of those claiming under the mortgagor. First, as to the *Camerons:* it appears to me that it did, unless they have a title by possession, and that they have such title appears to be negatived by *Jamieson* v. *Harker* and *Dowsett* v. *Cox*, to which I have referred.

By the sale under the power the position of the parties was altogether changed. There was no longer any subsisting mortgage; no suit could have been brought by *Dickinson*; and the Statute of Limitations had ceased to run. Upon the death of *Donald A. Cameron* in 1865, the right to redeem devolved upon *Angus Cameron*, his heir-at-law, and the widow also had a right to redeem as dowress. This right continued till after the issue of the patent and up to the

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actual sale by *Dickinson* under the power. After the sale the right of the *Camerons* would be limited to the surplus, if any, in the hands of *Dickinson* after satisfying the mortgage debt and expenses of sale.

The ruling of the Commissioner is silent as to the north half of the lot, and the mortgage upon it. The patent for that parcel issued to *Campbell*. As between *Dickinson* and *Campbell*, my opinion is, that *Campbell* was entitled to priority to the extent of the purchase money paid by him to the Crown, not that he was entitled absolutely under his patent, for the land patented was subject to the mortgage then held by *Dickinson*, but subject to that mortgage and to the paramount right of the Crown as vendor, it was the property of those claiming under *Donald A. Cameron*. Then came the arrangement, to which the sanction of the Crown was given, and to which the *Camerons* and *Campbell* were parties, that *Campbell* paying the purchase money due to the Crown, $985, a patent for the north half should issue to him, and patents for the east and west halves to the *Camerons*, these latter patents being by the ruling subject to the mortgage upon them held by *Dickinson*. The patent to *Campbell* was, in my opinion, by force of the statute (R. S. O. ch. 25, sec. 26), also subject to the mortgage upon it for $500, and the question is only one of priority.

Judgment.

The mortgages made by *Donald A. Cameron* to *McMillan* were of his equitable interest, which was subject to the payment of purchase money to the Crown. *Campbell* paying that purchase money, did not stand in the same position as *Cameron* would have stood in case he had paid it, but in a better position. I take it to have been the duty of *Cameron*, as between himself and his mortgagee, to pay the purchase money; but however that may be, no duty to pay it rested upon *Campbell*. It is true that he paid it in order to procure from the Crown an absolute title in himself to this land; but that does not disentitle him if as

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between himself and the mortgagee it is equitable, that he should have priority; that he should stand in the place of the Crown which had that priority, and be recouped for the money that he has paid. The patents for the whole lot issued upon that payment, and the mortgages thereupon attached upon the legal title obtained by means of that payment; and the mortgaged premises may be taken to be at any rate of *pro tanto* more value, and the security thereby increased *pro tanto*. Such payment is indeed in the nature of salvage, and was so treated by *Mowat*, V. C., in *McIntyre* v. *Shaw* (*a*). I refer to that case and to the cases therein cited. My recollection is, that there are several cases in this Court in which the same principle has been affirmed.

When *Dickinson* exercised his power of sale a new interest had intervened in place of the interest of the Crown, and that interest appears to have been ignored by *Dickinson* in exercising his power of sale. I am not informed by the papers put in or otherwise what price was obtained at that sale, whether sufficient to pay *Campbell* and to pay the mortgage debts. The lands appear to have got back into the hands of *Dickinson*, the purchaser *Lindsay* having failed to pay his purchase money and having reconveyed to *Dickinson*, after creating two mortgages upon the land, one to the plaintiff in this suit, the other to the defendant *McGee*.

Judgment.

If the defendant *Dickinson* is content to be relegated to his former position of mortgagee, a decree may be made which will be just to all parties, and whereby the pre-existing rights of all parties may be preserved. *Lindsay* should pay off the mortgages improperly created by him to the plaintiff and to *McGee*. They only claim as mortgagees, and *Dickinson* concedes that they took their mortgages without notice of his

(*a*) 12 Gr. 295.

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lien for unpaid purchase money payable by *Lindsay*. The *Camerons* should pay off the mortgages held by *Dickinson*, for all that appears equally; and *Campbell* may properly retain the land patented to him as the payment of the purchase money due to the Crown was as between him and the *Camerons* the consideration to be paid by him for the land patented to him; though it may be that the amount paid was considerably less than the value of the half lot at the time.

In the event of the arrangement that I have suggested being assented to by the parties, *Lindsay* should pay the costs of the plaintiff and *McGee*, and of course his own costs; the *Camerons* should pay *Dickinson's* costs, and of course their own; and *Campbell* should pay his own costs, as the defences he sets up are not sustained, and he claims to be entitled absolutely when he is, in my judgment, entitled only to be repaid an advance.

Judgment.

Failing this arrangement, I incline to think *Campbell* entitled to priority over the plaintiff and over *McGee*, as well as over *Dickinson*. The plaintiff and *McGee*, in searching the title of *Dickinson*, would find a patent issued to *Campbell* for the land comprised in one of the mortgages, and upon inquiry would have learned how it came to be issued to him. They would then have to elect between recouping *Campbell*, and abandoning their remedy against the land patented to him, and *Dickinson* of course would be put to the same election.

Again, failing an arrangement, there should be a declaration that the *Camerons* are not entitled to hold the land patented to them, or to redeem the same. No costs to be paid to them or by them. *Lindsay* out of the case, except as to costs, and direct order pay mortgage debts created by him. Plaintiff, *McGee*, and *Dickinson* to elect whether to redeem *Campbell* or to take remedy only against the south half of the lot. Declaration, that to the extent of his payment to the

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Crown and interest *Campbell* has priority;—they to pay that amount, and in default he is to hold the north half of the lot freed and discharged from any claim by them.

As to the south half of the lot. *Dickinson* to redeem plaintiff and *McGee*, or be foreclosed. As to remedy over against *Lindsay*, I have not the conveyances between these parties.

I am not clear as to whether counsel for the plaintiff intended to contend that the Statute of Limitations did not run against mortgages created before patent issued, or only that it did not run against possession before patent issued. The first point became immaterial, in my view of the case, upon the sale under the power of attorney. Upon the second point I follow *Jamieson* v. *Harker*, and *Dowsett* v. *Cox*, but in following those cases, I desire not to be understood as conceding that the statute does not apply where the title is equitable, as well as in the case of legal title. It was held by the full Cour to apply to possession under equitable title in *Arner* v. *McKenna* (*a*).

Judgment.

The defendants *Mary Cameron* and *Angus Cameron* thereupon set the cause down for re-hearing by way of appeal from the decree pronounced by the Chancellor.

Mr. *Fitzgerald*, Q. C., and Mr. *Beck*, for the parties re-hearing.

Mr. *Delamere*, for the plaintiff.

Mr. *Hoyles*, for the defendant *Campbell*.

Mr. *Francis*, for the defendants *Lindsay*, *McGee*, and *Dickinson*.

(*a*) 9 Gr. 226.

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Watson v. Lindsay.

March 17th, 1880.

SPRAGGE, C.—The mortgage upon which this bill is filed is, it is to be remembered, not the mortgage or one of the mortgages made by *Donald A. Cameron* to *McMillan*. Those ceased to exist, and the relation of mortgagor and mortgagee ceased by the exercise of the power of sale. If duly exercised the purchaser became thereupon the owner of the land, and might have obtained possession by ejectment bill in this Court, if not by action of ejectment at law.

To deal only with the land patented to the *Camerons:* they were still in their possession, and the question is what defence they might make to such a suit. This bill was filed the 3rd of June, 1878, and if the patent had issued more than ten years before that date they might set up that possession as extinguishing the title of the purchaser under the mortgage power of sale; such possession would be of course quite independent of the mortgage, just as if they had never had any connection with the mortgagor.

Judgment.

But this defence of possession is open to two objections. The question is not as put by Mr. *Fitzgerald*, whether the exercise of the power of sale interrupted the running of the Statute of Limitations, and gave, as he says, a new start to the statute. It may be conceded that the statute continued to run as it was running before. I take the effect of the exercise of the power of sale to have been this: to make the purchaser entitled absolutely, whereas Dr. *Dickinson* was before entitled to hold only his mortgage security. The effect was to convert what was a pledge in the hands of *Dickinson* into the absolute property of the purchaser, who thenceforth held the same as owner.

This owner derived his title, mediately it is true, but still he derived it through a nominee of the Crown; and through the same nominee of the Crown as the *Camerons* obtained their patent. They obtained it upon the ruling of the Commissioner, to which I have already referred, and upon the understanding ("it is

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to be understood") that the sales made by the Crown to them, and made by the description of widow and son of *Donald A. Cameron*, were not intended to cut out the rights, if any, of Dr. *Dickinson* as mortgagee. It has since been established in this suit that Dr. *Dickinson* had his rights as mortgagee. The words, "if any," in the "ruling," may therefore be put out of the case, and it may be taken that the *Camerons* accepted the grants from the Crown subject to the rights of Dr. *Dickinson* as mortgagee.

Now what I incline to think is, that the *Camerons* can make no claim in virtue of any possession by them anterior to the acceptance of the patent. It seems to me to fall within the doctrine of estoppel *en pais*, which, as put by Lord *Coke* (*a*) may be, *inter alia*, by acceptance of an estate. Here the estate was accepted from the Crown subject to a right existing in a third person; and which right had been derived through the Crown. The Crown owed it to that third person

Judgment.

to preserve that right unimpaired by any act of the Crown. The Crown was granting a new right to the *Camerons*, and it does seem to me they cannot go behind it, and claim in virtue of an antecedent possession against the person subject to whose right they accepted the estate from the Crown. A ten years' possession after the issue of the patent would, I apprehend, extinguish the right of such third person, but possession anterior to the patent cannot, I should say, be taken into account.

This is a reason against the running of the statute before the issue of the patent, quite distinct from the doctrine enunciated in *Jamieson* v. *Harker* (*b*), *Dowsett* v. *Cox* (*c*). But those cases also apply to this case, and to some extent the reasoning upon which they proceed, for the mortgagee of the nominee of the Crown held under the Crown. Time could not run

(*a*) Co. Litt. 352 *a*.
(*b*) 18 U. C. R. 590.
(*c*) 18 U. C. R. 593.

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against the Crown by the possession of the Crown's nominee, nor, I take it, against any person holding under the Crown.

When the Crown, in 1875, granted the land to the *Camerons* the patent might have been granted to Dr. *Dickinson*, or to any other person. If time could run, by reason of possession, before the issue of the patent, the title of the grantee might be extinguished by such possession in five years, or one year, or one day, after the issue of the patent. So here, if the patent had been issued to Dr. *Dickinson*, his title might have been extinguished by the possession of the *Camerons* within two years of the issue of the patent; for it is to be remembered that their claim, resting upon possession, is not under the patent, but quite independent of it. The sound rule I take to be, that time does not run in favour of persons in possession as long as the title remains in the Crown.

I confess I am unable to see how the fact of a mortgage having been given by *Donald A Cameron* gives a character to his possession, or that of the defendants Cameron, different from what such possession would have been if such mortgage had not been given; for the possession was entirely independent of the mortgage. The statute giving validity to mortgages by a nominee of the Crown, only gives them the same effect as if made after patent issued, and does not touch the question of possession; which question stands, to my mind, quite independent of the mortgage. I would give to the mortgage the same effect as if made after patent issued, and I would give to the possession the same effect as if no mortgage had been given; each being, in my opinion, quite independent of the other.

Judgment.

BLAKE, V. C.—I have read the evidence given on the hearing and examination, and also that adduced by consent on the rehearing. It fails to impeach the sale effected under the mortgage, and leaves the matter

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to be dealt with as if a binding sale had taken place and the property had passed to *Lindsay*, and by him had been conveyed to *Dickinson*.

The facts of the case, so far as they are material to the questions raised on this rehearing, appear to be as follows: *Donald A. Cameron* being in possession of the premises now claimed by *Mary* and *Angus Cameron*, as locatee of the Crown, by an indenture of mortgage, dated the 24th day of April, 1860, and registered on the 27th day of the same month, duly mortgaged the same to *Angus R. McMillan* to secure the repayment of $500 and interest. The defendant *Dickinson* became the assignee of this mortgage, and exercised the power of sale and sold and conveyed the same, so far as he could, on the 12th of April, 1876, to the defendant *Alfred Jarvis Lindsay*, who, on the 12th day of March, 1877, duly mortgaged the same to the plaintiff, really to secure the repayment of $540 and interest. This mortgage contained the usual covenant for payment of the amount secured. On the 29th of December, 1877, *Lindsay* transferred the equity of redemption to the defendant, *Dickinson*. On the 30th of April, 1875, the patents from the Crown of the premises issued to these defendants. *Donald A. Cameron* was in possession of the premises from a period prior to 1860 up to the time of his death, and from that time onward *Mary* and *Angus Cameron* have continued the possession; so that, if the circumstances hereinafter mentioned be not sufficient to prevent the running of the statute in favour of these defendants, they have acquired under the Statute of Limitations a good title to the land they claim.

Judgment.

It is said that the condition on which the Crown Lands Commissioner issued the patent is such that these patentees cannot now raise the defence on which they rely. The alleged condition consists in the following memorandum, "It being stated that Dr. *Dickinson* is assignee of a mortgage given by above

named *Donald A. Cameron*, which mortgage is registered against the lot in the county registry office, it is to be understood that the sales of the west half and east half, made respectively in the names of *Mary Cameron* and *Angus Cameron*, widow and son of said *Donald A. Cameron*, are not intended to cut out the rights, if any, Dr. *Dickinson* may have as such mortgagee." I agree in Mr. *Fitzgerald's* contention that this memorandum of the ruling of the commissioner did not give any fresh right to the mortgagee. If, then, the mortgage was a subsisting charge on the premises, under this ruling it continued such; if it were not so, this ruling did not make it effectual. If the Statute of Limitations had run for fourteen years, and six years were still to run, this ruling left the parties in the position in which by their contract and dealings they had placed themselves. In other words, the determination arrived at by the crown lands department was not to disturb the relative positions of mortgagor and mortgagee to the detriment or benefit of either party, save perhaps in this one respect, that whatever might be the legal consequences that flow from the issue of this patent should follow on its being granted.

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It is, perhaps, scarcely necessary on this point to do more than refer to the judgment of the Chancellor, given in the Court below, where he says: "I desired to refer to the ruling, to see whether it was made a condition of the sales to the *Camerons*, that the mortgage therein referred to should be paid. It is not made a condition, but it was evidently intended to leave the rights of the mortgagee, whatever they might be, unaffected by the patent; this is made the more clear by the words 'if any,' being interlined."

It is further urged that on the issue of the patents, a new period from which the statute was to run began. This position is, I think untenable; although the estate which passed from the Crown to the patentees may have been carried to the mortgagee, or to his vendee, yet it would

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only pass to feed the mortgage or the estate transferred to the vendee. It would, at most, strengthen the title, but not give new rights. It would enable the mortgagee perhaps to deal more advantageously with the property, but would not vary the rights, conditions, and consequences flowing from the contract entered into. If the legal estate passed to the mortgagee or his vendee, he took it merely to subserve the mortgage, but not to enlarge or extend its clauses and conditions, or to withdraw either the mortgagee or the mortgagor from the position in which, by their acts or the law of the land, they may happen to be placed.

It was further urged that by the exercise of the power of sale the running of the statute was intercepted. I do not think this is so. There is no authority for such a proposition. There was no act or admission on the part of the mortgagor under the statute; nor can we hold that the exercise of this power is equivalent to the taking of legal proceedings. This point must therefore be determined against the plaintiff (*a*). The Real Property Limitation Act came into operation 1st July, 1876, the bill was filed on the 3rd June, 1878, so that if the statute runs the ten years had elapsed, and the possession in these patentees and the ancestor had matured into a statutable title in their favour.

Judgment.

But it is further argued that, although this might be the result if the patent had issued at the time of the mortgage, as the land was then in the Crown the statute would not run. The enactment under which the mortgage was given is R. S. O. ch. 25 sec. 26: "In case the original nominee of the Crown, or any person through whom any party obtaining letters patent for any lands under this Act derived his claim, had before the allowance of such claim, and before the issue of such letters patent, granted any mortgage, incumbrance or lien on such lands, by any instrument by

(*a*) See *Re Alison—Johnson* v. *Mounsey*, L. R. 11 Ch. Div. 284.

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which the same would have been validly granted if the letters patent had issued in favour of the grantor before the date of such instrument, the same may be registered in the office of the registrar for the county in which the lands lie, subject to the same conditions, and with the same effect and no other, and shall in law and equity have the same force and effect, and no other, as if letters patent for the said land had before the execution of such instrument, been issued in favour of such grantor." By this enactment the chargee of unpatented lands was placed in the same position as the chargee of lands that were patented. The enactment which is to the advantage of such cha[illegible]e, declares not only that the instrument may be registered "subject to the same conditions, and with the same effect, and no other;" but it adds that it "shall in law and equity have the same force and effect, and no other, as if letters patent for the said land had before the execution of such instrument, been issued in favour of such grantor."

Judgment.

This enactment in no way interferes with the right of the Crown. It merely, as between mortgagor and mortgagee, settles the position of these parties, and declares that they shall stand, the one to the other, in the same position before patent as after patent. I do not think the language should be so limited as to refer the words quoted merely to the registration and its effect. The clause is clearly wide enough to embrace the Statute of Limitations, and I do not feel that it would be reasonable for us to exclude this enactment and its result, when by the language of the Act, although general, it is so plainly introduced. I am of opinion that, as against the parties that rehear, the plaintiff has no claim, and that the appeal should be allowed, and the bill as against them be dismissed, with costs.

PROUDFOOT, V. C,, concurred in the views expressed by BLAKE, V. C.

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MOBERLY v. BROOKS.

Fraudulent representations as to value of lands—Liability of party for deficiency—Discrediting party by his own evidence—Denial in answer met by evidence of plaintiff.

W. conveyed to his nephew, *E.*, for an alleged consideration of $1,200, 50 acres of land, and afterwards these parties applied to the plaintiff, the appraiser of a Loan Company, for a loan of $1,000 to pay, as was alleged, upon the purchase money, *W.* asserting that the property was well worth $2,200 cash, or $2,500 on a fair credit. The plaintiff, relying on the statements of *W.*, certified the value accordingly and the loan was effected. The land was not worth the $1,000 advanced, and sold for $800, leaving a balance due the company of nearly $500, which they required the plaintiff to pay, and which he did settle with the company for, considering himself liable, and obtained from the company an assignment of their securities. The Court [PROUDFOOT, V.C.,] being satisfied that the whole transaction was a fraudulent scheme to obtain the loan upon the certificate of the plaintiff, ordered both defendants to make good the deficiency, and pay the costs of the suit; holding that the plaintiff was entitled to take an assignment of the claim as against *W.* to indemnify himself; that he could sustain this suit though he had only secured the money, without paying it; that he had an independent right of suit against *W.* for the misrepresentation, and that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself.

Examination and hearing at November sittings, 1879, in Toronto.

The facts are clearly stated in the judgment.

Mr. *Ferguson*, Q.C., and Mr. *Bain*, for the plaintiff.

Mr. *Moss*, for the defendants.

Jan. 21st 1880.

PROUDFOOT, V. C.—This bill is filed by the plaintiff, the appraiser or valuer of the London and Canadian Loan and Agency Company, at Collingwood, and states that in February, 1876, the defendants came to him, when *William Brooks* represented that he had sold to *Edward Brooks* (his nephew) the east half of the west

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half of lot No. 22 in the 3rd concession of the township of Collingwood, 50 acres, and that *Edward Brooks* wanted a loan of $1,000 on it to be paid on the purchase money. That, to enable the plaintiff to make a report to the company for the purpose of obtaining the loan, *William Brooks* represented the land to be a good clay soil, and capable of cultivation, and that it was all under cultivation; that it was of the cash value of $2,200, and on a fair credit it was worth $2,500. That the ground was then covered with snow and the plaintiff could not make a personal examination, and told *William Brooks* he would rely upon his statements. That *Edward Brooks* was present, and acquiesced in them. The report was presented to the company, and the loan made upon the faith of it. That default was made, and it was then discovered that the condition and value had been grossly misrepresented, and that the land was not worth the $1,000 advanced; and it has been sold by the company for $800, part in cash and part upon credit; and after crediting the whole of the $800, there still remained due to the company nearly $500. The company required the plaintiff to pay the deficiency, and he, supposing himself liable, has satisfied the amount; and on the 1st of November, 1878, took from the company an assignment of their interest in the said moneys, and their right to recover the same from the defendants, as well as the benefit and advantage to be derived from the covenants contained in the mortgage.

Judgment.

The bill also alleges that the sale from *William Brooks* to *Edward Brooks* was not an actual sale, but part of a scheme to get the loan for the benefit of *William Brooks*, and so as he should not be liable for it.

It prays for an order for payment of the deficiency, $470.54 against both defendants; and at all events, for a decree against *Edward Brooks* for the amount upon his covenant.

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William Brooks, by his answer, says the land was his wife's, and he was acting on her behalf when he went with *Edward Brooks* to the plaintiff's office; that the land could have been inspected; that the plaintiff did not rely, nor lead him to believe he would rely, on any statements made by him. That the plaintiff had acted as his solicitor in the purchase of the land, and when plaintiff asked him the value he reminded him that he had purchased the whole west half for $2,000; and he truly stated the condition of the buildings and improvements. *Denies* he made any representation such as alleged, of the nature o the soil, and as to its being under cultivation. *Denies* he gave any instructions as to filling up the report and valuation mentioned in it, and did not know the contents of it; that he did not read it, nor was it read to him. Alleges that the sale to *Edward Brooks* was made in good faith; denies all fraud; and submits that the company could not assign a claim for unliquidated damages, and that the plaintiff could not sue upon such an assignment.

Judgment.

I understand that the bill has been taken *pro confesso* as against *Edward Brooks*, though there is nothing in the papers shewing that to be the case.

The application is on a printed form, and the plaintiff has suffered a statement to remain in the printed part that he had made a careful personal examination of the property. This is incorrect. But there seems to be no reason for imputing any improper motive, or anything more than a piece of negligence in not scoring out the usual premiss.

If the answer were true, it is quite probable that it makes out a sufficient defence for *William Brooks*. But, unfortunately for *William Brooks*, it is not true in nearly all essential particulars. He has been examined before an Examiner, and admitted that when he stated in the answer he gave no information to fill up the report or valuation, it was not true. And in regard to this application, or report and valuation, he says

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that the plaintiff asked him questions, and *Baines* (plaintiff's clerk) was sitting by; he will not swear he was not writing. "It was to find out what the land was worth, the plaintiff was asking me for this information. I knew he was valuator for the company. I expected, and it was reasonable to suppose, the company would act on plaintiff's valuation. I knew what plaintiff wanted was to get information as to the value of the land, * * he was making out the application and valuation to send to the company, so that they could determine whether they would lend the money or not. I knew that the company would act on that. I knew they would not advance the money without full information as to the state of the property and its value. I did not tell him this was stony land; he did not ask me. I did not tell him it would cost a good deal to take the stones off the land. * * I think I said the land was level, cleared; I will not swear I did not tell him it was easily cultivated. I said the land was cleared, level; and I am not prepared to swear I did not say it was fit for cultivation. * * At the time I gave this information the land was not in a first-rate state for cultivation, but it could be cultivated in a manner; it was not clear of stones, but could be ploughed and harrowed; thirty-five or forty acres of it is fit for cultivation in a manner; not a great deal of it is clear of stones; about twenty-five acres is tolerably clear of stones. There are some large and some small stones; some places the ground is covered pretty well with stones; it would require a great deal of labour to clear the land of stones; * * it is all rolling stones there; big granite stones on it a man could not lift alone. I will not swear that it would not cost more than $20 an acre to clear it of stones." As to value, he says: "The plaintiff asked me, what do you think is the value of the property? I said to him, Mr. *Gamon*, your partner, knows what it is worth, as he valued it for *Sandy Campbell* some years ago when

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he obtained the loan which I am paying off now, and you know what I gave for the property when I bought it from *Campbell* was $2,000." * * He did not expect any company would lend *Edward Brooks* $1,000 on this $1,200 farm, (that was the price he sold to *Edward Brooks* for); "my reasons for supposing this was, that they only lent two-thirds the value of the land, the $1,000 would be more than two-thirds the value." Immediately after he contradicts himself, and says, he "expected *Edward Brooks* would be able to get $1,000 on the land; the land would be a security for it. I think the property was worth $1,500; it was worth $30 an acre. I gave it to him at less than its value."

The defendant produced a very respectable witness, *Neil McColeman*, who has made an estimate of its value. He says there are about 44 acres cleared; 20 to 25 are capable of cultivation. Part can't be ploughed without stoning. The lot, in 1876, to make a home of, might be worth $1,500. It would cost $25 an acre to stone the land. The $1,500 would be the price on ordinary time of credit. I would have given that in cash for it. I would now give $1,200 or $1,300 for it.

Judgment.

A large amount of evidence was produced on behalf of the plaintiff, shewing that much the larger portion of the land is so covered with stones as not to be capable of cultivation, unless at a cost of about $20 an acre in removing them. But I do not think it necessary to refer further to it than to say that it was given by respectable witnesses, against whom, with one exception, nothing was said; that it satisfied me that the land is not capable of cultivation in any reasonable sense; and that the price obtained for it was a fair one, and as much as could be got.

The appraiser's report, a printed form, is all filled up in the handwriting of the plaintiff, and from his evidence, supported in the main by the defendant *William Brooks*, it is clear that the questions in it

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were asked, and the answers given by *William Brooks* and written down by the plaintiff. It is there represented to be level and capable of cultivation. The value is placed at $2,200, if sold for cash at a forced sale, and at $2,500 on fair terms of credit. The valuation indorsed on the back is—

40 acres cultivated at $46	$1,920.00
10 acres woodland at $25	250.00
Buildings	300.00
	$2,470.00

I think it a proper conclusion, from the evidence, that *William Brooks* wilfully and designedly misrepresented the condition and value of the property, knowing that his statements were to be acted on, with the purpose of getting the money himself, through the medium of *Edward Brooks*, who was worthless. I am also strongly inclined to believe that the sale to *Edward Brooks* was a sham, a step in the contemplated fraud upon the company; but it does not seem necessary to say anything further on this, as the other being established this is not essential.

Judgment.

If the plaintiff is entitled to sue, I think him clearly entitled to the relief prayed for. But it is objected that what was assigned to him was a mere claim for unliquidated damages, arising, not out of a contract, but from a tort, not assignable under the statute, and that the company should have been plaintiffs.

And also, that the plaintiff not having actually paid the money, only secured it, he cannot sue.

The last objection seems not tenable (*a*). *Randall* v. *Raper* (*b*).

In regard to the former, the plaintiff claims that he is entitled to sue, either as assignee of the company or in his own right, as for damages done to him by the

(*a*) Add. Torts 990. (*b*) El. Bl. & Ell 84.

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misrepresentations of *William Brooks*. The covenant of *Edward Brooks* in the mortgage has been effectually assigned under the R. S. O. ch. 117, sec. 7, it being a debt arising out of contract.

The claim against *William Brooks* is of a different complexion. It does not arise out of a contract, but from a tort, the untrue representations he made, which would have given ground for an action for deceit; and as such I think is not made assignable by the Act. There seems no doubt *William Brooks* would have been liable to an action by the company for the falseness of the representations made to induce them to enter into the contract with *Edward Brooks* (*a*). If not assignable by that Act, is it assignable on equitable principles independently of it? Mr. Justice *Story* (*b*) says that an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void as contrary to public policy, and as savouring of the character of maintenance. And for a like reason a mere right of action for a tort is not assignable. And (sec. 1048) he defines maintenance as properly an officious intermeddling in a suit which in no way belongs to him, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it; and he refers to the definition of maintenance by the Master of the Rolls in *Harrington* v. *Long* (*c*), as somewhat different from his own, it being, "Maintenance is where there is an agreement, by which one party gives to a stranger the benefit of a suit upon condition that he prosecutes it." In sec. 1048*a*, he continues: "The doctrine of the Lord Chancellor as to maintenance is to be understood with proper limitations, and cannot be applied to a person having an interest, or believing that he has an interest, in the subject in dispute, and *bonâ fide* acting in the suit."

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(*a*) Add. Torts 828, 3rd ed.
(*b*) Eq. Jur. sec. 1040 h.
(*c*) 2 M. & K. 592.

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It is plain, I think, that these reasons do not apply to this case. The plaintiff is not a stranger to the matter in question, officiously intermeddling in a suit which in no way belongs to him. He was himself liable for the effect of the misrepresentation, or what is sufficient, he believed himself liable for it. He was thus interested in the subject matter of the transaction, and under the law as stated he would be entitled to take an assignment of the claim to indemnify himself.

The case of *Hill* v. *Boyle* (*a*), to which I have been referred, does not seem applicable to the circumstances here. In that case the plaintiff had no interest in the debt assigned; it was simply a transfer to a stranger of a right of action for the chance of recovering interest or profits of part of some trust funds; *Hill* the plaintiff had parted with all his life interest, which had been sold by the mortgagee, and the assignment to him by the purchaser and mortgagee of this right of action, was just the same as an assignment to any stranger.

Judgment.

And by the General Order 58, Rule 7, an assignee of a chose in action may institute a suit in respect thereof without making the assignor a party.

It was contended also that the plaintiff had an independent right of action for himself against *William Brooks* for the representations that were wilfully made to him, and by which he has suffered loss. And for this was cited the general rule as stated in Add. Torts, 3rd ed., 852, that the person to whom a false representation was made to be acted upon, and who acted upon it, believing it to be true, and sustained damages thereby, is the party to sue for compensation. That would appear rather to refer to a case where the person to whom the representations were made was the person to act upon them. Here the representations were made to be acted upon by the company, at least chiefly. And that this is the meaning would appear

(*a*) L. R. 4 Eq. 260.

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from the following sentences, in which it is said that a person to whom the representation is indirectly made may sue upon it. But upon principle I do not see any reason to doubt the plaintiff's ability to bring such a suit. The defendant here knew that the plaintiff was going to *act* upon the representation by communicating it to his principal, and if the relations between the principal and agent were such as to render the agent liable to the principal, the agent ought to have a right to sue for his indemnity.

Mr. Justice *Story*, in his work on Agency, sec. 415, says that if an agent is induced by the fraud, deceit, or misrepresentation, of a third person, to purchase goods for his principal, and thereby sustains a personal loss, he will be enabled to maintain a suit against such third person for such wrongful act or deceit. Thus if a factor should buy goods for his principal, which were falsely and fraudulently represented by the seller to be of a particular quality, or growth, or manufacture,

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which alone he was authorized to buy for his principal, and the principal should refuse to receive them, or the factor should be otherwise injured thereby, he would be entitled to a full recompense from the seller for the tort. So here the agent was employed correctly to represent the nature and value of the property; he has been induced by the misrepresentation of *William Brooks* to make an incorrect statement, and has suffered loss thereby, and is therefore entitled to sue.

Upon one or other of these grounds I think the plaintiff entitled to succeed.

There were some other ingenious arguments for the defendant, which were disposed of at the hearing.

It was said that the plaintiff could not maintain the suit unless he could replace the parties in *statu quo*. This might be a very solid objection were the suit one to rescind a transaction, but this is not of that character It was also urged that the denial in the answer must be met by more than one witness. I do not think the

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rule applies where the defendant has been examined before the Court, or before an Examiner, and where the report has been read in evidence, if upon such examination there is sufficient ground for discrediting him. Here I think he discredits himself. He admits that the answer is wrong in a most material point, and his evidence shews that it is wrong in others; and there is, besides, evidence for the plaintiff contradicting him, and which is entitled to credit. Upon all the matters depending upon the evidence I think the case of the plaintiff is fully made out. I think also that the plaintiff was justified in relying upon the statements made to him, and that the defendant was aware he did so rely; and that the defendant had no reason to believe in their truth.

Judgment.

There will be a decree for plaintiff against both defendants, with costs, for the amount of the deficiency, to be ascertained, if required, by a reference to an officer of the Court—Master or Registrar.

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BOUSTEAD v. SHAW.

Settlement on wife—Verbal agreement to settle before marriage—Fraud on creditors—Evidence of agreement—Evidence of indebtedness—Entry in business books.

S., a wholesale merchant, upon the treaty for marriage with the defendant, and at her suggestion, verbally agreed to make a provision or settlement for her benefit, and proposed the purchase of a particular property for that purpose. Subsequently, and after the marriage had taken place, which was in 1870, the property referred to was sold, but, producing a larger sum than was anticipated, *S.* did not buy. Afterwards, and between the 9th of April, 1872, and the 10th of June, 1873, *S.* purchased amongst other properties four several parcels of land, for the alleged purpose of the proposed settlement, which, with the improvements put thereon, amounted to $15,320, or thereabouts; some of the conveyances of which it was alleged were in error taken to *S.* himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. *S.* subsequently became insolvent, and on a bill filed by the assignee of his estate impeaching the conveyance in trust as a fraud upon creditors, the Court [PROUDFOOT, V.C.] being satisfied that an agreement, though verbal, had been made by the parties prior to the marriage, although the only evidence thereof was that of the parties themselves, and that the conveyances of the parcels to *S.* had been so made by mistake, declared the defendant entitled to hold the lands in settlement, and dismissed the bill, with costs.

It was alleged that *S.* was indebted at the time of the settlement, but upon the evidence, set out below, it was held that this was not shewn; and that the entry of some of the property in the business books of *S.* as an asset did not, under the circumstances, shew that it remained his property.

Statement.

The bill in this case was filed by the plaintiff, *James B. Boustead*, as assignee in insolvency of *William James Shaw*, to set aside certain conveyances of property to the defendant, the wife of the insolvent, as being fraudulent and void against creditors.

Shaw had begun business as a wholesale grocer in Toronto, in the year 1860. In 1864 he took one *Campbell* as a partner in his business, giving him one-fourth interest in the profits. In 1870 *Campbell* died, the accounts of the business were taken, and a settle-

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ment was had between *Shaw & Campbell's* executors, when it was found that there was due to the executors between $6,000 and $7,000, which was paid to them by *Shaw*, and *Shaw's* capital was ascertained to be between $19,000 and $20,000. At this time *Shaw* resided at Russell Hill, near Toronto, now known as Glen Edith, of which he had a lease that would expire in a short time. He was a widower with three children. In July, 1870, he married the defendant. The defendant was then prineipal of a common school in New York, and had been so for some years, at a salary of $1,800, with extras which made it equal to $2,200, with the prospect of the situation being a permanency. Upon the treaty for the marriage the defendant represented to *Shaw* that considering the condition of his family it was reasonable he should make a provision or settlement for her. To this he at once assented, and proposed that if he could purchase Russell Hill, which was to be sold at the expiration of his lease, he would have it settled upon her. There was no writing evidencing this agreement. The marriage took place. Russell Hill was sold, but went for a higher price than was expected and *Shaw* did not buy it. Immediately after this Mr. and Mrs. *Shaw* began to inquire for a suitable site for a residence, and which should take the place of Russell Hill in the proposed settlement. They fixed upon a lot on the south-west corner of Bloor and Jarvis streets, known in the suit as A, in the expectation of obtaining another lot to the south (E), and procuring a lane (C) between them to be closed. Negotiations for the purchase of E did not for some time succeed, and a purchase was then made of lot B to the west of A. Upon B was a brick cottage which it was intended to pull down to form a garden, but before this was done they succeeded in acquiring E, and it was no longer necessary to pull down the cottage, and it was raised and converted into two

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dwelling houses. Soon after the lane C was acquired, the whole property thus acquired forming a block of 127 feet on Bloor street by 234 feet on Jarvis street. The cost of these several pieces, and of the improvements upon them, as stated in the answer, amounted to $12,565, but which, according to the plaintiff's evidence, amounted to about $15,320.

The dates of the several purchases were as follows: A, 9th April, 1872; B, 20th September, 1872; E, 12th May, 1873; C, 10th June, 1873. The deed of B was taken in the name of the defendant, all the others in the name of the insolvent.

The cause came on to be heard at the sittings of the Court in Toronto, in the Autumn of 1879.

The grounds for impeaching the deeds are fully stated in the judgment.

Argument.

Mr. *James Maclennan*, Q. C., (Mr. *Rae*, with him,) for the plaintiff. The evidence in this case establishes that there were in effect three different settlements for the benefit of the defendant. The cost of all the properties settled, exclusive of improvements, amounted to the sum of $11,019, and at this very time the contention on behalf of the plaintiff is that *Shaw* was indebted in a sum of about $90,000. In December, 1870, the evidence establishes the fact that his then indebtedness amounted to $70,000; in December, 1871, $90,000; in 1873, $90,000, and in 1876, at which time we submit it must be presumed the deeds of these properties were actually executed, *Shaw's* indebtedness on account of his business still continued to reach the large sum of $90,000. He was then in business, subject to all the vicissitudes of trade, and, in addition to these liabilities, he was indebted to the bank in a considerable sum, never dropping below $45,000. All that is necessary for the plaintiff to shew is, the state of *Shaw's* circumstances at the time of the settlement. [PROUDFOOT, V.C.—If you could shew that at that time he con-

templated embarking in the wild speculations which he entered into in 1877 and 1878, it would certainly be a strong fact from which to infer an intention to protect his estate from the claims of creditors.] *Townsend* v. *Westacott* (*a*), which has been approved by a long course of decisions, fully bears out the position taken by the plaintiff, that all that is necessary to be shewn is that *Shaw* was indebted at the time of making the settlement, and that by reason of such settlement a large portion of his assets has been placed beyond the reach of his creditors, and that damage has been sustained by them in consequence. It is not necessary to shew insolvency at the time to entitle creditors to relief; and *Crossley* v. *Ellworthy* (*b*), enunciates distinctly the principle that where, as here, a large portion of the funds is withdrawn for settlement, it rests upon the party so withdrawing the money to establish beyond doubt his perfect solvency. *Shaw* clearly comes within the principle laid down by Lord *Langdale*, in the case of *Ware* v. *Gardner* (*c*), as he was largely indebted at the time of the execution of the deeds, and had continued so ever since till the hour of insolvency. The evidence shews that some of the properties intended to be settled on the defendant were entered in the books of the business as an asset of *Shaw's*; that he received the rents of them, and in other ways treated them as his own. Counsel also insisted that the fair inference from all the evidence was, that the deed of settlement was really executed in May, 1876, and not before, as asserted by the answer; that in July, 1878 *Shaw's* arrest, in Montreal, took place, after which difficulties continued to increase, which ultimately culminated in his being placed in insolvency in October following. Under all these circumstances it was contended that the transactions of 1872 and 1876 cannot be permitted

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Statement.

(*a*) 2 Beav. 340. (*b*) L. R. 12 Eq. 158. (*c*) L. R. 7 Eq. 317.

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to stand in the way of *Shaw's* creditors being allowed to enforce their just claims against him.

Mr. *Blake*, Q. C., (Mr. *J. H. McDonald* with him), for the defendants. The bill here does not attack the date of the deed of June 1875; and the presumption fairly is, that it was executed on or about that date. The ante-nuptial verbal agreement to make a settlement, though incapable of being enforced, removed all taint of fraud or intention to save the settled estate from creditors.

Shaw's assets, it is shewn, were amply sufficient to discharge all his liabilities, leaving a surplus capital of something in the neighbourhood of $20,000. In October, 1873, the surplus is placed by the accountant at about $70,000, while his liabilities remained at only $80,000, or $90,000.

At the death of *Campbell*, the interest of *Shaw* would have been served, by reducing the amount and value of the assets, yet under these circumstances, the in-

Statement.

vestigation of the estate which he directed to be made, resulted in shewing that in September 1870, *Campbell's* one-fourth share of the profits amounted to $6,000, or $7,000, and which amount was paid by *Shaw* to the representatives of *Campbell*. Let us now pass along to October, 1873, at which time the formation of a partnership with *Hutchinson* was contemplated by Shaw. At this time it was clearly the interest of *Hutchinson* to ascertain the true amount of capital, and he now swears that *Shaw's* capital at that time was at least $40,000; *Hutchinson* himself put into the buisness $1,800, and at this time the gross amount of assets, including the properties subsequently conveyed in trust, amounted to at least $52,000. Again in 1875, it is proved that *Shaw's* capital, including the $40,000, had increased to $60,000, or $65,000, so that the withdrawal of $15,000 for the purpose of fulfilling his promise of a settlement was not such as could be deemed unreasonable under the circumstances. *Crossley* v. *Elworthy*, relied on by

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the other side merely establishes that the withdrawal in that case of £10,000 from the funds of the business was *prima facie* a fraud upon creditors, or that it did, or might hinder or delay them, and that *Elworthy* was bound to shew perfect solvency at the time. Here it is established that not only was *Shaw* perfectly solvent at the time of the settlement, but the accounts prove clearly, that not a debt existing at that time was outstanding at the date of the insolvency. In *Taylor* v. *Coenen* (*a*), a settlement was set aside but there it was established that the settlor's debts at the time of the settlement exceeded his assets.

Mr. *Jas. Maclennan*, Q. C. in reply. The deed sought to be impeached, is said to have been executed at the time it bears date, June, 1875; but as it was not registered till 1878, the question naturally arises if it were not executed in 1876, or later. Can it be said here, that the effect of this setlement did not or might not have hindered or delayed creditors?

Jan. 28th, 1880.

Judgment.

PROUDFOOT, V. C.—[After stating the facts as above set forth, proceeded.] The evidence of the defendant, of the insolvent, and of Mr. *Rose*, their solicitor, satisfies me that the purchases were all made to be settled upon the defendant, in pursuance of the verbal agreement before marriage, whatever its effect may be, and that the making the conveyances of some of them to the insolvent arose from mistake or accident in preparing the conveyances. When it was ascertained that the mistake had been made, a deed was prepared, bearing date 24th of June, 1875, from the insolvent to his solicitor, in trust for the defendant, of these properties that had been erroneously conveyed to him; this was the second deed prepared for the purpose, the first not having contained a proper description of the properties; both bear the same

(*a*) L. R. 1 Ch. D. 636

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date, and it is not shewn when either was executed; but I must take it as proved that the last was executed not later than the 19th of May, 1876, when the affidavit of execution was sworn. The deed itself was not registered till the 17th of May, 1878.

I have stated that upon the settlement in 1872 with *Campbell's* executors, the insolvent's capital was between $19,000 and $20,000. His business continued to prosper, his capital on the 31st of December, 1870, was $20,842, on the 31st October, 1871, it was $33,410, and the balance sheet, prepared on the 31st of December, 1873, shewed a surplus of $52,697, after deducting $20,000 for bad debts. In this balance sheet the properties now in question were entered, as to one of them, B., in the shape of a charge to the defendant of $2,417. This balance sheet was prepared by an accountant with the view of a partnership with *Hutchinson*, which was entered into on the 1st of January, 1874. The capital of the firm was placed at $41,800,

Judgment.

of which $1,800 was put in by *Hutchinson*, and $40,000 by *Shaw*. To arrive at this sum of $40,000, *Shaw* directed a deduction to be made of these properties and some other items, but leaving the charge to Mrs. *Shaw* of $2,417, B, as an asset of the firm, *Hutchinson* says: but *Blakely*, the bookkeeper, says it was not an asset of the firm, but part of *Shaw's* capital. The charge in respect of this B. property seems to have afterwards increased to $4,301. It was originally charged in *Shaw's* private ledger, but on the 1st of May, 1875, was transferred to the books of the firm, and on the 27th of November, 1878, charged to the insolvent. The partnership was for three years, but was continued till the insolvency, and *Hutchinson* was to have one-fourth of the profits. The articles provided for annual balance sheets, and balance sheets seem to have been made from time to time, though not complete as the proper deductions for bad debts could not be arrived at, but an approximation was

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made to the state of the business, and on the 30th of April, 1875, *Shaw's* capital was found to have increased to $61,575, and on the 31st of December, 1876, his capital had still further increased. *Hutchinson* thought the business a profitable one, till July, 1878. In December, 1875, his capital of $1,800 appeared to have increased to $7,821, though on the 1st of January, 1877, it appears to have fallen to $3,151, which is explained by *Blakely* as caused by no allowance having been made for profits, though in reality the business shewed an increase of profits.

Blakely was engaged by the firm and remained with them from February, 1875, till March, 1877. He was to have one-fourth of the profits. He thought he was not fairly dealt with, and that he ought to have had $5,000 or $6,000 for the two years, as I understand, in addition to his drawings of $100 a month. He also thought it a prosperous business; best at first.

Judgment.

The business done by the insolvent and his firm was a large one. By his arrangement with the bank his line of discount for customers' paper was $75,000, and for letters of credit and on his own paper $25,000. *Shaw* says that the account was what is termed an active one, from $50,000 to $60,000 a month, and sometimes as high as $100,000 a month. The annual sales were from $300,000 to $350,000. In the accounts there are some items put down as accommodation paper, but these are explained to mean paper discounted at the bank by the insolvent or his firm without an indorser. This was done, not for want of customers' paper, but it was at shorter dates than the customers' paper, and more satisfactory on that account to the bank, though there was in the safe of the firm customers' paper to a much larger amount than this accommodation paper. The practice of the insolvent was to give his own check, or the firm's, to retire any customers' paper that was not paid when it fell due. It was all run off in sixty or ninety days. No paper was renewed till December, 1878. To the

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public, the bank, and the parties concerned, the business appeared to be, and was, a prosperous one down, at least, to the beginning of 1877. In June or July, 1875, the insolvent thought himself worth $50,000 to $60,000 independent of the property in question, and so far as I can judge he was justified in the belief. In 1872, 1873, 1874, 1875, and 1876, the business was a good and increasing one; in 1877, it fell off, and in 1878, was very bad.

The causes of the declension and final collapse were the following. In July, 1876, the insolvent entered into a large speculation in sugar with *Cramp, Torrance & Co.*, and another smaller one in September, 1876. The sales in 1876 were profitable, what was not sold till 1877 yielded no profit. In December, 1876, or January, 1877, he entered into another very large venture with the same parties in the purchase of teas, which turned out to be a disastrous one. Prices fell; business generally in the country became depressed;

Judgment.

the times became very hard; many bad debts incurred; and it finally ended in the present insolvency. Down to July, 1878, the insolvent says he had no apprehension of not being able to carry the matter through, but in that month he was arrested in Montreal for a debt, which was settled immediately, but he then began to entertain apprehensions of not being able to weather the storm. And *Hutchinson* says, that till that time he had no doubt they had a good substantial business, though perhaps the capital might be slightly reduced; he had no doubt they were perfectly solvent.

The sugar and tea speculations were not engaged in as part of the insolvent's regular business. His firm had no share in them. They were exceptional ventures on his own account in conjunction with *Cramp, Torrance & Co.*

The bill attacks the conveyances to the wife as made without consideration, with the sole purpose of hindering, defeating, and delaying creditors, and that during all the time from the first of the purchases *Shaw* was never solvent, and did not have his books regularly balanced.

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The case was varied on the argument, and it was contended that if not insolvent, still *Shaw* was so largely indebted as to bring the case within the operation of the statute: that there were debts in existence prior to the conveyances which were not paid off; and that at all events to the extent of the $4,300 spent upon the cottages on B, and carried into the books as a debt of Mrs. *Shaw*, the plaintiff must succeed; and leave was asked to amend the bill so as to present these further grounds for relief.

I think all the evidence attainable on the subject has probably been procured, and that the plaintiff should be permitted to make the amendments.

If there were debts in existence at the time of the settlement the plaintiff would be entitled to a decree: *Masuret* v. *Mitchell* (*a*). It was said that the liability to the bank for the line of accommodation was a continuing liability, that the whole was one connected transaction from begining to end, and that being found indebted at the time of insolveney, *Shaw* must be deemed to have been liable to the same extent at the date of the conveyances. I do not agree in this. The liability was one accruing from time to time as paper was discounted, and was from time to time extinguished as the paper was retired. It is proved that no paper was renewed till December, 1878. If after retiring a customer's paper *Shaw* got new paper from him and discounted it, this was not a continuance of the old liability to the bank, it was the incurring of a new one. The case of *Cameron* v. *Kerr* (*b*), is no authority for the plaintiff's argument. There there was a security given to the bank for payment of $153,011, of discounted paper, and for renewals, substitutions, and alterations thereof, and all indebtedness of the mortgagors in respect thereof. The Court construed the deed as securing the existing debt, not-

Judgmnet.

(*a*) 26 Gr. 435.

(*b*) 3 App. 30.

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withstanding any transactions in the shape of fresh discounts, &c. Here there is no security for the account, the bank held nothing but the paper of customers, and when that was from time to time retired it ceased, as to it, to be a creditor.

One specific transaction, however, was relied upon as establishing that it was an existing debt at the date of the settlement, and not yet discharged. One *Charles Smith* was indebted to *Shaw* in 1872 and 1873, and gave notes that were discounted by *Shaw* in the bank. These notes were credited in *Charles Smith's* account, and when retired by *Shaw* he was debited with the amount, and new notes taken from him, which were also discounted and retired. To satisfy the debt he conveyed a farm to *Shaw*, who was to give *Reuben Smith*, his brother, the right to redeem it, and the account was transferred to his name. Notes have been taken from time to time from *Reuben*, sometimes discounted, sometimes not. All that were discounted prior to December, 1878, were retired as they fell due by *Shaw*, but at the time of the insolvency paper of *Reuben Smith* was under discount to the amount of about $5,000. *Shaw's* liability to the bank in regard to the paper of *Reuben Smith* arose when he indorsed and discounted it, when he retired it the debt was extinguished as between *Shaw* and the bank. So that the discount of this paper now in the bank cannot, it seems to me, be considered in any sense as a liability of *Shaw* in 1872 and 1873, continued down to the last discount.

Judgment.

The validity of the settlement cannot be sustained by force of the ante-nuptial verbal agreement, but the agreement removes from it the taint of moral fraud; indeed it was admitted there was no fraud unless it could be inferred there was legal fraud from the circumstances under which the settlement was made—the large indebtedness of *Shaw*, all the deeds but one taken in his name, and the entries of the properties in the books.

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Without the admission I conclude, as a fact upon the evidence, that there was no fraudulent design in the settlement, no intention to withdraw it from creditors, nor to protect it from the contingencies of business. Nor, in my opinion, do the circumstances warrant an inference of a fraud upon future creditors. No doubt in carrying on a business such as has been described there were large liabilities, but there were also large assets, more than sufficient to balance the liabilities, and which did in fact leave a large surplus. The business was a prosperous one, and the surplus of $20,000 in 1870 went rolling up rapidly every year. The liabilities of those years were wiped out, and the indebtedness existing at the date of the insolvency cannot be considered as being incurred earlier than 1878, or at the furthest, 1877. The case of *Townsend* v. *Westacott* (*a*), was much pressed as shewing that all that was necessary to establish was, that the settlement was voluntary: that the settlor was indebted, and that it has resulted in injury to the creditor. But the language and decision of Lord *Langdale* do not bear out this very wide proposition. He says it is not necessary to shew insolvency, but that the mere existence of debts is not enough. *May*, on Vol. and Fraud. Alien. &c., 36, says it is enough to invalidate the settlement if the settlor were in embarrasssed circumstances, or that he became so by the abstraction of the property comprised in the settlement. He quotes from *Skarf* v. *Soulby* (*b*), the rule that the existence of property at the time of the settlement, not included in it, ample for the payment of debts then due, would negative the fraudulent intention. He also quotes the rule in *Holmes* v. *Penny* (*c*), that the settlor must have been at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention was to defraud persons who, at the

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(*a*) 2 Beav. 340. (*b*) 1 M. & G. 364. (*c*) 3 K. & J. 90.

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time of the settlement, were creditors of the settlor. The application of these rules to the circumstances here must exempt this settlement from the operation of the statute. The settlor was indeed largely indebted, but he had also large assets, leaving a considerable surplus after the settled property was excluded; a surplus rapidly increasing, so that in eighteen months or two years after the settlement there was $50,000 and upwards beyond the settled property. I do not think it necessary to consider in detail the other cases cited for the plaintiff of *Buckland* v. *Rose* (*a*), *Ware* v. *Gardner* (*b*), *Crossley* v. *Elworthy* (*c*), *McKay* v. *Douglas* (*d*), and *Campbell* v. *Chapman* (*e*). They are all plainly distinguishable, they were cases where the fraudulent intention was clearly ascertained; in some, prior debts were still unpaid, or the whole of the settlor's property was conveyed, or the intention to protect it from future creditors plain.

Judgment.

It was further argued that the entry of the property in the business books was evidence that it remained the property of the settlor.

In regard to this it is to be borne in mind that the settlor was not in partnership at the time of the settlement, and the entry of the sums spent on the particular properties purchased, is what would naturally take place for the purpose of keeping a record of what was done with the money. When on the occasion of the partnership with *Hutchinson* a balance sheet was prepared, *Shaw* refused to allow these properties to be carried in as part of his capital. One entry, indeed, with regard to lot B was a charge to Mrs. *Shaw* of the amount invested in the purchase, and that seems to have been allowed to be taken in as an asset, but afterwards we find that one of the subsequent balances was not completed, owing to some difficulty about these

(*a*) 7 Gr. 440. (*b*) L. R. 7 Eq. 317. (*c*) L. R. 12 Eq. 158.
(*d*) L. R. 14. Eq. 106. (*e*) 26 Gr. 240.

properties. I am not certain that I correctly understand what the difficulty was. *Hutchinson* says it was clearly understood when the partnership was formed, that the properties were to be deducted to make *Shaw's* capital $40,000. *Blakely* says, that when he was preparing a trial balance in May, 1875, it was not completed because *Hutchinson* thought these Bloor street properties A and E should be written off as well as bad debts, and *Shaw* would not consent. The deduction of these, however, was made in 1876 or 1877 *Hutchinson* says. The B account of $4,301 still remained an apparent asset as a debt of Mrs. *Shaw*. This, however, was the property that was deeded to Mrs. *Shaw* originally, and it was good against the husband, and the improvements were made upon it in fulfilment of the original design to settle a homestead; and during all the time the expenditure was being made, *Shaw* was, in my opinion, in circumstances to justify it. There is no evidence that Mrs. *Shaw* was aware of the mode of entry in the books, or of any intention that she should be liable for the money spent on the improvements.

1879.

Bonstead v. Shaw.

Judgment.

And as to the whole of these properties, if the settlement ought only to be deemed made in March, 1876, I think *Shaw* was in a position to make it. But I believe the evidence of the husband and wife, corroborated as it is by their solicitor *Rose*, that the deeds being taken in *Shaw's* name was a mere accident of conveyancing; that the properties really were bought for the defendant, and were intended to have been deeded, and but for a mistake would have been deeded to her.

No relief was asked in this suit against the Bathurst street lots.

I think the bill must be dismissed, with costs.

1879.

THE PEOPLES' LOAN AND DEPOSIT COMPANY v. BACON.

Vendor and purchaser—Acceptance of title—Delivery of keys of house—Receipt of rents and profits—Taxes.

The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, and may be evidence of possession if given or received with that view.

Merely obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made, and to perform other acts to preserve the premises from deterioration, is not such a taking possession under a contract for sale as will bind the purchaser and render him liable to pay interest on the purchase money.

What will be a sufficient taking of possession of a purchased house considered and treated of.

By one of the conditions of sale the purchaser was required to pay a deposit of ten per cent. at the time of sale and the remainder within one month thereafter, and upon such payment the purchaser was to be entitled to a conveyance and to be let into possession of the property purchased:

Held, that under this condition the payment of the purchase money by the purchaser and the delivery to him by the vendor of possession were concurrent acts, and unless the vendor was in a position to put the purchaser in possession he could not be called upon to pay interest on the unpaid purchase money. Neither was he bound in such a case to pay ground rent accruing due upon the property whilst he was so kept out of possession.

In such a case letting a purchaser into receipt of rents and profits is not a compliance with the condition to give the purchaser possession.

Under such circumstances the purchaser was held entitled to make a deduction of a proportionate share of the taxes assessed on the premises for the year in which the sale was effected.

Statement.

This was a suit to compel the specific performance of a contract entered into by the defendant with the plaintiffs, for the purchase of the leasehold interest in certain premises, situate on King and Colborne streets, in the City of Toronto, known as "The Leader Buildings," and which had been sold by the plaintiffs under a power of sale contained in a mortgage in their favour, created by the lessee thereof.

The only ground of contention between the parties was as to the purchaser's liability to pay interest on

the amount of purchase money remaining due from the 7th of January to the 14th of April, and also the right of the purchaser to deduct from such purchase money the ground rent of the premises accruing due up to the last named day, as well as a proportion of the taxes assessed upon the property for the then current year, but which had not been paid by the mortgagor. 1879. The Peoples' Loan Co v. Bacon.

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

Mr. *Moss*, for the plaintiffs.
Mr. *Ferguson*, Q. C., for the defendant.

PROUDFOOT, V. C.—The plaintiffs were mortgagees of an unexpired term of a leasehold under a lease for forty years from 30th June, 1873, subject to a ground rent of $1,140, per annum, payable quarterly, and taxes; and on the 7th of December, 1878 exposed it, along with other mortgaged properties, for sale by auction, when it was purchased by the defendant for $18,500. This lot was parcel No. 1, of the properties sold that day. Jan. 28th, 1880. Judgmen

The sale was subject, among others, to the following conditions:

"6. The purchaser of each lot shall at the time of sale pay down a deposit of $10 for every $100 of his purchase money, to the vendors' solicitor, and shall pay the remainder of the purchase money within one month from the day of sale; and upon such payment the purchaser shall be entitled to the conveyance, and to be let into possession of the property purchased by him, or in so far as parcel No. 2 is concerned, into the receipt of the rents and profits of the same. The purchaser, at the time of such sale, to sign an agreement for the completion of the purchase.

"9. Purchasers will be bound to raise objections in writing to the title, if any, within fourteen days from date of sale, and serve a copy of such objections on the

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vendors' solicitor within that time, and if no objections be served within such fourteen days, the purchaser shall be held to have accepted the title."

The defendant paid the deposit of ten per cent. on the day of sale. No objection was made to the title within the fourteen days. On the 21st of December a draft conveyance was prepared by the vendors' solicitor, in pursuance of another of the conditions of sale; the purchaser's solicitors approved of it on the 13th of February, 1879, and on the 14th of February it was engrossed and executed by the plaintiffs. On the 14th of April the defendant paid to the plaintiffs part of the purchase money $16,000

The defendant retained for ground rent due 1st of April..	285
Paid into a bank under agreement with plaintiffs to await decision in this case..	365
Which with the ten per cent. deposit.....	1,850

Judgment.

Accounts for the whole purchase money...$18,500

The plaintiffs claim that the defendant should pay interest on the balance of purchase money from 7th of January to 14th of April; alleging that the defendant took possession of the property, and that he had not the purchase money lying idle.

The defendant claims that the plaintiffs should pay the ground rent falling due on the 1st of April, 1879, and taxes to that time; alleging that the plaintiffs had released tenants from rent due by them, and had failed to give possession.

The defendant offered evidence of representations made by the plaintiffs' solicitor at the time of the sale in the auction room, to the effect, as stated in the answer, that all ground rent and taxes, and any other charges upon the property, would be paid by the vendors up to the time the purchaser got possession, and that possession would be given in a month from the sale. I am not certain that if this representation had

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been proved it would have amounted to anything more than an agreement to pay ground rent, taxes, and other charges for a month from the sale, which the plaintiffs do not dispute their liability to pay; but if it did have the effect of adding to or modifying the printed conditions, I considered it was not admissible, and declined to receive it (*a*).

With regard to the possession;—the ground floor of the building fronting on King street had been used as the publishing office of a newspaper; the upper flats were, at the time of the sale, in the possession of four or five tenants; the building in the rear of this and fronting on Colborne street contained the boiler, presses, and machinery used in printing the paper. *Gegg*, a bailiff, had been in possession for some months under a warrant for taxes in arrear. And the assignee in insolvency of the mortgagor had been in possession with him for nearly as long. *Gegg* had offered the goods twice for sale; on the 13th of January and on the 20th of February. At the first sale *Manning*, who is jointly interested with the defendant in the purchase, bid for the boiler and heating pipes under protest, as he claimed that they had become part of the realty and were included in the purchase from the plaintiffs. *Gegg* left possession about the 1st of March. *Smith*, the assignee in insolvency of the mortgagor, cannot say he left possession so early as the 1st of March. The tenants in the upper part of the front building were thought by the vendors at the time of the sale to be monthly tenants, but it turned out that they were yearly tenants, and claimed the usual right to six months' notice. When the plaintiffs found this to be the case they relieved them from payment of rent after the 1st of January, and paid two of them $100 each to go out of possession. The checks for these payments were not drawn till the 27th of

Judgment.

(*a*) Sugden's Vendors and Purchasers, 14th ed., 158-9, secs. 4 & 5.

1879. March. On the 29th they got the keys from one of the tenants, and on the 1st of April from another. There is some discrepancy in the evidence as to the time the defendant finally got the keys. Mr. *Barrett* sent *Frenkel's* keys to defendant's solicitors on the 31st of March, they were returned the same day by *Manning's* clerk, together with a bunch of other keys belonging to the building, but Mr. *Barrett* only got *O'Connor's* keys on the 1st of April, and afterwards all were handed to the defendant. *Badenach*, a partner of *Smith* the assignee, says he lent the keys to defendant soon after the sale, who wanted them to enable him to look at the property, he finally gave the keys to defendant sometime in March. The keys may have been returned to the office in his absence. Defendant told him he hadn't got possession and did not want to take the keys. He told him he might take them and use them without prejudice to his position. It is not very clear whether this referred to the first or second occasion of giving the keys. But it is clear he could not have given him all the keys in March, for *O'Connor's* were not procured till April; and there is the positive evidence of the defendant that he did not get them till the 14th of April. And this is not inconsistent with Mr. *Barrett's* statement that *afterwards*, that is, after the 1st of April, all the keys were handed to *Bacon*. I determine, therefore, as a matter of fact that *Bacon* did not get possession of the keys till the 14th of April. But had it been shewn to be otherwise, and that in truth he had got them earlier, I am not prepared to assent to the conclusions the plaintiffs would have me draw from it. The delivery of keys is not of itself delivery of possession of the house. It would be, at the utmost, but a symbolical delivery, and might be evidence of possession if given or received with that view. But it would be impossible, under the circumstances here, to hold that taking some of the keys to view the premises, to estimate alterations intended to be made in the

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Judgment.

building, and to preserve the property from deterioration, can be considered as a taking of possession under the contract: *Revett* v. *Brown* (*a*), *Cannan* v. *Hartley* (*b*), *Bessell* v. *Landsberg* (*c*), *Griffith* v. *Hodges* (*d*).

Nor do I think the other acts of the defendant can reasonably be construed into the taking of possession. It is plain that till March, at all events, the bailiff and the assignee were in joint possession of part of the property, and the tenants were in possession of other parts till April. And anything done by the defendant during that period was done by their sufferance, not in the exercise of a right of ownership under the contract. And whether the boiler, pipes, &c., were sold by the plaintiffs as part of the building, or purchased by *Manning* as chattels, it was for the purpose of preventing deterioration of the boiler, &c., by rust that the fires were kept up, and the water turned on, not with the view of taking possession of the premises. It was besides only a part of the premises that were thus used. Of other parts, possession could not be got, and was not got till April.

Judgment.

The plaintiffs, however, contend that they are not bound under the conditions of sale to put the defendant in possession, otherwise than by giving him the right to collect the rents and profits. Mr. *Barrett* says, he thought it his duty to give possession to the purchaser, and in pursuance of that duty we find him getting rid of the tenants, paying them money to quit, in compliance with demands from defendant for possession. The possession demanded by the defendant, and which Mr. *Barrett* thought it his duty to give, is at variance with the argument now used; and I also think that the argument is at variance with the condition of sale. That condition provides that the purchaser is to be let into possession of the property purchased, but as to No. 2, he was only to be let into

(*a*) 5 Bing. 7.
(*b*) 19 L. J. C. P. 323.
(*c*) 7 Q. B. 638.
(*d*) 1 C. & P. 419.

1879.

The Peoples' Loan Co. v. Bacon.

the receipt of the rents and profits. It is quite clear therefore that the conditions of sale recognize a distinction between possession and receipt of the rents, and the contract here was for possession: *Engell* v. *Fitch*, (*a*),

The question then is, whether, in the absence of any agreement as to payment of interest on the purchase money, the purchaser is bound under these conditions of sale to pay interest before he receives possession.

The conditions provide that the purchaser was to pay his purchase money within a month from the day of sale, and upon such payment he was to be entitled to be let into possession. In agreements for purchase the covenants are always considered dependent where a contrary intention does not appear. It is not the employment of any particular words which determines a condition to be precedent, but the manifest intention of the parties. Accordingly, where a seller covenanted, on or before the 25th of March, 1844, on payment by the purchaser of the purchase money to execute a proper conveyance, and the purchaser covenanted to pay the money on the execution of the conveyance, it was held that the execution of the conveyance and the payment of the money were concurrent acts, the day for payment could not happen before the consideration for it was to be performed (*b*). Here the time for giving possession is to be upon payment, that is the plaintiff must be ready and able to give possession, and actually give it in one month from sale, if money paid. I think the acts were intended to be concurrent. The defendant was always prepared to pay the money if possession had been given, and only did not pay because the plaintiffs were not in possession, and could not get possession for some months after.

Judgment.

In the absence of an agreement to pay interest, the right to recover it rests upon general principles of

(*a*) L. R. 4 Q. B. 659. (*b*) Sug, Vendor and Purchaser, 14th ed. 239.

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equity; the result of a contract of sale being, in equity, that the thing sold becomes the property of the purchaser, and the purchase money the property of the vendor, whence it follows that the purchaser is entitled to the rents from the time fixed for completion, and the seller to interest on the purchase money from the same time (*a*). But this general rule is liable to exceptions. Many of these imposing obligations on the vendor after the date of the contract, are enumerated in *Fisken* v. *Wride* (*b*). In *DeVisme* v. *DeVisme* (*c*), Lord *Cottenham* held that a clause in the conditions of sale for payment of interest from the day appointed for completion in case of delay, from whatever cause the delay might have arisen, did not apply to the case of the vendor's own default, and therefore, when a vendor was not able to shew a good title at the time appointed, interest did not begin to run till a good title was shewn. From the observations in Vendors and Purchasers, 14th ed., 635-6-7, it would seem that this decision can no longer be considered as a true exposition of the law where there is an *express stipulation* for payment of interest from whatever cause the delay may arise; but that in the absence of fraud, vexatious conduct, or gross negligence on the part of the seller, the language will receive its ostensible and fair meaning. But if there is no express agreement on the subject there can be no doubt that delay attributable to the seller would absolve the purchaser from any liability for interest: *Bank of Montreal* v. *Fox* (*d*). The equity the seller has to the interest arises from this, that the purchaser is entitled to the rents, and that if he receive the rents, or go into possession himself, it would be inequitable to permit him to retain the money without paying interest. The act of taking possession is an implied agreement

Judgment.

(*a*) *Fry* on Specific Performance, p. 377, *et seq.*
(*b*) 11 Gr. 245. (*c*) 1 McN. & G. 336. (*d*) 6 Pr. R. 217.

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to pay interest: Per Sir *W. Grant*, *Fludyer* v. *Cocker* (*a*). But this whole reason fails where the purchaser, though willing to take, could not get possession; and where any rents that had accrued after the 1st of January were released or forgiven by the seller, it would seem abundantly clear that the purchaser is not liable for interest.

I have read the correspondence between the solicitors of the parties, but do not think it can have much effect upon the application of the principle that must determine this case. It appears from it, however, that in the middle of March the defendant was insisting upon possession, and threatening to take proceedings to enforce the contract.

The application of similar reasoning would seem to shew that until delivery of possession on the 14th of April, the seller was liable to pay the ground rent. Until that time the purchaser was neither in the actual possession of the estate which he had agreed for, nor in the receipt of the rents. The sale was not complete. The plaintiffs had not fulfilled their part of the contract, and though the purchaser was anxious and willing to take possession he could not get it. The cases referred to in *Fisken* v. *Wride* (*b*), deciding that until the purchaser gets, or may but for his own default get possession, the seller must, at his own risk, take care of the estate, would impose upon him the liability to pay the ground rent, to preserve the estate.

Judgment.

In regard to the taxes; the R. S. O. ch. 174, sec. 347, provides that the taxes or rates imposed for any year shall be considered to have been imposed and to be due on or from the 1st of January; and R. S. O. ch. 180, sec. 105, says that the taxes accrued on any land shall be a lien on the land. The sale here was to be completed on the 7th of January, when, according to these enactments, the taxes had already become a charge on the land

(*a*) 12 Ves. 25, 27, 28. (*b*) 11 Gr. at 248.

1879.

The Peoples' Loan Co. v. Bacon.

and it was not finally completed till the 14th of April, *The Bank of Montreal* v. *Fox* (*a*), decided that although the taxes were not actually imposed at the time of sale, yet under the statutes the vendor was liable for a proportion of them until the title was completed, when the purchaser might have taken possession. I think that is a reasonable construction of the acts, and that the purchaser here should be permitted to make a proportionate reduction. The defendant is entitled to his costs.

Judgment.

DEWAR v. MALLORY.

Fixtures—Freehold or chattels.

On rehearing the Court varied the decree as reported *ante* volume xxvi., page 618, by declaring the plaintiff entitled to restrain the removal of the machinery in question, by virtue of a mortgage prior to that in favour of the plaintiff upon the machinery, and which prior mortgage had been, before the institution of this suit, assigned to the plaintiff; leaving the rights of the parties in respect of the subsequent charges on the property to be disposed of either on appeal or on further directions, or on leave reserved.

This was a rehearing, at the instance of the plaintiff, of the decree as reported *ante* vol. xxvi, page 618, where the facts giving rise to the suit are fully set forth.

Statement.

The cause came on for rehearing before the Chancellor and two Vice-Chancellors.

Mr. *Bethune*, for the plaintiff, submitted that whatever question there might be as to the right of the plaintiff to enforce payment of his own mortgage against the planing machine and other machinery, there could not be any doubt that in so far as the mortgage assigned to him by *Barrie* was concerned, he had a right to call for the aid of this Court to restrain the defendant removing them from off the premises, which would have the effect of lessening the

(*a*) 6 Pr. R. 217.

1879.

Dewar v. Mallory.

means of obtaining payment of his subsequent claims.

Mr. *Jas. Maclennan*, Q. C., for the defendant, combatted these views, insisting that the Act of *McMaster*, concurred in by the plaintiff, of executing a mortgage to the plaintiff of the planing machine and machinery as "goods and chattels," had had the effect of completely severing them from the realty, and consequently they were not bound by either mortgage of the freehold.

The judgment of the Court was delivered by

March 17th 1880.

BLAKE, V. C.—Whatever may be the rights of the parties in respect of the subsequent charges on the property in question, it seems clear that the plaintiff is entitled to the usual decree for an account and foreclosure, and to an order restraining the dealing with the property sought to be removed, as transferee of the *Barrie* mortgage, which he held when the motion for injunction was made. The Master will have to add subsequent incumbrancers, when, if the parties desire, they may come in and prove and raise the questions as to priority argued before us, but not properly in issue on this appeal. In the meantime the plaintiff seems clearly entitled to this decree with costs, including the costs of this rehearing and of the injunction motion. See *London and Canadian Loan Co.* v. *Pulford* (a), decided by my brother Proudfoot. I think that, even if the so called chattels be not covered by the original mortgage to the plaintiff, he is entitled to have the chattels applied in satisfaction of the *Barrie* mortgage and the land in satisfaction of the subsequent mortgage. There seems to be no doubt that the property cannot realize sufficient to satisfy both of these claims, interest and costs. The advisable course would seem to be to let the property be sold, when, if there be any surplus, the questions argued and any other points may be raised—either on appeal or on further directions; or on leave reserved.

Judgment.

(a) C. L. J. vol. 15, p. 280.

1879.

KENNEDY v. PINGLE.

Executors—Costs—Legacies.

Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate, his testator's estate being ample.

A testator gave to each of his executors a sum of $40 "in remuneration for their trouble." In carrying on the affairs of the estate one of the executors, with the knowledge of his co-executor, and without any remonstrance from him, used in his business $200 of the estate, and the other had taken a mortgage, in his own name, for $900 belonging to the estate, without executing any declaration of trust in respect thereof. Under these circumstances the Court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the Court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble.

HEARING on further directions and as to the question of costs.

The facts are stated in the judgment.

Mr. *Ritchie*, for the plaintiff.

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

Mr. *A. Hoskin*, for the other defendants.

SPRAGGE, C.—The conduct of executors, and their dealings with estates, and the estates they deal with are so infinitely various, and they strike the minds of different Judges often so differently, that it would be vain to expect uniformity of decision, and I do not find it in the cases to which I am referred. March 24th, 1880. Judgment.

What appears to me upon the whole case is, that the plaintiff might have got all that she is entitled to without litigation. It is not shewn that she ever applied

1879.

Kennedy v. Pingle.

to the executors, or either of them, for an account of their dealings with the estate. The surviving executor states in his answer that he was never applied to, and that he was always ready and willing to account; and the executor of the deceased executor in his answer says the same; and it seems to me that all, including the deceased executor, may be acquitted of wilful misconduct. I think, therefore, they should not be charged with costs.

On the other hand, they have kept in their hands a larger sum of money than was necessary for the purposes of the estate. The taking of the mortgage for $1,000, in the name of *George*, was improper; and if $100 of it was, as is alleged, his own money, he should have given a declaration of trust for the $900; and this probably would have been done by himself or his executor if called upon. The use by *Jacob*, in his own business, of $200 was also improper, and it is reported to have been with the knowledge of his co-executor *George*, who took no steps to prevent the same. The executors having so dealt with the estate is, to my mind, sufficient reason for refusing them their costs. The executor of the deceased executor asks for his costs, and *Holdenby* v *Spofforth* (*a*), is cited in support of his claim. The costs in that case were the costs of the administrator of a deceased defaulting trustee, and they were allowed to his innocent personal representative on the ground, as I understand the report of the case, that the assets of the deceased were insufficient to answer the breach of trust; so that the administrator, who had accounted honestly, and was in no way to blame, would have had to pay the costs out of his own pocket, unless allowed them out of the estate. It is not shewn or suggested that the estate of *George*, the deceased executor, is insufficient.

Judgment.

The Master reports legacies to the executors in the following terms: "I also desire that my said executors

(*a*) 9 Bea. 195.

shall receive, out of the proceeds of the above sale, the sum of $40 each as a legacy from me, and in remuneration for their trouble." These legacies have not been paid. The Master has allowed to the executors $440, by way of compensation, and it is objected that they are not entitled to receive both. *Freeman* v. *Fairlie* (*a*), supports this objection. They are, therefore, not to be allowed the legacies.

The guardian of the infants may properly be allowed his costs out of the estate. The estate has no doubt been benefited to that extent by these proceedings.

CAMERON V. CAMPBELL.

Trustee, &c.—Executors—Lapse of time—Statute of Limitations.

A Testator bequeathed a sum of money to his executors to invest for the benefit of his brother, and failing to find his brother, the executors were to pay the fund to his sister *M. C.* The executors placed the amount out at interest on the bond of the borrowers, and subsequently a portion of the loan was paid over to one of the executors, who invested the same in his business, and sought to defeat a suit to compel payment of the amount at the instance of the personal representative of *M. C.*,—who had become entitled,—by setting up the Statute of Limitations, more than ten years having elapsed since *M. C.* became entitled to the legacy. The Court [BLAKE, V. C.], under the circumstances, considered that the money had been set apart to answer the trusts of the will, and was thus impressed with a trust in the hands of the executors, and that the claim, therefore, was not barred by the lapse of time.

Statement.

This was a suit by *Margaret Cameron* against *Donald Campbell* and *John Douglass Armour*, setting forth that on the 19th of September, 1857, one *Hugh Cameron* duly published his last will and testament, and appointed the defendants executors thereof, and that they had duly proved the same; that in and by such will the testator directed £700 to be set apart for the benefit of his brother *Edward Dimeas*

(*a*) 3 Mer. 24.

1879.

Cameron v. Campbell.

Cameron, who some years before had gone to California, the interest thereof to be applied in endeavouring to trace him out, and in the event of his not being discovered within five years from the death of the testator such sum of £700 was to be paid to his sister, *Margaret Cameron*, who died intestate, in November, 1864, and plaintiff had obtained letters of administration to her estate, and became and was the duly appointed personal representative of the said *Margaret Cameron*, deceased, and in that capacity instituted the present suit, seeking to obtain payment of the said sum of £700 This sum, it appeared, had been secured by a bond of *Jacques & Hay*, and a portion thereof, $653.42, had been paid by the obligors to the defendant *Armour*, and by him paid over to the parties entitled; and that $2,194.34 had been paid to the defendant *Campbell* by instalments, the last of which was so paid on the 9th of February, 1871.

Statement.

The defendant *Campbell*, by his answer, set up "that more than ten years had elapsed since *Margaret Cameron* became entitled; and that, if the plaintiff ever had any right to receive the sum (£700), the said right has long since been barred by lapse of time; and I plead all the statutes respecting the limitation of suits and actions in force in this Province as a bar to this suit."

The defendant was subsequently examined before the Master, at Cobourg, when, in answer to the question: "Do you intend to keep this money that has come into your hands?" he answered, "I say, if the law says I am to pay it, I will do it." And in answer to the question: "If the law says you are not to pay this money, do you intend to keep it?" he answered, "I say I do not know whether I will or not. I won't give any other answer than the one I have given." * *

The defendant was afterwards examined before the Court, and the facts then elicited were substantially the same as above set forth.

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The only defence relied on was the bar created by the statute (*a*).

For the plaintiff it was contended that the statute formed no defence to such a claim, the money having been set apart for the purposes of the will, and having been paid over to the defendant as a trustee, in fact, for the parties properly entitled to claim it; and the statute therefore did not apply to such a case.

Mr. *S. Smith*, Q. C., and Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Moss* and Mr. *G. H. Watson*, for the defendant.

The bill was, *pro confesso*, against the defendant *Armour*.

The authorities referred to are mentioned in the judgment.

March 8th, 1880.

BLAKE, V. C.—*Margaret Cameron*, by an order dated the 30th September, 1857, directed the executors and trustees of the will of *John Dougald Cameron* to pay to *Hugh Cameron*, her brother, the sum of £1,000 left for his benefit by the said will. These gentlemen, under an order on them, by the executors of the will of *Hugh Cameron* paid Mrs. *Maria Mactavish* £300 of this £1,000. This order is dated the 1st of October, 1862. It appears that the executors and trustees of the will of *John Dougald Cameron*, had invested £3,500 of the moneys of his estate in a loan to the then firm of *Jacques & Hay*; and that out of this sum the above £300 was paid to Mrs. *Mactavish*, and the said firm were instructed to answer the demand of the representatives of the estate of *Hugh Cameron*, for the £700 coming to them. Thereupon, in settlement of this claim, a bond dated the 1st day of January, 1863, was given to the defendants by *John Jacques*

Judgment.

(*a*) R. S. O. Ch. 108, sec. 23, p. 1042.

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and *Robert Hay*. Under this bond the defendant *Campbell*, on the 7th of January, 1865, was paid $472, and on the 15th of February, 1866, $520, and on the 9th of February, 1871, there was received, under his instructions, and paid into this Court in a case in which he was a defendant and ordered to pay that amount, the sum of $1,202.39; so that there is no doubt that the defendant last named has received of the moneys of this estate, and which he refuses to account for or pay over, at all events, a sum of $2,194.39. There is no pretence that there can be any mistake about this, nor is there any pretence that this defendant has paid this money, or that the legatee has received any benefit therefrom.

Such a course of conduct is not inaptly referred to by Sir *George Jessel* (*a*): "He had no doubt that in the case he was referring to, the money was stolen (to use a plain old Saxon word) by the solicitor against whom the order was made." There seems to be much misapprehension in the outside world of the aim and object of the Statute of Limitations, and of the position in which a man who, it may be, claims the title of "honest," places himself when under such circumstances he thereby endeavours to defraud a person whom he has undertaken to protect as trustee. Lord *Cottenham*, in *Phillipo* v. *Munnings* (*b*), says: "A man who being in possession of a fund which he knows to be not his own, thinks proper to sell it and apply the produce to his own use, certainly does not come before the Court under circumstances which entitle him to much indulgence, and the only question is, whether, by the statute which has been referred to, I am prohibited from entertaining this suit to make him responsible for that breach of trust." Again, in *Boatwright* v. *Boatwright* (*c*), the Master of the Rolls uses this language: "It is attempted to get rid of the ope-

Judgment.

(*a*) L. T. 1880 p. 230. (*b*) 2 M. & C. 309.
(*c*) L. R. 17 Eq. 71.

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ration of the statute by various ingenious arguments; and I must say that where a debt is clearly admitted, and where this statute is used, as it is in this case, not with a view of protecting persons from a claim of which they doubt the truth and honesty, but for a purpose for which it was not intended, viz., to defeat an honest claim, which is not brought forward within six years, the Court is anxious to listen to any fair ground which may bring the case of the creditor within some or one of the exceptions which have been established to the stringent provisions of the statute. * * I am not, therefore, I think, at liberty to say—whatever view I may entertain of the conduct of those who use the statute for such a purpose—that the statute is not a complete defence."

A legacy was not bound by the earlier statute (*a*): "A legacy is not within the Statute of Limitations, and length of time is only a presumption of payment, but in this case the defendant does not pretend a satisfaction, but only contests the duty. And there is this difference between debts and legacies as to their antiquity. Legacies always appear upon the face of the will, and so an executor knows what he ought to pay without being asked or told; but for debts and other dormant demands, against which he cannot provide without notice, there the statute had reason to limit the time." *Parker* v. *Ash* (*b*).

Judgment.

The sections cited for the defence are 23 and 24 of ch. 108, R. S. O. "No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years," &c.

Vice-Chancellor *Shadwell* held, in *Sheppard* v. *Duke* (*c*), that the corresponding section in England 3 & 4 Wm. IV. ch. 27, sec. 40, applies to legacies payable out

(*a*) 21 Jac. I. c. 16. (*b*) 1 Ver. 255, 1684. (*c*) 9 Sim. 567.

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of personal estate, as well as to legacies charged on real estate. This was followed in the House of Lords in *Bullock* v. *Downes* (*a*): "To the next objection, founded on the Statute of Limitations, 3 & 4 Wm. IV. ch. 27, the first answer attempted was, that this statute is confined to real estate, and does not apply to a pecuniary legacy not charged upon land. But I am of opinion that section 40 would be a bar if this were a suit for a legacy. Limiting the time for actions or suits to recover any sum of money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at "law or in equity," it adds, "or any legacy," *i. e.*, any action or suit to recover any legacy whatsoever, whether or not it be charged upon or payable out of any land or rent, at law or in equity.

Judgment.

Section 24 of our Limitation of Actions Act, is as follows: "No action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." This clause, however, only deals with legacies charged upon or payable out of land, and so does not limit the time if there be here an express trust.

I think there can be no doubt on the evidence that this sum of money was set apart to answer the trusts of the will, and that it is plainly proved that the defendant *Campbell* has received at least $2,194.39 of it. Lord *Cottenham* in *Phillipo* v. *Munnings*, before cited, says: "The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy.

(*a*) H. L. 14.

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Now, the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund."

This is approved of in *Watson* v. *Lane* (*a*), and *Tiffany* v. *Thompson* (*b*). It is referred to in Lord *Brougham* v. Lord *Powlett* (*c*), in the following language: "I can refer, as a familiar instance of the very imperceptible manner in which an executor changes into a trustee, to the case of *Phillipo* v. *Munnings*, where Lord *Cottenham* held that the Statute of Limitations did not apply, because the executor had, in fact, become a trustee." See also *Dix* v. *Bruford* (*d*). In *Tyson* v. *Jackson* (*e*), Lord *Romilly*, after stating other grounds for giving relief, concludes with: "But, independently of this, there is a distinct and clear trust, which time will not bar, and upon which the Statute of Limitations has no effect at all." See also *O'Rielly* v. *Walsh* (*f*); 2 *Williams* on Executors, p. 2039.

Judgment.

I think that in the present case the plaintiff is entitled to succeed against the defendant *Campbell*, for breach of the trust which he accepted, and to a decree for payment to the plaintiff of $2,194.39, with interest, and the costs of the suit

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(*a*) 1 Giff. 188. (*b*) 9 Gr. 244. (*c*) 19 Beav. 134.
(*d*) 19 Beav. 412. (*e*) 30 Beav. 387. (*f*) I. R. 6 Eq. 567.

1879.

JEFFREY v. SCOTT.

Will, construction of—Option to purchase—Life estate.

A testator directed that "in case any one of the above-named three legatees be able and willing to buy the farm, as aforesaid, at the price of $4000, my executors hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm:

Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will.

After directing a sale and division of the proceeds of an estate, the will, as to one of the legatees, *M. S.*, "provided that the said *M. S.'s* interest in my estate should not be transferrable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and incase the said *M. S.* die without legitimate issue, then her interest in my estate shall revert back to the other legatees," &c.:

Held, that *M. S.* took only a life-estate.

Statement.

THIS bill was filed for the construction of the will of *John Jeffrey*, deceased, and for the administration of his estate. After giving Mrs. *Jeffrey* (widow of testator) an estate for life in his property, the will provided that at her decease the entire estate should be "divided and disposed of as follows, namely, half I will and bequeath to Mrs. *Jeffrey's* niece, *Mary Steele*; quarter to *John Jeffrey*, son of my brother *David Jeffrey*; and quarter to *John Jeffrey*, son of my brother *William Jeffrey*." Then after giving an option of purchase, as mentioned in the judgment, the will (in case the option should not be exercised) provided that the executors "shall sell * * and the proceeds of said sale, and all other moneys then in hand, shall be divided * * Provided that *Mary Steele's* interest in my estate shall not be transferrable or transferred to any other person whatsoever, but may be inherited by her children legitimate; and in case the said *Mary Steele* die without legitimate issue, then her interest in my estate shall revert back to the other legatees."

1879.

Jeffrey v. Scott.

The chief point in the case was what estate *Mary Steele*—now *Mary Scott*—took in the lands of the testator.

Mr. *Johnston*, for the plaintiff.

Mr. *Black*, for the defendant *Mary Scott*, argued that the period referred to when, if she should "die without legitimate issue," the estate should pass to the other legatees, was the death of the life tenant, Mrs. *Jeffrey*, and that therefore *Mary Scott* took an estate tail in the lands in question. He referred to *Gould* v. *Stokes* (*a*), *Olivant* v. *Wright* (*b*), *Besant* v. *Cox* (*c*).

Mr. *Hoskin*, Q.C., for the infants, referred to *O'Mahoney* v. *Burdett* (*d*), *Ingram* v. *Soutten* (*e*).

Mr. *Malloy*, for defendant *John Jeffrey*.

Mr. *Bull*, for the executors.

Judgment.

BLAKE, V. C.—On the death of Mrs. *Jeffrey*, the estate of the testator was to be divided, but "in case any one of the above named three legatees be able and willing to buy the farm as aforesaid, at the price of $4,000, my executors hereafter named shall so sell said farm." Each of the three beneficiaries claims to purchase the farm at $4,000. By their act it is impossible for the executors to carry out the wish of the testator in this respect, as each insists on the right to purchase, and will not forego the claim. It is therefore necessary to have the other alternative of the will followed. The property must be sold, and the proceeds divided in the manner indicated in the will. *Mary Steele* is to get one-half of the proceeds, subject to the following clause: "provided that the said *Mary Steele's*

(*a*) 27 Gr. 122.
(*b*) L. R. 1 Ch. D. 346.
(*c*) L. R. 6 Ch. D. 406.
(*d*) L. R. 7 H. L. 388.
(*e*) L. R. 7 H. L. 408.

1879.

Jeffrey v. Scott.

interest in my estate shall not be transferrable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and in case the said *Mary Steele* die without legitimate issue, then her interest in my estate shall revert back to the other legatees, namely, one-half shall be paid over to the first named, *John Jeffrey*, his heirs, executors, or assigns, and the other half shall be paid over to the second named *John Jeffrey*, his heirs, executors, or assigns, for their sole and only use forever." Under this will *Mary Steele*, now *Mary Scott*, takes a life estate. It will not be proper until her death to say who will then take as those then in existence and interested in the disposition of this question, should and can then be brought before the Court. *Re Chisholm* (*a*), *O'Mahoney* v. *Burdett* (*b*), *Ingram* v. *Soutten* (*c*), *Olivant* v. *Wright* (*d*), *Besant* v. *Cox* (*e*). The shares of the *Jeffrey* infants, grandchildren of *David*, must be paid into Court, as also the share of Mrs. *Scott*, who is entitled to have the same settled and invested. If this be not done, it must be retained in Court and invested for the benefit of those entitled for life, and in remainder. Costs out of the estate to all parties, except the costs connected with the settlement, and dealing with the share of Mrs. *Scott*, which must be borne by this share.

Judgment.

(*a*) 17 Gr. 403, & 18 Gr. 467.
(*b*) L. R. 7 H. L. 388.
(*c*) L. R. 7 H. L. 408.
(*d*) L. R. 1 Ch. Div. 346.
(*e*) L. R. 6 Ch. Div. 604.

1879.

JONES v. JONES.

Will, construction of—Annuities payable out of rents, &c.—Corpus.

A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of $160 a year to his father, and after the death of his father to his mother, and after the death of both his father and mother the said annuity of $160 was given in equal shares to *N.* & *J.*, a sister and niece of the testator, and he thereby made this annuity to his father and mother, as also the annuities to *N.* and *J.*, a charge upon all his real estate; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely during widowhood.

Held, that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate.

This was a suit instituted to obtain the construction of the will of *James Jones*, deceased, and to have it declared that the annuities bequeathed by the testator were a lien on the corpus, as well as on the rents and profits of the estate. Statement.

The facts are fully stated in the judgment.

Mr. *D. McCarthy*, Q. C., and Mr. *Rye*, for the plaintiff.

Mr. *Bain* for the defendant *Mary Jones*, widow of the testator.

Mr. *J. G. Robinson*, for the personal representatives.

Mr. *Ewart*, for other defendants.

In addition to the cases mentioned in the judgment, counsel referred to and commented on the following authorities:—

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Graves v. *Hicks* (*a*), *Potts* v. *Smith* (*b*), *Croly* v. *Weld* (*c*), *Sheppard* v. *Sheppard* (*d*), *Pearson* v. *Helliwell* (*e*). *Taylor* v. *Taylor* (*f*), *Carter* v. *Carter* (*g*), *Darbon* *Rickards* (*h*), *Haynes* v. *Haynes* (*i*), *Phillips* v. *Phillips* (*j*), *Smith* on Real and Personal Property, 12-14, *Williams* on Executors, 5th ed., 1234, *Theobald* on Wills, 472.

March 24th. 1880.

SPRAGGE, C.—The question in this case arises upon the will of one *James Jones*, and the point in question is whether an annuity thereby given to *James Jones*, father of the testator, is a charge upon the corpus of the estate or upon income only. The will runs thus:

"Firstly. I desire that all my just debts and funeral and testamentary expenses be paid as soon after my decease as the same can conveniently be paid.

"Secondly. I desire that my wife *Mary Jones* shall enjoy the net annual income of all my estate, both real and personal, as long as she shall live and continue to be my widow, subject, however, to the payment of one hundred and sixty dollars a year to my father, *James Jones*, during the term of his natural life, and subject also to the payment of the like some of one hundred and sixty dollars a year to my mother, *Ann Jones*, if she shall survive my said father; such annuity to my mother to commence at the time of my father's death, and to be paid to her thenceforth as long as she shall live. And subject also to an annuity of eighty dollars each, to my sister *Nellie Jones*, and to *Lizzie Doig*, niece of my wife, to commence and be payable to them respectively when the payment of the above mentioned annuity of one hundred and sixty dollars shall cease by reason of the death of the survivor of my father and mother. And I hereby make this annuity to my father and mother, and also the annuities to *Nellie Jones* and *Lizzie Doig* a

Judgment.

(*a*) 11 Sim. 536.
(*b*) L. R. 8 Eq. 683.
(*c*) 3 D. M. & G. 993
(*d*) 32 Beav. 194.
(*e*) L. R. 18 Eq. 411.
(*f*) L. R. 17 Eq. 324.
(*g*) 26 Gr. 232.
(*h*) 14 Sim. 537.
(*i*) 3 D. M. & G. 590.
(*j*) 8 Beav. 193.

charge upon all my real estate, and desire my executors and trustees hereinafter named to cause the same to be paid regularly in equal half yearly payments. And I direct my said executors and trustees to pay, or cause to be paid, all the net annual income of my estate (after payment of the annuities as aforesaid), unto my said wife, *Mary Jones*, for her own separate and absolute use half yearly so long as she shall continue to be my widow."

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Upon the happening of certain events, the testator directs his executors and trustees to sell all his real and personal estate, and to pay to *Nellie Jones* and *Lizzie Doig* each, a sum in gross calculated upon the then value of their annuities; and to divide the residue among the three sons of his sister, *Rachel Willis*. In the event of his wife dying or marrying again before the death of both his father and mother, he directs that the net annual income of his estate (after providing for the annual payment to (his) my father or mother as aforesaid), "shall be paid to the *Willis*'".

As I read this will there is no direction in it nor any indication of intention on the part of the testator that his estate, or any definite part of his estate, should go over in its integrity to any persons named in the will. It is in that case distinguishable from the case of *Baker* v. *Baker* (*a*), in the House of Lords. The head note describes sufficiently the provisions of the will in that case. "A testator directed his brother A. B., (whom he appointed his executor and trustee), to get in his estate, and to stand possessed of the produce thereof, on trust, to raise thereout and invest in stocks, or upon mortgages, such a sum of money as that, when invested, the dividend should realize the clear annual income sum of £200".

Judgment.

Lord *Chelmsford* said: "It is quite apparent from the words of this will that the intention of the testator was that the funds which he thought would enable

(*a*) 6 H. L. C. 616.

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him to secure the annual payment to his widow should be provided by the sale of his property, and that she should be paid out of the dividends and interest of that fund; and that he intended that that fund in its integrity, in case of her death or marrying again, should go over to the parties who are named. * * It is quite clear that this is a question not between an annuitant and a residuary legatee, but between a tenant for life and a remainderman."

This distinction runs through the whole of the judgments delivered in that case.

In subsequent cases *Baker* v. *Baker* is referred to as deciding that particular point. Sir *George Jessel* refers to it in *Mason* v. *Robinson* (*a*), as "one of a class of cases in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum; and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else. That is the true explanation of the decision in *Baker* v. *Baker*."

Judgment.

And in *Gee* v. *Mahood* (*b*), L. J. *Cotton* thus speaks of it: "On the construction of the will the Court held that the widow was tenant for life only of a particular fund; and that it was given after her death as a fund intact, so that she could have no claim on the corpus of the fund of which she was tenant for life."

In the will that I have to construe, there is no person designated to take any fund intact; be it income or corpus of the estate. *Nellie Jones* and *Lizzie Doig* are only successors to the annuity granted to the father,

(*a*) L. R. 8 Chy. Div. 411. (*b*) L. R. 11 Chy. Div. 899.

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after his death, and the death of the mother of the testator; and the *Willis's* are only residuary legatees.

Birch v. *Sherratt* (*a*), resembles this case much more nearly than does *Baker* v. *Baker*: "A testator directed his trustees to convert and invest his property, and 'with and out of the interest, dividends, and annual proceeds thereof, levy and raise the annual sum of £100', and pay it to his mother for life; 'and from and after the payment of the said annual sum of £100, and subject thereto', he declared that the trustees should stand possessed of his said trust moneys, stocks, funds, and securities, upon the trusts thereinafter mentioned," *i. e.*, he gave the fund in thirds for the benefit of brothers and sisters. The income of the whole estate was insufficient to pay the annuity. The language of Lord *Cairns* is particularly pertinent to this case. He says he quite agrees "that the first and principal object in the testator's mind probably was to deal with his income, for he directs the conversion of his general estate, and the investment of it, and then directs that out of the income £100 a year shall be paid to his mother for her life. And it is quite possible that he may have been perfectly satisfied in his own mind that the income would be sufficient, and continue to be sufficient, to pay that sum. It is also possible that if it had been pointed out to the testator that the income might become deficient, he might have made arrangements of a different kind from those which he has made. We cannot speculate on any of those matters, but we must take the words he has used. If the will had stopped at the end of the direction to pay the annuity, the words would not appear to me, as at present advised, sufficient to constitute a continuing charge upon the income, or a charge upon the corpus, for the payment of this £100 a year. * * But then come these important words: *From and after the payment of the said*

Judgment.

(*a*) L. R. 2 Chy. App. 644.

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annual sum of £100, and subject thereto, I do hereby declare that my said trustees for the time being shall stand possessed of the said trust moneys, stocks, funds, mortgages, and securities, upon the trusts and for the ends, intents, and purposes hereinafter mentioned. * * I think the natural meaning of the words 'from and after the payment of the said annual sum:' is from and after full and complete payment of the said annual sum of £100; and the natural meaning of the words 'subject thereto' is, subject to the full and complete payment thereof."

Sir *John Rolt* thought that, without the words relied upon by Lord *Cairns*, the annuity was made a charge upon the corpus. But I find, at any rate, in the will before me that everything is made subject to the payment of the annuity to the father. The bequest to the wife—which is general—of the whole income is made so, and there is nothing preserving the corpus intact in favor of those to whom the residue is given. It is indeed apparent enough that the testator expected that there would be a surplus of income after paying this annuity; but the instances are numerous in the books where that has been the case and yet the annuitants have been held entitled to have their annuities raised out of the corpus.

Judgment

By the will in *Mason* v. *Robinson*, the testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trust for his sons and daughters. Sir *George Jessel* held the annuities chargeable on the corpus of the estate. He thus states the case and his conclusion upon it: "Now, here is a gift of certain annuities, and a trust or direction to set apart a fund to answer them is created in this way; the testator bequeaths his residuary personal estate to trustees, upon trust for sale, and to invest the proceeds in some or one of the investments thereinafter author-

ized, 'and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable; and subject thereto', upon trusts for his son and daughters. The question is, what is the meaning of the trust in this will? It is a trust to keep down the annuities in the first place, no doubt, out of income; but it is not the less a trust to keep down: it does not do more than indicate a mode of providing for the annuities previously given. Why, then, should it prevent payment of the annuities being made out of the capital if the income proves insufficient. I am of opinion it ought not to do so, and that the arrears of the annuities may be paid out of the capital if the specific means provided for payment shall not be found sufficient for the purpose."

It may be said that in *Mason* v. *Robinson* there was a more direct bequest of the annuities than there is in this case. There is so in terms, but in this case it is sufficiently distinct, for everything that is given by the will is made subject to it, and there is in this case, what there was not in *Mason* v. *Robinson*, a direction by the testator that the annuity should be a charge upon all his real estate: he does not say upon the income of my estate, but "a charge upon all my real estate." This is an additional indication of the intention of the testator that the annuity should be charged upon the corpus, if necessary, of his estate.

Judgment.

I have examined all the cases to which I have been referred. To review them all would be a long and unprofitable task. I have, therefore, quoted from those only which throw most light upon the question before me.

In my opinion, the plaintiff in this case is entitled to have his annuity (the arrears, as well as future payments) raised out of the corpus of the estate by sale or any other mode that may be necessary; and he is entitled to his costs also out of the estate. This direction will, I apprehend, be all that is necessary.

1880.

YOUNG v. WRIGHT.

Demurrer—Pleading—Practice—Multifariousness.

The owner of real estate died intestate, and *A.* the husband of one of his sisters, took possession of the property and appropriated to his own use the rents and profits thereof, whereupon some of the surviving brothers and sisters of the intestate filed a bill against *A.*, to which they made all the next of kin of the intestate parties, calling upon *A.* for an account of rents received, and seeking to restrain him from further intermeddling therewith. The Court [*Spragge, C.*] on demurrer by *A.* held the bill was not multifarious.

This bill was filed by *Sarah Young, William Young,* and *Charles Young* against *Mary Ann Wright, Frederick Wright, John Grady,* the elder, and sixteen others interested in the property in question in the cause, as next of kin of *Robert Young,* deceased, who died intestate, such property consisting of a lot on Sumach street, in the city of Toronto, upon which were erected several small tenements, setting forth that the defendant *John Grady,* the elder, who had married a sister of the said *Robert Young,* had entered into possession of the premises, and into the receipt of the rents and profits, and had improperly applied such rents to his own use; and alleged that the plaintiffs and the defendants other than *John Grady,* the elder, were entitled to the said land and premises, and to the rents and profits thereof; and prayed a partition of the estate, or if a sale should be considered to be more advantageous for the infant defendants, that a sale of the property might be ordered, and the proceeds distributed amongst the parties entitled, and the defendant *John Grady,* the elder, restrained from collecting in or receiving the rents of the premises; that *Grady* might be ordered to deliver up possession, and for further relief.

Statement.

The defendant *John Grady,* the elder, demurred to the bill on the ground "that it appears by the said bill that the same is exhibited against this defendant

and the other defendants for several and distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned. Wherefore," &c.

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Mr. *Moss*, in support of the demurrer, cited *Cole* v. *Glover* (*a*), *Salvidge* v. *Hyde* (*b*), *Whaley* v. *Dawson* (*c*), *Glass* v. *Munsen* (*d*), *Loucks* v. *Loucks* (*e*), *Roche* v. *Jordan* (*f*), *Brown* v. *Capron* (*g*), *Franco* v. *Franco* (*h*), to shew that it was not necessary that these defendants should be made parties in order to reach *Grady* and obtain from him the relief to which the plaintiffs were, according to the allegations of the bill, entitled.

Mr. *McArthur* contra. The bill traces the relationship of *Grady* to all the parties, both plaintiffs and defendants, and it appears that he has possession of an estate in which all are interested, and to all of whom he is accountable. He referred to *Story's* Equity Pleadings, *Redfield's* ed., p. 458; *The Attorney-General* v. *The Haberdashers' Co.* (*i*), *Campbell* v. *McKay* (*j*), *McLaren* v. *Fraser* (*k*), *The Attorney-General* v. *Cradock* (*l*), *Barker* v. *Cox* (*m*). He cannot be prejudiced by being made a party, because it is now competent for the Court to direct that in all matters in which he is not interested his attendance can be dispensed with. This is the practice now in England. The question whether a bill will be held to be demurrable or not for multifariousness, now rests wholly within the discretion of the Court under the circumstances of each case. Here the defendant *John Grady*, the elder, cannot make any pretence that he will be prejudiced by continuing to be a party, and the Court, in the

Argument

(*a*) 16 Gr. 392.
(*b*) Jac. 151.
(*c*) 2 Sch. & Lef. 367.
(*d*) 12 Gr. 77.
(*e*) 12 Gr. 343.
(*f*) 20 Gr. 573.
(*g*) 24 Gr. 91.
(*h*) 3 Ves. 75.
(*i*) 1 M. & K. 420.
(*j*) 1 My. & C. 603.
(*k*) 15 Gr. 239.
(*l*) 3 My. & C. 85.
(*m*) L. R. 3 Chy. D. 369.

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exercise of a sound discretion, will not put this small estate to the cost of a partition suit, and the cost of a suit for an account.

March 24th, 1880.

SPRAGGE, C.—This bill is for partition or sale. The demurrer is by *John Grady*, the elder, for multifariousness.

The plaintiffs claim to be entitled as tenants in common of the real estate of *Robert Young*, who, it is alleged, died intestate and unmarried; and the defendants, other than *John Grady*, senior, are made defendants as entitled also as tenants in common. *John Grady*, senior, was the husband of *Rebecca Young*, a sister of *Robert*, and her children by *Grady* are defendants. *Rebecca* and *Grady* married in 1851; he died in 1875 intestate.

The bill charges that *Grady*, upon the death of *Robert Young*, went into possession of the lands of *Robert Young*, and has collected rents from tenants, and prays that he may be enjoined from further receiving rents and may be decreed to account for what he has received. The bill prays also for a partition or sale.

Judgment.

It is not objected that he is not accountable for rents and profits received, but that it is multifarious to bring him to account in the same suit in which questions may arise between different parties claiming to be entitled as tenants in common.

I think it is a sufficient answer to this objection that all or any of the tenants in common have the same right as the plaintiffs to bring *Grady* to account; and that the bill raises no questions between the tenants in common. It alleges that all are entitled; and that the father of several of them, who appears upon the face of the bill to be interested as tenant by the courtesy in the share that would have been the share of *Rebecca*, has received rents and profits, to an account of which all are entitled. I have looked at the cases cited, and am of opinion that this bill is not multifarious.

1880.

BANK OF ROCHESTER v. STONEHOUSE, GRAYDON, AND DARLING.

Demurrer—Pleading—Execution creditor—Fraudulent assignment.

The plaintiffs were execution creditors of one of two co-partners in trade, both of whom had joined in an assignment by way of mortgage of all their goods and chattels, and also certain lands, comprising all the real estate owned by the judgment debtor, as an indemnity to the assignee against an incumbrance on lands sold and conveyed by both partners to the assignee. The bill charged that such assignment was executed in fraud of creditors, as by reason of the joint occupation of the partners the sheriff was unable to ascertain what portion of such chattels belonged to the execution debtor, and prayed a declaration that such assignment was void as against the plaintiffs, and that such portion of the goods and lands as was not required to indemnify the assignee might be sold, and the proceeds applied in payment of the plaintiffs' claim. A demurrer by the execution debtor for want of equity was allowed with costs.

Statement.

The bill in this case was filed by *The Bank of Rochester* against *William Stonehouse*, *William Graydon*, and *William Darling*, setting forth in detail that the plaintiffs were judgment creditors of the defendant *Stonehouse*, having executions against his goods and lands, in the hands of the sheriff. The defendants *Stonehouse* and *Graydon* were joint owners of certain land, subject to a mortgage thereon for the sum of $3,000. This land these defendants sold to the defendant *Darling* for $5,000, indemnifying him against the payment of the sum due in respect of the mortgage, by assigning to him by way of mortgage all their goods and chattels, together with several parcels of land. This latter mortgage comprised all the real and personal estate owned by *Stonehouse*, and having been given after service of the writ in the common law action, and the value of the said lands and goods being estimated at from $12,000 to $15,000, the plaintiffs filed the present bill impeaching the transaction as fraudulent. It was alleged that the defendants *Stonehouse*

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and *Graydon* occupied the one house, and were partners in business, in consequence of which the sheriff could not distinguish the chattels belonging to *Stonehouse* from those of *Graydon*, and so was unable to make a levy or execute the writ against goods, It was also charged that the chattel mortgage was void, because it was given as a guarantee for a debt which would not mature within one year from its date. The bill prayed that the chattel mortgage might be declared void: that the interest of *Stonehouse* in the lands and chattels might be ascertained: that *Stonehouse's* interest therein —in excess of what was necessary to indemnify *Darling*—might be discharged from *Darling's* mortgage; and that a receiver might be appointed with power to sell such portions of the chattels comprised in *Darling's* mortgage as ought to be disposed of for the benefit of the plaintiffs.

The defendant *Stonehouse* demurred for want of equity.

Mr. *Ewart*, for the demurrer.

Mr. *Donovan*, contra.

Skarf v. *Soulby* (*a*), *Dickinson* v. *Duffill* (*b*), *Taylor* v. *Jones* (*c*), *Hurd* v. *Billington* (*d*), *Gray* v. *Mathias* (*e*), *Walker* v. *Niles* (*f*), were referred to.

Judgment

SPRAGGE, C.—The plaintiffs have recovered judgment against the defendant *Stonehouse*, and placed execution against goods and lands in the hands of the sheriff; but which, as the bill states, have been unexecuted by reason of certain dealings of the debtor, (which are set out at great and unnecessary length in the bill) with his lands and goods. The demurrer is by *Stonehouse*. The bill alleges that *Stonehouse and Graydon* sold to *Darling* a certain lot of land

(*a*) 1 M. & W. 364.
(*b*) 10 Gr. 76.
(*c*) 2 Alk. 600.
(*d*) 6 Gr. 145.
(*e*) 5 Ves. 286.
(*f*) 18 Gr. 210.

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for $5,000, the receipt of which sum was acknowledged in the conveyance; a subsequent paragraph, the 14th, alleges that it is untrue that the sum was paid by *Darling* to the vendors. The land sold was subject to a mortgage to one *Coulter* for $3,000, and *Stonehouse*, "on pretence," as the bill says, to indemnify *Darling* against this mortgage to *Coulter*, mortgaged to him, *Darling*, three certain parcels of land which or two of which (the bill is uncertain upon that point) are stated to be under mortgage to third persons, and that he and *Graydon* for the same purpose of indemnity joined in a chattel mortgage to *Darling*. The chattel mortgage and all the articles mortgaged, together with the affidavit accompanying it being set out in full in the bill; and this chattel mortgage is alleged to be void for several reasons appearing upon its face.

The bill alleges that the equity of redemption in the lands mortgaged by *Stonehouse* to *Darling* greatly exceeds in value the amount of the mortgage to *Coulter;* and charges that the said pretended mortgage is fraudulent and created solely for the purpose of protecting the lands of *Stonehouse* against the plaintiffs as creditors of the said defendant.

Judgment.

The bill further alleges that *Stonehouse*, with the view still further to hinder the plaintiffs in the recovery of their debt, joined with *Graydon* in a mortgage to *Darling* of all their respective goods and chattels, which are set out in full, and are stated to be of the value of at least $10,000; that this was "on pretence" of indemnifying *Darling* against the *Coulter* mortgage, but is only a part of the scheme for protecting the goods of *Stonehouse* from the plaintiffs' execution.

The bill charges that the lands and chattels mortgaged are of the value of from $12,000 to $15,000, and that *Stonehouse* has no other goods or lands out of which the plaintiffs' execution can be levied.

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At the argument the demurrer was supported principally on the ground that the bill, alleging the chattel mortgage to be void on its face, it was not necessary to come to this Court. It may not have been *necessary* in one sense, inasmuch as the plaintiffs might have taken the goods in execution by legal process if the mortgage is void; but that does not affect his right in this Court as a creditor impeaching a transaction as void under the Statute of Elizabeth. The cases cited appear to me not to apply to such a case.

The bill is however demurrable, in my opinion, upon this ground. It does not allege that *Darling* was not entitled to indemnity against the mortgage to *Coulter*, nor that *Darling* did not pay within a small amount the full agreed consideration of $5,000, or indeed that he did not pay the full amount. The allegation being that it is untrue that he paid the $5,000, trusting to *Stonehouse & Graydon* to pay off the mortgage to *Coulter*. It is not alleged that *Darling* was in any way party to the fraudulent scheme charged against *Stonehouse*, and perhaps intended to be charged also against *Graydon*. That being so the allegations amount to no more than this, that *Darling*, a purchaser of land subject to a mortgage and entitled to be indemnified against that mortgage, is indemnified to a larger amount than is necessary; and that the motive and object of the vendor who indemnified him was to hinder and delay a creditor of that vendor—the purchaser, however, being no party to that motive and object.

Judgment

The party who demurs is, it is true, the indemnifying vendor; but he has a right to say that assuming the charges of fraud against him to be true the bill is not sustainable, no fraud being charged against *Darling*; and that the demurrer admits the charges of fraud against himself only for the purposes of the demurrer.

The plaintiffs do not pray for a sale of either lands

or chattels, or of the interest of *Stonehouse* in the latter, subject to the mortgage to *Darling*; or pray to be allowed to redeem *Darling*; and they cite no authority for any of the various kinds of relief that they do pray for, and I am not aware that they are entitled to any such relief. The demurrer is allowed, with costs.

DARLING v. PRICE.

Fraudulent conveyance—Traders—Insolvency.

One of the members of a trading firm, in March, 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling house at an expense of $3.000, and in July following the firm were compelled to effect a compromise of their liabilities, and finally, in February, 1877, became insolvent. The plaintiff was appointed their assignee, and thereupon filed a bill impeaching the settlement as having been made, while insolvent, with a view of defrauding creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency. Under these circumstances the Court, on rehearing, reversed a decree of *Proudfoot*, V. C., directing the payment of the plaintiff's claim out of the estate remaining after the payment of two mortgages created by the wife and repaying to the wife what, if anything, she had paid on account of the purchase of the land, and dismissed the bill without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife.

Statement

The bill in this case was filed by *Thomas Darling*, as assignee in insolvency of *John Lewis & Co.*, composed of *John Lewis* and *David Price*, seeking to have a property claimed by the defendant, Mrs. *Price*, wife of the insolvent *Price*, declared to be the property of the estate, as having been conveyed to her by her husband in March, 1875, when he was insolvent; and also attacking a mortgage made by Mrs. *Price* to the other defendants, *Watson, Rose & Sutherland*, as having been made with notice of the fraudulent nature of Mrs. *Price's* title. The bill also contained a statement that

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the defendants, *Watson, Rose & Sutherland*, alleged the mortgage to them was taken *bonâ fide* and without notice, and, if this were so, submitted that, at all events, the plaintiff was entitled to relief against Mrs. *Price*, subject to this mortgage.

The answer of Mrs. *Price* denied all fraud; but it admitted that the land in question was first conveyed to the insolvent, she having repaid to him the purchase money out of her own moneys; that the land, when conveyed, was vacant; and that the insolvent built a dwelling on it worth about $3,000. She also set up that she had created a mortgage on the property in favour of one *H. A. Price* for $600, to secure moneys from time to time borrowed by Mrs. *Price*.

It was alleged that the deed was made to the insolvent through a mistake, but nearly a year elapsed before the mistake (though known) was rectified, and it was urged as a strong fact that the building was nearly completed before this was done.

Statement.

The cause was heard before *Proudfoot*, V. C., at the sittings of the Court at Belleville, in the Spring of 1879, when a decree was made referring it to the Master at Belleville to take an account of what, if anything, was due to the mortgagees, *Watson, Rose & Sutherland*, and also to *H. A. Price*, on the mortgage for $600, and to the wife for purchase money; and then, if anything should be found due to the plaintiff, ordered payment and, in default, a sale—costs to be paid to plaintiff out of the estate.

The plaintiff thereupon reheard the case.

Mr. *Ferguson*, Q.C., and Mr. *Monck*, for the plaintiff.

Mr. *R. Martin*, Q.C., for the mortgagees, *Watson, Rose & Sutherland*.

Mr. *Holden*, for Mrs. *Price*.

Spirett v. *Willows* (*a*), *Freeman* v. *Pope* (*b*), *Jackson* v. *Bowman* (*c*), *Hill* v. *Thompson* (*d*), *Totten* v. *Douglas* (*e*), *Lawson* v. *Laidlaw* (*f*), *Picard* v. *Hine* (*g*), were referred to. 1880. Darling v. Price.

The judgment of the Court was delivered by

BLAKE, V. C.—The bill in this cause is filed by the plaintiff as assignee in insolvency of *Lewis and Price*, as partners, trading under the style of *John Lewis & Company*. It is alleged that the firm became embarrassed in January, 1875. There is no evidence to shew this firm was embarrassed until they came to the assistance of *John Lewis* in September, 1875. The case of the plaintiff fails entirely on this point. *Price*, in 1874, and up to January, 1875, could, for anything that appears in the evidence, have made a voluntary settlement on his wife. The firm became embarrassed by the liabilities undertaken for *John Lewis* in September, 1875. There is no evidence that any debt due in 1874, or up to June, 1875, was unpaid at the filing of this bill. I cannot see anything in the case to have prevented *Price* dealing as he did with the premises, the subject matter of this litigation. It was stated by counsel on the re-hearing, that the property in question would not do more than satisfy the claims of the mortgagees upon it. As these are prior to the plaintiff, if he succeeded in the suit he would not really make anything by it for the creditors of the estate he represents. It may be that the plaintiff may prove such facts as to entitle him to relief, and to allow him to follow the separate estate of the female defendant. Without forming an opinion on this point, I think the dismissal of the bill in the present case should be without prejudice to such proceedings being taken by the plaintiff on the payment of the costs of the present litigation.

Dec. 11th, 1879.

Judgment

(*a*) 3 DeG. J. & G. 293.
(*b*) L. R. 5 Ch. 538.
(*c*) 14 Gr. 156.
(*d*) 17 Gr. 445.
(*e*) 15 Gr. 126.
(*f*) 3 App. Rep. 77.
(*g*) L. R. 5 Ch. 274.

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COMPTON v. MERCANTILE INSURANCE COMPANY.

Fire insurance—Incorrect answers—Invalidating policy—Statutory conditions.

In answer to the questions, "(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner?" a party seeking to effect an insurance against fire answered, "(1) Tenant—as boarding house. (2) Applicant." And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land; and he answered $600. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building the subject of insurance.

Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions.

The plaintiff was insured by the defendants under an interim receipt, which stated that it was "subject to approval at the head office, and to the conditions of the policy. Unless previously cancelled this receipt binds the company for thirty days from the date hereof, and no longer."

Held, that the conditions of the policy applied to the insurance during the thirty days, and included any variations of the statutory conditions adopted by the defendants.

THIS was a bill to enforce payment of the amount of a policy of insurance against fire.

Statement.

The case came on originally to be heard before *Proudfoot*, V. C., at London, at the sittings in May, 1878. On that occasion the evidence of the plaintiff shewed that the insurance sought to be recovered had been effected with the agent of the defendant company on the 23rd of January, 1877, and that the frame building, the subject of insurance, had been destroyed by fire on the following day. It was shewn that the agent had himself filled up the application for insurance, which had not even been read over by the plaintiff, and he swore that he was not aware that any fact necessary, in his judgment, to be communicated, had been omitted from the application, and that the agent was himself well acquainted with the nature and state of the building.

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The defence principally relied on was concealment of facts in the application, the plaintiff being really only lessee of the land upon which the building was erected, and which the defendants alleged was worth not more than $450, and was, at the time of effecting the insurance, subject to a mortgage created by the plaintiff for $300; and they insisted that the insurance was really void for misrepresentation: in fact that the defendants entered into the contract—if it could be considered that a contract was actually made—only on the basis of the application, which untruly represented the existing facts.

At the conclusion of the argument a decree was made dismissing the bill with costs; the Vice-Chancellor remarking: "It is very much to be regretted if the plaintiff is in such a position that he cannot recover from the company under the circumstances of this case, where it was shewn that he was perfectly honest in his appplication, and the fire is not attributable to him in any way, and no suspicion is cast upon his character. The defendants do not venture to place any defence of that kind on the record, and they do not venture to say that any of the alleged misrepresentations influenced the loss that has occurred, or that the loss in any manner is to be attributed to them. The contract which is sued upon is an interim receipt which insures, or purports to insure, the applicant from the 19th of January, 1877, subject to approval at the head office and the conditions of the policy, and unless previously cancelled this receipt binds the company for thirty days from the date and no longer, after which the risk shall be considered cancelled and of no effect.

Statement.

Upon the best consideration I think that the conditions of the policy are to be taken as binding, and are to be read as part of this interim receipt. The clause "subject to approval at the head office and the conditions of the policy," seems to be put in the

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same sentence; and the next is the commencement of a new one. "Unless previously cancelled this receipt binds the company for thirty days and no longer." But I apprehend that the binding the company refers to whether it is to be subject to the approval of the head office, and the conditions of the policy are, in any event, to be read as part of the conditions on which the insurance was to extend for thirty days. By the first condition of the policy, "If any person shall insure his building and shall cause the same to be described otherwise than it really is to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk such insurance shall have no force in respect of the property in regard to which the misrepresentation or omission is made."

Statement.

I take it, also, that the conditions of the policy must include the variations of the statutory conditions, and that the applicant must be taken to have known what the conditions of the policy are, not only the statutory ones but their liability to be varied by the company, and that they were in fact varied by the company.

Then the 22nd condition is, "That the application of the insured, the certificate, and the diagram of the premises, &c., shall be a condition and form part of this policy."

By the 6th condition, "If the building and premises shall be kept in a way so as to render the risk any more hazardous, &c., the insurance shall be void."

The question is, whether these variations in the application or variations from the truth in the application, are such as are material to the risk and ought to enable the company to say, "We would not have entered into the contract; they were material for us to know; and if we had known them we would very probably not have entered into the contract that is now sued upon."

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The first of these that is referred to is the size of the building, but it seems to me that the evidence of the size of the building was not a material matter in the risk; that it did not involve any additional risk to the company, and in fact the company does not seem to rely upon it as being objectionable.

The next, however, is that the plaintiff is the "owner" of the property. The question in the application is, "Are the premises occupied by the owner or tenant?" A. "By tenant—boarding house." "If by tenant, give name of owner." A. "Applicant." It does seem to me to be a material fact for the Company to know whether the applicant was in reality the owner of the property or not; and the question is, whether this means the "owner" of the building, or the "owner" of the land and building. Read in connection with the 11th question, "Is the applicant the owner of the building? State the value of the land." I think the two questions together probably are intended to mean, "State the owner of the land upon which the building is situated." The 7th and 11th questions seem to comprehend these two points—not only the owner of the building upon the land, but also the owner of the land itself; and the answer to that, if that be the true construction of the question, is a mistake, because the applicant is not the owner of the land. He may have been the owner of the building; but the insurance agents tell us that that is a material question in determining the risk, and whether the Company would incur it or not. I cannot say, in the face of that evidence, that it is not a material point; that whether the person were the owner or the lessee of the premises; whether the lease had a long time to run or a short time to run; what the amount of the rent was; what the value of the building was; and all these various circumstances may be taken into consideration by the Insurance Company in determining to accept the risk or not; and I think that was a material question for the Company to know,

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and not being communicated I do not think they are bound by the insurance. I cannot avoid acting on those decisions that have determined that this covenant is binding on the applicant, although he may not have read the questions and may have trusted to the agent of the Company. They may have all been filled up erroneously, yet if he choose to sign the paper stating that "the agent of the Company is to be his agent for the purposes of the insurance," I think he must be bound by it.

I think the bill must be dismissed, but I will dismiss it without costs.

The plaintiff thereupon reheard the cause before the full Court.

Mr. *Coyne*, for the plaintiff.

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

Sept 11th, 1879.

SPRAGGE, C.—It is not without regret that I come to the conclusion that the plaintiff's bill cannot be sustained.

The first statutory condition appears to me to be sufficient for the determination of the case. Omitting parts not applying to this case, it runs thus: "If any person * * shall insure his * * building and shall cause the same to be described otherwise than it really is to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of the property in regard to which the misrepresentation or omission is made." And the question, to my mind is, whether there was not an omission on the

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part of the assured to communicate a circumstance material to be made known to the company in order to enable them to judge of the risk they were undertaking.

The building insured was a frame building, standing upon land not the property of the insured. The insured was lessee of the land, the lease not having very long to run; and he had the privilege of removing the building. The application does not inform the company of this. It rather assumes throughout, without, as I read it, in terms asserting as a fact, that the applicant is owner of both building and land. It certainly does not state that he is owner of the building only and not owner of the land. The answers to the seventh query are not quite consistent, but still do not give the information. To the first part of the question: "Are the premises occupied by owner or tenant," the answer is "Tenant;" to the second: "If by tenant give name of owner," the answer is: "Applicant." If the word "premises" refers to the building, he affirms that he is both tenant and owner. I think taken strictly it does refer to the building, as nothing else is premised, and taking it to refer to that only the fact of his not being owner of the land is not communicated; then the answer to the eleventh question is such an answer as would be given by the owner of both land and building; and of course the same fact is not communicated. It is not necessary, as I think, to shew that the applicant *represented* himself to be owner of the land as well as of the building; he is brought within the first statutory condition if he omits to communicate that the fact is otherwise, if without representation one way or the other the presumption would be, or the reasonable inference from the whole of his application would be, that he was the owner of both.

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Then is the fact that he was owner of the building only, the ownership of the land being in his lessor, a fact

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that was material to be made known to the company? Upon that point I cannot do better than take the language of my brother *Proudfoot*, at the hearing of the cause: "The insurance agents tell us that that is a material question in determining the risk and whether the company would incur it or not. I cannot say, in the face of that evidence, that it is not a material point; that whether the person was the owner or the lessee of the premises; whether the lease had a long time to run or a short time to run; what the amount of the rent was; what the value of the building was; and all these various circumstances may be taken into consideration by the insurance company in determining to accept the risk or not; and I think that was a material question for the company to know."

I may add that in my opinion it is perfectly evident that it is a proper element of consideration for an insurance, whether a party insuring a building is owner also of the land on which it stands. It is obvious, without any evidence to the point, that the owner of a building with a right to remove it, standing upon land the lease of which will shortly expire, stands upon a very different footing from one who is owner of both land and building; and ordinarily will have a less interest in preserving the property from fire. He may indeed, from the character of the building, from its state of repair, from its want of soundness and strength, or from other circumstances, have a direct interest in its destruction by fire, even where the insurance is for an amount which if he were owner of both land and building would be much less than its value to him. I agree, therefore, in thinking that the bill was properly dismissed, and that the decree should be affirmed, with costs of rehearing.

Judgment.

BLAKE, V. C.—I am unable to come to the conclusion that the plaintiff can recover in this suit. In the application for insurance we have variously used

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the words "building," "premises," "property," and "building and land." The seventh question reads as follows: "7 (1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner," and the answer is "(1) Tenant—as boarding-house; (2) Applicant." As a matter of fact the applicant did not own the premises. He had a lease of them which had to run for a short time, and a right to remove the building. By the question attention is called to the distinction between owner and tenant. It is a matter of vital moment to an insurance company to know exactly the interest of the person seeking insurance, as, to a very large extent, it must control them in accepting, rejecting, or fixing the rate of the insurance. Here the answer could not but mislead. The premises, which consisted of the building with the land on which it was situated, were not owned by the applicant. He was himself but tenant with a right to remove the building. If the company had known this, it appears that they would not have accepted the risk, and the agent under his instructions could not have accepted it without reference to the head office. I think the decree should be affirmed, with costs.

Judgment

PROUDFOOT, V. C., concurred.

Per Curiam.—Decree affirmed, with costs.

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BANKS v. BELLAMY.

Pleading—Statute of Limitations—Dower.

In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant *E. B.* (the widow) is not entitled to dower:"

Held, a sufficient allegation that the defendant's right to dower was barred by the Statute, though it omitted to state that this was the legal result of any particular statute.

Statement.

The bill in this cause was filed in 1879, by *Mary Jane Banks*, an infant, by her aunt *Mary Ann Banks*, her next friend, against *Elizabeth Bellamy* and *Samuel Bellamy*, setting forth that the plaintiff was the only child and heir-at-law of one *Robert Banks*, deceased, who died intestate in the year 1862, the defendant *Elizabeth Bellamy* having been his widow, and having, shortly after his death, intermarried with one *William Bellamy*. The bill further stated that at the time of his death *Banks* was seised in fee of various parcels of valuable real estate, which had descended to the plaintiff, and also possessed of valuable personal property, to a share of which the plaintiff was entitled. The bill alleged that the defendants had, shortly after the death of *Banks*, taken possession of and continued to occupy such real estate, and had converted the personal effects to their own use, and the defendant *Elizabeth Bellamy* had sold and co[illegible]eyed or pretended to sell and convey a portion of said lands, and the defendants claimed to have a right to do so: and charged the defendants with having committed waste upon the said lands, and continued to commit such waste; and the fourteenth paragraph of the bill alleged that—

"The defendant *Elizabeth Bellamy* has never brought any action or suit or begun any proceeding whatever to recover dower out of the said lands and premises,

or to recover a distributive share of the said personal estate or any part thereof, nor has dower out of the said lands ever been assigned to the said *Elizabeth Bellamy*, nor has the said personal estate ever been divided or distributed according to law. (15) The plaintiff submits that the defendant *Elizabeth Bellamy* is not entitled to dower out of the said lands and premises, and that neither of the said defendants is entitled to the possession or use of any part thereof or of the said personal estate."

The bill, amongst other things, prayed the appointment of a fit and proper person to be the guardian of the plaintiff and of her estate, and to have the defendants restrained by injunction from molesting or interfering with the plaintiff or the person having charge of her, and that it might be declared that the defendant *Elizabeth Bellamy* had no right to dower out of the said lands and premises, and that neither of the said defendants was entitled to the possession thereof.

The cause came on for hearing at Chatham, in the Autumn of 1879, when a decree was made directing a sale of the land and appointing a guardian of the person and estate of the plaintiff—but not material to the present report; the Chancellor reserving judgment, however, upon the question whether the statement in the bill sufficiently set up the Statute of Limitations in bar of the claim of the defendant *Elizabeth Bellamy* for dower; and whether upon the facts therein appearing her remedy was barred.

Mr. *Wilson*, for the plaintiff.

Mr. *Moss*, for the defendants.

January 28, 1880.

Judgment.

SPRAGGE, C.—At the hearing two questions remained for judgment. One whether the title, or rather the remedy of the widow for her dower, was barred by the Statute of Limitations, as to which I said I would reserve my judgment until judgment was given on

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re-hearing in *Laidlaw* v. *Jackes* (*a*). The other question was, whether the question of the Statute of Limitations is sufficiently raised upon the pleadings. As to this counsel were to refer me to authorities.

The statute says (*b*), "No action of, or suit for dower shall be brought but within ten years from the death of the husband of the doweress, notwithstanding any disability of the doweress, or of any person claiming under her."

The plaintiff files her bill as only child and heiress-at-law of the husband of the doweress; and alleges, (paragraph 3) that her father, the husband of the doweress, "died intestate in the year 1862," and in paragraph 15 "submits that the defendant, *Elizabeth Bellamy*, is not entitled to dower." The statute is not invoked in express terms. The answer, in paragraph 3, says, that the husband died in 1864, and in paragraph 13 the defendant says, "I claim that I am entitled to dower in said lands." Whether the husband

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died in 1862 or 1864, more than ten years had elapsed before the filing of the bill; and the widow had taken no steps in order to the assignment to her of dower. I have not been referred to any authorities upon the sufficiency of the allegation in the bill as a question of pleading. The bill alleges the death of the husband at a period which would bar the wife's remedy to dower. That is the single fact which would constitute a bar; and it alleges that she is not entitled; so that the bill states the fact, and also the legal consequence of the fact; though it omits to state that the legal consequence is made so by a particular statute. That is the only omission, and I incline to think that the omission does not make the allegation insufficient. The passages in the answer to which I have referred shew that the defendant understood the *intuitus* with which these allegations in the bill are made, viz., that the

(*a*) See ante page 101. (*b*) R. S. O. ch. 108, sec. 25.

plaintiff sought the land, to which she was entitled by descent, free from the dower of the widow. 1880.

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There are allegations in the bill of misconduct on the part of the widow, but they are made in relation to the guardianship of the plaintiff, who is still an infant; and that they are so understood appears from the 12th paragraph of the defendant's answer, where she denies that her conduct has been such as to disentitle her to be guardian of the plaintiff, and denies in any way misusing the plaintiff.

The cases of setting up the statute which I have seen, are when the statute has been set up by plea or answer. Assuming the same rules to apply where the facts making the statute a bar are set up, as in this case, in a bill, I incline to think the allegations here sufficient; but if counsel for the defence desire to refer me to authorities upon the point I will examine them.

The principal question, viz., whether the statute is a bar, is concluded, so far as I am concerned, by *Laidlaw* v. *Jackes*. There, as here, the land had been directed to be sold; and it was the opinion of the majority of the Court that a widow making a claim upon the proceeds of sale is in the position of a demandant; and that the Statute of Limitations applied to her case. The decree then will be that the plaintiff is entitled to the whole proceeds of the sale; and will be with costs, unless, (which I have not noted,) there was some consent at the hearing as to costs.

Judgment.

1880.

GEORGIAN BAY TRANSPORTATION CO. v. FISHER.

Liability of owners of vessels for damages—Practice—Injunction.

The Imperial Statute 32 Victoria ch. 11, declares that under the 17 & 18 Vict., ch. 104, and the 25 & 26 Vict., ch. 53, "Canada shall be deemed to be one British possession," and thus the owners of vessels navigating the lakes and rivers of this country are entitled to the benefit of the limited liabilities clauses contained in those acts, in case of loss of life or property.

Proceedings having been instituted at law to recover damages for loss sustained by a widow and her child by reason of the death of the husband and father on board a steamer plying on Lake Huron.

This Court [Spragge, C.,] restrained proceedings in the action, on the ground that the owners of the vessel were entitled to have the amount of their liability, if any, ascertained and distributed ratably among the several claimants upon the fund, by this Court.

In such a case, the owners are not bound as a condition of obtaining relief in this Court to admit a liability for any amount.

Statement.

Emma Fisher, the widow and administratrix of *Baptiste Noel Fisher*, deceased, instituted proceedings, on behalf of herself and her infant child, in the Court of Queen's Bench of Ontario, against the present plaintiffs, seeking to recover from them the sum of $20,000 for damages in respect of the death of the said *Baptiste Noel Fisher*, who had been a passenger on board the steamer *Waubuno* at the time of her loss in November, 1879, such vessel being then owned by the present plaintiffs, who were duly incorporated under the provisions of the Ontario Joint Stock Companies' General Clauses Act, for the purpose of carrying freight and passenger traffic and carrying mails between Collingwood and the Sault Ste. Marie, in Algoma. The bill alleged that the plaintiffs (the Company) had been threatened by numerous other persons with actions for recovering damages for loss of life and property caused by the wreck of the said steamer, and that such persons were only waiting to see the result of the action, brought by Mrs. *Fisher* against the Company, before commencing actions on their own behalf.

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The Company submitted that, if they were liable for damages in respect of such loss of life and property, by virtue of the provisions of sec. 54 of the Imperial Statute passed in the 25th and 26th years of Her Majesty's reign, intituled, "An Act to amend the Merchant Shipping Act of 1854," "The Merchant Shipping Act Amendment Act," and "The Customs' Consolidation Act, 1853," the amount of damage recoverable against the Company under the circumstances could not, in the aggregate, exceed the sum of £15 for each ton of the steamer's tonnage—in this case the sum of £2,205, or $8,820—and submitted also that the question of the liability of the Company for damages for such loss should be first determined by this Court, and if the plaintiffs were found liable, then that the Court should, pursuant to sec. 514 of "The Merchant Shipping Act of 1854," direct a distribution of the amount for which the Company were liable, ratably, amongst the several claimants thereto, when ascertained by the Court; and prayed to restrain the action at law and a distribution of the amount for which the plaintiffs were liable amongst the persons to be found entitled.

Statement.

The plaintiffs moved for an injunction in the terms of the prayer.

Mr. *Hoskin*, Q.C., and Mr. *Creelman*, for the plaintiffs, in support of the application.

Mr. *Bethune*, contra.

The points involved were simply whether or not the Company were subject to an unlimited liability for damage caused by the loss of the vessel, or only to a limited amount, as above suggested; and also whether the vessel at the time of proceeding on her said voyage was in good repair and reasonably seaworthy.

Affidavits were filed tending to prove the seaworthiness of the steamer; that such vessel was built in the township of Thorold, in this province, and was at the time of her loss owned by residents in this province.

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March 16th.

The authorities cited appear in the judgment of

SPRAGGE, C.—Under sec. 504 of the Imperial Merchant Shipping Act of 1854, 17 & 18 Vict., ch. 104, the limited liability therein provided for was made applicable only to sea-going ships. That section was repealed by the amending Act of 1862—25 & 26 Vict., ch. 63, and sec. 54 of the latter Act was substituted for it; and the limited liability is made applicable to "the owners of any ship, whether British or foreign;" and by 32 Vict., ch. 11, it is enacted that under these Acts "Canada shall be deemed to be one British possession." My opinion is, therefore, that the steam vessel in question, the Waubuno, was, and that her owners are within the Merchant Shipping Acts.

Sec. 514 of the Act of 1854 remains as originally enacted. I take the terms of this section, as stated by Lord *Hatherley*, then Vice-Chancellor, in *Hill* v. *Audus* (*a*), "In cases where any liability has been, or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability," then, subject to the power before given to the Board of Trade to make a first charge upon the fund in case of loss of life or personal injury, this Court is empowered to entertain proceedings at the suit of any owner, to determine "the amount of such liability, subject as aforesaid, and for the distribution of such amount ratably amongst the several claimants."

Judgment.

In that case, as in this, the plaintiffs, owners of a vessel, the *Clara*, filed their bill to bring themselves within sec. 514, alleging that an action was brought against them by the owners of another vessel, founded upon the alleged improper navigation of the *Clara*; that other claims were made, and still

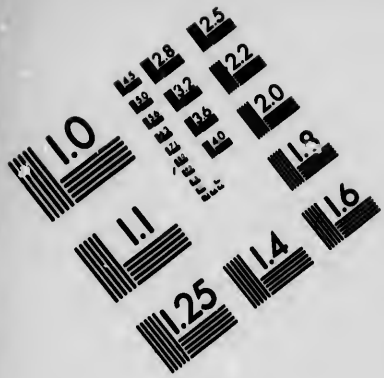
(*a*) 1 K. & J. 267.

others apprehended. The bill stated that the plaintiffs did not admit liability; and prayed, firstly, that if necessary, the question of the plaintiffs' liability, as owners of the *Clara*, might be determined, and asked for an injunction. One branch of the prayer was that the amount of the plaintiffs' liability, if any, might be distributed ratably among the several claimants who had made, or should within such reasonable time as the Court should direct make and establish any claim in respect of such liability.

Lord *Hatherley* put the question thus: "It is entrusted to this Court, by sec. 514, where several claims are made or apprehended, to entertain proceedings, at the suit of the owner, for the purpose of determining the amount of the liability; and when ascertained, the amount is to be a common fund to answer all damages sustained; because it would be unjust to allow one person recovering his claim by a prior execution to realize the full amount, and leave the ship owner to plead against other claimants that the whole extent of his liability had been thus exhausted. It would be inconvenient also to allow such claims to be raised by several proceedings, and therefore the Act gives power to apply to this Court to have them all ascertained together, and the fund brought here to be distributed. The owner, then, is entitled to say, 'My liability being limited, I wish to bring the fund into Court, and to be protected against a multitude of actions.' But he must admit some liability on bringing the matter into this Court. And the only question to be tried by this Court is the amount of damage which each claimant has suffered."

Judgment.

In another passage the learned Vice-Chancellor says: "The plaintiff admits his liability, or chooses to allege that he has incurred it, in order thereby to give jurisdiction to this Court to proceed to ascertain the amount, and then impound it, to answer all claims. It is possible that this Court may find that the damage



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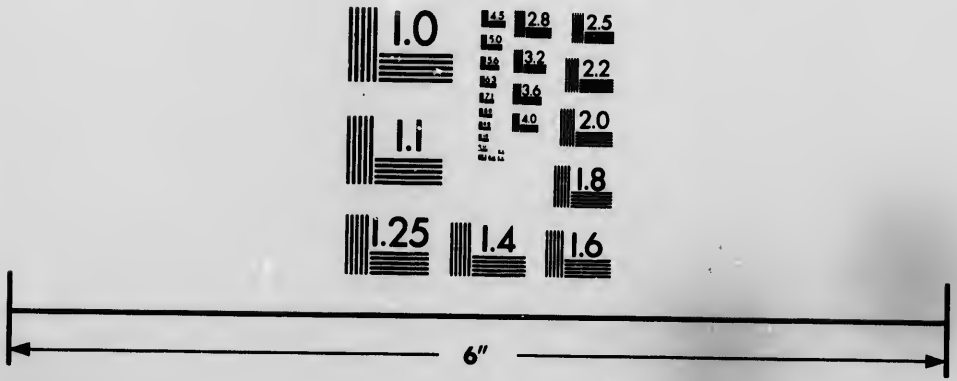

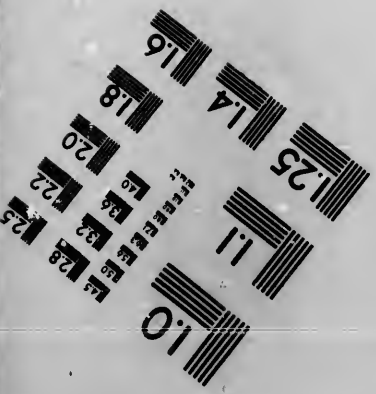

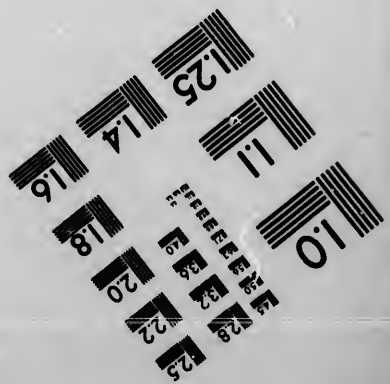

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was *nil* to some particular persons claiming, but that would only arise from the amount of injury being such as not to require compensation. Unless driven to that conclusion by force of the words of the Act, I cannot, however, hold that the Legislature intended anything so futile as that the owner should come here to have the whole amount of his liability ascertained, before there is any constat of that liability by his admission."

Lord *Hatherley* does not put his judgment solely upon the ground upon which it was assumed by Sir *Robert Phillimore*, in the case of the *Normandy* (*a*), to, have been rested, viz., that the Court of Chancery had not original jurisdiction in the subject matter, but also upon his construction of sec. 514, and upon what he conceived would be reasonable and proper in such a case.

This construction does certainly place the ship owner in a dilemma. He may honestly believe, and have reason to believe, that he has incurred no liability, and yet be uncertain whether liability may not be established against him; and desire in the latter case to avoid being harassed by several actions and to bring himself within the limited liability clause. Yet he is put to the alternative of either admitting liability, where he does not believe that he is liable, or running the risk of resisting the claim at law and having to pay full damages.

Judgment.

In a subsequent case before the Privy Council, *The Amalia* (*b*), the Court seemed to throw doubt upon this decision of Lord *Hatherley*. Lord *Chelmsford* observing, after referring to that case: "It is not for me to question the soundness of that judgment. The circumstances under which I am called upon to apply the statute are very different." The question was whether a vessel should be allowed to proceed on a voyage upon

(*a*) L. R. 3 Ad. & Ecc. 157. (*b*) 1 M. P. C. C., N. S., 471.

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giving bail, and the Court came to the conclusion that it was "not indispensably requisite in these cases that the owner of a ship, be he British or foreign, preferring a claim in this Court, under the statute, to limited liability, should begin by acknowledging that his vessel is to blame."

Sir *Robert Phillimore*, in the case of the *Normandy*, was of the same opinion, distinguishing the case before him from *Hill* v. *Audus*, upon the ground that *his* Court had original jurisdiction in the subject matter.

On the other hand is the case of *James* v. *The London and South Western R. W. Co.* (*a*), in the Court of Exchequer, where the Lord Chief Baron Sir *Fitzroy Kelly*, and *Martin*, B., and *Cleasby*, B., expressed their concurrence in the judgment of Lord *Hatherley* in *Hill* v. *Audus*.

There is, then, upon this question a conflict of authority. That which I must hold to be the highest is the Privy Council.

Judgment.

Looking at the question from the standpoint of a Court having original jurisdiction in the subject matter, there seems no good reason for requiring, as a condition of relief to the owner, an admission of liability. Under the circumstances given in sec. 514, the extent of the owner's liability is limited. The claimant has his choice of forum. In the case of the loss of the *Waubuno*, this Court was the proper forum, because this Court can deal with the whole question, whatever shape it may assume. If the enactment had been simply that in the circumstances given in sec. 514 the liability should be limited, without giving power to this Court to stay proceedings at law, this Court would, I apprehend, entertain a bill to stay such proceedings, and that without requiring an admission of liability. If so, this Court ought not to require such admission unless it is very clearly made necessary by

(*a*) L. R. 7 Ex. 187.

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the Act, and we have the authority of the Privy Council that such admission is not in all cases "indispensably requisite."

But for the interpretation put upon the Act I should have thought it open to the construction that in the commencement of the section the word "alleged" may have meant, alleged by the claimant for damages, not alleged by the owner of the vessel, as was taken by Lord *Hatherley* to have been its meaning. In that case the words, "by any owner," would refer to liability, not to the word alleged; and this construction would seem to be reasonable, because the allegation of liability would naturally be made by the party claiming damages by reason of liability, rather than by the person against whom damages are claimed. There are, however, parts of the section that make such construction doubtful, and the section has been construed differently.

My decision therefore is, based principally upon the case in the Privy Council, that the plaintiffs are entitled to the injunction asked.

Judgment.

1880.

LITTLE v. BILLINGS.

Will, construction of—Estate tail—Dying without issue.

A testator among other devises and bequests devised as follows:—"Secondly, I bequeath to my son *Robert Little*, eighty-six acres of land (describing them), also one span of horses and one-half of my farming utensils; he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s. to be paid annually, the first instalment to be made one year after my decease, until the whole is paid." He next devised to his son *John* fifty acres of land, together with one span of horses and the one-half of his farming utensils, subject also to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, *John* and *Robert* were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons *Robert* and *John* die without issue I wish that their shares should be divided equally among my surviving children."

Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over.

This was a suit to obtain the construction of the will of *John Little*, who died in 1853, having made his will dated 2nd April in that year. It appeared that in 1878, the sheriff under an execution against the lands of *Robert Little*, one of the sons of the testator, sold the interest of *Robert* in the lands devised to him, and at that sale the defendant *Billings* became the purchaser, and that *Robert Little* afterwards conveyed to *Billings* and died in 1878 without having been married. Statement.

Mr. *McCarthy*, Q. C., and Mr. *Rye*, for the plaintiff.

Mr. *Boyd*, Q. C., for *Billings*.

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

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In addition to the cases mentioned in the judgment, counsel referred to *Beauclerk* v. *Dormer* (*a*), *Candy* v. *Campbell*, (*b*), Doe *King* v. *Frost* (*c*), *Sheers* v. *Jeffrey* (*d*), *Davies* v. *Mercerom* (*e*), *Edwards* v. *Edwards* (*f*), *Forsyth* v. *Galt* (*g*), *Hellem* v. *Severs* (*h*), *Hopkins's Trusts* (*i*), *Moore* v. *Raisbeck* (*j*), *Nichols* v. *Hooper* (*k*), *Radcliffe* v. *Buckley* (*l*), *Right* v. *Day* (*m*), *Sibley* v. *Perry* (*n*), *Stratford* v. *Powell* (*o*), *Exel* v. *Wallace* (*p*), *Jarman* on Wills, p. 240; *Theobald* on Wills, p. 208.

March 18th.

PROUDFOOT, V. C.—*John Little* died on the 5th of April, 1853, having made his will on the 2nd of April, by which he devised to his son *William* sixty-three acres of land during his natural life, and after his decease that his two sons should have it share and share alike, viz., *John Andrew Little* and *George Wellington Little*; he then provided for the application of the rent first to pay a debt *William* owed, and then for the benefit of *William* during his life, and if he died before his sons attained majority for their benefit during minority. He next made the devise now in question: "Secondly. I bequeath unto my son *Robert Little* eighty-six acres of land (describing them), also one span of horses and one-half of my farming utensils: he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s. to be paid annually, the first payment to be made one year after my decease, until the whole is paid." He next devised to *John* fifty acres of land, together with one span of horses and the one-half of his farming utensils,

Judgment.

(*a*) 2 Atk. 308.
(*b*) 2 Cl. & F. 421.
(*c*) 3 B. & Ald. 546.
(*d*) 7 T. R. 589.
(*e*) L. R. 4 Ch. D. 182.
(*f*) 12 Beav. 97.
(*g*) 22 U. C. C. P. 115.
(*h*) 24 G. 320.
(*i*) L. R. 9 Ch. D. 131.
(*j*) 12 Sim. 123.
(*k*) 1 P. W. 198.
(*l*) 10 Ves. 195.
(*m*) 16 East 67.
(*n*) 7 Ves. 522.
(*o*) 1 B. & B. 1.
(*p*) 2 Ves. Sr. 118.

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subject to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, *John* and *Robert* were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons, *Robert* and *John*, die without issue I wish that their shares should be divided equally among my surviving children." And he appoints *Robert Spence* and his son *Robert* his executors.

The sole question is, whether *Robert* took an estate tail, or a fee simple, subject to an executory devise over.

Unless the case of *Re Chisholm* (*a*), in Appeal *nomine Chisholm* v. *Emery* (*b*), can be distinguished from the one now before me, it disposes of the question. In that case it was held that the granddaughter took an implied estate tail, and the will contained a provision that in case of her dying without lawful issue or heir the land was to be sold by his executors, out of the proceeds of which they were to pay certain legacies, and the remainder to be applied at the discretion of his executors to missionary purposes. *Mowat*, V.C., held that this last was a discretionary trust personal to the executors, and indicated that the testator was contemplating an event which should happen within the compass of existing lives. The circumstances of lawful issue being used as equivalent to heir, in the singular; the power of sale failing such issue; and the discretion given to the executors; would in my opinion suffice to distinguish it from the present. But, in Appeal, the judgment of *Draper*, C. J., takes a wider range, though it seems to me that he meant to confine the decision to the intention to be gathered from the whole will, not to the isolated phrase, dying without issue. The decisions to which he refers are not applicable to that phrase by

Judgment.

(*a*) 17 Gr. 403, S. C. (*b*) 18 Gr. 467.

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itself. *Ex parte Davis (a)*, *Murray* v. *Addenbrook (b)*, are cited for the general rule that the construction is to be on the whole will, and, as instances of its application, reference is made to *Ex parte Hooper (c)*, where *Kindersley*, V.C., considered that where the devise over on the death of *A.* without leaving issue is to such of a class of persons *as shall be living at the death of A.*, the gift over should be construed as a gift over on the death of *A.* without issue living at his death. In *Parker* v. *Birks (d)*, in which a testator devised lands to his nephew in fee, but in case the nephew should die without child or children of his body lawfully begotten, he devised the same lands to the children of his niece, their heirs and assigns for ever, *on the decease* of the nephew: it was held to be an executory devise on failure of issue living at his death. *Blinston* v. *Warburton (e)*, in which the devise was to a daughter, and in case she died without lawful issue the house to go to testator's son *Thomas*, or his heirs, in consideration that he should pay testator's son *Joseph*, or his heirs, the sum of £250, *twelve months after the daughter's death*, and it was held to be an executory devise. *Coltsman* v. *Coltsman (f)*, is cited for the decision in regard to Fleck Castle. The devise was to his son of the lands, &c., and by a codicil he said: "If it should happen that my son die without heirs of his body, in that case and in default of such heirs, I do hereby devise and direct that the land shall, *at my son's death*, descend and be transferred to my grandson." This was held to give an estate in fee with an executory devise over on the son dying without leaving issue, *McEnally* v. *Weatherall (g)*, is also quoted; but the learned Chief Justice leaves out the material words that clearly limited the failure of issue to the death of *M. M.*: "in case he

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(a) 2 Sim. N. S. 120.
(b) 4 Russ. 497.
(c) 1 Drew. 264.
(d) 1 K. & J. 156.
(e) 2 K. & J. 400.
(f) L. R. 3 H. L. 121.
(g) 15 Ir. C. L. R. 502.

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has no heir, *at the demise of M. M.*, my estate and freehold to be given to the first heir-at-law"—the words in italics are left out.

In all these cases there was language used indicative of an intention to limit the usual sense of the phrase, die without issue, which, by itself, has long had a well-defined construction as meaning an indefinite failure of issue, and it seems to me that the Chief Justice meant therefore to rest the decision on the special circumstances of the case; which, indeed, without such intention, would have been the effect of the decision. I feel myself therefore in no wise trammelled or fettered by that decision, and at liberty to discuss the present case on its own merits.

The devise in the earlier part of the will clearly passed a fee to *Robert*, Consol. Stat. U. C. ch. 82 sec. 12. The clause giving the property over on his dying without issue as clearly means an indefinite failure of issue, and cuts down the fee to an estate tail. *Forth* v. *Chapman* (*a*), *Crooke* v. *Derandes* (*b*), *Elton* v. *Eason* (*c*). The effect of this may, however, be modified or changed if language can be found in the will limiting the failure of issue to the death of *Robert*. Two circumstances were relied on as showing an intention to that effect, viz., that the devise over was to the *surviving children* of the testator, and that it was of a mixed description of shares of realty and personalty.

Judgment.

The surviving children would be those living at the testator's death, *O'Mahony* v. *Burdett*, *Ingram* v. *Soutten* (*d*), and the estate they would take would be a fee, Consol. Stat. U. C. ch. 82 sec. 12, and the devise is of the same effect as if the word heirs were expressly mentioned, and therefore excludes the presumption that it was a mere personal benefit that was intended for the survivor, *Massey* v. *Hudson* (*e*).

(*a*) 1 P. W. 633.
(*b*) 9 Ves. 197, 203.
(*c*) 19 Ves. 76.
(*d*) L. R. 7 H. L. 388, 408.
(*e*) 2 Mer. 134.

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The case of *Greenwood* v. *Verdon* (*a*), was much relied on, however, as establishing the rule that a gift to the survivor of certain legatees limited the dying without issue to the life of the survivor. In that case the testator gave legacies to certain persons by name, and then devised the residue of his personal property, and all his real property to his wife and son for their lives, and after the decease of the wife to the son, his heirs and assigns for ever, and from and after the decease of the wife and of the son without issue, "to the then surviving legatees, share and share alike." There the class of persons was ascertained, and the survivor of that class was to take. The case is of difficult apprehension. In accordance with many previous decisions the word *then* would seem to refer to the death without issue, and this phrase means an indefinite failure of issue. The Vice Chancellor must have thought a benefit personal to the person to have been intended, and then the dying without issue would be limited to the death. If it carries the matter further than this it is at variance with other cases which are equally binding upon me. Thus in *Garret* v. *Cockerel* (*b*), the bequest was, "if all my children die without heirs my property in that case to be divided equally between the children of my brother and sisters alive on the death of my last child," Lord *Langdale* held the bequest over void, and Sir *J. L. Knight Bruce* followed it though expressing doubt. Being a bequest of personalty it was void, because the language meant an indefinite failure of issue. Had the property been realty it would have given an estate tail. In *Travers* v. *Gustin* (*c*), there was a devise of real estate to go, share and share alike, between surviving children or their heirs, when the youngest child came of age, and in case of the children dying without issue then their

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(*a*) 1 K. & J. 74. (*b*) 1 Y. & C. C. C. 494.
(*c*) 20 Grant 106.

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uncle was to be the testator's heir. *Strong*, V. C., says: "The first gift to the children and their heirs is cut down by the subsequent words, 'and in case of my children dying without issue' to an estate tail." There the ultimate gift on failure of issue was to the testator's brother, as equally specific and definite as in this case to the testator's children, but this did not prevent the usual rule applying.

The other argument for the limited time for the failure of issue was that the devise over was of mixed realty and personalty. In the cited case of *Travers* v. *Gustin*, this argument is also disposed of. The learned Judge says: "The words, dying without issue, cannot be read as imputing anything but an indefinite failure of issue, consequently all subsequent limitations are as regards the personal property void for remoteness. Words applied to personalty which would expressly give an estate tail in realty, confer an absolute interest, and it is now also well settled that words which would create a fee tail by implication in real estate give the absolute property in personalty. It can make no difference that by this will real and personal property are comprised in the same gift. The well-known case of *Forth* v. *Chapman* (*a*), shews this very clearly." Considering that clearly to express the law on the subject, I do not think it necessary to notice the argument that the word *share* only refers to the personalty. I may say, however, that my impression is otherwise, and that it intends the whole interest under the will, the share of the estate.

Judgment.

It would be an endless labor to refer to all the cases that were cited. I shall only quote *Gray* v. *Richford* (*b*). The devise was to my son *John Gray*, his heirs and assigns forever. But if my said son *John* should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then,

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

(*b*) 2 Sup. Court 431, 445.

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and in such case I will and devise the lands to my son *Thomas Gray*, his heirs and assigns, to have and to hold the same at the death of the said *John Gray* to my son *Thomas*, his heirs and assigns forever. The canon of construction laid down by the Chief Justice, and supported by a reference to nearly all the cases cited to me, is this, "No doubt the rule is, that where real estate is devised, either directly to or by way of executed trust for a person and his issue, the word issue will be construed a word of limitation so as to confer an estate tail on the ancestor, unless there are expressions *unequivocally* indicative of a contrary lawful intent. * * If, however, the testator makes use of words in his will which indicate an intention to confine the generality of the expression of dying without issue, to dying without issue living at the time of the person's decease, they will be so construed to effectuate the intent." This rule is of course binding on me, and I acquiesce in it as a clear statement of the law. There could be little doubt that in *Gray* v. *Richford* the dying without issue was confined to a failure of issue at the death of *John*—the issue were to be issue surviving him, and the devisee was to take at *John's* death. The Chief Justice and Mr. Justice *Henry* commented upon most of the cases cited to me.

Judgment.

I think that *Robert* took an estate tail. There will be a declaration accordingly, and the defendant will have his costs from the plaintiffs.

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PARKHURST v. ROY.

Will, construction of—Devise to a foreign State—Mortmain—Perpetuity.

A testator desired his executor should, "so soon after his death as might be found convenient, sell and convert all my said estate into cash, and after paying my funeral and testamentary expenses, &c., will pay and deliver the rest and residue thereof to the Government and Legislature of the State of Vermont, one of the United States of America, to be disposed of by the said Government and Legislature as they shall deem best." The Legislature (the Senate and House of Representatives) of the State of Vermont passed resolutions accepting the bequest and assuming the duties of the trust, with a determination to perform them with fidelity and zeal.

Held, that this was a valid devise and bequest of the estate; that the governing body of the State was capable of assuming and discharging the duties of trustee; and that the Court ought to give effect to such resolutions as an assertion by the highest authority of the State that the trust was legal, or that it would be made so.

By another clause of his will the testator suggested and recommended that the profits to arise from the investment of the funds, amounting in all to $203,000, should be added to the principal until the whole sum should be sufficient to pay each county in the said State $100,000.

Held, that this did not render the trust void as creating a perpetuity.

So far as the devise affected real estate in this Province, it was void as contravening the Statutes of Mortmain.

Judgment.

The bill in this cause was filed against *Ebenezer Roy* and *The Government and Legislature of the State of Vermont*, on the 28th August, 1877, and as amended under order of 13th October, 1879, stated that the plaintiff, *Arunah Parkhurst*, of Farmington, in the State of Michigan, physician, was one of the heirs-at-law and next of kin of *Arunah Huntington*, who died at Brantford 10th January, 1877, having first duly made his last will and testament, of which he appointed the defendant *Roy* sole executor; by which he made several small specific legacies, and by the third clause thereof declared the "wish that my executor shall, so soon after my decease as may be found

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convenient, sell and convert all my said estate into cash, and, after paying my funeral and testamentary expenses, and of proving and registering this my will, pay and deliver the rest and residue thereof to the Government and Legislature of the State of Vermont, one of the United States of America, to be disposed of by the said Government and Legislature as they shall deem best, having regard to the recommendations hereinafter contained," and appended a schedule or statement shewing the items of real and personal estate—(other than household goods, furniture, and wearing apparel), of which the testator was possessed at the date of his will—as follows:—

Statement.

1. Stock of the Manufacturers and Traders' Bank, Buffalo	$40,000	
2. Cash in hands of Henry Martin & Sons, Buffalo	20,000	
3. Preferred Stock in Northern Pacific Railway	14,000	
4. Bonds of the Vermont Division of the Ogdensburg and Portland Railway	4,000	
5. Cash Deposits in the Manufacturers' and Traders' Bank, Buffalo	7,000	
6. Stock in the Michigan Central Railway	40,000	
7. Bonds of the Buffalo, New York and Philadelphia Railway	40,000	
The above in the United States		$165,000
8. Stock in the Royal Canadian Ins. Co., $20,000, of which paid	$2,000	
9. The Royal Loan and Savings' Co. of Brantford, $5,000, of which paid	1,500	
10. Robert Shannon's Mortgage	4,500	
11. Lot 9 in the 4th con. Township of Brantford, 150 acres	5,000	
12. Lot 14, on the south side of Colborne Street, in the Town of Brantford, 5 stores	12,000	
13. Lot 5, and the East ½ of Lot 4, on the south side of Colborne Street, in the said Town of Brantford	6,000	
14. Lots 4, 5, and 6, on the south side of Darling Street, in the said Town of Brantford	7,000	

Which shewed that the testator at the time of his death was possessed of real and personal property situate in the United States of America, and in this Province, valued at about $203,000, of which the sum of $30,000 was comprised in real estate situate in the City of Brantford aforesaid, and the sum of $4,500 on a mortgage on real estate, situated in the same city.

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The bill further alleged that "the Government and Legislature of the State of Vermont" were a foreign State, forming a part of the United States of America, and as such recognized by the Courts and Government of this country, and submitted that the devise and bequest to the defendants, the Government and Legislature of the State of Vermont, were for charitable purposes; and so far as the same consisted of real property, or money secured on real estate, or to be invested or secured on the same, such devise and bequest were void, under the Statute of Mortmain, passed in the ninth year of the reign of His Majesty, King *George* the second, and chaptered 36: that the trusts of the said will were illegal according to the laws of the State of Vermont, and that the same were therefore null and void: that the Courts of the State of Vermont had no power as against the defendants, the Government and Legislature of the State of Vermont, to compel the said defendants to carry the said trusts into effect for the benefit of the Common or District Schools of the said State of Vermont, as recommended by the will, and that the same were therefore void; and that the said trusts were illegal according to the laws respectively of the States of New York and Michigan, and that as to so much of the securities and moneys mentioned in the said will as were therein situate the said trusts were null and void; and prayed relief accordingly.

Statement.

The defendants severally answered the bill; *Roy* by his submitting the question to the Court whether or not the devise and bequest to the other defendants were void, and therefore could not be carried out, and could not be enforced by the Court. The defendants *The Government and Legislature of Vermont* insisting that the devise and bequest were valid, and ought to be carried out by this Court.

Evidence was taken by Commission, the effect of which is clearly stated in the judgment.

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The case came on to be heard before *Proudfoot*, V.C., on the pleadings and evidence, at Toronto, on the 12th day of February, 1880.

Mr. *Boyd*, Q. C., and Mr. *Black*, for the plaintiff, contended that the trusts of the will were illegal according to the laws of the State of Vermont, and that the State could not be compelled to act as trustees under the will; and that the Courts of that State had no power to enforce as against the said State the trusts thereof. They also contended that the trusts created by the will in favour of the State of Vermont were void according to the laws of this Province, the domicile of the testator, and that they were also void as providing for an illegal accumulation of property.

Argument.

Mr. *Bethune* and Mr. *Moss*, for the defendants. It is shewnby evidence that the Senate and House of Representatives of the State of Vermont, subsequently to the devise, passed a resolution accepting the bequest, and undertaking to assume the duties of the trust under the will; that the State of Vermont having accepted the trust thereby became a competent trustee, and that the domicile of the testator having been in Ontario, the law of Ontario governed, and by that law the devise of the personal property was valid.

March 18th. Judgment.

PROUDFOTT, V. C.—The bill is filed by one of the heirs-at-law and next of kin on behalf of himself and the other heirs and next of kin of *Arunah Huntington*, late of the city of Brantford, in Ontario, who died there on the 10th of January, 1877.

By his will, dated the 15th of November, 1876, *Arunah Huntington* gave a specific bequest to his wife, and then devised and bequeathed all the rest, residue and remainder of his estate, personal and real, to his executor upon the trust therein mentioned. "It is my wish that my executor shall, so soon after my decease as may be found convenient, sell and convert

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all my said estate into cash, and after paying my funeral and testamentary expenses, &c., will pay and deliver the rest and residue thereof to The Government and Legislature of the State of Vermont, one of the United States of America, to be disposed of by the said Government and Legislature as they shall deem best, having regard to the recommendations hereinafter contained. I recommend the said Government and its Legislature to appoint three trustees under regulations to be approved of and settled by the said Legislature, for the management, control and distribution of said fund, and in accordance as far as may be with my wishes hereinafter expressed. First. I would suggest and recommend to the said Government and Legislature, and to the trustees to be appointed, the propriety of employing the capital of the said fund in the establishment of a banking institution to be called the Vermont District School Bank, or of an institution for investing the said capital in mortgages on real estate. Second. I would further suggest and recommend that the profits to arise from the investment of the said funds as aforesaid, should be added to the principal until the total accumulation shall amount to a sum sufficient, when distributed, to pay each county in the said State the sum of $100,000. Third. I would further suggest and recommend that thereafter the profits arising annually from the investments of the said capital shall be divided by the said trustees, under regulations to be framed by the said Government and Legislature as aforesaid, equally among the several counties comprising the said State of Vermont, for the use or benefit of common schools. Fourth. I would also suggest and recommend to the said Government and Legislature the propriety of repealing the usury laws of the said State, and of not assessing for school purposes any person whose assessment does not amount to at least $1,000." The testator appointed the defendant *Roy* his sole executor. The testator annexed to

Judgment.

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his will a schedule of his estate amounting, exclusive of household furniture, wearing apparel, and household goods, to the sum of $202,000, par value.

From the schedule it appears that a large part of his estate ($165,000) consisted of stocks in banks and railways and railway bonds, and money on deposit in bank, &c., in the States of Michigan and New York. The remainder chiefly in real estate, &c., in Ontario.

The plaintiff submits that the devise is void as to the real estate under the Statute of Mortmain: that the trusts and onditions of the devise cannot be carried out by the defendants, and cannot be enforced by this Court: that the trusts are void as creating a perpetuity: that the trusts are illegal according to the laws of the State of Vermont, and are therefore null and void: that the Courts of Vermont have no power against the Government and Legislature of the State, to compel them to carry into effect the trusts for the benefit of the common or district schools, and are therefore void:

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that the trusts are illegal according to the laws of New York and Michigan, and are void as to the securities and money situate in those States.

The defendant *Roy*, by his answer, submits to the Court whether the devises are void or not.

The defendants, The Government and Legislature of Vermont, submit that the devise and bequest to them are valid, and can and ought to be carried out by this Court.

The Senate and House of Representatives of the State of Vermont, at their regular biennial session in 1878, passed a resolution as follows: "Whereas *Arunah Huntington*, a native of Vermont, and late of Brantford, Province of Ontario, Dominion of Canada, deceased, by his last will and testament bequeathed to the State of his nativity, as a common school fund, an estate valued at over $200,000. And whereas it is due to the memory of the deceased that the State should, through its Legislature, place upon record an expression of its

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appreciation of his generous bequest; therefore, be it resolved by the Senate and House of Representatives that we accept the bequest of the said *Arunah Huntington* with grateful recognition of his affectionate regard for his native State, and his donation, and assume the duties of the trust with a determination to perform them with fidelity and zeal. That the Governor be and he hereby is directed to take, on behalf of the State, all necessary and proper measures to prevent any impairment of the design of the testator, and secure the full benefits contemplated by his will."

The Hon. *Thomas M. Cooley*, one of the Justices of the Supreme Court of Michigan, *John Hubbel*, a counsellor-at-law in Buffalo, in the State of New York, the Hon. *John Prout*, a former Judge of the Supreme Court of Vermont, and now a practising counsellor-at-law in the State, and *E. J. Phelps*, a counsellor-at-law in Vermont, have been examined as witnesses. All gentlemen of ability, and some of them of more than local reputation.

Judgment.

These witnesses establish that the property of the testator in the United States is all of a personal nature. And this being established I think the evidence in regard to the law of the States of Michigan and New York is immaterial. For the domicile of the testator having been in Ontario, the validity of any bequests of his personal property must be decided by the law of Ontario; personal property having no *situs*, but being annexed to the person, and following the law of his domicile.

Mr. Justice *Story* in his Conflict of Laws, after stating the general rule that personal property has no locality, proceeds to say, s. 383, that it follows as a natural consequence that the laws of the owner's domicile should in all cases determine the validity of every disposition made by the owner. He excepts, however, cases where by some positive or customary law of the country where the personal property is situate, or from

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the nature of the property, it has an implied locality. He instances stock in the public funds, bank stock, railway stock, and others. But it is plain he is speaking of the solemnities required to transfer these properties, or to cases where the local law has indicated a special mode of devolution. He says no positive transfer can be made of such property except in the manner prescribed by the local regulations. But contracts to transfer would be valid if made according to the *lex domicilii* of the owner, or the *lex loci contractus*, unless specially prohibited by the *lex rei sitæ*, and the property would be treated as personal or real, in the course of administration, according to the local law. He quotes Mr. *Burge* as saying that though stocks of this nature can only be transferred according to the forms of the *lex rei sitæ*, so as to confer a legal title on the purchaser, yet it will give the purchaser a right of action to compel the vendor to make a transfer in the manner required by the local law, (3 *Burge* Comment. 750), and *Erskine* in his Instit. (B. 3, tit. 9, sec. 4), that stocks of that nature are descendible according to the law of the State where they are fixed, but the bonds or notes of the companies are no exception to the general rule.

Judgment.

Mr. Justice *Cooley*, in his evidence, says, that the stocks in this case are personal property by the laws of all the States in which they are situate. But there seems to be no regulations providing for any special mode of devolution different from that attaching to all personal property. Had the testator been domiciled in Michigan the trusts in the will would not have been valid. But that would not have depended on the nature of the property, but on the prohibition upon the testator to make such a disposition. Mr. Justice *Cooley* adds, if the property devised was such as to pass the title by virtue of the foreign probate and no act of transfer was required, there he thinks their Courts would recognize and act upon the foreign probate on

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the will being re-probated there. *Hubbell* gives similar evidence as to the law in New York. And so far as the witnesses from Michigan and New York speak of the law of Vermont, I apprehend their evidence does not come within the definition of expert evidence, as their knowledge seems to have been acquired from sources equally open to myself: *Sussex Peerage* (*a*).

It was admitted by the counsel for the State of Vermont, that so far as the devise affected real estate it was void as contravening the Statutes of Mortmain in force in this Province, and there is no doubt that this is our law: *Anderson* v. *Kilborn* (*b*).

The arguments addressed to me against the validity of the bequest were, that the State of Vermont was not a competent trustee: that the Courts of Vermont had no power to supervise the trustee: that the trusts as to accumulation were mandatory and imperative, and they were void as creating, or tending to create, a perpetuity.

Judgment.

I have no hesitation in holding that the devise to the Government and Legislature of the State of Vermont is equivalent to a devise to the State of Vermont. The State can only act through its Government and Legislature, the legislative and executive power, and these apart from the State would be a nonentity.

The evidence shews that the State of Vermont has a legal existence under that title. And in *Perry* on Trusts, sec. 41, the capacity of sustaining the character of trustee, and of taking and executing trusts for every purpose, is ascribed to the United States and each one of the separate States. Mr. *Perry* cites *Mitford* v. *Reynolds* (*c*), and *Nightingale* v. *Goulbourn* (*d*). A decision was referred to by counsel, *Levy* v. *Levy* (*e*), in which it was denied that the United States could

(*a*) 11 Cl. & Fin. at 134.
(*b*) 13 Gr. 219.
(*c*) 1 Phil. 185.
(*d*) 2 Phil. 594.
(*e*) 33 N. Y. 97.

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take in trust. This case is said to have been overruled: *Bigelow's* Overruled Cases, 3 *Washburne's* Real Property Law, 443, 3rd ed. At all events Mr. *Perry* is of opinion (sec. 45) that the case would not be followed outside of New York State. On referring to the case there appear to have been several special circumstances which would detract from its application as laying down a general rule. The devise there was "to the people of the United States, or such persons as Congress shall appoint to receive it, in trust, &c., and should the Congress of the United States refuse to accept them to the people of the State of Virginia instead of the people of the United States, provided they, by acts of their Legislature, accept it and carry it out." A considerable portion of the judgment turns upon this acceptance being a condition precedent to the existence of the trust. And there had been no acceptance.

Judgment.

If this position be correct, that the State can accept trusts for any purpose, it disposes of the second argument that the Courts have no power to supervise the acts of the State. It will not be presumed that a Sovereign State requires such supervision, that it would do anything to violate the trust reposed in it, or if any omission or inadvertence should occur in the application of the trust, that it would not, upon petition, set it right. The argument to be of any value would require to go a step further, and hold that this Court would not recognise a gift to a charity in a foreign country where it would be beyond the control of this Court, for there would be no greater assurance, if so great, of a foreign Court discharging its duty, than of the foreign State to which that Court owes its existence. But the cases are numerous in which the validity of bequests to be applied in foreign charities have been sustained: *Story's* Equity Jurisprudence, sec. 1184, note 4. See also *New* v. *Bonaker* (*a*). In *Mitford*

(*a*) L. R. 4 Eq. 655.

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v. *Reynolds* (*a*), a testator bequeathed the remainder of his property to the Government of Bengal, to be applied to charitable, beneficial, and public works at and in the city of Decca in Bengal, and it was held a valid charity. The State of Vermont has accepted the bequest, and expressed its determination to assume the duties of the trust, and to perform them with fidelity and zeal. I cannot suppose that the State will require any judicial interference to make them comply with this deliberate resolution.

But it is said that the recommendations of the testator are imperative, and amounting to an endeavour to create a perpetuity are void. It was not very distinctly alleged whether they would be void because they contravene our law, or the law of the State of Vermont.

In regard to our law, I am not satisfied that a bequest, violating the rule as to perpetuities, is of such a character that it is to be held void, when it is to be executed in a foreign country. Mr. Justice *Story* remarks (Eq. Jur., sec. 1185) it is not every bequest which, if to be executed in England, would be void under the Mortmain Act, that will be held void when it is to be executed in a foreign country. There must be some other ingredient, making it reprehensible in point of public policy. As money to be laid out in lands in Scotland may be a valid bequest, though if to be laid out in lands in England it would be void: *Oliphant* v. *Hendrie* (*b*), *Anderson* v. *Kilborn* (*c*). If this be the rule in regard to a provision of the Mortmain Acts, it would be equally so in regard to a general provision of our law, such as that against perpetuities.

Judgment

In regard to the law of Vermont, Mr. *Prout* says the Mortmain Acts are not in force there, nor any similar law. He says the only objection he sees to the bequest is the period limited in the will during which the fund

(*a*) 1 Phil. 185.
(*b*) 1 B. C. C. 571.
(*c*) 13 Gr. 219.

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should accumulate, but which he does not think would defeat the bequest. The law on the subject of perpetuities is the same as the common law of England. He thinks their Courts would disregard the provisions of the will as to accumulation beyond the period allowed by law,—the life and lives of persons in being and twenty-one years afterwards. Mr. *Phelps* expresses similar views. He also states that the equity rule of *cy pres* is in force in Vermont. Assuming, however, that if the recommendations are imperative, the bequest would be void as tending to a perpetuity by the law of Vermont, and that this Court should not hold the bequest valid, it remains to consider whether these recommendations are imperative.

There is no doubt that a trust may be created by the use of the words of entreaty or recommendation, and numerous examples may be found collected, in *Lewin* on Trusts, 167, 3rd ed., and *Jarman* on Wills, 356, 3rd ed., but every case must depend upon the in-

Judgment.

tention of the testator, to be inferred from the whole of the language of the will and from the circumstances of the case. The bequest here is to the Government and Legislature, to be disposed of as they shall deem best, having regard to the recommendations. He then recommends the appointment of three trustees, under regulations to be settled by the Legislature, for the management, control, and distribution of said fund, and in accordance *as far as may be* with his wishes thereupon expressed. The phrase, *as far as may be*, appears to me to be the key to the intention of the testator. He was making a bequest to his native State for the benefit of the schools,—he does not wish to contravene their laws so that the State should not be able to receive the benefit. He adds, therefore, that his wishes on the subject are to guide so far as they may do so. What was to prevent their being the guide, unless the law? I construe this as being expressive of a desire that his wishes, if legal, should be attended to, if not,

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he leaves the mode of disposition to the wisdom of the representatives of the State. If the rule as to perpetuities should prevent the accumulation he recommended, then that accumulation would not be a condition of the bequest. But the testator also knew that the Legislature represented a sovereign State which could enact what laws it pleased, and the recommendation would receive full effect as an appeal to the Legislature to pass such laws as might give effect to his wishes, without deeming it of the essence of the bequest that they should do so. The nature of some of the recommendations seem to me to favour this view. Thus in the first he suggests the establishment of a bank, or of an institution for investing in real estate. He indicates no preference for either, he leaves it to the Legislature to decide. The fourth seems to me to be conclusive as to the nature of the recommendations. He suggests the propriety of repealing the usury laws, and an amendment of the assessment laws, so as not to assess for school purposes any person whose assessment does not amount to at least $1,000. The former of these has no connection with his bequest at all, and the latter only a very remote one, he probably thought that the gift he was making would enable the State to relinquish the assessment to the extent he indicates. But it would be a very extraordinary construction to say that these were conditions of the bequest.

Judgment.

My conclusion, therefore, is, that while the will creates a trust for the benefit of the common schools of Vermont, it is such a trust as is legal by the laws of the State, or such as the State can, if it choose, make legal, *i. e.*, he makes the gift subject to the existing laws, with the recommendation to the State, in its wisdom, to modify these laws so as to give effect to his wishes.

There is, besides, the acceptance of the trust by the State and a determination to perform the duties of the

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The costs of all parties will be borne ratably by the pure personalty and the impure personalty: *Anderson* v. *Kilborn* (*a*). Those of the executor as between solicitor and client.

RAE v TRIM.

Crown lands—Highways—Dedication—Municipal by-law.

A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of Crown lands before patent issued dedicate any portion of the same: parties so in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained.

In 1855, the plaintiff became the owner, by a patent from the Crown, of lot No. 8, in the 1st concession of Mornington, and at once went into possession of the property.

Statement.

The front half of the lot being very swampy, he cleared the rear half, and built his house there.

(*a*) 22 Gr. 385, 397.

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In 1856 the plaintiff, and other settlers in that neighbourhood, petitioned the municipal council of the township to open a highway along the blind line, between the 1st and 2nd concessions, from the plaintiff's lot across lots 7 to 1 to the line between the townships of Elmira and Mornington.

The plaintiff claimed that the council, in 1859, duly passed a by-law, opening and establishing, as a public highway, a road allowance along said blind line, as far as the plaintiff's land, taking a strip of land of equal width from both the 1st and 2nd concessions; and that ever since that time their statute labour had been done upon this road allowance, and it had been used as a public highway.

The plaintiff further alleged that recently the defendants, who owned different parts of lot No. 7, in the 1st Concession of Mornington, had obstructed the said highway by erecting fences across it to the blind line, and the plaintiff claimed to be entitled to enjoin the defendants from these alleged wrongful acts.

Statement.

The defendants having answered the plaintiff's bill, claiming that at the time the by-law before mentioned was passed, the fee to the greater part of the land embraced in such road allowance was vested in the Crown, and that therefore the Council had no power to make such a by-law, the plaintiff amended his bill setting up that prior to the passage of the by-law the defendants were locatees of the lands, and although they had not actually obtained the patent when the by-law was passed, yet that they had an equitable estate in the lands before the passage of the by-law, and that the by-law never having been repealed, or oved against, bound them.

The plaintiff further contended that the defendants were guilty of fraud in not disclosing to the Government, when applying for their patent, the fact that the municipal council, by the by-law so passed by them, claimed to have some right to a portion of the land covered by their patent.

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The plaintiff alleged special damage to himself by reason of his having built upon the rear part of his lot, and made his improvements thereon, on the faith of the by-law being good and the said road allowance effectually set apart as a highway.

The plaintiff also claimed that by the conduct of the defendants in permitting this road allowance to be used for years as a public highway, without any objection or remonstrance, they had, in effect, dedicated that portion of their lots to the public as a highway.

The defendants, besides claiming that the by-law was invalid on the ground above mentioned, also shewed that the alleged highway was used by no one except the plaintiff and those visiting him; that the plaintiff had frequently been informed that they did not recognize his right to use the land, but that he might use it so long as the defendants did not require to clear that portion of their land, in accordance with the customary dealings between neighbours.

As soon as it became necessary to use that part of their lands they fenced in the same, and refused to permit the plaintiff any longer to use it as a road, which gave rise to the present suit.

It was shewn at the hearing that before the institution of the suits the defendants had offered to sell a sufficient quantity of land for a roadway for the sum of $15; this offer, however, the plaintiff rejected, and proceeded to file the bill and brought the cause down to a hearing before *Blake*, V.C., at Toronto, on the 1st of March, 1880.

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

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

Judgment. May 8th.

BLAKE, V.C.—The land needed for the road was offered to the plaintiff for $15. This was refused, and as the result twenty-one witnesses have been examined,

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which has resulted in the production of four hundred and fifty-five folios of evidence, and the citation, commenting on, and reading by me, of the following authorities: *Haynes* v. *Copeland* (*a*), *Smith* v. *Toronto* (*b*), *Wilson* v. *Middlesex* (*c*), *Carmichael* v. *Slater* (*d*), *Re Lafferty* (*e*), *Rex* v. *Sanderson* (*f*), *Beveridge* v. *Creelman* (*g*), *Barry* v. *Gillies* (*h*), *Re Cuckfield Burial Board* (*i*), *Alexander* v. *Reid* (*j*), *Glover* v. *Walker* (*k*), Doe *Henderson* v. *Seymour* (*l*), Doe *Henderson* v. *Westover* (*m*), *Welland* v. *The Buffalo and Lake Huron R. W. Co.* (*n*), *Cotton* v. *The Hamilton and Toronto R. W. Co.* (*o*), *Mountjoy* v. *The Queen* (*p*), *Rex* v. *Allan* (*q*), *Lister* v. *Lobley* (*r*), *Regina* v. *Lordsmere* (*s*), *Regina* v. *Thomas* (*t*), *Guelph* v. *Canada Company* (*u*), *Rugby* v. *Merryweather* (*v*), *Rex* v. *Lloyd* (*w*), *The Trustees of the British Museum* v. *Finniss* (*x*), *Regina* v. *Petrie* (*y*), *The Queen* v. *East Mark* (*z*), *Surrey Canal Co.* v. *Hall* (*aa*), *Regina* v. *Bradfield* (*bb*), *Regina* v. *Wismer* (*cc*), *Regina* v. *Rankin* (*dd*), *Woodyer* v. *Hadden* (*ee*), *Angell* on Highways (*ff*), *Regina* v. *Hunt* (*gg*), *Regina* v. *The Great Western R. W. Co.* (*hh*), *Byrnes* v. *Bown* (*ii*), *Prouse*

Judgment.

(*a*) 18 U C. C. P. 150.
(*b*) 7 U. C. L. J. 239.
(*c*) 18 U. C. R. 348.
(*d*) 9 U. C. C. P. 423.
(*e*) 8 U. C. R. 232.
(*f*) 3 O. S. 103. [*Ib.* 213.
(*g*) 42 U. C. R. 29.
(*h*) 20 U. C. C. P. 369, and 21 [C. R. 539.
(*i*) 19 Bea. 153.
(*j*) 8 U. C. C. P. 539.
(*k*) 5 U. C. C. P. 478.
(*l*) 9 U. C. R. 47.
(*m*) 1 E. & Ap. 465.
(*n*) 30 U. C. R. 145, and 31 U.
(*o*) 14 U. C. R. 87.
(*p*) 1 E. & Ap. 429.
(*q*) 2 O. S. 90.
(*r*) 7 Ad. & El. 124.
(*s*) 15 Q. B. 689.
(*t*) 7 El. & Bl. 399.
(*u*) 4 Gr. 632.
(*v*) 11 East 376.
(*w*) 1 Camp. 260.
(*x*) 5 Car. & P. 460.
(*y*) 4 El. & Bl. 737.
(*z*) 11 Q. B. 877.
(*aa*) 1 Scott N. R. 264.
(*bb*) L. R. 9 Q. B. 552.
(*cc*) 6 U. C. R. 293.
(*dd*) 16 U. C. R. 304.
(*ee*) 5 Taunt. 125.
(*ff*) Secs. 143, 148, 165.
(*gg*) 16 U. C. C. P. 145, and 17 U. C. C. P. 443.
(*hh*) 21 U. C. R. 577.
(*ii*) 8 U. C. R. 181.

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v. *Glenny* (*a*), *Jamieson* v. *Harker* (*b*), *Dowsett* v. *Cox* (*c*), *Re Smith and Euphemia* (*d*), *Dennis* v. *Hughes* (*e*), *Re Brown and York* (*f*), *Regina* v. *Plunkett* (*g*), *Grand Hotel Co.* v. *Cross* (*h*), *Wood* v. *Veal* (*i*), *Harper* v. *Charlesworth* (*j*), *Mytton* v. *Duck* (*k*), *Regina* v. *Gordon* (*l*), *Belford* v. *Hynes* (*m*): C. S. U. C., ch. 54, secs. 321, 325, 331, 358, sub-secs. 4, 12.

The case occupied four days. I have, since its argument, again read the evidence, and am strengthened in the view I formed when the cause was being heard.

Judgment.

The Crown opened such roads and thereby dedicated, for the purpose of highways, so much of its land as it thought proper, and I do not think there can be taken from it, by a by-law of the corporation, any lands in addition to those given for the purpose of opening up the country. In the survey made by the Crown it allotted such portions of the land as it deemed necessary to answer its purposes, and if more of the land belonging to the Crown were wanted, it could not be taken without its assent. I do not think there was any intention on the part of the defendants, or those under whom they claim, to dedicate the land now demanded as a public highway. That part of the road in question claimed by the plaintiff was not used by the public. It was the means of exit allowed by neighbours for the benefit of a neighbour. The land could not be actually dedicated by the defendants while it was in the Crown; but although this is so, yet still parties may so far bind themselves by their acts as

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(*a*) 13 U. C. C. P. 560.
(*b*) 18 U. C. R. 590.
(*c*) 18 U. C. R. 594.
(*d*) 8 U. C. R. 222.
(*e*) 8 U. C. R. 444.
(*f*) 8 U. C. R. 596.
(*g*) 21 U. C. R. 536.
(*h*) 44 U. C. R. 172.
(*i*) 5 B. & Ald. 454.
(*j*) 4 B. & C. 574.
(*k*) 26 U. C. R. 61.
(*l*) 6 U. C. C. P. 213.
(*m*) 7 U. C. R. 464.

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that when a patent issues to them the land granted would be bound in their hands by the right or easement which had obtained their sanction.

In the present case I am unable to conclude that there was any such act or intention. Such assent, intention, and act must be clearly proved before the Court will take away a man's land from him. This has not been done here. The road was not marked out by the surveyor beyond lot 6. Beyond this point he merely ran a trial line, more or less accurate. The road was of various widths—33, 40, and 60 feet, according to the locality; and opposite lot 7 it was not even cut out 40 feet in width. It was not extraordinary that the statute labour of Mr. *Rae* should have been allowed on this part of the road, so as to give him a means of egress and ingress; or that, as a matter personal to him, the small sum spoken of should have been allowed, as he was complaining to a friendly councillor that he could not get into or out of his property. We must look at the state of the country at the period in question, and remember that as a matter of convenience, in very many places such a liberty as that accorded to the plaintiff by the defendants has been often given, but it has never been held that thereby the one is bound to give up to the other an absolute right in the land, because such liberty of user as a means of going in and out was for a time accorded. The land in question could not be taken from the Crown against its wish. This land the Crown has granted, without mistake on its part or fraud practised on it, to the defendants. They have done no act to dedicate, nor to entitle the plaintiff to claim this land as against them.

Judgment.

I think the bill should be dismissed, with costs.

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KENNEDY v. BATEMAN.

Tenants in common—Statute of Limitations—Real Property Limitation Act—Sheriff's sale.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The Court, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs.

Whether the sale under execution was operative or not, the defendant having held possession ever since, claiming the premises as absolute owner, the title by virtue of the Statute of Limitations ripened into a title in his favour.

Statement.

This was a suit by *Caleb Kennedy, Catherine Kennedy*, his wife, by her next friend, *Thomas Smith, Mary Ann Smith*, his wife, by her next friend, and *Horatio N. Bateman, George Bateman, John H. Bateman, Peter Edwin Bateman, Georgianna Bateman*, and *Robert Bateman*, infants under the age of twenty-one years, by their next friend, against *John Bateman*, setting forth that *Horatio N. Griffin*, deceased, who died intestate on 20th September, 1853, was at the time of his death seised of 200 acres in the township of Madoc, being composed of the east half of lot 3 and the west half of lot 4, in the 4th concession, leaving him surviving his widow, *Lucy Griffin*, and his three daughters, *Delilah Griffin* (afterwards *Bateman*, wife of the defendant) now deceased; and the plaintiffs *Catherine Kennedy* and *Mary Ann Smith*: that at the time of the said *Horatio N. Griffin's* death, his widow and his three daughters, together with *Thomas Smith*, the husband of *Mary Ann Griffin*, were all residing together on the said premises.

The bill further stated that the widow on the 10th of October, 1853, was duly appointed administratrix of

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the intestate's estate, and immediately proceeded to settle the affairs of the estate, and paid off all claims or debts against the estate of her late husband, after which *Thomas Smith* and his wife left the premises and removed to a distant part of the province, leaving the other members of the family in occupation and control of the said lands; that on the 9th of September, 1858, *Delilah Griffin* married the defendant, who continued to reside on the premises and to work the same with the widow and family, but shortly afterwards *Catherine Griffin*, being dissatisfied with the manner in which *Bateman* managed the property, left and went to reside with her sister *Mary Ann*, and on the 2nd of February, 1860, married the plaintiff *Caleb Kennedy*.

The bill also stated that after *Catherine* left, the defendant had induced the widow to agree to raise some money on one of the said half lots, and then had prepared a quit claim deed from the three daughters to their mother of the west half of No. 4, and sent the same to *Mary Ann Smith* and *Catherine Griffin* for execution by them, saying that his wife would execute it after it was returned to him, and that the object of making such deed was to raise money in order to make their mother more comfortable on the place; that they accordingly executed such deed and returned it to *Bateman*, in June, 1859, but the same never was registered, and they were unable to ascertain if it had ever been executed by their sister *Delilah Bateman*.

Statement.

The bill further stated that in the year 1871 the widow left the premises to visit one of her daughters, leaving the defendant in possession as her tenant, but she never returned thereto; and before she left a claim was made against her as administratrix of her late husband for a debt of which she had never before heard, and she was prevailed upon by the defendant to give a confession for the amount (about $50). Afterwards, hearing that the east half of lot No. 3—the portion of the lands on which she was residing—was

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advertised for sale under a writ of execution issued on said judgment, she sent to her son-in-law, the said *Thomas Smith*, requesting him to come and arrange the matter by paying off the claim; and he accordingly made arrangements to do so, when the defendant told him that he (*Smith*) need not trouble himself about the judgment, as he (*Bateman*) had made arrangements to settle it and would pay it off; and relying on such statement of *Bateman*, *Smith* returned home, believing that the claim would be settled by *Bateman*, and the sale of the land prevented; and had it not been for such promise and representation by *Bateman*, *Smith* would have paid off the claim, but the defendant misled the parties with the view of obtaining the property for himself.

Statement.

The bill further stated that some years afterwards, and a year or two after the widow had left the premises, she and her daughters *Mary Ann* and *Catherine* learned that the land which had been advertised had been sold in 1860 under the writ of execution, and had been bought in by *Bateman*, who had obtained a deed thereof from the sheriff to himself for the amount of the judgment, although worth the full sum of $1,000, and the sale thereof was grossly improvident, and in fact fraudulent; and that the issue of the execution and the sale thereunder were contrived by the defendant, and were all part of a fraudulent scheme and plan on the part of the defendant to acquire the title to the said premises.

The bill further alleged that the widow, after hearing of such purchase by the defendant, refused to return to reside on the property with him, and being unable to induce the defendant to deliver up to her the said quit claim deed, she did, in August, 1871—after the death of her daughter *Delilah*, who died in July, 1869—institute proceedings in ejectment against the defendant to recover possession of the portion of the lands comprised in such deed of quit claim; and in Septem-

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ber, 1871, judgment was obtained therein against the defendant, who did not defend the action, but no writ of possession was sued out thereon, the said *Lucy Griffin* relying upon effecting an arrangement of all the matters in controversy without proceeding to extremities. The said infant plaintiffs were the only children of the said *Delilah Bateman*, all of whom, with the exception of *Horatio N.* and *Peter Edwin*, were residing with and supported by the other plaintiffs.

Lucy Griffin died in 1877, intestate, leaving her surviving her two daughters *Catherine* and *Mary Ann*, and the said infant plaintiffs.

The bill further stated that the defendant had frequently, before and since the death of the widow and within ten years before the commencement of this suit, acknowledged both in writing and verbally the title of the plaintiffs and the said *Lucy Griffin* to their respective shares in the portion of the lands not embraced in the said deed of quit claim; but the defendant had recently claimed all the said lands as his own, and was in possession thereof, and refused to recognize or admit any title in the plaintiffs or any of them; and the plaintiffs submitted that they, the said *Mary Ann Smith* and *Catherine Kennedy*, together with the infants, were entitled to all the said lands as tenants in common—the said adult plaintiffs to one-third thereof each, and the infant plaintiffs to the remaining one-third—and were also entitled to have the sale by the sheriff, and his deed of the part thereof sold and conveyed to the defendant, set aside and declared void; or to have the defendant declared a trustee thereof for the plaintiffs, according to their respective interests, and that the defendant should account for the rents and profits thereof; and that the quit claim deed to the said *Lucy Griffin* should also be declared void. Also, that similar relief in respect to the lands thereby conveyed should be directed, and that the defendant should be ordered to deliver up possession thereof to the plain-

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tiffs. The plaintiffs also submitted that they were entitled to have a partition of the said lands among them, according to their respective rights and interests, or to a sale thereof and a division of the proceeds; and prayed relief in accordance with such statements and allegations.

The defendant answered the bill, denying all fraud and fraudulent practices charged therein, and setting up that the sale of lands by the sheriff had taken place under a writ of *venditioni exponas*, the judgment having been entered up in the Division Court and a transcript thereof filed in the County Court upon a return of *nulla bona* to a writ against goods sued out of the said Division Court, and that the same had been conveyed by the sheriff to him on the 10th day of December, 1860; and he claimed the lands thereby conveyed by possession and by force of The Real Property Limitation Act. The defendant also set up that he and his wife had been in possession of the other portion of the said lands and claimed that, subject to the claims of his children—the infant plaintiffs—he had acquired an absolute title thereto under the said Act.

Statement.

The defendant was examined on his answer on the 10th of October, 1879, in the course of which he admitted that he had no title to lot 4 except by possession, and he swore that the other portion—east half of lot 3—was worth about $500 when he got possession. He admitted it was "middling farming land; a good farm house, two storey; a frame barn (a good size), and a driving house 36 × 34," were on the premises. He said a confession of judgment was given by Mrs. *Griffin* for the amount of a claim brought against the estate by one *Farnham*, but that he did not advise her to do so—did not advise her at all. He next saw the place advertised in the newspaper; advised her of the fact. *Smith* came to Madoc, and from there to Belleville, and defendant with him. He could not get the money.

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"I did not tell him at any time that he need not bother about it; that I would pay it, or words to that effect; nor did I tell Mrs. *Griffin* any such thing. I said nothing about getting the money * * to pay it off. Mrs. *Lucy Griffin* came to Belleville with us. The place was advertised for sale at the time. Mrs. *Griffin* and *Smith* did not go back to Madoc. They went west without making any arrangement to pay off the claim. I tried to borrow money from *Ezra Seal* to pay off the claim. * * I applied to no one else. I never tried to raise money by mortgage on the place, to pay off the claim. I don't think I ever suggested it. I attended at the place of sale. * * I went to buy it in for myself, not for Mrs. *Griffin* or her daughter. I had no instructions to do so. * * My wife wanted the place sold. She did not care: she did not want it saved for her mother. The sale was postponed—cannot say how long. I attended the second time. * * Mr. *Marshall*, my wife's uncle, was at the sale. He and I went together. I think he suggested I should buy it in. He got me the money on his note and my note to pay part of the purchase: in the neighbourhood of $200. This was after the sale. * * The office was pretty well filled. Several bid on the property. Mr. *Marshall* bid. I won't say I did not ask him to bid. He bid for himself. I can't say who else bid. I did not let it be known that I wanted to buy it in for the family. I never told any one that I was going to buy it in for the family, and not to bid against me. I tried, where I was recommended, to get the money to pay off the claim before the sale. * * I knew nothing of the suing of this claim in the Division Court. I don't remember that any one suggested to me that this would be a good way to get a title to the lot; I won't swear they did not. I don't think *Farnham* did. I won't swear he did not. It is a long time ago. *Kennedy* was at my place just before this suit was commenced. I never told *Kennedy* at any time that *Farnham* and I had the matter arranged how I could get the property. I never offered Mrs. *Kennedy* a span of horses for her claim. * * I expect I own the mill lot (No 4) and the other lot, too. * * I can't give any opinion as to the value of these two parcels now. I won't say the east half of lot 3 is not worth $3,000. * * The west half of 4 is not worth more than $400

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now. * * My mother-in-law went away after the land was advertised, and she never came back. I have been in sole possession since: lived on the east half of No. 3."

The cause came on for examination of witnesses and hearing at the Belleville sittings in the Autumn of 1879.

Mr. *George E. Henderson*, Q. C., and Mr. *H. E. Henderson*. for the plaintiffs.

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

Jan. 21st.

BLAKE, V. C.—I find on the evidence that there was a debt actually due by the estate of *Horatio N. Griffin* for which a judgment was recovered, and under it the east half of lot three in the fourth concession of Madoc was sold, and bought by the defendant. This sale was known to the members of the *Griffin* family. They did not choose to discharge the debt which was reduced to judgment, and with their knowledge and assent the defendant purchased, and he has since held this lot. I find on the evidence that there was no agreement that the defendant should purchase for any one but himself, and I do not find any collusion or impropriety proved. Whether the sale was operative or not, from that period on the defendant has claimed the premises as absolute owner, and the title has by virtue of the Statute of Limitations ripened into a title in his favour. On and prior to the date of the sale the defendant was in possession of these premises, and this possession had not been up to the filing of the bill interrupted. By the 11th clause of his answer the defendant admits the right of the infant plaintiffs to the west half of lot four in the fourth concession of Madoc, subject only to his right as tenant by the courtesy. There is no doubt that there has been possession in favour of *Bateman*, his wife and their children, as opposed to the other parties since 1860 up to the present time. Mrs. *Kennedy* left the property in April, 1859, and Mrs. *Smith* left it

Judgment.

earlier than that. Mrs. *Bateman* as co-tenant was entitled to possession. The possession enjoyed by the family would be traced to her title, and should enure to her benefit. By such possession she obtained a title under the statute, which has devolved upon her children. The infant plaintiffs are therefore entitled to this lot as tenants in common, subject to the rights of the father as tenant by the courtesy. The parties are entitled to this declaration of their rights in these properties. The costs must be borne by the adult plaintiffs and the next friend of the infants.

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See *Wilson* v. *Haight* (*a*), *McKinnon* v. *McDonald* (*b*).

Loughead v. Stubbs.

Pleading—Parties—Demurrer—Husband and wife—Dower.

An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal: *VanNorman* v. *Beaupre*, *ante* vol. v., p. 599. But when his wife joins with him in the contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant; and the fact that the bill alleges that her only interest is that of an inchoate dowress forms no ground for dispensing with her being so joined.

On the argument of a demurrer any document referred to must be taken to be truly stated, and cannot be looked at to contradict or alter the averments in the pleading, even though there is a reference to the instrument for greater certainty as to its contents.

This was a suit instituted by *David Loughead* against *John F, Stubbs*, the bill in which set forth that on the 14th February, 1880, the plaintiff and defendant and *Sarah Stubbs*, wife of the defendant, entered into an agreement in writing, whereby the defendant and his said wife agreed to sell to the plaintiff fifty acres of land in the township of Euphrasia for the price of $1,400, payable as follows: the plaintiff

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(*a*) 11 Gr. 420. (*b*) 11 Gr. 432.

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to pay off all incumbrances on the said lands to the extent of $1,400, and the defendant to pay off any excess thereof, and convey and assure the said lands to the plaintiff by a good and sufficient deed in fee simple, free from all liens, charges, and incumbrances whatsoever, to which agreement the plaintiff craved leave to refer when produced: that the said *Sarah Stubbs* had not at the time of the execution of the agreement any interest in the said lands other than her inchoate right of dower therein: that the plaintiff had frequently requested the defendant to execute his part of said agreement, but he refused to carry out the same or to convey the said lands to the plaintiff.

The bill further alleged that the incumbrances on said land largely exceeded the amount of purchase money; but the defendant neglected and refused to pay off such excess, or to make a good title to the land: that the plaintiff was always ready and willing to pay such incumbrances to the extent of his purchase money; but by reason of defendant's neglect to pay such excess he was unable safely to pay his purchase money, and was unable to procure a conveyance in fee from defendant. The plaintiff offered to do all things necessary to be done under the contract, and prayed specific performance of the agreement, and for further and other relief.

Statement.

To this bill the defendant demurred for want of parties, insisting that his wife was a necessary party defendant.

Mr. *George Radenhurst*, in support of the demurrer.

Mr. *Hoyles* contra.

Barker v. *Cox* (*a*), *Skinner* v. *Ainsworth* (*b*), *Barnes* v. *Wood* (*c*), were referred to in addition to the cases mentioned in the judgment.

(*a*) L. R. 4, Ch. D. 464. (*b*) 24 Gr. 148. (*c*) L. R. 8 Eq. 424.

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June 10th.

PROUDFOOT, V. C.—Demurrer. Bill by purchaser against *John F. Stubbs*, states that defendant and his wife, *Sarah Stubbs*, entered into an agreement to sell the premises in question to the plaintiff, the plaintiff to pay off incumbrances upon them to the extent of $1,400, and the defendants to pay off any excess of incumbrances beyond that sum, and to convey and assure the premises to the plaintiff by a good and sufficient deed in fee simple, free from all incumbrances. That *Sarah Stubbs* had no estate other than her inchoate right of dower.

The defendant demurs because his wife is not made a party defendant.

Counsel for defendant wished to refer to the agreement for the purpose of shewing that the wife was concerned in the contract to a much greater extent than as an inchoate dowress, that she as well as the defendant had covenanted to convey, and to pay off the excess of incumbrances, and if the incumbrances did not amount to $1,400, she was entitled to the difference. But upon demurrer it is clear that nothing can be looked at but the allegations in the bill. In *Cuddon* v. *Tite* (*a*), Sir *John Stuart* says, "On the argument on a demurrer, whenever the plaintiff's bill refers to a document and states its contents, tenor, or effect, that statement must for the argument of the demurrer be taken to be accurate: and even in cases where a settlement or a will is set out, and it is attempted at the bar to shew by the production of the instrument itself that it is inaccurately stated in the bill, the Court on demurrer cannot look at the original for the purpose of contradicting or altering the averments in the bill, which the defendant by demurring admits to be true." Nor is the operation of this rule obviated by the bill containing, as this does, a reference for greater certainty as to its contents to the deed. *Campbell* v. *McKay* (*b*).

Judgment.

(*a*) 1 Giff. 395, 399.

(*b*) 1 M. & C. 603, 613.

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The question then is, whether an inchoate dowress who joins with her husband in an agreement for the sale of an estate, and that the husband shall pay off a proportion of incumbrances, and that the husband shall convey free from incumbrances—for that is the effect of the allegations in the bill—is a necessary party to the suit.

There is no doubt that had the husband alone entered into the agreement he might have been required to procure a bar of his wife's dower, or to make an abatement of the purchase money: *Van Norman* v. *Beaupre* (*c*). But that is not the case here. The husband did not contract alone to sell, but united with his wife in the contract, and I think he has the right to say that the wife should be made a defendant; that he should not be put to the risk of having to abate the purchase money. And, besides, it is a joint agreement of husband and wife that the husband is to convey; and in such cases all the parties liable must be made parties, the General Order 62, only applying to cases of a joint and several demand (*d*).

Judgment.

I allow the demurrer, with costs, with leave to amend in a fortnight.

(*c*) 5 Gr. 599.

(*d*) 1 Dan. C. P. 13.

DUFF v. CANADIAN MUTUAL FIRE INSURANCE CO. 1880.

Mutual Insurance Co.—Separate branches—Guarantee capital fund—Deficiency of assets—Liability of policy-holders to contribute.

The defendants, a mutual insurance company, were incorporated under C. S. U. C. (22 Vict. ch. 52), and in pursuance of the powers vested in the company the directors divided the business into three separate branches, namely, "The Hydrant Branch," "The Country Branch," and "The Commercial Branch." In 1874, they passed a by-law for the purpose of raising a guarantee capital fund of $20,000; $13,100 of which was paid in, and all these proceedings were unanimously adopted, ratified and confirmed at a general meeting of the members. In 1877, a fourth branch was established called "The Water Works Branch;" and this was also approved of at a general meeting. In carrying on the affairs of the company the losses, in all the branches, as they arose, were paid out of such guarantee fund. The policies in the Commercial Branch and the Water Works Branch had been cancelled and rebates made for unearned premiums. In a proceeding at the instance of a creditor to realize the assets of the company, it was found that the amounts to be collected on the premium notes in the Commercial and Water Works branches would not suffice to pay the losses in those branches, but the amounts to be collected on such notes in the other two branches (the Hydrant and Country branches) were sufficient for that purpose.

Held, on appeal from the Master, (1) that the passing of the by-law for raising the guarantee fund was not *ultra vires* of the company, (2) that the company had properly applied the guarantee capital in payment of the several losses as they arose, and that the subscribers thereto were liable to pay up their subscriptions to the fund, (3) that policy-holders in the Hydrant and Country branches were not liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders, except in so far as might be necessary to discharge losses paid in those branches but not repaid by them, the 13th section of the Act providing that members of the company insuring in one branch should not be held liable for any claim on the other branches, and (4) that holders of policies in the other two branches were liable to be so assessed for the purpose of making good any losses sustained, up to the time of the cancellation of their policies, though such losses had not then been paid.

Held, also, that the defendants as such mutual insurance company were capable of granting insurances in Quebec as well as in Ontario.

This was a suit by *William A. H. Duff*, on behalf of himself and all other creditors of *The Canadian* Statement.

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Mutual Fire Ins. Co., against the company, for the purpose of realizing the assets thereof, and paying the respective claims against them.

On the 13th of November, 1878, a decree was drawn up by consent referring it to the Master at Hamilton to appoint a receiver of the estate and effects of the company, who was to proceed to collect and get in all the assets of the company. And the said Master was directed to take and make the following accounts and inquires: (1) An account of the debts and liabilities of the company, and fix the priorities of the creditors; (2) an account of the assets and estate outstanding and undisposed of; (3) an inquiry of what real estate the company was entitled to or interested in; and (4) an inquiry what incumbrances affected such real estate if any, and an account of what was due to such of the incumbrancers as should consent to the sale of such real estate, directed by the said decree; and (7) the receiver was to be at liberty from time to time to apply to the Court for directions upon any questions which might arise in winding up the company, which the Master should certify in his opinion to be of such importance that the same should be submitted to the Court.

Statement.

By an order, dated the 21st May, 1879, made on the petition of *William G. Dunn* and others, the Court referred it to the said Master to take and make the following accounts and inquiries, in addition to the accounts and inquiries, ordered by the decree: an inquiry as to the several branches into which the business of said company had been divided and carried on, with the date of the establishment and closing of each branch. And an account of the assets of the company, distinguishing between the general assets of the company, and the assets pertaining to each of the said branches, and an account of the general liabilities of the company, and of the liabilities chargeable to each of the said branches, and of the state of the

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accounts between them, shewing the balances as between the said several branches of the company; and the Master, upon the application of the defendants, or of the solicitor representing any of the said branches, was to inquire into and take an account of the liabilities, if any, of the directors or former directors, manager, or secretary, or treasurer, in respect of the matters alleged in the said petition, and to ascertain and state the amount, if any, of such liabilities; and for the purpose of such inquiry to add all necessary parties. And it was further ordered and decreed, that all proceedings for the collection of assessments in the Hydrant Branch and Country Branch should be stayed until further order. And that all policy holders, and persons liable to contribute to the assets of the company, should be made parties in the Master's office. And it was further ordered that the said Master, after notice to the solicitors for the petitioners of any appointment for that purpose, should appoint a solicitor to represent each class of parties, who might be added as parties in the Master's office, and service on such solicitor of all papers in the proceedings should bind all parties in the class represented by such solicitor.

Statement.

In proceeding in the Master's office under the decree and order, the said Master directed the several policy holders and persons liable to contribute to the assets of the said company, to be made parties defendants in his office, and thereupon proceeded to take and make the several accounts and inquiries by the said decree and order directed to be taken and made; and in pursuance thereof made his report, dated the 20th day of November, 1879, in the terms following:—

(1). That in July, 1872, The Canadian Mutual Fire Insurance Company was duly incorporated under C. S. U. C. 22 Vic. c. 52. (2). That on the 14th August, 1872, the business of the company was divided into two branches, the one called "The Hamilton Hydrant Branch," for the purpose of insuring property within the range of

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the water works; and the other "The Country Branch," for the purpose of insuring other property. And the risks in these branches were taken only on property situated in Ontario, and were conducted solely on the premium note system until the 16th June, 1875, in the Country Branch, and the month of November, 1875, in the Hydrant Branch, after which dates risks were taken in both these branches on the cash premium principle system, as well as on the premium note principle. (3). That on the 7th November, 1873, the board of directors established the "Commercial Branch," to go into operation on the 1st of January, 1874; and the business in this branch was taking risks and granting policies on property situate both in Ontario and Quebec, but the business in Quebec was done exclusively in this branch: and the business in this branch was conducted in both provinces part on the cash principle, commencing 2nd January, 1874, and part on the premium note principle, commencing the same day. (4). That on the 12th of January, 1874, a by-law was passed and adopted by the directors of the company for the purpose of raising a guarantee capital of $20,000, in the following terms:

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"Whereas, it is expedient and desirable to provide for the speedy and certain payment of losses, and full powers being given under 22 Vic. ch. 52 and subsequent Acts. Therefore be it resolved that the following by-law for the raising of a guarantee capital for the Canadian Mutual Fire Insurance Company, be and is hereby adopted:

"1. A guarantee capital of the sum of twenty thousand dollars shall be raised by the subscription of members of the above-mentioned company, or some of them, or by the admission of new members not being persons assured by the company, which guarantee capital shall belong to the said company, and shall be liable for all the losses, debts and expenses of the company.

"2. The said guarantee capital shall consist of five hundred shares of the value of forty dollars each share, and the subscribers thereto shall pay into the treasury of the company twenty-five per centum on the amount subscribed for by them within thirty days from the date of such subscription for which receipts signed by the president and secretary-treasurer of the company, and sealed with the corporation seal thereof, shall be given.

"3. The directors of the company shall from time to time make such calls of money upon the respective shareholders

in respect of the amount of capital respectively subscribed by them as they may deem necessary, and thirty days' notice at the least shall be given of each call, and no call shall exceed the sum of four dollars upon each share so subscribed, provided always, that the said directors shall not have power to make more than one call upon stock so subscribed in any one month.

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"4. All subscribers of shares or stockholders in the said guarantee capital shall be held and bound, and they are hereby required to pay the sums of money subscribed for by them as the same shall be called for as hereinbefore provided, and as by the directors of the said company ordered, and in case any person or persons neglect or refuse to pay the same at the times appointed, it shall be lawful for the said company to sue for and recover the same with interest upon the amount and costs in any court of law having competent jurisdiction, provided always that no such stockholder so in arrear shall be at liberty to speak or vote personally or by proxy at any meeting of the holders of such capital, nor be entitled to receive or take any dividend or interest upon his stock until all arrearages due upon his stock shall have been fully paid up.

"5. Each and every subscriber of shares or stockholder in the guarantee capital, his executors, administrators, or assigns, may give, sell, alien, devise, or dispose of his or their respective share or shares in the said guarantee capital to any person or persons to whom the said directors may consent, and the said person or persons shall thereafter be entitled to all and every the rights and privileges of such subscribers of shares or stockholders, and to the profits and advantages arising from such share or shares; provided always that any sale or transfer of share or shares shall be made by instrument in writing, which instrument shall be in duplicate, one part of which shall be delivered to the said directors, to be filed and kept for the use of the said company, and an entry thereof shall be made in a book or books to be kept for that purpose, for which transfer not more than one dollar shall be paid; and until such duplicate of such instrument or act of transfer shall be so delivered unto the said directors or secretary-treasurer of the company and filed and entered as above directed, such purchaser or purchasers shall not be held a proprietor or proprietors of such share or shares, and shall have no part of the profits or interest in the said guarantee capital, and such sale or transfer shall not be valid until approved of by the directors, which approval must be indorsed on the back of the instrument by the secretary of the company.

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"6. If any share or shares in the said guarantee capital be

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transmitted by the death, bankruptcy, or last will, donation, or testament, or by the intestacy of any stockholder, or by any lawful means other than the transfer hereinbefore mentioned, the party to whom the share or shares are to be so transmitted shall deposit with the secretary or manager of the said company a statement in writing, signed by him, declaring the manner of such transmission together with a duly certified copy or probate of such will, donation, or testament, or sufficient extracts therefrom, and such other documents or proof as may be necessary, and without which such party shall not be entitled to receive any share of the profits or interest of the said guarantee capital nor vote in respect of any such share or shares as the holders thereof.

"7. Each and every subscriber of shares or stockholder in the said guarantee capital shall be paid interest on the amount paid by him or them on or in respect of his or their shares at the rate of ten per centum per annum, payable at the company's offices at the city of Hamilton, half-yearly from the date of his or their subscription to the said guarantee capital respectively, except in the case or cases hereinfore provided for

"8. The said company shall create from the surplus profits of the company from year to year and by assessments on premium notes or undertakings of the company, such assessment not to exceed ten per centum per annum, a reserve fund for the purpose of paying off the said guarantee capital, after which its affairs and property shall revert to and be vested in the parties insured as the sole members of the company, and unless such guarantee capital be paid off in the manner hereinbefore provided, this by-law shall not be repealed or altered without the consent of the majority of votes of the shareholders of such guarantee capital either personally or by proxy, at a meeting held for that purpose, of the shareholders of such capital, each shareholder being entitled to a vote for every share of forty dollars held by him."

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That $16,680 of such stock has been subscribed, whereof only $13,100 has been paid in, although the whole of the said $16,680 has been called in, and ordered to be paid. (5). That the establishment of these branches and the said guarantee capital was reported to the annual general meeting of the members of the company on the 3rd of February, 1874, and unanimously adopted, ratified, and confirmed. (6). That all policies in the Commercial Branch were cancelled on 1st May, 1877, and in this branch there were then large arrears for assessments for losses; and

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upon such cancellation rebates for unearned premiums were allowed to policy holders in that branch, and premium notes given up to such of the policy holders as had then paid all assessments made on their notes. (7). That on the 10th April, 1877, a new branch was established in the said company called "The Water Works Branch," which included all cities, towns, and villages in Ontario in which water works were then or might be established, except the city of Hamilton, and in which branch the risks to be taken should be within the reach of the hydrants in cities, towns and villages. (9). That the establishment of the Water Works Branch was reported to the annual general meeting of the company held in February, 1878, and unanimously adopted. (10). That on the 19th September, 1878, all policies in the Water Works Branch were cancelled, and rebates made for unearned premiums. (11). That the amount which can be collected on the unpaid balance of the notes for policies issued in the Hydrant Branch will be more than sufficient to pay the amount of losses in that branch and their proportion of the expenses of said company, exclusive of the liability (if any) in respect to the guarantee capital. (12). That the unpaid balance of the premium notes in the country branch will realize enough to pay the losses in that branch to the present time, exclusive of the liability (if any) in respect of the guarantee capital. (13). That the unpaid balance of the premium notes in the Commercial Branch will not realize sufficient to pay the losses in that branch. (14). That the unpaid balance of premium notes in the Water Works Branch will not be sufficient to pay the losses in that branch. (15). That the accounts of each of the branches of the company were kept separate and distinct, but the cash received from insurances in all the branches and from guarantee stock account was deposited in one common bank account, and drawn upon from time to time for the losses and proportional expenses in all the branches, and charged to the proper branch in the separate accounts, and there is no money now remaining: That assessments for the losses in each branch, and proportional expenses in conducting the business, were made in each branch from time to time; but in assessment of losses in each branch a small percentage was added in order to give a margin for such guarantee capital; but no assessment

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was specifically made under the by-law for raising the guarantee capital, unless a resolution of 26th March, 1878, can be so construed: That assessments have been paid or are now collectable in the Hydrant and Country Branches for the payment of losses and proper proportional expenses in such branches, but the Commercial Branch is in arrears for assessments to a large amount, which is uncollectable, and such assessments amount to a sum equal to the greater proportion of the guarantee capital. (16). And I hereby certify that, before proceeding any further with the reference in this cause, it appears to me both advisable and necessary that a declaration should be obtained from this honourable Court upon the questions hereinafter submitted; that the accounts to be taken and inquiries to be made will, to a great extent, depend on the declarations which may be made by the Court on such questions; and that, in my opinion, a great deal of delay and expense will be saved by the disposal of the said questions of law, before proceeding any further with the reference in my office.

Statement.

(1). Was the by-law passed by the directors for raising the guarantee capital stock, and subsequently adopted, ratified, and confirmed by the members of the company at the annual general meeting of such members, within the powers conferred by the law in that behalf, or was it *ultra vires* in whole or in part? (2). Are the persons who have subscribed for guarantee capital stock, but have not paid up in full for the amount of stock subscribed by them, liable to pay the balance of stock subscribed in order to meet losses, debts, and expenses of the company? (3). Had the directors of the company the right to apply the money received from the guarantee capital stock in payment of losses as they occurred in all the branches on policies other than those issued on the cash premium principle, and in payment of the debts and expenses of the company generally? (4). Are the policy holders in the Hydrant and Country Branches liable to be assessed on their premium notes in order to repay the amount paid in and to be paid in on the guarantee capital stock; and, if yea, are they liable to be assessed for that purpose more than ten per cent. per annum for each year covered by their policies? (5) If the by-law authorizing the raising of the guarantee capital stock is *ultra vires*, can the

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holders of guarantee capital stock rank against the Company for moneys advanced, and have the right of subrogation against the policy holders of the several branches in place of losses, debts and expenses paid from money received on guarantee capital stock, and to what extent? (6). All the policies of parties insured in the Commercial Branch have been cancelled by order of defendants' board of directors on 1st May, 1877, and notes of policy holders in that branch have been assessed for amounts then considered necessary to pay the losses in said branch and their proportion of the debts and expenses of the company, and the policy holders notified of the amount so ascertained and that on payment thereof their notes would be delivered up, in pursuance of which notice a considerable number of which policy holders paid the amount demanded and got up their notes. Can the policy holders so notified, but who have not paid the amount then called for, and whose notes the company still holds, be called upon for any further amount to meet the losses in said branch and the debts and expenses of the company existing at the time of the cancellation of their policies, including guarantee capital stock, it having been ascertained since the cancellation of the policies that the amount assessed at the cancellation of the policies has not realized sufficient for payment of the losses in said branch and the due proportion of the debts and expenses of the company, it having been found impossible to collect a large portion of said assessment in the province of Quebec? (7) Had the said company power to carry on the business of insurance in the province of Quebec? (8). And, at the request of all the solicitors, I certify that, in my opinion, the said inquiries and points are of such importance that the same should be presented to this Court; and, at the request of said solicitors, I direct that the foregoing questions be submitted to this honourable Court for its opinion thereon, pursuant to the provisions contained in the seventh paragraph of the decree herein.

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The questions so settled by the Master having been set down for argument before the Court,

BLAKE, V. C., directed the Master should first give his own rulings thereon, and it might then be heard

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by way of appeal by any of the branches who might be dissatisfied with his rulings, and the motion stood over for that purpose.

The matter was then argued before the Master, who made his report thereon, dated 29th January, 1880.

Statement

"The by-law passed by the directors of said company for raising the guarantee capital stock was within the powers conferred by law on said directors. That the said by-law was regularly passed by said directors, and was not *ultra vires* in whole or in part. (2) That the persons who have subscribed for guarantee capital stock, but who have not paid up in full for the amount of stock subscribed by them, are liable to pay the balance of the stock respectively subscribed for by them, in order to meet losses, debts, and expenses of the company. (3) That the directors of the company had the right to apply the money received from the guarantee capital stock in payment of the losses as they occurred in all the branches, and in payment of the debts and expenses of the company generally. (4) That the policy holders in the Hydrant and Country Branches are liable to be assessed on their premium notes in order to repay the amount paid in, and to be paid in on the guarantee capital stock, but for that purpose they are only liable to be assessed to the extent of ten per cent. per annum for each year originally covered by their policies. (5) That the policy holders in the Commercial Branch who have not paid the amount they were notified to pay on the cancellation of their policies, and whose notes the company still hold, are liable to be assessed for such amount as may be necessary (not exceeding the amount of their respective notes) to meet the losses in the Commercial Branch, and the debts and expenses of the company existing at the time of the cancellation of their policies, including the liability of the company in respect of the general capital stock. (6) That the said company had power to carry on the business of insurance in the Province of Quebec. And I certify that the foregoing findings will affect the taking of all the accounts in my office, and that it is in the interest of all parties that they should be finally decided before proceeding further with the reference before me.

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The parties made defendants in the Master's office as "The Hydrant Branch" of the company appealed from the report of the 29th day of January, 1880, on the grounds:—

(1). In respect of the finding of the said Master numbered 1 in the said report, The Hydrant Branch disputes the validity of the said by-law as against them on the following grounds (amongst others), namely: (a) That when the company was established the business was divided into two branches, "The Hydrant Branch," and "The Country Branch," and was carried on solely on the mutual system before the passing of the Ontario Statute of 1873. (b) That no insurances were effected on the cash premium principle in the Hydrant Branch or the Country Branch until after the passing of the by-law for raising the guarantee capital stock. (c) That the establishment of the "Commercial Branch" by the directors on the 1st of January, 1874, was not a separation of the business of the company under the powers conferred by the Mutual Insurance Acts, and the effecting of insurances on the cash premium principle in that branch before the passing of the by-law does not give validity to the by-law. (d) That after the division of the business of the Company into branches each branch was a separate company under the provisions for separation, and a by-law of the company, without regard to branches, was not binding upon the present policy holders.

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(2). With respect to the finding numbered 3 in the said report, The Hydrant Branch appealed on the following amongst other grounds, namely: (a) The business of the Commercial Branch was unauthorized by the Mutual Insurance Acts, and therefore *ultra vires*. (b) If the directors had power to establish that branch it was under the powers conferred by the Ontario Act of 1873, and the extension of the business of the Company by means of this branch to the Province of Quebec was unauthorized and *ultra vires*, and

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the directors had therefore no right, as against the Hydrant Branch, to apply any money from guarantee capital stock account in payment of losses in this branch, and more especially of losses in the Province of Quebec.

(3). With respect to finding number 4, The Hydrant Branch appealed on the following grounds, namely: (a) That by statute, and by the report of the meeting of the members when the guarantee stock by-law was passed, it was declared that the members insuring in one branch should not be liable for any claims on the other branch, and that the effect of this finding was to make members in the Hydrant Branch liable for claims upon the Commercial Branch. (b) That the guarantee capital account was a separate account of the company, and when a loss occurred in a branch an assessment was forthwith made in that branch for the payment of the loss. (c) That the guarantee capital account was drawn upon for speedy payment and recouped from the collection of the assessments, and the Hydrant Branch was not indebted to the guarantee fund account. (d) That the guarantee fund account has been exhausted in payment of losses in the Commercial Branch, and chiefly in the Province of Quebec, for which assessments have been made which were not collectable, and that the Hydrant Branch was not a guarantor for payment of assessments in the Commercial Branch. (e) That the premium notes were not assets of the company but of the branch, and as between the guarantee stockholder and the then members of the Hydrant Branch (many of whom had become members after the guarantee capital account had been exhausted by the Commercial Branch losses), that branch was only liable to recoup any balance (if any) due from that branch to the guarantee capital account. (f) That the power of assessment for a reserve fund, referred to in the judgment of the said Master, was for the purpose of enabling the company to acquire the fund, and there

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was no power to assess the Hydrant Branch notes to make up to the guarantee capital stockholder the assessments which had been made on the Commercial Branch notes uncollectable in the Province of Quebec.

(4). With respect to finding numbered 6, The Hydrant Branch appealed, on the following grounds: (a) That the business of the company in the Province of Quebec, as against the Hydrant and Country Branches, was unauthorized by the Mutual Insurance Acts, and therefore *ultra vires*. (b) That the Consolidated Act of 1859, ch. 52, permitted a company to admit as members owners of property lying within any part of Upper or Lower Canada, but the business of the company under that Act was divided into Hydrant and Country; and no business was done in either branch in the Province of Quebec. (c) That previous to the British North America Act of 1867, the Province of Canada consisted of Upper and Lower Canada. There was one Province, and by this Act it was separated and divided into two Provinces—Ontario and Quebec; and Canada was divided into four Provinces. (d) That the Commercial Branch could not have been established under the Consolidated Act of 1859, and if the establishment of this branch was a proper exercise of the power of the directors under the Ontario Statute, there was no power, as against the Hydrant Branch, to insure property in the Province of Quebec or elsewhere out of the Province of Ontario; and the Ontario Legislature could not, and had in fact repeatedly refused to give insurance companies any such power; and

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(5). In addition to the grounds aforesaid, the Consolidated Act is repealed by the Ontario Statute of 1873.

The parties made defendants as "The Country Branch" appealed on similar grounds.

The parties interested in the Commercial Branch also appealed on the grounds:

1. That the Master, in and by the fifth paragraph, found that the premium notes remaining in the posses-

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sion of the defendants, and which were made by policy holders in the Commercial Branch of the company whose policies were cancelled, were liable for further assessments for losses and expenses, and to pay the guarantee stock capital, and they submitted that no assessment could be made on such notes in that branch, as all the policies in that branch had been cancelled on the first day of May, 1877, and the proportion of each of such policy holder's indebtedness up to that time was ascertained and fixed by the said defendants, and such sum demanded, and notice of cancellation of the policy given according to law, and nothing remained further for such policy holder to do than to pay the amount demanded and receive his note.—Sec. 26 of Ontario Statute, 1873. That by such cancellation of the Policies under sections 26, 43, and 50 of Ontario Stat. 1873, the relation of insurer and insured then ceased effectually; that the amount demanded at the time of cancellation being then admitted as amply sufficient to cover every indebtedness to the company of such policy holder, the necessity of a further assessment could only be for a debt of the company found to be due, or accruing since cancellation of the said policies, and the mere possession of the premium notes by the company after such cancellation of the policies (probably through the inability or neglect of policy holders not having yet paid up the amount demanded from them), can give the company no better right to assess those notes than the notes which were taken up of those who paid pursuant to that notice. There being no limit in such notice as to when payment must be made, the only condition was payment of the amount demanded. The policy holder could therefore avail himself of the notice at any time. Besides, the policy holder could not force a delivery of the note until after forty days from cancellation, (sec. 50,) and such policy holder was in no worse position after that time; and no further assessment was made within the

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forty days. As between the policy holders who took up their notes and those who did not do so, it would be inequitable to assess the remaining notes for the proportions of those notes that had been given up being in the nature of joint sureties they would be released.

As the company did not intend to pay off the guarantee capital before or at the time of cancellation of such policies in this branch, and no assessments were made therefor, previous to such cancellation there was then no debt; and an assessment could not be made, as this would be for a debt accruing subsequently to the cancellation, and not during the currency of the policies.—Sec. 43.

Sec. 44 sets forth the only circumstances under which a subsequent assessment can be made, and does not apply to this case.

Mr. *Duff*, for the plaintiff.

Mr. *Mackelcan*, Q.C., for *The Company*.

Mr. *E. Martin*, Q.C., for the *Guarantee Stockholders*.

Mr. *R. Martin*, Q.C., for persons insured in the *Hydrant Branch*.

Mr. *Laidlaw*, for the *Hydrant Branch*.

Mr. *Osler*, for the *Country Branch*.

Mr. *Lemon*, for the *Commercial Branch*.

March 18th. Judgment.

PROUDFOOT, V. C. — The Hydrant and Country branches are solvent, and I understand have repaid to the guarantee fund all losses in these branches that were paid from it. The Commercial Branch is insolvent. The Master has held that the by-law is not *ultra vires*. It purports to create a guarantee capital of $20,000, to be liable for all the losses, debts, and expenses of the company, and by the eighth section made provision to create from the surplus profits of the company from year to year, and by assessments

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on premium notes or undertakings of the company, not to exceed ten per cent. per annum, a reserve fund to pay off the guarantee capital. I am inclined to agree with the Master that the Act of 1873, 36 Vic. ch, 44, O., did not take away from this company the right to have a guarantee capital. The 71st section seems to preserve this right to them; and the by-law following the language of the Act would seem to be within the powers of the company, so far as the creation of a guarantee stock is concerned.

This disposes also of the second question, and the subscribers to the guarantee capital are, in my opinion, liable to pay up the balance of the sums subscribed by them.

I also agree with the Master that the guarantee capital might properly be applied in payment of losses as they occurred in all the branches other than those on policies on the cash premium principle. The object of such a fund was to provide for the speedy and certain payment of losses (*a*).

Judgment.

The next and most material question is, whether the policy holders in the different branches, the Hydrant and Country, are liable to be assessed on their premium notes to repay the amount paid in, and to be paid in on the guarantee capital, and whether they can be assessed for more than 10 per cent. per annum. The Master has found that they are so liable, resting his opinion upon the ground that the by-law so determined, and that this by-law received the unanimous assent of the meeting.

I do not agree in this conclusion. The same statute that authorized the creation of separate branches, and of a guarantee fund, also provided (sec. 13) that members of the company insuring in one branch shall not be liable for any claim on the other branch. The statute has been recently carefully considered in *The Beaver*

(*a*) C. S. U. C., ch. 52, sec. 31; 27 & 28 Vic. ch. 38
(*b*) 30 U. C. C. P. 304, 336.

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Mutual Insurance Co. v. *Spires* (*b*). The learned Chief Justice, whose reasoning I adopt, says: "It will be remembered that the members insuring in one branch are, by the general provisions of the statutes, leaving out of consideration for the present the Winding-up Act of the company, liable only for the losses sustained by that branch. The company was authorized to issue debentures for the purpose of paying losses or expenses, or for other purposes of the company, and they were to be payable out of the notes held by the company, or, if necessary, out of the reserve fund; but as this company had no reserve fund, the case must be confined wholly to the premium notes. The Consol. Stat. U. C. ch. 52, sec. 61, says: 'The directors of the company may always assess upon the members thereof in proportion to the amount of their deposit or premium notes respectively, such sum or sums as may be necessary to pay any such debentures * * then outstanding, and the interest thereon.' Does that enactment authorize an assessment to be made upon members *in proportion to the amount of their premium notes*, without regard to the purpose for which the debenture debt was incurred? If the debentures were given to pay losses occurring wholly in one branch of the company's business, can the members who are not insured in that branch be made to contribute to that payment? If they can, then the general provision of the statute is expressly violated in that respect. The statute must not therefore be construed so as to make one section of it repugnant and contrary to another section if it can be avoided. The section of the Act just referred to does not require that it should be construed in any way opposed to the other general provisions. The section does not say that *all* the members of the company shall be assessed, but merely that *the members* shall be assessed in proportion to the amount of their premium notes; and that language, read in connection with the

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above provisions of the Act, necessarily means that the members *who are liable to be assessed for that particular debt* shall be assessed in proportion to the amount of their premium notes. If a different construction be given to it, it would enable the directors when they pleased to make all the members of the company contribute to the losses of any particular branch or branches by the simple process of first issuing debentures to raise money to pay the losses, and then of assessing the members generally to pay such debentures. I am of opinion that the debentures are not to be ranked as a general liability to be contributed to by the whole body of members as of course, but that it must be ascertained how and for what purpose the debentures were issued; and then those members who were liable for the original debt are those only who are to be or can be called upon to contribute towards that debt in its new form of a debenture."

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Nor do I think that the by-law can receive a different construction from the clauses in the statute. The fund to be formed to pay off the guarantee capital is to be raised by assessments on the premium notes, among other things. But that is to be interpreted as the statute itself is, on the premium notes liable in respect of the several losses, *i. e.*, notes in each branch for the losses in that branch. The adoption of the by-law at the general meeting therefore cannot be used as proof of any greater liability. But the proceedings at that meeting seem to me clearly to shew that the meeting understood the law in this sense, and that any subscribers to the guarantee capital cannot be considered to have contracted for any greater security. The report of the directors, adopted at the meeting, refers to the creation of this capital account in the following terms: "It having been considered expedient to provide for the certain and speedy payment of losses, a by-law authorizing the raising of a guarantee capital of $20,000 has been passed by your directors, and you

will be called upon to ratify the same. * * In order to increase the scope of the company, and enable a large portion of the community to obtain the benefit of cheap insurance, your directors determined to establish a Commercial Branch, and it came into operation on the first day of January last. We have now three branches in successful operation, each liable only for its own losses, and a just proportion of the expense of management."

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It seems impossible then to say that the express exemption in the statute can be controlled by the passing of this by-law. The branches never did consent to pass a by-law subjecting all for the benefit of all; and if such were its legal effect it would present a case for rectification. It is not pretended that the guarantee subscribers were ignorant of the proceedings of this meeting; they were shareholders, members of the company; though if they were ignorant, it would not, in my opinion, make any difference. The other grounds on which the Master's opinion is based are all met by the decision in *The Beaver Mutual Insurance Co.* v. *Spires*.

Judgment.

The resolution of the 26th of March, 1878, so far as it is sought to be enforced for any purpose at variance with the above, is void.

On the 6th question I agree with the Master, that though the policies in the Country Branch have been cancelled, the makers of the notes continue liable for assessments for losses up to the date of cancellation while the notes remain in the hands of the company. The 26th section of the Act of 1873 is sufficient authority for that proposition, and might perhaps even warrant a further exercise of the right of suit. But as that is not in the question submitted, I express no opinion at present upon it.

Sec. 43 makes the premium notes liable to assessment to meet the losses and other expenditures of the company during the currency of the policies for which such

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notes or undertakings were given; and sec. 50 directs that forty days after the expiration of the term of insurance the premium note shall be given up to the signer, but with this qualification, provided all losses and expenses with which the note may be chargeable shall have been paid. The guarantee capital was to be paid off by virtue of the terms of the by-law creating it, and that was made on the 12th January, 1874. The resolution of the directors was not therefore the creation of a new liability, but merely carrying out the contract with the lenders to the fund. The notice of cancellation, stating an amount upon payment of which the premium note would be given up, is not absolutely conclusive of the amount for which the note was liable. It would be always liable to correction if by mistake or error too small a sum had been stated.

But I think that in this branch, as in the others, the makers of the notes can only be assessed for losses in that branch, or to repay the guarantee fund advances that may have been made from it to pay such losses.

Judgment.

For the reasons assigned by the Master, I agree in his conclusion that the company could carry on business in Quebec as well as Ontario. In *Bunyon* on Fire Insurance, p. 25, it is said that any person entitled to enter into a contract on his own behalf is capable of becoming an insurer against fire. And from the cases there referred to it seems that French insurance companies insure in Great Britain, and British companies insure in the colonies and foreign dependencies of the Crown; and there seems no reason why they should not insure in foreign countries. This right might, of course, be limited by legislation, but, as the Master has pointed out, there seems in this instance to be no such limit. Many authorities are collected in *The Howe Machine Co.*

v. *Walker* (*a*), establishing the proposition that a foreign corporation may do business here, and sue upon contracts entered into here; and that corporations created here may act elsewhere. 1880. Dnff v. Canadian Mutual Fire Ins. Co.

Costs reserved till hearing on further directions.

JELLETT v. ANDERSON.

Ferry, disturbance of—Construction of license of right of ferry—Lease of ferry, construction of.

The license from the Crown of a right of ferry was "between the town of B. to A." *Held*, that the phraseology, though inaccurate and not free from doubt, was sufficient to warrant the Court in assuming that between the one place and the other was meant.

Under this license the town of B. made a lease to the plaintiff, the franchise being "to ferry to and from the town of Belleville to Ameliasburg," Ameliasburg being a township opposite Belleville, running in a westerly direction to the head of the waters of the Bay of Quinté, a distance of ten or twelve miles; the lease providing for only one landing-place on each side. *Held*, that this, taken in connection with the Act relating to ferries,—C. S. U. C. chapter 43, section 10,—was a sufficient grant to the plaintiff of a right of ferriage to and from the two places named; and the defendant having started a ferry some two miles west of Belleville, running to a point nearly opposite, in the township of Ameliasburgh, was such a disturbance of the plaintiff's franchise as entitled him to a declaration of the right to the exclusive use of the ferry, together with an account of profits made by the defendant, and the costs of the suit.

This was a bill by *John Jellett*, seeking to restrain the defendants *James Anderson* and *Jonathan A. Porter* from interfering with the plaintiff's rights as proprietor of the ferry between the City of Belleville and the township of Ameliasburgh, under the following facts and circumstances as stated in the Bill:—By letters patent under the great seal of Canada, on the Statement.

(*a*) 35 U. C. R. 37.

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Statement.

26th April, 1858, Her Majesty granted to the municipality of the then town of Belleville, full license and authority to establish a ferry between the said town and the township of Ameliasburgh, across the Bay of Quinté, for a term of 25 years: that the said town of Belleville did thereafter duly pass a by-law in that behalf and sub-let the same to one *A. L. Bogart* for fifteen years from 1st January, 1868: that thereafter and in the spring of 1874 *Bogart*, with the consent and approval of the town of Belleville, assigned and transferred the residue of the lease to the plaintiff for a valuable consideration paid therefor, who gave security to the satisfaction of the town for the due performance of the ferry service. The bill further alleged that the plaintiff had ever since continued to be the only authorized proprietor of such ferry, and as such was alone entitled to ferry over people and freight, cattle, horses, and vehicles, and generally to carry on such business as appertains to ferries to and from Ameliasburgh and Belleville until the first day of January, 1883, and to collect tolls and fees therefor. The bill further proceeded to state that in violation of plaintiff's rights, and without any right on their own part, the defendants had during the previous year (1878) run a ferry boat for the conveyance of people and freight, cattle, horses, and vehicles, and generally for the carrying on of a ferrying business in the same manner as was done by the plaintiff from the said township of Ameliasburgh to Sidney, a township on the same side of the Bay of Quinté as Belleville, and immediately adjoining the limits of the said City, and thereby conveyed and transported across the Bay of Quinté for hire and reward large numbers of persons from Ameliasburgh whose immediate destination was Belleville, and carried back the same and other persons to Ameliasburgh from Belleville, all of whom would otherwise have used the ferry owned by the plaintiff; and thereby the defendants intended to and did divert such persons from the

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ferry of the plaintiff to his detriment and loss: that the ferry used by the defendants was established near to that of the plaintiff, on the Sidney side of the Bay of Quinté within about two miles from the terminus of the plaintiff's ferry at Belleville, while on the Ameliasburgh side the terminus of the defendants' ferry was within the limits for which the plaintiff had the exclusive license as granted by the said letters patent: that the plaintiff had notified the defendants not to start their said ferry, notwithstanding which they carried on their ferry during the summer of 1879, and threatened and intended to continue the use thereof during 1880, unless restrained.

The defendants answered the bill, admitting the issue of the letters patent mentioned in the bill, the fact of their having run the ferry boat between Ameliasburgh and Sidney, and which was so run under the sanction and with the consent of the Municipal Councils of those two townships. The answer further set up that on the 30th September, 1879 an order in Council was passed in the words following—"The twenty-sixth day of September, one thousand eight hundred and seventy-nine. Upon consideration of the application of the Councils of the townships of Sidney and Ameliasburgh in the County of Prince Edward, in that behalf, and upon the recommendation of the Honourable the Attorney General, the Committee of Council advise that a license under the great seal be issued to the corporation of the township of Ameliasburgh for a ferry over that portion of the Bay of Quinté *between the said township of Sidney and Ameliasburgh*, subject to the following conditions:

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(1.) That the craft to be used for such ferry shall be propelled by steam with an engine of not less than twenty-five horse power. (2.) That such craft shall not be less than of the following dimensions, namely 50 foot keel, and 20 foot breadth of beam. (3.) That the *licensee or sub-lessee of the ferry* for the time

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being shall at all times during the continuance of this license carry across the said ferry without fee, toll, reward, or rewards, all militia-men, soldiers, and sailors who shall be provided with proper passports, or who shall be with and under the command of their officer or officers. (4.) That the licensee or sub-lessee of the ferry for the time being shall obey, observe, abide by, perform, fulfil, and keep all such rules and regulations respecting the tolls and attendance at the said ferry, and other customs and revenue laws of the Province, as may in that behalf be lawfully made or ordained. (5.) That upon breach of any of the foregoing conditions this license shall in the discretion of the Lieutenant Governor in Council, cease to exist, and become inoperative and void. (6.) That it shall be lawful for the Lieutenant Governor in Council at any time when it shall seem advisable for him so to do to revoke the said license. (7.) That unless revoked or made void the said license shall continue for the period of seven years. (8.) That the landing place of any boat to be run between the said townships under such license shall be at least *one and a half miles from the western limit of Belleville, at the water's edge.*

Statement.

"30th September, 1879."

(Signed.) J. G. SCOTT,
Clerk, Ex. Council, Ontario.

That a license was directed to be granted to the Corporation of the township of Ameliasburgh to have a ferry as in the said order in Council set forth, and the said license was afterwards issued.

The answer further stated that since the 30th September, 1879, the defendants had been conducting their said ferry as sub-licensees and sub-lessees of the Corporation of Ameliasburgh; denied infringing on the rights if any of the plaintiff, and alleged that the terminus of the defendants' ferry in Ameliasburgh was not the same as the terminus claimed by the plaintiff, whilst the other terminus was in a different Municipality, and beyond the boundary claimed by the plaintiff as being the boundary on the Belleville side of his ferry.

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The cause having been put at issue, came on for the examination of witnesses, and hearing at the sittings of the Court at Belleville in the Spring of 1880.

Mr. *Boyd* Q.C., and Mr. *Flint*, for the plaintiff.

Mr. *Wallbridge*, Q.C., and Mr. *Hoyles*, for the defendants.

The facts established and points relied on at the hearing, appear in the judgment of

June 21st.

SPRAGGE, C.—The plaintiff holds his ferry under a lease from the town (now city) of Belleville, granted under a license from the Crown to the municipality "to establish a ferry between the town of Belleville to Ameliasburgh." There is no town or village of Ameliasburgh, but Ameliasburgh is a township extending from opposite and south of Belleville to the head waters of the Bay of Quinté, a distance of some ten or twelve miles in a westerly direction.

Judgment.

Considering what a ferry is, the generality of the southern terminus of the one in question is remarkable.

In *Huzzey* v. *Field* (*a*), Lord *Abinger* describes it as "a public highway of a special description, and its *termini* (he says) must be in places where the public have rights, as towns or villages, or highways leading to towns or villages," and it is described by learned Judges in other cases in much the same terms.

It may, however, have been intended that the exact points of terminus on each side should be determined and defined by the town of Belleville, to which the license was granted; and we find a provision to that effect in the lease granted by the town to *Abraham Lazier Bogart*. This lease contemplates only one landing place on each side, and I apprehend that if

(*a*) 2 C. M. & R. 432.

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there were more than one landing place on either side it would be in excess of the license, which recites the prayer of the municipality to be for one ferry; whereas more than one landing place on either side would make more than one ferry, unless, as put by *Willes*, J., in *Newton* v. *Cubitt* (*a*), it be from or to one or more landing places "in the village"; and the same learned Judge proceeds to say, that the notion that a large area of land should be subjected to the servitude, that the owners and occupiers thereof should be prohibited from using the highway, (in that case the Thames,) as they might choose, would be anomalous. I notice this because, as I thought, Mr. *Boyd* claimed too much for his client in claiming for him as the southern terminus of his ferry the whole northern coast of the township of Ameliasburgh.

The question remains whether the acts done by the defendant in carrying persons and vehicles for hire in the manner that he is proved to have carried them is not an infringement of the plaintiff's right of ferry. Sir *Wm. Blackstone*, in his Commentaries, vol. 3, p. 219, says: "If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one." So Lord *Abinger*, in *Huzzey* v. *Field*: "If another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profit of passengers which he would otherwise have had, and which he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for injury;" and after stating the exclusive right of the grantee of a ferry, he adds: "Any new ferry, therefore, which has the effect of taking away such passengers must be injurious."

Statement.

I may notice here some language of *Willes*, J., in *Newton* v. *Cubitt*, at p. 60, which qualifies somewhat

(*a*) 12 C. B. N. S. 58.

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the passages I have quoted from Sir *Wm. Blackstone* and Lord *Abinger*. "If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable. The authorities do not define, either in respect of ferries or markets, or the like, what proximity is actionable." Then after referring to the area within which he conceived a new market would be actionable, he says: "On the same reasoning the area for the monopoly of a ferry would depend on the need of the public for passage." These observations were made in a case where the plaintiff's ferry was extremely inconvenient to those who were in the habit of using the defendant's ferry.

Our Provincial Act in relation to ferries affirms the principle enunciated by Sir *Wm. Blackstone* and Lord *Abinger*. 8 Vic. ch. 50, C. S. U. C. ch. 46, sec. 10, p. 457, imposes a penalty upon, *inter alia*, any person who "unlawfully does any act or thing to lessen the tolls and profits of any lessee of the Crown of any such ferry," *i. e.*, of any "licensed ferryman." I take the word unlawfully, used in the Act, to have the same meaning as the words "without legal authority" used by Lord *Abinger*.

Judgment.

It is the effect of the unlawful act that governs, not the motive which influenced the doing of it. Here the evidence shews very distinctly that the effect of the defendant's ferry was to "draw away custom" from that of the plaintiff, the "withd rawingthe profit, of passengers which he wouldo therwise have had." And the motive, it is clear from the evidence, was to make profit to himself out of passengers who would otherwise have been carried by the plaintiff, and one mode of doing this was by competition at low rates of carriage. Further, the evidence leads me to believe that many who used the defendant's ferry did so, not because it was of convenience in the usual sense of the term, but because it was more convenient to pay a

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lower rate of ferriage than was charged under the plaintiff's tariff. It may be that to some persons on the Ameliasburgh side of the bay the defendants' ferry gives more convenient access to and from Belleville than does the plaintiff's; but it is not such "a real convenience to the public, such a need of the public for passage," as would, without legal authority, warrant or excuse the establishment of a rival ferry.

A further question is made, whether the plaintiff's right of ferry extends both ways. It is not so clear as it ought to have been upon the document before me. In the lease by the town the franchise granted is to ferry to and from the town of Belleville to the township of Ameliasburgh. The language is not accurate, but the words "to and from" are sufficient to grant a ferry both ways. The license from the Crown to the town recites the petition of the town to be for a ferry "from Belleville to Ameliasburgh," and recites that the Crown assents to the prayer of the petition. This would import a ferry one way only. The license, however, is less restrictive, it is to establish a ferry "between the town of Belleville to Ameliasburgh," another inaccurate piece of phraseology. I suppose between one place and the other is meant, but it is not free from doubt; for a ferry from one place to another is a ferry between the two, and looking at what is asked for and what assented to, the word "between," used in the connection that it is, does not make the meaning quite clear.

Judgment.

There is the maxim quoted in *Smith* v. *Rattè* (*a*) that "when the King's grant may be taken to two intents, one of which may be good and the other not, the grant shall be construed to such intent that it may take effect." Here the grant takes effect to some extent, whichever way it be construed, so that the maxim does not directly apply. Still if a grant from

(*a*) 15 Gr. 481.

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the Crown may be taken to two intents, and one be in accordance with a statute and the other, while not against it, still does not follow it, I think the grant should be construed so as to be in accordance with the statute. Here the license recites the Ferry Act, and that the town of Belleville is incorporated, and as such, under the provisions of the Act, entitled to the license prayed for. Turning to the Act we find (sec. 9) that where the one shore of a stream or other water is within the limits of a town, and the other shore in a township, the license shall be issued to the town. The shores of the water in question are as described in this section, and, as I read the Act, it was intended that in such a case only one license should be granted, and that, to the town. Under section 5, where the shores are in two different rural municipalities not in the same county, a license might be granted to either or to both; but the provision is different, under section 9, where, as in this case, one shore is in a town. I think the proper construction is, that in such case the one license to be granted is to be for a ferry to and from the town and the township. A little care in the use of accurate language would have left the question free from doubt. If the franchise were only the one way the plaintiff would still have his right of suit for disturbance of ferry.

Judgment.

Some proceedings have been taken towards the legal establishment of a ferry having one terminus on the Belleville side of the bay, some two miles west of the town, in the township of Sidney, and the other nearly opposite, on the shore of Ameliasburgh. It is between these two points that the defendants have run their ferry. These proceedings have not gone the length of giving any legal authority to the defendants, and their position continues that of disturbers of the plaintiff's ferry.

My conclusion is, that the plaintiff is, entitled to the declaration asked for in the prayer of his bill, and to an account of the profits made by the defendants by their

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The decree will be with costs.

EMMETT v. QUINN.

Lessor and lessee—Covenant to rebuild in case of fire —Second fire.

A lease, under the Short Forms Act, contained a covenant on the part of a lessee to erect a dwelling house on the premises worth $2,000, to rebuild in case of fire, and to surrender the premises with the appurtenances to the lessor at the determination of the term. The houses having been destroyed by fire, were rebuilt by the lessee.

Held, that this had not the effect of exhausting the covenant to rebuild; and that the lessee was bound, on a second fire destroying the building, to rebuild the same.

Statement.

The bill in this case was filed on the 4th of November, 1879, seeking to compel the defendant to rebuild certain buildings erected on lands of the plaintiff leased by him to one *John F. Robinson*, by indenture dated 21st September, 1874, in pursuance of the Act respecting short forms of leases. By the lease the lessee covenanted to erect a dwelling house and other buildings, to the value of not less than $2,000, and "at the end or sooner determination of said term, from what cause soever, he will leave the said buildings and all buildings and fences erected by him upon said premises, thereon, and the same property shall be the property of the said party of the first part," and that he would insure the buildings so to be erected, and keep the same insured during the currency of said lease, and assign the policy or policies to the lessor (the plaintiff), and also "that in the event of the said buildings being

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destroyed by fire during said term, he will immediately re-build to an equal amount; and in case the said buildings shall be destroyed during the last ten years of said term, the insurance moneys recovered for the buildings destroyed shall be applied to the erection of such new building; but the party of the first part shall not be obliged to pay the insurance moneys he may have received toward the the erection of such new buildings, until the same shall be in course of erection. and then only in payment in proportion to the amount of work performed upon such buildings, the clause hereinbefore set out in reference to insurance of buildings to apply in every respect to such new buildings;" and that he would at the end or sooner determination of the term surrender the premises with the appurtenances to the lessor.

The bill further stated, that on the 28th of October, 1874, *Robinson*, with the assent of the plaintiff, assigned said lease to one *James Meadows*, who immediately thereafter erected a building on the premises, in accordance with the terms of the lease, and afterwards, on the 30th June, 1875, with the assent of the plaintiff, mortgaged his leasehold in the said lands and premises to the defendant, who on the 13th December, 1877, under a power of sale contained in the mortgage, sold the interest of *Meadows* to one *Mary A. Nicholson*, and she, by indenture of the 19th of the same month of December, with the assent of the plaintiff, assigned said lease to the defendant, and defendant thereupon went into possession of the premises, the purchase thereof by *Mary A. Nicholson* having been made for and on behalf of the defendant, in order that he might become the assignee of said lease.

Judgment.

The bill further stated, that on the 15th June, 1876, the buildings which *Meadows* had, as before stated, erected upon the premises, were destroyed by fire, and were rebuilt by *Meadows*; that on the 29th August, 1879, another fire occurred on the premises, which

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destroyed the building so rebuilt by *Meadows*, and the defendant received $900 for insurance money thereon, he having paid the necessary premium for such insurance; that on the 22nd September, 1879, the plaintiff caused notice to be given to the defendant, requiring him to rebuild upon said premises, but he failed to do so, and on the 1st of October, 1879, assigned said lease, and the residue of the term, to one *William Green*, who was a man of no means, without the consent or approval of the plaintiff to such assignment, and which was so made by the advice of defendant's solicitors, and for the express purpose of getting rid of the covenants in such lease.

The defendant, by his answer, assented to this statement of facts, but submitted that he was not compelled by the terms of the lease to rebuild a second time, nor was he liable in damages under the covenants in the lease; contending that the effect of the lease was such that the lessor could only compel, under the circumstances stated, the rebuilding of the said buildings after the fire, which occurred on the 15th of June, 1876, and that such re-building after said fire had exhausted the covenant to rebuild.

Statement.

The cause came on to be heard on bill and answer.

Mr. *P. McCarthy* and Mr. *W. Cassels*, for the plaintiff.

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

March 8th.

BLAKE, V. C.—The lease in question being made in pursuance of the Act respecting short forms of leases, the words, "the said party of the second part covenants with the said party of the first part," are to be read as if the words, "and the said lessee doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said lessor," were contained therein. This removes the objection, taken by Mr. *Maclennan*,

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from the omission of the word "assigns." The lease is stated to be granted "in consideration of the rents, covenants, and agreements, hereinafter reserved and contained on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, observed, and performed;" and thereafter the covenants based on this recital are by "the said party of the second part." If the consideration for the lease be not "the rents, covenants, and agreements, hereinafter contained, on the part of the said party of the second part, his executors, administrators, and assigns, to be paid, observed, and performed," carried through the whole of the lease, then it is a covenant on the part of the lessee, which, under the Act, is to be construed as if it contained the words, heirs, executors, administrators, and assigns.

The lease contains the covenant "And that in the event of the said buildings being destroyed by fire, during said term, he will immediately rebuild to an equal amount." This follows the covenant, "and to repair," and the covenant "that he will erect, put up, and build, upon said demised premises, a good, substantial dwelling house, and other buildings, to the value of not less than two thousand dollars; and that at the end or sooner determination of said term from what cause soever he will leave the said buildings."

Judgment.

I think that, under the first of these covenants, the plaintiff could compel the rebuilding of the premises burnt down. If he could not, it is said that the Court could not decree this under the covenant "and to repair," because there is the covenant "and that he will leave the said premises in good repair," which, by the extended column of the Act, is to be read, "reasonable wear and tear, and damage by fire, only excepted." It may be that if there be nothing more in the lease than "to repair," and to "leave the premises in good repair," the covenant to repair may be qualified by the later covenant; but if this qualification is thus

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impliedly to be allowed where these two covenants stand alone, this is to be rebutted by the distinct and plain statements in the lease, which, if not to be read as separate covenants, binding the assignee, can be read as "exceptions," or "qualifications," to prevent the last clause in paragraph 8 being applied to paragraph 3.

I think it plain, from the whole tenor of the lease, that the lessor and his foresaids were to erect and keep erected a building on the premises, and that this covenant was a continuing covenant, applying to any building there which might be destroyed: *Re Wrisley* (*a*), *Crozier* v. *Tabb* (*b*), *Lee* v. *Lorsch* (*c*).

There has been no valid assignment of the lease, and therefore the defendant still holds. The fire took place when he held the lease, and he did not attempt to transfer it until after he had received notice from the lessor to rebuild, and then only to endeavour to defeat the plaintiff's claim.

Judgment.

I think the plaintiff is entitled to a decree against the defendant for the breach of the contract, with the costs of the suit.

(*a*) 44 Q. B. 345.
(*b*) 38 Q. B. 54.
(*c*) 37 Q. B. 262.

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CRONE v. CRONE.

Arrears of annuity—Interest on annuity—Puisne incumbrancer.

On the 19th of October, 1866, the owner of real estate granted an annuity thereout of $40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant claiming ten years' arrears, with interest thereon:

Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of annuity; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could receive only six years' arrears without interest, as against a *puisne* incumbrancer who had duly registered his conveyance.

This was an appeal by the plaintiff from the report of the Master at London, on the grounds set forth in the judgment.

Mr. *R. M. Meredith*, for the plaintiff.

Mr. *Street* and Mr. *W. Cassels*, for *The Huron and Erie Loan Society*, made parties in the Master's office.

Mr. *Hoyles*, for defendant *Crone*.

In addition to the authorities mentioned in the judgment counsel referred to and commented on *Goldsmith* v. *Goldsmith* (*a*), *Re Fitzmaurice's Minors*, (*b*), *Crooks* v. *Dickson* (*c*), *Tew* v. *Winterton* (*d*), *Booth* v. *Coulton* (*e*).

PROUDFOOT, V. C.—The plaintiff is an annuitant on the land in question, by virtue of a grant of an annuity Feb. 12th.

(*a*) 17 Gr. 213 (*b*) 15 Ir. Ch. 445.
(*c*) U. C. L. J. N. S. vol. i. p. 211—15 U. C. C. P. 523.
(*d*) 1 Ves. jr., 450. (*e*) 2 Giff. 514.

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of $40 per annum, to be received, taken and issuing out of the land in question for his life, with powers of distress in case of default; and the grantor covenants to pay it. The deed is dated the 19th of October, 1866. and with the exception of $40 no sum has been paid to the plaintiff. The bill was filed to realize the annuity.

In taking the accounts in the Master's office *The Huron and Erie Loan Society* were made parties as mortgagees by virtue of a mortgage registered in May, 1872, made by the grantor of the annuity.

In October, 1877, the grantor, in writing, acknowledged the amount then due to the plaintiff. The Master has allowed to the plaintiff six years' arrears of the annuity and no interest.

The plaintiff appeals from this finding. The argument for the plaintiff is, that by virtue of the covenant he is entitled to ten years' arrears, for which he cites: *Paget* v. *Foley* (*a*), *Strachan* v. *Thomas* (*b*), *Manning* v. *Phelps* (*c*): that the R. S. O. ch. 108, sec. 4, was the governing clause, and not sec. 17: that *Bolding* v. *Lane* (*d*), only applies to interest on mortgages, but if applicable it has been overruled by *Chinnery* v. *Evans* (*e*); and that the grantor having acknowledged the amount it binds the mesne mortgagee: *Roddam* v. *Morley* (*f*), *Pears* v. *Lang* (*g*), *Chinnery* v. *Evans*(*h*), *Bodger* v. *Arch* (*i*), *Darby and Bosanquet*, p. 78.

Judgment.

As to the interest, it was admitted the general rule was against allowing it on arrears of annuity, but that there were exceptions, as hardship, indigence, or where a penalty was imposed. That here there was a penalty; the right to distrain, and therefore, &c.: *Blogg* v. *Johnson* (*j*).

(*a*) 2 Bing. N. C. 679.
(*b*) 12 A. & E. 536.
(*c*) 10 Exch. 59.
(*d*) 1 DeG. J. & S. 122.
(*e*) 11 H. L. C. 115.
(*f*) 1 DeG. & J. 1.
(*g*) L. R. 10 Eq. 41.
(*h*) 11 H. L. C. 115.
(*i*) 10 Exch. 333.
(*j*) L. R. 2 Ch. 228.

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It was also said that this was a rent charge, and not an annuity, and the rule did not apply.

I shall not discuss all the cases that have been referred to, for as to the arrears, I think it was conceded that if *Bolding* v. *Lane* has not been overruled it must govern this case. The R. S. O. ch. 108, sec. 17, is in the same terms as the Imp. Stat. 3 & 4 Wm. IV. ch. 17, sec. 42, and provides that no arrears of rent or interest in respect of any sum of money charged upon any land, &c., shall be recovered but within six years after it has become due, or after an acknowledgment of the same in writing, &c., signed by the person by whom the same *was* payable. The word *was* is the same in both Acts, and there is no ground for the argument based on a supposed difference of *was* for *is* in the two Acts. By sec. 2, *rent* shall extend to all annuities and periodical sums of money charged upon or payable out of any land, which puts an end to another argument, that *rent* in the 17th section refers to ordinary rent reserved in a lease. Any decision determining the operation of this section on the interest on mortgages, must also decide a question upon arrears of an annuity or rent charge. *Bolding* v. *Lane* is a clear and explicit determination that only six years' arrears are recoverable, and that the person to give an acknowledgment is not merely the person who was legally bound to pay, but all the persons against whom it might be enforced,—any person in fact who might be properly sued as a defendant in a suit in equity, brought to enforce payment of the principal and interest out of the land. Lord Chancellor *Westbury* points out the alarming consequences that would follow from any other determination. The right of one man might be taken away by the act of another.

Judgment.

Chinnery v. *Evans* is said to have overruled *Bolding* v. *Lane*. Lord *Westbury*, who decided *Bolding* v. *Lane*, was one of the Lords who gave judgment in *Chinnery* v. *Evans*, and he pointed out that the decision in this

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case does not interfere with the former, which was upon a different section (sec 40, equal to our sec 23.) Messrs. *Darby* and *Bosanquet* (Statutes of Limitations 168-171,) compare the two cases, and while finding it hard to distinguish them in principle yet consider that *Bolding* v. *Lane* is still in force; and Mr. *Browne* (Law of Limitation, 530,) treats it as also a subsisting authority. In *Seton* on Decrees, 4th ed. 1057, it is referred to as an authority for the position that sub-incumbrancers are not bound by such an acknowledgment as in this case; and at p. 1055 *Chinnery* v. *Evans* is quoted for the decision that payment of interest by a stranger will not be an acknowledgment, but otherwise by a person who has been appointed receiver. Mr. *Dart* also, V. & P. 367, 4th ed., refers to *Bolding* v. *Lane*, as a subsisting authority. Upon an examination of *Chinnery* v. *Evans*, I think it is not inconsistent with *Bolding* v. *Lane*. A mortgage had been made, and the mortgagee had applied for the appointment of a receiver, which was made. The mortgagee owned estates in Cork, Limerick, and Kerry. The equity of redemption of the estates in Cork and Kerry had been conveyed to different persons, the interest continuing to be paid out of the Limerick estates exclusively. The decision was, that the act of the mortgagor, without the concurrence of the mortgagee, could not deprive him of his security, while the interest was paid by the person liable to pay. There is nothing in this that appears to me at variance with *Bolding* v. *Lane*.

Judgment.

As to the arrears, therefore, I think the Master is right. The general rule as to interest upon arrears may be found in Seton on Decrees, 4th ed., 962, 1163, together with the exceptions where interest is allowed. I do not think this case is brought within any of the exceptions. Where it is secured by a bond with a penalty it has sometimes been allowed, but not always. But the power to distrain for arrears is not a penalty.

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I have referred to *Howeren* v. *Bradburn* (*a*), but that decides nothing where incumbrancers would be affected by the enforcing of the remedy as between the grantor and grantees of the annuity.

The appeal is dismissed, with costs.

KILBOURN v. ARNOLD.

Legal adviser and client—Principal and agent—Fiduciary relations.

The defendant applied to the plaintiff, who was acting as inspector and legal adviser to a Loan Society in one of the rural districts—he being a barrister (not an attorney) at law, though carrying on business as a conveyancer or scrivener—to obtain a loan of $200 from such society, to be secured by a mortgage on, together with other land, property already held by them for $600. The plaintiff told the defendant that he could not recommend the security to his company, and that he had better apply elsewhere for the money. One *B.*, who, as the defendant had informed the plaintiff, held a mortgage on the same lands, afterwards applied to the plaintiff to sell his mortgage to the company. The company did not buy, the plaintiff having written to the manager that it "would not afford anything like what you require"; but the plaintiff afterwards purchased the security at a heavy discount, and about fifteen months thereafter, nothing having been paid on the mortgage, proceeded to enforce by means of a foreclosure suit, the full amount of principal and interest secured thereby. The plaintiff, it was shewn, had previously acted for the defendant in the transmission of money to the company for the interest on the mortgage held by them. The Court, [BLAKE, V. C.,] considering that under the circumstances stated the relation of legal adviser and client had been created between the plaintiff and defendant, held that the plaintiff could recover only the amount advanced by him on receiving the assignment of the security to himself, with interest thereon from the date of his purchase; the discount or rebate allowed to him on making the purchase enuring to the benefit of the defendant, who was liable to pay the plaintiff the costs of the suit subsequent to decree, not up to the hearing.

Statement

The defendant *Thompson S. Arnold* in the spring of 1877, being then the owner of 200 acres of land in the township of Derby, in the county of Grey—applied for and obtained through the plaintiff *J. M. Kilbourn*, acting as agent, a loan of $600 from the London and Canadian Loan and Agency Company on the security of this land, and when the interest became due the defendant remitted the amount to the company through the plaintiff. About the time of obtaining this loan, or shortly afterwards, the defendant purchased from one *Bricker*, of Port Elgin, a lot of 100 acres, adjoining his own 200 acres, for $2,000, and gave a mortgage on the whole 300 acres for that sum.

(*a*) 22 Gr. 26.

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In the month of January following, the defendant wishing to obtain a further loan of $200, went to the plaintiff—in whom he swore he placed confidence, and who was then a barrister-at-law, practising in the village of Invermay, in the adjoining county, and also acting as agent of such company—for the purpose of obtaining the loan; and to facilitate the obtaining thereof, the defendant informed the plaintiff that *Bricker* would postpone his mortgage to this further loan. The plaintiff, with a view of ascertaining the correctness of the defendant's statements in this respect, wrote to *Bricker* for information, and in the following month (February) received a reply which, while it was silent as to postponing his security, expressed *Bricker's* willingness to sell his mortgage, and suggested doing so to the plaintiff's company. In the meantime the plaintiff had told the defendant that he would not recommend his company to make the advance, and that the defendant had better apply elsewhere for the money. Subsequently *Bricker* through the plaintiff offered his mortgage for sale to the company, but the company did not buy, the plaintiff having written to the company's manager that the land was rough and stony, "so that your main margin would be on the 200 acre lot previously owned by *Arnold*, and covered by your $600 mortgage, and this would not afford you anything like what you require, viz., double or two-thirds amount advanced. I therefore consider it useless to make a formal report. You will therefore please return mortgage." Negotiations were then entered into between the plaintiff and *Bricker* with a view of the plaintiff acquiring this mortgage for his own benefit, which continued until the following month of July, when the plaintiff obtained an assignment of it for the sum of $1,650, including $25 claimed by the plaintiff for his services and trouble in the matter. He notified the defendant of his having procured a transfer and obtained from him a written acknowledgment of the amount then due on the mortgage, namely, $2,150. The plaintiff, about fifteen months afterwads, no portion of the amount due having been paid, instituted proceedings for the foreclosure of the mortgage so assigned to him.

Statement.

The defendant answered the bill claiming that the plaintiff was a trustee for him, and only entitled to claim payment of what he actually paid for the mortgage, upon obtaining such assignment.

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The case came on for the examination of witnesses and hearing, at the sittings of the Court, at Owen Sound, in June, 1880.

Mr. *Boyd*, Q.C., and Mr. *Hales*, for the plaintiff.

Mr. *Arthur MacIntyre*, for the defendant.

Counsel referred to and commented on *Hobday* v. *Peters* (*a*), *Davis* v. *Hawke* (*b*), *Carter* v. *Palmer* (*c*), *Austin* v. *Chambers* (*d*), *Rhodes* v. *Bates* (*e*).

At the conclusion of the argument,

Judgment.

BLAKE, V.C.—In most of the cases cited, it is by virtue of the position the person occupies, either as solicitor or attorney, that he is employed by some person for the purpose of transacting business; and by virtue of the certificate that he obtains as solicitor or attorney, there is, or should be, a very large amount of confidence placed in him by the person who seeks to employ him.

I cannot distinguish here in this case very nicely, whether it was as conveyancer, or whether it was as solicitor he was approached by the defendant; and, if he acted in the character of solicitor, whether it was in regard to the work that is ordinarily transacted by solicitors and attorneys, that the defendant sought his advice. The defendant goes to him, however, and asks him, "will you obtain for me a loan of $200?" And that results in a letter being written to the person who had obtained the mortgage on the property; and the answer to that letter is not written for a month afterwards, but traced by the defendant in this case as being an answer to it—not that he will advance another $200,

(*a*) 28 Beav. 349.
(*b*) 4 Gr. 394.
(*c*) 8 Cl. & Fin. 657.
(*d*) 6 Cl. & Fin. 1.
(*e*) L. R. 1 Ch. 252.

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but that he will sell the mortgage at a discount; and asks him, whether his company will buy it at such and such a rate?

The negotiations for the purchase lasts from February until the month of July. It is perfectly true, that during that period, the defendant had in the meantime been informed by the plaintiff that he could not obtain this loan from the company. And it may be that the defendant could not have obtained from any other source that sum of money; but the result of the dealing—the defendant going to the plaintiff as his solicitor or attorney and asking him to procure an advance of some money—was, that person, who is thus employed, getting a letter, entering into a negotiation, and obtaining a security for $1650, which then covered $2,000, together with interest for at least a year and three or four months, so that it was worth, at the time, $2,200.

Judgment.

Now, I do not think that any solicitor, or other professional gentleman, who is employed by a client for the purpose of obtaining a loan, when the answer to that was a statement that the mortgage which is upon valuable property will be sold at a reduction—a large reduction—has any right to take to himself that benefit.

For all I know it would have been advantageous, much more advantageous, for the defendant, instead of procuring a fresh loan of $200, to have procured a loan of $1650, and pay his mortgage off. I think it was clearly the duty of the plaintiff, under these circumstances, to have informed the defendant of the facts; not only that he could not raise the money, but that he was going to deal in the matter for himself,—that he had an opportunity of buying the mortgage at this discount; and, before he took to himself a benefit, to seek out the man who employed him, and who had placed confidence in him, and explain fully his position.

I think, therefore, it is out of the question, under the

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ordinary mode of dealing between solicitor and client, to say that the solicitor acquired any right to take to himself, as against the person who has employed him for the purpose of obtaining a loan of money, and who has had the knowledge, the information, and the advantage of the dealings that then took place—to take to himself a benefit, which, to my mind, it is perfectly clear should have gone to his client.

The only way I think the plaintiff could have legally acted in the matter, would have been to have informed the defendant of the fact, and to have given him ample opportunity to have obtained the benefit of paying off the mortgage at the reduced sum.

A very reasonable time might possibly have shaken off the relationship that existed; but no attempt of that kind was made here at all. I think, therefore, this mortgage cannot be held, as against the defendant, for any larger sum than was actually paid by the legal adviser of the defendant for it, and interest at the rate of 9 per cent. I think the defendant can get no costs up to the hearing. If he had tendered the money, he would have been entitled to the costs; but he made no tender; and, not having made any tender, he cannot, of course, possibly get the costs of the suit.

Judgment.

The mortgage stands for $1650, and interest at 9 per cent.

No costs up to the hearing, subsequent costs as usual —six months to redeem, and foreclosure in case of non-payment.

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GRAHAM ET AL. V. STEPHENS.

Specific performance—Costs.

In a suit, at the instance of a vendor of land for the specific performance of an agreement to sell, the defence raised was, that the land was agreed to be conveyed free from incumbrances, but the same was subject to the dower of one *M.* and to a mortgage, and therefore that a good title could not be shewn. It was satisfactorily shewn that the dower had been sufficiently barred, and the report of the Master stated that the price agreed to be paid for the land was $3,500; that $1,800 was due on the mortgage, and that the purchaser had paid only $100 on account of his purchase, "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The defendant, down to the bringing of the decree into the Master's office, had not demanded any abstract or made any objection to the title: The Court, on further directions, made a decree ordering defendant to specifically carry out the agreement, and pay to the plaintiff the general costs of the cause.

Statement.

This was a bill by *Henry Graham* and *James B. Boustead*, against *Thomas Stephens*, to enforce the specific performance of an agreement entered into between *Graham* and *Stephens*, for the purchase by the latter of ten acres of the west half of lot No. 32, in the third concession of the township Adjala, in the County of Simcoe, the metes and bounds of which were set forth; —and also the west 50 acres of the same lot, the consideration money for which, $3,500, was to be paid as follows: $1,000, part thereof, on the 1st day of January, 1879, with interest at 8 per cent. and the balance in 7 equal annual instalments, with interest at 6 per cent. The defendant covenanted to pay the purchase money in the manner above mentioned; and in consideration thereof the vendor (*Graham*) covenanted, on payment of the $1,000 and interest, to convey and secure to the defendant the said sixty acres of land; and liberty was reserved to the vendor to re-sell in case of default in payment.

The bill further alleged that *Graham* had assigned

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the said contract or agreement to one *William J. Shaw*, who had since become insolvent, and the plaintiff *Boustead* had been appointed his assignee. The bill also alleged default on the part of *Stephens*, in payment of the stipulated consideration and refusal on his part to complete the contract, and prayed a decree for specific performance of the agreement and further relief.

The defendant answered admitting the execution of the agreement as stated in the bill, and by the sixth paragraph of his answer set up that "by the said agreement the said lands were to be conveyed to me free from all incumbrances whatever; and that at the time the said agreement was executed, and up to the present time the said lands were and are not free from all incumbrances, but were and are subject to a mortgage to the *Canada Landed Credit Company*, for the sum of $1,800 and interest at 7 per cent. I submit that owing to the plaintiffs' title to the same lands not being good, and not being free from incumbrances, and the said plaintiffs not having tendered to the defendant a proper conveyance to him of the same lands, the plaintiffs have not placed themselves in a position to demand from the defendant a specific performance of the alleged agreement."

Statement.

The cause came on by way of motion for decree, when a reference was directed to the Master at Barrie, to inquire whether a good title could be made; the plaintiffs being declared entitled to specific performance in case a good title could be made to the premises.

In pursuance of this decree the Master at Barrie, by his report dated 14th April, 1880, found:

(1.) "That a good title can be made to the lands comprised in the agreement in the pleadings mentioned * * * subject to the dower of *Margaret McLean* therein, and to the mortgage mentioned in the fifth paragraph of this my report. (2.) * * That from the time of the making of the said agreement down to the bringing of the decree herein into my office, the defendant did not demand any abstract of the plaintiffs'

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title from the plaintiffs or their Solicitors, or make any objection or requisition in respect thereof. (3.) * * That the defendant retained possession of the said lands as purchaser thereof and not as tenant, from the 22nd day of March, 1878, being the date of the said agreement, until he quitted possession thereof as hereinafter mentioned. (4.) * * That the plaintiffs have a good title to the said land, subject to the said mortgage and to the dower of *Margaret McLean*, by length of possession on the part of the plaintiff *Graham*, and on the part of those through whom he claims, and that the defendant was well aware of such title by possession at the time he entered into the said agreement, and such title by possession, subject as aforesaid, was shewn in my office on the 18th day of February, 1880. (5.) * * * That there is an existing mortgage against the said property and other lands created by the plaintiff *Henry Graham* in favour of *The Canada Landed Credit Company*, dated the 15th, day of June, 1871, on which on and for some time after the 1st of January, 1879, there was about $1,800 and interest due, and that there is now due thereon an unpaid balance of about $1,200 and interest, and that the said mortgagees must join in the conveyance to the defendant or otherwise release their said mortgage before the fee simple in the said lands can be properly vested in the defendant, but the whole of the money secured by the said mortgage is not yet due. (6.) * * * The said mortgage contains a covenant by the mortgagees to accept their money at any time on six months' notice being given, but at the request of the defendant's Solicitor I find that there is no evidence before me of any such notice having been given. (7.) * * That the defendant was made aware of such mortgage on entering into the said agreement; and that the plaintiff *Henry Graham* was ready and willing to have removed and paid off the said mortgage at the time the defendant was entitled to call for a deed of the said lands, upon payment of the balance of instalment of principal and interest then falling due but that the defendant did not ask to have the same discharged. (8.) * * * That the defendant has only paid $100 on account of the purchase money of the said lands, and that he made default in the payment of and did not tender to the plaintiffs the balance of the sum of $1,000 and interest,

Statement.

which fell due upon the 1st day of January, 1879, under the said agreement, and in tendering to the said plaintiff, a mortgage of the said lands for the balance of the said purchase money. (10.) * * * That the non-completion of the said contract is attributable to the desire of the defendant to recede from the contract, owing to his not being prepared with the purchase money. (11.) * * * That the defendant has abandoned the said land; and that the buildings are out of repair, and that the said land is becoming deteriorated in value for want of proper cultivation. (15.) * * * That at the time the defendant executed the agreement in the pleadings mentioned he was in possession of the lands under a lease from the said *Graham*, which lease became void on execution of the agreement for sale."

From this report the plaintiffs appealed on several grounds, and the same came on to be argued before *Blake*, V. C., on the 26th day of April, 1880, when the following order was drawn up :—

Statement.

This cause coming on this present day by way of Appeal from the report of the Master at Barrie, bearing date the fourteenth day of April, 1880, on behalf of the plaintiffs, upon opening of the matter upon the following among other grounds: (1). The Master should have found that a good title could be made without either of the qualifications set out in the first paragraph of his report. (a) *Margaret McLean's* dower was sufficiently proved to have been barred. As to this ground, it appearing that since the argument of this appeal the deed in question was discovered, and that the defendant's solicitor was satisfied as to the objection being removed: this Court doth not think fit to make any other order than as to the costs. (b) The existing mortgage on the land is only a matter of conveyancing. As to this ground, it appearing that the Master found that the title was good, subject to the mortgage, which made the objection merely a matter of conveyancing, the appeal was dismissed. (2.) The Master should have found that this title was shewn on the eighteenth day of February last. (3.) The Master should not have qualified the finding in the fourth paragraph of his Report, by reference either to

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the said dower or to the said mortgage. * * (5.) And upon hearing counsel for both parties, and what was alleged by counsel aforesaid, it is ordered that the said appeal be, and the same is hereby dismissed, with costs to be paid by the plaintiffs to the defendant forthwith after taxation thereof.

The plaintiffs thereupon set the cause down for hearing on further directions and as to the matter of costs, and the same came on for hearing before *Spragge*, C., on the 26th day of May, 1880.

Mr. *G. M. Rae*, for the plaintiffs.

Mr. *G. W. Lount*, for the defendant.

The points relied upon appear in the judgment of

June 21st.

SPRAGGE, C.—This is a bill by a vendor, for specific performance. The contract which the plaintiffs seek to enforce, is dated 22nd March, 1878, and is to sell to the defendant sixty acres of land in the township of Adjala, for the price or sum of $3,500—$1,000 with interest to be paid 1st January, 1879, and the balance in seven annual instalments, with interest at six per cent; a conveyance of the property to be executed by the vendor on payment of the first instalment, and a mortgage to be given by the defendant for the balance;

Judgment.

all which is admitted by the answer.

The defence, as suggested by the sixth paragraph of the answer, is, that the land was to be conveyed free from incumbrances; and that at the date of the agreement the land was subject to a mortgage, in favour of the *Canada Landed Credit Company*, for $1,800, and so a good title could not be shewn.

The case came on to be heard before me, on the 5th of November, 1879, when a decree was made declaring that the plaintiffs were entitled to have the agreement specifically performed, and directing the usual inquiry as to title. In pursuance of this decree the Master, on the

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14th day of April 1880, made his report, finding, amongst other things, that a good title could be made subject to the mortgage of the *Canada Landed Credit Company*, and the dower of one *Margaret McLean*. From this report the plaintiffs appealed on the ground, amongst others, that the Master should have found that a good title could be made without either of the qualifications set out in the first paragraph of his report, as the existence of the mortgage was simply a matter of conveyancing, and the dower of *Margaret McLean* was sufficiently proved to have been barred. The appeal came on to be argued before my brother *Blake*, on the 26th of April last, who made an order dismissing the same, with costs to be paid by the plaintiffs to the defendant.

By his report the Master also finds that there was such a mortgage; and that the fact of such mortgage was made known to the defendant at the time of entering into the agreement. He finds further that at the date when the instalment of $1,000 was payable about $1,800 was due, and further that the plaintiff *Graham*, was ready and willing to have removed and paid off, the mortgage at the time the defendant was entitled to call for a deed, upon payment of the balance of the instalment, but that the defendant did not ask to have the same discharged; he does not, however, find whether or not this was made known to the defendant.

Judgment.

He further finds that at the date of his report about $1,200 was due upon the mortgage: further, that the mortgage contains a covenant by the mortgagees to accept their mouey at any time, on six months' notice being given; but that no such notice had been given.

He finds further, that the defendant has paid only $100 of his purchase money, and that the non-completion of the contract is attributable to the desire of the defendant to recede from the contract owing to his not being prepared with the purchase money.

A doubt is suggested as to the finding that the

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plaintiff *Graham* was ready and willing to discharge the mortgage if the defendant had paid the instalment. Does it mean that he was in a position to do it? To be in such position he must have been on his part ready with the money, and the mortgagees ready to accept it.

The finding is somewhat ambiguous. *Graham* could have placed himself in such position by giving the notice to the mortgagees, which he did not give; but he may have been in such position by a readiness on his part to pay, and a readiness on the part of the mortgagees to receive interest for six months, instead of notice. The report, however, does not find that he was in a position to pay, but only that he was ready and willing to pay.

In fact, however, there was no real difficulty—the purchaser was to pay $1000; and getting rid of the incumbrance was only a question of money, with which the plaintiff was ready, or of six months' time, if at the worst the mortgagees had been so blind to their own interest as not to accept six months' interest instead of six months' time.

Judgment.

It could be only a question of conveyancing, not a question of title. Something was to be done on the defendant's part; he was to pay $1,000 and interest, less $100 that he had paid. This the Master reports that he was not prepared to do, and he reports also that he did not ask to have the mortgage discharged.

Then as to what is properly matter of title; there was a question as to the dower of one *Margaret McLean*. The Master reports that from the time of the making of the said agreement, down to the bringing of the decree into his office, the defendant did not demand any abstract of the plaintiffs' title, or make any objection or requisition in respect of it; and the order on Appeal finds that this dower was sufficiently proved to have been barred; and that the Master should have found that title was shewn on the 18th of February, 1880.

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My conclusion, therefore, is, that the plaintiffs are entitled to specific performance.

Upon the question of costs, the general rule is, that where upon a bill filed by a vendor he does not shew, until he proves it in the Master's office, that he can make a good title, he has to pay the costs up to the time of his shewing good title. But, as was said by Sir *James Wigram*, in *Munro* v. *Taylor* (*a*), the time when a good title is shewn is not conclusive upon the question of costs, although it may materially affect that question. He goes on to say: "In deciding who shall pay the costs of the suit, the Court must inquire by whom and by what the litigation was occasioned." The case was a long one and somewhat complicated. It is sufficient to say, that acting upon the principle he had enunciated, he held the plaintiff entitled to the costs of the suit.

Upon appeal (*b*), Lord *Truro* said: "With regard to the costs, even supposing that a good title was not shewn till the attested copy of the lease of 1810 was left in the Master's office, I agree with the Vice-Chancellor that the same kind of litigation would have arisen even if the lease of 1810 had been produced before the filing of the bill; and that, therefore, the plaintiff is entitled to the costs of the suit." Judgment.

If an abstract of title had been asked for by the defendant, or he had made any objection or requisition in regard to the title, there is no reason to suppose that it would not have been shewn before suit, as it was shewn in the Master's office. It is evident, not only from the report, but from the defendant's answer, and from the whole case, that the litigation was not occasioned by any question of dower, or any question of title; but from the desire of the defendant for his own personal reasons to avoid the performance of the contract. The case is one in which I may properly

(*a*) 8 Hare 70.

(*b*) 3 McN. & G. 725.

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follow the decisions of Sir *James Wigram* and Lord *Truro*, in *Munro* v. *Taylor*.

I give the plaintiffs the general costs of the cause. I except, of course, the costs of appeal from the Master's report, which by the order made on appeal the plaintiffs are directed to pay.

MACAULAY v. KEMP.

Will, costs of contesting.

The rule is, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party to question either the execution of a will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party." This rule was acted upon, and the plaintiff relieved from costs in a case where the plaintiff had seen the deceased the day after the will was executed, and found him very low and unable to speak intelligibly, and where the testator had, to several persons, spoken approvingly of the conduct of the plaintiff, a son of a deceased brother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, in which his name was not mentioned, and which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof.

The bill in this case was filed on the 3rd of April, 1879, for the purpose of impeaching the will of the late *Alexander MacAulay* for want of testamentary capacity by the testator, and as having been procured by the undue influence of the defendants.

Statement.

The will bore date the 12th of March, 1874, and the death of the testator, it was shewn, occurred on the 14th of the same month.

The cause came on for hearing at Belleville, at the sittings in the spring of 1880. 1880.

Macaulay v. Kemp.

Mr. *Boyd*, Q. C., and Mr. *Clute*, for the plaintiff.

Mr. *Wallbridge*, Q. C., Mr. *Ostrom* Mr. *Hoyles* for the defendants.

Counsel for the plaintiff conceded that the evidence adduced would not support a decree for the relief prayed; but urged that the facts were such as to warrant the Court in relieving the plaintiff from the payment of costs.

Orton v. *Smith* (*a*), *O'Kelly* v. *Brown* (*b*), *Davies* v. *Gregory* (*c*), were referred to on the question of costs.

SPRAGGE, C.—I reserved at the hearing only the question of costs. This case seems to fall more nearly within one of the classes into which the Judges of the Court of Probate divide cases before them upon the question of costs, as explained by Sir *J. P. Wilde*, than any other. It is said by that learned Judge, in *Mitchell* v. *Gard* (*d*), as descriptive of one class of cases: "Secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent."

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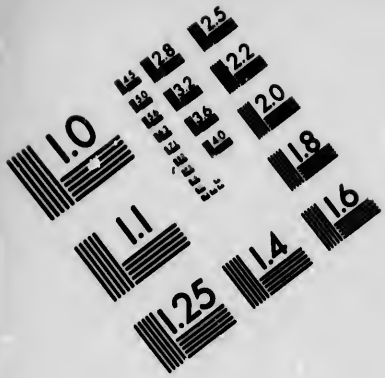
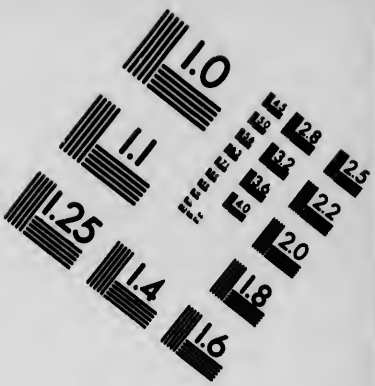
Judgment.

In this case the testator was not married. There were two families of deceased's brothers; he had lived for some years, became ill, and died in the house of the widow of one of these brothers, after a short illness. The plaintiff is a son of the other brother,

(*a*) L. R. 3 P. & D. 24.
(*b*) Ir. Rep. 9 Eq. 356.
(*c*) L. R. 3 P. & D. 28.
(*d*) 3 Sw. & T. 278.





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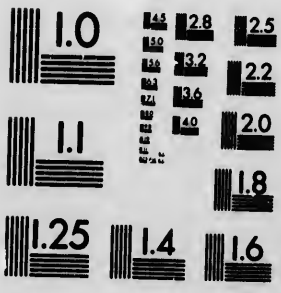

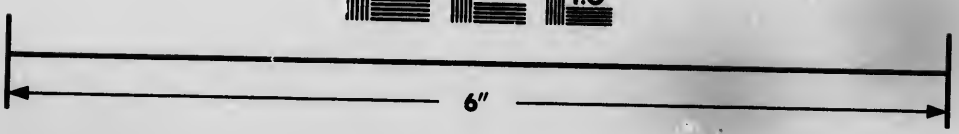

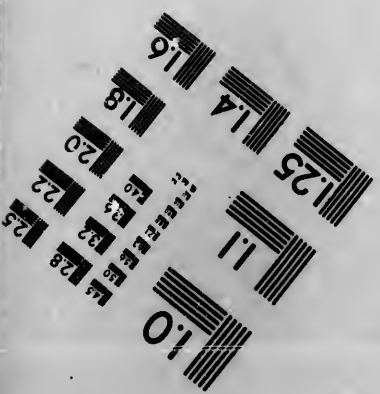

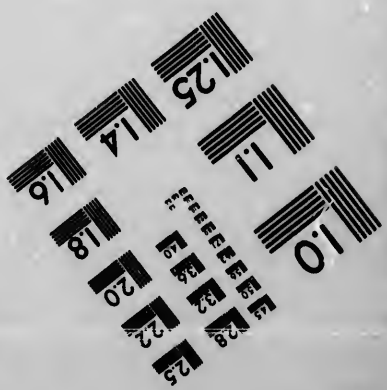

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and the testator had to several persons expressed his appreciation of the manner in which he had, after the death of his father, brought up the younger members of his family, and had expressed himself in such terms as to lead his auditors, and the plaintiff himself, to expect that he would have found some place at any rate in his uncle's will. His name was not mentioned in the will. His uncle had disappointed his reasonable expectations. When he saw his uncle the day after the execution of the will, he was very low; he appeared to wish to speak to him, but was unable to speak intelligibly. Under these circumstances he might not unreasonably suspect that the testator was not of testamentary capacity, or had been unduly influenced in the making of his will.

His case failed entirely at the hearing, but questioning the will was not, under the circumstances, unreasonable. The point in which he is to be blamed is, his not taking more care and pains than he appears to have done in informing himself as to the testamentary capacity of the testator; and in charging undue influence without seeing that he had some evidence to support it.

Judgment.

It is a case in which each party may properly be left to bear his own costs: the plaintiff to pay his own, and the costs of the defendant to be borne by the estate.

FAWCETT v. BURWELL. 1880.

Improvements made under mistake of title—Enhanced value of estate—Increased rent—Interest on money expended on improvements.

The plaintiff being in possession of property—a flouring mill—of which he believed his wife to be owner in fee as heiress of her father, expended upon it, about $3,253. After her death the father's will was discovered, which gave her a life estate only. Upon a reference to the Master, at London, to ascertain the amount of enhancement in value of the property, that officer, on the evidence adduced, found that its value at the death of the testator was $2,700, and that the value at the date of the report was $4,500: *Held*, that he had, under the circumstances, properly found the enhanced value of the estate by reason of such expenditure to be $1,800, not $1,300—although upon a sale under a decree of the Court the property had realized $4,000 only—and further, that the plaintiff was entitled to interest on such enhanced value from the time the money was expended.

The Master in ordinary, on appeal from the Master at London, thought the plaintiff had been charged with rent on the unimproved value; but *Proudfoot*, V.C., on appeal, reversed this finding, thinking it against the weight of evidence, which he had the same opportunity of judging of as the Master in Ordinary, who had not seen the witnesses.

Semble, that a forced sale for cash is not a proper mode of determining the amount of the enhancement in value of an estate which has been improved by a person in possession under a *bonâ fide* mistake of title.

This was an appeal from the Master, under the circumstances appearing in the judgment, and came on for argument before *Proudfoot*, V. C., on the 12th and 26th day of February, 1880.

The bill was filed to enforce a claim for improvements made by the plaintiff under a mistake of title. The plaintiff and his wife had been residents on the premises, which were owned by her father, for several years; and in the belief that the father had died intestate, and that the wife, who was an only child, was solely entitled, the plaintiff made the improvements now claimed for. After the death of the wife, and seven years after her father's decease, a will was discovered, by which he devised to her a life estate only. Statement.

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Fawcett v. Burwell.

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

Mr. *Creelman*, contra.

PROUDFOOT, V. C.—The plaintiff had made improvements upon the lands in question under a mistake of title, believing them to be the property of his wife as heiress-at-law of her father, while by the discovery of her father's will, after her death, it was ascertained that she had had only a life interest.

By the decree an account was directed of the estate of the testator, and, among others, an account of the rents and profits of the testator's estate and by whom received; and an inquiry as to the nature and extent of the improvements made by the plaintiff, and necessary for the protection and preservation of the property, or proper under the circumstances of the case.

The Master at London, to whom the case was referred, made a report allowing large sums to the plaintiff as proper expenditures. Upon appeal a number of these were disallowed, and it was referred back to the Master to review his report, among other things, as to the value of the improvements and the extent to which they had enhanced the value of the estate. The same Master made a further report, which was appealed from and some alterations made, and it was referred to the Master in Ordinary to review the reports of the Master at London, as to the items discussed on the second appeal except certain specified particulars.

Judgment.

The Master in Ordinary has made his report, which is now appealed from because: 1. He has reduced the value of the improvements made by the plaintiff below the value fixed by the Master at London. 2. That the Master improperly deducted the occupation rent charged against the plaintiff out of such reduced value. 3. The purport of this objection, which is not very clearly stated in the notice of appeal, as argued before me, the objections to the insufficiency of the notice being

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waived, is, that the occupation rent should have been deducted from the gross expenditure; that the enhanced value has been estimated much too low: that the rental charged is upon the enhanced value: that the Master has allowed no interest upon the expenditure for repairs and improvements.

It is not disputed that the amelioration of the premises was properly made under a mistaken belief as to the title of the property.

The mode in which the enhanced value was arrived at was this: evidence was given to shew that at the death of the testator the property, a flouring mill, very much out of repair and rapidly deteriorating, was worth $2,700; and the Master adopted this value, and it seems to me a proper enough conclusion from the evidence. The Master at London then ascertained the value, from evidence, at the time of his report to be $4,500; and the difference between these two sums, $1,800, he fixes as the enhancement in value by reason of the improvements. The actual cost of the improvements appears to have been $3,253.69, and the Master finds that proper deductions from that sum for wear and tear would be $888.69, so that the enhancement should apparently have been $3,253.69—$888.69=$2,365; but finding the present value to be $4,500 he only allows $1,800. In this mode of finding the value, it is plain that no allowance is made for the depression in value of the property as it stood at the death of the testator, but the whole depression is ascribed to the wear and tear, &c., of the improvements.

Judgment.

Since the report of the Master at London, the property has been sold under the decree of the Court, when, instead of realizing $4,500, it brought only $4,000.

The Master in Ordinary has without further evidence, except that of the sale, determined that the enhanced value, was only $1,300, and he has deducted the $500, difference between the estimated value and the realized value from the sum expended by the plaintiff. It may

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be a question whether the plaintiff in such a case should be bound by the result of a forced sale, I presume for cash, as alleged, as determining the amount of enhancement. I do not think it necessary to decide this point now, but considering the nature of the property, thirty-two acres of land, with a mill in a very bad state of repair, and which must have gone on deteriorating with the rest of the improvements, I think the $500 difference may very fairly be ascribed to that cause, and therefore, that the enhancement should be replaced at $1,800. But the evidence was not directed to this point, and if the parties desire it there will be a reference back to the Master to review the report in this respect. But seeing the large costs already incurred, I would deprecate any such reference unless the parties advisedly insist upon it.

Judgment.

The plaintiff has been allowed no interest upon the cost of improvements. I think him entitled to interest upon the $1,800 the increased value, from the time he paid it. The cases are not uniform upon this subject; sometimes it is allowed and sometimes not. In *Eyre* v. *Hughes* (*a*) a mortgagee was allowed for repairs, and interest. In *King* v. *Kitchener* (*b*) he was allowed the cost of improvements and interest, and a number of cases both ways are collected in 2 *Seton* on Dec., 1080-81. Certainly where the rental is charged on the enhanced value interestshould be allowed; and especially considering the rule that improvements made by a person, under the belief that he was absolute owner, are allowed far more liberally than to a mortgagee who knew himself to be such when spending his money: *Carroll* v. *Robertson* (*c*). In *Brunskill* v. *Clarke* (*d*) the plaintiff, who thought himself the owner, was allowed for his improvements, and interest. In *Fitzgibbon* v. *Duggan*, (*e*) there seems to have been no interest allowed on the improve-

(*a*) L.R. 2 Ch. D. 148 164. (*b*) *Seton* on Dec. 1068.
(*c*) 15 Gr. 173 176. (*d*) 9 Gr. 430.
(*e*) 11 Gr. 188.

ments. *Walton* v. *Bernard*, (*a*) decides nothing as to interest, and there was no need to do so, as it was referred back to the Master as to what improvements should be allowed, and there seems no report of the case on further directions. In *Kerby* v. *Kerby* (*b*) a mortgagee was held entitled to interest on sums expended on repairs. It would be needless to go through all the cases cited. There is no invariable rule as to interest. In this case I think it ought to be allowed. If the estate has paid interest upon the sum spent for improvements in discharging the mortgage by which money was raised to make them, the plaintiff will not be entitled also to interest. I only give him interest on the sums he has paid.

With regard to the rent charged to the plaintiff, the result of the evidence seems to me to favour the view that it was a rental based upon the increased value That I understand was the finding of the Master at London; and it is no violation of the rule laid down in *Day* v. *Brown* (*c*) if I differ from the Master in Ordinary, if he considered, as it is said he did though it does not so appear in his judgment, that the $400 was rent upon the unimproved value,—because he did not see the witnesses and he could have had no reason from demeanor or manner, for attaching more credit to one than to another. And upon the weight of evidence. I think the $400 was rent at the improved value, and I agree with the Master who saw the witnesses.

Judgment.

The parties will be able to correct the report from these findings, and I think the plaintiff entitled to his costs of this appeal.

The case was also spoken to on further ctions; and when the report is corrected in the manner I have indicated, the balance ascertained to be due to or by the plaintiff, will be ordered to be paid to the party entitled.

(*a*) 2 Gr. 344, 369. (*b*) 5 Gr. 584 590. (*c*) 18 Gr.

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CLARK v. BOGART.

Covenant on sale by vendor, to pay off incumbrances—Right of subsequent purchaser from vendee to benefit of—Enforcement of at instance of subsequent purchaser in suit to marshal securities—Costs—Exoneration—Marshalling—Registry Law—Notice.

A vendor of lands, which were subject to incumbrances created by himself, covenanted with his vendee to pay off the incumbrances and discharge the lands sold from them. The vendee subsequently mortgaged the lands to the plaintiffs, with the usual mortgagor's covenants. In a suit by plaintiffs seeking (amongst other things), to have the lands relieved of the incumbrances.

Held, that the plaintiffs were entitled to the benefit of the vendor's covenant, and he was ordered to discharge the incumbrances and pay the costs of the incumbrancers.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to *S.* who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels.

Held, (1.) That the plaintiffs were entitled to require as between them and *S.* that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2.) That the registration of the prior mortgage against the parcel bought by *S.* was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that *S.* was affected with notice of the plaintiffs' mortgage, and the right it conferred.

The material facts were as follows:—

Statement.

On the 27th of February, 1873, the defendant *Abraham L. Bogart*, being the owner of two several parcels of land subject to two mortgages created by him, one to the *Trust and Loan Co.*, and the other to one *Lucretia Mackenzie*, sold and conveyed one of the parcels to *David D. Bogart*, and in the conveyance thereof covenanted and agreed with him that he the said *A. L. Bogart*, would pay off and discharge the mortgages thereon to the *Trust and Loan Co.*, and *Lucretia Mackenzie*, and that until paid they should be charged upon the remaining parcels. The conveyance

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also contained covenants for seisin in fee simple, right to convey, and freedom from incumbrances.

On the 28th of February, 1873, *David D. Bogart*, mortgaged the said parcel so conveyed to him by *A. L. Bogart*, and other parcels of land, of which he was the owner, called the *Hill* property, to *Pitceathly & Kelso*, by an instrument which contained the usual mortgagor's covenants.

On the 4th of February, 1874, *David D. Bogart*, mortgaged the parcel conveyed to him by *A. L. Bogart*, to the plaintiffs by an instrument which contained the usual mortgagor's covenants.

Both these instruments were soon after their respective dates registered against the various parcels embraced in them respectively.

On the 16th of September, 1874, *David D. Bogart* conveyed a portion of the *Hill* property, to the defendant *Wm. Sutherland*, by deed in the short form under the Statute.

Statement.

At the date of the conveyance to him, the defendant *Wm. Sutherland*, was not aware of the mortgages to *Pitceathly & Kelso*, and the plaintiffs.

Subsequently on becoming aware of them, he paid off *Pitceathly & Kelso*, and procured them to assign their mortgage to the defendant *John Sutherland*, who admitted that he was a trustee thereof, for the defendant *Wm. Sutherland*.

There were other conveyances and agreements affecting the titles to the lands in question, and other lands; but as no question arose with regard to them, it is not considered material to set them forth.

The bill was filed for the purpose (amongst others), of having it declared that the defendant *A. L. Bogart*, was bound to pay off the mortgages to the *Trust and Loan Co.*, and *Lucretia Mackenzie*, and that as between the plaintiffs and him, the parcels retained by him were primarily charged with the amounts of the mortgages, and that the plaintiffs were entitled to

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throw the *Pitceathly & Kelso* mortgage upon the *Hill* property, including the parcel sold to the defendant *Wm. Sutherland*, in the first instance, and before resort should be had to the parcels embraced in the plaintiffs' mortgage, for satisfaction of the *Pitceathly & Kelso* mortgage.

By consent, during the progress of the suit, all the lands were sold; and it was then ascertained that the proceeds of the parcels retained by *A. L. Bogart* were insufficient to pay off the *Trust and Loan Co.* and *Lucretia Mackenzie* mortgages; and that the proceeds of the *Hill* property, were insufficient to pay off the *Pitceathly & Kelso*, mortgage.

By the decree it was referred to the Master at Belleville, to take an account of the amounts due to the several parties in respect of their securities, and to settle the priorities, and to ascertain and state upon which properties the said securities were chargeable; and reserved further directions and costs.

Statement.

The Master having made his report, finding the above amongst other facts, the cause came on for hearing on further directions.

Mr. *Moss*, for the plaintiffs, submitted that they were entitled to an order against *A. L. Bogart*, as asked, and that the plaintiffs were entitled to have the proceeds of the *Hill* property, including parcel 4, purchased by defendant *Wm. Sutherland* from *David D. Bogart*, applied first towards payment of the *Pitceathly & Kelso* mortgage; that *A. L. Bogart* should pay the costs of the *Trust and Loan Co.* and *Lucretia Mackenzie*, and that *Wm. Sutherland* should only be allowed costs of proving his claim on the *Pitceathly & Kelso* mortgage, to be added to his claim.

Mr. *A. H. Marsh* for *Trust and Loan Co.* and *Lucretia Mackenzie*, asked that their costs should be paid out of the fund in Court.

Mr. *Hoskin*, Q.C., for the infant heirs of *David D. Bogart*, pointed out that the fund realized would not

satisfy the incumbrances, and asked that his costs should be borne by the fund in Court. 1880. Clark v. Bogart.

Mr. *W. Cassels*, and Mr. *G. D. Dickson*, for *A. L. Bogart* and *Wm. Sutherland*, contended that the plaintiffs could not obtain the benefit of the covenant with *David D. Bogart*, that there was no privity, and that the only remedy was by a proceeding in the name of the representatives of *David D. Bogart*,

That as regards the parcel 4, part of the *Hill* property, purchased by *Wm. Sutherland*, from *David D. Bogart*, *Sutherland* was a purchaser for value without notice of the plaintiffs' mortgage; that in order to give plaintiffs the right they claimed their mortgage should have been registered against the *Hill* property; that not being so registered, but registered only against the parcels embraced in it, there was no notice of any kind to *Sutherland*, at the date of his purchase, of the plaintiffs' alleged rights; that by virtue of the Registry Law, *Sutherland* acquired an indefeasible title, so far as plaintiffs were concerned, and that he was entitled to hold the proceeds of this parcel free from the claim of the plaintiffs to have them applied towards satisfaction of the *Pitceathly & Kelso* mortgage. Statement.

In addition to the authorities referred to in the judgment, the following were cited and commented upon by Counsel:

Boucher v. *Smith* (*a*), *Aldrich* v. *Cooper* (*b*), *Jones* v. *Beck* (*c*), *Davis* v. *White* (*d*), *Barker* v. *Eccles* (*e*), *Beevor* v. *Luck* (*f*), *Brower* v. *The Canada Permanent Building and Savings Society* (*g*), *Gibson* v. *Seagrim* (*h*), *Howeren* v. *Bradburn* (*i*), *Registry Act*, Rev. Stat. Ont. cap. 111, secs. 74, 78, 80.

(*a*) 9 Gr. 347.
(*b*) 2 W. & T. L. Ca. 780.
(*c*) 18 Gr. 671.
(*d*) 16 Gr. 312.
(*e*) 17 Gr. 277.
(*f*) L. R. 4 Eq. 537.
(*g*) 24 Gr. 509.
(*h*) 20 Beav. 619.
(*i*) 22 Gr. 96.

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BLAKE, V. C.—I think the plaintiffs are entitled to an order against *Abraham L. Bogart* compelling him to discharge the mortgages remaining unpaid, and which were in existence on the property sold to *David D. Bogart* by him, at the time of such sale. The true rule seems to be laid down in *Rice* v. *George* (*a*), by Vice-Chancellor *Proudfoot*, where he states, "I do not think it material to inquire whether the covenants in the deed of February, 1855, ran with the land or not, for even if in gross they are binding on the covenantors and their representatives, who may be sued on them by the covenantee or his representatives: *Stokes* v. *Russell*. And when the covenants entered into with a purchaser are covenants in gross, and he afterwards sells, the purchaser from him being entitled to the benefit of the former covenants, can compel him to allow his name to be used for the purpose of enforcing the covenants: *Riddell* v. *Riddell*." See *Empire Gold Mining Co.* v. *Jones*, (*b*). As *A. L. Bogart* should have discharged these mortgages, the costs of these mortgagees, *The Trust & Loan Co.* and *Lucretia Mackenzie*, must be borne by him. When the plaintiffs took their mortgage they had the right to demand that the purchase money of the piece of land not embraced in their mortgage and embraced in the *Pitceathly & Kelso* mortgage, should be applied on the *Pitceathly & Kelso* mortgage, so as to leave so much more of the purchase money of the property embraced in the plaintiffs' mortgage, to go in satisfaction of this claim. It is now argued that as this piece of property was sold and conveyed to *Sutherland*, he is entitled to hold it free from this right of the plaintiffs, and it is urged that by the registry he has acquired an indefeasible title. But I do not think that is the case. When *Sutherland* bought a part of the *Hill* property, he found it covered by a mortgage to *Pitceathly & Kelso*. The

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(*a*) 24 Gr. at 517.

(*b*) 19 C. P, 245.

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land he bought was liable for this mortgage unless he could cast it on other lands embraced in this mortgage. Whether this could be done or not depended on the state of the title to these lands. If he had investigated that point he would have found that the right to cast the payment of this mortgage on other lands depended on the rights of other persons whose claims would appear from the perusal of the mortgage on his own lands. The right of *Sutherland* then to have this mortgage discharged, otherwise than out of the land he bought, depended on the position of others whose claims appeared on investigating the title to the land mentioned in the mortgage in question. The land he buys must either bear the *Pitceathly & Kelso* mortgage, or, if he seeks to cast it on the land, other than his own in the *Pitceathly & Kelso* mortgage, the registry office shews him how far the other lands can be charged in his favour. I think *Sutherland* is bound with notice of any instrument registered against these other lands, which he seeks to charge with the mortgage debt he desires to have paid thereout in ease of the land purchased by him.

Judgment.

The parties are entitled to a declaration that those who have not come in and proved are foreclosed. As the purchase money is not sufficient to answer the claims proved, the heirs have no interest in the litigation, and being brought before the Court simply to get the estate out of them, are entitled to be paid their costs.

I understand that an order is needed for the payment of the dower of Mrs. *Bogart*, and her costs; the amount, and other particulars as to which, have been settled.

Let the Receiver pass his accounts, and pay in the balance in his hands to be applied in the same way as the purchase money of the various lots of land sold.

The costs of the *Trust and Loan Co.* and of *Lucretia Mackenzie* should be added to their debts, and paid by

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A. L. Bogart, who should have discharged these mortgages under his covenant.

I do not see why the costs of the incumbrancers should not be added to their claims, and paid along with them. No reason was assigned, nor authority cited, for not following this rule in the present case.

MENZIES v. OGILVIE.

Suit by creditor against mortgagee—Mortgagor—Garnishee.

The plaintiff claimed to be a creditor of *O.*, and as such filed a bill alleging that *O.* was mortgagee or otherwise entitled to some interest in the lands of *M.*, and that *O.* was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by *O.*, and to restrain *M.* from paying *O.*, and also an order for *M.* to pay plaintiff. At the hearing the Court [SPRAGGE, C.] made a decree referring it to the Master to ascertain what was due by *O.* to the plaintiff, and if anything found due that *O.* should be ordered to pay the amount due to the plaintiff, with costs; but dismissed the bill as against *M.* with costs.

This was a bill filed to enforce an alleged claim held by the plaintiff against the defendant *Ogilvie,* for which no judgment had been recovered at law. The material facts of the case appear in the judgment.

Statement.

The cause came on to be heard at the sittings of the Court at Belleville, in October, 1878.

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

The defendants resisted the claim set up, on the ground that there was not any precedent for such a proceeding; it being in fact an attempt to obtain the benefit of garnishee proceedings without the person claiming to be a creditor having ever recovered judgment against his debtor. The only relief to which the

plaintiff could be entitled at law was under the statute enabling the sheriff upon a writ of *fieri facias* to seize and sell the mortgage security. The only possible ground for obtaining the relief here sought would be that *Ogilvie* was about to sell and convey the land, or rather his interest in it. This, however, *Ogilvie* had by his answer positively denied, and, therefore, it could only be established against him by the evidence of at least two witnesses.

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Powell v. *Lea* (*a*), *Willis* v. *Jernegan* (*b*), *McIntyre* v. *Cameron* (*c*), *Boulton* v. *Robertson* (*d*), were referred to.

SPRAGGE, C.—The plaintiff's case is, that he is a creditor of the defendant *Ogilvie* in the sum of $1,000: that *Ogilvie* is entitled to some estate or interest in certain lands under a mortgage made to him by the defendants, the *Mooneys*, on the 19th of August, 1873, to secure payment of $1,175: that *Ogilvie* threatens and intends to dispose thereof for the purpose of defeating the plaintiff's claim; and he asks by his bill for an account of what is due to him from *Ogilvie*, and that in default of payment his interest in the mortgage and mortgaged lands may be sold; that the *Mooneys* be restrained from paying *Ogilvie*, and be ordered to pay the plaintiff to the extent of his debt, and for other relief. No injunction is prayed against *Ogilvie*.

Judgment.

My opinion is, that the plaintiff is entitled to a reference, as prayed by him, against *Ogilvie*. The serious question in the case is, as to the relief he asks for in respect of the mortgage. The only relief in terms given by statute is by the Common Law Procedure Act, enabling the sheriff under a writ against goods to seize a mortgage, and to recover the mortgage debt. There was no remedy at common law or in this Court.

(*a*) 20 Gr. 621.
(*b*) 2 Atk. 251.
(*c*) 13 Gr. 475.
(*d*) 4 Gr. 109.

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The remedy given is the creature of the statute, and like the remedy by garnishee proceedings, applies only in such cases and in such mode as is pointed out by the statute. The prayer that the *Mooneys* be restrained from paying *Ogilvie*, and that they be ordered to pay the plaintiff, is in effect asking for such remedy in this Court by a simple contract creditor as a judgment creditor, and only a judgment creditor, could obtain at Common Law by garnishee proceedings.

The bill prays that the interest of *Ogilvie* in the mortgage and mortgaged lands may be sold. I find no authority for this. An interest in lands saleable at common law or in this Court would be sold under an execution against lands; and so the interest of a mortgagor, *i. e.*, his equity of redemption, which is made saleable in execution by statute, is saleable under an execution against lands, while the interest of a mortgagee is classed under the head of securities for money, and is made saleable under an execution against goods. The law makes no provision for reaching the interest of a mortgagee, except that made by the Common Law Procedure Act. If the plaintiff establish in this Court his alleged debt against *Ogilvie*, he will be entitled to his *fi. fa.* against the goods of his debtor, and this mortgage will be exigible under the Act as it would be at common law. I know of no other mode of reaching it. Much of the reasoning of the Court in *Horsley* v. *Cox* (*a*) applies to this case. I would refer also to *Brown* v. *Perrott* (*b*), before Lord Langdale.

Judgment.

I cannot properly make a decree for payment of the sum claimed by the plaintiff against *Ogilvie*, and to the correctness of which the plaintiff has deposed, because the plaintiff has prayed for a reference to ascertain the amount, and *Ogilvie* had a right therefore to assume that the amount would not be adjudged against him without a reference. The decree will be

(*a*) 4 Chy. App. 92. (*b*) 4 Beav.

for such reference, and if anything be found due to the plaintiff, with costs. 1880.

The bill as against the *Mooneys* must be dismissed, with costs. Menzies v. Ogilvie.

FLEMING v. MCDOUGALL.

Will, construction of—Estate tail.

A devise was to *A. C. M.* for her life with remainder to her husband *W. M.* "and the heirs of their bodies for ever":—*Held*, that *W. M.* took an estate tail.

By a subsequent clause the will provided that, in the event of the said *W. M.* dying without making a will, the property should be divided among his surviving children in certain shares, but declared it to be the intention of the testatrix that he should have full power, with the assent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best":—*Held*, that the powers so given to *W. M.* to vary the shares or proportions of the heirs-in-tail, did not affect the quality of the estate devised.

This was a suit instituted by the plaintiff against the defendant *McDougall*, to enforce payment of the amount due for principal and interest upon a mortgage created by him in favour of the plaintiff for $4,000; and in pursuance of the decree drawn up in the cause, a sale had been made of the mortgaged premises—a farm of 190 acres in the township of York—to one *F. McDougall*, for $10,600, which amount had been paid into court, and a vesting order made in favour of the purchaser, and so made upon his application. *F. McDougall* subsequently agreed to sell to one *G. D. Morse*, but upon searching the title it was discovered that a mortgage in favour of one *J. M. Grant*, was registered against the property, and remained unsatisfied. Various proceedings were taken in respect to matters connected with the sale not necessary to be here mentioned, but Statement.

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amongst other proceedings an order was made referring it to the Master at Peterborough to ascertain if a good title could be made to the premises so sold, and to settle the conveyances, &c. In pursuance of such order the Master made his report dated 30th December, 1878, finding against the title on the ground that under the will of *Samantha Easton*, the testatrix in the pleadings mentioned, the defendant *McDougall* took a life-estate only, and that therefore a good title could not be made to the premises so sold. The will was dated 31st March, 1855, and the testratrix thereby after directing payment of debts and sundry bequests, disposed of the said mortgage premises, together with several houses and lots in the city of Toronto, and all her real and personal property whatsoever, "and wheresoever situate, to her niece and adopted daughter *Amelia C. McDougall*, for her life, with remainder to her husband *William McDougall*, and the heirs of their bodies forever. In the event of the said *William McDougall* dying without making a will, then I direct the said property to be divided among the surviving children of the said *William McDougall* and wife in the following shares and proportions: To their eldest son *Joseph*, three shares, to each of their other sons two shares, and to each of their daughters, one share; but it is the intention of this my will, and I hereby declare that my said nephew *William McDougall*, shall have full power with the consent of his said wife, to sell and convey absolutely by deed any part or portion of the said property, and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best," and appointed the defendant *McDougall* her executor, who proved the will.

Statement.

From the ruling or finding of the Master on the abstract of title, and the objections to the title, the plaintiff appealed on the grounds (amongst others) that "the said Master erred in allowing the said objections, but should have overruled the same and have found

that the said *William McDougall* had power to mortgage the said lands," and the same came on to be argued before the Chancellor on the 30th January, 1879. 1880. Fleming v. McDougall.

Mr. *Boyd*, Q. C., and Mr. *W. Cassels*, for the appeal, contended that the only real doubt there was as to the effect of the will was, whether the husband took an estate tail or one in fee, as the power given to him to convey with his wife might be considered as enlarging the estate he would otherwise have taken.

Mr. *G. B. Gordon*, for the purchaser.

In addition to the cases mentioned in the judgment, Doe *Atkinson* v. *Featherstone* (*a*), *Roddy* v. *Fitzgerald* (*b*), *Jack* v. *Fetherston* (*c*), *Jesson* v. *Wright* (*d*), *Clifford* v. *Brooke* (*e*), *Seale* v. *Barter* (*f*), *O'Mahoney* v. *Burdett* (*g*), *Ingram* v. *Soutten* (*h*), *Olivant* v. *Wright* (*i*), *Clark* v. *Henry* (*j*), were referred to.

SPRAGGE, C.—The rule of construction enunciated by Lord *Alvanley* in *Poole* v. *Poole* (*k*), has been adopted in numerous cases since. He says: "The Courts have never deviated from the general rule, which gives an estate tail to the first taker, where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Feb. 19th. Judgment.

I have examined all the cases, and do not find the rule laid down by Lord *Alvanley* questioned in any of them.

(*a*) 1 B. & Ad. 944.
(*b*) 6 H. L. C. 823.
(*c*) 9 Bli. N. S. 237, 273.
(*d*) 2 Bli. O. S. 1.
(*e*) Ir. Rep. 10, C. L. 179.
(*f*) 2 B. & P. 485.
(*g*) L. R. 7 E. & I. App. 388.
(*h*) L. R. 7 E. & I. App. 408.
(*i*) L. R. 1 Ch. D. 346.
(*j*) L. R. 6 Chy. 588, 11 Eq. 222.
(*k*) 8 B. & P. 627.

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That being the rule of construction, the devise to *William McDougall*, husband of *Amelia C. McDougall*, and the heirs of their bodies for ever, would convey an estate tail to *William McDougall* unless the other provisions of the will, which I am about to notice, bring it within the rule applying to cases where the devise is upon a contingency.

The devise is first of all to "*Amelia C. McDougall*, for her life;" then follow the words: "with remainder to her husband *William McDougall*, and the heirs of their bodies for ever." I do not apprehend that the devise to *William McDougall* being preceded by a life-estate to his wife, would make any difference in the quality of the estate devised to him. In fact, the wife died after the testatrix; and *William*, her husband, survived her, and made a conveyance which, if he had an estate tail, it is agreed, had the effect of barring it.

The will contains this other provision. "In the event of the said *William McDougall* dying without making a will, then I direct the said property to be divided among the surviving children of the said *William McDougall* and wife, in the following shares, and proportions: to their eldest son *Joseph* three shares, to each of their other sons two shares, and to each of their daughters one share. But it is the intention of this my will, and I hereby declare that my said nephew *William McDougall* shall have full power, with the consent of his said wife, to sell and convey, absolutely by deed, any part or portion of the said property. And in case of his making a disposition by will, to vary the shares and proportions thereof as he may deem best."

Judgment.

The power given to *William McDougall* to vary the proportions of the heirs-in-tail, by will, does not affect the quality of the estate. That was the case in Doe *Cole* v. *Goldsmith* (*a*), and is among the instances

(*a*) 7 Taunt. 209.

given by Sir *Alexander Cockburn*, in *Jordan* v. *Adams* (*a*), as failing to affect the quality of the estate given by the general devise, and I find no case that decides that, failing an appointment by will, the heirs-in-tail shall take in unequal proportions, affects the quality of the estate. To give that effect to such a provision would be against the rule laid down in the same case by the Chief Justice, at p. 499, that "when once the donor has used the terms 'heirs,' or 'heirs of the body,' as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect."

Judgment.

Edwards v. *Edwards* (*b*), and subsequent cases in which that case has been discussed, belong to another class: they are cases turning upon the construction to be given to provisions for the event of the happening of certain contingencies, and the substituting of one person or class for another upon the happening of such contingencies. They do not appear to me to apply to the case before me.

The costs, I think, may properly come out of the estate.

(*a*) 9 C. B. N. S. at 498.

(*b*) 15 Beav. 357.

1880.

BRIGGS v. LEE.

Mechanics' Lien Act—Lien of party furnishing materials.

The plaintiff furnished materials to *G.* for a building which *G.* had contracted to erect for the defendants. After the defendants had paid *G.* all there was due to him, and after *G.* had abandoned his contract, the plaintiff notified the defendants of his unpaid account against *G.* for such materials; and filed a bill to enforce his lien more than 90 days after the materials had been furnished.

A demurrer for want of equity was allowed, with costs; and *Semble*, that even if the bill had been filed in time, there would not have been any lien.

Remarks upon the various provisions of the Mechanics' Lien Act.

THIS was a suit by *Daniel Briggs*, lumber merchant, against *Arthur B. Lee* and *John Leys*, and *Robert Hall Smith*, the bill in which was filed on the 21st of February, 1880, setting forth that the plaintiff had entered into a contract with *Joseph Gearing* to supply the lumber to be used by him in the erection of a certain building for the defendants *Lee* and *Leys* in the city of Toronto; that *Gearing*, at the date of such contract, and until about the 15th of November, 1878, was a contractor, carrying on business as such in the said city, and as such entered into a contract with *Lee* and *Leys* for the erection of certain buildings in the said city, on certain lands of the said *Lee* and *Leys*; and that in pursuance of plaintiff's agreement with *Gearing*, he (plaintiff) did furnish to the said *Gearing*, between the 10th day of October, 1878, and the 13th day of November following, a large quantity of lumber, for which *Gearing* agreed to pay plaintiff $581.41, and which said lumber was used in the erection of the said building.

Statement.

The bill further alleged that on the 18th of November, 1878, the plaintiff notified the defendants *Lee* and *Leys* of his unpaid account of $581.41 against the said

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Gearing: that the total amount agreed to be paid to *Gearing* by *Lee* and *Leys*, under their said contract, was $10,152, and at the last mentioned date the amount paid by them to him was $7,700: that on or about the 16th of November, 1878, *Gearing* abandoned his contract, and in order to complete the same *Lee* and *Leys* employed workmen to do so, and paid them therefor about the sum of $2,500: that under the terms of their contract with said *Gearing* they, the said *Lee* and *Leys*, were entitled to employ said workmen and charge the amount paid them against *Gearing*, and as between them and the said *Gearing*, or his estate, there was nothing due under the contract to him.

The plaintiff alleged that, under the contract, work and labour and materials had been done and supplied to the value of at least $7,700, and that it was the duty of the said *Lee* and *Leys* to retain one-tenth of that amount to meet the claim of the plaintiff and other claims of a like nature.

Statement.

The bill further stated that *Gearing* became insolvent, and the defendant *Smith* was appointed his assignee, and submitted that it should be declared that the said *Lee* and *Leys* had in their hands sufficient of the said moneys to answer the claim of the plaintiff, and that the plaintiff had a charge on such moneys for the amount of his claim, and prayed relief accordingly.

The defendants *Lee* and *Leys* demurred for want of equity.

Mr. *McMichael*, Q.C., and Mr. *A. Hoskin*, for the demurrer.

Mr. *Rose* and Mr. *J. H. Macdonald*, contra.

McCormick v. *Bullivant* (*a*), *Phillips* on Mechanics' Lien, pp. 193, 201–4, 302, 454 were referred to.

(*a*) 25 Gr. 273.

1880.

Brigge v. Lee.

June 21st.

SPRAGGE, C.—The bill is filed under the Mechanics' Lien Act, R. S. O., ch. 120, amended by 41 Vic., ch. 17. The plaintiff was a furnisher of materials to one *Gearing*, who was a contractor with the defendants *Lee* and *Leys* for the erection of certain buildings, the contract price being $10,152. The bill alleges that the owners paid to *Gearing* $7,700: that about the 16th of November, 1878, *Gearing* abandoned the contract; that in order to complete the same, the owners were obliged to employ workmen to complete the same, and paid them therefor about $2,500; that the owners were entitled to do this under their contract, and that as between the contractor and the owners nothing is due on the contract.

The plaintiff alleges that under a contract with *Gearing* he furnished materials for the building between the 10th of October and 13th of November, 1878, which materials were used in the building, and the contract price for which was $581.41; that on the 18th of November, 1878, the plaintiff notified the owners of his said unpaid account against *Gearing*, and that at that date the owners had paid to *Gearing* the above sum of $7,700 under proper certificates.

Judgment.

It appears, therefore, that the owners had paid to *Gearing* all that was due to him, and that it was not until after that payment, and after the abandonment by *Gearing* of his contract, that the plaintiff notified the owners that *Gearing* was indebted to him for materials furnished for the building.

The bill is demurred to generally for want of equity. It was assumed by Dr. *McMichael* that secs. 3, 6, and 11, of ch. 120 of the Revised Statutes, are the sections applying particularly to the plaintiff's claim, and that under sec. 11 the plaintiff would have had no claim, that section protecting all payments made in good faith by the owner to the contractor * * before notice in writing by the person claiming the lien, given to the owner by the person claiming the lien.

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Briggs v. Lee.

The Mechanics' Lien Amendment Act of 1878 protects payments made under the circumstances stated in sec. 11, not as in sec. 11, to the full extent of the payments made, but only up to 90 per cent. of the price to be paid.

Questions may arise as to whether section 11, as it stood originally or as amended, applies to such a case as this, where the work is abandoned by the contractor, and it has taken the whole contract price for the owner to finish the work. It is not necessary, however, in this case to determine that point, for Mr. *Rose*, who supports the bill, says that he does not proceed upon sections 6 and 11, but upon sections 3, 8, and 9. The material section is 8, and it is as follows: "All persons furnishing material to or doing labour for the person claiming a lien under this Act, in respect of the subject of such lien, who notify the owner of the premises sought to be affected thereby, within thirty days after such material is furnished or labour performed, of an unpaid account or demand against such lien-holder, for such material or labour, shall be entitled to a charge therefor *pro rata* upon any amount payable by such owner under said lien; and if the owner thereupon pays the amount of such charge to the person furnishing material and doing labour as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien."

Judgment.

Here the person furnishing the material was the plaintiff; the person to whom it was furnished was *Gearing*. *Gearing* was not, so far as appears, a person claiming a lien under the Act. But assuming, as is suggested by Mr. *Holmsted* in his useful treatise on the Acts, that the word "claiming" may properly be read as "having," there remains the question, upon what is it that the sub-contractor giving notice to the owner gives him a charge? The Act says, "upon any amount payable by such owner under such lien." But what if the person to whom the material has been

1880. Briggs v. Lee.

furnished has no lien, by reason of there being nothing payable to him by the owner? This section enables the sub-contractor, by giving notice to the owner, to intercept payments which he might otherwise make to a contractor claiming or having a lien; but it obviously can have no application to a case where there is no money payable to the contractor. It gives a charge upon a fund, but there can be no charge where the fund has no existence. The concluding words of the section make it clear that it only applies where, at the time of notice given, there is money payable by the owner to the contractor, inasmuch as it provides that if the owner thereupon, *i. e.*, upon being so notified, pays the amount of such charge to the sub-contractor who has notified him, such payment shall be deemed a satisfaction *pro tanto* of such lien.

Mr. *Macdonald*, who also appeared for the plaintiff, desired to support the bill upon those sections of the statute which give a lien upon the land of the owner.

Judgment.

But besides the general question which I have already indicated, it is at least doubtful whether the allegations in the bill bring the plaintiff within the provisions of the Act of 1878, for section 2 of that Act provides that the lien, to the extent of 10 per cent., shall operate as a charge "up to ten days after the completion of the work in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing be given as hereinbefore provided."

The notice, it is alleged, was given on the 18th of November, and the materials furnished between the 10th of October and 13th of November, which would be true if the last of them were furnished on the 1st of November, or the 7th, which would be more than ten days before the giving of the notice.

Another minor objection is, that it is not alleged that the plaintiff notified the owners of any "claim" made by him, but only of the fact of *Gearing* being indebted to him for the materials furnished his said unpaid

account of $581.41 against said *Joseph Gearing*—a proper notification under sec. 8, but not the proper notice under sec. 11. 1880. Briggs v. Lee.

A still more serious difficulty exists under secs. 20 and 21. Section 20 makes every lien not registered under the Act to cease to exist after the expiration of thirty days after work completed, or machinery or materials furnished, unless in the meantime proceedings be taken to realize the claim under the provisions of the Act. Registration is not alleged in this case. In case of registration ninety days are given by sec. 21 to institute proceedings. Judgment.

The bill in this case was filed on the 24th of February, and consequently after the lapse of more than even ninety days after the furnishing of the materials, where even after thirty days would have been too late.

The demurrer is allowed, with costs.

1880.

McGregor v. McGregor.

Mistake of title—Statute of limitations—Improvements — Rents and profits—Tenant by the courtesy.

Sometime before 1863 the defendant *M.* at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to *M.* of the whole 300 acres, and which *M.* executed as grantee. The father died in 1873, and *M.* continued to reside on the property with the knowledge of his several brothers and sisters until 1877 when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres, it was discovered that the deed of 1866 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the Court being satisfied that the same had been obtained improperly set it aside, with costs ; but ordered *M.* to be allowed for his improvements, as having been made under a *bonâ fide* mistake of title, he accounting for rents and profits since the death of the father ; and

Held, that under the circumstances *M.* could not avail himself of the Statute of Limitations, as up to the death of his father in 1873, he was rightfully in possession under the deed from the father which stopped the running of the statute against the heirs of the mother and which, though void as a deed in fee, was effectual to convey the father's interest as tenant by the courtesy.

Statement.

This was a suit instituted in October, 1878, by *Mary McGregor* and others, children of the late *Duncan McGregor* and *Mary McGregor* against *Malcolm McGregor*, and the husbands of such of the female plaintiffs as were married, praying to have a deed of quit claim or release xecuted by the plaintiffs and their said husbands, set aside and a sale ordered of the premises embraced therein and the proceeds thereof divided amongst the parties entitled.

The statements of the bill were, that the mother was, at the time of her decease, seized of one hundred

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acres of land, being the east half of lot seven in the fifth concession of the township of Tosorontio, and that she died intestate, 1st February, 1866, leaving the said *Duncan McGregor*, her husband, and the plaintiffs and defendant *Malcolm McGregor*, her only children her surviving, and that her husband died in May, 1873, since which time the defendant *Malcolm*, had continued in possession of the said lands, and in receipt of the rents and profits. The bill also alleged that the defendant *Malcolm*, had procured the executors of *Duncan McGregor* (his father) to induce the plaintiffs and their husbands to execute such conveyance or release of said land, and which they did execute under the belief that they were executing a discharge of certain legacies given by their father's will.

The defendant *Malcolm* answered, setting up that after he had attained twenty-one years of age, and about twenty-two years before putting in his answer, he informed his father and mother that he intended to start for himself, when they said that if he would accept the land in question, together with two hundred acres adjoining owned by his father, and reside thereon, they would give him the same for his own use, and would make a deed thereof to him, which offer he then accepted, and that about six months thereafter he went into possession of the said lands, including the lands in question, and built a house upon the lands owned by the father, and had continued to reside thereon, and had ever since he "took possession continued to reside upon the whole of the said lands;" that his mother had frequently during her lifetime requested his father to fulfil their agreement, and have proper conveyances made to him to which his father always assented, but owing to the distance they were from any conveyancer it had been postponed until after the death of the mother in 1866, after which he had spoken to his father saying that he might at any time die, and that he (defendant) would

Statement.

1880.

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be obliged to take a child's share, when the father remarked that he would have the deed made at once; that at the time he so spoke to his father it was believed by the defendant, as also by his father and all his children, that the father was the heir of their mother, and that the father could complete the agreement made with *Malcolm* in the same manner, and as fully and effectually as if she had been alive, and that acting upon such belief his father did, on the 22nd October, 1866, convey to defendant the whole of the 300 acres, and that he accepted such conveyance fully believing that his father had the right to convey the fee simple thereof to him, and that he continued in such belief until the Hamilton and North-Western Railway Company, purchased a portion for the use of their track, and they refused to pay him the purchase money therefor unless he obtained a quit claim deed from the heirs-at-law of his mother.

Statement.

The defendant further stated that the plaintiffs were, from the time he took possession, fully aware that he was residing on the property, and in possession thereof under and in pursuance of the promise so made to him by his father and mother and always acquiesced therein. The defendant denied all fraud in obtaining the quit claim deed to be executed and insisted on the Statutes of Limitations as a further defence to the suit.

The defendant had been examined upon his answer before the Master at Barrie, when he swore that he had obtained possession of the 300 acres in 1856, which were then all wild lands and unfenced, and that he had since cleared all the land in question; denied that he was to give any consideration for the land, and could not account for the sum of $5,000, being the consideration inserted in the deed executed by his father who alone had given instructions therefor.

The cause, having been put at issue, came on for the examination of witnesses and hearing at the sittings in Toronto, when the evidence adduced estab-

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lished that the deed sought to be set aside had been improperly obtained from the plaintiffs, and counsel for the defendant *Malcolm*, conceded that such was the effect of the evidence, and rested his defence solely on the lapse of time; and failing that, then he submitted that the defendant should be allowed compensation for the improvements made by him upon the property and which had been so made under a *bonâ fide* mistake of title.

The defendant *Malcolm* by his answer raised the objection that his brother—*Robert McGregor*, should have been made a party defendant, and the same objection having been renewed at the hearing an order was, by consent, directed to be drawn up, adding him as a defendant.

Mr. *W. Cassels*, for the plaintiffs and the defendants other than *Malcolm McGregor*.

Mr. *George Lount* and Mr. *Moss*, for *Malcolm McGregor*.

Counsel referred to and commented on *Lewis* v. *Thomas* (*a*), *Gray* v. *Richford* (*b*), *Jayne* v. *Hughes* (*c*), *Darling* v. *Rice* (*d*), *Jumpsen* v. *Pitchers* (*e*), *Williams* v. *McDonald* (*f*).

Feb. 18th.

Judgment.

SPRAGGE, C.—The land in question is the east half of lot 7 in the 5th concession of the township of Tosorontio, which was the property of *Mary*, the mother of the plaintiffs and of the defendants *Malcolm* and *Robert McGregor*. *Duncan McGregor*, her husband, was the owner of the west half of the same lot, and of the east half of lot 6 in the same concession.

I am clear that *Malcolm* does not establish any

(*a*) 3 Hare 26.
(*b*) 1 App. Rep. 112.
(*c*) 10 Ex. 430.
(*d*) 1 App. Rep. 431.
(*e*) 13 Sim. 327.
(*f*) 33 U. C. R. 423.

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equitable title to the land in question by agreement with his mother—assuming that she was competent, though a married woman, to make a contract—by conduct on her part, or by change of position on his. His evidence in support of that branch of his case is not corroborated as contended for by Mr. *Moss* by the evidence of *Oliver*. The whole property, his father's and mother's together, consisted of 300 acres. The house that he lived in and the mill that he worked, were on lot 6, and his first clearing was on the same lot. *Malcolm* and his wife were dissatisfied at no deed being made to him, but of what? *Oliver* speaks of its being for 200 acres, and he spoke as if the deed were to come from the father, and he says he never heard that *Malcolm* was to get 300 acres; and that there never was anything said to him about the mother giving *Malcolm* a deed. The evidence of *Oliver* is the reverse of corroborative.

Judgment.

The mother died intestate, in February, 1866. Her husband became entitled as tenant by the courtesy; and, subject to that life-estate, her children were entitled by descent. It may be assumed that *Malcolm* was at that date in possession of the land in question, as well as of the father's 200 acres. The commencement of his possession of the 100 acres may be placed at about 1863. It would make no difference, however, if it were placed several years earlier. On 22nd October, 1866, the father made a conveyance in fee by indenture, with usual covenants for title of the whole 300 acres; and when the cause was heard before me it was a moot question whether the Statute of Limitations continued to run against the heirs of *Mary McGregor*, or the conveyance stopped the running of the statute. That question has since been decided in the Supreme Court adversely to the contention of *Malcolm*, in *Gray* v. *Richford* (*a*).

(*a*) 2 Sup. C. R. 431.

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That question was the all-important one in the case; for the statute commenced to run in the lifetime of *Mary McGregor*, the mother; but it had not run a sufficient time to extinguish the title of the tenant by the courtesy, or of the heirs-at-law, when this conveyance, which is executed by both grantor and grantee, was made.

The judgment in *Gray* v. *Richford* decides that after the conveyance by the tenant by the courtesy, the Statute of Limitations had not during his life any application. The language of Baron *Parke*, in *Smith* v. *Lloyd* (*a*), was quoted by Mr. Justice *Patterson*, when the same case was before the Court of Appeal (*b*): "There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." The reasoning of Mr. Justice *Strong* in the Supreme Court (*c*), may be applied to this case thus: Let me inquire who was the owner out of possession between the 22nd of March, 1866, the date of the deed from *Duncan McGregor*, the father, to *Malcolm McGregor*, and the 7th of May, 1873, the day on which the father died, to be affected by the statute? Not *Duncan*, for he had conveyed to *Malcolm*, not the heirs of *Mary*, the mother, other than *Malcolm*, for their possessory title had not accrued. "There was, therefore, no one whom the statute could affect. It had ceased to operate for the possession was rightful from that date." The Statute of Limitations, is therefore, out of the case.

Judgment.

Mr. *Moss* conceded, very properly, that the conveyance dated 28th January, 1878, from the plaintiffs and their husbands to *Malcolm* cannot, having regard to the circumstances under which it was obtained, be supported. I had come to that conclusion upon the evidence before I noticed this concession by Mr. *Moss*.

(*a*) 9 Ex. 562. (*b*) 1 App. R. at 126. (*c*) At p. 455.

1880.

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Mr. *Moss* asks that *Malcolm* be allowed for improvements under the statute, as for improvements made under mistake of title. I think this is not unreasonable; he in that case accounting for rents and profits from the time the title of the plaintiffs accrued, that is, from the death of the father. It appears probable from the evidence that he really was under a mistake as to his title, as it was a general belief among his sisters and their husbands that the father was, as they phrase it, heir to his wife, and consequently that his conveyance to *Malcolm* was effectual to convey to him an absolute title.

Judgment.

The bill prays that the land in question may be sold and that, I apprehend will be advisable, as the number entitled is considerable. The costs are to be paid by *Malcolm*. I except, however, the costs of sale which should be as in a suit for partition or sale.

1880.

WEAVER v. VANDUSEN—WILLS v. AGERMAN.

Mortgagor and mortgagee—Merger—Purchase of equity of redemption—Payment for improvements.

The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee who was entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:

Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as *puisne* incumbrancers, and that the purchasers were entitled to an enquiry as to the enhanced value of the property by reason of their improvements.

This was a bill by *Louisa Ann Weaver* against *John H. Vandusen; John Agerman, Ludwig Rickett, Andrew Weaver* and *Jacob Fry*, setting forth that under and by virtue of an indenture dated 2nd July, 1856, made between *Jabez Wills* of the first part, and *Philip Wills* and *Frances Wills* of the second part, which contained a proviso "that if the said party of the first part (the said *Jabez Wills*), his heirs, &c., shall well and truly pay or cause to be paid unto *E. Wills*, daughter of the said party of the second part (the said *Philip Wills*), or her heirs or assigns the sum of £250 of lawful money of Canada, on or before the expiration of four years from and after the day of the date of these presents; provided the said *Philip Wills* should decease before the expiration of three years from and after this date; if not, then to pay the aforesaid sum at such further time as he the said *Philip Wills* may or shall direct, or within one year after the decease of the said *Philip Wills*; also do and shall pay or cause to be paid unto *Louisa Ann Wills* (the plaintiff) daughter of the same party of the second part, her heirs or assigns the sum of £250 of lawful money on or before the expiration of two years from

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and after the aforesaid payment to *E. Wills* has become due, or if the said *Philip Wills* should be alive at such time as he may and shall direct," the plaintiff was an equitable mortgagee of certain property therein comprised, being composed of 200 acres in the township of Louth for securing the payment of £250 and interest; that the said *Philip Wills* departed this life on the 4th of May, 1867, without having directed payment of the said moneys in any way. The bill further alleged that the time for payment had elapsed and default in payment; that the defendants were entitled to the equity of redemption in the said lands and prayed payment of the said sum of £250 and interest, or in default a sale of the mortgaged premises and further relief.

Statement.

The defendants answered the bill admitting they were entitled to the equity of redemption as owners of several portions of the premises which they particularly set forth, but claimed that the whole of the said lands were subject to a mortgage bearing date the said 2nd July, 1856, and made by *Jabez Wills* to one *Alfred H. Coulson*, securing payment of the sum of £2,680 6s. 8d. in two equal annual payments on the 16th day of June, 1857 and 1858, and claimed that the plaintiff's mortgage was a charge on the lands embraced therein subsequent to the mortgage in favour of *Coulson* by reason of prior registration of the last mentioned mortgage; and that believing that it was to their interest that the charge thereunder should be kept alive they had acquired the interest of the said *Coulson* therein, and submitted that in case of a sale being decreed they were entitled to a declaration that the charge under the said mortgage of *Coulson* was prior to the plaintiff's claim, and that it had not become merged in the equity of redemption.

By a supplemental answer the defendants set up that, since they had been in possession of the mortgaged premises, believing they were the owners thereof

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Weaver v. Vandusen.

they had expended large sums of money in permanently improving the same and had greatly enhanced the value thereof, and claimed compensation therefor and a lien on the lands for the value thereof.

The several defendants were examined on behalf of the plaintiff before the Master at St. Catharines, the effect of which tended to shew that they had bought fully believing they were purchasing a good title to the lands, and had since occupied and improved the same in perfect good faith.

The cause was subsequently brought on for hearing before *Spragge*, C., in June, 1879.

Mr. *Cassels*, for the plaintiff, in both cases.

Mr. *Moss*, for the defendants.

In addition to the cases mentioned in the judgment *Hood* v. *Phillips* (*a*), *Pitt* v. *Pitt* (*b*), *Tyler* v. *Lake* (*c*), *Parkinson* v. *Hanbury* (*d*), *Finlayson* v. *Mills* (*e*), *Elliott Jayne* (*f*), were referred to.

March 21st.

SPRAGGE, C.—The mortgage, *Jabez Wills* to *Philip Wills*, and the mortgage, *Jabez Wills* to *Alfred H. Coulson*, bear the same date: the 2nd of July, 1856; but the last named obtained priority by prior registration. *Jabez* released to *Coulson* his equity of redemption on the 30th of June, 1857, and the interest of *Jabez* having been offered for sale by the sheriff, *Coulson* became the purchaser on the 27th December, 1858. These bills are filed by purchasers claiming under the mortgage to *Philip Wills*, against purchasers from *Coulson*, treating such persons as entitled to the equity of redemption; and by amendment, after answer by the defendants, setting up the mortgage to *Coulson*,

Judgment

(*a*) 3 Beav. 513.
(*b*) 22 Beav. 294.
(*c*) 4 Sim. 351.
(*d*) L. R. 2 E. & I. App. 1.
(*e*) 11 Gr. 218.
(*f*) 11 Gr. 412.

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and its priority, the plaintiffs claim that the mortgage to *Coulson* is merged in the equity of redemption. Each party pleads as against the other the Statute of Limitations.

It is clear under *Hart* v. *McQuesten* in Appeal (*a*), that the acquisition by *Coulson* of the equity of redemption had not, *per se.*, the effect of merging his mortgage. Some years after this, *Coulson* made sale of different portions of the mortgaged premises to different persons; and it is contended that this was a dealing with the land inconsistent with an intention to keep alive the mortgage. But, assuming that it was the intention of the parties that is to govern, it must be the intention of the parties at the time, and we cannot tell what the intention was at the time, by the dealing of one of the parties several years afterwards with third persons.

Judgment.

Secs. 1 & 2 of ch. 99, R. S. O., define the position of a mortgagee who has acquired the equity of redemption. Sec. 2 is this case: As between the mortgagee and the mortgagor the mortgage debt may be satisfied, or may have been barred by the Statute of Limitations; but as between prior and subsequent mortgagees it is different; the subsequent mortgagee cannot foreclose without redeeming the prior mortgagee; and can only sell subject to the rights of the prior mortgagee; "in the same manner," (the section goes on to say,) "as if such prior mortgagee, or his assignee, had not acquired such equity of redemption." I do not know whether it has been determined that under the concluding words of sec. 2 the mortgage debt is kept alive only for such time as it would have been kept alive as against the mortgagor, if the assignee had not acquired the equity of redemption. It is not necessary, at any rate, to determine the point in this case, for the mortgage debt to *Coulson* was not barred when the bills in these cases were filed.

(*a*) 22 Gr. 133.

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Weaver v. Vandusen.

The position, then, of the parties is, that in each case the plaintiff is a puisne incumbrancer; and the defendants are assignees of a prior incumbrancer, who acquired the equity of redemption from his mortgagor, and who thereby had the rights of each. The defendants are in possession, and, as I understand, took possession in 1874. If so, the plaintiff in each case has a right to redeem. They claim as prior incumbrancers, and so do not make the usual offer to redeem; but no objection is made on that score.

As to arrears of interest. In *Howeren* v. *Bradburn* (*a*), which was a bill to redeem a mortgage, my brother *Blake* held the mortgagee—there being a covenant to pay the mortgage debt—entitled to interest beyond the six years, that is, to any interest to which his covenant would entitle him: *Ford* v. *Allen* (*b*), in Appeal, and *Edmunds* v. *Waugh* (*c*), upon which *Ford* v. *Allen* was decided, were previous decisions in the same direction. I have not the mortgage from *Jubez Wills* to *Coulson*, but the memorial only, which does not give the covenants. If the mortgage contains a covenant to pay the mortgage debt, or if there was a bond by the mortgagor to make such payment, I should hold the defendants not limited to the six years.

Judgment.

In *Howeren* v. *Bradburn* the bill was by the mortgagor, who was also covenantor to pay the mortgage debt, but in *Edmunds* v. *Waugh* it was not so; it was rather placed upon this, that a party coming into equity can only be relieved upon the terms of doing what is equitable. Sir *Richard Kindersley* said: "The intention of the Legislature, I think, was, that if a man chose to let interest run into arrear for more than six years, and then come to a Court of justice to recover the interest, he should only be entitled to recover six

(*a*) 22 Gr. 96. (*b*) 15 Gr. 565.
(*c*) L. R 1 Eq. 418.

1880.

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years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute."

A claim is made by supplemental answer in respect of improvements made by the defendants on the land. Nothing was said in argument upon this. They would be entitled, as of course, to a proper allowance for improvements made by them as mortgagees in possession; but they appear to ask more, as they say that they expended moneys in improvements and otherwise, fully believing that they were the owners of the land. There may be an inquiry as to these improvements, and if the parties claim for them as made under a mistake of title, the Master must find by how much the value of the property has been thereby enhanced.

Judgment.

The costs up to the hearing must be paid in each suit by the plaintiff.

1880.

DAVIDSON v. MCGUIRE.

Fraudulent conveyance—Insolvent Act—Marriage.

M. had been carrying on business in partnership, and in October, 1876, purchased out his partner's interest for $1,332. About this time *M.* was paying his addresses to the defendant whom he led to believe, as he himself did, that he was doing a flourishing and profitable business, and during the negotiations for their marriage the defendant's father proposed to *M.* that he should erect a house he was speaking of building, on a lot of his (the father's), and that he would convey the same to his daughter as a marriage dowry, to which *M.* assented. The marriage took place in November of that year, and during the following year *M.* erected a house on the lot as proposed, at a cost of about $900, and in fulfilment of the arrangement the father conveyed the lot to his daughter. In January, 1880, *M.* became insolvent and a bill was filed by the assignee impeaching the transaction as a fraud upon creditors under the 132nd section of the Insolvent Act of 1875. The Court [*Proudfoot*, V.C.] thought that the evidence did not establish any fraudulent intention on the part of *M.* and distinctly negatived any knowledge by the defendant and her father when entering into the arrangement of any such intention; and that, under the circumstances, the transaction could not be impeached under the Statute of 13th Elizabeth, and dismissed the bill, with costs.

Statement.

This was a suit by *Alexander Davidson*, official assignee of *James McGuire*, an insolvent, against *Hattie M. McGuire*, his wife, seeking a declaration of the Court that the plaintiff as representing the creditors of the insolvent, was entitled to a lien on certain lands, and the dwelling-house thereon erected, to the extent of the value of the house and improvements erected and put by the insolvent on the said lands, and praying that the defendant might be ordered to pay the amount expended thereon by the insolvent to the plaintiff for the benefit of the creditors, or in default a sale and application of the proceeds towards payment thereof and the costs of the suit; and that the defendant might be restrained from alienating, incumbering, or otherwise disposing of the property, under the circumstances stated in the judgment.

1880.

Davidson v. McGuire.

The cause came on for the examination of witnesses and hearing at the sittings in Hamilton, in June, 1880.

Mr. *Alexander Bruce*, for the plaintiff.

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

Pott v. *Todhunter* (*a*), *Cotton* v. *VanSittart*, (*b*), *Buckland* v. *Rose* (*c*), *Taylor* v. *Coenen* (*d*), *Spirrett* v. *Willows* (*e*), *Jenkyn* v. *Vaughan (f)*, *Freeman* v. *Pope* (*g*), *Campbell* v. *Chapman* (*h*), *Masuret* v. *Mitchell* (*i*), were referred to by counsel.

Argument.

For the plaintiff, it was contended that the evidence of the parties themselves did not establish any agreement on the part of the husband as a consideration for anything to be done by the father; and that at most only a parol agreement was attempted to be proved as having been entered into before the marriage, and even marriage does not of itself constitute a part performance—*Pollock* (*j*)—*Lassence* v. *Tierney* (*k*); neither can a postnuptial settlement be made to relate back to a prior parol agreement so as to bind the rights of creditors; and although it is true that part performance would entitle the other party to obtain a specific performance on the ground of estoppel, still that in this case there had not been any part performance by any one until after the erection of the dwelling-house and the other improvements had been made, so that the erection of the house could only be looked on as a voluntary act on the part of the insolvent.

(*a*) 2 Coll. 76.
(*b*) 20 Gr. 244.
(*c*) 7 Gr. 440.
(*d*) L. R. 1 Ch. D. 636.
(*e*) 3 DeG. J. & S. 293.
(*f*) 3 Drew 419.
(*g*) L. R. 9 Eq. 206.
(*h*) 26 Gr. 240.
(*i*) 26 Gr. 435.
(*j*) at p. 559.
(*k*) 1 McN. & G. at 551.

For the defendant it was urged that the Insolvent Act had not any application here—any knowledge by the parties as to the true position of the husband had been distinctly negatived, and it could not be contended with any show of reason that there was an intention on the part of the insolvent, his wife or her father to injure or impair the rights of creditors, or to obtain any undue advantage over them. 1880. Davidson v. McGuire.

PROUDFOOT, V. C.—The bill is filed by the assignee in insolvency of *James McGuire*, the husband of the defendant, claiming that a house and some other improvements made by him upon the land of the defendant were so made while he was in insolvent circumstances, and with intent to defeat, delay, and defraud his creditors. July 28th.

The insolvency took place on the 22nd January, 1880.

The circumstances material to be considered seem to be these: The insolvent had been in partnership with one *Hutton* in the business of general merchants in the village of Wingham, and in October, 1876, the partnership was dissolved, the insolvent purchasing *Hutton's* interest for $1,332, of which some $400 or $500 remains still unpaid. The insolvent seems to be one of a numerous class of persons who enter upon mercantile business without any previous training for the pursuit, with a very superficial knowledge of business, and but little versed in accounts; and he now says that he agreed to pay *Hutton* too much for his interest in the business. There is no difficulty in believing that there may be ground for such an assertion, as it seems that stock was not taken at the time of the dissolution, nor since the month of March previous, and that no allowance was made for the contingency of bad debts; all were assumed to be good. It is too late to complain of this now; and it is only referred to, as shewing how the insolvent may be relieved from any fraudulent design in the transactions that have taken place, as in Judgment.

1880.

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my opinion he really thought himself doing a good business, and that he was fully justified in spending what he did upon a house and other improvements,—it was in all about $900,—when in the eyes of more skilful men of business, familiar with the contingencies of trade, a different view might have been taken. And I may state here that there is no evidence of intentional fraud against any of the parties. If the plaintiff succeeds, it will be on the ground of legal fraud imputed from the circumstances of the insolvent. All the witnesses examined before me, including the defendant and her husband and her father, appeared to me to be telling the truth, and there was nothing to contradict them, apart from such legal deductions.

In the summer of 1876, the insolvent was paying his addresses to the defendant, and impressed her with the idea, which he entertained himself, that he was doing a good business and was in flourishing circumstances. In July or August, 1876, he was speaking of building a house on a lot he owned in a remote part of the village, which the defendant and her father did not approve of, as it would remove the defendant to an inconvenient distance from her father. The father then proposed to the insolvent that he would give the lot in question to the defendant as a marriage dowry, if the insolvent would build his house upon it. To this the defendant agreed. The marriage took place in November, 1876, and in pursuance of his agreement, the insolvent built the house upon the lot in the following year. After it was finished, and in December, 1877, the father directed the conveyance to be made to the defendant by the persons in whom the legal estate was vested. Both the defendant and her father testify that down to a much later period they thought the insolvent was doing well, and in flourishing circumstances. And in March, 1877, the insolvent took stock, and balanced his books, when he appeared to have a surplus of $4,000; and the same result appeared on a balance he made in

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March, 1878, though in striking these balances he seems to have assumed, with characteristic simplicity, that all his book debts would be paid, and made no allowance for any of them turning out bad. 1880. Davidson v. McGuire.

The plaintiff claims the improvements as made under a contract obnoxious to the 132nd section of the Insolvent Act of 1875, which renders void all contracts made by a debtor with intent fraudulently to impede or delay his creditors. But this section only avoids contracts made for that purpose with the knowledge of the person contracting or acting with the debtor. In this instance, I think there was no actual intention of the kind by the debtor, and certainly no knowledge of any such intention by the other party; and there was no knowledge by the defendant or her father of the real circumstances of the insolvent, from which knowledge might or ought to be imputed to them of the insolvent's inability to spend money on improvements, from which an inference of legal fraud might be drawn. I apprehend, therefore, that the case fails upon the Insolvent law. Judgment.

It remains, therefore, to consider whether it can be supported under the Statute of Elizabeth. It was argued that this was not an interest saleable at law, and therefore that it could not be impeached under that statute. The same difficulty must have been met and overcome in *Jackson* v. *Bowman* (*a*), for it was held there that the wife was not affected with notice, and the relief was had under the Statute of Elizabeth; and although the present Chancellor, who decided that case, was pressed with the many legal difficulties in the way of giving relief, he says: "I place my judgment, be it right or wrong, shortly upon this: The expenditure, in building after marriage upon the wife's land, is a voluntary settlement upon her, and if made by a husband in insolvent circumstances, is void as against creditors: the

(*a*) 14 Gr. 156.

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getting at it is the difficulty. The right to have it is with the creditors, and as I must deny their right or overcome the difficulty, I hold the difficulty should be overcome when these two things concur; when it is essential to the giving effect to the rights of creditors, and when it can be done without practical injustice to the wife."

If the facts, then, are such as to bring the case within the mischief of the statute, this case would seem to require that the creditors should not be frustrated of their rights by the interposition of this technical difficulty. And I ought to consider myself bound by this decision, though there are not wanting authorities which establish that nothing which is not liable to execution is within the statute: *Sims* v. *Thomas* (*a*), *Barrack* v. *McCulloch* (*b*), *Stokoe* v. *Cowan* (*c*), *French* v. *French* (*d*); and it is difficult to see how these improvements could have been seised upon execution. They became part of the land, a part of the wife's freehold, and the extreme right that the husband or his creditors could have would be to establish a lien for the amount. But a right to a lien could not have been seised or sold upon execution.

Judgment.

The evidence also sufficiently establishes that debts were owing by the insolvent at the time of the agreement, and of the expenditure on improvements to enable the plaintiff to attack the transaction if he is otherwise entitled to succeed. But the case of *Jackson* v. *Bowman* (*e*) was very different from this. The land was the husband's, which he conveyed to the wife before marriage; part of the improvements were made before, part after the marriage. The marriage was held to be a valuable consideration for the conveyance. But as to the part of the improvements made after the marriage, it was held to be a voluntary gift,

(*a*) 12 A. & E. 536-554.
(*b*) 3 K. & J. 110.
(*c*) 29 Beav. 637.
(*d*) 6 D. M. & G. 95.
(*e*) 14 Gr. 156.

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and amounted to a post-nuptial gift by an insolvent. It was also contended by the wife that the husband had agreed before marriage to build and complete the house. In regard to this the learned Judge says: "Assuming that such agreement is to be inferred from the fact of the house having been commenced and progress in building having been made before the marriage, the right of the wife contended for is negatived by the case of *Warden* v. *Jones* (*a*); and the language of the Statute of Frauds, upon which that case proceeds, is clearly against it." And in that case also the Court came to the conclusion that the husband's actions were a designed fraud upon creditors, indeed that the marriage itself was hurried to anticipate by a day or two the coming into force of the insolvent law.

There the only parties concerned were the husband and wife, here a third party intervenes,—there the husband's acts were designedly fraudulent, here they were not so; there the evidence of any ante-nuptial promise to build the house was not satisfactory, and seems to have been left to be inferred from the fact of the house being begun before the marriage, while here it is clearly established.

Judgment.

The Statute of Frauds requires any promise to charge any person upon any agreement made upon consideration of marriage, or some note or memorandum thereof to be in writing and signed by the party to be charged. It seems to be still a moot point whether a written admission or recognition after marriage of a parol agreement before, takes the case out of the statute. The weight of authority would seem to be in favour of the proposition that it is sufficient. See the cases collected and commented on in *May* on Voluntary and Fraudulent Alienation of Property (*b*). Mr. *Pollock*, in his work on Contracts (*c*), while think-

(*a*) 2 DeG. & J. 76. (*b*) at pp. 355, 364.
(*c*) at p. 559.

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ing the authorities not very clear submits there is no real conflict, and that, as against the promisor, the post-nuptial settlement can be made to relate back to the ante-nuptial parol agreement; but that as against creditors it cannot. It is rather difficult to understand this distinction. The reason why a prior parol agreement was not a sufficient consideration to support the settlement was, that it could not be enforced, as the marriage was not a part performance: *May* (*a*). But if, as Mr. *Pollock* says, it is good between the parties, then it could be enforced through the subsequent acknowledgement, it then became a valuable consideration, and it would seem should be effectual even against creditors: *May* (*b*).

But it does not appear to me to be necessary to pursue this subject further, for there are other grounds upon which, in my opinion the settlement can be supported.

Judgment.

Several cases decided by Judges of great eminence lay it down as a general principle that, "If after marriage the wife's father or other person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good and for valuable consideration." *Wheeler* v. *Caryl* (*c*), *per* Lord *Hardwicke*. And the amount of the additional portion is not material, unless the inadequacy is so great as to induce the presumption of collusion, *per* Lord *Talbot*. See the cases collected in *May* (*d*). It can make no difference in principle whether the gift be of money or land. If we assume therefore that there was no promise by the father prior to marriage, and that is as strong an assumption in favour of the plaintiff as possible, but that the father, after marriage made the grant of the land in consideration of the improvements, made by the husband, the case is brought within

(*a*) *Ib.* 349, 350, n. 1.
(*b*) 238, *et seq.*
(*c*) 1 Amb. 121.
(*d*) at p. 347.

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the scope of these authorities. In this case, however, I take it that the prior promise is clearly established, which is of value as removing any imputation of designed fraud, that might otherwise have formed a ground of relief. *Boustead* v. *Shaw* (*a*).

Upon the evidence I have no doubt that the improvements were made upon the property in consequence of the promise that the land should be conveyed to the wife.

The settlement may also be sustained on the ground of part performance of the verbal agreement.

Though marriage alone is not a part performance of a verbal provision, any acts or transactions which, apart from the question of the marriage, would be enough to uphold the contract on the ground of part performance, will not be less effective because marriage has intervened: *May* (*b*). Here the husband made the improvements upon the lot, while the title was in or under the control of the father. He was a trespasser unless there were some agreement for the purpose. In *Warden* v. *Jones* (*c*), Lord *Cranworth* says: Where one of the contracting parties agrees as the consideration of the marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party contracts to make a settlement, the settlement made by the one contracting party is a good act of part performance. And he cites as an authority for this the case of *Hammersley* v. *DeBiel* (*d*), where an agreement having been entered into by a lady's friends on her marriage, and reduced to writing but not signed, the execution by the husband of a settlement after marriage, in accordance with the agreement, was held by Lord *Cottenham*, L. C., to be an act of part performance, and on appeal the application of the Statute of Frauds was held excluded on the same grounds. See also *Surcome* v. *Pinniger* (*e*).

Judgment.

(*a*) *ante*, 280.
(*b*) at p. 353.
(*c*) 2 DeG. & J. 76.
(*d*) 12 Cl. & Fin. 45.
(*e*) 3 D. M. & G. 571.

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A part performance by the party to be charged will not do, but here the party to be charged was the father, and the part performance was by the husband. *Stroughill* v. *Gulliver* (*a*), *Caton* v. *Caton* (*b*).

Upon the whole, therefore, I think the bill must be dismissed, with costs.

SHERRITT v. BEATTIE.

Practice—New hearing—Surprise.

A defendant knew precisely the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness, whom he would have called, was called by the plaintiff, and gave evidene which the defendant swore was different from what he had anticipated he would give:

Held, that this was not such a case of surprise, as entitled the defendant to have the cause re-opened, in order that there might be a new hearing; and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness, had taken him by surprise, and that the same was incorrect, and would be contradicted by the wife and son of the defendant.

This was a motion by Mr. *Moss*, on behalf of the defendant, to open up the decree pronounced in the cause at the sittings in London, in the Spring of 1880; on the grounds set forth in the judgment.

Mr. *J. A. Boyd*, Q.C., contra.

The authorities cited, are mentioned in the judgment.

July 28th.

PROUDFOOT, V. C.—This cause was heard before me at London at the last Spring sittings. After the evidence of one *Wilson* was given, the first and most

(*a*) 27 L. T. 258. (*b*) L. R. 1 Ch. 137.

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material witness for the plaintiff, the defendant asked for an adjournment of the case as he was taken by surprise by the evidence given by *Wilson*, which he had expected would have been in his favour; and because the plaintiff had led him to believe two days before that *Wilson* was not to be examined as a witness, but had returned to his home in Michigan. I declined to postpone the case, as I thought it of dangerous consequence to allow a defendant to hear the evidence on the part of the plaintiff, and then to postpone the case to enable him to get witnesses to contradict it, while it would not prevent the defendant from applying for a new hearing if he should be found entitled to it. The defendant was examined on his own behalf, and produced no other witnesses. I censured the plaintiff for his deceptive conduct, but made a decree in his favour.

An application is now made to open up the hearing of the cause and allow the defendant to adduce further evidence, on the ground of surprise, and on grounds disclosed in affidavits filed.

Judgment.

The defendant had assigned three mortgages to the plaintiff, two of which the mortgagor insisted were invalid; that one had been paid, and on the other nothing had been advanced. *Wilson* began a suit on the two mortgages and then assigned them to the plaintiff, who prosecuted it, and who was defeated, the mortgagor having been able to substantiate his defence. The defendant had covenanted that the mortgages he assigned were good and valid securities. By his answer he admits that he is liable for the amount of the two mortgages and interest. The question really in dispute is the costs incurred by the plaintiff in prosecuting the suits in which he was defeated. The defendant in his answer swears that the suit was begun by *Wilson* without consulting him as to it, and he was not aware that it was going on till some time after it was commenced.

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At the hearing *Wilson* swore that after the mortgagor refused to pay he told the defendant of it, who said it was all nonsense, to put them in law, and told him to do so on several occasions. That just before putting the mortgages in suit *Wilson* told the defendant who said it was all right, that was the only way to do, and that the mortgagor would have to pay the full value. On one of the occasions when defendant told him this *Wilson* says that *Beattie's* wife was present.

Sherritt, the plaintiff, swore that after the mortgages were assigned to him he saw the defendant by the direction of Mr. *Elliott*, *Sherritt's* solicitor, when defendant told him the mortgages were all right, and to go right on with them.

Elliott, the plaintiff's solicitor, swore that before defendant assigned to *Wilson* he told him *(Elliott)* he had gone to the mortgagor to collect interest on the mortgages when the mortgagor said he was not liable for two of them. Before filing the bill he saw *Beattie* and told him he was about to take proceedings, *Beattie* said he had been advised he was not liable—repudiated all liability.

Judgment.

Upon the present application the defendant has made an affidavit upon which he has been cross-examined. In his affidavit he says he was taken by surprise by the appearance of *Wilson* as a witness after having been assured that he had gone home, and that if he had known *Wilson* was to be examined he would have had his wife and eldest son present as witnesses on his behalf; that he had intended taking them to London, but refrained when plaintiff told him *Wilson* was not to be present; that the wife and son were important witnesses and would have given material evidence in rebuttal of what *Wilson* swore. The sittings at London opened on the 30th April, Friday, (this is a mistake, they opened on Thursday the 29th,) and that defendant was in London for the

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purpose of finding out when the case would come on for trial and he saw the plaintiff and his solicitor there; that *Wilson* told him he was not going to be a witness, and next day plaintiff told him he had gone home. The case came on for hearing on the 4th May, Tuesday.

On cross-examination on this affidavit he says that he went to London on the 30th April (Friday) and expected the case would be disposed of before his return. He went home on Saturday, and returned to London on Monday. He had no witnesses subpœnaed; had made no arrangements for having any witnesses attend previous to going to London on Friday. He saw *Wilson* for the first time on the Monday night. He was glad to see him at London, he was also surprised to see him. He wanted him to remain as a witness, he would not. If he had remained, he would have called him as a witness. He did not tell his solicitor that *Wilson* was in London. He endeavoured to persuade him to stay. Until he cleared out (left the country) he was generally regarded as a reliable man. He considered he was an important witness for him.

Judgment.

The story of the defendant that he told *Wilson* the mortgagor refused to pay two of the mortgages, and that *Wilson* was to risk them, when he was exchanging a security of undoubted value for them, is not a very probable thing—but the wife in her affidavit swears to the same thing. The wife also says she had no intention of going to London, her husband did not tell her to go, nor say why he wanted her to go. She did not anticipate having to attend Court as a witness.

I have also read Mr. *McCaughey's* affidavit, but it does not seem material, as he only testifies he did not hear *Wilson* tell the defendant something *Wilson* had sworn to as taking place in his office.

The application then is simply upon the ground that *Wilson* told a different story in the box from what the defendant expected. The defendant had no wit-

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nesses present, although he knew what the issue was —as set out in his answer—whether he had authorized *Wilson* to prosecute the suit. He ought to have been prepared to show that his answer was true, and to have brought all the necessary evidence to substantiate it: *Young* v. *Moderwell* (*a*). To constitute surprise it is said a case must have been made at the trial which the opposite party could not reasonably have been expected to meet: *Dillon* v. *Cook* (*b*). But here the defendant must have known that the only matter to be tried was if he had given authority to prosecute the suit. Then had defendant known that *Wilson* was to be in town he would have called him himself; but it is a general rule that a party is not entitled to a new trial on the ground of surprise occasioned by a witness, whom he called, giving different evidence from that which he expected him to give. *Hilliard* on New Trials (*c*). There is nothing to prevent the application of that rule to this case, the defendant did not ask *Wilson* what evidence he would give—nor did *Wilson* mislead him as to what he could say. It would seem that even if a witness has perjured himself, it would not be a ground for a new trial until he has been indicted and convicted: *Archibold's* Practice (*d*).

Judgment.

The affidavits both of husband and wife are not satisfactory. The wife says, in her affidavit, she was present at several conversations between defendant and *Wilson*. On cross-examination she says she never heard but that one conversation. *Wilson* swore to several conversations with the defendant.

The affidavit of the defendant, however, made upon this application is so completely shattered by his cross-examination that I do not feel inclined to place more reliance upon it than I did upon his oral evidence at

(*a*) 14 U. C. C. P. 143, 145. (*b*) Ir. R. 9 C. L. 118.
(*c*) at p. 539, c. 16 s. 36. (*d*) 13th ed. p. 1219.

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the hearing. In his affidavit he says that if he had known *Wilson* was to appear as a witness he would have had his wife and eldest son present as witnesses. That he saw *Wilson* on the Friday when he was told he was not going to be a witness, and he would wish us to believe that had he known the contrary on his return home on Saturday he would have had his wife and son with him on Monday as witnesses. But on cross-examination it turns out that he only saw *Wilson* on the Monday night after his return to London; he was glad to see him, &c., wanted him to stay as a witness for him. It does not appear in what way the son is a material witness—he makes no affidavit—and his father states nothing he can prove or disprove.

I had both *Wilson* and *Beattie*, examined before me, and I am satisfied that the decree is substantially right, and I refuse this motion, with costs.

Judgment.

Mr. *Moss*—The plaintiff in his evidence said that he told *Beattie*, on Saturday, that *Wilson*, had gone home.

PROUDFOOT, V.C.—On referring to the evidence I find that is so; and in that respect the affidavit is true, and the cross-examination is otherwise. But it does not alter the conclusion I have arrived at, for the defendant said, in his evidence, that the plaintiff when he told him that *Wilson*, had gone home, also told him that he had got an affidavit from him that would put the defendant in for the costs. This ought to have convinced the defendant that *Wilson*, or *Wilson's* evidence, would be used against him, and he should have been prepared to meet it. And the affidavit and cross-examination of the defendant display a recklessness of statement that does not invite confidence.

1880.

VanNorman v. Grant.

Practice—Appeal—County Judge—Garnishee proceedings.

Proceedings were taken before a County Judge to garnishee certain moneys, payable by the County to the plaintiff, as Clerk of the Peace and County Crown Attorney, and which moneys that Judge ordered to be attached in favour of the creditor, the present defendant. Thereupon the debtor, the defendant in those proceedings, filed a bill in this Court, seeking to retain further action on such order:

Held, that this Court had no jurisdiction to grant the relief asked; that the proper course to obtain such relief was, by appeal to the Court of Appeal; and, without determining whether the claim of the debtor against the County, was such as could be garnished, the Court [Proudfoot V.C.,] refused the motion for injunction, with costs.

This was a motion to restrain proceedings by the defendant, *Grant*, to garnish money payable to the plaintiff, under the circumstances stated in the judgment.

Mr. *J. A. Boyd*, in support of the motion, referred to *Re Harvey* (*a*), *Kenneth* v. *Water Commissioners* (*b*), *Ames* v. *Birkenhead* (*c*), *Reynolds* v. *Ontario* (*d*), *Re Lincoln* (*e*), *Fisken* v. *Brooke* (*f*), contending that the assignment of the claim against the County, was vaild, though all the money coming to plaintiff had not been advanced.

Mr. *Moss*, for the defendant *Grant*. This application is really by way of appeal from the decision of the County Judge. The County Judge had jurisdiction to adjudicate upon the question; the action against the plaintiff here was in his Court, and the order to garnish this fund, was issued by him. The

(*a*) 13 U. C. L. J. N. S. 108.
(*b*) 11 Ex. 349.
(*c*) 20 Bear. 332.
(*d*) 30 C. P. 14.
(*e*) 34 U. C. R.
(*f*) 4 App. 28.

only right the plaintiff here has, is, to appeal to the Court of Appeal, (*a*), there is clearly no appeal to this Court, if even there is no right to go to the Court of Appeal. 1880. VanNorman v. Grant.

Mr. *V. MacKenzie*, for the County and County Treasurer, submitted to such order as the Court might see fit to make.

Clarke v. *Clarke* (*b*), *Moseley* v. *Cressey's Co.* (*c*), *St. Michael's College* v. *Merrick* (*d*), *Priddy* v. *Rose* (*e*), were also cited.

PROUDFOOT, V. C.—Motion to restrain proceedings to garnish money payable by the corporation of the county of Brant to the plaintiff as county attorney. The defendant *Campbell* is the county treasurer; *Grant* is the attaching creditor. July 28th.

On the 9th of March, 1880, *VanNorman* assigned all the money coming to him for the quarter to *Campbell*, for advances to be made to him. *Campbell* advanced $160 before the attaching order. The attaching order issued in the County Court on the 3rd of April. The amount coming to the plaintiff was ascertained by the auditors on the 8th of April to be:— Judgment.

As Clerk of the Peace.....	$134 85
As County Attorney	94 00
	$228 85

VanNorman applied to the County Judge to set aside the garnishment proceedings, which he refused to do; and on the application to him, some, if not all, the questions seem to have been discussed that were argued before me. The learned Judge gave a considered judgment, which I have had the advantage of perusing.

(*a*) R. S. O. Ch. 50 Sec. 200.
(*b*) U. C. L. J. O. S. 107 (1862.)
(*c*) L. R. 1 Eq. 405.
(*d*) 1 App. R. 520.
(*e*) 3 Mer. 102.

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It was contended that there was no legal debt, it having been assigned: that there was no liability in the county council to pay to the plaintiff; but if a debt, it was one *sui generis*, and not attachable; that at all events there was nothing due until the accounts were audited; that there being no legal debt, the County Judge had no jurisdiction, and the order may be attacked on any equitable grounds without appealing.

The learned Judge held that, as *Campbell* held the debt assigned as a bare trustee for *VanNorman*, beyond the amount advanced by him, it might be attached under the Administration of Justice Act, if not otherwise, and that the county were liable to pay the plaintiff his fees as County Attorney.

I do not think it necessary to consider the nature of the liability of the county for these fees, as under the circumstances detailed above I do not think I have any right to interfere with what the County Judge has done, and if his decision is erroneous, it must be reversed on appeal.

Judgment.

The garnishment proceedings were in the County Court; the action was there, and if erroneous, the County Judge had the power to set them aside. The plaintiff applied to him for that purpose and failed. It was not disputed that an appeal would lie to the Court of Appeal from such an order under R. S. O. ch. 50, sec. 200, but it was said there was an equity attaching to the claim or debt with which the County Judge could not interfere, and, therefore, that this Court should entertain jurisdiction.

It is true that in the cases in the Court of Appeal, that were referred to, it was held that if a person has an equitable defence to an action or other proceeding at law, he is not bound to raise it at law, but may, at any time before judgment, come into this Court for relief. That is not the case here; the defence has been raised at law, in the application to set aside the proceedings, and the right to attach an equitable debt was

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discussed, and a judgment given thereon. These cases in appeal do not seem to me to warrant the plaintiff in filing this bill.

This is not like the case of an excess of jurisdiction, for which, perhaps, there would be a remedy in another Court; but the County Judge has construed the Administration of Justice Act, and the Acts for the Administration of Criminal Justice, as creating a debt that might be attached by proceedings in this Court. In this construction he may be entirely wrong, but it is not in my power to correct it if it is wrong. It may be found that the County Judge was quite right in thinking that the Administration of Justice Act gave him power to [illegible] such an equitable debt as this. And the case of *Fenton* v. *The Board of Audit of the County of York*, (*a*), may probably be found to have determined that there is a liability in the county to the County Attorney, to pay him his fees.

If a similar question should be discussed before me by these parties or by others, I might be at liberty to exercise my own judgment and interpret the statutes for myself. But when the question is the same one that was argued before the County Judge, upon the same facts, and between the same parties, I could exercise no jurisdiction unless an appeal lay to me, and it is clear there is no appeal to this Court in such a case.

Judgment.

The necessity for an audit to ascertain the amount before the attaching order issued does not seem to have been brought before the County Judge, and it should not be entertained as a ground of jurisdiction here. If the plaintiff neglects to take all the objections he might have taken in the County Court, he cannot now be permitted to get the benefit of them by a bill in this Court. There is no peculiar equity arising from the non-audit; it is purely a legal objection, and could have been given full effect if raised below.

"He cannot be allowed to take his chance of a decision in his favour on the merits, and then, if the

(*a*) Not yet reported.

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decision is against him, to raise an objection to the exercise of jurisdiction by the Court of Bankruptcy. He cannot be allowed to say to the trustee, 'Heads I win, tails you don't win:'" per *James*, L. J. *Ex parte Butters—In re Harrison* (*a*).

The whole foundation of the suit seems to be, that the County Judge gave an erroneous decision, which is not a sufficient reason for coming to this Court.

I refuse the motion, with costs.

GIVINS v. DARVILL.

Vendors and Purchasers' Act, R. S. O. ch. 109—*Will, construction of—Devise until married—Costs.*

A testatrix devised to trustees all her estate, real and personal, which, or a sufficient portion of which, they were to dispose of for payment of debts, and support and education of her two youngest daughters *C.* and *M.* during their minorities, excepting two tenements known as the Westminster property, which were to be reserved for the use of *C.* and *M.* so long as they or either of them should remain unmarried, and in order that *C.*, on attaining 21 and being unmarried, might in her option occupy and enjoy for her life, so long as she should be unmarried, one of the houses for her own residence and that of her sister; and, in the event of her marriage, the youngest daughter *M.* was to have the same option and choice, the intention of the testatrix "being, that in addition to their support and maintenance out of all my estate, as devised, my youngest daughters *C.* and *M.* shall have a home within their control so long as they or either of them shall remain unmarried"; and upon the marriage of both *C.* and *M.* the whole of such Westminster property was to be sold, and the proceeds thereof to form part of the residuary estate and be divided amongst all her children, sons and daughters then living, share and share alike. *C.* and *M.* attained majority and were unmarried, when all the children, including *C.* and M., together with the trustee, joined in a contract to sell the Westminster property. In answer to a question submitted to the Court, under the Act (R. S. O. ch. 109,) it was *held* that all these parties joining in a conveyance, a good title could be made; and although in applications of this kind the costs are in the discretion of the Judge, the purchaser was ordered to pay the costs.

(*a*) 14 C. D. 265, 267.

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This was a case submitted under the Act, relating to vendors and purchasers; (R. S. O. Ch. 109 S. 31,) for the opinion of the Court, whether the children of the testatrix joining with the trustee in whom the legal estate was vested, could make a good title to the premises in question, and which all joined in a contract agreeing to sell to the purchaser *David Darvill*. The will, as far as relates to the question now raised, was set out in the case, and appears at length in the judgment. The questions submitted were (1). Can the children of the said *Eliza Givins* now living, including the two daughters *Caroline* and *Maud*, and the trustee Mr. *Shanly*, by joining in a conveyance, make a good title to the property known in will as the Westminister property to the purchaser, before the marriage of the two daughters *Caroline* and *Maud*? (2). In the event of the answer to the first question being in the affirmative, can the Trustee, according to the provisions of the will, safely to himself, join in the conveyance and sanction the sale? (3). In the event of the answer to both questions being in the affirmative, can the Trustee, with or without the consent of the two daughters *Caroline* and *Maud* with safety to himself, divide the purchase money amongst the then living children of said testatrix, or must he continue to hold the proceeds on the same conditons as are mentioned in the will respecting this property? (4). Can the Trustee alone make a good title?

Statement.

Mr. *J. A. Boyd*, Q. C., for the purchaser, contended that there was not any power given by the will to accelerate the time appointed for the sale of this property; and their being no provision made by the will in case *Caroline* and *Maud* did not marry, there would in that event be an intestacy as to this portion of the real estate: and in the event of intestacy, the consent of the present heirs would not bind others who might be then interested.

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Mr. *Bethune*, for the Vendors—If the condition or contingency upon which the devise is made, should never arise, the property would be vested in the heirs-at-law, all of whom are of full age and will join in conveying to the purchaser, and any child of theirs would be bound by the act of the parent. The trustee clearly can convey the legal title, and the heirs can pass their equitable estate.

Lewin on Trust, 6 Ed. p. 380 was, in addition to the cases mentioned in the judgment, referred to.

July 28th.

PROUDFOOT, V. C.—*Eliza Givins*, the owner in fee of the lot, on the 6th November, 1863, made her will by which she devised to three persons as her executors and trustees, one only of whom proved and acted, all her real and personal estate, in trust. The testatrix gave some directions as to the disposition of all her property

Judgment.

exepting "her houses and premises in Westminster, where she resided," being the property now in question—and providing for the maintenance and education of her two youngest daughters *Caroline* and *Maud*. The testatrix then proceeds: "And when *Caroline* shall be of the full age of twenty-one years, and being then unmarried, she may in her option use, occupy and enjoy for her life, so long as she shall be unmarried, one of the houses and the lands now appertaining to it, for her own residence and that of her sister, selecting either of the two residences and the premises belonging to it comprising my Westminster property. And in the same manner should she be married before her sister is of the full age of twenty-one years and unmarried her sister, my youngest daughter aforesaid, shall have the same option, and choice; my intention being, that in addition to their support and maintenance out of all my estate as devised, my youngest daughters *Caroline* and *Maud* shall have a house within their control so long as they or either of them shall

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remain unmarried. And it is further my will and my desire that whenever both my said daughters shall marry then that the whole of my Westminster property be sold and conveyed by the trustees hereinafter named or their lawful representatives, either by private contract or public auction, for the best price or prices together or in separate tenements as they shall deem best in their discretion, and that the proceeds of such sale or sales being added to and forming part of all the residue of my estate and effects, shall then be divided and distributed equally amongst all my children, sons and daughters, share and share alike, then living. Provided always, that if my then surviving children then desire it, and unanimously join in a writing sufficient in law to that effect releasing my said executors and trustees from the fulfilment and discharge of so much of the trusts herein declared, the Westminster property either wholly or in part shall, instead of being disposed of as aforesaid and the proceeds added to my general estate, be conveyed by the said trustees to such use or uses as my said surviving children shall in the manner aforesaid then desire."

Judgment.

Caroline and *Maud* are both now of full age and unmarried; they have not for some time lived on the property, but are in receipt of the rents.

The surviving children of the testatrix, including *Caroline* and *Maud*, and the trustee, have entered into an agreement with *Darvill* for the sale of the Westminster property to him. The purchaser has objected to the title; and it has been agreed to submit a case under the Vendor and Purchasers' Act for the opinion of a Judge of this Court, whether the children of the said *Eliza Givins* now living, including *Caroline* and *Maud*, and the trustee can make a good title to the property in question before the marriage of *Caroline* and *Maud*.

Three other questions are also asked, but only this

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first one was argued, and on it only will I give an opinion.

The power of sale as to the Westminster property only comes into existence upon the marriage of both *Caroline* and *Maud*, and the trustee therefore could make no title.

If all the persons interested, however, join in a conveyance, a good title might doubtless be made. Then, who are the parties interested?

There is no disposition of the beneficial interest in this property by the will except in the case of the marriage of *Caroline* and *Maud*, and the proviso enabling the then surviving children to dispense with a sale only comes into effect upon the same event. In case *Caroline* and *Maud* do not marry there is an intestacy as to the beneficial interest in this property, and it descended to the heirs of the testatrix at her death, who were her children, and all, I understand, are now living and of full age. At the death of the testatrix then, *Caroline* and *Maud* took under the will an estate for life, or while they remained unmarried, and the reversion descended upon all the children. The heirs are not to be ascertained at the death of the tenants for life. The beneficial reversion is wholly untouched by the will, and descended immediately upon the heirs, and they can dispose of it. The legal estate being in the trustee he will require to join in the deed.

Judgment.

In case the daughters both marry, the persons entitled to the proceeds of the sale would be the children then living, which would not include the children of any that might be dead, and they would not take as heirs of the testatrix, but as purchasers; and if all the others should die before the marriage of the daughters, the daughters or the survivor would be entitled to the whole. As *all* the children of the testatrix join in the sale, their conveyance will suffice to bar their contingent right.

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The only other question is, whether *Caroline* and *Maud* can dispose of their estates for life, or while unmarried. The object of the testatrix in postponing the sale till after their marriage, as expressed in the will, was, to give them the choice of occupying one of the houses for a home. But she makes no provision against alienation, and upon the daughters attaining their majority there is nothing to prevent them disposing of their interest as freely as if an absolute estate for life had been given. Indeed, in my opinion, the estate given to them is an absolute one for the time specified in the will, not clogged by any condition.

I answer the question, then, that the heirs of the testratrix and the trustee, and *Caroline* and *Maud* conveying their estate under the will, can make a good title to the purchaser.

I have read and considered the following cases to which I was referred: *Johnstone* v. *Baber* (*a*), *Swain* v. *Denby* (*b*), *Want* v. *Stallibrass* (*c*), *Mitchell* v. *Great Western R. W. Co.* (*d*).

Judgment.

The costs of applications under this Act are in the discretion of the Judge, but I think the same rules should apply as in regard to special cases under the Imperial Statute 13 & 14 Vict. ch. 35, *Morgan & Davey* (*e*), and it seems that in general the costs of such cases are governed by the same rules that regulate the costs of a suit instituted by bill: *Usticke* v. *Peters* (*f*), and in that case a plaintiff succeeding upon a special case arising out of the construction of a will was entitled to his costs from the defendant. Following that case I think the defendant must pay the costs.

See also *Re Mercer and Moore* (*g*).

(*a*) 8 Beav. 233.
(*b*) 28 W. R. 622, L. R. 14 Ch. D. 326.
(*c*) L. R. 8 Ex. 175.
(*d*) 38 U. C. R. 480.
(*e*) p. 222.
(*f*) 4 K. & J. 437.
(*g*) L. R. 14 C. D. 287, 296.

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CLEAVER v. THE NORTH OF SCOTLAND CANADIAN MORTGAGE COMPANY.

Specific performance—Compensation—Incorporated company—Corporate seal—Growing crops.

Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with a compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants, (the corporation), answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "*When the plaintiff bid for and was declared the purchaser of the lands * * the sum bid by the plaintiff was a low price * * that the plaintiff was not in fact the real purchaser of the lands at the said sale * * that The Company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and * * that possession was taken by the plaintiff,*" and the answer claimed no benefit from the statute, and did not deny having made the contract; neither did it raise any objection to the want of the corporate seal:

Held, that this sufficiently admitted the agreement to sell and no protection of the statute having been claimed, that the plaintiff was entitled to a decree with compensation for the loss of the crops, with costs.

This was a bill by *Sarah Cleaver*, against *the North of Scotland Canadian Mortgage Company (Limited)*, setting forth, that on the 20th November, 1877, one *Thomas Cleaver* made a mortgage to the defendants on Lot 22, in the 14th concession, and lots Nos. 23 and 24, in the fifteenth concession of the township of Elma, in the county of Perth, containing in all 300 acres; that default was made in payment of such mortgage, and the defendants acting under the power of sale contained therein, duly advertised the lands for sale by auction, and the same were accordingly offered for sale on the 14th of July, 1879; when the plaintiff became, and was declared to be the purchaser thereof at the price of

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$4,770, and she executed a written contract for the purchase of the same from the defendants. The bill further alleged, that by the advertisement of sale, it was stated that there were about fifty acres of fall and spring wheat and peas on the premises, and the agents at the time of sale made statements confirming the advertisement, that such crops were to be sold, together with the land; and that relying on the advertisement and statements, plaintiff had become the purchaser at a much larger price than she would have given, if the crops had not been so offered for sale. The bill further stated, that since the sale, the plaintiff had discovered (as the fact was,) that at the time of the sale, one *Frederick May*, and *Lewis May*, were the owners of one-half of the grain and other crops, under an agreement to that effect, entered into with them by the said *Thomas Cleaver*, and confirmed and ratified by the defendants; that the plaintiff had offered to complete the purchase, but the defendants were unable to put her in possession of the said lands and crops; and had offered to allow her $100 in full of her claim for compensation, but which plaintiff refused to accept.

Statement.

The prayer was for specific performance of the contract, with an allowance as compensation for the loss of one-half of the crops.

The defendants answered the bill setting up that the plaintiff before and at the time of the sale, and when she bid and was declared the purchaser of the property, was well aware, and had full knowledge of the fact that the said *Frederick* and *Lewis May*, were entitled to one-half of the crops other than the fall wheat, and denied that she was at all misled by the advertisements of sale, or statements of the agents; that the sum bid by her was a low price for the property without regard to the crops; that the plaintiff was not the real purchaser, but she purchased the same on behalf of her son, the mortgagor; and her name was only used in the transaction, and that she in fact was only a trustee for

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her son, and as such had not any right or title to make the claim asserted by her bill; that after the sale, they the said defendants for the sake of peace, and in order to avoid litigation, offered to pay the plaintiff the sum received by them from the lessees, as the proceeds of one-half of said crops; but such offer was wholly without prejudice, and was not accepted by her; that they were not bound to put her in possession of the property, but that they never did or sanctioned any act preventing her taking possession—and that in fact she did go upon the premises, and cut and removed the fall wheat, and that thus possession was taken by the plaintiff; that they (the defendants) were always willing that the plaintiff should take possession, without thereby waiving or losing any right or claim (if any she had) in respect of the said crops, and so offered the plaintiff. The defendants submitted that, under the circumstances, the plaintiff was not entitled to any compensation in respect of the matters complained of by the bill, and also that the mortgagor *Thomas Cleaver*, was a necessary party to the suit.

Statement.

The plaintiff thereupon amended the bill, by making *Thomas Cleaver* a party defendant, alleging that he claimed that the purchase by her was on his behalf, but which the bill alleged was not the case. The defendant *Cleaver* answered, setting up a similar claim; but as the evidence did not sustain his contention, it is unnecesary to further notice this part of the case.

The cause came on for the examination of witnesses and hearing at the sittings at London, in the Spring of 1880.

At the hearing the advertisement of sale was produced, in which it was mentioned that "the lands are well fenced, and on them is a spring of pure water. There are about fifty acres of fall and spring wheat and peas, and in fine condition."

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Mr. *Fisher*, for the plaintiff. The crops were clearly intended to be and were sold at the auction; if this were not so, with what object was it mentioned in the conditions of sale, that these crops were on the ground, and were "in fine condition?" If the purchaser was not to be entitled to them, of what interest was it to him in what state the crops were? and the plaintiff has sworn that she would not have purchased at the price offered if she was not entitled to them. It may be the case, though this has not been shewn, that the plaintiff was aware that the *Mays* were working the farm on shares, and could have ascertained what their rights were. She was not dealing with them, only with *The Company;* and, for aught that she knew, *The Company* might have effected an arrangement with them to relinquish their interest. Under the terms of the sale the company was bound to put her in possession of the lands and crops, while by the terms of the agreement with the *Mays*, *The Company* was entirely without the means of giving such possession.

Argument.

Mr. *Meredith*, Q.C., for the defendant *Thomas Cleaver*, insisted that the plaintiff had purchased solely for the purpose of saving the property for the son; and that as there was not any contract under the corporate seal of *The Company* the plaintiff was not entitled to sustain the bill.

Mr. *Moss* for the defendants, *The Company*. The case of *The Dominion Bank* v. *Knowlton* (*a*), establishes that the contract here alleged cannot be enforced against *The Company;* there is clearly here no contract for agreement "signed by the party to be charged." It is true that Mr. *Rankin*, as agent for *The Company*, was cognizant of and recognized the arrangement, and *The Company* now are willing to carry it out on the footing and on the terms of the agreement as he under-

(*a*) 25 Gr. 125.

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stood it. The plaintiff had the fullest notice of the facts as regards the crops; and the mere inaccurate wording of the advertisement will not controul that notice; and besides, the conditions of sale do not provide for possession of the premises being delivered to the purchaser: *Canada Permanent Building Society* v. *Young* (*a*).

Argument.

Mr. *Fisher*, in reply. Any difficulty that could have been urged as to the contract not being sealed by *The Company* is entirely obviated by the form the pleadings have assumed. In the answer *The Company* discusses the effect of the biddings made by the plaintiff, and asserts that plaintiff took possession under the sale. It is true that the contract does not expressly stipulate for possession being delivered by *The Company;* but this is not necessary, the fifth condition of sale, under which the auction took place, providing that upon payment of the deposit and execution of a mortgage, "the purchaser shall be entitled to a conveyance to be prepared by the vendors' solicitors, and to contain covenants only against the acts of the vendors;" and if *The Company*, after all that has taken place, can be heard to raise such a defence as is here attempted, it will have the effect of making the Statute of Frauds work a very great injustice.

London Docks Co. v. *Sinnott* (*b*), *Brewster* v. *The Canada Company* (*c*), *Osborne* v. *The Farmers and Mechanics' Building Society* (*d*), *Crampton* v. *Varna R. W. Co.* (*e*), *The South of Ireland Colliery Co.* v. *Waddle* (*f*), *Kidderminster* v. *Hardwick* (*g*), were also referred to.

(*a*) 18 Gr. 666.
(*b*) 8 E. & B. 347.
(*c*) 4 Gr. 443.
(*d*) 5 Gr. 326.
(*e*) L. R. 7 Chy. 562.
(*f*) L. R. 3 C. P. 463, S. C., L. R. 4 C. P. 617.
(*g*) L. R. 9 Ex. 13.

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July 28th.

PROUDFOOT, V. C.—The defendants, *The Company*, were mortgagees of some land, and default having been made, caused it to be exposed for sale by auction, when the plaintiff became the highest bidder, and was declared the purchaser. She signed a contract on the back of the conditions of sale, agreeing to purchase the property for $4,770. It was not signed by *The Company*, nor by the auctioneer on their behalf. To the condition was attached the advertisement, which, among other things, stated that "there are about fifty acres of fall and spring wheat, and peas, and in fine condition." It turned out that there were some persons who were working the place on shares, and who were entitled to half the crop. The plaintiff is ready to carry out the agreement, with compensation for the crops, and the bill is filed for that purpose. The defendants object to her right to compensation upon several grounds that I found in favour of the plaintiff, and also because they had not signed or sealed the agreement for sale, and therefore were not bound. Upon this last point only I reserved judgment.

Judgment.

There is no doubt that the Statute of Frauds requires an agreement for the purchase of lands or a memorandum of it, to be signed by the party sought to be charged. But the difficulty in this case is removed, I think, by the form of the pleadings; for if the agreement be admitted by the defendants in their answer, it will suffice.

The bill first states the mortgage made to the defendants, the company; then it alleges the sale by *The Company* under the power of sale, and next states the contents of the advertisement as to the crops, the subject now in question.

The answer in terms only admits that *The Company* were mortgagees. It then, however, says that *when the plaintiff bid for and was declared the purchaser of the lands, &c.* Again, that the sum *bid by the plaintiff was a low price, &c., The Company* charge

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that the plaintiff was not in fact the real purchaser of the lands at SAID *sale, &c.* Again, that after *the said sale, &c.* Again, *The Company* say that they were not bound to put the plaintiff in possesion, but they never did any act to prevent her taking possession; and they in fact charge that possession was taken by the plaintiff. Again, *The Company* say they were always willing the plaintiff should take possession, &c.: and the answer claims no benefit from the Statute of Frauds, and they do not deny having made the contract.

The only reasonable interpretation of this language is, that the sale was made by *The Company*, and the reference to the *said* sale that it was the sale mentioned in the bill. They do not deny the plaintiff's right to take possession, and indeed insist that they were always willing she should take possession, and that she had in fact taken possession. The effect of these statements is, in my opinion, an admission that they made the agreement to sell to the plaintiff, but for various reasons are not bound to carry out its terms, none of these reasons being that it was not signed so as to bind them.

Judgment.

I understand the rule in cases of specific performance to be, that if the defendant denies the agreement, the plaintiff must prove one sufficient within the Statute of Frauds, whether the benefit of the statute be claimed by the answer or not. If the defendant admit the agreement and claim the benefit of the statute, no decree can be made against him; but if the agreement is admitted in the answer, expressly, or by necessary inference, if he desires to have the protection of the statute, he must claim it by the answer: *Heys* v. *Astley*, (*a*), *Seton* on Decrees, 4th ed., 1290; *Daniel's* C. P. 5th ed., 567.

I think, therefore, that the plaintiff is entitled to a decree for specific performance with compensation, with costs. There will be a reference to ascertain the amount, if the parties cannot agree.

(*a*) 4 DeG. J. & S. 34.

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LIVINGSTON v. WOOD.

Assignment of bond—Absolute transfer or security—Receipt in full—Evidence—Costs.

The plaintiff transferred a covenant for the payment of $4000, executed by four persons in his favour to the defendant by an absolute assignment, as security for $2000; the defenant giving to the plaintiff a separate agreement, to "reassign" on payment of the loan and interest. On a bill to obtain a reassignment alleging that such loan had been repaid, the Court [SPRAGGE, C.,] made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof.

A cheque of the plaintiff's, when produced at the hearing, had written on it, "in full of all his [the defendant's] claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of a clerk in the bank, whom he had requested to initial the words so introduced: The Court [SPRAGGE, C.,] refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness.

Statement.

This was a suit by *Joseph Alpheus Livingston*, against *Peter Wood*, claiming a right to a reassignment of a bond executed on the 27th of May, 1872, by *William Bell*, *Robert W. Bell*, *Henry W. Metclalf*, and *William James*, in favour of the plaintiff, securing to him payment of $4,000 in ten annual instalments, of $400 each, which bond plaintiff assigned to the defendant, to secure the repayment of $2,000 and interest thereon at ten per cent., compounded yearly; and that it was then agreed between the plaintiff and the defendant, that on repayment of such sum of $2,000 and interest, the bond of *Bell* and others should be reassigned to the plaintiff, and all sums received by the defendant on account of such bond were to be credited to the plaintiff on account of such indebtedness of $2,000 and interest; the plaintiff in assigning such bond to the defendant, having covenanted with the defendant, that the same would be fully paid.

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The bill further alleged that the plaintiff had given to the defendant some articles of household furniture, and sundry notes of hand in favour of the plaintiff, on which considerable sums were due, which were when realized to be credited to the plaintiff on such loan; that the defendant had received from *Bell*, the sum of $2,400 on account of the bond, and there remained due thereon, $1,600.

The bill further stated that the plaintiff had paid all sums due the defendant on account of said loan, and all other dealings and transactions between them, and that he had demanded a reassignment of the bond, and redelivery of the other securities, but the defendant refused to do so, insisting that he held the said bond absolutely.

The defendant answered the bill, admitting the receipt of the $2,400 on account of the loan, but denied that the notes, &c., were to be applied to that loan, but were to be applied on other dealings between the plaintiff and defendant; also that the interest on the $2,000 was to be compounded half-yearly, and not yearly as stated in the bill; and claimed that the assignment of the bond to defendant was absolute, he having become the absolute purchaser thereof.

The other facts are sufficiently stated in the judgment.

The cause came on for hearing at the sittings in Toronto, in the Autumn of 1878.

Mr. *W. Cassels*, for the plaintiff.

Mr. *Osler*, Q.C., and Mr. *Gwyn*, for the defendant.

Feb. 18th. Judgment.

SPRAGGE, C.—The question in this case is, whether the assignment made by the plaintiff to the defendant dated 27th May, 1872, was a security for money, or a sale with a right of repurchase.

The subject of assignment was a covenant dated 17th of February, 1872, from *William Bell* and three

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others, to pay to the plaintiff $4,000, by annual instalments of $400, without interest. Of the same date as the assignment is an instrument to which both are parties, whereby the defendant agrees that upon payment to him by the plaintiff, at any time within two years, of the sum of $2,000 and interest at ten per cent, compounded yearly, he will reassign to the plaintiff, or his assigns, the covenant of *Bell* and others, describing it, adding, "and which covenant was by the said *Livingston* absolutely asssigned to the said *Wood* by indenture of even date herewith," and goes on to provide, "the said *Wood* to deduct from the said $2,000 whatever payments may have been made to him on the said covenant previous to the time of re-assignment." The sum of $2,000 was the consideration paid by the defendant to the plaintiff for the assignment. The assignment contains a covenant by the plaintiff that he will himself, in default of payment by *Bell* and company, pay the money covenanted to be paid by them, and perform the covenants to be by them performed.

Judg t.

Taking the two instruments of even date together, I think the proper construction to be put upon them is that the transaction was in reality an advance of money by way of loan, and security for its repayment in two years with interest and compound interest. In the instrument intended, as I think, by way of defeasance, the word repurchase is not used, nor any equivalent word; but the word reassign, certainly an apt word where the contract is to restore upon repayment the thing pledged as security.

Then as to the effect of the covenants contained in the two instruments, as throwing light upon the nature of the transaction. There is, it is true, no covenant to repay the $2,000. This may, or may not, have been the conveyancer's omission; but there is a covenant that the debt assigned shall be paid by the assignor, if not paid by the original debtors, *Bell & Co.*; the defendant thus having the personal covenant of the

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assignor for the payment of a larger sum than the sum advanced, a covenant that he may have preferred to a covenant for payment of the sum advanced. The assignor, by this covenant, made himself surety to the defendant for the payment by *Bell & Co.*, and if he paid, would be entitled to a return of the security. The assignee having his remedy against the assignor by this covenant, has something beyond the value of the thing assigned. And, assuming that he has not the usual remedies of a mortgagee, in which case, as Mr. *Fisher* (*a*) says, "The deed may be taken to be only a security," he has what he may well be taken to have accepted as equivalent to it: the assignor's covenant to pay, in default of payment by the debtor.

Verner v. *Winstanley* (*b*), before Lord *Redesdale*, is a good deal like this case. There was a purchase of an annuity, by way of rent-charge, with a provision for re-purchase on payment of a certain sum, which was secured by bond of the owner of the rent-charge and another. The Chancellor held the dealing to be a loan, founding his opinion on a circumstance that exists in this case, the defendant not taking on himself the whole risk of the thing assigned, but securing himself by the bond of the plaintiff.

Judgment.

The cases where the question has arisen, whether a given transaction is a mortgage, or a sale with agreement for right of re-purchase, have most of them been cases where the subject has been land. The reasons for holding a dealing to be one of sale and right of re-purchase, scarcely apply at all where the subject of the dealing is a debt from third persons. The reasons where the dealing is in respect of the freehold are discussed at some length in *Thornborough* v. *Baker* (*c*).

I have not referred to the extension of time given by indorsement on the defeasance, because it appears to be consistent with either view of the case. It seems to

(*a*) Page 14. (*b*) 2 S. & L. 392.

(*c*) 3 Swan. 638.

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be chiefly material, in view of the date to which time was given: it was one year beyond the 27th of May, 1874. It rather, indeed, helps the plaintiff's contention in the use of the words "time of redemption."

I have been referred to the accounts and correspondence between the parties, and to their business paper; some of the latter is material. There had been dealings between the parties under an agreement of an earlier date, 14th of June, 1870; and it was made a question whether this business paper referred to these other transactions, or to the transaction in question in this suit. There are two drafts of the same date, 1st of October, 1875, each for $500, drawn by the defendant on the plaintiff; one at sight, the other at thirty days The defendant says they were in order to making payments on the other transactions; or at least that he so applied them. The plaintiff's case is, that they were payments on account of the advance of the $2,000 in question. They are both marked as accepted on the same day, 4th of October, 1875. Across the face of the sight draft is written, "Accepted on account of *Bell & Co.'s* bond and interest account," and the plaintiff's initials are signed; the whole having every appearance of being written at the same time. Across the face of the other is written, "Accepted on account;" then, on a line below, "of *Bell & Co.'s* bond;" then on the line below is the signature, "*J. A. Livingston.*"

Judgment.

Both these drafts were in the hands of the defendant. The sight draft was protested; the other was used at the bank by the defendant; both were afterwards paid by the plaintiff. They were in the hands of the defendant, and he used them; and this was a little over four months after the expiry of the time to which re-payment of the $2,000 advance was extended; and certainly nothing occurred after that to make time of the essence of the contract, assuming that it ever had been so.

The plaintiff, in his letter to the defendant, of the

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same date as the acceptances, and in which he seems to have sent the drafts accepted to the defendant, says that he accepted both drafts "on account of the *Bell* bond and interest account;" and in the same letter he states other payments as made on the same account, amounting, with the drafts, to $2,263. Defendant, in his evidence, says he did not receive that letter till the 15th, and that he applied the drafts on another account, *i. e.*, on a note on the other transaction; but he does not say that when he received them they were not accepted in the shape in which they now appear, though he does say of a cheque produced, dated 28th of March, 1878, that certain words have been since added to it; saying this of the cheque, and saying nothing of the kind as to the drafts, I infer that he could make no such assertion as to the drafts.

Judgment.

As to the drafts, then. The moneys payable upon them were *appropriated* by the plaintiff, the acceptor. If the defendant was unwilling to have the moneys so appropriated, he should have refused to accept them in that shape. He did accept them, and received the money, and had no right to appropriate it otherwise; and if so, the moneys paid by plaintiff on those drafts were payments on account of the $2,000 advance, and as I have said, there was nothing after that, at any rate, to make time of the essence of the contract.

The cheque of the 28th of March is for $4,717, and has been paid by plaintiff; it is expressed upon its face to be in favour of the defendant, or order, "in full of all his claims for notes or otherwise." The words, "for notes or otherwise," were, he says, not on the cheque when he got it, and the words have the appearance of not having been written at the same time. Plaintiff says they were so written, and that he got the bank clerk to initial them. There are initials in the margin of the cheque, and crosses, thus ×, in four parts of the writing. The bank clerk should have been called. The initials may be his, and the crosses, or some of them, not his. I should not take this as evidence of a receipt in full.

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I think the plaintiff entitled to succeed upon both grounds: Upon the instruments, taken together, being properly construed as securities for a loan of money; and upon the dealings between them to which I have adverted.

The decree will be with costs.

I suppose an account will be necessary.

PARR v. MONTGOMERY.

Fraudulent conveyance—Sale under execution—Valuable consideration—Trust deed.

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortagor, there is nothing to prevent him, if his claim is left unsatisfied from suing on the covenant in the mortgage, and proceeding to a sale under execution, or applying to this Court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim.

P. created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth $6000, subject to incumbrances amounting to $3,500 and interest. One of the mortgages was in favor of the defendant *M.*, who subsequently acquired the interests of the other two mortgagees. After the creat[illegible] these mortgages *P.* executed a deed of trust of the whole property in order to defeat a claim of title set up to 10 acres by one *S.* Default was made in payment of *M's* mortgage who instituted proceedings at law and recovered judgment on which he sued out execution and under it the Sheriff (after the defendant *M.* had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and *M.* bid for and became the purchaser of all at sums amounting in the whole to $20. The *cestuis que trust* thereupon filed a bill to redeem, alleging that the sale to *M.* had been at a gross undervalue, and praying to have the same set aside; the Court, however, refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large considering that it was a Sheriff's sale.

The plaintiffs filed their bill, alleging that the defendant *Joseph Parr*, by deed of trust dated the 22nd

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April, 1859, granted the lands in question (about 140 acres in the Gore of Toronto) to a trustee, in trust for the plaintiff *Hannah Parr* his wife, for her natural life, and after her death in trust for her children the co-plaintiffs. The evidence shewed that prior to the deed of trust, the settlor had created three several mortgages upon separate parcels of the 140 acres; one being in favour of the defendant *Montgomery*, another in favor of the Home District Savings Bank, and the third in favour of one *Joseph Nattrass;* and that default having been made in payment of the amount due to *Montgomery* on his mortgage, he instituted proceedings thereon at law, and obtained a judgement against *Parr*, upon which he sued out execution. At a Sheriff's sale under this execution on the 15th of August, 1863, *Montgomery*, who had meanwhile acquired the interests of *Nattrass* and the Savings Bank, became the purchaser of the three several parcels at sums amounting in all to $20. The bill further alleged that the lands were worth $6,000, and at the time of the Sheriff's sale, the incumbrances, including the judgment, were not more than $3,500, together with interest. The prayer of the bill was, that the sale should be set aside, and the plaintiff allowed to redeem.

Statement.

From the evidence it appeared that the trust deed was executed to defeat a claim made by one *St. John* to ten acres of the land included in the trust deed. The cause was originally heard before *Proudfoot*, V. C., who dismissed the bill, with costs

The plaintiffs reheard the cause.

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

Mr. *Blake*, Q. C., and Mr. *Tilt*, for the defendant *Montgomery*.

The judgment of the Court was delivered by—

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BLAKE, V.C.—It is clear from the evidence of *Joseph Parr*, and *Hannah* his wife, that the voluntary conveyance in trust to *Laughton*, of 1859, was made for the purpose, amongst other things, of defeating a claim which one *St. John* was making to ten acres of the land transferred to this trustee. There were some creditors then in existence whose debts have not since been paid. There is no doubt the conveyance in question is one which can be impeached under 13 Eliz., cap. 5, as one intended to "defraud creditors and others of their just and lawful actions, suits, &c." This is not a case in which the Court is obliged to enter into a calculation to ascertain whether or not the debtor was solvent when the impeached transaction was entered into, in order thereby to shew that it cannot stand; as here, the inevitable and intended consequence of the grantor's act was the defeating or delaying creditors. The voluntary grantor admits the fraudulent intention with which he made the instrument. The defendant *Montgomery* was at the time of the execution of this conveyance a mortgagee of the defendant *Joseph Parr*. He was a creditor secured by specialty. It is true that, as mortgagee, he could not have complained of the subsequent dealing with the estate which was subject to his rights as mortgagee; but I do not think there is anything to prevent the mortgagee, if his debt be not satisfied from suing on the covenant in the mortgage, and thereupon asking the Court to remove any fraudulent conveyance which may have been executed by the debtor between the date of the incurring of the debt on which he sues, and his execution, and which interferes with the realization of the debt out of the debtor's estate. I think this is the case here, and therefore, that the instrument of 1859 is void as against the execution in question. The land was sold in three parcels. This being so the sale cannot be set aside upon the grounds which the Court interfered in *Heward* v. *Wolfenden* (a), *Donavon*

Judgment.

(a) 14 Gr. 188.

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Bacon (*a*), *Wood* v. *Wood* (*b*). I do not think the sale can be set aside on any of the grounds urged by the learned counsel for the plaintiff. The price realized was large, considering that it was a Sheriff's sale; and following *Paine* v. *Mathews* (*c*), it must be allowed to stand. I think the decree made should be affirmed, with costs.

MERCHANTS' BANK v. GRAHAM.

Part owners of a vessel—Mortgagees of a vessel—Rights and liabilities of mortgagees and part owners of vessel—Evidence.

Semble, a mortgagee of a vessel until he takes possession or does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight, &c.; (but)

Where in a suit by the mortgagees of a part owner of a vessel the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefit of himself and the other owners—other than the plaintiffs, though previous to the institution of the suit he had only asked for evidence that the agent of the plaintiffs really held the shares for them:

Held, that the fair inference was, that the defendant was sailing for whomsoever might be the owners or entitled to the earnings; and that having had sufficient information to acquaint him of the fact that the plaintiffs had acquired the shares either as mortgagees or owners he had thus recognized their right to demand an account.

Quære, whether co-owners of a vessel have a right to share in the profits thereof earned in ventures to which they do not assent, as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety or pay the value of their shares. In such case the minority do not share the hazard, neither are they entitled to the benefit of the voyage.

One *C.* entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to

(*a*) 16 Gr. 403. (*b*) 16 Gr. 471.
(*c*) 14 Gr. 36.

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be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and *C.* both swore that the arrangement had not been made by *C.* as agent of the defendant, but for his own benefit:

Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and *C.*, that the contracts had not been made in behalf of and as agent for the defendant, freight being *primâ facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor.

The plaintiffs, who were mortgagees of a vessel, in exercise of a power of sale contained in their security, on default of payment sold the interest of their debtor by auction, when the same was bought by one who held it in trust for the mortgagees:

Held, that the effect of such sale and purchase was, that the plaintiffs remained mortgagees only of the interest so sold.

This was a suit by *The Merchants' Bank of Canada* against *James C. Graham*, seeking (1) to have an account taken of the dealings of the defendant with two vessels called "*Laura*" and "*William Horne*," during the year 1878, and of his receipts and legal necessary disbursements; (2) that he might be ordered to pay what, upon the taking of such account should be found to be the share of the plaintiffs, and for further relief. Statement.

The bill set forth, amongst other things, that the plaintiffs were on the 1st day of April, 1878, absolute owners of 21 shares, and entitled as mortgagees to other 21 shares in the schooner "*Laura*;" the defendant being the owner of the remaining 22 shares thereof.

The bill further stated that at the same date the plaintiffs were the owners of 28 shares of the schooner "*William Horne*," and that the defendant claimed to be the owner of the residue of the said vessel, and that by mutual agreement and understanding between the plaintiffs and the defendant, it was arranged that

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the defendant should take charge of the said vessels for that year, and should account and pay over to the plaintiffs their proportion of the earnings of the vessels after deducting all proper expenses; and that the defendant had rendered to the plaintiffs accounts purporting to shew all receipts and disbursements in respect of such vessels for the season of 1878, which accounts, the bill alleged, were false, and did not shew correctly the earnings of the vessels; and that by reason of the defendant's fraudulent misrepresentations the plaintiffs were unable to state the precise amount to which they were entitled in respect of their interest in such vessels.

The defendant answered the bill, denying all fraudulent dealings with the plaintiffs as charged by the bill, and denied that there ever was any understanding between them as to the management of the vessels.

Statement.

The defendant was examined upon his answer before the Master at St. Catherines, in April, 1880, and again as a witness at the Spring sittings in London, when he reiterated his denials of any falsifications of his accounts.

The other facts material to the case appear in the judgment.

Mr. *Boyd*, Q.C., and Mr. *Gibbons*, for the plaintiffs.

Mr. *J. A. Miller*, and Mr. *Cox*, for the defendant.

Aug. 17th.

PROUDFOOT, V. C.—The bill alleges that on the 1st April, 1878, the plaintiffs were absolute owners of 21 shares, and mortgagees of 21 shares more in the schooner "*Laura*"—and the defendant was the owner of the remaining 22 shares.

That at the same date the plaintiffs were owners of 28 shares in the vessel "*William Horne*," the defendant claiming to be the owner of the residue of the vessel.

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That by mutual agreement and understanding between the plaintiffs and the defendant it was arranged that the defendant should take charge of the said boats for the season of 1878, and should account to the plaintiffs for their proportion of the earnings of the vessels after deducting proper expenses.

That defendant has rendered accounts to the plaintiffs, purporting to shew all receipts and disbursements in respect of the said vessels during that season.

That these accounts on the whole shew a net loss.

That the accounts are false, and do not shew the correct earnings, and that the defendant has in the accounts stated the freight earned to be less than it really was, and has endeavoured thus to defraud the plaintiffs. The plaintiffs pray for an account.

The defendant in his answer says, that in and before the year 1878, he managed the vessels for the joint benefit of himself and the other owners other than the plaintiffs, and after the close of the season of 1878 the plaintiffs claimed to have acquired an interest therein, but that he never made any agreement with the plaintiffs to take charge of the vessels for the season of 1878, and account to them for their proportion of the earnings after deducting proper expenses. That during the season of 1878 he managed the vessels and procured the most remunerative freights he could get, but the disbursements and expenses exceeded the profits. In March, 1879, the plaintiffs demanded an account, and without admitting their right to any share in the vessels he rendered to them true and correct accounts; denies fraud and dishonesty, and alleges the account to be correct; and says that he has always been ready and willing to permit the plaintiffs to examine his books and vouchers, and investigate the accounts, and satisfy themselves of their correctness; that the plaintiffs, as a banking corporation, could not own shares in vessels. That the *Wm. Horne* has always been a foreign vessel, and registered in the

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United States, and that the plaintiffs could acquire no interest in her.

On the 12th January, 1878, 21 shares in the *Laura* were conveyed to the plaintiffs by *J. G. Daoust*, who had previously mortgaged them to the plaintiffs. The plaintiffs are mortgagees of 21 other shares under a mortgage made by *George Campbell* on 22nd March, 1877.

On the 21st April, 1877, the plaintiffs were mortgagees of 28 shares of the *Wm. Horne*, and under a power of sale sold them by public auction, on the 29th of July, 1878, to *Herbert Bowen*, trustee, who holds them in trust for the plaintiffs; the effect of which, I apprehend is, that they still remain mortgagees of the vessel

The defendant rendered an account (Exhibit Z) of the earnings and expenses of the *Wm. Horne* from the 3rd April, 1878, to the 28th January, 1879, shewing a net gain of $110.47; and one for the *Laura* (Ex. O[2]) for the season of 1878, brought down to 18th February, 1879, shewing a net loss of $102.66.

Judgment.

The defendant was applied to by *Bowen* on the 22nd March, 1879 (Ex. P), for an account of the *Wm. Horne* for 1878. On the 27th March, the defendant in reply (Ex. Y) says he has some recollection of being in Windsor some time last season when the manager of the plaintiffs' bank there told him that some person in Detroit had purchased *George Campbell's* interest in the *Wm. Horne*, and was holding it in trust for the plaintiffs and asking if he was the person and requesting him to forward proof, and he would send a statement as near as possible to the exact thing for 1878.

On the 29th March *Bowen* answers giving the information asked for, that *Campbell's* interest was foreclosed and bid in by him (*Bowen*) on 29th July, 1878. (Ex. 2).

On the 7th April the defendant answered, enclosing the statement of the *Wm. Horne* account for 1878, (O[3]).

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When *Daoust* conveyed the twenty-one shares in the *Laura* on the 12th January, 1878, he signed an agreement (Ex. N.) in which he states he had conveyed the *Laura*, and all his interest therein, to the plaintiffs.

The defendant subsequently rendered to the plaintiffs the accounts of the *Laura* for the season of 1878, (O^2).

From these accounts it appears that the freights had not been all earned till late in November, 1878.

It was contended that the plaintiffs had no right to an account at all. As to the *Wm. Horne*, that plaintiffs were mortgagees, and did not take possession, and gave no notice to the defendant of their intention to do so; that the freight was all earned prior to July, 1878; and that as to the *Laura*, so far as the plaintiffs were mortgagees, the same grounds apply; and so far as the plaintiffs were owners it was necessary to shew that the defendant had ousted them

I think it is pretty well established that a mortgagee is not entitled to an account of the freight until he takes possession or does something equivalent to it. *Gardner* v. *Cazenove* (*a*), *Keith* v. *Burrows* (*b*); and I think there is no evidence here of anything equivalent to taking possession. Mr. *Wickson* telling the defendant in the season of 1878 that some person in Detriot had purchased the shares in the *Wm. Horne* and held them for the Bank, was no notice of any intention to take possession as mortgagees, it was a statement that the plaintiffs held by another title, as owners—a position I do not think they do hold. The mortgages both on the *Wm. Horne* and the *Laura* were registered, and the defendant must be taken to have known that; but until the mortgagees chose to intervene the mortgagor would have been entitled to the freight. There seems to be a good deal of uncertainty as to the right of co-owners to share in the

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(*a*) 1 H. & N. 423. (*b*) L. R. 2 App. C. 636.

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profits of a ship earned in ventures to which they have not assented. A majority can employ the ship against the will of the minority, but the minority can compel them to give a bond to restore the ship in safety or pay them the value of their shares, and in that case the minority share neither the hazard nor the benefit of the voyage. If the minority neglect this precaution they would appear to have no remedy for the loss of a ship sent to sea without their assent. But if a ship is employed by some of the owners, not against the will of the others, it would appear that all the owners are entitled to share in the earnings. *Maclachlan* on Merchant Shipping, pp. 94, 96, *Lindsay* on Partnership, 3rd ed., p. 67.

But whatever may be the strict rules applicable to such cases, they have no application here, for the position taken by the defendant shews that he is liable to account to the plaintiffs. In his answer he does not pretend that he was sailing the vessels on his own account or for his own profit, but that he did so for the joint benefit of himself and the other owners, other than the plaintiffs he adds; but that appears to have been an afterthought, for in his correspondence with *Bowen* as to the *Wm. Horne* all that he asks for is evidence that he really held the ship for the bank, and concedes his right to an account when that should be produced. And when he is informed how the title stands sends him the account; and he also furnishes an account to the bank of the *Laura*. The fair inference from these facts is, that the defendant was sailing the vessels for whoever might be the owners, or entitled to the earnings. And he recognizes the right of simple mortgagees to require an account, for he was informed that at the foreclosure sale *Bowen bid in* the *Wm. Horne* for the plaintiffs, and must be taken to have known that they did not acquire an absolute title.

Judgment.

There must therefore be a reference to take the

accounts. And here possibly I might stop; but a great deal of evidence was given to shew that the accounts rendered were erroneous, and that for some freight $65 per M. feet of lumber was received, and for others $100 per M., while only $50 and $70 respectively are credited in the accounts. This question depends upon whether *George Campbell* was the agent of the defendant in procuring freight, or was acting on his own behalf; for *Campbell* engaged for the freight at the higher rates, and it is alleged that he did so as agent for the defendant, while *Campbell* and the defendant deny this agency, and say that *Campbell* arranged for himself, and agreed with the defendant to carry at the lower rate, as he might have done with any third party. *Campbell* and the defendant are brothers-in-law, which probably caused the suspicion of agency to arise.

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Campbell and the defendant had been part owners in several vessels, but were never partners. *Campbell* and the defendant settled their accounts in October, 1877, (Ex. S^3), when *Campbell* was found indebted to the defendant in $101,477.55, and after transferring to him his interest in some vessels, and some North-West Transportation stock, the balance remaining due to the defendant was found to be $55,340.91. *Campbell's* affairs had got into irretrievable confusion. He had been largely engaged in lumber business, and this was put an end to. He then endeavoured to maintain himself by making contracts with lumbermen to get their freights carried and employed vessels to carry them. On the 29th March, 1878, the defendant wrote to *Campbell*, (Ex. X^2), telling him the *Laura* was open for freight and asking if he had any to carry, and to name best rates. On the 1st April, 1878, *Campbell* answers, (Ex. P^2). offering freight for several trips, and stating rates to be $50 and $70 per M. respectively. The defendant accepted the offer.

Judgment.

Two contracts were particularly referred to—the

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Stokes, and the *Carrier*. *Stokes*, made an agreement with *Campbell* (Ex. Q^1) without date, but a short time before, 25th January, 1878, to carry his timber for $65 and $70, from places named, payments to be made to the defendant. By letter to the defendant of 25th January, 1878 (Ex. B^2O), *Stokes* says: "I am happy to say that I closed with you through Mr. *George Campbell* for the freighting of the timber." To which the defendant replies on the 28th January, 1878 (Ex. R^2). "I am glad to hear you have closed for your timber, I think we can do your business fully as well as strangers, as we have always worked harmoniously together so far." The defendant afterwards sued *Stokes* for part of the freight, and at length a final settlement was made on the 30th April, 1879 (Ex. T^2), which is headed "Transaction *John C. Graham* and *William Stokes*, *John C. Graham* to *William Stokes*, Dr. and Cr.," and contains the charges for freight at full rates. And an account is produced (Ex. S^2) headed, "*William Stokes* to *J. C. Graham*," and charging the freight at $70.

Judgment.

The letter of the 28th January, 1878, is in the writing of the defendant's son, the defendant says his son had no authority to write it, was not employed in his office, and he never heard of it till he did so in this suit. It is not copied in his letter book. That may be so, but it does not injure the defendant more than the account that was rendered by his acknowledged agent (Ex. S^2), and the settlement of accounts signed by himself (Ex. T^2). *Stokes* says he understood *Campbell* was acting for *Graham*, that he would not have made the contract with *Campbell*, as he was in difficulties. *Campbell* denies he ever told *Stokes* he was acting for *Graham*, and claims he was acting for himself.

The other case is that of a contract made by *Campbell* with one *A. Carrier*, agent, of Detroit, on the 13th November, 1877 (Ex. T^3), by which *Campbell* agreed to provide freight for from 150,000 to 250,000 cubic

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feet of pine timber, from Lake Superior to Lake Ontario at $100 per M., freight payable by *Merrick, Fowler & Esselstyn's* acceptance of *J. C. Graham's* draft at four months.

On 1st February, 1878, *Merrick, Fowler & Esselstyn* write to *Graham*, saying they had made a contract with *Campbell* last fall to procure the freighting of 150,000 to 250,000 feet *Carrier* pine, &c. We understand from Mr. *Campbell* you have the contract, and suppose it was made for you, or that you had the carrying of it out. If so, will thank you to write us confirming it. (Ex. U[2]).

On the 4th July, 1878, *Graham* replies (Ex. V[2]): "It is as you understand. I have the contract made with Mr. *Campbell*, and I will see that it is carried out."

On the 27th June, 1878, *Graham* draws upon these gentlemen for the freight calculated at $100 per M. feet (Ex. W[2]), by one vessel, the *Laura*, and the others, I understand, were similar.

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Graham, when examined, said he never authorized *Campbell* to make the *Carrier* contract for him: that he had applied ineffectually elsewhere for freight for his vessels, to *Neelon*; and to *Calvin & Breck*, and he produced their letters stating that they could not give him any, 1st and 5th April, 1878; that he was glad to get the freight from *Campbell*, and the rates he was to receive were those then current; that in previous years *Campbell* had not, as part owner of the *Laura*, made contracts for the vessel without consulting the defendant; that defendant, as manager, never gave him authority to charter the vessel.

Campbell, in his examination, said he made the contracts for himself and for his own benefit. He had no vessels particularly in view when the contracts were made. He would have given the defendant the preference, but would not have paid him much more than to others. The rates he agreed to pay defendant were current rates. The defendant was not his partner.

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Both the defendant and *Campbell* deny any secret arrangement between them to defraud the bank.

At the hearing, after having heard the evidence of the witnesses, including the defendant and *Campbell*, and when my attention was principally occupied with the oral evidence I had just heard, I expressed my opinion that it did not seem to establish that *Campbell* was the agent of the defendant to procure freights.

I have since then gone over the documentary evidence, which has somewhat weakened the confidence I had in this opinion, but after carefully considering it, the material facts of which are set out as above, it does not seem to me sufficient to override my first impression. If what appears in these papers stood alone it might perhaps be the proper conclusion to deduce from them that the defendant was the contracting party. But the language is ambiguous and capable of an interpretation such as the defendant claims it ought to bear. When he wrote to *Merrick & Co.* that he had the con-

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tract made with *Campbell*, and would see that it was carried out, it does not necessarily imply that the contract was made for him: the terms are satisfied if he had the carrying out of *Campbell's* contract, and so the mode of payment in one sum to the defendant's order is not inconsisent with the notion that *Campbell* was the real contractor and the defendant his agent, to receive payment and pay the freight either to himself or to whomsoever should carry the timber, and the balance to *Campbell*. *Campbell* says he had no vessels in view when the contracts were made, in November, 1877, and January, 1878, and this is corroborated by the form of the contracts, which are only in one *to provide freight*, in another *to carry the timber*. Had it been the intention to get freight for the defendant's vessels they would naturally have been specified.

And it is not shewn how the defendant was to be benefited by the arrangement. He was incurring a loss if he agreed to carry the freight for less than current

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rates; and it is proved that he paid to *Campbell* the difference between the rate he, the defendant was to get, and what *Campbell* was to get. It would seem, then, if the plaintiffs' charge were correct, that he was gratuitously assisting—or rather paying *Campbell*—to perpetrate a fraud on them. It is possible to conceive a man doing this, but it is not a likely thing for him to do, and would require stronger evidence than exists here to establish it against his express denial.

There is a connection by marriage between the defendant and *Campbell*, but there is no presumption that brothers-in-law are so fond of each other as to commit frauds to benefit one another.

In the *Stokes* contract, as in the *Carrier*, the payments were to be made through the defendant, and the defendant renders the accounts as if he were the principal contractor, and he afterwards sues in his own name for the freight or a portion of it. In another subject than freight this would be very strong evidence of his being the original contractor; but freight is *primâ facie* payable to the master of the vessel, he need only deliver upon payment of it: *Maclachan* on Shipping, pp. 404, 470. The acts relied on here lose much of their significance as evidence of who was the contractor. And accounts and receipts are alway capable of explanation, and in this case they have been explained in a way that seems to me satisfactory.

Judgment.

If the plaintiffs desire it, after this expression of my view as to *Campbell* not being defendant's agent, there will be a reference to take the accounts with a declaration that such an agency was not established, and the costs will be reserved till after the Master shall have made his report. I reserve the costs, because the defendant has rendered accounts, and the issue is, whether these are correct or not, a matter that cannot be ascertained till the accounts have been taken.

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SYNOD v. DEBLAQUIERE.

Mortgagor—Mortgagee—Collateral security.

Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand.

This was an appeal on behalf of the defendants from the report of the Master. There were three grounds of appeal, but only the two first grounds turned on matters of fact.

In 1857 the plaintiffs were possessed, as part of the Clergy Reserve Fund, of £15,000 sterling debentures of the Town of St. Catharines, the estimated currency value of which was £18,250. It was arranged between the plaintiffs and the defendants that the plaintiffs should advance these debentures to the defendants at their par value, and that the defendants to secure payment of the value of the debentures, should assign or give to the plaintiffs mortgages upon real estate. The late Hon. *John Hillyard Cameron* was the Manager of the Clergy Trust Fund, and acted on behalf of the plaintiffs in the dealings between them and the defendants, and the securities to be given by the defendants were to be valued by Mr. *Cameron*, and the debentures were to be handed to the defendants from time to time as they furnished mortgage securities.

Statement.

On the 9th August, 1858, the defendants gave to the plaintiffs a bond conditioned for the repayment of £18,250 currency, and interest at six per cent. per annum in advance, which bond was payable on the 1st July 1863.

It was contended, on behalf of the defendants, that the arrangement was, that the plaintiffs were to collect the mortgages assigned to them, and thus repay the £18,250 and interest, but this was denied on behalf of

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the plaintiffs. It appeared that the debentures were advanced from time to time as securities were furnished. *A. H. Farmer* was the owner of a farm near Woodstock, which was subject to a mortgage for $8000, held by Messrs. *Ross, Ireland, & Aiken*. Under a power of attorney from Messrs. *Ross, Ireland, & Aiken*, Mr. *Cameron* was authorized to collect this mortgage.

Mr. *Farmer* sold this farm to Judge *McQueen* for $12,000 and Judge *McQueen* gave to *Farmer* a mortgage for $6,484 dated the 10th August, 1859, to secure the balance of purchase money, and which was payable by instalments on or before the 1st April, 1863, the agreement between *Farmer* and *McQueen*, was that *Farmer* should pay off the existing mortgage for $8,000 and that *McQueen's* mortgage should not be made use of until the $8,000 mortgage was paid.

On the 9th March, 1860, *Farmer* assigned *McQueen's* mortgage and other mortgages to the plaintiffs, and then became entitled to debentures to the extent of £4,000 sterling. On behalf of the defendants it was alleged that Mr. *Cameron* was made aware of the arrangement between *Farmer* and *McQueen*, and as Manager undertook to pay off the $8,000 mortgage, and as such Manager retained £2000 in debentures to pay it off.

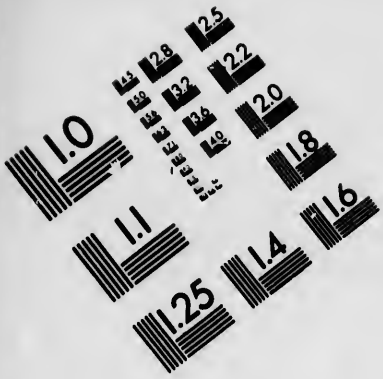
Statement.

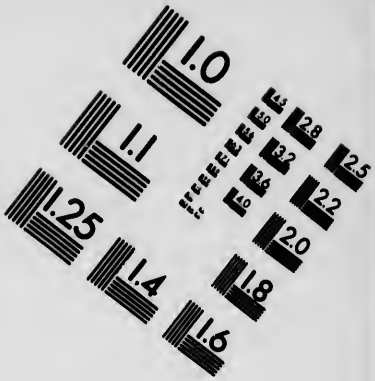
Mr. *McQueen* paid $800 on account of interest but refused to pay any more until the $8,000 mortgage was paid.

On the 25th September, 1860, Mr. *Cameron* gave to the defendants the following written statement:

"There are still debentures to the amount of £3,000 sterling remaining with the Clergy Trust Fund of which £2,000 stand as security to the *Ross* trust for a similar amount in currency due to that Trust."

The debentures were not so applied, and the second ground of appeal was, that the plaintiffs were chargeable with the difference between the $8,000 and the £2,000 sterling.





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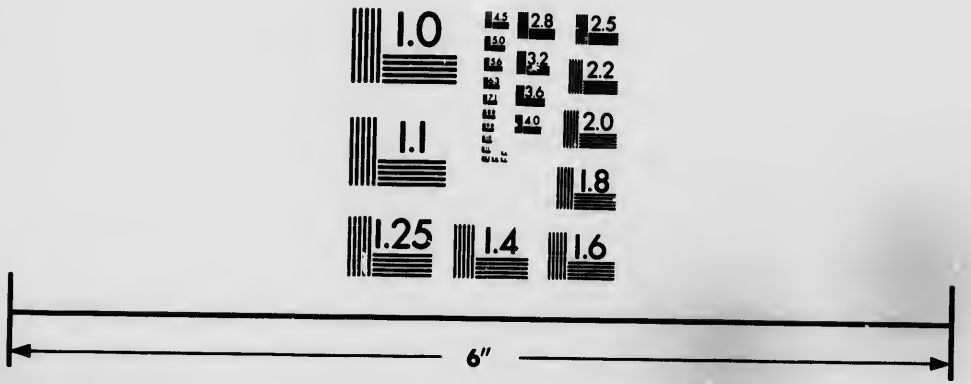

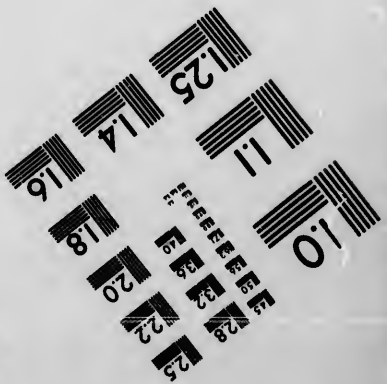

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On the 4th February, 1867, the plaintiffs, through Messrs. *Cameron & Murray*, their Solicitors, filed a bill in this Court against Mr. *McQueen*, to foreclose the mortgage.

On the 7th March, 1867, *McQueen* filed an answer, in which he set up the agreement as to the payment of the $8,000 mortgage, and his readiness to pay his own mortgage, so soon as the former was discharged.

The usual foreclosure decree was pronounced on the 21st April, 1868, (*Church Society* v. *McQueen*, *ante* vol. xv., p. 281,) but was not issued until the 18th February, 1871. The decree was taken into the Master's office on the 9th March, 1871, and the Master made his report on the 25th October, 1872, but the final order was not obtained until the 2nd April 1875. The $8,000 mortgage was discharged on the 15th of July, 1874. In November, 1875, the plaintiffs sold the land to Judge *McQueen* for $6,500.

Statement.

The defendants claimed that the plaintiffs were chargeable with the interest on the *McQueen* mortgage from its date to the date of the resale to *McQueen*, and it was from the disallowance of this by the Master that this appeal arose.

Mr. *Blake*, Q. C., and Mr. *A. Hoskin*, for defendants. The plaintiffs undertook to pay the $8,000 mortgage, and retained moneys for such purpose. They took the assignment with notice that this mortgage was to be paid. They were to be repaid by collecting the securities assigned to them, and were bound to see that *McQueen* paid his mortgage, and the evidence shews that he would have paid, and could have been made to pay. The interest was not paid because the plaintiffs neglected to pay off the prior mortgage, and they are responsible for the loss; and they should have prosecuted the suit with greater diligence. The plaintiffs are estopped from denying their liability for the interest, because by foreclosing the mortgage and

re-selling the property they have released *McQueen* from his liability under the covenant, and are not in a position, on payment of any balance due to them, to hand back the security in the same condition as they received it. 1880. Synod v. DeBlaquiere.

Mr. *Moss* and Mr. *W. Barwick*, contra. The evidence shews that the plaintiffs received the securities merely as security for the indebtedness of the defendants, and there was no obligation on the part of the plaintiffs to take any steps to realize any of them. At the time of default in payment of the *McQueen* mortgage the defendants were in default, and it was incumbent on them, if they wished to take proceedings on that mortgage, to have paid the plaintiffs, and taken an assignment of the securities. If the defendants desired the plaintiffs to take proceedings on the *McQueen* mortgage, they should have notified the plaintiffs to do so, and have supplied funds to pay the costs.

PROUDFOOT, V. C.—The first ground of appeal is, because the Master has not charged the plaintiffs with the sum of $1,697, and interest. Judgment.

This is a draft for $1,697, dated 1st July, 1859, drawn by *J. H. Cameron*, on *E. Deedes*, at ten days after sight. The defendants say that this draft with some other sums at their credit paid the interest on their transaction with the plaintiffs, for six months in advance, from 1st July, 1859. It was a term of the agreement, between the parties, that the interest should be paid in advance; *De Blaquiere*, *Deedes*, and their book-keeper, *Beard*, all swear that the draft was given and paid on account of the transaction now in question.

The Master has not allowed it, because there was evidence of accommodation drafts between *Cameron* and *Deedes*, and all the other drafts bear on their face the loan with which it is connected, while this does

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not, and because on the 6th February, 1860, *Cameron* wrote a letter informing *Deedes* that he had drawn on him that day, for $1,668.45, for balance of interest to the Clergy Trust Fund, made up as follows, "6 months interest to 1st January, on £17,250," and after crediting sundry other sums he adds interest for sixty-nine days.

The word supposed to be January is not distinct, and it is said to be as like July as January, but I will assume it to be January, as the Master has done. The draft was drawn at thirty days after date, and the sixty-nine days' interest added, would be interest from the first January, till the date the draft matured.

I think these circumstances quite insufficient to overbalance the evidence in favour of the payment on this account. It is drawn the day the money is payable for an amount just sufficient with other sums to make up the interest due to the plaintiffs; it was drawn by the person whose duty it was to draw it; and the payment was made in pursuance of the draft. The payment is not disputed, or, at all events, I take it to be proved. Then the evidence of the three gentlemen is direct and clear, that it was paid on this account.

Judgment.

Their veracity is not impeached, and the Master does not discredit them, but he doubts the accuracy of their memory, and some instances were pointed out in which their recollection was clearly at fault. But because they made mistakes in other matters I am not at liberty to conclude they made a mistake in this; if there were evidence, or circumstances not ambiguous, pointing to a contrary conclusion, then these mistakes might lead us to place less reliance on the evidence in regard to this particular. The Master seems to have thought he found such circumstances or evidence, in the fact of there being accommodation dealings between *Cameron* and *Deedes*; but the same evidence that tells of the existence of these dealings, tells also that this was not one of them; and it is proved to have been

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entered in a book where the accommodation dealings were not entered. The form of the draft might have been of some importance, had it been the last of a series drawn uniformly in a different manner, or had it been shown that the drawer, as agent of the plaintiffs, had authority to draw only in this way; but the only evidence we have is, that the drawer was authorized to receive payment on account of the plaintiffs. That being so it seems to me indifferent how the draft was made, the main fact being that of payment,

The circumstance upon which great reliance was placed, was the letter of *Cameron*, of 6th February, 1860. But the terms of it seem to me as easily applicable to a payment of interest in advance, as to one not in advance—"six months interest, to 1st January," *i. e.*, the interest calculated to 1st January, pursuant to the agreement, which would mean interest for the following six months. The force of the letter as evidence, on either side, rests on this one expression,—for the adding on of the sixty-nine days' interest, on interest would be plainly applicable either to past or future interest. Judgment.

This letter is therefore ambiguous and consequently not at variance with the defendants' contention.

The evidence in my opinion very much preponderates in favour of the defendants, and I allow this ground of appeal.

The second reason of appeal is, that the Master ought to have charged the plaintiffs with the difference between £2,000, in sterling debentures retained by the plaintiffs, and $8,000 currency, the amount due on a mortgage, referred to throughout the discussion as the *Ross* mortgage.

To understand this it is necessary to state the nature of the transaction between the parties. The plaintiffs had £15,000 sterling of debentures, of the Town of St. Catharines, and sold them to the defendants, to be delivered from time to time, upon the defendants giving to the plaintiffs their bond, a

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mortgage on their own property, and transferring mortgages made by third parties. One of the mortgages so transferred, was made by Mr. *McQueen*, for £1,621 currency; but it was a second mortgage, the *Ross* mortgage being prior to it, and therefore it was not such security as the plaintiffs could take. The defendants allege that the plaintiffs retained two debentures of £1,000 sterling each to meet this mortgage, and ought to have applied them in payment. And they seek to make the plaintiffs responsible for the difference between the value of the £2,000 sterling debentures, and the $8,000 mortgage, roughly calculated at $1,234 and interest from 9th March, 1860. The plaintiffs say they did not retain these debentures; that *Cameron* was the Solicitor for the *Ross* trust, and that he held the debentures, and that the defendants must look to his estate.

Judgment.

By the terms of the agreement between the plaintiffs and defendants, the defendants were only chargeable with the debentures that came to their hands. This is clear, not only from the oral evidence, but also from the records of the Synod, in which the manager is authorized, on several occasions, to hand over portions of the debentures on being satisfied with the title to the various properties offered in security. The plaintiffs must shew then, to relieve themselves from this charge, that these two debentures passed from them to the defendants, and from the defendants to the agent of the *Ross* trust.

A copy of a memorandum made by *Cameron*, dated 25th September, 1860, was put in, which is of material importance on this point. It was objected, however, that a sufficient ground had not been laid for admitting secondary evidence of it. The original paper was pinned in an invoice-book of *De Blaquiere* & Company; the copy was made by *Beard* for *McQueen*. The original was used in a suit of the *Synod* v. *McQueen*, and search seems to have been made for it in every

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place where it was likely to be. The objection was not that the proper places were not searched, but that as regarded one of them, the office of Messrs. *Mowat & Maclennan*, the witness *De Blaquiere* only said: "The papers of *Mowat & Maclennan* have also been searched," and that this was not sufficient, as it did not appear that the witness searched; but on referring to another part of his evidence (page 3) I find he states expressly, "I have searched * * among the papers of *Mowat* & Company, who were acting for *McQueen*." This appears to me to furnish sufficient reason for admitting secondary evidence; but, had the evidence been weaker I would not have felt inclined to give effect to the objection, for none was made in the Master's office, he considered it proved, and rests his conclusion upon a criticism of what does, and does not, appear in it, and the plaintiffs ought not to be permitted to take advantage of such an objection on this appeal.

Judgment.

This paper says: "There are still debentures to the amount of £3,000 sterling remaining with the clergy trust fund, of which £1,000 has been appropriated to the Bank of Upper Canada in exchange for mortgages; and £2,000 stand as security to the *Ross* trust for a similar amount in currency due to that trust. *J. Hillyard Cameron*, Toronto, 25 September, 1860."

Evidence was given to show that besides what here appears, *Cameron* added to his signature "Manager," or some phrase, showing he was acting for the plaintiffs. The Master examines the evidence, and concludes that there was no description added to the name. He does not say that he discredits the wit ses or doubts their veracity; but, reasoning from . . discrepancies between the witnesses as to what the word or phrase was, and from its not having been copied with the rest of the paper, he decides there was no such word or phrase.

I do not agree in this conclusion; and there is one part of the evidence of Mr. *Farmer*, not referred to by

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the Master in his judgment, which appears to me so strong, that, if the Master's attention had been directed to it, he would probably have arrived at a different conclusion. And in this matter, it is not a question whether some particular words were used, but whether any words indicative of that character were employed.

Mr. *Farmer* is not impeached, and the different statements he makes in his evidence are just such as would naturally arise from the course of the examination. Mr. *Farmer* says he saw the original first in 1868, not long after his return from England, he was interested because it referred to property of his brothers, of which he was trustee. He did not see the copy now produced till four or five months before his examination; when he first saw it he saw that the words, "Manager, Clergy, Trust Fund," were not under the signature. He, at once, on his return to the office, spoke to *DeBlaquiere* and to *Beard* about the words not being in the copy. He spoke to *DeBlaquiere* first about it: he took for granted the words were important. It is difficult to imagine all this to be a fabrication. It was a matter that occured only four or five months before he gave his evidence; and if much allowance ought to be made for the lubricity of memory at a distance of ten years, it is reduced to a minimum when we find that the recollection was clear and precise at so recent a period as four or five months. The witness was not a casual observer: it was a matter in which he had an interest, and it was natural that it should impress him, and that the impression should remain. All the witnesses agree that there was some addition to *Cameron's* name expressing that he was acting for the plaintiffs, and because they are not at one upon the precise words it scarcely seems logical to conclude that there were no words at all; or, that a discrepancy in that respect should justify a conclusion that the witnesses were not credible from defect of memory. It is only on this ground that the Master distrusts their evidence.

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But assuming the conclusion to be correct, that there was no addition to the signature of *Cameron*, it by no means follows that the plaintiffs are not bound. The plaintiffs entrusted their funds to *Cameron* for investment; the defendants borrowed from the plaintiffs through him. The paper (4) purports to be a statement of the position of the money borrowed. It says there are still debentures to the amount of £3,000 sterling remaining with the Clergy Trust Fund, of which £1000 has been appropriated to the Bank of Upper Canada in exchange for mortgages, and £2,000 stand as security to the *Ross* trust, &c.

If this paper was written by *Cameron*, as agent of the *Ross* trust, why should it contain any reference to the £1,000, and how it had been appropriated? The *Ross* trust had nothing to do with that, it was a matter that did not affect it at all; but the state of the account between the plaintiffs and defendants was a matter embracing the whole £3,000, and the conclusion seems inevitable that the paper was written by *Cameron* on behalf of the plaintiffs.

Judgment.

Then the entries in the minute book of the Synod shew that the plaintiffs considered that *Cameron* was holding these £2,000 for them. Under date of 9th September, 1869, there is a report entered on the minutes containing a statement of the amount due by *Cameron* to the plaintiffs, which it is said "does not include the £2,000 St. Catharines debentures connected with the *Farmer* and *DeBlaquiere* loan, for which it is said Mr. *Cameron* is in some manner responsible and which he states will be shortly collected." And again, "we are of opinion that the sterling bonds, amounting to £1,800, should be at once handed over to the Trust, as well as the £2,000 of St. Catharines debentures, held in connection with the *Farmer* and *DeBlaquiere* loan." Thereupon a resolution was moved by the Rev. Canon *Baldwin*, and seconded by the Rev. Archdeacon *Palmer*, that Mr. *Cameron* should be requested to

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transfer them to the custody of the Commutation Trust Fund. When Mr. *Cameron* was applied to, in pursuance of this resolution, he denied that he held any debentures for the Synod. He did not say he held them for the *Ross* trust, or, indeed, that he held them at all. The plaintiffs produce a copy of a letter written by Mr. *Cameron* to Mr. *McQueen*, dated, 14th October, 1861, in which he states he held these debentures for the *Ross* trust, and it is sought to bind the defendants by this statement on the ground that the letter was shewn to them by *McQueen* soon after its receipt. I do not think it ought to have this effect. It is quite possible that an arrangement might have been made between the parties, by which, without an actual handing over of the debentures to the defendants, it might have been agreed that they should pass to the hands of *Cameron* as agent of the *Ross* trust; but there is no other evidence of any such arrangement than this letter. It is expressly denied by the witnesses. *Deedes* denies that, until a recent period, he knew Cameron was agent of the *Ross* trust at all. *DeBlaquiere*, in one part of his evidence, says that he dealt with *Cameron* as agent of that estate, but in a subsequent part he explains that as referring to the dealings in connection with the original mortgage to the trust, not as referring to the *McQueen* mortgage. When the letter of October was shewn to him by *McQueen*, he was justified in assuming that any arrangement by which *Cameron* held the debentures for the *Ross* trust, was one made with the plaintiffs. That this was *DeBlaquiere's* belief at the time appears from *McQueen's* evidence, who says: "I always understood the Church Society held the debentures for the *Ross* mortgage; that Mr. *Cameron* held them for the Church Society; I understood that from Mr. *DeBlaquiere*; I can't say I understood it from Mr. *Cameron*, unless in general conversation between him and *DeBlaquiere*." There is no pretence that there were two arrangements between the parties as to the

Judgment.

manner in which these debentures were to be held by Mr. *Cameron*, and if the defendants are to be affected by his statements in the letter of October, 1861, they ought to receive the benefit of the statements in the memorandum of September, 1860, made by Mr. *Cameron* on their theory, in the same character as he wrote in 1861; the one neutralizes the other.

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I conclude, therefore, that these debentures were held by *Cameron*, as agent for the plaintiffs, and that the plaintiffs are liable for the difference mentioned in this ground of appeal. As no question was made in argument, but that when a mortgagee retains money in his hands to pay off a prior incumbrance, he is bound so to apply it, the interest will be charged from the time the debentures might have been applied in discharge of the mortgage—the time it fell due—if the debentures could then have been converted, if not, then from the time they could.

I allow this ground of appeal.

Judgment.

The third ground of appeal is, that the Master ought to have charged the plaintiffs with interest on $6,484, (the amount of the *McQueen* mortgage), from the 10th of August, 1859, to the date of the present mortgage held by the plaintiffs from Mr. *McQueen*, &c.

It will be seen that this is intimately connected with the preceding, and having held that the debentures were in the hands of the plaintiffs to be applied in payment of the *Ross* mortgage, which should have been so applied when it fell due, 9th March, 1860, and McQueen having refused to pay interest on account of an agreement with the defendants that his mortgage should not be used until the *Ross* mortgage was paid off, it remains to consider whether the plaintiffs are reponsible for the interest, the payment of which was not enforced in consequence of that agreement.

In 1867, the plaintiffs did file a bill for foreclosure against *McQueen*, who, in his answer submitted to pay, on the *Ross* mortgage being discharged. The suit was

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conducted in such a dilatory manner, that the final order was not obtained till 2nd April, 1875, the same day that the Ross mortgage was discharged; and then the plaintiffs sold the property to *McQueen*. I presume the effect of this was, to put an end to any liability of *McQueen* for arrears of interest, on his mortgage assigned to the plaintiffs. The evidence seems to me to establish that during the whole time *McQueen* was able to pay the interest; he was in possession of the property, and I think it might have been recovered from him. He did pay $800 on this account.

I do not think the evidence establishes any express agreement between the defendants and the plaintiffs as to the diligence to be used in collecting the mortgages assigned to the plaintiffs as collateral security, of which the *McQueen* mortgage was one. *DeBlaquiere* says that Mr. *Cameron* was to take the mortgages and collect them on account of the defendants. with all due diligence. He cannot say there was any express positive agreement. The plaintiffs were to be repaid by collecting these mortgages as far as they would go; and I think the minute book of plaintiffs shews they were to collect these mortgages.

Judgment.

Then, in the absence of any such agreement, does the law cast any duty on the plaintiffs in regard to the collection of the mortgages? It is clear that they were collateral securities, from the minute book of the Synod, as well as from the evidence. It is true that the bond given by the defendants was for the payment of the moneys in 1863, but I cannot accede to the argument that no other agreement could be shewn in regard to the collateral securities. I do not think any other express agreement has been shewn, but I do not know any principle that would prevent any agreement by implication of law, if there is such an implication.

At the time of the argument I was under the impression that it was nothing more than the ordinary

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case of principal and surety—the defendants being in the position of sureties for the assigned mortgages, and that they could not make the plaintiffs liable for mere delay in proceeding upon the mortgages. But upon reflection, and reference to the cases, other principles are involved. When mortgages or judgments, or securities of these kinds, are assigned, the assignees are affected with a trust in regard to them, which imposes on them the duty of diligence in their management, and in this respect distinguishes them from the remedies the creditor holds under the contract. The latter are held by the creditor, solely for his own benefit and need not be exercised unless he thinks proper. The assignment removing the property from the control of the debtor and placing it within the control of the creditor imposes on him the duty of using proper exertions to render it effectual for the purpose for which it was assigned. The subject has received great attention, both in England and the United States, and the decisions in England, by which I am bound, recognise this duty to a greater extent and in a more imperative manner than those in the United States. The American authorities do not carry the duty of the creditor to take active measures for the purpose of making the collateral securities taken for the debt available for its payment, as far as the English, and it appears to be doubtful if the American cases bind the creditor to take active measures for their collection, either by bringing suit or by issuing execution, when they have passed into judgment. But in every such case in England negligence, though passive, will operate as a defence, *pro tanto*, to a subsequent suit. See *Capel* v. *Butler* (*a*), *Williams* v. *Price* (*b*), *Ex parte Mure* (*c*), *Rees* v. *Berrington*, in the notes to 2 W. & T. Leading Cases, American Edition; 2 *Fisher* on Mortgages, 2nd Edition, 807.

Judgment

(*a*) 2 S. & S. 457.

(*b*) 1 S. & S. 518.

(*c*) 1 Cox 63.

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Here there was not only inexcusable negligence, but, by the plaintiffs' mode of procedure, Mr. *McQueen* has been relieved from liability for the interest. It was contended for the plaintiffs however, that the defendants should have required the plaintiffs to take proceedings upon the *McQueen* mortgage, and, not having done so, have themselves to blame. It is to be recollected that the defendants had debarred themselves from taking measures upon this mortgage until the *Ross* mortgage had been discharged; and while there is no evidence of their making any such requisition, there is abundant and uniform testimony of the repeated applications made to *Cameron* on behalf of the plaintiffs to discharge the *Ross* mortgage. Until that was done, the other would have been useless. It was the duty of the plaintiffs, I think, to comply with this request and they did not do it. In my opinion, the plaintiffs are liable for not having collected this interest, and I allow the appeal.

Judgment.

The $800 paid to the plaintiffs by *McQueen* to go in reduction of what may be found due.

Costs will follow the result.*

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* This judgment was affirmed by the Court of Appeal on the 30th June, 1880. The plaintiffs have carried the case to the Supreme Court.

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CRONN v. CHAMBERLIN.

Mortgagor and mortgagee—Sale of equity of redemption of some of several mortgagors—Right to redeem.

Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:

Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits.

This was a bill by *Jane Cronn* against *Edmund Chamberlin* and *Martha Ann Mulder*, praying that the lands in question in the cause might be sold or partitioned under the following circumstances, as set forth in the bill, which alleged that under a deed of 22nd November, 1845, one *George Parker Hall* conveyed to *Robert H. Cronn*, *Martha Ann Cronn*, *George Cronn*, *John Cronn*, and *Mary Jane Cronn*, since deceased, children of the plaintiff, and *Henry Cronn*, as tenants in common, certain lands in the town of Peterborough; that on the 1st of November, 1869, *Robert H. Cronn*, for valuable consideration, conveyed his interest therein to the plaintiff for life, and that *John Cronn*, by a deed of 15th December, 1869, for valuable consideration, conveyed his interest to the plaintiff in fee. Statement

The bill further alleged that under a writ of execution against lands, issued out of the County Court of the County of Peterborough, at the suit of the defendant *Chamberlin*, all the interest of the said *Robert H. Cronn* in the said lands was sold to the said defendant on the 10th of January, 1871, and that on the same day, under another writ against lands, issued out of the same Court, at the suit of one *William Claxton*, all the right and interest of the said *John Cronn* and

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George Cronn in the said lands, was sold to the defendant *Chamberlin*.

The bill further stated that the defendant *Chamberlin* had been in possession of the premises since the year 1870, under a mortgage theretofore executed upon the premises by the said *Robert H. Cronn, Martha Ann Cronn, George Cronn*, and *John Cronn;* that the said *Martha Ann Cronn* did, in the year 1873, intermarry with and was the wife of one *C. T. Mulder*. The bill charged that by the receipt of rents, &c., the mortgage held by *Chamberlin* had been discharged, but if anything remained due thereon the same should be paid by the defendant *Martha Ann Mulder*, to which payment the plaintiff offered to contribute in such proportion as the Court should direct.

Statement.

The defendant *Chamberlin* answered the bill, setting up that by two several mortgages, bearing date respectively the 12th and 30th of March, 1867, the said *Robert H., Martha Ann, George*, and *John Cronn* mortgaged the said lands to the said defendant, for securing the sums of £100 and £25 15s. respectively, with interest; and that neither of the said sums had been paid, and denied ever having been in possession of the lands until after the sales under the executions mentioned in the bill; denied notice of the deeds to the plaintiff, and charged that the same were voluntary and without consideration; alleged that the mortgages to him were duly registered in the proper office; that the same were executed with the full knowledge and concurrence of the plaintiff; and that the plaintiff had not been in possession for a period of more than fifteen years; and under these circumstances claimed the benefit of the registry laws and of the Statute of Limitations as a bar to the claim, if any, of the plaintiff; but admitted her right to redeem as part owner of the equity of redemption; and further alleged that he went into possession as purchaser at sheriff's sale and not as mortgagee.

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The defendant *Martha Ann Mulder* also answered claiming to be entitled to an undivided one-fifth of the mortgaged premises, and alleging that at the time of her executing the mortgage to *Chamberlin* she was a minor, and incapable of conveying or incumbering her interest in the premises; denied her liability to pay the amount, if any, that might be found to be due to *Chamberlin*, and claimed that he had been paid by the receipt of rents and profits.

The cause came on for the examination of witnesses at the sittings of the Court at Peterborough, in the autumn of 1878, when evidence was taken, the effect of which appears in the judgment, and the argument subsequently took place at Toronto.

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

Mr. *Moss*, for the defendant *Chamberlin*.

March 12th.

SPRAGGE, C.—In November, 1845, a conveyance of a parcel of land in a town, was made by one *Hall* to five persons, children of *Henry* and *Jane Cronn*. The mother is the plaintiff in this suit. The names of the grantees were *Robert H.*, *Martha Ann*, *George*, *John*, and *Mary Jane*; the last named died when about five years old, the father died, as the bill alleges, in or about 1867, intestate. *Martha Ann* married one *Mulder*, and is a defendant.

On 12th March, 1863, the three sons and *Martha Ann* joined in a mortgage to the defendant *Chamberlin*, of the land in question, to secure £100, and on the 30th of the same month the same parties mortgaged the same land to the same person to secure £25 15s.

Under a writ against lands of *Robert* issued upon a judgment recovered in the County Court against him by *Chamberlin* for $90.60, the sheriff, on 1st February, 1870, sold the interest of *Robert* in the land in question to *Chamberlin*, and on 10th Jan., 1871, under

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a writ against the lands of *John* and *George* upon a judgment recovered in the same Court against them by one *Claxton*, sold their interest in the same land; and at that sale also *Chamberlin* was the purchaser.

Conveyances were made by the sheriff to *Chamberlin*, and after the second sale he entered into possession.

What was sold in the first suit was of course the equity of redemption of *Robert*; in the second, of *John* and *George*; and a principal question in the case is, whether under the Common Law Procedure Act, C. S. U. C. ch. 22, the equity of redemption of these parties respectively was saleable.

This case differs from *Heward* v. *Wolfenden* (*a*), in the circumstances. In that case several lots were comprised in one mortgage, and one of them was sold under common law process against the lands of the mortgagor, and it was held by the late learned Chancellor Mr. *VanKoughnet*, that under the statute this could not be done: that the sheriff must sell the equity of redemption in all the mortgaged lands, or not sell at all. He pointed out, with his usual clearness and force, the anomalies that would result from such a sale; and from such being the results drew the conclusion that the statute could not have been intended to apply to such a case.

Judgment.

In the case before me, one sale is of the equity of redemption of one of four mortgagors, the other sale is of the equity of redemption of two other of the same four mortgagors. The statute reads as if framed for the case of one judgment debtor who is himself entitled in severalty to an equity of redemption in land. If, however, it can be so worked out, where the judgment is against one or more, not all, of several tenants in common, that we may reasonably say that the statute was intended to apply to such a case, it is our duty to hold it to apply.

The use of the word "mortgagor" throughout sec. 258

(*a*) 14 Gr. 188.

rather indicates the intention of the statute to be that this process shou'd apply only to the case of a mortgage of land held in severalty. If intended to apply to a judgment and execution against one of several tenants in common, the effect of the sale would properly be stated to be to vest in the purchaser the interest of the execution debtor, not, as it is, of the mortgagor; and the same words "execution debtor" would be the proper words to use throughout the rest of the section. The word mortgagor, used as it is by itself, is an inappropriate word in the connection in which it is used in this section.

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It is evident from the language, and the provisions of the statute, and the form of the certificate of payment, that the value of what is sold is taken to be the value of the land beyond the mortgage debt; not the value of the interest of the execution debtor, as distinguished from the value of the land.

Further, under section 259, in case of the mortgagee purchasing, he is to give to the "mortgagor" a release of the mortgage debt. What he purchases in the case supposed, is the equity of redemption of one of several, *i.e.*, the interest of the execution debtor. Is what he purchases based upon the worth of the whole land beyond the mortgage debt, or the worth of the interest of the execution debtor beyond the whole debt? It must be the worth of one or the other *beyond the whole debt*, because his purchase casts upon him the obligation of releasing the whole debt. The result is, that the mortgage debt is paid at the expense of one of several of the mortgagors, and he does not, as in a foreclosure suit, upon such payment get a conveyance of the land and hold it until paid by his co-mortgagors *their* due proportion of the debt, but the land itself, so far as he is concerned, is gone—his interest in it transferred to another. And under the same section if any other person becomes purchaser, the burthen of the whole mortgage debt is thrown upon him; and if the mortgagee enforces payment of the debt against the mortgagor—in such a case

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it would be the mortgagors, the purchaser is to repay the amount to the mortgagor or the mortgagors. In that event the position of the mortgagors would be an anomalous one. The rights of the mortgagee are properly not interfered with, and he has enforced the mortgage debt against the mortgagor. But who is to obtain re-payment against the purchaser? The execution debtor has satisfied the whole mortgage debt, not only his own proportion, but the whole. His co-mortgagors *primâ facie* should bear their proportion of the debt whatever it might be. Whom then is the purchaser to pay, and in what proportions? *Primâ facie* the execution debtor should be paid all except that which was his due proportion to pay himself. But the statute says the purchaser is to repay the mortgagor. If there be one mortgagor the statute may be worked out. So probably if the mortgagors and execution debtors be identical, but it appears to me to have been obviously not framed for the case of one or two execution debtors who are one or two of more mortgagors. My conclusion is, that the statute must be taken not to have been intended to apply to such a case. There are two English cases which lead to the same conclusion.

Judgment.

In Doe *Hull* v. *Greenhill* (*a*), the question was, what trust estate was exigible under section 10 of the Statute of Frauds. Certain lands were held in trust for the judgment debtor and another; the judgment debtor being entitled, subject to an annuity to be paid to the other *cestui que trust*. The case did not present anything like the difficulties in the way of applying and working out the elegit that exist in this case; but the Court held the statute not to apply. *Abbott*, C. J., said: "We are all of opinion that this case does not present a trust within the intent and meaning of the statute. The words of the statute are: 'Seised or possessed, in trust for him against whom execution is sued, like as

(*a*) 4 B. & Al. 684.

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the sheriff might and ought to do, if that person were seised.' This statute made a change in the common law, and up to a certain extent at least made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated, must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor."

Every word of this is applicable to the case before me.

That case was followed by *Harris* v. *Booker*, (*a*), in which case also the trust was for the judgment debtor and another. The Court refer to Doe *Hull* v. *Greenhill*, and say, in conclusion, that the judgment debtor "had nothing in the premises but a joint equitable interest of which a Court of Equity could alone take cognizance."

Judgment.

Mr. *Moss* points out that the bill does not allege that these sales by the sheriff were not valid. That is so; but it states the facts, and it states further that *Chamberlin* went into possession, and that that possession was under a mortgage by the four mortgagors. Besides it would be, if necessary, a case for amendment upon that point. I do not think it follows, as is contended, that if the sheriff's sales were not valid, the execution creditors should be made parties having, as incumbrancers, a right to redeem. This would apply only to *Claxton*, and his execution, as is stated by *Chamberlin's* answer, has been satisfied by *Chamberlin* himself. Nor do I think that *Chamberlin* can now make any claim upon his judgment, or upon any debt for which his judgment is recovered. They both must be taken to have been satisfied by the execution, whether the execution produced any substantial fruit or not.

(*a*) 4 Bing. 96.

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The plaintiff claims under conveyances from *George* and *John Cronn* in fee, and from *Robert H. Cronn* for her life. None of these conveyances were registered until after the registration of the mortgages to *Chamberlin*. The plaintiff files her bill to redeem the mortgages, and the defendant in his answer admits her right to redeem them as part owner of the equity of redemption in a portion of the lands. The plaintiff states the possession of *Chamberlin*, which was, she says, under a mortgage; and claims that the mortgage has by receipt of rents and profits, or otherwise, been discharged, or nearly so. *Chamberlin* claims that his possession has been under his purchases at sheriff's sale. Holding those sales to be inoperative, I must hold him bound to account for rents and profits as mortgagee. He claims to have expended moneys in making tenantable the premises which, he says, were out of repair, dilapidated, and unfit for occupation. He is entitled to be allowed for all moneys properly so expended. He makes no case for compensation for moneys expended under a mistake of title. Probably there were no improvements of a character to bring the case within the Act.

Judgment.

The answer impeaches the conveyances to the plaintiff from her three sons as voluntary, and made to defeat creditors; but *Chamberlin* does not allege that he has been injured thereby, or that the sons were indebted to him otherwise than by mortgage, or that the mortgages were not a sufficient security. As between the parties themselves the conveyances were of course valid, and they give the plaintiff a title to come into Court to redeem. Some evidence was given of the circumstances of the sons; but I have not thought it necessary to determine whether or not they were in a position to make these conveyances, or whether they were voluntary. They are each of them expressed to be for valuable consideration, and there is some evidence of services rendered by the plaintiff to two of them.

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The defendant *Martha Ann Mulder* is made a defendant as a joint mortgagor with her brothers. She was not represented at the hearing; and it did not appear by any evidence given, that she was not of age, as she alleges, when she executed the mortgage. The decree will be as to her as well as to the plaintiff to redeem, and on default as to plaintiff dismissal of her bill, as to the female defendant foreclosure.

The plaintiff is entitled to her costs of the hearing. The other costs will be as in an ordinary bill to redeem.

ROGERS v. LOWTHIAN.

Will, construction of—Life interest—Homesteads' Act.

A testator bequeathed to his two daughters (both of whom were married and had children at the time of the will) the sum of $1,000 each, charged upon his realty, which he devised; such sums to be invested in bank stock, and the interest accruing therefrom to be paid to his daughters during their natnral lives, and after their decease directed these sums to be equally divided amongst their heirs. By a codicil the testator directed that should his real estate be sold, the $2,000 might remain on mortgage at interest, payable half yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters should they desire to do so:

Held, that the daughters, took a life estate, with remainders to their heirs as purchasers.

By the R. S. O. ch. 24, free grants of lands for homesteads are only authorized to be made to men.

This was a suit for the construction of the will of *George Lowthian*, and was heard by way of motion for decree.

Mr. *Moss*, for the plaintiff.

Mr. *Bayly* and Mr. *Plumb*, for the defend[illegible]s.

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Sept. 13th.

PROUDFOOT, V.C.—The question in this case is, as to the extent of the interest taken by the plaintiff under her father's will.

By his will the testator bequeathed to his daughter, *Dinah Hutty*, the wife of *George Hutty*, $1,000, to be invested in bank stock: his said daughter to have the interest accruing therefrom during her natural lifetime; afterwards the said sum of $1,000 to be equally divided amongst her heirs. He also gave to his daughter *Jane Rogers* (the plaintiff), the wife of *George Rogers*, the sum of $1,000, the same to be invested in bank stock: his said daughter to have the interest accruing therefrom during her natural lifetime, afterwards to be equally divided amongst her heirs. These legacies were in effect charged upon land devised to one of the testator's sons.

By a codicil to his will, the testator altered these bequests to the daughters, so that they might be disposed of as follows: should his real estate be sold, the

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$2,000 might remain on mortgage, the purchaser might have the use of the money by paying a stated interest on the mortgage, half-yearly; but when the mortgage was paid his executors were to have full power to invest the $2,000, in homesteads for his daughters, should they, the daughters, desire to do so.

Both the daughters had children when the will was made.

The plaintiff claims to be entitled to an absolute interest in the $1,000, while the other parties interested contend that she is only entitled to a life-interest in it.

It was contended that a gift of the income was equivalent to a gift of the fund itself. It is true that an indefinite bequest of the income of personal estate passes the absolute interest, but I am not aware that a gift of income for a limited period has ever that effect: *Humphrey* v. *Humphrey* (*a*), *Theob.* Wills. 243.

(*a*) 1 Sim. N. S. 536,

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It was also argued that in this bequest the word "heirs" was a word of limitation and not of purchase; and as in a devise of real estate it would pass a fee, when applied to personal estate it transferred the absolute interest. But it is added, "to be equally divided amongst her heirs." Mr. *Theobald* (p. 241) states the rule in such a case to be that the life-estate will not be enlarged whether there is a gift over in default of issue or not. I was inclined at first to think that our Act abolishing primogeniture might perhaps render this rule inapplicable; but further reflection satisfies me that it does not. When th property is to be equally divided amongst the heirs, it shews that the word *heirs* cannot mean the heirs in a continual line of descent, which is necessary to create a fee, because it could not be divided equally among them; and therefore that it must mean children. The same reasoning applies whether all the children take as heirs, or only one.

Judgment.

But it is said that the testator having given the plaintiff an option to have the $1,000 invested in a homestead, shews that he intended the interest to be absolute, as there is no limitation in favour of any one but the plaintiff, and no intention that her estate in it was only to be for life, and therefore that the same construction is to be applied to the money itself. The meaning of the word, as found in the dictionaries, affords no guide to the quantity of the estate embraced in it. *Worcester* defines it as, "the place of the home, a mansion house with adjoining land," where mansion evidently has the sense of a dwelling house. But a homestead in this sense might consist of a leasehold, or estate for life, or fee simple, or fee tail. It has received a legal signification in our Homestead Act, 31 Vict. ch. 8, and R. S. O. ch. 24, which authorized free grants to be made on condition of actual settlement, and making specified improvements; and protecting the interest of the locatee's widow by prevent-

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ing him from alienating before patent, and also after patent during the widow's life, and within twenty years from the date of location, except by devise, unless the wife joined in the conveyance; and exempting it during that period from liability for debts. The Act 31 Vict. ch. 8, permitted such grants to be made to a woman, but the peculiar privileges of the estate were only applicable where the locatee was a man. This incongruity has been removed in the revised Statute, and such grants are only made to men. The masculine gender only is used in the revised Act. The Interpretation Act provides that the masculine shall include the feminine, "except in so far as the provision is inconsistent with the intent and object of such Act"; and I think the whole scope of the Act was to protect the wife and family of the locatee.

But the testator could not dispose of property divested of its legal incidents; he could not exempt it from liability to the debts of the donee (2 Jarm. 20); nor could he limit her power of alienation, which would be repugnant to the nature of the estate, whether for life or in fee. There was only one other peculiarity attaching to homesteads which the testator could have had in his mind, and that is, the limited nature of a wife's estate, and the plaintiff was a wife when the bequest was made; and he would rather seem, therefore, to have intended to give her a life-estate, with a remainder to her heirs as purchasers.

Statement.

But even if the testator had expressed himself a little more clearly as to the estate in the land, in the event of an option being exercised, I do not see any very cogent reason why that should regulate the interest in the personalty, rather than that the estate in the personalty should govern that in the land. As Lord *Hatherley* said, in *Jackson* v. *Calvert* (*a*): "It is very difficult to give any sound logical reason for the

(*a*) 1 J. & H. 235.

proposition, that an intention that the two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than with those which would apply to a bequest of personalty alone." The difficulty is increased when the realty is to be a substitute for the personalty. And, besides, where an estate of an enlarged kind is given in one part of the will it will not be cut down by ambiguous phraseology in another part: 1 *Jarm.* 450, *et seq.*

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MEALEY v. AIKINS.

Will, construction of—Lapsed legacy.

The testator bequeathed an amount of personal estate to his brother *John* "to have and to hold to him, his heirs and assigns, for ever." *John* predeceased the testator:

Held, that the legacy lapsed, and that the next of kin of the legatee was not entitled.

Hearing of motion for decree for the construction of the will of the late *Samuel Aikins*.

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

Mr. *Maclennan*, Q. C., and Mr. *Mulock*, for the defendants.

SPRAGGE, C.—The testator, *Samuel Aikins*, who died in December, 1873, bequeathed personalty to his brother *John*, "to have and to hold to him, his heirs, and assigns for ever." *John*, it is now admitted, predeceased the testator; and it is not disputed that if the bequest had been to him, his executors and assigns for ever, the bequest would, in the event that happened,

Sept. 29th.

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have lapsed: and the reason given by Mr. Justice *Williams*, in his book on Executors, 8th ed., 1212, is "for the words executors, administrators and assigns, &c., are considered as only descriptive of the interest bequeathed; and those who take by representation only cannot be entitled to anything to which the person they represent never had any title." There are numerous authorities to this point, but it is a point now so clearly settled that I do not refer to any cases in its support.

But in this will the word "heirs" is used instead of executors; and it is contended that in a bequest of personalty the word heirs is to be taken as descriptive of a class taking by substitution, and not as a term denoting succession or as descriptive of the interest bequeathed.

I have examined a number of cases, those cited by counsel and others, and find nothing in support of this contention. Where a bequest of personalty is to one and his heirs and assigns and there is no lapse, the

Judgment.

bequest goes to the next of kin, and not to the heir; *i. e.*, it goes according to the quality of the thing bequeathed, it being assumed that the testator used the word heir through ignorance or inadvertence.

The words used by the testator in making the bequest indicate this, "I will and *devise* unto my brother *John*," then follows a description of the personalty that he bequeaths.

There are cases where there has been a gift of personalty by will to a person *or* his heirs, but the *ratio decidendi* in those cases does not at all support the construction contended for by Mr. *Boyd*. One of these, *Gittings* v. *McDermott* (*a*), was first before Sir *John Leach*, and then on appeal before Lord *Brougham*. Both those learned Judges held that there was no lapse; but they placed their decision upon the use of the disjunctive "or." The Master of the Rolls used this

(*a*) 2 M. & K. 69.

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language, "It is clear that the word 'or' implied a substitution, and that there was consequently no lapse. The word heir must, in respect of personal property, be taken to mean next of kin. * * * When, therefore, the testator gives the several legacies of stock to the children of his sister, or to their representatives, he plainly intends that if any of the children should not be living at his death, their representatives should take by substitution. This is the effect of the word 'or' which differs wholly from that which must have been given to the bequest, had the word 'and' been used."

In the same case, Lord *Brougham* said: "The force of the disjunctive word 'or' is not easily to be got over. Had it been 'and', the words of limitation would of course, as applied to a chattel interest, have been surplusage; but the disjunctive marks as plainly as possible that the testator, by using it, intended to provide for an alternative bequest; namely, to the legatees if they should survive, and if they should not to their heirs." The Chancellor refers also to the language of the Court in *Tidwell* v. *Ariell* (*a*), as in accordance with his own view, and so upon a careful reading of the case it appears to be.

Judgment.

Gittings v. *McDermott* was followed by *Doody* v. *Higgins* (*b*), first heard before Sir *George Turner*. The words were, to certain persons or their heirs for ever, and the learned Judge holding that there was a substitution, held so expressly upon the use of the disjunctive "or," and deals with a case put to him of the words "and his heirs" thus: "It was also argued that the word 'or' ought to be read 'and,' and that upon that construction the personal representatives of the deceased grandchildren would be entitled. But I see no reason for altering the words of the will; and if the testator had intended the personal representatives

(*a*) 3 Mad. 403.

(*b*) 9 Hare, App. xxxii.

1880. to take, the words 'or their heirs' might have been omitted altogether."

Mealey v. Atkins.

In re Porter's Trusts (*a*), Lord *Hatherley*, then Vice-Chancellor, speaking of the decision in *Gittings* v. *McDermott*, says: "The Court arrived at the conclusion that the disjunctive word 'or' must mean substitution. The disjunctive marked plainly that the testator intended to provide for an alternative bequest, viz., to the legatees if they should survive, and if they should not, to their heirs, as they were called in his will."

It appears very clearly from these cases that the learned Judges who decided them proceeded entirely upon the use of the disjunctive "or" in the will, and they intimate plainly that if the bequest had been to a man and his heirs there would be no substitution; and I attribute the absence of cases to that effect to its being perfectly well understood that such was the rule of construction, and I am strengthened in this opinion by its being put by Sir *John Leach*, by way of illustration in *Mounsey* v. *Blamire* (*b*). He says: "Where the word 'heir' is used to denote succession, there it may well be understood to mean such persons as would legally succeed to the property according to its nature and quality; as in *Vaux* v. *Henderson* (*c*), * * and in the familiar case of a gift of personal property to a man and his heirs;" and this is quoted by Lord *Hatherley*, in *Doody* v. *Higgins* (*d*), when the case came before him, after being before Sir *George Turner*.

Judgment.

I think it clear, therefore, that there was a lapse of this legacy upon the death of *John* before the death of the testator.

(*a*) 4 K. & J. 188.
(*b*) 4 Russ. 386.
(*c*) 1 J. & W. 388, *n*.
(*d*) 2 K. & J. 736.

1880.

LAVIN v. LAVIN.

Deed from father to son—Voluntary grantee—Independent advice—Costs.

The testator—ninety years old—while residing with his son *W.*, executed a will devising to his sons *W.* & *J.* all his real and personal estate. About a year afterwards, having removed to a distance, and while residing in the house of his daughter, where his son *T.* also resided, he executed a deed of all his real estate to *T.*, which recited that *T.* had agreed to pay him $10 a month during his natural life; and this was the only consideration expressed for the conveyance, which was prepared by a solicitor on instructions given by *T.* On a bill filed by *W.* against *T.* and his sister, charging them with conspiracy, and impeaching the deed on the ground of fraud and undue influence, the Court [SPRAGGE, C.] although satisfied that no fraud or undue influence had been practised on the grantor, set aside the deed as the same had been executed without proper advice, but refused the plaintiff costs in consequence of the unfounded charges of fraud contained in the bill: and as against the female defendant dismissed the bill, with costs; the fact that the Court was of opinion that if the fullest explanations had been given to the father of the nature and effect of his deed he would still have executed it, making no difference in that respect as to what was required on the part of a voluntary grantee, which *T.* in effect was.

Statement.

This was a bill by *William Lavin* against *Thomas Lavin*, *Frances Brooks*, and *John Lavin*, setting forth: (1) That one *John Lavin* (who was the father of the plaintiff and defendants, his only children) was seised of the lands and premises thereinafter mentioned as heir-at-law of one *Margaret O'Neill*, deceased, and of a large amount of personal estate. (2) That the said *John Lavin* died on the 13th December, 1879, having first duly made and published his will, bearing date 26th November, 1874, whereby he purported to devise and bequeath all his land, and all household furniture, &c., whatever and wheresoever unto his sons *William* and *John*, in the proportion of two-thirds to *William*, and one-third to *John*, subject to the payment to *William* of a reasonable sum for the board, &c., of the testator,

1880.

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and payment also of his just debts, and one dollar each to his daughter *Frances Brooks* and son *Thomas Lavin*; and *William Lavin*, was appointed sole executor of said will, probate of which was granted to the plaintiff. (5) That up to April, 1875, the testator resided with the plaintiff at the town of Bothwell, being then about the age of ninety-one years. (6) The bill charged that about the date last mentioned the defendants, *Thomas Lavin*, and *Frances Brooks*, formed the design and conspiracy of obtaining the real and personal estate of the testator, and persuaded him to lease the residence of the defendant *Thomas Lavin*, at Toronto, in order that on his arrival there, by exerting undue influence on the testator, they might obtain a conveyance of his lands; and in pursuance of such fraudulent scheme a deed was prepared, which they told the testator to sign, which he did without being aware of what he was doing, and which was so executed at the residence of the defendant *Thomas Lavin*, without the testator's having any independent advice. (11) That said conveyance was dated 13th April, 1875, reciting that: "Whereas, *Margaret O'Neill*, formerly of Toronto, widow of the late *James O'Neill*, now deceased, who died intestate, and without issue, was the daughter of the said *John Lavin*, and was entitled to an interest in the lands and premises hereinafter described, as tenant in common with her brother, the said *Thomas Lavin*, the party hereto of the second part: and whereas, the said *John Lavin*, as the only heir-at-law of the said *Margaret O'Neill*, is entitled as such to whatever interest she, the said late *Margaret O'Neill*, was entitled to in the said lands hereinafter described: and whereas, the said *Thomas Lavin* has agreed to pay to the said *John Lavin* (his father) the sum of ten dollars per month and every month during the remainder of his natnral life," and purported to convey to the said defendant *Thomas Lavin* two several parcels of land in the City of Toronto, valued at $3,200,

Statement.

without any consideration being paid therefor other than the said ten dollars a month mentioned in such recital as having been agreed to be paid by the grantee to his father. 1880. Lavin v. Lavin.

The prayer of the bill was, that it might be declared that the said deed of conveyance was fraudulent and void, and might be set aside and cancelled, and the lands comprised therein partitioned or sold under the decree of the Court, and for an account of the personal estate and effects of the deceased.

The defendant *Thomas Lavin* answered the bill, alleging that he purchased the several parcels of land mentioned in the bill, one in April, 1870, the other in April, 1874; the first having been conveyed to the said defendant and his sister, *Margaret O'Neill*, who for many years previous to his death had resided with him, and assisted him in his business of grocer; and denied all weakness of intellect on the part of the testator or fraudulent practices by the defendant.

Frances Brooks also answered the bill, and made similar denials of fraud, or weakness of intellect. Statement.

The plaintiff and the defendants *Thomas* and *Frances* were examined in the cause, and the effect of their evidence, and the points relied on by counsel, appear sufficiently in the judgment.

Mr. *J. H. McDonald* and Mr. *G. T. Blackstock*, for the plaintiff.

Mr. *O'Donohue*, for the defendant *Thomas Lavin*.

Mr. *Haverson*, for the defendant *Frances Brooks*.

The defendant *John Lavin* was in the same interest as the plaintiff, and did not appear on the hearing.

SPRAGGE, C.—The bill in this case is filed by *William*, a son of the late *John Lavin*, and a devisee under August 31st.

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his will, which is dated 26th of November, 1874, and impeaches a conveyance from the father to another son, *Thomas*, dated 14th April, 1875. The father was a widower, and at the date of the will was living in the family of *William*, in the town of Bothwell; at the date of the deed, in the house of a daughter, the defendant *Frances Brooks*, *Thomas* residing in the same house and paying the board of his father to his sister.

The father had no property of his own, other than his interest in land inherited from a daughter, *Margaret O'Neill*, who had died intestate, in the month of March next before the execution of the will.

The bill alleges that, by a fraudulent scheme of *Thomas* and Mrs. *Brooks*, the father, then over ninety years of age, was persuaded to leave the plaintiff, and accompany them to Toronto; that they exercised undue influence over him in procuring the execution of the deed, and charges that he did not know what he was doing when he executed the deed, and that he had not the independent advice of any friend or legal adviser. It is not alleged in terms that he was not of sufficient capacity to understand what he was doing. I should say from the evidence that he was, though of great age, capable of understanding any plain explanation, if any had been given, of the nature and effect of the instrument that he executed. My conclusion from the evidence is, that no such explanation was given, and that the conveyance was, if read or partly read at all, not so read as to convey to the mind of the grantor any definite idea of it beyond its being a deed to his son *Thomas* that he was executing; and that it was a deed of which he had previously heard. I speak here of what passed and what did not pass at the execution of the deed. *Thomas* himself says, in his evidence, that he had explained to his father his title as heir to his daughter, Mrs. *Margaret O'Neill*; and that his father had expressed himself willing to execute to him either

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a will or a deed. The conveyance was prepared, from instructions given by *Thomas*, by a solicitor employed by him. 1880. Lavin v. Lavin.

The conveyance has this recital: [The Chancellor read the recital above set forth]

The property conveyed, or the interest in which is conveyed, consists of two parcels of land in the city of Toronto of considerable value.

The recital of an agreement by *Thomas* to pay to his father $10 a month did not, as was held in *Beeman* v. *Knapp* (*a*), prevent the instrument being a voluntary deed. In *Walker* v. *Smith* (*b*) it was held by the Master of the Rolls that to sustain a gift there must be other evidence than that of the donee of the gift. Lord *Romilly* said: "In my opinion Mr. *Smith* has not fulfilled the obligation which lies upon him of shewing that the gift was really *bonâ fide* made to him. I am of opinion that, in all these cases you must not take into account the evidence of the recipient himself; the gift must be established by separate and independent evidence, and if there were separate and independent evidence here, I should uphold the gift." Judgment.

I acted upon this in *Delong* v. *Mumford* (*c*). Discarding the evidence of *Thomas*, there is nothing to take this case out of the rules constantly applied to deeds of gift, and other deeds of this character; and if his evidence were receivable it would still leave this transaction open to several of the objections applicable to such cases. I may say, in the first place, that this case is plainly outside of the cases in which a gift from father to son is upheld on the principle of advancement by the father to his child. The age of the respective parties, their relative position, and indeed all the circumstances, render the application of that principle to this case out of the question. There is a passage in

(*a*) 13 Gr. 398. (*b*) 29 Bea. 396.
(*c*) 25 Gr. 90.

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the American notes to *Huguenin* v. *Baseley* (*a*), which well expresses the relative position of parties: "As life draws to a close the relation which existed at an earlier period is not unfrequently reversed. The parent comes under the sway of his children, and is liable to be influenced by them; and if they procure, or even suffer him to make a contract, or execute a deed which operates disadvantageously to him, or by which they are unduly benefited, a Court of Equity will avoid the instrument without other proof of breach of confidence, or of an undue exercise of influence than that afforded by the nature of the transaction: see *Whelan* v. *Whelan* (*b*), *Brice* v. *Brice* (*c*), *Comstock* v. *Comstock* (*d*), *Highberger* v. *Stiffler* (*e*). 'The natural relation of the parties,' said *Bowie*, C. J., in the case last cited, 'was reversed in this instance by the hand of time. The parent had become a child, and the child was guardian to the parent. There was the same dependence, overweening confidence and implicit acquiescence which had rendered one an automaton in the hands of the other; *et ubi eadem ratio, ibi idem jus* The wish of the agent had become the will of the principal. Whatever the former suggested the latter executed. There was no consent of two minds, but a merger of the principal's mind into the agent's. In such cases it is not necessary to prove the actual exercise of overweening influence, misrepresentation, importunity, or fraud *aliunde* the act complained of.'"

Judgment.

I am referred by the defendants to a case decided by myself, *Armstrong* v. *Armstrong* (*f*), a case of voluntary deed from father to son. The decision in that case went upon the ground that it was shewn affirmatively that the father perfectly comprehended the nature, the legal effect, and the consequences of the deed executed by him.

(*a*) W. & T. L. C., ed. of 1877, vol. 2, Am. p. 206.
(*b*) 3 Cowen 557.
(*c*) 5 Barb. 533.
(*d*) 57 Barb. 473.
(*e*) 21 Mary. 338.
(*f*) 14 Gr. 528.

1880.

Lavin v. Lavin.

There are two cases in this Court decided by the late V. C. *Mowat*, both cases of conveyance from parent to child, in which the subject of voluntary conveyances is elaborately discussed, and the English cases referred to. The cases are *Mason* v. *Seney* (*a*), and the case I have referred to of *Beeman* v. *Knapp*. The profession is so familiar with these cases that I content myself with referring to them without quoting from them at any length. I will quote only the language of the learned Vice-Chancellor, at p. 455 of *Mason* v. *Seney*:

"*Samuel's* position was, therefore, plainly such as to render it necessary for the defendants to establish by clear evidence that the old people really did make the deeds which the defendants claim under; that their nature and effect were fully and truly explained; that they, the donors, perfectly understood them; that they were made alive, by explanation and advice, to the effect, and consequences to themselves, of executing them; and that the deeds were willing acts on their part, and not obtained by the exercise of any of that influence which *Samuel's* position put it in his power to employ. It is almost impossible in such a case as the present to establish these necessary particulars, unless the donors have had the benefit of independent professional or other assistance in the transaction. * * It is not pretended that these donors had such assistance: the donee himself was their only adviser."

Judgment.

Both English and American cases are well summarized and their effect stated, in the American Notes to *Huguenin* v. *Baseley*, pp. 1252-3-4. I quote further from these notes passages which give accurately and in a comparatively small space a compendium of some decisions in regard to what the law requires to the validity of such conveyances:

"According to Lord *Eldon*, in *Huguenin* v. *Basely* (*b*), the question is, whether the deed is the 'pure, voluntary, well understood act' of the settlor's mind, and whether the settlor executed it with full knowledge of all its effects, nature, and consequences; or, as the Master of the Rolls, Sir *John Romilly*, put it, in *Phillips* v. *Kerry* (*c*), 'whether the deed fully expresses the nature of the arrangement

(*a*) 11 Gr. 447. (*b*) 14 Vesey 293. (*c*) 32 Beav. 628.

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she (the settlor) wishes to make, and whether its full import and effect were clearly and distinctly made known to her.' It is not enough to say that the settlor read the deed, or that it was read to him, or that he understood it as well as any unprofessional man could be supposed to do; but it must be established that it was so explained to him that he might understand it: *Nanney* v. *Williams* (*a*), especially if any of the usual clauses are omitted: *Phillips* v. *Mullings* (*b*). Nowhere is it authoritatively laid down just what clauses every deed of voluntary settlement should or should not contain; each case must be judged by its own circumstances; but there are certain clauses the absence of which almost always arrests the attention of equity, and satisfactory proof is required that they were omitted intelligently and intentionally. Under circumstances where the insertion of them would not defeat the purpose of the settlement, or that purpose could be effectively accomplished without their omission, the absence of a general testamentary power has been held to be a serious defect, and the absence of a power of revocation has been held to be almost if not quite sufficient of itself to warrant the interposition of the Court to reform, or even set aside the deed at the instance of the settlor. Not that the reservation of both or either of these powers is absolutely indispensable to the validity of a voluntary settlement even under such circumstances, but only that the settlor's attention should be called to them, and he should be advised about them, and made to understand them, and their absence should be satisfactorily explained by proof that the settlor declined to reserve them, or in some affirmative way signified his intention that they should not be reserved; otherwise the inference will be more or less conclusive that he did not execute the deed with that full knowledge which he ought to have possessed. In *Huguenin* v. *Baseley ut supra*, Lord *Eldon* regards the absence of a power of revocation as a circumstance to be considered, and refers approvingly to Lord *Hardwicke's* opinion, that the absence of such a power was to be looked upon as 'strong evidence that the party did not understand the transaction.' In *Nanney* v. *Williams*, *ut supra*, the Master of the Rolls thought the want of such a power was a strong circumstance tending to establish want of competent knowledge; and he was of opinion that a party purposing to make a voluntary settlement should be asked, in the first place, whether he meant it to be revocable or irrevocable, and if revocable, in what way he intended the deed should be revocable. In *Forshaw* v. *Welsby* (*c*), the want of the power was declared a serious consideration, as affecting the settlor's knowledge; and in *Coutts* v. *Acworth* (*d*), it was held that the party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will, in general, be fatal to the deed.' * * In *Hull* v. *Hull* (*e*), the last English case, decided June 4th, 1872, it is held as the established rule that where in a voluntary settlement of real estate a revocable deed would have answered the settlor's purpose as well as an irrevocable one, the absence of a power of revocation is *primâ facie* evidence of mistake, and that evidence can only be rebutted by shewing that the settlor had his attention pointedly called to the fact that the instrument

Judgment.

(*a*) 22 Beav. 452.
(*b*) L. R. 9 Eq. 44.
(*c*) 20 Beav. 243.
(*d*) L. R. 8 Eq. 558.
(*e*) L. R. 14 Eq. 365.

was irrevocable, and that he could have equally effected his purpose by a revocable one. In *Wollaston* v. *Tribe*, *ut supra*, it was held that a 'person taking a benefit under a voluntary gift which is not subject to a power of revocation, has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable', and 'that a voluntary gift, not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor.'"

1880.

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It is perfectly manifest that what the law requires in order to the validity of such conveyances has not been done in regard to the conveyance in question, and that it cannot be supported as a valid conveyance.

I do not say that any intentional wrong was committed by *Thomas Lavin* in the obtaining of this deed from his father. I think he intended no wrong to his father; that he regarded the question as one between himself and his brother *William*, and honestly thought that he had a better claim in justice to have the interest which his deceased sister had had in the land, than *William* had; and I think it probable that if every proper explanation had been made to the father, and everything had been done which the law requires in such cases, the father would have conveyed or devised to him the property in question; but still, if well advised, he would not have conveyed it to him without securing a reasonable provision for himself. As it was, the conveyance was improvident.

Judgment.

It is not necessary upon the question of the validity of the conveyance to *Thomas* that I should say what interest *Margaret O'Neill* had in these two parcels of land, or whether in the "Parliament street" parcel she or her representative was entitled to any interest at all: and I do not know whether all the evidence has been given that can be given in relation to the alleged partnership between *Thomas* and his sister *Margaret O'Neill*.

I must hold that the conveyance from *John Lavin*, deceased, to *Thomas Lavin* was obtained by *Thomas* under circumstances which render the same void, and decree that it must be given up to be cancelled. The decree to be in the usual form in such cases.

1880. Lavin v. Lavin.

Under the circumstances disclosed in the evidence, the decree will be without costs, except as to the costs of *Frances Brooks*; as to her the bill will be dismissed, with costs.

RICKER v. RICKER.

Mortgage—Executor—Infant—Practice—Sale under decree, conduct of—Costs.

Although a decree of sale should direct the same to take place with the approbation of the Master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested.

Where an infant appears and defends a suit by his guardian *ad litem*, or by his next friend institutes proceedings, he is bound by such proceedings just as if he had been an adult.

The plaintiff was mortgagee under an incumbrance created by the testator, who by his will nominated him an executor. In a suit to enforce the mortgage the guardian of the defendant—an infant—agreed to take the conduct of the sale, and the decree gave the plaintiff liberty to bid. A sale accordingly took place, the guardian attending on the settlement of the advertisement of the terms and conditions of sale, but the amount due on the plaintiff's mortgage and the costs of the suit had not been ascertained, and the sale was subject thereto, and the same took place in February, 1871, when the plaintiff became the purchaser, having arranged with the tenant of the property not to bid, and to whom he shortly afterwards sold the premises at a considerable advance. In May, 1880, the defendant filed a petition impeaching such sale as improper under the circumstances, which the petitioner alleged only came to his knowledge in the March preceding. The Court [*Proudfoot*, V. C.] considering that after the appointment of a guardian *ad litem* to the infant, and the permission to bid at the sale given to the plaintiff, the parties were, so to speak, placed at arm's length, so far as the sale was concerned, and that the plaintiff had a perfect right to purchase at such sale notwithstanding the fiduciary relations existing between them, refused the petition; but as the petitioner had carefully abstained from ascribing fraud or fraudulent conduct to the plaintiff, and the circumstances were such as to invite discussion, in dismissing the petition did so, without costs.

1880.

Ricker v. Ricker.

This was a suit instituted by *Christopher Ricker* against *Joseph Lehman Ricker*, an infant, the bill in which was filed in April, 1865, for the foreclosure of certain mortgage premises which were sold under the decree; and on the 10th May, 1880, the defendant filed a petition setting forth that on the 15th of May, 1860, one *Joseph Lehman* created a mortgage on certain lands for $1,200, payable in four years, with interest at ten per cent.; that *Joseph Lehman* died on the 6th June, 1860, seized in fee of the mortgage property, subject to said mortgage, having duly made his will, and thereby bequeathed to the petitioner $600, charged upon the lands embraced in the said mortgage, and thereby devised the said lands to the said *Christopher Ricker*, and appointed him and one *James H. Cooper* executors of the said will; and on the 24th of December, 1860, probate of such will was duly granted to the plaintiff, *Cooper* having renounced, and that the bill was filed as above stated, alleging that the petitioner was entitled to the equity of redemption in the mortgage premises; that one *Henry Wetenhall* was appointed guardian *ad litem* of the petitioner, he being then about nine years of age, and on the 11th of December, 1867, a decree was pronounced declaring that the plaintiff was entitled to be paid his mortgage debt out of the lands devised to him in priority to the charge created by said will, and that the petitioner and other legatees were entitled to be paid out of the personalty after payment of debts, other than the mortgage debt, in preference to the mortgage debt, and it was referred to the Master at Hamilton to take the usual accounts and make the usual inquiries for the administration of *Lehman's* estate, and it was ordered, in default of payment, that the mortgage premises should be sold to pay the amount found due the plaintiff on his mortgage and the residue, if any, applied to pay the charges created by the will, and that the plaintiff should pay into Court out of such residue the

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1880.

Ricker v. Ricker.

share of the petitioner; that at the sale the plaintiff should have liberty to bid; the guardian *ad litem* having agreed to take the conduct of the sale.

The petition further set forth that at the time of filing the bill the plaintiff was in receipt of the rents and profits of certain portions of the lands situated in the village of Rockton, and continued in possession of such Rockton property, and leased the same to one *John Anderson* for five years from the 1st of March, 1870, at an annual rental of $200; that no proceedings were taken after the making of the said decree in the cause until the 7th of June, 1870, the plaintiff having bespoken the same a short time after he had leased the Rockton property, and on the 4th of July, 1870, the plaintiff took the decree into the Master's office at Hamilton; that on the 29th of September, 1870, the plaintiff swore to an affidavit in the cause in which he stated that he had been in receipt of the rents and profits of the mortgage premses from the death of the said *Joseph Lehman*, and had applied the same in discharge of the said *Lehman's* debts, as shewn in the plaintiff's accounts as executor, filed in the cause, and that he was chargeable with any balance that might appear upon the passing of his accounts, to be applied in reduction of the interest upon his said mortgage; and in the said affidavit he further stated that the whole sum of $1,200 and interest thereon from the date of the mortgage, amounting to upwards of $2,440 then remained justly due and owing to him; but, although diligent search had been made in the office of the Master at Hamilton for the accounts of the plaintiff, referred to in his affidavit, the same could not be found.

Statement.

The petition further stated that in January, 1871, the plaintiff caused to be published an advertisement for the sale of the said lands, purporting to be in pursuance of the said decree, with the approbation of Mr. *William Leggo*, the then Master of the Court at

1880.

Ricker v. Picker.

Hamilton, whereby the said Rockton property, in the advertisement described as parcel 1, was advertised for sale, subject to the said lease for five years from the 1st March, 1870, and also subject to the mortgage of the plaintiff and the costs of the plaintiff in the suit, which it was stated in the said advertisement would amount to about the sum of $450, and the said advertisement did not shew whether any or what sum had been paid on account of the said mortgage, or what amount remained due thereon: that the said Rockton property was a hotel and tavern property, and was much frequented and the most public place in the village, but the plaintiff, although he posted all the notices of sale himself which were published in the said village and neighbourhood thereof, did not post or publish the said advertisement on the said property, and the fact that the same was to be offered for sale was almost unknown in the said village; that pursuant to such advertisement the said lands were offered for sale by auction in the city of Hamilton, on the 4th of February, 1871, and the plaintiff bid thereat, and was declared the purchaser, subject to the said lease and the said mortgage, as also the said costs, at the price and value of $240; that on the 3rd of October, 1871, Mr. *Miles O'Reilly*, then Master of the Court at Hamilton, made what purported to be his report upon the said sale, whereby he certified that the plaintiff had become and was declared to be the purchaser of the said parcel 1 for $240, and although it was not so stated in the said report the fact was that he did become the purchaser thereof, subject to the said incumbrance above set forth; and that at the time of the said sale there was actually due to the plaintiff for principal money and interest and all costs of this suit, including the costs of the guardian *ad litem* up to and including the final winding up of this suit, the sum of $1,174.64, and no larger sum, as shewn by the report of the said Master, dated 1st of December, 1871.

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1880.

Ricker v. Ricker.

The petition further stated that a few days before the day of the said sale the plaintiff went to the said lessee, *John Anderson*, when, at the suggestion of the plaintiff, it was agreed between them that the said *Anderson* should not bid for the said lands at the then approaching sale, and that the plaintiff should buy the same at the said sale as cheaply as possible, and should afterwards convey the same to *Anderson* for such sum as the said Rockton property should have cost the plaintiff; that the said *Anderson* had intended to bid at the said sale, and was willing to have given $2,500 for the said Rockton property, and would have bid that sum therefor had he not been prevented from doing so by the plaintiff, as stated; that *Anderson* did not bid at the sale, and plaintiff became the purchaser of the Rockton property as stated, and subsequently sold the same to *Anderson* for $2,500, and which property was then worth the sum of $3,000 and upwards.

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The petition further alleged that all the debts of the testator remaining due at the time of such auction sale amounted to $311.70, and no more; that the petitioner had never been paid his said legacy of $600, or any portion thereof.

The petition further stated that the petitioner had attained his majority on the 21st of April, 1877, but he was never aware of the facts set forth in the petition until the same were discovered by his solicitor, when instructed by the petitioner to make inquiry respecting the disposition of the said lands, about the 15th of March, 1880; and that the plaintiff had always pretended to the petitioner that he had expended the whole of the assets of the estate of the said *Joseph Lehman* in payment of his debts, and although requested to give the petitioner an account of his dealings with the said estate the plaintiff had refused to give him such account, and refused to pay the petitioner his legacy, or any part thereof, and had left him to ascertain the facts respecting the said estate as best

1880.

Ricker v. Ricker.

he might, without any assistance from the plaintiff, and prayed that it might be declared that the plaintiff upon his purchase of the said Rockton property took the same subject to the charge of the legacy in favour of the petitioner thereon, and that an account might be taken of the amount due the petitioner for his said legacy and interest thereon, which the plaintiff should be ordered to pay together with the costs of the petition, and for further and other relief.

Mr. *F. B. Robertson*, for the petitioner, moved for an order in the terms of the prayer of the petition.

It is not necessary for the defendant in this case to charge the plaintiff with fraud or other improper conduct, the simple relation of the facts being, it is submitted, sufficient to entitle the defendant to the relief he asks by the present application; and no one reading the facts alleged in this petition, all of which have been substantially verified by the evidence taken on the motion, can hestitate for a moment in characterizing the conduct of the plaintiff as having been most imprudent, and such as he never should have been advised to adopt.

Argument.

It is admitted that plaintiff as mortgagee had a *primâ facie* right to lease the mortgage premises, but he had not a right to create a term for five years, and immediately afterwards proceed to a sale of the property, under a decree which had been pronounced three years before and allowed to lie dormant in the interval; the decree, in fact, was not even issued until a few months preceding the sale. As the property was advertised, the claim would appear to an intending purchaser to stand thus: Amount due on mortgage as sworn by plaintiff $2,440, subject probably to be reduced by some trifling unascertained amount, together with interest from the 15th September, 1870; also, the costs of the suit said to be "about" $450, in all $2,890, exclusive of interest. In fact, the amounts were quite

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indefinite, and it would have been impossible for him to obtain any correct information. The accounts of the mortgagee had not been taken, and the costs were yet untaxed, and it no where was stated on what conditions the lease had been made. As a matter of fact, however, the matter really stood thus: Due plaintiff for principal, interest and costs, including the costs of the guardian, $1,124.64, as found by the Master's report, while according to the plaintiff's affidavits there was due for principal and interest $947.64; costs of guardian, $169.65; costs claimed by plaintiff though not yet taxed, $522.15, making in all $1,639.44, as the total amount of incumbrances.

[Counsel then analyzed the accounts in view of the different claims set up by the plaintiff, and contended that whatever might be the true amount coming to the plaintiff, there could be no doubt that the evidence shewed the premises to be good value for $2,500 at least, and in any view of the case there was an excess of value over the charges against the property of from $370 to $862.]

Argument.

If the sale was made in a manner not authorized by the decree, the plaintiff cannot as purchaser, much less as a party to the suit and an assenting party to the mode of sale, protect his purchase by asserting that the guardian of the infant was at fault; or that the advertisement of sale was settled by the Master: *Colcough* v. *Sterum* (*a*). It was his duty, and bearing in mind the relative position of parties he was bound to see that the decree authorized what was done. And here it is to be borne in mind that the decree did not give the Master any jurisdiction as to the manner in which the sale should be carried out.

Under all the circumstances it is submitted that the sale was carried out in a grossly improvident, it may almost be said, improper manner. (1) The decree directed a sale of the property to pay the amount of

(*a*) 3 Bligh 181.

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mortgage and costs, and it was offered for sale, subject to the incumbrance and the costs of the suit which had not yet been ascertained. (2) Even if the act of selling, subject to the mortgage were proper, the amount actually due thereon should have been accurately stated, if not in the advertisement, at all events at the auction, and the amount of costs should have been distinctly and correctly shewn: *Cann* v. *Cann* (*a*). We must ask ourselves how the matter would appear to an intending purchaser, unacquainted with the actual amount due? Certainly the advertisement would not convey to his mind anything like an accurate amount of the liabilities he was about to assume on acquiring the estate. And at the time it was absolutely impossible for him to obtain accurate information, owing to the irregular manner in which the plaintiff had proceeded. (3) The creation of the lease and the selling subject to it, acts of the plaintiff himself, had unavoidably the effect of prejudicing the sale. (4) The property was not properly advertised. And, (5) the fact that the plaintiff had permission to bid was not notified, as should have been done, according to the General Order, 381.

Statement.

Now, the plaintiff was clearly responsible for all these irregular or improper acts, and he could have prevented them, but on the contrary he and his solicitor took an active part throughout the whole business. But even if the sale had been ever so properly conducted, the action of the plaintiff in preventing *Anderson* from bidding is sufficient to render him liable for any loss that has been sustained: *Watson* v. *Birch* (*b*); *Ryder* v. *Gower* (*c*).

As to the remedy that can now be afforded to the defendant. The property has got into the hands of a *bonâ fide* purchaser, and the plaintiff having put it out of reach so that it cannot now be sold, the Court

(*a*) 3 Sim. 447. (*b*) 2 Ves Jr. 51. (*c*) 6 Bro. P. C. 306.

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will not, under the circumstances, inquire very minutely as to the amounts: *McDonald* v. *Gordon* (*a*). In *Jones* v. *Clark* (*b*), the sale was set aside in consequence of a mistake in the advertisement having caused the property to be sold at a much less price than would otherwise have been bid for it, although no bad faith could possibly be imputed to the plaintiff. *Mitchell* v. *Mitchell* (*c*), *Dickey* v. *Heron* (*d*), were also referred to.

Mr. *Duff*, contra, combatted the views urged on behalf of the petitioner, contending that the amount actually due had been distinctly stated at the sale; and that the evidence shewed that a fair price had been obtained for the property, and that *McDougall* v. *Bell* (*e*) shews that an infant will be bound by the acts of his guardian *ad litem* in the same manner and to the same extent as an adult. He also contended that there was not anything illegal in the agreement made with *Anderson* as to his not bidding. *Daniell's* Ch. Prac., p. 1290, shews that the mere agreement that one person shall bid for himself and another is not illegal.

August 17th.

Judgment.

PROUDFOOT, V. C.—The plaintiff was a mortgagee under a mortgage made on the 15th May, 1860, by *Joseph Lehman*. On the 6th June, 1860, *Joseph Lehman* died, having made a will, and appointed the plaintiff and one *Cooper* his executors, and devised the mortgaged land to the plaintiff, and bequeathed a number of legacies, amongst others, one to the petitioner of $600, and charged them upon the mortgaged land. In April, 1865, the plaintiff filed this bill for a foreclosure of the mortgage. The defendant was then an infant, and one *Wetenhall*, a solicitor of this Court, was appointed his guardian *ad litem*, and defended the suit for him. In December, 1867, a decree was

(*a*) 2 Chy. Ch. 125.
(*b*) 1 Gr. 368.
(*c*) 6 Pr. R. 232.
(*d*) 1 Ch. Cham. 149.
(*e*) 10 Gr. 283.

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pronounced declaring the plaintiff entitled to be paid his mortgage in priority to the legacies charged upon the land by the will, and that the legatees were entitled to be paid out of the residue of the personal estate remaining after payment of the testator's debts other than the mortgage debt, in preference to the mortgage; and it was referred to the Master at Hamilton to take the usual accounts for the administration of the real and personal estate of the testator; and it was further ordered that the mortgaged lands should be sold to pay the plaintiff the amount due on the mortgage, and the residue, if any, was to be applied in payment of the charges created by the will; and directed that at the sale the plaintiff should have liberty to bid; the conduct of the sale being taken by the guardian *ad litem* of the defendant. This decree was not issued until June, 1870, and on the 4th July, 1870, the plaintiff carried it into the Master's office. During the months of September and October the accounts were proceeded with before the then Master; and on the 21st December, he settled an advertisement for the sale of the lands mentioned in the mortgage on the 4th of February, 1871. It was stated in the advertisement that this land would be sold subject to an existing lease for five years from 1st March, 1870, at $200 a year, particulars of which would be made known at the time of sale, and also subject to the mortgage given by *Lehman* to the plaintiff, and the costs of the plaintiff in the suit, which would amount to about the sum of $450. The guardian *ad litem* attended upon the taking of these accounts and upon the settling of the advertisement, and seems to have made no objection to it. I think the evidence sufficiently establishes that the directions of the Master were complied with as to the publication of the advertisement and the putting up of posters. The sale took place on the 4th February, 1871, and the plaintiff became the purchaser, subject to the lease and the mortgage, for $240. The

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present Master at Hamilton, having been meanwhile appointed, made a report on the sale on the 31st October, 1871, and on the 1st December, made his general report, adopting the accounts, so far as taken by the previous Master, and continuing and completing them. In regard to the plaintiff's mortgage he finds that on the 4th February, (day of sale), there was due to him on that account $1224.64, which includes the costs of the defendant, (which seem to have amounted to $169.65). The costs of this suit have been paid by the plaintiff, and amount to $691.80.

The consideration for the land given by the plaintiff was $1,879.44.

The petitioner complains of the proceedings that were had in the suit on many grounds, several of which were probably made upon defective information arising from some difficulty in tracing the proceedings and papers in the Master's office, and the lapse of time.

Judgment.

Those that were pressed upon the argument of this petition were:

1. That the decree did not direct the sale to take place with the approbation of the Master.

2. That the advertisement was an improper one, and not calculated to procure the best price for the property; as the amount due on the mortgage had not been ascertained, the costs had not been taxed, and the amount of them was not known, though a limit of about $450; was placed, and that it did not state that the plaintiff had liberty to bid.

3. That the land was sold at a gross undervalue, the plaintiff appearing to have paid only $1,880 for it, while it was worth at least $3,500.

4. That the plaintiff made an arrangement with *Anderson*, the tenant of the property, by which *Anderson* was not to bid for it, and that the plaintiff should convey to him for the price the plaintiff had to pay for it.

The plaintiff, it seems, soon after he purchased, sold

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the property to *Anderson* for $2,500, payable in small yearly instalments; and some years afterwards *Anderson* sold to *Patrick* for $3,700. The property was a tavern stand in the village of Rockton, and *Patrick* bought it furnished. It does not appear whether the $3,700 includes the furnishings.

The petition prays that it may be declared the plaintiff bought the property subject to his legacy, and that an account may be taken of what is due thereon and the plaintiff ordered to pay it.

With regard to the first objection, it was obviously a mere clerical mistake to omit the direction that the sale directed by the decree was to be with the approbation of the Master, and it could have been inserted upon an application in Chambers. And when without that direction the sale in fact had the approbation of the Master, it would be preposterous to render the plaintiff liable for the omission.

Judgment.

The objection to the advertisement is of a much more serious character. At the time of the sale the amount due upon the mortgage had not been ascertained, and one can scarcely imagine a more unwise proceeding than to sell a property with an incumbrance upon it of an unknown amount. It is quite unnecessary to repeat the objections to sales of that kind, they have been pointed out frequently by the Judges of this Court, and it is obvious that a fair and just price could not be expected to be obtained for property sold in that manner. It is true that sales upon execution at law are usually of the interest of the party without defining it, but that is a practice to be avoided, not followed. The evidence of the plaintiff as to what took place at the sale shows how little he or his solicitor knew of what was due on the mortgage. The plaintiff understood from his own solicitor, and from the guardian *ad litem*, that the amount due on the mortgage was $1,200 or $1,500, or thereabout, and Mr. *Best*, the auctioneer, proclaimed publicly the amount

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due on the mortgage (*i. e.,* I suppose $1,200 or $1,500, or thereabout) and that the costs would not vary $10, either way from $450—while we have seen that the amount due on the mortgage was only $947.64. Yet even with such vague information a number of persons seem to have bid upon the property, and it was knocked down to the plaintiff as the highest bidder. From some of the affidavits used before me it would seem that it was understood the price paid by the plaintiff at the sale was $2,250 which must have been on the assumption that $1,500 at least was due to the plaintiff, irrespective of costs. The objection that the advertisement did not say that the plaintiff had liberty to bid, seems to me to be immaterial. The *Peg. Gen.*, 381, requiring it to be stated when parties have leave to bid, was intended as a protection to the purchaser, and, by affording him the security that he is not contending with a puffer, as a benefit to the estate. *Lewin* on Trusts, 7th ed. 443, *Daniell's* C. P. 5th ed. 1159.

Judgment.

But, however objectionable the advertisement may have been, it does not necessarily follow that the plaintiff must be treated as the offending party, and made responsible in the manner sought by this petition. The suit was defended for the petitioner by his guardian *ad litem*. The guardian prepared the advertisement and attended the Master when it was settled. Now it is quite clear that when an infant defends a suit by his guardian *ad litem* he is bound by the proceedings just as if he had been an adult; *Daniell's* Chancery Practice; 5th ed.,149. And so an infant plaintiff is bound by the proceedings in his suit. *Chambers* on Infants, p. 772, *McDougall* v. *Bell* (*a*), *Robertson* v. *Robertson* (*b*); and an infant defendant can only dispute the decree or the proceedings under it upon the same ground as an adult might have disputed it; such as fraud, collusion, or error.

(*a*) 10 Gr. 283. (*b*) 22 Gr. 449, 456.

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When the decree gave the plaintiff liberty to bid at the sale, it put the parties at arm's length; it divested the plaintiff, so far as the sale was concerned, of any fiduciary relations he might have sustained to the infant; intrusted the conduct of the sale to the infant's guardian, and in effect placed the plaintiff in the position of an outside purchaser: *Lewin* on Trusts 7th ed., 443, and cases cited there. He is no longer responsible for the proper conduct of the sale; that is taken from him, and he can only be made to answer for fraud, collusion, or perhaps error. The irregularities in the advertisement do not constitute such an error as would warrant the setting the sale aside, if error in proceedings subsequent to decree would in any case suffice to invalidate them. The charge of fraud is rested upon the alleged agreement with *Anderson* and upon some alleged collusion between the plaintiff's solicitors and the guardian *ad litem*. Some of the affidavits used in the Master's office, proving the proceedings in relation to the sale, are indorsed with the name of the plaintiff's solicitors, but this is wholly inadequate to establish a case of fraud. These were affidavits of service or putting up posters I think. They are not shewn to be inaccurate; and even if some papers were prepared by the plaintiff's solicitors which should properly have been done by the guardian, it would not establish a case of fraudulent collusion to injure the infant.

Judgment.

The alleged agreement with *Anderson* not to bid at the sale and to convey to him for the same price at which the land was sold, is not a very probable agreement to have been entered into. If it were established it does not appear how it would benefit the plaintiff, when he was to sell for just what he gave. But the only evidence of the agreement is that of *Anderson* himself, and it is denied by the plaintiff. It would be improper on such evidence to charge the plaintiff.

But the sale is impeached as made at such an under-

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value as necessarily to infer fraud. It is difficult to see how a sale at a low price at a public auction would establish fraud, in the absence of any collusive or fraudulent arrangements prior to it, and of which the evidence appears to me to fail. But the allegation of the price being too low by $1,620 does not seem to be established. The petitioner says the property was worth $3,500 at the time of the sale. *Wallace McDonald*, a witness produced by him, says that the sale by the plaintiff to *Anderson* at $2,500 was a good one; the place was more valuable when *Anderson* sold to *Patrick* for $3,700, but *Patrick* gave too much for it; that $3,000 was all that it was worth either for cash or on short time. *Anderson* was examined for the petitioner, who says he would not have given more than $2,500 for it. These witnesses reduce the petitioner's estimate of value by at least $1,000, and would appear to make the property worth at most $2,500.

Judgment

On the other hand the plaintiff swears that the price he paid was the full value for the property, *i. e.* $1,880. *Hunter*, who is a valuator for a mortgage company, and who lived in Rockton prior to the sale to *Anderson*, says that the sale at auction, which he seems to have thought was for $2,250, was a good sale, and all the property was worth. He had himself arranged previously for the purchase of it at $2,000, if his wife would consent, but she would not. Property in Rockton has increased in value since then.

Upon this evidence I cannot say that there was any such undervalue in the sale to the plaintiff as to evidence fraud or fraudulent collusion, for which alone I think him answerable. The price he gave was cash, or its equivalent. The agreement by which he sold to *Anderson* appears to have been for payments in small annual instalments extending over a number of years; and if I assume *Hunter's* valuation of $2,000 as for a cash price, the plaintiff would seem to have made by no means an extravagantly good bargain.

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I have not treated the laches of the petitioner as a bar to the assertion of his claim, which perhaps in strictness it would be: *Simpson* on Infants, p. 476; but have discussed the various reasons he assigns for impeaching the proceedings as if unaffected by the delay of three years. I have been led to do so from his statement that he has always been very poor and without means and unable to afford to pay for legal advice respecting his rights, and he was afraid to take proceedings against the plaintiff, who he says is very wealthy, until a short time since when, having by hard and persevering exertion and economy educated himself, and saved a small sum of money out of his salary as a school teacher, he felt warranted in employing a solicitor.

Judgment.

I regret that I must add to his difficulties by dismissing this petition. But considering the petitioner has abstained from ascribing fraud and fraudulent conduct to the plaintiff in terms in the petition, and has stated what he believed were facts leaving the proper deductions from them to be made by the Court, and that though in several he was mistaken, and has failed to prove the others, there was enough to have invited discussion which might have been avoided by the plaintiff, I think justice will be done by dismissing it, without costs.

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ATLANTIC AND PACIFIC TELEGRAPH CO. v. DOMINION TELEGRAPH CO.

Pleading—Demurrer—Parties.

The rule of equity is, that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer. Where, therefore, a bill was filed against the Dominion Telegraph Company seeking to restrain that company from carrying out an agreement for the transfer of telegraphic messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between the plaintiff and defendant companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party, a demurrer for want of parties on that account was allowed, with costs.

Demurrer for want of parties. The point rasied by the demurrer is clearly stated in the judgment.

Mr. *Blake*, Q. C., and Mr. *W. Cassels*, in support of the demurrer contended that more was sought by the bill than a mere recovery of damages for breach of the alleged contract, as it sought to restrain the defendants from carrying out a contract alleged to have been entered into by them with another company without having that other company before the Court. As to so much of the prayer as seeks to restrain the transfer of the Ogdensburgh and Oswego line all that is necessary to state is that the transfer has already been effected, and this Court will not now attempt to interfere.

Argument.

Mr. *McCarthy*, Q. C., and Mr. *Moss*, contra, distinguished this from the case of *Jones* v. *The Imperial Bank* (*a*), as in that the question was simply whether or not the proceeding of the bank was *ultra vires*, and here no question of right of property arises, the simple question being, shall or shall not the defendants be compelled to carry out their agreement.

(*a*) 23 Gr. 262.

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Marker v. *Marker* (*a*), *Jones* v. *The Imperial Bank* (*b*), *Munro* v. *Munro* (*c*), *Brice* on *Ultra Vires*, pp. 849, 850, were referred to.

Sept. 15th.

SPRAGGE, C.—The plaintiffs allege an agreement for mutual exclusive connections and exchange of telegraph business; and that the defendants subsequently and while their agreement with the plaintiffs was still subsisting, did, in contravention of their agreement with the plaintiffs, form an alliance with, or absolutely lease or sell out their business and telegraph lines in Canada to the American Union Telegraph Co., a rival in telegraphic business of the plaintiffs; and there is an allegation as to a particular line which it is alleged has been constructed by the defendants at the expense of the plaintiffs between Ogdensburgh and Oswego in the United States; and the plaintiffs pray *inter alia* for an injunction restraining the defendants from continuing "the transfer to any telegraph or other company or person other than the plaintiffs of telegraph messages passing over the defendants' lines in the Dominion of Canada, and destined to parts within the United States of America. (3.) That the defendants may likewise be restrained from selling, leasing, or parting with the said telegraph line from Ogdensburgh to Oswego, or any interest therein or right of use thereof to any company, or person or persons whomsoever, and from allowing the continuance of any arrangement or agreement already entered into by them with any person or persons, or body corporate for effecting such objects, or any of them."

Judgment.

It is the rule of the Court that if any person, not made a party, be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer: *Penny* v. *Watts* (*d*). The objection in this

(*a*) 9 Hare 1.
(*b*) 23 Gr. 262.
(*c*) 17 Gr. 205.
(*d*) 2 Ph. 152.

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case is, that the American Union Telegraph Co. is a necessary party.

It appears to me that the last named company is directly interested in resisting the decree sought by the prayer of the bill that I have quoted, inasmuch as this Court is asked to prevent the defendants from carrying out their agreement with that company. In my opinion *Hare* v. *London and North Western R.W. Co.* (*a*), applies in principle to this case. The bill, at the suit of a shareholder in the Railway Company, prayed for a direction that an agreement with reference to the traffic between the defendants and several other companies, which the plaintiff alleged to be *ultra vires*, might be declared invalid, and that the company might be restricted from acting upon it. A preliminary objection was taken at the hearing, having been previously taken by answer, as appears by the report in the *Law Times*. Vol. 3 N. S. 289, that the other companies parties to the agreement with the defendant company were necessary parties; and Sir *W. Page Wood*, then V. C., held them to be so; observing, "If I allowed the suit to proceed in the absence of the other companies, any decree which I might make would not bind them, and the defendants might become liable in damages for obeying the order of the Court." In the report in the *Law Times*, the Vice-Chancellor is reported also to have said: "It would be highly improper to restrain one company from proceeding in the execution of such agreement after such a length of time (four years) without hearing what the other companies parties to the agreement, had to urge on the subject."

Judgment.

The case would have been still stronger for allowing the objection if it had been taken by demurrer. The argument of the plaintiff's counsel is stated shortly thus: "We do not ask to set aside the agreement, or any other relief against the other companies. Our case

(*a*) 1 J. & H. 252.

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is simply that, as our company is doing what is *ultra vires*, we ask a declaration to that effect, and consequential relief. We are entitled to this quite irrespective of any other relief against the other parties to the agreement."

It is plain that these arguments were of more force at the hearing of the cause than they could be if the objection had been taken by demurrer. It is plain, too, that there is more reason in requiring parties to another agreement to be made parties to a suit where the plaintiff's case depends upon facts which the absent parties may controvert, or as to which they may shew facts and reasons why the relief prayed for should not be given, than in a case where the question is one of law, as was the case in *Hare* v. *The Railway Co.*, and certainly the *ratio decidendi* in that case applies with more force to the case before me. To this may be added a reason which we find given in some of the cases, that there may be collusion between parties to suits to get rid of a contract with other parties, not made parties to the suit.

Judgment.

At any rate it does appear to me to be manifestly unjust, as well as contrary to the rule of procedure in this Court, as I understand it, to hear a cause and make a decree (if the decree be made as prayed for) which would disable these defendants from performing their agreement which the plaintiffs themselves say the defendants have made with another company, and for all that appears in the bill made innocently and in perfect good faith on the part of that other company, without giving that other company an opportunity of shewing why this should not be done.

In my opinion the demurrer should be allowed, with costs. I do not at all controvert the decision of my brother *Proudfoot*, in *Jones* v. *The Imperial Bank* (*a*).

(*a*) 23 Gr. at 275.

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WILLIAMSON v. EWING.

Sale of business—Restraint of trade—Account—Pleading—Practice.

E. carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to *W.*, and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for five years. By a subsequent agreement the first was modified, so as to allow *E.* to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto on allowing *W.* a percentage on the prices realized. *W.* filed a bill alleging that *E.* had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The Court [*Spragge* C.] being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the Master, although the answer professed to state the actual amount of sales, and on the motion for decree the answer had been read as evidence by the plaintiff.

Statement.

THIS was a motion for decree. In 1875 the defendant carried on a retail business on King street, Toronto, consisting of photography, pictures, works of art, &c. He also carried on a similar wholesale business. On the 4th of May, 1875, he sold the retail business to the plaintiff, and in the agreement of sale was the following stipulation: "The said *Ewing* agrees not to open or start a retail and photographic business of a similar character in the city of Toronto for five years from the 1st of May, 1875." On the 15th of September, 1875, another agreement was entered into by which the price to be paid by the plaintiff was reduced and the restriction as to selling retail withdrawn. The clause as to this was as follows: "It is understood that Mr. *Ewing* may sell in any way he pleases to parties residing out of Toronto, and that Mr. *Ewing* may sell retail in Toronto on allowing Mr. *Williamson* fifteen per cent. commission on the price received therefor."

The bill was filed to recover the commission. The

defendant, by his answer, admitted the execution of the two agreements, but stated that the retail sales only amounted to about $70, and alleged that the agreement to give commission was without consideration.

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Mr. *A. Hoskin*, for the plaintiff, asked for a decree referring it to the Master to take an account of the retail sales made by the defendant.

Mr. *J. Boyd*, Q.C., for the defendant. The plaintiff is not entitled to a decree for an account. By thus hearing the cause on motion for decree he admits the defendant's answer, and can only recover commission on the $70.

Mr *A. Hoskin*, in reply. The practice is, that on bill and answer, the truth of the answer must be accepted. On motion for decree this is not so. When the suit involves a matter of account, all that is necessary to shew is, that there is a dispute, and a reference will be granted as a matter of course. There was consideration for the commission. The defendant obtained the privilege of selling retail, which was sufficient consideration.

SPRAGGE, C.—I cannot agree in the defendant's contention that the second agreement, that of 15th September, 1875, was without consideration.

Judgment.

Sept. 22nd.

By the agreement of the 1st May of the same year the defendant agreed "not to open or start a retail and photographic business of a similar character," in the city of Toronto, for five years. The earlier part of the agreement shews the character of the business which the defendant was not to continue to carry on. It is described as the business of "a photographer and retail dealer in pictures and objects of art." The agreement of September modifies the agreement of May, in allowing the defendant to "sell in any way he pleases to

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parties residing out of Toronto," and to "sell retail in Toronto on allowing to the plaintiff 15 per cent. commission on the price received therefor." He could, as I thought at the hearing, under the agreement of May do neither of these things. Whether the relaxation of the agreement of May was worth the reduction in price, $1,500, made by the agreement of September, is beside the question. It may have been worth more, or may have been worth less, or it may have been a reasonable equivalent. However that may be, it is impossible for me to say that the agreement of September was without consideration.

Mr. *Boyd* refers me to cases to shew that the defendant might, under the agreement of May, have sold out of Toronto in any way he pleased, and in Toronto by retail the articles which he was by the agreement of September authorized to sell. What he sold besides his photographic business was his retail business as a dealer in pictures and objects of art, retaining what the agreement calls his "wholesale or manufacturing business." If in or from his wholesale or manufacturing business, or in any other way, in Toronto, he sold pictures or objects of art by retail, it would be a clear contravention of his agreement not to open or start such a business. As much in contravention of his agreement as was what was done by the defendant in *Taylor* v. *Evans* (*a*), the case of a sale of a wine-merchant's business, and which was decided in the same way in the Queen's Bench and in the Court of Chancery. *Lumley* v. *The Metropolitan R. W. Co.* (*b*) has no application. The head-note sufficiently describes it. "It is no breach of covenant not to carry on the business of a wholesale or retail confectioner, for a grocer and tea dealer to sell a particular kind of sweetmeat in which a confectioner may happen to deal." What was held was, that a grocer selling this parti-

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(*a*) 2 E. & B. 512; 2 D. M. & G. 740. (*b*) 34 L. T. N. S. 774.

cular sweetmeat, was not carrying on the trade of a confectioner. 1880.

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Allen v. *Taylor* (*a*) was three times before the Courts. The covenant by the defendant was, that he would not exercise or carry on the trade of a rag-dealer. He became manager of a business of that nature for a third person, at a fixed salary. The question was at first treated as a doubtful one. It was eventually decided not to be a breach of the agreement. It turned upon the meaning of the words "exercise or carry on" the trade in question. I confess I do not see the bearing of this case upon the one before me. By the first agreement the defendant agreed not to open or start the business of a retail dealer in pictures and objects of art; by the second agreement he was allowed to sell retail in Toronto on allowing the plaintiff a commission. He contravened the first agreement upon any reasonable construction of it, if he sold the articles in question before the making of the second agreement. After the making of the second agreement there was, of course no breach of agreement in selling. It became a matter of account to what amount he sold; and upon that amount, whatever it was, the plaintiff became and is entitled to the agreed commission.

Judgment.

Upon the other point in the case, I continue of opinion that the defendant has in his answer admitted that which entitles the plaintiff to an account; for, while denying that he has made large retail sales to parties residing in Toronto, he admits that he has made some sales. He says his books shew only to the extent of $77.91. The plaintiff is not bound to accept his statement as to the extent of his sales, and is entitled to a reference, in which he may be able to shew more.

The matter between these parties is probably of small amount. My idea is, that the defendant would do well to make such an offer as will make further

(*a*) 18 W. R. 888, 19 W.R. 35, 556, 22 L. J. N. S. 651.

1880. litigation unnecessary;—to offer to pay the agreed commission on the sales he finds, or may find, that he has made, and to afford the plaintiff the means of verifying his statement. And as to the costs, they may, upon a result being arrived at, be disposed of upon an application in Chambers, as pointed out by the Master, when Referee, in *Webb* v. *McArthur* (*a*), a practice that has been adopted and acted on by the Court in several cases.

Williamson v. Ewing.

FORHAN v. LALONDE.

Mechanics' Lien Act—Agreement to forego lien—Sub-contractors bound by agreement of original contractor—Trust.

In a building contract for the erection of a Church, the contractor agreed with the building committee to settle with all other persons doing work upon, or furnishing materials for the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials.

Held, binding on the sub-contractors, though made without their knowledge or assent.*

It was also stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with: *Held*, (1) that no trust was thereby created in favour of the sub-contractors as to the sum agreed to be retained; and the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid: *Held* (2) that the assignee was entitled to receive the 20 per cent. to the exclusion of the sub-contractors.

The bill was filed 13th February, 1880, at Chatham. The plaintiffs were the building committee of a Roman

(*a*) 3 Chan. Cham. 364.

* See this point as suggested in Mr. *Holmsted's* Annotations on the Mechanics' Lien Act, p. 8, note *a*.

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Catholic Church, and the defendant *Lalonde*, was the builder who had contracted with the plaintiffs to build the church. The defendants *Judson*, *Blacker*, *Scott*, and *Davis* were sub-contractors under *Lalonde* who had registered claims under the Mechanics' Lien Act; the defendant *Henderson* was a sub-contractor who had not registered a claim, but who claimed a charge on ten per cent. of the price under 41 Vict. ch. 17, sec. 2. The *Roman Catholic Episcopal Corporation* of the diocese of London was made a party defendant, as having the fee in the land upon which the church was erected. The defendant *Livingstone* was the assignee of the defendant *Lalonde*.

Statement.

The contract was made between the defendant *Lalonde* and the plaintiffs, and contained the following stipulations with regard to the payment of the contract price, viz.: "Payments will be made eighty per cent. upon the materials provided and delivered to the parties of the second part on the ground, and work done upon the building by the party of the first part, to be made upon the superintendent's certificate, and in such manner, shape, and proportion that, when the work is completed and ready for the architect's acceptance, there shall remain in the hands of the parties of the second part [the plaintiffs] twenty per cent. of the contract sum, and the balance of such contract price, after deducting therefrom or adding thereto any difference caused by any alterations of the plans and specifications as aforesaid, within thirty days after the said architect shall have accepted the said work, and only upon the final certificate of such architect of the completion of said work by the said party of the first part, and the amount due to him under and by virtue of this contract; no estimates to be given for materials until the same are delivered on the ground as aforesaid. And the said party of the first part covenants with the said parties of the second part, that he will settle with every mechanic, builder, or other person doing work upon, or

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furnishing materials to be used in the construction of said building, and that neither he nor the said parties respectively shall have a lien upon the said building for such work or materials. And it is further distinctly understood and hereby agreed by and between the said parties that the balance of the contract price so to be retained as aforesaid shall not be payable until all the persons in the last preceding clause hereof mentioned are fully paid and settled with."

Lalonde proceeded with the erection of the building and employed his co-defendants other than the *R. C. Episcopal Corporation* and *Livingstone*, to do parts of the work and furnish materials. Twenty per cent. of the contract price remained in the hands of the plaintiffs.

On 24th December, 1878, *Lalonde* assigned all his interest in the contract to his co-defendant *Livingstone*, who claimed to be paid the moneys remaining in the hands of the plaintiffs.

Statement.

The defendant *Judson*, who had registered a claim under the Mechanics' Lien Act, had commenced a suit to enforce it, and the other defendants threatened suit.

The plaintiffs prayed that the defendants might be ordered to interplead, and might be restrained from proceeding against the plaintiffs, they offering to pay the money in their hands into Court.

The cause came on for examination and hearing at Chatham, on 24th September, 1880.

Mr. *Cassels* and Mr. *Christie* for the plaintiffs.

Mr. *McMahon*, Q. C., for the *Roman Catholic Episcopal Corporation.*

Mr. *O'Neill* for the defendant *Henderson.*

Mr. *Lister* for the defendants *Blacker*, *Scott*, and *Davis.*

Mr. *Moss* and Mr. *Pegley*, for the defendant *Livingstone.*

There was no evidence that the sub-contractors had any notice of the agreement between *Lalonde* and the plaintiffs that there should be no lien. 1880. Forhan v. Lalonde.

Mr. *Lister*, for the sub-contractors. The question arising in this case is, what are the rights of the persons who supplied material under the contract? It is submitted that a trust was created for their benefit, by the stipulation that the twenty per cent. should not be payable until their demands were satisfied. *Livingstone* took his assignment subject to this trust, and is bound by it. Then under the Mechanics' Lien Act, an agreement of this kind between an owner and contractor that there shall be no lien is only operative between themselves, it cannot affect the rights of sub-contractors who are not parties to it, and have no notice of it. To give validity to such agreements would be to enable owners and contractors to defeat the true scope and intention of the Act, which was passed for the protection and benefit of all who furnish work and material. Argument.

Mr. *McMahon*, Q. C. The clauses referred to prevent a lien—the corporation, at all events, in whom the land is vested, is not a party to the contract, and there could be no lien in any case, because the plaintiffs have no estate in the land. At the utmost there is, if any thing, only a charge on the money.

Mr. *Moss*. The clause providing for the reservation of 20 per cent., and for the payment of sub-contractors is a stipulation for the protection of the plaintiffs, and not one that can give the sub-contractors any rights either in the land or the contract price. Under sec. 3 of the Mechanics' Lien Act the sub-contractor is only entitled to a lien to the extent of the lien, if any, of the contractor under whom he claims. Here the contractor has no lien. *Phillips* on Mechanics' Liens, sec. 272; *Currier* v. *Freiderick* (*a*).

(*a*) 22 Gr. 249.

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BLAKE, V.C.—The rights of a sub-contractor grow out of the rights of the contractor by whom he is employed, and are limited by the rights of the latter. It is a matter for investigation by each sub-contractor before he contracts, as to the extent to which his rights may be affected by the contract which may have been made between the contractor and the owner. This was merely a matter of extra caution on the part of the building committee, who insisted on this covenant; and where the contractor has no lien, he, whose rights grow out of that contractor's, cannot stand in a higher position.

I think there is no doubt that under this contract there was not to be a lien on the building for work and materials. *Lalonde* no doubt covenanted to discharge all these claims, but the sub-contractors had no right to any lien nor to any direct claim upon the money. I am also of opinion that no trust was created in favour of the sub-contractors, and that therefore, as the plaintiffs waive their right to insist on the prior payment of the sub-contractors, *Livingstone* as the assignee of *Lalonde*, is entitled to the money remaining due on the contract.

Judgment.

The decree must therefore be for the payment by the plaintiffs to the defendant *Livingstone* of the amount remaining in their hands; and the plaintiffs and the defendants *Livingstone* and the *Roman Catholic Episcopal Corporation*, must be paid their costs by the other defendants.

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MARSH v. HURON COLLEGE.

College Council—By-laws of Council—Power of expulsion—Special meeting—Insufficiency of notice—Jurisdiction—Defence before the Council—Costs.

Where a member of a College Council complains that he has been improperly expelled from the Council, the Court of Chancery, under the Administration of Justice Act, has jurisdiction in a proper case to decree relief: that Act giving jurisdiction to the Court of Chancery "in all matters which would be cognizable in a Court of law;" although the remedy in such a case in a Court of law would be sought by *mandamus*.

One of the by-laws of an Incorporated College provided, amongst other things, that special meetings of the Council might be convened as the President should deem necessary, or upon the requisition of any three members of the Council, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting in addition to that specified in the notice. The plaintiff, as one of the members of the Council, having acted in such a manner as in the opinion of the President merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the President, and notices were accordingly sent to all the members of the Council stating that a meeting would be held "for special business," but omitting to say what such special business was. At the meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members of the Council present, expelling the plaintiff from the Council.

Held, that the notice calling such meeting was invalid, because it did not specify the business intended to be brought before the Council; and a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed, and that the plaintiff continued to be and was a member of the Council. But the Court [*Spragge*, C.] being of opinion that the plaintiff had wittingly and designedly left the members of the Council under a false impression as to his conduct in regard to the matters which had been the subject of inquiry before the Council—if he did not designedly produce such impression—refused the plaintiff the costs of the proceedings.

The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the Council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid.

The wrong (if any) complained of being a personal wrong on the part of the members of the Council who voted for the resolution:

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Quære, if costs were adjudged to the plaintiff whether they should not be paid by those members.

The reasons for which alone members of a municipal body may be disfranchised, do not apply to the members of the governing body of an educational institution whether incorporated or not.

Quære, what would form a sufficient ground for the expulsion of a member of such a body as the Council of Huron College.

The bill in this case was filed by the Reverend *John Walker Marsh*, against *Huron College*, setting forth that the defendants were a corporation duly incorporated under 26 Vict. ch. 31 (*a*), and that the plaintiff was a member of the Council of the Corporation, having been appointed by the Right Reverend *Benjamin Cronyn*, the Lord Bishop of the Diocese of Huron, pursuant to the Act of incorporation (*b*), and had continued to exercise the rights and powers of said office from the time of his appointment until the 26th day of April, 1879.

Statement.

The bill further stated that the Corporation, in pursuance of the said recited Act, had passed certain by-laws for the management of its affairs, and among others the following: "By-law No. 1, Meetings of Council."

"(1) The Council shall meet quarterly at such time and place as the President, and in his absence the Principal, may appoint.

"(2) Special meetings may be convened as the President may deem necessary, or upon the requisition of any three members of the Council. Notices for all meetings shall be sent to each member at least ten days before the time appointed.

(*a*) Amended by the Act of Ont. 32 Vict. ch. 52, O., 1868-9, p. 266.

(*b*) The first section of the Act declared, that "There shall be and there is hereby constituted and established in or near the City of London, Canada West, a body politic and corporate under the name of "Huron College," which corporation shall consist of the Lord Bishop of the Diocese of Huron for the time being, and the Council of the said College not less than three in number, which members of the Council shall be named in the first instance by the Right Reverend Benjamin Cronyn, Lord Bishop, as aforesaid, and shall in the event of the death of any of them, dismissal, or disqualification from office, or resignation of any of them, be replaced from time to time by other persons to be named in such manner as may be set forth in the Constitution or By-Laws of the said College; Provided always, that the Lord Bishop of the Diocese of Huron, for the time being, shall, *ex-officio*, be a member of the said Council and the President thereof."

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"(3) Notices for special meetings shall specify the business to be brought forward.

"(4) No business shall be introduced at any special meeting in addition to that specified in the notice."

And such by-laws remained in full force. That on or about the 17th of April, 1879, the plaintiff received the following notice: "Huron College, London, Ontario. By order of the President a meeting of the Council of Huron College will be held at the College on Saturday, the twenty-sixth day of April, at ten o'clock, a.m., for special business.—*V. Cronyn*, Secretary.

And immediately after the adjournment of the said meeting, another special meeting of the Council will be held to elect members to fill the vacancies in the Council."

That on or about the 21st of April, 1879, the plaintiff received from *Verschoyle Cronyn*, Esquire, the Chancellor of the Diocese of Huron, the letter following:

"LONDON, Ont., 21st April, 1879.

"*My dear Mr. Archdeacon.*

Statement.

"Enclosed is a copy of a letter just received by me from the Bishop, which I send you at his request, and say that the matter will come before the Council at their meeting on Saturday next, and any communication you may desire with the Bishop he wishes to come through me as his Chancellor.

"I am, yours faithfully,

"V. CRONYN."

That the copy of letter therein referred to, was as follows:

"*My Dear Mr. Chancellor.*—I am under the painful necessity of inclosing for the information of the Council of Huron College, a letter containing evidence that the Venerable Archdeacon *Marsh* was cognizant of the letter which appeared in the London *Evening Herald* on the 17th of February last, and bearing the signature of 'A Churchwoman,' and that he advised and undertook its publication.

"I abstain from animadverting on the frivolous and mischievous character of the letter, and would have much preferred to treat the communication with the indifference all anonymous communications deserve, but for the additional circumstances connected with it, which add to the graveness of the act; and render it, in my opinion, necessary that the Council should be made acquainted with it.

"These are as follows: When the subject of the letter and its appearance in the newspaper were brought before the Council at which the Venerable Archdeacon *Marsh* was present, he not only expressed utter ignorance of its authorship, but joined in reprobating such a proceeding, and openly expressed his abhorrence of the practice of writing anonymous letters reflecting upon individuals or institutions, and acquiesced with the Council in demanding from Dr. *Schulte* an

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ample apology for the outrage which had been perpetrated, placing the whole transaction before the Council in a manner and language which made it impossible for them to conceive that the Venerable Archdeacon was, as it appears, not only cognizant of all the particulars connected with the inception and character of the letter, but also of its publication.

"Participation in severely censuring a brother clergyman for the commission of an act for which it appears the Venerable Archdeacon was chiefly responsible, without an extenuating plea on behalf of one who acted entirely on Archdeacon *Marsh's* advice, or frankly admitting his share in the transaction, is a conduct which gives the whole proceeding so dark a complexion as to call, in my judgment, for an enquiry by the Council into the whole information placed before them.

"I am confident that the Council's zeal for the preservation of harmony among themselves in a Christian spirit, and the desire of faithfully guarding the important interests entrusted to them, will lead them, after having carefully weighed all the information and circumstances connected with the matter, to arrive at a just and satisfactory conclusion.

"I am, &c."

Statement.

The bill also stated that no copy of the letter mentioned by the Bishop as having been enclosed to Mr. *Cronyn* was sent to the plaintiff with those above set forth, so that the plaintiff was in entire ignorance of the same until some days afterwards: that on Saturday, the 26th of April, 1879, the plaintiff went to the Library of Huron College, where meetings of the Council had theretofore been held—at the hour named for the meeting—when, after waiting about an hour, he was informed that that particular meeting was to be held, not in the usual place, but in the drawing room of the Dean's house, which adjoined the College building, whither he went, and found most of the members of Council already assembled: that the minutes of the previous meeting of Council were then read relating wholly to the business of Huron College; and thereafter a discussion arose as to whether certain conversations which had taken place at a previous meeting—on the 6th of March—relating to matters wholly foreign to the management of said College, should be entered upon the minutes, whereupon the plaintiff gave his version of such conversations, which was contradicted; and there was much excited discussion, after which a resolution in the following words was moved, seconded, put, and carried:—

"Moved by the Very Rev. Dean *Grasett*, seconded by the Venerable Archdeacon *Sweatman*, and resolved:

"That circumstances having come to the knowledge of the Council which deprives Archdeacon *Marsh* of their confidence, and in their judgment renders him unfit to share in the charge of the interests of the institution, his name be erased from the list of the Council."

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And the plaintiff was thereupon desired by the chairman of the meeting to leave the room as he was not wanted; whereupon the plaintiff answered in substance, "I don't think you have power to dismiss me. I am a member of Council by Act of Parliament, but as I am in a gentleman's private room, when I am told I am not wanted, nothing is left for me but to rise and go"; and the plaintiff accordingly left the room.

The bill further alleged that the defendants pretended that the reasons for which they passed the said resolution were, that in the month of February, 1879, the plaintiff was a party to the publication of a letter in *The London Evening Herald*, which had been written by the wife of a professor of the College, in the following words.

Statement.

"*To the Editor of the Herald.*

"SIR.—In reading the account of the various welcomes accorded to the Bishop on his return, one cannot fail to be struck by the pleasant variety thereof. First we have a 'Service of Welcome' (whatever that may be) in the Chapter House. I find in my prayer-book no provision for anything of the kind, and I did think hitherto that the object in going to Church and singing 'Te Deums' was to praise God, not to welcome a Bishop 'or any other man.'

"Next we have a theatrical performance in the Ladies' College. Now to invite a Bishop to witness the acting of a party of school girls seems to me decidedly *infra dig.* The performance, however, had the merit of originality, especially in the tableaux, in which 'five young ladies in green dresses lying on the ground,' represented the river 'St. Lawrence.'

"The fact was unfortunately overlooked that the waters of the 'St. Lawrence' are not green. However, it may be doubted whether the resemblance would have been very striking whatever the colour of the young ladies' attire. *Artemus Ward*, with his famous 'these are the horses, the painter told me so,' would have been an excellent master of ceremonies on this occasion. The frequency of these performances in the Ladies' College leads me to ask whether the young ladies are intended for actresses; or has the histrionic art become as necessary a part of female education as music or drawing? I think that most parents would be sorry to have their daughters educated in this sort of frivolity; and in a Church school under the patronage of a Bishop, and the principalship of a clergyman, we might expect that the pupils would be taught to remember their baptismal vows, to 'renounce the pomps and vanities of the world.'

"I am, Mr. Editor, yours truly,

"A CHURCHWOMAN."

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That shortly after the publication of the foregoing letter, and on the 17th of February, 1879, another appeared in the same newspaper, which was as follows:—

"*To the Editor of the Herald.*"

"DEAR SIR.—I think most Churchmen will agree with 'Churchwoman,' in her strictures upon the late 'Phantom of Glory,' and I trust they will stop, in the future, any exhibition of the same nature. It is not surprising that Canadian parents should refrain from sending their children to the College, if their time is occupied in such superficial and vainglorious tuition. I am afraid the fulsome address signed by the clergy, although it does not say by how many and by whom, will hardly bear investigation. Referring to the University, great credit is given to the Bishop, stating as that it was due to his own projection. There must be a mistake here, as the Bishop expressed his great surprise when it was first brought before him in an official shape, and also in his charge to the Synod of 1877, he stated that this movement had been inaugurated by the Professors and Alumni. I believe Church people in general are very unconcerned about the University, and trouble little whether the honour of instituting it lies with the Professors and Alumni, or the Bishop, after the unfortunate failure of getting the Government to buy this 'huge elephant,' (in the shape of the Boys' College) for a Normal School.

"What concerns us more is that our Bishop should be absent so many months getting up subscriptions in England to convert this incubus into what the future will witness as a monumental folly built upon the respected ruins of Huron College. I see by this adulatory address that much sympathy was shewn in England. Very fortunate for its success that it was so. The simple donation there added to the magnificent and munificent subscription of the Bishop, I think will make up for the want of sympathy and assistance here, and accomplish the undertaking which, I trust, will not be more injurious to the welfare of the Church than the Boys' College has been. These exhibitions of 'vain glory' are demoralizing the whole Church, and making it a by-word among other denominations, and a source of grief and shame to its own members. I hope that such an exhibition of worldly worship may never be witnessed again, as certainly it cannot be counted as one of the 'blessed privileges of being a Churchman.' It would be a higher privilege if, instead of the notices so nauseous to well regulated minds, we were to hear on every side about the Christian zeal, purity, toil, and labour of our Bishop in spiritual matters. We should then be spared reading about such frivolity as that of last week.

"Yours truly,

"CHURCHMAN."

Statement.

The bill further set forth, that the Right Reverend *Isaac Hellmuth*, the Bishop of Huron, having become aware of the authorship of the letter signed "Churchwoman," demanded of and received from the husband of the writer an apology therefor, which was discussed at a meeting of the Council of the College held on the said 6th of March, and at the conclusion of that meeting, and after the said apology had been discussed, and a

committee appointed with reference thereto, the plaintiff made certain observations with reference to the letter signed "Churchman," stating that he had not any knowledge of the authorship thereof, and deprecating the practice of anonymous attacks upon public men, but that plaintiff's remarks had not any reference whatever to the letter signed "Churchwoman," and were not made until after the discussion relating to that letter and to the apology therefor had entirely ceased. And the plaintiff charged that the defendants pretended contrary to the fact that the plaintiff's said remarks did refer to the letter signed "Churchwoman" and that the plaintiff intended to deceive the defendants and induce the belief that he had not anything to do with the letter signed "Churchwoman:" and, upon representations to that effect being made at the meeting held on the 26th of April, several members of the Council who were not present at the meeting on the 6th of March, were induced to believe that the plaintiff had been guilty of deceit and duplicity, and in consequence thereof voted for the said resolution of expulsion; and also charged that such representations were wholly untrue, and that even if true, they would form no justification for the adoption of the resolution above set forth, or for the exclusion of the plaintiff from the Council of Huron College, and submitted that the said special meeting was irregularly and illegally called, and that the resolution passed thereat was illegal and void. The prayer of the bill was for a rescission of the said resolution; a restoration of plaintiff to his rights of membership of the said College Council; an injunction to restrain the defendants from interfering with his exercise of such rights; and for further and other relief.

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The defendants answered the bill stating the facts which had occurred at the meeting of the Council on the 6th of March, 1879, when the plaintiff expressed himself strongly against any anonymous writing against

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public men, and setting forth an extract at considerable length from the minutes of Council of Huron College, made on the 14th June, 1879, in consequence of an application of the plaintiff that the Council would reconsider and rescind the resolution passed on the 26th of April, and which, amongst other things, set forth that the Council were "constrained to express our surprise that Archdeacon *Marsh* so labours to throw the contents of the letter published in *The Evening Herald* of the 17th February last into the foreground. This, as we conceive, can only be with the view of drawing the mind of the Council from the main issue. We would therefore distinctly state that we admit the right of the exercise of private judgment upon all matters, and of the expression of such opinion in the public press or otherwise. But the contents of the said letter, or the subject animadverted upon therein, did not in the least degree enter into the question before the Council, nor had it anything to do with the decision arrived at * * * and the Council dealt (we again repeat) not with the subject of the letter signed 'Churchwoman,' but with what we believe to have been the designed deception practised on the Council, at its meeting held on the 6th of March, by the Archdeacon. * * * The Archdeacon denies that in his remarks at the Council meeting held on the 6th day of March, he made any reference to the letter signed 'Churchwoman,' which was the only letter under consideration of the Council: that his denial and the words of strong condemnation which he used in relation to the practice of attacks upon public men, had reference only to the letter signed 'Churchman.' We again remark that the unanimous feeling of those present was and still is, that the address of the Archdeacon was designed to leave the impression upon the minds of the Council that he distinctly repudiated all connection with both letters. This impression is deepened and confirmed by

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the fact, as stated by the Rev. Dr. *Schulte*, that the Archdeacon went to him and warned him earnestly against saying a word to implicate him (the Archdeacon) with the publication of the letter. * * * The Archdeacon implies that the facts of the whole case have been misrepresented to the Council. The facts were already known to the members of the Council, all of whom with the exception of one or two had been present at the Council meeting at which the Archdeacon, in their opinion, had distinctly denied any complicity in the publication of the letter signed 'Churchwoman.' * * * We cannot consent to regard the matter in the light of a mere thoughtlessness or want of judgment. We feel that, whichever letter it was to which the Archdeacon immediately limited his remarks at the Council meeting, his designed purpose was to mislead. After a thorough and impartial consideration of all the materials placed before us, and with a desire to avoid injustice to Archdeacon *Marsh*, the Council regrets that in view of the above facts, and of our obligation to maintain the true interests of the College, we have no other course open to us but to reaffirm the resolution passed at the special Council meeting, held on the 26th April. * *

Statement.

* Our action throughout the whole matter, so far as Archdeacon *Marsh* is concerned, has been based entirely and solely upon the deception and duplicity exhibited towards this Council with regard to his knowledge of, and participation in, the publication of the letter signed 'Churchwoman,' * * * neither the fact of the publication of the letter nor its subject has entered into the consideration of this Council. *

* We feel confident that, when these facts are duly and calmly weighed by the Archdeacon, he will see that the conclusions arrived at by the Council are fully warranted, and such as he himself, had he been called on to pronounce on another, would have unhesitatingly indorsed.

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The circumstances which occurred at the Council meeting on the 6th of March, are as follows:—After the discussion which took place upon 'Churchwoman's' letter, during which the Archdeacon kept silence, he rose and said, addressing the Bishop: 'I would like to ask your Lordship whether I am correctly informed that you charge me with being the author of 'Churchman's' letter?' The Bishop replied: 'I did think you had much to do with it, as I was told it had been taken to the office of the *Herald* by the brother of a clergyman of the diocese; and that the letter signed 'Churchwoman,' was brought to the editor by a dignitary of the Church of long standing. I must confess that I attributed the letter to you.' Being further asked by the Archdeacon his reasons for suspecting him of such unworthy conduct, the Bishop replied: 'Because of the long continued hostility which you have always maintained towards me and my administration of the diocese. * * There are but two dignitaries residing in London besides yourself * * As they were both promoters of the service of welcome and personal friends, I could not suppose that either of them could be a party to the adverse criticism contained in 'Churchwoman's' letter.' The Archdeacon then asked if it was his brother to whom his Lordship referred as having taken 'Churchman's' letter to the office. The Bishop replied, 'No.' The Archdeacon then spoke in the strongest language of detestation of the practice of anonymous attacks upon public men, saying that he would sooner cut off his right hand (or words to that effect) than be guilty of such an act. One of the members of the Council, who was convinced from the language used by the Archdeacon (as were all) that his denial referred to both letters, said, with an evident intention of removing all suspicion from him, 'I do not think that we ought to attach too much importance to the statement that the letter was taken to the office by a dignitary; the editors are not members of

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the Church and would probably consider that a representative to the Synod or a pew-opener was a dignitary.' To this the Archdeacon with the rest assented. The above remark could only refer to the letter signed 'Churchwoman,' for the Bishop had stated distinctly that he had been informed that that letter had been delivered at the office by a dignitary of the Church. The Archdeacon could not but be aware that this last remark referred to 'Churchwoman's' letter, and that only; and that the Council was under the impression that his denial was intended to include both letters. He assured the Bishop, in the presence of the Council, that he knew as little about the affair as the man in the moon: that the Bishop's expressed charge of his being the author of the letter was libellous, and might be made the ground for an action at law. He further said that he left for Hamilton shortly after, and thought nothing more about the matter till his return, when he was informed that it had been disclosed that the Rev. Dr. *Schulte* was responsible for its publication. Upon this the Bishop said: 'I am perfectly satisfied; I accept the Archdeacon's denial, and exonerate him from all suspicion of connection with it.'"

Statement.

The minute of the College Council then proceeded to give further details of the plaintiff's connection with the publication of "Churchwoman's" letter, and proceeded: "Can any unprejudiced mind fail to arrive at the same conclusion as that at which the Council arrived, and upon which their action was solely based at the special meeting on the 26th of April, viz., that such unworthy conduct on the part of a member of its body renders it impossible for them to continue to act with him upon the same Board, and, therefore, that the striking of his name from the list of the Council was not only merited, but was what they were bound to do, for ther own protection and for the well being of the College of which they are the appointed guardians. The above statement explains why it is impossible for

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the Council to reverse its decision by rescinding the resolution passed on the 26th April, with respect to Archdeacon *Marsh*."

The answer further stated, that after having detected the deception and duplicity of the plaintiff, as aforesaid, it became impossible for the Council to retain the plaintiff as one of their number, and that the plaintiff's conduct was such as to warrant his dismissal, and to justify what was done in the premises; and submitted that the by-laws referred to in the bill did not relate to the dismissal of members of the Council, membership of which was a purely honorary position, with no remuneration or other like beneficial advantage accruing to the occupants directly or indirectly therefrom: that there was no entrance or annual fee or other pecuniary qualification required or received from members: that no question of property or civil rights was involved in the tenure of the office; and for these reasons the defendants submitted that the Court had not any jurisdiction in the premises. The defendants submitted that their Council had power to dismiss a member for any cause which, in the judgment of the Council, rendered him unfit to continue to be a member, and that even if the said meeting of the 26th April was irregular in any respect as alleged by the bill, the plaintiff having attended and entered on his defence thereat, and having subsequently appealed to the Council to reconsider and reverse their decision, he could not afterwards question the regularity or legality of the proceedings; and that the Council came to the *bonâ fide* conclusion that the conduct of the plaintiff was such as to disqualify him from further occupying the position of a member thereof, and acting on the oel the Council passed the resolution complained of; and also that the jurisdiction (if any) to deal with the matters complained of by the plaintiff was vested in, and was to be exercised by, the visitor of the College, and not by this Court.

Statement.

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The cause was put at issue on the 29th of April, 1880, and came for the examination of witnesses and hearing at the Spring sittings in Toronto.

The facts established by the evidence, so far as they bear upon the point decided, were substantially as they appear in the foregoing statement of the pleadings.

Mr. *McCarthy*, Q. C., Mr. *Bethune*, Q. C., and Mr. *Biggar*, for the plaintiff.

The first matter of any importance to be defined in this case is, the precise position the plaintiff occupied in Huron College; and what, if any, right or power the College Council had to disfranchise or expel him from that body. The plaintiff, in the sixth clause of the constitution, is named as one of the Council, which is to consist of sixteen members, exclusive of the then Bishop of the Diocese, and the Principal of the College. By the 17th clause of the constitution the Council are entrusted with the entire management of all the general affairs of the institution, including the appointment and dismissal of the Principal, Lecturers, Tutors, &c., but no power whatever is given to expel or remove a member of the Council (*a*).

Argument.

(*a*) The 17th clause of the Constitution provided that "The Council shall have the entire management of all the general affairs and concerns of the Institution, including the appointment (after the first appointments, which are to be made as provided hereafter) of the Principal, Lecturers, Professors and Tutors, and including also the appointment of the Treasurer, Secretary, and Solicitor, for the time being, of the Institution, and also of all inferior officers and servants (excepting those mentioned in the twenty-seventh clause of these presents) in connection with the business concerns thereof; the regulation and payment out of the funds of the Institution of such salaries and wages as may be necessary, and may remove at pleasure, any such officials (other than the Principal and the Divinity Professor), and for the better guidance of the Council in its management and superintendence over the business affairs and concerns of the Institution, it shall be lawful for the Council to make whatever rules and by-laws it shall think proper; provided the same shall be not inconsistent with, or repugnant to, any special provision in or the true intent and spirit of these presents, and at any time by rule or by-law duly made to alter or repeal all or any of the rules and by-laws which shall be so made, but no rule or by-law shall be considered as duly made unless the same shall have been read, approved

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As a corporator the plaintiff is entitled to a franchise, and as such he could not be amoved or disfranchised; though if he had held any office in the institution he might, under the comprehensive words of the statute, have been dismissed or discharged from the duties of such office.

Clubs in some sense are corporations, in others they more nearly resemble partnerships; and if acting under the rules and by-laws of the particular society no Court of Law would interfere: *Hopkinson* v. *Exeter* (*a*), *Labouchere* v. *Wharncliffe* (*b*). Under the charter or constitution of this institution no provision has been made for the dismissal or removal of one of the members: *Angell and Ames*, Ch. 12, sec. 4; *Baggs's Case*, (*c*); *Rex* v. *Richardson* (*d*).

Conceding that the Council had the power to disfranchise, as good grounds must exist to warrant disfranchisement as would be required for amotion. Here there was no valid reason for such a step. Even if the plaintiff had been, in the words of the answer, "guilty of duplicity and deception," that, it is submitted, could not form any ground for disfranchisement.

Argument.

Huron College had no concern with the institution treated of in Churchwoman's letter, and if duplicity and deception are, in the rigid views of the members of the College Council, a ground for expulsion, we submit that the proceedings must go much further and not stop with Archdeacon *Marsh*, as the evidence shews that other members of that learned body have been guilty of that offence to a much greater extent than can possibly be laid to the charge of the plaintiff:

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of, and confirmed, at two successive and distinct meetings of the Council, held at intervals of at least seven days between each meeting: Provided always, however, that the said the Lord Bishop of Huron shall solely appoint the persons first to be appointed to fill the various offices hereinbefore stated.

(*a*) L. R. 5 Eq. 63.
(*b*) 13 Ch. Div. 246,
(*c*) 11 Co. 99.
(*d*) 1 Burr. 539.

Fisher v. *Keane* (*a*), *Dean* v. *Bennett* (*b*), *Rex* v. *Faversham* (*c*). 1880.

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Here it is clearly proven that the formalities to be observed and the steps necessary to be taken, to attain the end the Council would appear to have had in view, were not observed or taken. This point is distinctly disposed of in *Cannon* v. *The Corn Exchange* (*d*), which was affirmed on appeal (*e*).

It is but too plain that the Bishop of the Diocese was the moving cause of the proceedings against the plaintiff, and the other members of the Council appear to have surrendered all their own independent judgment to his will; in fact, the whole movement looks very much like a pretext to get rid of the plaintiff, who probably was not as acceptable to his Lordship as might have been desired: *Dummer* v. *The Corporation of Chippenham* (*f*), *Willis* v. *Childe* (*g*).

As to the jurisdiction of the Courts to interfere in such a case, *Stratford* v. *Perth* (*h*) may be referred to. A Court of law has power to order restitution of the rights of a corporator improperly amoved, and this principle is equally applicable to a case of disfranchisement: *Weber* v. *Zimmerman* (*i*). Argument.

Here the notice was clearly insufficient according to the by-laws of the institution: *Angell* and *Ames*, secs. 501, 2. *The State* v. *The Georgia Medical Society* (*j*), *The State* v. *Milwaukee* (*k*), *The State* v. *The Medical College of Erie* (*l*).

A corporator cannot be expelled unless he has been convicted of some offence: Bac. Ab. 260; *Angell* and *Ames*, secs. 707-12-23-25; *Osgoode* v. *Nelson* (*m*), *Rex.* v. *Alsop* (*n*).

(*a*) 11 Ch. D 353.
(*b*) L R. 6 Ch. 489.
(*c*) 8 T. R. 352.
(*d*) 27 Gr. 23.
(*e*) 4 App. R. 268.
(*f*) 14 Ves. 245.
(*g*) 13 Beav. 117.
(*h*) 38 U. C. R. 112.
(*i*) 22 Maryd. 156.
(*j*) 38 Geo. 608.
(*k*) 29 Wis. 69.
(*l*) 24 Barb. 57.
(*m*) 10 B. & S. 119. S. C. on App. L. R. 5 E. & I. App. 636.
(*n*) 2 Show. 170.

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The position of the parties here is such as renders it impossible for the plaintiff to call in the aid of the visitatorial power, and therefore we are compelled to apply to the Court for a remedy against the action of the Council.

The by-laws of the Council provide:—(1) that the notice to be given for the purpose of calling a special meeting of the Council must specify expressly the object for which the meeting is called; and (2) that no other business shall be proceeded with at such meeting than that stated in the notice.

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

Upon the frame of the bill it is not open to the plaintiff to raise the question of *bona fides*. The plaintiff's conduct shews that he is not innocent of the charge of duplicity and deceit. After he had spoken disapprovingly of the service of welcome with *Schulte* in private, he thought it necessary to conceal his connection with the publication of the letter, by having it sent not to the "Free Press," but to the "Herald," for insertion, and rather than commit it to the post he delivered it himself. The letter itself, though it might have been perfectly innocent had it come from one not in an official position, is a very improper letter to have been written by an Archdeacon about his Bishop. [Counsel read and analyzed the letter].

Argument.

The plaintiff in his evidence admits that he had undertaken to see to the delivery and publication of this letter, and but for the plaintiff's personal delivery of the letter to the "Herald" it would probably never have been published. Having thus secured its publication, he attended also to its distribution. He knew from several sources that the Bishop suspected him of complicity in its publication, and he begged *Schulte* not to disclose his connection with it. This was his mental attitude on the afternoon of March 6th, when the letter

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first came before the quarterly meeting of Huron College Council. He knew then that he was suspected of connection not with the letter of *Churchman* but of *Churchwoman*. He went to that meeting knowing that an apology had been made, and that the question would be, whether it or any apology should be accepted. During the discussion about Dr. *Schulte* he remained silent, which he says meant assent part of the time, and dissent during the other part. It must have been intended to produce the natural effect, viz., belief that he acquiesced in what was done. But he did more; he agreed in words as well as by silence, that the apology was insufficient, and he gave a reason why agreeing as to the necessity for an apology, and the insufficiency of the one already sent, this apology, though insufficient, should still be accepted as meaning more than it said. Such conduct would unfit a judge to be a judge; a member of a secular trust to be a trustee; and it is still more unbecoming in a member of the Council of a College whose chief function is to train men for the ministry of truth.

Argument.

[Counsel then analyzed the Archdeacon's speech at the meeting of March 6th, shewing that it could not have referred to the letter of *Churchman* only, and that it would have been unnecessary to say anything so far as Dr. *Schulte* was concerned, and that the plaintiff's speech must have been designed to exonerate himself from all suspicion of connection with either of the letters. Counsel also referred to the plaintiff's joining in the request for the addition of a postscript to Dr. *Schulte's* letter, as not only additional evidence, but an aggravation of his former duplicity.]

There is certainly somewhere the power of dismissal, and surely it is not necessary that the offence should be one cognizable at law. Without giving a schedule of moral offences not cognizable at law, but unfitting a man to sit on the board of a divinity school, it is enough to say that it is unnecessary that the offence

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should be an indictable one. As for the argument that it is a question of intention, this Court investigates intention every day in cases under 13 Elizabeth, and, indeed, in every case of fraud. There is, then, clearly the power to dismiss; the cause is surely sufficient, and if this Court were now sitting in appeal from the Council it would not reverse their decision.

Huron College may be said to be a private eleemosynary corporation, and the word "dismissal" indicates power to remove: *Kyd* on Corporations; *Rex* v. *Richardson* (*a*). This is not disfranchisement, nor is it like the Club cases the violation of a pecuniary right. It is a visitatorial power: 2 *Kent's* Commentaries, 300. The Council itself is visitor: 2 *Kent's* Commentaries, 195; *Dartmouth College Case* (*b*). The jurisdiction of this Court does not extend to visiting a visitor. If this were a club or friendly society the Court could not exercise an appellate jurisdiction: *Inderwick* v. *Snell* (*c*). The plaintiff has waived all irregularities in the summoning of the meeting, and cannot now take these objections.

Argument.

Mr. *McCarthy*, Q. C., in reply. There can be no waiver of the irregularity unless by all the members of the corporation duly assembled: *Angell* and *Ames*, sec. 423. This is not an eleemosynary corporation at all: *Angell* and *Ames*, sec. 39; but being a corporation created by the Crown the Crown itself is visitor. The council cannot be visitors and visited: *Angell* and *Ames*, sec. 688; 2 *Bacon's* Abr. 283; *Rex* v. *Ely* (*d*), *Rex* v. *Chester* (*e*), *Weir* v. *Mathieson* (*f*). The want of a pecuniary emolument does not affect the plaintiff's right: *Fuller* v. *Plainfield Academy* (*g*.)

(*a*) 1 Burr. 539. (*b*) 4 Wheaton 633-640. (*c*) 2 McN. & G. 216.
(*d*) 2 T. R. 290. (*e*) 2 Strange 797. (*f*) 3 E. & A. 123.
(*g*) 6 Conn. 532.

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Sept. 1st.

SPRAGGE, V.C.—The first question to be determined is, whether this Court has jurisdiction to entertain a suit in relation to the matters complained of in this bill: that is, whether this Court is a proper forum, as distinguished from the question whether the plaintiff has shewn a case entitling him to a remedy in any Court?

This first question is fully answered by the administration of justice Act R. S. C., ch. 40., the 86th sec. of which enacts that "the Court of Chancery shall also have jurisdiction in all matters which would be cognizable in a Court of law." The Act does not say "cognizable in an action at law," but is as broad and comprehensive as it can well be, and necessarily includes all matters cognizable in a Court of law in any mode of procedure. In dealing with such cases, the Court will ordinarily, and primarily at any rate, take cognizance of them by its usual course of procedure, and certainly I see no reason why such a course is not a fit and appropriate one in a case of the nature of that now before me.

Judgment.

The next question is, whether a case of this nature is cognizable in a Court of law. It is the case of a member of a corporation aggregate, who has been amoved or disfranchised, who complains that this has been done wrongfully, and who seeks to be reinstated. A Court of law would have cognizance of such a case, and in a Court of law the party aggrieved would seek his remedy by *mandamus*. I do not cite cases for this. The books abound with authorities that he has his remedy, and that it is in that mode of procedure; but whether in that or in any other mode of procedure is not the point. All that is material is, that the case of the party aggrieved is cognizable in a Court of law. I have used the words "amoved or disfranchised," though perhaps neither term exactly expresses what has been done in this case, the word "amove" being more properly applied to the removal of an officer or servant of a corporation, while the term "disfranchise" is more strictly applicable to the deprivation of a freeman of

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I will assume, and I take the law to be so, that a power of expulsion is incident to a corporation aggregate—in what cases and for what reasons is another question; but it has been recognized to be inherent in a corporation, as necessary to the good order and government of corporate bodies. Moreover, the word "dismissal" used in the Act of incorporation* in relation to the members of this Council, who themselves constitute the corporate body, implies that the power to dismiss or expel resides somewhere.

Several of the cases cited to me, have been cases of the expulsion of members of clubs, not corporate bodies, but standing on a different footing from members of a corporation, and from officers of a corporate body. They are private voluntary associations for social, literary, or political purposes; and questions in regard to the expulsion of members have to be determined by the rules of the club, to which the expelled member belongs. These rules are the contract entered into by a member upon joining the club. Yet even in such cases a member wrongfully expelled is not without remedy; for a Court of Equity, while disclaiming any right to examine the sufficiency of the reasons for his expulsion where the power to pronounce upon the sufficiency of these reasons is lodged in the club itself, or in a committee or other body in the club, will decree the restoration of the expelled member, where it appears that the proceedings for the expulsion have not been taken in good faith; where they have not been in accordance with natural justice, though taken in good faith; and also where the course of procedure prescribed by the constitution of the club has not been duly observed. The late case of *Labouchere* v. *The Earl of Wharncliffe* (a), is one of several instances of this.

Judgment.

* See note *b*, ante 606.

(a) 13 Chy. Div. 346.

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It appeared to me at the hearing, and I observed at the time, that the omission to specify in the notice to members of the Council the particular business to be brought before the Council on the 26th of April, would probably be found to be a fatal objection to the validity of the proceedings of that day. It was a special meeting; and the notice expressed only that it was for special business, not saying for what special business.

The by-law in relation to meetings of the Council is explicit upon this point. After providing for quarterly meetings and special meetings, notices for such meetings are thus provided for:—

"(2.) Special meetings may be convened as the President may deem necessary, or upon the requisition of any three members of the Council. Notices for all meetings shall be sent to each member of the Council.

(3.) Notices for special meetings shall specify the business to be brought forward.

(4.) No business shall be introduced at any special meeting in addition to that specified in the notice."

Judgment.

Of these clauses No. 3 would be sufficient, for it cannot be said that a notice that a meeting is called for special business, specifies the business to be brought forward; but No. 4 excludes all doubt as to the meaning of the by-law; it points distinctly to the business being specified, and so specified that a member not attending could safely say that the business is of such a nature that I do not care to be present; and a member present might object, in regard to the business brought before the meeting, that it was not specified in the notice.

These are objections upon principle, and the authorities shew that they are fatal objections. And they are something more in this case than technical objections, for it appears by the evidence of two members of the Council who were absent from that meeting, that if the notice had specified the business that really was to be brought before that meeting they would have been

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present; and one of them, Canon *Elwood*, intimates that his sympathies were with Archdeacon *Marsh*.

It is no answer to say that all those present concurred in the vote of expulsion, and that they outnumbered those who were absent; and that therefore the result would have been the same if the business to be brought before the meeting had been specified. It may be that the result would not have been the same. Dean *Boomer*, concurred rather than be the sole dissentient; and we cannot tell what might have been the result upon the minds of others if Mr. *Shanly* and Canon *Elwood* had been present. It is not necessary, however, to shew that any different result might have been produced. It was the right of the member whose conduct was to be discussed and dealt with, that every other member should be notified that at this meeting his conduct was to be discussed and dealt with.

Judgment.

I may notice in this connection, before referring to the cases upon this point, the solicitous care with which Article 28 of the Constitution of Huron College makes provision for the case of the removal of the Principal and also of the Divinity Professor of the College. It provides that they shall be removable for misconduct or any cause which to the Council shall seem reasonable and proper, "but not until after such removal shall have been decided upon by two successive meetings of the Council specially summoned for the purpose, with an interval of at least one month between each meeting."

The observations of the Master of the Rolls in *Fisher* v. *Keene* (*a*), are appropriate to this point, though the circumstances were different.

In *Rex* v. *Faversham*, (*b*) a case of a freeman of a company, the return to the *mandamus* was quashed because the freeman had been removed without proof of the offence wherewith he was charged, his presence

(*a*) 11 Chy. Div. 353. (*b*) 8 T. R. 356.

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and non-denial of the charge, having been taken instead of proof; and Lord *Kenyon* took occasion to observe: "Besides which, every member of the company having power to disfranchise should have notice to attend for that particular business."

Dean v. *Bennett* (*a*), was the case of the removal of a minister of a Baptist congregation. By the rule respecting the appointment and dismissal of a minister it was required that notice should be given which should state expressly the object of the meeting, and that each of the directions to be declared at any such meeting should be reconsidered at a second meeting, to be convened by public notice, expressly stating the object thereof. A notice was given of a meeting expressed to be "for the purpose of bringing charges against and considering the dismissal of" the minister; and at that meeting a resolution was adopted declaring the minister not to be "a fit and proper person to occupy the position of pastor, and that his office of pastor cease forthwith." The second notice given was for a meeting "for the purpose of confirming and ratifying" the resolution passed at the previous meeting. Sir *W. M. James*, then V. C., held the second notice "insufficient and invalid in point of law, because, it being a notice to confirm resolutions, there was no way in which the congregation could be informed of the resolutions; and the only mode by which that notice could have been properly given was a notice intimating the resolutions which had been passed, and convening a meeting for the purpose of considering those resolutions": and the learned Vice Chancellor held the second meeting void, and that there was therefore no valid deposition of the minister. He also observed upon the charges not having been communicated to the minister, but his *ratio decidendi* was the insufficiency of the second notice. The decree was affirmed by Lord

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(*a*) L. R. 9 Eq. 625.

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Hatherley, in appeal, upon both grounds (*a*). I may also refer to *Rex* v. *Langhorne* (*b*), in which the omission to serve a notice upon a burgess who ought to have been served, was held to invalidate the election of a mayor; and to the case of *Weber* v. *Zimmerman* (*c*), where the question was whether proper notice had been given of a meeting at which the question was to be the dismissal of the pastor of a congregation. The constitution of the congregation required that in notices of meetings for business the object, purpose, and reason for calling the same should be specified. In the notices given (in the words of the report) "no intimation whatever was given that it was intended to consider the question of removing the pastor." It was held that the notice was insufficient, and the action of the meeting of the congregation invalid. I think it very clear, not only from these authorities and from the terms of the by-law in relation to meetings of the Council—and there are others to the same effect—but from reason also, that the notices given for the meeting of the 26th of April, were insufficient.

Judgment.

I think further that the plaintiff's presence and addressing the Council was no waiver of the defect.

I refer upon this to the language of the Master of the Rolls in *Labouchere* v. *Wharncliffe*:—"In the next place, the general meeting was not properly called. On the one hand, it has been said, that Mr. *Labouchere* attended that meeting, and entered into the discussion; that he did not protest against the meeting having been irregularly called; and that, therefore, he has no right now to complain; but, on the other hand, Mr. *Labouchere* said, he did protest, though it does not appear what the protest was. Mr. *Labouchere* was not compelled to say what it was. A man might say, 'I have a good defence upon the merits. I con-

(*a*) L. R. 6 Chy. 489. (*b*) 4 A. & E. 538.
(*c*) 22 Maryd. 156

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tend that I ought not to be expelled; therefore, I am not going to run away by availing myself of a technical objection.' He was entitled to say, 'though the meeting was irregularly called, I have such a good case on the merits, that I should like to take your opinion.' But he was not bound to tell the meeting that it was irregularly or improperly called."

I refer also to the judgment of my brother *Proudfoot* in *Cannon* v. *The Toronto Corn Exchange* (*b*).

It can make no difference upon this point, whether Mr. *Crooks's* contention that the Council are visitors of Huron College, and that consequently their decision is final and without appeal, is correct or not. In whatever character they are convened, they must be convened regularly; the business that was brought before the meeting of the 26th of April, was not properly before it. It was not competent to those present to pass the resolution that they did pass, or even to discuss the question whether one of their number should be visited with censure or other punishment, or indeed to discuss any question of special business whatever.

Judgment.

I desire not to be understood as at all assenting to Mr. *Crooks's* position, "that the Council are visitors" of the College. I do not see how the same individual or the same body can be at once visitors and visited. The functions of visitors are not to supervise or to deal with themselves, but with the body and members of the body of which they are visitors. But it is not necessary to pursue the question further. I will only say, shortly, that if the members of the Council are also visitors, it is not as visitors that they can expel a member of their body from the Council, and that it was not in their character of visitors that they passed the resolution expelling the plaintiff; and that having expelled him, as members of the corporation they are in the same position as if the visitatorial power resided elsewhere.

(*a*) 27 Gr. 23.

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I will only say a few words as to what may be grounds for expulsion from such a body as this Council. The College is, I think, correctly described by Mr. *Crooks* as a private eleemosynary corporation, and it is quite distinct in its objects and functions from municipal and trading corporations, as they are distinct one from the other. Mr. *Willcock*, in his treatise on Municipal Corporations, p. 271, well points out the distinction between municipal bodies and bodies of the nature of the corporation in question:—

"The law relative to disfranchisement is not well ascertained, and is for that reason more open to observation than that relating to amotion. I apprehend that some of Sir *E. Coke's* remarks on this subject are worthy of considerable attention, although they have been frequently looked upon as overruled. At the time when *James Bagg's* case was before the Court, their attention had been rarely attracted to the consideration of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement. But there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honourable distinction which he holds for the welfare of the corporation, and therefore, although it be an office of a freehold nature, it is entirely conditional; in the first place depending on the particular regulations of the constitution such as residence, &c.; secondly, upon his discharge of those duties which belong to the office, neglect of which is cause of amotion; thirdly, on his being such a person as ought to be permitted to hold office, and therefore defeated by commission of any infamous offence, although not relating to the corporation. But the franchise of a freeman is wholly for his own benefit and a private right; a right in the municipality similar to that of a natural subject in the state; of which he ought not to be deprived for any minor offence against his corporate fealty, than that for which as a subject he ought to be deprived of his franchise as a liegeman. For this reason all minor corporate offences, such as

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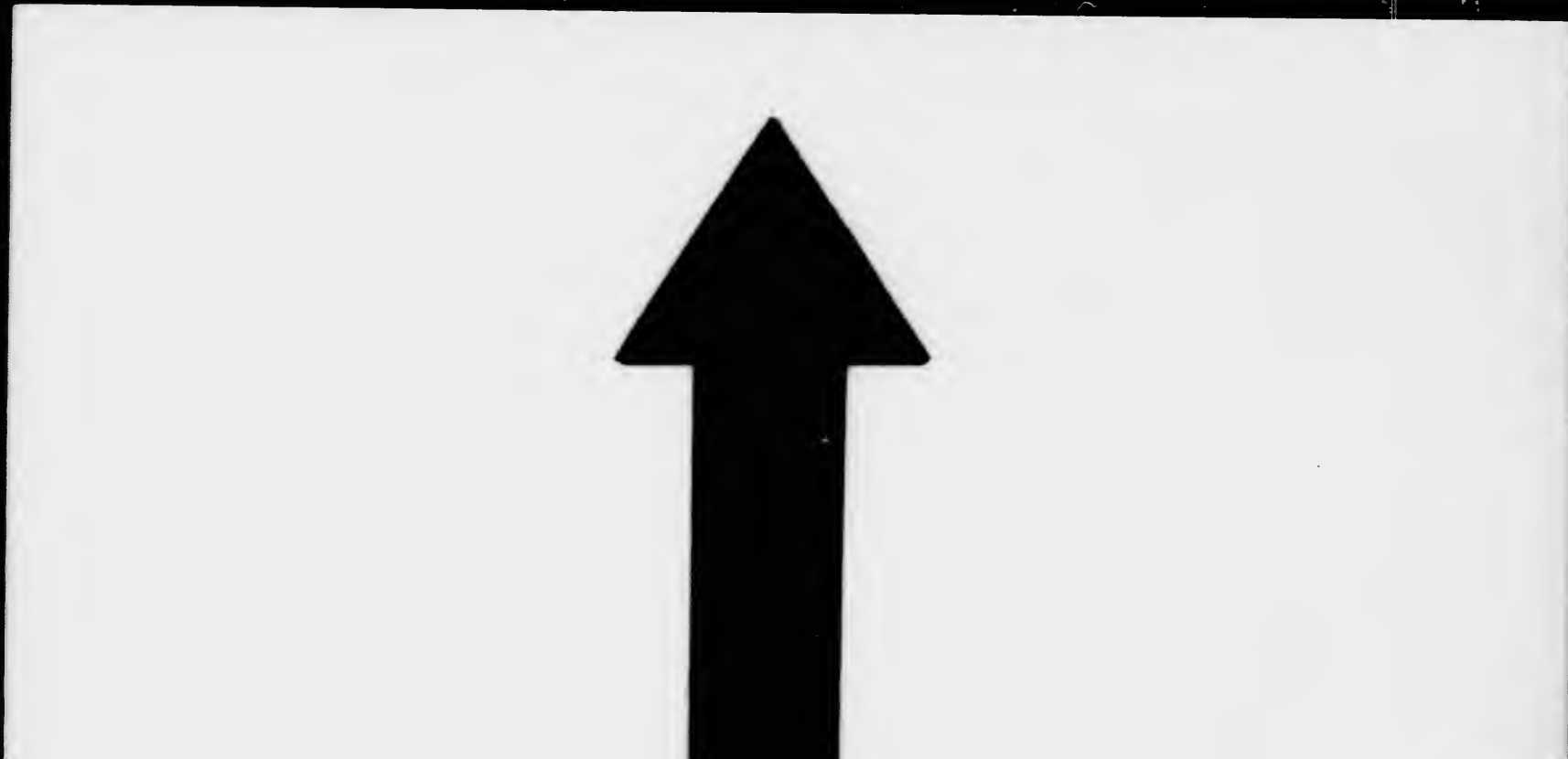
improper behaviour to his fellow corporators, were not punishable by the general law of the land as well as violations of his corporate duties ought to be punished by penalties imposed by the ordinances of the municipality, and not by disfranchisement. But such offences against the general law as occasion a forfeiture of all civil rights, import in themselves a forfeiture of the corporate franchise; and offences against the corporation, which tend to its destruction, such as defacing the charters, altering the corporate records, so as to destroy the evidence of their title to privileges, or that of the title of his fellow corporators to their franchise, are of course causes of disfranchisement."

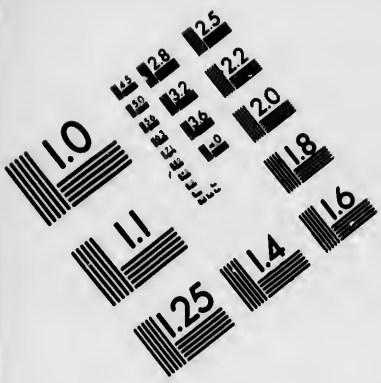
There is no reason why the three classes of reasons for which only, as put by the books, members of a municipal body may be disfranchised should be applied to the members of the governing body of an educational institution, whether incorporated or not. A man may lead a grossly immoral life; may offend the decencies of life in many ways; may so demean himself in his intercourse with others as to be palpably unfit to be a member of such a body; and yet may not be capable of being brought within any of the classes which afford grounds for the disfranchisement of members of a municipal corporation. My own opinion is, that it has yet to be decided what will form sufficient ground for the expulsion from membership of such a body as the Council of Huron College.

Judgment.

In my view of this case it is not necessary that I should determine whether the expulsion of the plaintiff from membership of the College was rightful. To determine that question now would be to determine a purely hypothetical question—that is, whether it would have been rightful, if it had been regular. In my opinion the whole proceeding was altogether irregular, and is incapable of being sustained as a valid and effectual expulsion of the plaintiff from membership in the College Council.

If it were necessary for me to express an opinion whether the case as it stood before the





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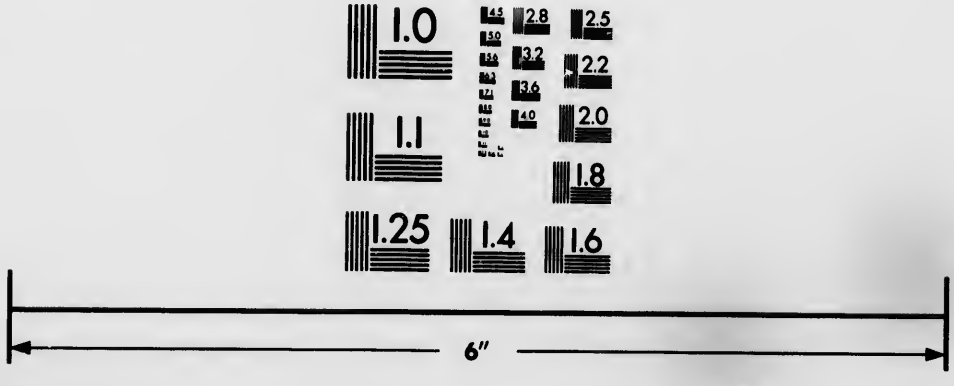

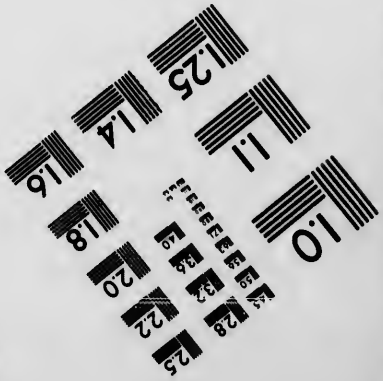

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1880.

Marsh v. Huron College.

Council afforded sufficient ground for the expulsion of the plaintiff, I should not shrink from expressing it. I could not listen to the evidence and to the very able arguments which have been addressed to me without forming an opinion in my own mind upon that point; but after reflecting upon it a good deal, it is my deliberate conviction that it is not advisable, as well as not necessary, that I should express it.

I am prepared to make a decree declaring that the resolution passed at the meeting of the 26th of April, in relation to the plaintiff, was, for the reasons that I have stated, illegally and improperly passed, and that the plaintiff still is a member of the Council of Huron College.

As to costs, I should say, in the first place, that the members of the Council who concurred in the vote for the resolution are not made parties to this suit, but "Huron College" in its corporate capacity only.

Judgment.

What the plaintiff complains of was—assuming it to have been a wrong—a personal wrong on the part of the members of the Council who voted for the resolution, and I doubt, whether, if costs were to be adjudged to the plaintiff, they should not be payable by those members of the Council.

But however that may be, I should at any rate refuse costs to the plaintiff upon this ground: that the evidence leads properly to the conclusion that the members of the Council understood the plaintiff in his address to them on the 6th of March, condemnatory of anonymous publications reflecting upon public men, to be referring to the letter signed "Churchwoman" as well as to the letter signed "Churchman"; that the plaintiff knew or at least had reason to believe, and did believe, that his observations were so understood by the Council, and wittingly and designedly left the Council under that impression. I come to this conclusion taking the most favourable view of the conduct of

the plaintiff upon that occasion that in my judgment can be taken of it. 1880.

Marsh v. Huron College.

I abstain from expressing any more decided opinion upon the conduct of the plaintiff on that occasion, because, looking at the share that he had in the publication of the letter of "Churchwoman," and at the whole of his conduct in connection with the publication of that letter, after as well as before its publication, his leaving the Council in the belief (assuming in his favour that he did not designedly lead them to the belief) that he reprobated the letter of "Churchwoman" as well as that of "Churchman," was conduct which in my judgment should disentitle him to costs. Judgment.

The decree will therefore be in the terms that I have indicated, without costs.

1880.

CAMPBELL v. ROBINSON.

Mortgagor and mortgagee—Assignee of equity of redemption—Principal and surety—Covenant in mortgage.

When a mortgagor, who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, he becomes surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt.

G., the owner of real estate executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one *H.*, which he transferred to the plaintiff. Afterwards *G.* mortgaged the same lands to *R.* and *D.*; and subsequently assigned the equity of redemption to them, in which assignment the mortgage to the plaintiff and that to *R.* and *D.* were recited, but the intermediate one to *H.* was not, though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against *G.* upon his covenants and against his assignees *R.* and *D.*, as the owners of the equity of redemption and entitled to redeem.

Held, that under these circumstances *G.* having claimed such relief by his answer, was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of *R.* and *D.* in not paying the plaintiff. they were also bound to pay *G.* his costs.

Examination and hearing at the Spring Sittings, at Peterborough.

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

Mr. *Moss*, for the defendants, *Robinson* and *Davidson*.

Mr. *Beck*, for the defendant, *Graham*.

The facts are clearly stated in the judgment.

Sept. 18th. SPRAGGE, C.—The plaintiff files his bill upon two mortgages made by the defendant *Graham* and his wife, since deceased; one to the plaintiff himself, the other to one *Hatton*, assigned to the plaintiff. *Graham*

Judgment.

1880.

Campbell v. Robinson.

and wife subsequently mortgaged the lands comprised in those mortgages to the defendants *Robinson* and *Davidson*, and subsequently in June, 1877, conveyed their equity of redemption to the subsequent mortgagees. The bill is filed against *Graham* upon his covenant to pay the mortgage debt; and against *Robinson* and *Davidson* as the parties entitled to redeem.

Graham, by his answer, prays relief against his co-defendants; that they be ordered to pay to the plaintiff the amount which he is liable to pay, or that he may be ordered to pay to the plaintiff under the covenants contained in the mortgages held by the plaintiff.

At the hearing I held the plaintiff entitled to a decree against *Robinson* and *Davidson*, for foreclosure or sale; and against *Graham* upon his covenants, reserving the question whether *Graham* is entitled, and entitled in this suit, to the relief he prays for against his co-defendants.

Judgment.

The position of a mortgagor who has covenanted with his mortgagee for the payment of a mortgage debt, selling his equity of redemption subject to the mortgage, is that of surety to the purchaser for the payment of that debt. It is thus put by Lord *Eldon* in *Waring* v. *Ward* (*a*): "The party means at the time of the contract to buy the estate subject to that mortgage, in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

(*a*) 7 Ves. 337.

1880.

Campbell v. Robinson.

Lord *St. Leonards*, when Lord Chancellor of Ireland, stated the point thus in *Jones* v. *Kearney* (*a*), "If I create an incumbrance on my estate and sell, and no engagement be entered into with respect to that incumbrance but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance."

This seems quite clear. And it is clear also that it is the right of a surety upon the debt being in default, to call upon the party as to whom he stands in the relation of surety, to pay the debt.

This being the case, the question that remains is, whether the surety *Graham* can have that relief against those for whom he is surety in this suit, and I see no good reason why he should not. It falls within the principle laid down by Lord *Eldon* in *Chamley* v. *Lord Dunsany* (*b*), on appeal: "Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants. Further, my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may be then decided between him and his co-defendant; and his co-defendant may insist that he shall not be obliged to institute another suit for a matter that may be then adjusted between the defendants."

Judgment.

In this case there is no reason against it, for though it is not necessary to the plaintiff's case, he is not thereby delayed; and, giving all the relief that can be given between the parties in the one suit is carrying out the spirit of the Administration of Justice Act and the principle upon which this Court acts of adjudicating, as far as is reasonably practicable, upon the rights of all parties, in one suit.

(*a*) 1 D. & W. 155. (*b*) 2 S. & L. 718.

1880.

Campbell v. Robinson.

My conclusion then is, that *Graham*, in this suit, is entitled to a direction in the decree, that his co-defendants pay to the plaintiff the amount due upon the mortgages held by him, and he is entitled to his costs against them, inasmuch as it has been by their default, in not paying *Campbell*, that he has been put to costs.

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PRINCIPAL MATTERS.

ABSOLUTE TRANSFER OR SECURITY.

The plaintiff transferred a covenant for the payment of $4,000, executed by four persons in his favour to the defendant by an absolute assignment, as security for $2,000; the defendant giving to the plaintiff a separate agreement, to "reassign" on payment of the loan and interest. On a bill to obtain a reassignment alleging that such loan had been repaid, the Court [SPRAGGE, C.] made a decree for redemption in favour of the plaintiff with costs; the defendant having set up a claim to be entitled to hold the security as absolute purchaser thereof.

Livingston v. Wood, 515.

ACCOUNT.

See "Sale of Business."

ADDING TO CONSIDERATION OF DEED BY PAROL EVIDENCE.

See "Specific Performance," 1.

ADMINISTRATION SUIT UNNECESSARILY BROUGHT.

Where one of several persons beneficially interested under the will of a testator, without making proper inquiries into the conduct and dealings with the estate by the executors, instituted proceedings against them, and groundlessly charged them with misconduct, causing thereby much unnecessary costs and trouble, the Court being satisfied with the conduct of the executors,

refused to take the further administration and winding up of the estate out of their hands; and it being shewn that all the other persons interested in the estate were satisfied with the conduct of the executors, ordered the plaintiff to pay the costs of the suit.

Rosebatch v. Parry, 193.

ADULTERY.

See "Alimony," 1.

AFFIDAVIT EVIDENCE.

See "Sale for Taxes," 1.

AGREEMENT IN LIEU OF DOWER.

See "Dower," 1.

ALIENATION.

See "Fire Insurance," 5.

ALIMONY.

In consequence of a wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, and locked the door.

Held, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony; independently of the fact that during such exclusion of the wife the husband entered into a formal marriage with another woman, with whom he continued to live until after the institution of this suit; and,

Quære, whether adultery *per se* by the husband is not a ground entitling the wife to alimony.

Howey v. Howey, 57.

AMENDMENT.

Although according to the ruling in *Adamson* v. *Adamson*, ante vol. xxv, page 550, a plaintiff will not be allowed to amend so as to set up a title acquired after the filing of the bill, yet

where by error in the conveyance the *west* instead of the *east* half of the lot was conveyed, it would seem [per PROUDFOOT, V. C.] that it would not be any infringement of that rule to allow an amendment setting up the fact that since the filing of the bill the error had been corrected by a new conveyance, and making the necessary amendments in the bill in accordance therewith. But the bill having been amended in one part of it in this respect, leaving the erroneous description of the land in the earlier part of it.

The Court, on rehearing, *held* that the suit had not been instituted with regard to the east half so as to prevent the defence of the Statute of Limitations being set up, and affirmed the decree of BLAKE, V. C., as reported ante volume XXV, page 552.

Dumble v. Larush, 187.

ANNUITY, ARREARS OF.

On the 19th October, 1866, the owner of real estate granted an annuity thereout of $40, with power of distress in case of default. Only one year's annuity was paid, and in October, 1877, the grantor, by writing, acknowledged the amount then due. On a bill filed by the annuitant claiming ten years' arrears, with interest thereon :

Held, that the power of distress was not such a penalty as took the case out of the general rule that interest will not be allowed on arrears of annuity ; and that notwithstanding the written admission by the grantor of the amount due under the deed, the annuitant could recover only six years' arrears without interest, as against a *puisne* incumbrancer who had duly registered his conveyance.

Crone v. Crone, 425.

ANNUITIES PAYABLE OUT OF RENTS, &c.

See "Will," &c., 5.

ANSWERS BY APPLICANT FOR INSURANCE.

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See "Fire Insurance," 1.

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See "Will, Construction of," 1.

BOND, ASSIGNMENT OF.

See "Absolute transfer or Security."

BY-LAW.

The by-laws of an association provided that notice of a meeting for the expulsion of a member must be given:

Held, that a notice of "a meeting to take into consideration the conduct of a member" was not a compliance with such provision, but should state distinctly what the object of the meeting was.

Cannon v. The Toronto Corn Exchange, 25.

[Affirmed on Appeal, 7th March, 1830.]

See also, "College Council," 1.

—— MUNICIPAL.

See "Crown Lands," 2.

—— OF COLLEGE COUNCIL.

See "College Council," 1.

CHATTELS OR FREEHOLD.

See "Fixtures."

COLLATERAL SECURITY.

See "Mortgage," &c., 4.

COLLEGE COUNCIL.

1. Where a member of a College Council complains that he has been improperly expelled from the Council, the Court of Chancery, under the Administration of Justice Act, has jurisdiction in a proper case to decree relief: that Act giving jurisdiction to the Court of Chancery "in all matters which would be cognizable in a Court of law;" although the remedy in such a case in a Court of law would be sought by *mandamus*.

Marsh v. Huron College, 605.

2. One of the by-laws of an incorporated college provided, amongst other things, that special meetings of the Council might be convened as the President should deem necessary, or upon the requisition of any three members of the Council, the notices of which special meetings should specify the business to be brought forward, and that no business should be introduced at any special meeting in addition to that specified in the notice. The plaintiff, as one of the members of the Council, having acted in such a manner as in the opinion of the President merited his dismissal or expulsion from the body, a meeting for that purpose was ordered to be convened by the President, and notices were accordingly sent to all the members of the Council stating that a meeting would be held "for special business," but omitting to say what such special business was. At the meeting so called, at which the plaintiff was present, a resolution was unanimously adopted, by the other members of the Council present, expelling the plaintiff from the Council.

Held, that the notice calling such meeting was invalid, because it did not specify the business intended to be brought before the Council; and a decree was pronounced declaring that such resolution of expulsion had been illegally and improperly passed, and that the plaintiff continued to be and was a member of the Council. But the Court [SPRAGGE, C.] being of opinion that the plaintiff had wittingly and designedly left the members of the Council under a false impression, as to his conduct in regard to the matters which had been the subject of inquiry before the Council—if he did not designedly produce such impression—refused the plaintiff the costs of the proceedings. *Ib.*

3. The fact that the plaintiff had attended a meeting which had been illegally called, and had entered upon a defence before the Council, did not preclude him from afterwards filing a bill impeaching the proceedings as irregular and invalid. *Ib.*

4. The wrong (if any) complained of being a personal wrong on the part of the members of the Council who voted for the resolution:

Quære, if costs were adjudged to the plaintiff, whether they should not be paid by those members. *Ib.*

5. The reasons for which alone members of a municipal body may be disfranchised, do not apply to the members of the governing body of an educational institution whether incorporated or not. *Ib.*

6. *Quære*, what would form a sufficient ground for the expulsion of a member of such a body as the Council of Huron College. *Ib.*

COMMISSION.

See "Executors," 3.

COMPENSATION.

See "Specific Performance," 3.

CONCEALED INCUMBRANCE.

See "Sale of Land," 1.

CONDITION ON POLICY.

See "Fire Insurance, 6.

CONTRACT OF HIRING.

The plaintiff induced the defendant to enter into a written agreement to employ him for six years as manager of a tannery, representing himself to the defendant to be a practical tanner; and that he had a secret process of tanning which he would impart to the defendant and to be used in the tannery, but which he was not to use after their agreement should be terminated; and the defendant was to have the right to stop the business at the end of any one year if the net profits did not amount to $3,000; the defendant to furnish capital to stock and work the the tannery to its fullest capacity. After carrying on the work to a limited extent for about seven months the defendant gave notice to the plaintiff discharging him from being manager of the tannery, assigning, amongst others, the following reasons: (1) that the plaintiff was not a practical tanner; (2) not using the secret process, and not disclosing it, and that it was fictitious; (3) that it would be ruinous to the defendant to continue plaintiff as manager; and (4) deceit as to process, and as to alleged profits,

and misrepresentation of facts in connection with the tannery. The evidence given bore out the grounds of objection stated in such notice. The Court, under these circumstances, dismissed, with costs, a bill filed to compel the defendant to carry out the agreement, or for payment of the damages alleged to have been sustained by the plaintiff by reason of the refusal to continue the engagement.

Blake v. Kirkpatrick, 86.

The objection that the defendant never asked knowledge of the alleged secret process to be imparted to him was no answer to his alleging that as a ground of dismissal; though had he been proceeding against the plaintiff for not communicating such secret to him, it might have been necessary to shew a demand therefor. *Ib.*

CORPORATE SEAL.

See "Specific Performance," 3.

CORPUS.

See "Will," &c., 5.

COSTS.

The plaintiff by his bill did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the Court could not grant. The Court, on pronouncing a decree, refused costs to either party.

Clemow v. Booth, 15.

See also "Absolute Transfer or Security."
"Administration Suit Unnecessarily Brought."
"College Council," 4.
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"Legible Writing."
"Specific Performance," 2.
"Varying Written Instrument by Parol."
"Voluntary Grantee."
"Will, Construction of," 12.
"Will, Costs of Contesting."

COUNTY JUDGE.

See "Practice," 3.

[ON SALE BY VENDOR, TO PAY OFF INCUMBRANCES.]

A vendor of lands, which were subject to incumbrances created by himself, covenanted with his vendee to pay off the incumbrances, and discharge the lands sold from them. The vendee subsequently mortgaged the lands to the plaintiffs, with the usual mortgagor's covenants. In a suit by plaintiffs seeking (amongst other things), to have the lands relieved of the incumbrances:

Held, that the plaintiffs were entitled to the benefit of the vendor's covenant, and he was ordered to discharge the incumbrances, and pay the costs of the incumbrancers.

Clark v. Bogart, 459.

Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to *S.* who, when he took his conveyance, was not aware of the plaintiffs' mortgage, but it was registered against the parcels embraced in it, though not against the other parcels.

Held, (1.) That the plaintiffs were entitled to require as between them and *S.* that the parcel conveyed to the latter should be resorted to for the satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2.) That the registration of the prior mortgage against the parcel bought by *S.* was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that *S.* was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Ib.*

CREDITOR'S SUIT AGAINST MORTGAGEE.

The plaintiff claimed to be a creditor of *O.*, and as such filed a bill alleging that *O.* was mortgagee or otherwise entitled to some interest in the lands of *M*, and that *O.* was about to dispose of his interest therein in order to defeat the claim of the plaintiff, and prayed an account of what was due by *O.*, and to restrain *M.* from paying *O.*, and also an order for *M.* to pay plaintiff. At the hearing the Court [SPRAGGE, C.] made a decree referring it to the Master to ascertain what was due by *O.* to the plaintiff, and if anything found due that *O* should be ordered to pay the amount due to the plaintiff, with costs; but dismissed the bill, as against *M.*, with costs.

Menzies v. Ogilvie, 456.

CROWN LANDS.

1. The R. S. O. ch. 25, sec. 26, declares that any mortgage or lien created by the nominee of the Crown on lands for which the patent has not issued, shall in law and equity have the same force and effect, and no other, as if letters patent had before the execution of such instrument, been issued in favour of the grantor:

Held, (1) that under this provision a mortgagor and mortgagee had all the rights and liabilities as between themselves that they would have had, had the freehold been actually vested in the mortgagor; (2) that the mortgagor was entitled to set up the defence of the Statute of Limitations against any one claiming under such mortgage; (3) that the fact of the mortgagee having exercised the power of sale contained in his mortgage had not the effect of stopping the running of the statute; and (4) that the fact that the Commissioner of Crown Lands before the issuing of the patent had made a memorandum in his "ruling" upon the claims of the parties that the sales made to them were "not intended to cut out the right, if any, Dr. *Dickinson* may have as such mortgagee," had not the effect of estopping the mortgagor or those claiming under him from claiming the benefit of the statute. [SPRAGGE, C., dissenting.]

Watson v. Lindsay, 253.

2. A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. Neither can parties in possession of Crown lands before patent issued dedicate any portion of the same: parties so in possession, however, may so far

bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained.

Rae v. Trim, 374.

DEDICATION.

See "Crown Lands," 2.

DEED FROM FATHER TO SON.

See "Voluntary Grantee."

DEED OF SEPARATION.

See "Separation Deed," 1.

DEFENCE BEFORE COUNCIL.

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DEFICIENCY.

[LIABILITY OF PARTY FOR.]

See "Fraudulent Representations," &c.

DEFICIENCY OF ASSETS.

[OF INSURANCE CO.]

See "Mutual Fire Insurance Co."

DELIVERY OF KEYS OF HOUSE.

See "Vendor and Purchaser," 1, 2.

DELIVERY OF POSSESSION.

See "Vendor and Purchaser," 4.

DEMURRER.

1. An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge;" and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the foot-way of the said bridge at their will and pleasure on the payment of lawful tolls," or preventing them from using in the same manner the foot-paths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated in the Act of Incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge so far as it was built, and which had been so built in accordance with the provisions of their Act of Incorporation, the Court [BLAKE, V.C.,] allowed a demurrer for want of equity; but, in so far as the information shewed an unlawful exclusion of the public from the use of the foot-paths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party.

The Attorney General v. The International Bridge Co., 37.

2. To such an information a railway company who had become lessees of the bridge were held to be proper parties. *Ib.*

3. The plaintiffs were execution creditors of one of two copartners in trade, both of whom had joined in an assignment by way of mortgage of all their goods and chattels, and also certain lands, comprising all the real estate owned by the judgment debtor, as an indemnity to the assignee against an incumbrance on lands sold and conveyed by both parties to the assignee. The bill charged that such assignment was executed in fraud of creditors, as by reason of the joint occupation of the partners the sheriff was unable to ascertain what portion of such chattels belonged to the execution debtor, and prayed a declaration that such assignment was void as against the plaintiffs, and that such portion of the goods and lands as was not required to indemnify the assignee might be sold, and the proceeds applied in payment of the plaintiffs' claim. A demurrer by the execution debtor for want of equity was allowed, with costs.

Bank of Rochester v. Stonehouse, 321.

See also "Fraudulent Conveyance," 2, 4.
"Multifariousness."
"Sheriff's Fees," 2.
"Pleading," 2, 4.

DISCREDITING PARTY BY HIS OWN EVIDENCE.

See "Fraudulent Representations," &c.

DISCRETION GIVEN BY WILL.

See "Executors," 1.

DOWER.

1. The widow and heir joined in creating a term in the descended lands for ten years, and in the lease it was stated that it had been mutually agreed between the parties thereto that one-third of the rent should be paid to the widow in each year, which was accordingly done during the currency of the term:

Held, that this had the effect of preventing the lapse of time being set up as a bar under the statute to the widow's right to dower.

Fraser v. Gunn, 63.

2. The testator by his will, executed in 1840, gave the annual income of all his real estate to his wife, for the support of herself and children during widowhood; and after death or marriage, and the youngest child attaining majority, the property was to be divided. He appointed his widow and eldest son executrix and executor, both of whom continued to reside, with the other members of the family, in the homestead, and she, with the consent of her son, received the rents of the realty, which she applied in the support of the children for more than twenty years after the death of the testator, without having had dower assigned to her, or having made any demand therefor. Some of the lands had been acquired by the testator after the execution of the will, and as to them there was an intestacy. A bill having been filed by one of the heirs, seeking an account of rents received by the widow, and a partition of descended lands:

Held, on rehearing [in this affirming the order of PROUDFOOT, V. C., reported ante vol. xxv p. 293] that the widow was not bound to elect between the provision made for her by the will and her dower, and that notwithstanding the lapse of time she was entitled, out of the devised lands, to retain one-third of the rents in respect of past and future dower; but that, as to the descended lands, the remedy was barred by the Statute of Limitations; that the claim made by the widow in her answer, and awarded her by the decree, was a pursuing the remedy so as to bring the case within the statute, although as to the rents of these lands received, the widow was entitled to set off against

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DURANTE VIDUITATE.

[BEQUESTS TO WIDOW.]

DYING WITHOUT ISSUE.

EASEMENT.

1. Where a person has enjoyed an easement by having windows overlooking the lands of an adjoining proprietor for any period, even one day, over nineteen years, he cannot be deprived thereof unless he subsequently submits to an interruption of such easement for a period of twelve months.
Burnham v. Garvey, 80.

2. The propriety of such a rule in the towns of this province remarked upon and questioned. *Ib.*
[But see 43 Vict. ch. 14, sec. 1, abolishing such prescriptive rights.]

ELECTION.

ENHANCED VALUE OF ESTATE.

ENTRY IN BUSINESS BOOKS.

EQUITY OF REDEMPTION.

[SALE OF]

See "Mortgage," &c., 5.

ERRONEOUS DESCRIPTION.

The premises intended to be conveyed by a deed were described therein as 180 acres of the east halves of two lots, "commencing at the front east halves of said lots, taking the full breadth of each half respectively, and running *Northwards*, so far as required to make ninety acres of each half lot:"

Held, that "Northwards" might be rejected, being evidently a mistake for westward.

Ferguson v. Freeman, 211.

ERRONEOUS STATEMENTS.

See "Unpaid Valuator," 1.

ESTATE TAIL.

See "Will," &c., 6, 10.

ESTOPPEL.

See "Crown Lands," 1.
"Judgment," &c.

EVIDENCE.

A cheque of the plaintiff's, when produced at the hearing, had written on it, "in full of all his [the defendant's] claims for notes or otherwise," and which words the plaintiff swore were on the cheque when sent to the defendant, which he denied, however. Four crosses were on the face of the cheque, and some initial letters in the margin, and these the plaintiff stated were the initials of a clerk in the bank, whom he had requested to initial the words so introduced: The Court [SPRAGGE, C.,] refused to receive this as evidence of a receipt in full, in the absence of the bank clerk, who should have been called as a witness.

Livingston v. Wood, 515.

See also "Vessels rights and liabilities of Mortgagees and part owners of," 3.

EVIDENCE OF AGREEMENT.

See "Settlement on Wife," 1.

EVIDENCE OF INDEBTEDNESS.

See "Settlement on Wife," 2.

EVIDENCE OF WARRANT.

See "Sale for Taxes," 1.

EXCLUSION.

See "Alimony," 1.

EXECUTION CREDITOR.

See "Demurrer," 3.

EXECUTORS.

1. The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in United States securities. By his will he named one resident of the United States (his brother-in-law), and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks, or securities of any bank incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares, and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said *W. E. C.*, my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and re-investment thereof, or the permitting of the same to be and remain as they are, until maturity thereof,

and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby."

Held, that this did not authorize the re-investment of moneys realized on the sale, or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator.

Burritt v. Burritt, 143.

2. Executors may be deprived of their costs where they have improperly managed the affairs of the estate, though not guilty of any wilful misconduct; and this rule was acted on where the personal representative of one of the executors was a party to the suit, though he had not acted in the management of the estate; his testator's estate being ample.

Kennedy v. Pingle, 305.

3. A testator gave to each of his executors a sum of $40 "in remuneration for their trouble." In carrying on the affairs of the estate one of the executors, with the knowledge of his co-executor, and without any remonstrance from him, used in his business $200 of the estate, and the other had taken a mortgage, in his own name, for $900 belonging to the estate, without executing any declaration of trust in respect thereof. Under these circumstances the Court refused to the surviving executor, and to the executor of the deceased executor, their costs of the suit; the Court, however, being satisfied that neither of them had been guilty of any wilful misconduct, did not charge them with costs, and allowed them the amount of their commission; but refused to allow them to receive the legacies given by the will, which were expressed to be in remuneration for their trouble. *Ib.*

4 A testator bequeathed a sum of money to his executors to invest for the benefit of his brother, and failing to find his brother, the executors were to pay the fund to his sister *M. C.* The executors placed the amount out at interest on the bond of the borrowers, and subsequently a portion of the loan was paid over to one of the executors, who invested the same in his business, and sought to defeat a suit to compel payment of the amount at the instance of the personal representative of *M. C.*,—who had become entitled,—by setting up the Statute of Limitations, more than ten years having elapsed since *M. C.* became entitled to the legacy. The Court [BLAKE V.C], under the circumstances, considered that the money had been set apart to answer the trusts of the will, and was thus impressed with a trust in the hands of the executors. and that the claim, therefore, was not barred by the lapse of time.

Cameron v. Campbell, 307.

See also "Practice," 6.

EXONERATION.

See "Covenant by Vendor to pay off Incumbrances."

EXPULSION OF MEMBER.

See "By-Law."
"Incorporated Society."
"College Council," 2, 5, 6.

FALSE REPRESENTATIONS.

See "Unpaid Vaulator."

FARM CROSSING.

See "Specific Performance," 1.

FATHER AND SON.

See "Fraudulent Conveyance," 2.

FERRY.

[CONSTRUCTION OF LICENSE OF RIGHTS OF.]

The license from the Crown of a right of ferry was "between the town of B. to A." *Held*, that the phraseology, though inaccurate and not free from doubt, was sufficient to warrant the Court in assuming that between the one place and the other was meant.

Jellett v. Anderson, 411.

[CONSTRUCTION OF LEASE OF.]

Under this license the town of B. made a lease to the plaintiff, the franchise being "to ferry to and from the town of Belleville to Ameliasburg," Ameliasburg being a township opposite Belleville, running in a westerly direction to the head of the waters of the Bay of Quinte, a distance of ten or twelve miles; the lease providing for one landing place on each side. *Held*, that this, taking in connection with the Act relating to ferries,—C. S. U. C. chapter 43, section 10,—was a sufficient grant to the plaintiff of a right of ferriage to and from the two places named; and the defendant having started a ferry some two miles west of Belleville, running to a point nearly opposite, in the township of

Ameliasburg, was such a disturbance of the plaintiff's franchise as entitled him to a declaration of the right to the exclusive use of the ferry, together with an account of profits made by the defendant, and the costs of the suit.

Jellett v. Anderson, 411.

FIDUCIARY RELATIONS.

See "Legal Adviser and Client."

FIRE INSURANCE.

1. A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance when effected. Therefore where a mortgagor enters into such a covenant it is not necessary, in the interest of the mortgagee, that an assignment of the policy or interim receipt should be actually made; it is sufficient if the insurers in case of loss have notice of the fact before settling with the mortgagor; and if after being notified of the rights of the mortgagee they pay over the insurance money to the mortgagor or a transferee of the receipt or policy, they do so at their peril; and such payment will be no answer to a suit at the instance of the mortgagee.

Greet v Citizen's Insurance Co., 121.

2. In effecting insurances the appellant is bound to make true answers to the questions put by the company; if he does not, and misrepresents the risk in any way, it will invalidate the policy. *Ib.*

3. The owner of a mill had received an anonymous letter threatening to burn the mill, which was attributed to a worthless drunken character who had made threats against the owner, and who was in the habit of threatening people, but whose threats no one heeded, so that the owner took little or no notice of either the threats or the letter; and on applying for insurance one of the questions put by the company was, "Have you any reason to believe that your property is in danger from incendiaries," and by another company, "Have you any reason to suppose, &c." and the answer to each was in the negative.

Held, not an untruthful answer, or such a misrepresentation of the risk as could vitiate the policy. [Reversed on Appeal, 25th September, 1880.]

Where the question put by a company was, "Is there any incendiary danger threatened or apprehended." and the answer to that was also in the negative;

Held, that this was such a misrepresentation as avoided the

policy, although the answer was given with no fraudulent intention, and in the honest belief that no such danger did exist. *Ib.*

4. In the application for insurance prepared by the company there was inserted, in very small type, a notice that the estimated value of personal property and of each building to be insured "*must be stated separately.*" &c., which had escaped the notice of the applicant, and such separate valuations, &c., were not given. The Court being of opinion that although this provision might not have been framed in order to elude observation, it was certainly calculated to elude observation, refused to give the insurers the benefit of it, if under the circumstances it would have operated in their favour. *Ib.*

5. By a condition in a policy of insurance additional to the statutory conditions, it was provided, that "When property insured * * or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company indorsed hereon, or if the property hereby insured shall be levied upon, or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company."

Held, [affirming the decree of PROUDFOOT, V. C.,] (1) that such condition was not just or reasonable, and that it was not binding; and (2) that the fourth statutory condition did not apply to an alienation by way of mortgage, but only where there was an absolute transfer of the property.

Sands v. The Standard Ins. Co., 167.

Quære, whether the additional condition in this case was so printed as to comply with the statute.—See judgment of PROUDFOOT, V. C., ante volume xxvi, at page 115. *Ib.*

7. In answer to the questions, "(1) Are the premises occupied by owner or tenant? (2) If by tenant, give name of owner." a party seeking to effect an insurance against fire answered, "(1) Tenant—as boarding house. (2) Applicant." And another question (the 11th) was: "If the applicant is the owner of the said building—state the value of the building and land; and he answered $600. In fact the applicant did not own the land, having a lease of it which had only a short time to run, with the right to remove the building the subject of insurance.

Held, that this was such a misrepresentation of the interest of the applicant as rendered the policy void under the first of the statutory conditions.

Compton v. The Mercantile Ins. Co., 334.

8 The plaintiff was insured by the defendants under an interim receipt, which stated that it was "subject to approval at the head office, and to the conditions of the policy. Unless previously cancelled this receipt binds the company for thirty days from the date hereof, and no longer."

Held, that the conditions of the policy applied to the insurance during the thirty days, and included any variations of the statutory conditions adopted by the defendants. *Ib.*

FIXTURES.

On rehearing the Court varied the decree as reported *ante* volume xxvi., page 618, by declaring the plaintiff entitled to restrain the removal of the machinery in question, by virtue of a mortgage prior to that in favour of the plaintiff upon the machinery, and which prior mortgage had been, before the institution of this suit, assigned to the plaintiff; leaving the rights of the parties in respect of the subsequent charges on the property to be disposed of either on appeal or on further directions, or on leave reserved.

Dewar v. Mallory, 303.

FOREIGN STATE.

[DEVISE TO.]

See "Will," &c., 7, 8.

FRAUD ON CREDITORS.

See "Settlement on Wife," 1.

FRAUDULENT ASSIGNMENT.

See "Demurrer," 3.

FRAUDULENT CONVEYANCE.

1. Where a suit is instituted by a judgment creditor, who has not placed an execution against lands in the hands of the sheriff, in order to set aside a deed as fraudulent, he must sue on behalf of all creditors of the defendant, and the fact that the deed was made by a third party in consideration of money paid by the debtor does not alter the rule of pleading in this respect.

Morphy v. Wilson, 1.

2. A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a distance, it being agreed between them that he should remit to his father from time to time so much of his earnings as he did not require for his support, and that the same should be repaid by the father after the son attained majority, as the son should want it. Accordingly remittances were alleged to have been made to his father, which, on the son coming of age, amounted to $600 and upwards, when he found his father was unable to repay his advances. It was arranged that the son should make further advances, and that unless the father paid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement made in 1877, it was ascertained that the father's indebtedness amounted to $1,600 and upwards, which it was then agreed should be the consideration for the purchase of the equity of redemption of the father in the premises, the conveyance of which was impeached by a judgment creditor of the father under 13 Elizabeth.

The Court being satisfied of the *bona fides* of the dealings between the father and the son, and that the sums claimed had really been advanced (although the only evidence of the dealings was that of the father and son) dismissed the bill; but, under the circumstances, without costs.

Jack v. Greig, 6.

3. One of the members of a trading firm, in March, 1875, effected a voluntary settlement on his wife of land on which he had erected a dwelling house at an expense of $3,000, and in July following the firm were compelled to effect a compromise of their liabilities, and finally, in February, 1877, became insolvent. The plaintiff was appointed their assignee, and thereupon filed a bill impeaching the settlement as having been made, while insolvent, with a view of defrauding creditors. There was no evidence that any debt due at the time of making the settlement was unpaid at the date of the insolvency. Under these circumstances the Court, on rehearing, reversed a decree of PROUDFOOT, V. C., directing the payment of the plaintiff's claim out of the estate remaining after the payment of two mortgages created by the wife and repaying to the wife what, if anything, she had paid on account of the purchase of the land, and dismissed the bill without prejudice to the right to institute proceedings to obtain relief out of any separate estate of the wife

Darling v. Price, 331.

4. *M.* had been carrying on business in partnership, and in October, 1876, purchased out his partner's interest for $1,332. About this time *M.* was paying his addresses to the defendant whom he led to believe, as he himself did, that he was doing a

flourishing and profitable business, and during the negotiations for their marriage the defendant's father proposed to *M.* that he should erect a house he was speaking of building, on a lot of his (the father's), and that he would convey the same to his daughter as a marriage dowry, to which *M.* assented. The marriage took place in November of that year, and during the following year *M.* erected a house on the lot as proposed, at a cost of about $900, and in fulfilment of the arrangement the father conveyed the lot to his daughter. In January, 1880, *M.* became insolvent and a bill was filed by the assignee impeaching the transaction as a fraud upon creditors under the 132nd section of the Insolvent Act of 1875. The Court [PROUDFOOT, V. C.] thought that the evidence did not establish any fraudulent intention on the part of *M.*, and distinctly negatived any knowledge by the defendant and her father when entering into the arrangement of any such intention; and that, under the circumstances, the transaction could not be impeached under the Statute of 13th Elizabeth, and dismissed the the bill, with costs.

Davidson v. McGuire, 483.

5. Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him, if his claim is left unsatisfied from suing on the covenant in the mortgage, and proceeding to a sale under execution or applying to this Court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim.

Parr v. Montgomery, 521.

6. *P.* created three several mortgages on separate portions of his estate, in all about 140 acres, estimated as worth $6,000, subject to incumbrances amounting to $3,500 and interest. One of the mortgages was in favour of the defendant *M.*, who subsequently acquired the interests of the other two mortgagees. After the creation of these mortgages, *P.* executed a deed of trust of the whole property in order to defeat a claim of title set up to 10 acres by one *S.* Default was made in payment of *M.'s* mortgage who instituted proceedings at law and recovered judgment on which he sued out execution and under it the Sheriff (after the defendant *M.* had so acquired the other mortgages) proceeded to a sale of the property, which he offered in three distinct parcels, and *M.* bid for and became the purchaser of all at sums amounting in the whole to $20. The *cestuis que trust* thereupon filed a bill to redeem, alleging that the sale to *M.* had been at a gross undervalue, and praying to have the same set aside; the Court, however, refused the relief asked with costs, being of opinion that the deed of trust was fraudulent, and that the price realized was large, considering that it was a Sheriff's sale. *Ib.*

FRAUDULENT REPRESENTATIONS.

[AS TO VALUE OF LANDS.]

W. conveyed to his nephew, *E.*, for an alleged consideration of $1,200, 50 acres of land, and afterwards these parties applied to the plaintiff the appraiser of a Loan Company, for a loan of $1,000 to pay, as was alleged, upon the purchase money, *W.* asserting that the property was well worth $2,200 cash, or $2,500 on a fair credit. The plaintiff, relying on the statements of *W.*, certified the value accordingly and the loan was effected. The land was not worth the $1,000 advanced, and sold for $800, leaving a balance due the Company of nearly $500, which they required the plaintiff to pay, and which he did settle with the company for, considering himself liable, and obtained from the company an assignment of their securities. The Court [PROUDFOOT, V. C.,] being satisfied that the whole transaction was a fraudulent scheme to obtain the loan upon the certificate of the plaintiff, ordered both defendants to make good the deficiency, and pay the costs of the suit; holding that the plaintiff was entitled to take an assignment of the claim as against *W.* to indemnify himself; that he could sustain this suit though he had only secured the money, without paying it; that he had an independent right of suit against *W.* for the misrepresentation, and that it was unnecessary that the denial in the answer should be met by more than the plaintiff's own evidence, for the defendant had been examined, and had furnished sufficient ground for discrediting himself.

Moberley v. Brooks, 270.

FREEHOLD OR CHATTELS.

See "Fixtures."

GARNISHEE.

See "Creditor's Suit against Mortgagee."
"Practice," 3.

GOVERNMENT LANDS.

See "Railways."

GROUND FOR RESCINDING CONTRACT.

[OF HIRING.]

See "Contract of Hiring."

GROWING CROPS.

See "Specific Performance," 3.

GUARANTEE CAPITAL FUND.

See "Mutual Fire Insurance Co.,"

HIGHWAYS.

See "Crown Lands," 2.

HOMESTEADS' ACT.

By the R. S. O. ch. 24, free grants of lands for homesteads are only authorized to be made to men.

Rogers v. Lowthian, 559.

HUSBAND AND WIFE.

See "Pleading," 2.

IMMEDIATE SALE.

Although by the general rule and course of proceeding in mortgage cases the mortgagor is entitled to six months to redeem, before a sale is ordered, the Court will, under special circumstances, direct an immediate sale of the property, even as against the infant heirs of the mortgagor.

Swift v. Minter, 217.

IMPROVEMENTS MADE UNDER MISTAKE OF TITLE.

1. The plaintiff being in possession of property—a flouring mill—of which he believed his wife to be owner in fee as heiress of her father, expended upon it, about $3,253. After her death the father's will was discovered, which gave her a life estate only.

Upon a reference to the Master, at London, to ascertain the amount of enhancement in value of the property, that officer, on the evidence adduced, found that its value at the death of the testator was $2,700, and that the value at the date of the report was $4,500:

Held, that he had, under the circumstances, properly found the enhanced value of the estate by reason of such expenditure to be

$1,800, not $1,300—although upon a sale under a decree of the Court the property had realized $4,000 only—and further, that the plaintiff was entitled to interest on such enhanced value from the time the money was expended.

Fawcett v. Burwell, 445.

2. The Master in ordinary, on appeal from the Master at London thought the plaintiff had been charged with rent on the unimproved value; but PROUDFOOT, V. C., on appeal, reversed this finding, thinking it against the weight of evidence, which he had the same opportunity of judging of as the Master in Ordinary, who had not seen the witnesses. *Ib.*

3. *Semble,* that a forced sale for cash is not a proper mode of determining the amount of the enhancement in value of an estate which has been improved by a person in possession under a *bonâ fide* mistake of title. *Ib.*

See also "Mistake of Title."
"Mortgage," &c., 3.

INCENDIARISM.

See "Fire Insurance," 3.

INCORPORATED SOCIETY.

The Toronto Corn Exchange was empowered to pass by-laws for the proper government of the body. One of the by-laws enabled the society to expel any of its members for flagrant breaches of the rules of the body, and a refusal to submit a question arising between members to arbitration was declared to be a flagrant breach thereof. One member claimed against another (the plaintiff) a balance of $1.06 for purchase money of grain, a sum of $397 for freight on the same grain, and which, it appeared, the purchaser had been compelled to pay, and did pay under protest, before obtaining the grain, and which amount the purchaser insisted the plaintiff was bound to pay; and also a sum for costs incurred in an action brought by the purchaser to recover back the freight so paid. The first item the plaintiff paid, the second he admitted and offered to arrange, but disputed the last, and refused to arbitrate as to any other item of the account than the last, whereupon the council of the defendants passed a vote of expulsion against the plaintiff, and did expel him from the benefits of the association. On a bill filed to set aside such order of expulsion, and reinstate the plaintiff in his rights of membership, the Court

granted the relief prayed, with costs; and, *Quære*, whether either of the items was such a claim as the statute contemplated being the subject of a reference between members of the association.

Cannon v. The Toronto Corn Exchange, 23.

[Affirmed on Appeal, 7th March, 1880.]

INCORRECT ANSWERS.

See "Fire Insurance," 7.

INDEPENDENT ADVICE.

See "Voluntary Grantee."

INFANTS.

See "Immediate Sale."
"Practice," 5.

INSOLVENCY.

See "Fraudulent Conveyance," 3, 4.

INTEREST ON ANNUITY.

See "Annuity, arrears of."

INCUMBRANCES.

[COVENANT AGAINST.]

See "Sale of Land," 1.

INJUNCTION.

See "Vessels, Liability of Owners of."

INSUFFICIENCY OF NOTICE OF MEETING.

See "By-Law."
"College Council," 2,3.

INSURANCE AGENT

The agent of an insurance company cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company. And the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction and approval of the company.

White v. The Lancashire Insurance Co., 61.

INTEREST.

[ON MONEY EXPENDED ON IMPROVEMENTS.]

See "Improvements," &c., 1.

INVALIDATING POLICY.

See "Fire Insurance," 7.

JUDGMENT BINDING ON PARTIES,

A judgment in favour of the plaintiff in an action for trespass to lands upon pleas (amongst others) of lands not plaintiffs and *liberum tenementum*, is not a complete estoppel, preventing the defendant in another suit, from questioning the plaintiff's title to any part of the lands. The judgment is only an estoppel with regard to the title of that portion of the land upon which it had been shewn that the defendant had trespassed.

Hunter v. Birney, 204.

JURISDICTION

See "College Council." 1.

LAPSE OF TIME.

See "Executors," 4.

LAPSED LEGACY.

See "Will, Construction of," 14.

LEASE BY CESTUI QUE TRUST TO TRUSTEE.

"See Trust," &c., 1.

LEGACIES.

See "Executors," 3.

LEGAL ADVISER AND CLIENT.

The defendant applied to the plaintiff, who was acting as inspector and legal adviser to a Loan Society in one of the rural districts—he being a barrister (not an attorney) at-law, though carrying on business as a conveyancer or scrivener—to obtain a loan of $200 from such society, to be secured by a mortgage on, together with other land, property already held by them for $600. The plaintiff told the defendant that he could not recommend the security to his company, and that he had better apply elsewhere for the money. One *B.*, who, as the defendant had informed the plaintiff, held a mortgage on the same lands, afterwards applied to the plaintiff to sell his mortgage to the company. The company did not buy, the plaintiff having written to the manager that the security was insufficient according to the rule of the company; but the plaintiff afterwards purchased the security at a heavy discount, and about fifteen months thereafter, nothing having been paid on the mortgage, proceeded to enforce, by means of a foreclosure suit, the full amount of principal and interest secured thereby. The plaintiff, it was shewn, had previously acted for the defendant in the transmission of money to the company for the interest on the mortgage held by them. The Court [BLAKE, V.C.] considering that under the circumstances stated, the relation of legal adviser and client had been created between the plaintiff and defendant, *held*, that the plaintiff could recover only the amount advanced by him on receiving the assignment of the security to himself, with interest thereon from the date of his purchase; the discount or rebate allowed to him on making the purchase enuring to the benefit of the defendant, who was liable to pay the plaintiff the costs of the suit subsequent to decree, not up to the hearing.

Kilbourn v. Arnold, 429.

LEGIBLE WRITING.

Where affidavits used on a motion were badly written, scarcely legible and difficult to decipher, the Court refused the plaintiff all costs connected with their preparation, although the costs of the suit were given him.

Burnham v. Garvey, 80.

LESSOR AND LESSEE.

A lease, under the Short Forms Act, contained a covenant on the part of a lessee to erect a dwelling house on the premises

MARSHALLING.

See "Covenant by Vendor to pay off Incumbrances."

MASTER AND SERVANT.

See "Principal and Agent."

MASTER.

[CERTIFICATE BY—AFTER REPORT.]

See "Practice," 1.

MATERIALS.

[LIEN BY PARTY FURNISHING.]

See "Mechanics' Lien," 2.

MECHANICS' LIEN.

1. In order to preserve the lien which the Mechanics' Lien Act creates in favour of a contractor performing work on a house or other building for the owner, it is necessary to register the same during the progress of the work, and as soon as the claim arises, or it may be postponed to a mortgage created subsequently, but registered prior to such lien. [PROUDFOOT, V.C., dissenting.]

Hynes v. Smith, 150,

2. The plaintiff furnished materials to *G.* for a building which *G.* had contracted to erect for the defendants. After the defendants had paid *G.* all there was due to him, and after *G.* had abandoned his contract, the plaintiff notified the defendants of his unpaid account against *G.* for such materials; and filed a bill to enforce his lien more than 90 days after the materials had been furnished.

A demurrer for want of equity was allowed, with costs; and *Semble*, that even if the bill had been filed in time, there would not have been any lien.

Briggs v. Lee, 464.

3. Remarks upon the various provisions of the Mechanics' Lien Act. *Ib.*

MERGER.

See "Mortgage," &c., 3.

MISTAKE OF TITLE.

Sometime before 1863 the defendant *M.* at the solicitation of his father and mother went into possession of 300 acres of land, 100 acres of which were the estate of the mother, and cultivated the same relying on the promise and agreement of his parents to give him a conveyance. In 1866 the mother died without having executed any deed of her 100 acres, and in October of that year the father, in the belief that he was heir to his wife, executed a conveyance to *M.* of the whole 300 acres, and which *M.* executed as grantee. The father died in 1873, and *M.* continued to reside on the property with the knowledge of his several brothers and sisters until 1877, when, owing to an objection raised by a railway company who desired to obtain a deed of a portion of the 100 acres it was discovered that the deed of 1866 had not effectually conveyed that portion belonging to the mother, and thereupon the defendant obtained a deed of quit claim from the several heirs. In 1878 a bill was filed by the heirs impeaching this deed as having been obtained by fraud, and the Court being satisfied that the same had been obtained improperly set it aside, with costs; but ordered *M.* to be allowed for his improvements, as having been made under a *bonâ fide* mistake of title he accounting for rents and profits since the death of the father; and

Held, that under the circumstances *M.* could not avail himself of the Statute of Limitations, as up to the death of his father in 1873, he was rightfully in possession under the deed from the father which stopped the running of the statute against the heirs of the mother and which, though void as a deed in fee, was effectual to convey the father's interest as tenant by the courtesy.

McGregor v. McGregor, 470.

MONEY LENT BY SON.

See "Fraudulent Conveyance." 2.

MORTGAGE

[SALE UNDER POWER IN.]

See "Crown Lands," 1.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgage premises, including a covenant

against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute.

McLennan v. McLean, 54.

2. The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due on the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the plaintiff as the person paying, or to execute a reconveyance in his favour, the plaintiff offering to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The Court, on a bill filed for that purpose, ordered the mortgagee to execute the reconveyance, and pay the costs of the suit. *Ib.*

3. The owner of lands created two mortgages thereon, and subsequently released his equity to the mortgagee entitled to priority, who afterwards bought the interest of the mortgagor at sheriff's sale, and subsequently sold the premises to several purchasers, who bought without notice of the second mortgage:

Held, that this had not the effect of merging the mortgagee's charge in the equity of redemption; and that in a proceeding by parties claiming under the second mortgage, their only right was to redeem as *puisne* incumbrancers, and that the purchasers were entitled to an inquiry as to the enhanced value of the property by reason of their improvements.

Weaver v. Vandusen—Wills v. Agerman, 477.

4. Where mortgages or other evidences of debt are assigned as collateral security by a debtor to his creditor, the latter is bound to use due diligence in enforcing payment thereof; and if through his default or laches the money secured thereby is lost, it will be charged against the creditor, and deducted from his demand.

Synod v. DeBlaquiere, 536.

[Affirmed on Appeal, 30th June, 1880.]

5. Four persons joined in executing a mortgage of their joint estate, and subsequently the interest of three of them was sold under executions at law:

Held, that the sale was inoperative; that the owner of the equity of redemption had a right to redeem; and that the purchaser at sheriff's sale, who was also the mortgagee, having gone into possession of the mortgage estate, was bound to account for the rents and profits.

Cronn v. Chamberlin, 551.

6. When a mortgagor, who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such

mortgage, he becomes surety of the purchaser for the payment of such debt, and if the same is allowed to run into default he will be entitled to call upon his assignee to pay such debt.

Campbell v. Robinson, 634.

7. *G.*, the owner of real estate executed a mortgage to the plaintiff, and subsequently created a second mortgage in favour of one *H.*, which he transferred to the plaintiff. Afterwards *G.* mortgaged the same lands to *R. D.*; and subsequently assigned the equity of redemption to them, in which assignment the mortgage to the plaintiff and that to *R.* and *D.* were recited, but the intermediate one to *H.* was not, though the amount stated as due to the plaintiff was about the sum secured by both mortgages held by him. Default having been made, a bill was filed against *G.* upon his covenants and against his assignees *R.* and *D.*, as the owners of the equity of redemption and entitled to redeem.

Held, that under these circumstances *G.* having claimed such relief by his answer, was entitled as against his co-defendants to an order for them to pay such sum as might be found due the plaintiff under his securities, and the suit having been rendered necessary by reason of the default of *R.* and *D.* in not paying the plaintiff, they were also bound to pay *G.* his costs. *Ib.*

See also "Creditor's suit against Mortgagee."
"Crown Lands," 1.
"Fire Insurance," 1, 5.
"Immediate Sale."
"Practice," 6.
"Varying Written Instrument by Parol."

MORTMAIN.

See Will," &c., 7, 8, 9.

MULTIFARIOUSNESS.

The owner of real estate died intestate, and *A.* the husband of one of his sisters, took possession of the property and appropriated to his own use the rents and profits thereof, whereupon some of the surviving brothers and sisters of the intestate filed a bill against *A.*, to which they made all the next of kin of the intestate parties, calling upon *A.* for an account of rents received, and seeking to restrain him from further intermeddling therewith. The Court [SPRAGGE, C.] on demurrer by *A.* held the bill was not multifarious.

Young v. Wright, 324.

MUNICIPAL BY-LAW.

See "Crown Lands," 2.

MUTUAL FIRE INSURANCE CO.

The defendants, a mutual insurance company, were incorporated under C. S. U. C. (22 Vict. ch. 52), and in pursuance of the powers vested in the company the directors divided the business into three separate branches, namely, "The Hydrant Branch," "The Country Branch," and "The Commercial Branch." In 1874, they passed a by-law for the purpose of raising a guarantee capital fund of $20,000; $13,100 of which was paid in, and all these proceedings were unanimously adopted, ratified, and confirmed at a general meeting of the members. In 1877, a fourth branch was established called "The Water Works Branch;" and this was also approved of at a general meeting. In carrying on the affairs of the company the losses, in all the branches, as they arose, were paid out of such guarantee fund. The policies in the Commercial Branch and the Water Works Branch had been cancelled and rebates made for unearned premiums. In a proceeding at the instance of a creditor to realize the assets of the company, it was found that the amounts to be collected on the premium notes in the Commercial and Water Works branches would not suffice to pay the losses in those branches, but the amounts to be collected on such notes in the other two branches (the Hydrant and Country branches) were sufficient for that purpose.

Held, on appeal from the Master, (1) that the passing of the by-law for raising the guarantee fund was not *ultra vires* of the company, (2) that the company had properly applied the guarantee capital in payment of the several losses as they arose, and that the subscribers thereto were liable to pay up their subscriptions to the fund, (3) that policy-holders in the Hydrant and Country branches were not liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders, except in so far as might be necessary to discharge losses paid in those branches but not repaid by them, the 13th section of the Act providing that members of the company insuring in one branch should not be held liable for any claim on the other branches, and (4) that holders of policies in the other two branches were liable to be so assessed for the purpose of making good any losses sustained, up to the time of the cancellation of their policies, though such losses had not been paid.

Held, also, that the defendants as such mutual insurance company were capable of granting insurances in Quebec as well as in Ontario.

Duff v. The Canadian Mutual Fire Ins. Co., 391.

PERPETUITY.

See "Will," &c., 8.

PLEADING.

1. In a bill seeking to obtain the benefit of a sale of land freed from the dower of the widow of the deceased owner, it was alleged that he had died at such a time as would, if true, bar the widow's right to dower, and submitted "that the defendant *E. B.* (the widow) is not entitled to dower:"

Held, a sufficient allegation that the defendant's right to dower was barred by the Statute, though it omitted to state that this was the legal result of any particular statute.

Banks v. Bellamy, 342.

2. An owner of real estate who alone enters into an agreement to sell will be required to procure a bar of his wife's dower or abate the purchase money in the event of her refusal; *Van Norman* v. *Beaupre*, *ante* vol. v., p. 599. But when his wife joins with him in the contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant; and the fact that the bill alleges that her only interest is that of an inchoate dowress forms no ground for dispensing with her being so joined.

Loughead v. Stubbs, 387.

3. On the argument of a demurrer any document referred to must be taken to be truly stated, and cannot be looked at to contradict or alter the averments in the pleading, even though there is a reference to the instrument for greater certainty as to its contents. *Ib.*

4. The rule of equity is, that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer. Where, therefore, a bill was filed against the Dominion Telegraph Company seeking to restrain that company from carrying out an agreement for the transfer of telegraphic messages to the American Union Telegraph Company, on the ground that such agreement was in contravention of an agreement previously entered into between the plaintiff and defendant companies for mutual exclusive connections and exchange of telegraphic business, without making the American Union Company a party, a demurrer for want of parties on that account was allowed, with costs.

Atlantic and Pacific Telegraph Co. v.
Dominion Telegraph Co., 592.

See also "Demurrer."
"Fraudulent Conveyance," 1.
"Multifariousness."
"Sale of Business."

POSSESSION, TAKING.

See "Vendor and Purchaser," 2, 3.

POSTPONING LIEN.

See "Mechanics' Lien," 1.

POWER OF EXPULSION.

See "By-Law."
"College Council," 2.

PRACTICE.

1. After the closing of his report, a master should not certify as to any matters before him in the course of the inquiry upon which he has reported, unless called upon to do so by the Court. After report any certificate, unless called for by the Court, is irregular and improper.

Rosebatch v. Parry, 193.

2. A defendant knew precisely the question to be tried at the hearing, but took no steps to adduce any evidence on his behalf, and a witness, whom he would have called, was called by the plaintiff, and gave evidence which the defendant swore was different from what he had anticipated he would give:

Held, that this was not such a case of surprise, as entitled the defendant to have the cause re-opened, in order that there might be a new hearing; and a motion made for that purpose was refused with costs, although the defendant swore that the evidence given by the witness had taken him by surprise, and that the same was incorrect, and would be contradicted by the wife and son of the defendant.

Sherritt v. Beattie, 492.

3. Proceedings were taken before a County Judge to garnish certain moneys, payable by the County to the plaintiff, as Clerk of the Peace and County Crown Attorney, and which moneys that Judge ordered to be attached in favour of the creditor, the present defendant. Thereupon the debtor, the defendant in those proceedings, filed a bill in this Court, seeking to restrain further action on such order:

Held, that this Court had no jurisdiction to grant the relief asked; that the proper place to obtain such relief was, by appeal to the Court of Appeal; and, without determining whether the claim of the debtor against the County, was such as could be garnished, the Court [PROUDFOOT, V.C.,] refused the motion for injunction, with costs.

Van Norman v. Grant, 498.

4. Although a decree of sale should direct the same to take place with the approbation of the Master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested.

Ricker v. Ricker, 576.

5. Where an infant appears and defends a suit by his guardian *ad litem*, or by his next friend institutes proceedings, he is bound by such proceedings just as if he had been an adult. *Ib.*

6. The plaintiff was mortgagee under an incumbrance created by the testator, who by his will nominated him an executor. In a suit to enforce the mortgage the guardian of the defendant—an infant—agreed to take the conduct of the sale, and the decree gave the plaintiff liberty to bid. A sale accordingly took place, the guardian attending on the settlement of the advertisement of the terms and conditions of sale, but the amount on the plaintiff's mortgage and the costs of the suit had not been ascertained, and the sale was subject thereto, and the same took place in February, 1871, when the plaintiff became the purchaser, having arranged with the tenant of the property not to bid, and to whom he shortly afterwards sold the premises at a considerable advance. In May, 1880, the defendant filed a petition impeaching such sale as improper under the circumstances, which the petitioner alleged only came to his knowledge in the March preceding. The Court [PROUDFOOT, V.C.] considering that after the appointment of a guardian *ad litem* to the infant, and the permission to bid at the sale given to the plaintiff, the parties were, so to speak, placed at arm's length, so far as the sale was concerned, and that the plaintiff had a perfect right to purchase at such sale notwithstanding the fiduciary relations existing between them, refused the petition; but as the petitioner had carefully abstained from ascribing fraud or fraudulent conduct to the plaintiff, and the circumstances were such as to invite discussion, in dismissing the petition did so, without costs. *Ib.*

See also "Calling on Solicitor to shew Cause."
"Legible Writing."
"Multifariousness."
"Sale for Taxes," 1.
"Sale of Business."
"Vessels, Liability of Owners of."

PRESCRIPTIVE TITLE.

See "Easement," 1, 2.

PRINCIPAL AND AGENT.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-third of the losses to the extent of $3,000, all losses above that amount to be borne by the defendant, and he agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the *bona fides* of a settlement which he had been induced to make with the defendant, acting through an agent, and the Court being satisfied that the settlement had been secured by the fradulent misrepresentations of such agent, *held* the plaintiff entitled to an account of the transactions and an inspection and an inspection of the books of the defendant, nothwithstanding the provisions of the Statute 36 Vict. ch. 25. s. 1 (R. S. O. ch. 133, sec. 3.

Rogers v. Ullman, 137.

See also "Legal Adviser and Client."

PRINCIPAL AND SURETY.

See "Mortgage," &c., 6.

PUISNE INCUMBRANCER.

See "Annuity, Arrears of."

PURCHASE OF EQUITY OF REDEMPTION.

See "Mortgage," &c., 3.

PURCHASER OF PART OF MORTGAGE ESTATE.

Where a purchaser of part of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money, and a bill was filed by the vendor's assignee to compel payment by the purchaser, the Court refused to give such relief, except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the Court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due.

Clemow v. Booth, 15.

In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers, upon indemnitying him against costs. *Ib.*

RAILWAYS.

The Ontario, Simcoe, and Huron Railway Company, (afterwards changed to "The Northern Railway of Canada,") in the course of the construction of their roadway, acting in assumed and alleged pursuance of the powers conferred on the company by its charter entered upon and took possession of certain Government lands held by the Principal Officers of Her Majesty's Ordnance for Ordnance purposes, and proceeded to construct their road thereon. Afterwards negociations were opened between the company and The Principal Officers for acquiring such right of way, in the course of which numerous letters passed between the parties and between the several departments connected with the Ordnance Department from which it appeared that the parties concerned had arrived at the conclusion that the company were acting within their statutory powers, and that all the department could require was, compensation for the land taken. Subsequently all these lands were, by the Imperial Government ceded to the Government of Canada, and in the year 1875 it was ascertained that the sum for which the Government held a lien upon the road amounted to about £600,000; and by an Act of the Legislature of that year that claim was compromised by the Government for £100,000 sterling, which was paid. In the year 1856 or 1857, this company agreed with *The Grand Trunk Railway Company* for the use of a portion of this land for the purposes of the line of the latter Company, who it was shewn had entered upon and continued in the use of this land until 1880, when *The Credit Valley Railway Company*, with a view of obtaining an entrance into the City of Toronto, entered upon this tract of land, and were proceeding to construct their line of road thereon. Upon a bill filed by *The Grand Trunk Railway Company* an interlocutory injunction was granted to restrain the further construction of the Credit Valley Railway, until the hearing, when the injunction was made perpetual. The Court being of opinion that the Northern Railway Company, under their dealings with the Board of Ordnance, and under the various statutory enactments appearing in the case, had acquired an absolute title to the land in question, free from any license in respect thereof.

The Grand Trunk Railway Co. of Canada v.
The Credit Valley Railway Co., 232.

See also "Specific Performance," 1.

REAL PROPERTY LIMITATION ACT.

See "Tenants in Common."

RESTRAINT ON ALIENATION.

See "Will," &c., 2.

RESTRAINT OF TRADE.

See "Sale of Business."

SALE FOR TAXES.

1. Where a sale of lands for taxes had taken place, and a suit was subsequently instituted by the purchaser to set aside a conveyance to the defendant executed after the registration of his own deed and the defendant impeached the deed executed in pursuance of such sale, it was shewn that a warrant had been at one time in the Court House, a portion of which was destroyed by fire, and that on that occasion the warrant had been probably consumed.

Held, sufficient evidence to authorize the Court in admitting secondary evidence of its contents; which on being taken established satisfactorily the existence and contents of such warrant: and, on rehearing, an objection being raised which had not been taken at the original hearing, that the township or county clerk should have been called to produce or negative the existence of a duplicate of such warrant:

Held, that, if such proof were necessary, affidavit evidence to shew what was the fact should be received.

Ferguson v. Freeman, 211.

2. *Quære*, [per SPRAGGE, C.] whether the provisions of section 155 of the Assessment Act of 1869 apply where a sale of land took place betore the Act, but the deed was not executed until after; or whether it applies only to a case where both were before or both after the enactment. *Ib.*

3. The proper officers to execute the deed of land sold for taxes are the Warden and Treasurer at the time the deed is demanded, not the persons holding those offices at the time of the sale. *Ib.*

SALE OF BUSINESS.

E. carrying on the trade or calling of a dealer in pictures and photographic business, sold out such business to *W.*, and by the agreement covenanted "not to open or start a retail and photographic business of a similar character" in the city of Toronto for

five years. By a subsequent agreement the first was modified, so as to allow *E.* to sell in any manner to persons residing out of Toronto, and to sell retail in Toronto, on allowing *W.* a percentage on the prices realized. *W.* filed a bill alleging that *E.* had, prior to such second agreement, sold goods in contravention of the first agreement, and had subsequently sold to a large amount, and prayed an account and payment of his percentage. The Court [SPRAGGE, C.] being of opinion that such second agreement had been executed for a valuable consideration, granted the decree as asked, and directed the account to be taken by the Master, although the answer professed to state the actual amount of sales, and on the motion for decree the answer had been read as evidence by the plaintiff.

Williamson v. Ewing, 596.

SALE OF LAND.

Where on the sale and conveyance of land the existance of an incumbrance is concealed by the vendor, who covenants against incumbrances and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the Court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage.

Lovelace v. Harrington, 178.

This principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself. *Ib.*

SALE UNDER DECREE.

See "Practice," 5.

——— UNDER EXECUTION.

See "Fraudulent Conveyance," 5, 6.

——— UNDER POWER IN MORTGAGE.

See "Crown Lands," 1.

SECOND FIRE.

See "Lessor and Lessee."

SECOND SEPARATION.

See "Separation Deed."

SEPARATE BRANCHES.

See "Mutual Fire Insurance Co."

SEPARATION DEED.

Semble, that a provision in a deed of separation that the maintenance secured to the wife for life, and her children during their residence with her, should continue notwithstanding a renewal of cohabitation, and that in the event of the parties again separating for any the like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation:

Therefore, where a deed after reciting an agreement for separation between husband and wife; that she was to have the custody of the children until twelve years old, and that he, in consideration of her releasing her dower in his lands, had agreed to pay her a certain sum for her own and the children's maintenance, secured to the wife for her separate maintenance a yearly sum of $600, and a further yearly sum of $200 for the maintenance of each of the children so long as they should continue in her custody, and provided, that in the event of a reconciliation taking place the annuity for the wife and allowance for the children should not be thereby defeated or revoked; and in case of any future separation of the parties for any of the same causes, (which were such as to justify a separation,) the whole of the provisions of the deed should be revived and be in full force.

Held, that such deed, upon a fair construction of it, was not open to objection as providing for a future separation; and,

Semble, if it provided for such separation for the causes mentioned, it would not have been void.

Meredith v. Williams, 154.

SETTLEMENT ON WIFE.

1. *S.*, a wholesale merchant, upon the treaty for marriage with the defendant, and at her suggestion, verbally agreed to make a provision or settlement for her benefit, and proposed the purchase of a particular property for that purpose. Subsequently, and after the marriage had taken place, which was in 1870, the property referred to was sold, but producing a larger sum than was anticipated, *S.* did not buy. Afterwards, and between the 9th of April, 1872, and the 10th of June, 1873, *S.* purchased amongst other properties four several parcels of land, for the alleged purpose of the proposed settlement, which, with the improvements put thereon, amounted to $15,320, or thereabouts; some of the conveyances of which it was alleged were in error taken to *S.* himself, who, two years afterwards, conveyed the same in trust for his wife, but the deed was not registered until three years after its date. *S.* subsequently became insolvent, and on a bill filed by the assignee of his estate impeaching the conveyance in trust as a fraud upon creditors, the Court [PROUDFOOT, V. C.] being satisfied that an agreement, though verbal, had been made by the parties prior to the marriage, although the only evidence thereof was that of the parties themselves, and that the conveyances of the parcels to *S.* had been so made by mistake, declared the defendant entitled to hold the lands in settlement, and dismissed the bill, with costs.

Boustead v. Shaw, 280.

2. It was alleged that *S.* was indebted at the time of the settlement, but upon the evidence set out in this case, it was held that this was not shewn; and that the entry of some of the property in the business books of *S.* as an asset did not, under the circumstances, shew that it remained his property. *Ib.*

SHERIFF'S FEES.

1. The fees earned by a deputy sheriff while the office is vacant by reason of the death, resignation, or removal of the sheriff, of right belong to the deputy himself, and neither the representatives of the late nor the newly appointed sheriff has any right or claim thereto.

McKellar v. Henderson, 181.

2. In such a case where fees had been received by the deputy, and which the bill alleged he had in error paid over to the executors of the late sheriff, and the deputy subsequently voluntarily assigned all his right and claim to such fees to the newly appointed sheriff, who filed a bill to compel repayment of the amounts to him, the Court allowed a demurrer for want of equity. *Ib.*

SHERIFF'S SALE.

See "Tenants in Common."

SHORT FORM OF DEED.

See "Trust," &c. 2.

SOLICITOR, CALLING ON—TO SHEW CAUSE.

Where at the hearing matters are brought to the notice of the Court which affect the character of one of the parties—a solicitor—the Court will of its own motion, and without being applied to by any other party, call upon such solicitor to shew cause why he should not be called upon to answer these matters.

In the Matter of a Solicitor, 77.

SPECIAL MEETING.

[OF COUNCIL.]

See "College Council," 2.

SPECIFIC PERFORMANCE.

1. The engineer of a railway company in arranging for the right of way across a party's farm agreed that if it were necessary a second farm crossing should be made; whereupon the owner executed a deed of the land for the railway in consideration of $130, "the company to make and maintain a farm-crossing, with gates at the present farm lane." By reason of the accumulation of snow in this crossing the same was useless during the winter, and the company having refused to construct or allow the owner to construct another crossing, he filed a bill to compel the specific performance of the agreement in respect of such second crossing:

Held, that this was not a varying of the deed by parol, but simply an addition to the expressed consideration of another not at variance with that stated, and decreed specific performance, with costs; (but)

The lessees of the road having been made parties to the bill the Court, under the facts stated in the case, refused relief against them, with costs to be paid by the lessor company.

Held, also, that under the above agreement the Railway Company was bound to give the owner such a crossing as would be reasonably passable at all seasons of the year, or if rendered impassable by the accumulation of snow, that they would make it

passable by clearing it ; that is, they were bound not only to make the crossing, but maintain it in a fit state to pass from one portion of the farm to another.

Cameron v. Wellington, Grey, and Bruce Railway Co., 95.

2. In a suit at the instance of a vendor of land for the specifit performance of an agreement to sell, the defence raised was, that the land was agreed to be conveyed free from incumbrances, buc the same was subject to the dower of one *M.* and to a mortgage, and therefore that a good title could not be shewn. It was satisfactorily shewn that the dower had been sufficiently barred, and the report of the Master stated that the price agreed to be paid for the land was $3,500 ; that $1,800 was due on the mortgage, and that the purchaser had paid only $100 on account of his purchase, "and that the non-completion of the contract (was) attributable to the desire of the purchaser to recede from the contract." The defendant, down to the bringing of the decree into the Master's office, had not demanded any abstract or made any objection to the title : The Court, on further directions, made a decree ordering defendant to specifically carry out the agreement, and pay to the plaintiff the general costs of the cause.

Graham v. Stephens, 434.

3. Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with a compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants, (the corporation), answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "*When the plaintiff bid for and was was declared the purchaser of the lands * * the sum bid by the plaintiff was a low price * * that the plaintiff was not in fact the real purchaser of the lands at the said sale * * that The Company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and * * that possession was taken by the plaintiff,*" and the answer claimed no benefit from the statute, and did not deny having made the contract ; neither did it raise any objection to the want of the corporate seal :

Held, that this sufficiently admitted the agreement to sell and no protection of the statute having been claimed, that the plaintiff was entitled to a decree with compensation for the loss of the crops, with costs.

Cleaver v. The North of Scotland Canadian Mortgage Co., 508.

STATUTE OF LIMITATIONS.

See "Crown Lands," 1.
"Dower," 1, 2.
"Easement," 1, 2.
"Executors," 4.
"Mistake of Title."
"Pleading," 1.
"Tenants in Common."

STATUTORY CONDITIONS.

"See Fire Insurance," 8.

STREET RAILWAY.

1. The stock of an incorporated street railway company, consisting of 2,000 shares, was owned exclusively by two brothers (*G. & W.*). The charter of the company required that there should be a board of directors consisting of not less than three members, each of whom should hold stock to the amount of not less than $100. It having become necessary to raise funds for the purpose of carrying on the business of the company, the two brothers agreed that they should convey to *M.* (their father) one share each in order to qualify him as a director, and which they did accordingly assign; the father from thenceforth acted as the third director, and the funds for the construction and improvement of the road, were obtained and expended thereon. By his will the father bequeathed these two shares to his daughter, *S.*, who, after the death of her father, continued to exercise when necessary, the functions of director. After some time *G.* became dissatisfied with the manner in which *S.* discharged her duties as director, alleging that she acted simply as the nominee of *W.*, and finally asserted that the shares had been originally assigned to the father for the avowed purpose of qualifying him to act, but in reality as trustee for *G. & W.*, and that he had not power to dispose of them by will and filed a bill seeking to have it declared that *M.* had, during his lifetime, and that *S.* since his death had held these shares simply as trustee of *G. & W.*, and that *S.* might be ordered to reassign them. The Court, under the circumstances dismissed the bill, with costs.

Smith v. Kiely, 220.

2. The charter of the company provided that the stock "shall be transferrable in such way as the directors shall by by-law direct:" *Held*, that this did not prevent the transfer of the stock until such a by-law should be passed, but left it as at common law, so that it might be transferred by word of mouth. *Ib.*

3. And, *Semble*, that the plaintiff, one of the directors, should be estopped from alleging that *M.* was not properly qualified as a director, the effect of which would have been to injuricusly affect the value of bonds of the company, to the issue of which the plaintiff was a party. *Ib.*

4. *Held*, also, that the transfer to *M.* was not without consideration, the agreement by the two brothers with each other to make it being sufficient. *Ib.*

SUIT ON BEHALF OF ALL CREDITORS.

See "Fraudulent Conveyance," 1.

SURPRISE.

See "Practice," 2.

TAXES, DEDUCTON OF.

See "Vendor and Purchaser," 6.

TENANTS IN COMMON.

The defendant, husband of one of several tenants in common, being in possession of the joint estate, purchased the same at sheriff's sale, of which fact the co-tenants were aware, but took no steps to impeach the transaction until after such a lapse of time as that under the statute the defendant acquired title by possession. The Court, on a bill filed by the other tenants in common, asking to set aside the sheriff's sale and deed on the ground of fraud and collusion between the defendant and execution creditor, negatived such charges, and dismissed the bill, with costs.

Kennedy v. Bateman, 380.

Whether the sale under execution was operative or not, the defendant having held possession ever since, claiming the premises as absolute owner, the title by virtue of the Statute of Limitations ripened into a title in his favour. *Ib.*

TRADERS.

See "Fraudulent Conveyance," 3.

TRANSFER OF SHARES.

[TO QUALIFY DIRECTOR.]

See "Street Ralilway," 1, 2, 4.

TREASURER AND WARDEN.

See "Sale for Taxes," 3.

TRESPASS.

See "Judgment" &c.

TRUST DEED.

See "Fraudulent Conveyance," 6.

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

1. *L.* and *S.* were appointed by the Court trustees for the plaintiff, a married woman, upon a written consent purporting to be signed by them agreeing to act. Subsequently *L.* obtained from the plaintiff a lease of the trust estate to himself, at what was alleged to be an inadequate rental. Some years afterwards, and after the death of her husband, the plaintiff instituted proceedings to have the lease cancelled, alleging as grounds of relief, inadequacy of rent, want of proper advice by the plaintiff in the execution thereof, and the fiduciary relation towards herself which *L.* had assumed. Under the circumstances the Court [*Per* SPRAGGE, C.] granted the relief asked, notwithstanding *L.* swore that he was not aware that he had been appointed trustee; that he never signed the consent to act as such, and that his conduct throughout had been *bonâ fide*, it being shewn that he had effected an insurance upon the buildings situate upon the premises, the application for which he had signed as trustee, and there being reason to believe that if he had not signed the consent himself he had authorized the husband of the plaintiff to affix his signature thereto; but gave *L.* the option of accepting a new lease of the property to be settled by the Master; which decree was affirmed by the full Court on rehearing.

Seaton v. Lunney, 169.

2. The operation of an ordinary deed of bargain and sale under the Short Forms Act—R. S. O. ch. 102—conveying lands to trustees considered and acted on. *Ib.*

See also "Executors," 4.

UNJUST AND UNREASONABLE CONDITION.

See "Fire Insurance," 5.

UNPAID VALUATOR.

The defendant, by a certificate signed by him as Reeve of the township, stated he had personal knowledge of property belonging to one *A. M.*, and occupied by him, which the defendant believed to be worth $2,000, and would readily sell at a forced cash sale for $1,600: that about fifteen acres were cleared and ready for or under cultivation, &c., setting forth further favourable particulars as to buildings on the land and the nature of the soil, all of which proved to be erroneous. In fact the defendant had not any personal knowledge of the premises, which were almost worthless; and the particulars as given had been communicated to him by *A. M.* himself. The defendant was aware that the plaintiffs were about to advance money by way of loan on the security of this property, and had called for his certificate, by which they said they would be guided in making such advance. The Court, under these circumstances, *held* the defendant answerable for the loss sustained by the plaintiffs in consequence of having acted on his certificate, although no fraud was attributable to him, and his services were gratuitous.

Gowan v. Paton, 48.

UNPATENTED LANDS.

[MORTGAGE ON.]

See "Crown Lands," 1.

USES, STAUTE OF.

See "Trusts," &c., 2.

VALUABLE CONSIDERATION.

See "Fraudulent Conveyance," 6.

VALUATION AND DISTRIBUTION OF ESTATE, REAL AND PERSONAL.

[ON DEATH OR MARRIAGE OF WIDOW.]

See "Will, Construction of," 1.

VARYING WRITTEN INSTRUMENT BY PAROL.

The plaintiffs were mortgagees of two town lots in Windsor, described as being "73 × 85 feet deep to a lane," in front of which were two water lots and dock property on the river side, which the evidence preponderated in establishing as having been verbally agreed and intended to be included in the security, although the documentary evidence tended the other way. The Court refused to reform the instrument on parol evidence, although satisfied that the plaintiffs ought to have succeeded had the case been one depending on the weight due to such evidence, and had the bill only asked for that relief would have dismissed it with costs; but as the bill contained a prayer for foreclosure that relief was afforded the plaintiffs, subject to the payment of such costs as the defendant—an assignee in insolvency—had incurred in resisting a rectification of the mortgage.

Dominion Loan and Savings Society v. Darling, 68.

See also "Specific Performance," 1.

VENDOR AND PURCHASER.

1. The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, and may be evidence of possession if given or received with that view.

The Peoples' Loan and Deposit Co. v. Bacon, 294.

2. Merely obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made, and to perform other acts to preserve the premises from deterioration, is not such a taking possession under a contract for sale as will bind the purchaser and render him liable to pay interest on the purchase money. *Ib.*

3. What will be a sufficient taking of possession of a purchased house considered and treated of. *Ib.*

4. By one of the conditions of sale the purchaser was required to pay a deposit of ten per cent. at the time of sale and the remainder within one month thereafter, and upon such payment the purchaser was to be entitled to a conveyance and to be let into possession of the property purchased:

Held, that under this condition the payment of the purchase money by the purchaser and the delivery to him by the vendor of possession were concurrent acts, and unless the vendor was in a position to put the purchaser in possession he could not be called upon to pay interest on the unpaid purchase money. Neither was he bound in such a case to pay ground rent accruing due upon the property whilst he was so kept out of possession. *Ib.*

5. In such a case letting a purchaser into receipt of rents and profits is not a compliance with the condition to give the purchaser possession. *Ib.*

6. Under such circumstances the purchaser was held entitled to make a deduction of a proportionate share of the taxes assessed on the premises for the year in which the sale was effected. *Ib.*

See also "Specific Performance." 1.

VENDORS AND PURCHASERS' ACT.

[R. S. O. CH. 109.]

See "Will, Construction of," 12.

VERBAL AGREEMENT TO SETTLE.

[BEFORE MARRIAGE.]

See "Settlement on Wife."

VESSELS, LIABILITY OF OWNERS OF.

The Imperial Statute 32 Victoria ch. 11, declares that under the 17 & 18 Vict., ch. 104, and the 23 & 26 Vict., ch. 53, "Canada shall be deemed to be one British possession," and thus the owners of vessels navigating the lakes and rivers of this country are entitled to the benefit of the limited liabilities clause contained in those Acts, in case of loss of life or property.

Proceedings having been instituted at law to recover damages for loss sustained by a widow and her child by reason of the death of the husband and father on board a steamer plying on Lake Huron.

This Court [Spragge, C.] restrained proceedings in the action, on the ground that the owners of the vessel were entitled to have the amount of their liability, if any, ascertained and distributed ratably among the several claimants upon the fund, by this Court.

Georgian Bay Transportation Co. v. Fisher, 346.

[Reversed on Appeal, 7th September, 1880.]

—— RIGHTS AND LIABILITIES OF MORTGAGEES AND PART OWNERS OF.

1. *Semble*, a mortgagee of a vessel until he takes possession or

does something equivalent thereto, is not entitled to an account of the money earned by the vessel for freight, &c. ; (but

Where in a suit by the mortgagees of a part owner of a vessel the defendant, the owner of the other shares, admitted that he was sailing the vessel for the joint benefit of himself and the other owners—other than the plaintiffs, though previous to the institution of the suit he had only asked for the evidence that the agent of the plaintiffs really held the shares for them :

Held, that the fair inference was, that the defendant was sailing for whomsoever might be the owners or entitled to the earnings ; and that having had sufficient information to acquaint him of the fact that the plaintiffs had acquired the shares either as mortgagees or owners he had thus recognized their right to demand an account.

Merchants' Bank v. Graham, 524.

2. *Quære*, whether co-owners of a vessel have a right to share in the profits thereof earned in ventures to which they do not assent, as a majority of the owners can employ the vessel against the will of the minority, who, however, can compel the majority to give a bond to restore the vessel in safety or pay the value of their shares. In such case the minority do not share the hazard, neither are they entitled to the benefit of the voyage. *Ib.*

3. One *C.* entered into agreements with several parties to carry freights for them at certain named prices to be paid to the defendant—not mentioning any particular vessels in which the same were to be carried—and then agreed with the defendant, as part owner and master of vessels in which the plaintiffs had an interest, at rates considerably below the sums agreed upon. The defendant and *C.* both swore that the arrangement had not been made by *C.* as agent of the defendant, but for his own benefit.

Held, that the fact of the defendant having rendered an account in his own name and also sued for a portion of the freight, though aided by the other circumstances mentioned in the judgment, was not sufficient to countervail the positive denials of the defendant and *C.*, that the contracts had not been made in behalf of and as agent for the defendant, freight being *primâ facie* payable to the master of a vessel, and the cargo need not be delivered by him until the freight thereof is paid ; although in any other transaction such conduct would have been strong evidence that the defendant was the principal contractor. *Ib.*

4. The plaintiffs who were mortgagees of a vessel, in exercise of a power of sale contained in their security, on default of payment sold the interest of their debtor by auction, when the same was bought by one who held it in trust for the mortgagees :

Held, that the effect of such sale and purchase was, that the plaintiffs remained mortgagees only of the interest so sold. *Ib.*

VOLUNTARY GRANTEE.

The testator—ninety years old—while residing withhis son *W.*, executed a wil. levising to his sons *W.* & *J.* all his real and personal estate. About a year afterwards, having removed to a distance, and while residing in the house of his daughter, where his son *T.* also resided, he executed a deed of all his real estate to *T.*, which recited that *T.* had agreed to pay him $10 a month during his natural life; and this was the only consideration expressed for the conveyance, which was prepared by a solicitor on instructions given by *T.* On a bill filed by *W.* against *T.* and his sister, charging them with conspiracy, and impeaching the deed on the ground of fraud and undue influence, the Court [SPRAGGE, C.] although satisfied that no fraud or undue influence had been practised on the grantor, set aside the deed as the same had been executed without proper advice, but refused the plaintiff costs in consequence of the unfounded charges of fraud contained in the bill: and as against the female defendant dismissed the bill, with costs; the fact that the Court was of opinion that if the fullest explanations had been given to the father of the nature and effect of his deed he would still have executed it, making no difference in that respect as to what was required on the part of a voluntary grantee, which *T.* in effect was.

Lavin v. Lavin, 567.

VOLUNTARY TRANSFER OF SHARES.

See "Street Railway," 1, 4.

WARDEN AND TREASURER.

See "Sale for Taxes," 3.

WARRANT, EVIDENCE OF.

See "Sale for Taxes," 1.

WEIGHT OF EVIDENCE.

See "Varying Written Instrument by Parol."

WILL, CONSTRUCTION OF.

1. A testator devised and bequeathed to his wife during widowhood all his household goods, furniture, &c., together with an annuity of twenty dollars, and also the free use, during the same time, of the homestead lot, together with the several dwellings and other outbuildings thereon. Two parcels of his real estate he devised to his two sons, upon which he placed certain fixed valuations—found by the Master to be the full values—and directed one of the sons to pay three-fifths of the interest computed on the valuation of his lot to the three daughters of the testator for life, the other son to pay interest on the valuation of his lot to the executors during the life or widowhood of his mother. The homestead or other portions of his real, as also his personal estate, the testator directed to be sold and the proceeds divided at the death or marriage of the widow.

Held, that there was not in these directions any indication on the part of the testator of an intention to exclude the widow from claiming dower in addition to the provisions of the will in her favour, and that the direction to sell the lands was not sufficient to put her to her election.

Beilstein v. Beilstein, 41.

2. Testator devised his farm to his two sons in equal moieties, subject to certain legacies to daughters, and also a comfortable support for his wife, or the sum of ten pounds to be paid by each of the sons annually during her life; and directed that the devisees should not sell or transfer the said property during the lifetime of the widow, without her written consent. One of the devisees, without obtaining the consent of the widow, mortgaged his portion of the estate. *Held*, that this operated as a forfeiture of the estate which the devisee took under the will.

Earls v. McAlpine, 161.

3. A testator directed that "in case any of the above-named three legatees be able and willing to buy the farm, as aforesaid, at the price of $4,000, my executors hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm:

Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will.

Jeffrey v. Scott, 314.

4. After directing a sale and division of the proceeds of an estate, as to one of the legatees, *M. S.*, "provided that the said *M. S.'s* interest in my estate should not be transferrable or transferred to any other person whatsover, but may be inherited

by her children, legitimate ; and in case the said *M. S.* die without legitimate issue, then her interest in my estate shall revert back to the other legatees," &c.

Held, that *M. S.* took only a life-estate. *Ib.*

5. A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of $160 a-year to his father, and after the death of his father to his mother, and after the death of both his father and mother the annuity of $160 was given in equal shares to *N.* and *J.*, a sister and niece of the testator, and he thereby made his annuity to his father and mother, as also the annuities to *N.* and *J.*, a charge upon all his real estate ; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely during widowhood.

Held, that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate.

Jones v. Jones, 317.

6. A testator, amongst other devises and bequests, devised as follows : — "Secondly, I bequeath to my son, *Robert Little*, eighty-six acres of land (decribing them), also one span of horses and one-half of my farming utensils : he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s., to be paid annually, the first instalment to be made one year after my decease, until the whole is paid." He next devised to his son *John* fifty acres of land, together with one span of horses and one-half of his farming utensils, subject also to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife ; and if his unmarried daughters should die before their legacies were paid, *John* and *Robert* were to divide the unpaid sums equally between them. He then provided as follows : "Should either of my two sons *Robert* and *John* die without issue, I wish that their shares should be divided equally among my surviving children."

Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over.

Little v. Billings, 353.

7. A testator desired that his executor should, "so soon after his death as might be found convenient, sell and convert all my estate into cash, and after paying my funeral and testamentary expenses, &c., will pay and deliver the rest and residue thereof to the Government and Legislature of the State of Vermont, one of the United States of America, to be disposed of by the said Government and Legislature as they shall deem best." The Legislature (the Senate and House of Representatives) of the State of Ver-

mont passed resolutions accepting the bequest and assuming the duties of the trust, with a determination to perform them with fidelity and zeal.

Held, that this was a valid devise and bequest of the estate; that the governing body of the State was capable of assuming and discharging the duties of trustee; and that the Court ought to give effect to such resolutions as an assertion by the highest authority of the State that the trust was legal, or that it would be made so.

Parkhurst v. Roy, 361.

8. By another clause of his will the testator suggested and recommended that the profits to arise from the investment of the funds, amounting to $203,000, should be added to the principal until the whole sum should be sufficient to pay each county in the said State $100,000.

Held, that this did not render the trust void as creating a perpetuity. *Ib.*

9. So far as the devise affected real estate in this Province, it was void as contravening the Statutes of Mortmain. *Ib.*

10. A devise was to *A. C. M.* for life with remainder to her husband *W. M.* "and the heirs of their bodies for ever": *Held*, that *W. M.* took an estate tail.

Fleming v. McDougall, 459.

11. By a subsequent clause the will provided that, in the event of the said *W. M.* dying without making a will, the property should be divided among his surviving children in certain shares, but declared it to be the intention of the testatrix that he should have full power, with the consent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best":—

Held, that the powers so given to *W. M.* to vary the shares or proportions of the heirs-in-tail, did not affect the quality of the estate devised. *Ib.*

12. A testatrix devised to trustees all her estate, real and personal, which, or a sufficient portion of which, they were to dispose of for payment of debts, and the support and education of her two youngest daughters *C.* and *M.* during their minorities, excepting two tenements known as the Westminster property, which were to be reserved for the use of *C.* and *M.* so long as they or either of them should remain unmarried, and in order that *C.*, on attaining 21 and being unmarried, might in her option occupy and enjoy for her life, so long as she should be unmarried, one of the houses for her own residence and that of her sister;

and, in the event of her marriage, the youngest daughter *M.* was to have the same option and choice, the intention of the testatrix "being, that in addition to their support and maintenance out of all of my estate, as devised, my youngest daughters *C.* and *M.* shall have a home within their control so long as they or either of them shall remain unmarried;" and upon the marriage of both *C.* and *M.* the whole of such Westminster property was to be sold, and the proceeds thereof to form part of the residuary estate and be divided amongst all her children, sons and daughters then living, share and share alike. *C.* and *M.* attained majority and were unmarried, when all the children, including *C.* and *M.*, together with the trustee, joined in a contract to sell the Westminster property. In answer to a question submitted to the Court, under the Act (R. S. O. ch. 109,) it was *held* that all these parties joining in a conveyance, a good title could be made; and although in applications of this kind the costs are in the discretion of the Judge, the purchaser was ordered to pay the costs.

Givins v. Darvill, 502.

13. A testator bequeathed to his two daughters (both of whom were married and had children at the time of the will) the sum of $1,000 each, charged upon his realty, which he devised; such sums to be invested in bank stock, and the interest accruing therefrom to be paid to his daughters during their natural lives, and after their decease directed these sums to be equally divided amongst their heirs. By a codicil the testator directed that should his real estate be sold, the $2,000 might remain on mortgage at interest, payable half yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters should they desire to do so:

Held, that the daughters took a life-estate, with remainders to their heirs as purchasers.

Rogers v. Lowthian, 559.

4. The testator bequeathed an amount of personal estate to his brother *John* "to have and to hold to him, his heirs and assigns, for ever." *John* predeceased the testator:

Held, that the legacy lapsed, and that the next of kin of the legatee was not entitled.

Mealey v. Aikins, 563.

WILL, COSTS OF CONTESTING.

The rule is, that if there exist "sufficient and reasonable ground, looking at the knowledge and means of knowledge of the opposing party, to question either the execution of a will or the capacity of

the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of the successful party." This rule was acted upon, and the plaintiff relieved from costs in a case where the plaintiff had seen the deceased the day after the will was executed, and found him very low and unable to speak intelligibly, and where the testator had, to several persons spoken approvingly of the conduct of the plaintiff, a son of a deceased brother, and had expressed himself in such a manner as induced the plaintiff and others to believe that he would become a beneficiary under his uncle's will, in which his name was not mentioned, and which had been prepared at the house of the widow of another brother of the testator, where he had for some time been residing, and was taken ill and died, although at the hearing the plaintiff's case entirely failed in proof.

Macaulay v. Kemp, 442.

WILL.

[DESTRUCTION OF]

The widow kept possession of the will for eleven months after the death of the testator, when she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will—an estate for life—and the only child professed to convey, as heir-at-law, to one *R.*, who created a mortgage, under which the property was sold to *D.*, a *bonâ fide* purchaser without notice, who afterwards agreed to sell to *R.* for the amount of his purchase money, interest and costs.

Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore *D.* was entitled to the protection of the registry laws (R. S. O. ch. 3, sec. 75), as against the infant devisees; but it appearing that *R.* had notice of the will when he purchased from the widow and heir-at-law, the Court declared the infants entitled to redeem.

Re Davis, 199.