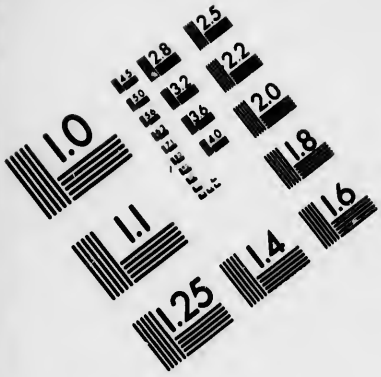

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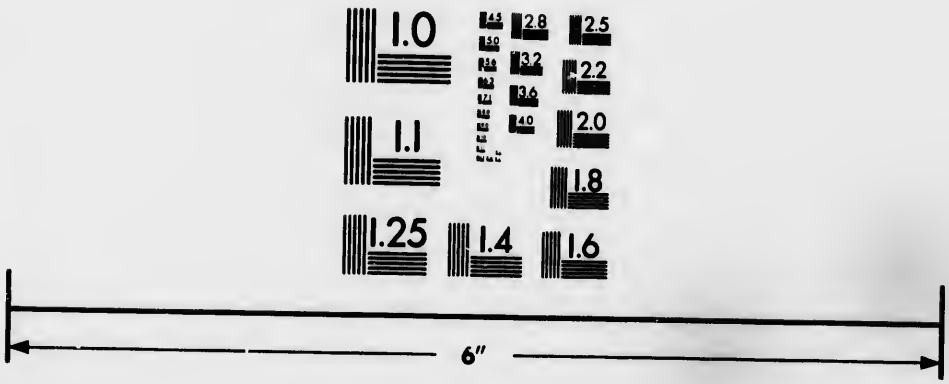

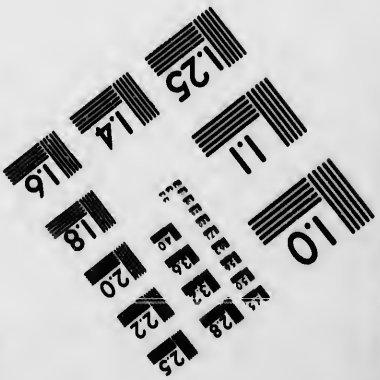

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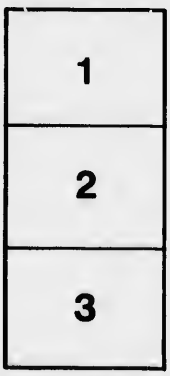

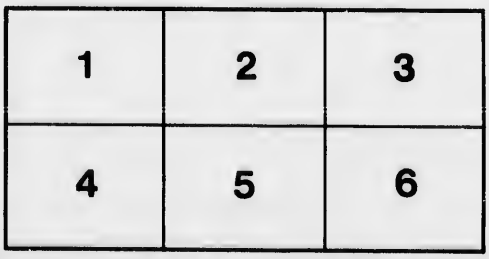

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,
REPORTER TO THE COURT.

VOLUME XXIV.

TORONTO:
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1877.

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TH

THE HON. JOHN GODFREY SPRAGGE, *Chancellor.*

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

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

A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

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A TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY,

OF

ONTARIO,

DURING PORTIONS OF THE YEARS 1876 AND 1877.

WADSWORTH v. MCDOUGALL.

Mill owner—Riparian rights—Backwater—Damages—Alteration of bed of stream—Injunction—Action at law.

This Court refused to recognize the existence of such a rule as that the first action at law for damages to a mill site is brought simply to try the right, not to obtain substantial damages, if any such have been sustained. BLAKE, V.C., *dubitante.*

Where the owner of a mill files a bill against another mill owner to restrain the latter from backing water, he must establish affirmatively that certain alterations in the stream effected principally by digging out the bed of the mill-race, and which was done by the plaintiff himself, have not caused the injury complained of: where it is doubtful whether such is not the case, this Court will refuse to interfere by injunction.

Statement.

The plaintiffs were the owners of a grist mill at Weston, built on the River Humber. The defendants were the owners of a grist mill on the same river but a little lower down the stream. The plaintiffs complained that the dam of the defendants caused the water of the river to be penned back up their tail-race so as to interfere with the working of their mill, and this bill was filed for an injunction to restrain such backwater. The bill stated that on the 7th April, 1854, the mill privilege

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owned by the plaintiffs was granted to them by the Crown. That for several years previous (as appeared by the evidence 30 years) to the issue of the patent a mill had been in existence where the plaintiffs' mill was; that for the same length of time, the water flowing from the mill had been carried some distance down by means of a tail-race until it emptied itself into the river. That the defendant *James McDougall* some ten years after the date of the patent had erected a dam across the river, the effect of which was, to back the water up the plaintiffs' tail-race; that the water at the confluence of the river and tail-race was in consequence of the dam deepened and did not flow away so rapidly as before the erection of the dam, and consequently the water was backed up the tail-race and impeded the working of the mill. That the plaintiffs commenced an action against the defendant *James McDougall* in the Court of Queen's Bench for damages (*a*), and recovered one shilling dama-

Statement.

ges and costs. That the other defendants were lessees of the mill owned by *James McDougall.*

The principal defence set up by the defendants was, that the plaintiffs had at different times deepened their tail-race until its bed had become lower than the bed of the river, and that if there were any backwater it was in consequence of the deepening of the tail race, and not because of defendants' dam. A great deal of evidence was given by both parties, but finally, *Strong*, V. C., who heard the cause, referred the matter to *John Kennedy*, Esq., C.E., submitting certain questions to him which he answered, and afterwards made a subsequent report in the words following: "The undersigned, nominated as referee in this cause, begs leave respectfully to state as a subsequent or additional report in reference to the effects produced upon the waters of the river Humber by reason of the construction of the defendants' dam that, supposing the bed of the river

(*v*) *Wadsworth* v. *McDougall*, 30 U. C. R. 369.

at the date of Mr. *Dennis's* plan to have been about the same as it now is, I am of opinion that the surface of the water at the point of junction shewn in Mr. *Dennis's* plan would not be affected by defendants' dam during low or ordinary stages of the river, for the reason that the bed in that vicinity is materially higher than defendants' present dam. This would also apply supposing the point of confluence to be at a distance of about fifty feet further down the stream than the said junction shewn by Mr. *Dennis's* plan. Owing to alleged alterations in the bed of the race, I am unable to say as to what effect defendants' dam as it now is, may have had on the race as it then existed."

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Mr. *M. C. Cameron*, Q. C., Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, for the plaintiffs.

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

STRONG, V. C.—I must dismiss this bill with costs— and I am not sorry to be able to do so, as in my opinion the case of the plaintiffs is not a meritorious one.

Judgment.

In the action at law only one shilling damages was given, and I know of no such rule as that asserted on the part of the plaintiffs, that in these cases the first action is brought merely to try a right; but must take it that, in the opinion of the jury, there was no substantial injury to the plaintiffs. However this may be, I must be bound by the opinion of Mr. *Kennedy* the referee, of this mixed question of science and fact, which is, that this dam does not raise the river. Then as to the raceway whether considered as an easement, or as an actual right, the case here must be reduced to one of injury to an artificial channel, up to a certain extent not interfering with the mill, *i. e.*, to an extent of three inches. Admitting that it is not necessary to shew actual damage, still, giving the plaintiffs the full benefit of the rule in this respect, I should still think

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that the plaintiffs have no right to call upon the defendants to reduce their dam.

Since the grant from the Crown, an alteration has been made in the bed of the watercourse; and this was altered not to a slight extent merely, but to a very material extent. This, according to Mr. *Kennedy's* report, must have the effect of causing the dam to back the water in the raceway.

Supposing the raceway had remained in precisely the same position as when the easement was acquired, the plaintiffs probably would be entitled to relief, but this is not demonstrated to me. To entitle the plaintiffs to the relief sought, things must remain in precisely the same position as at the time of the acquisition of the easement.

It does not lie on the defendants to shew that the dam has *not* caused the damage. The plaintiffs must shew that the alteration has not had any injurious effect.

Judgment.

All that the defendants could do to assert their right was to erect this dam, they are not to entangle themselves with a nice discrimination as to facts.

Gale, on Easements 556, states the law clearly on the subject. Bill dismissed with costs.

The plaintiffs thereupon reheard the case, when the same counsel appeared for the parties respectively.

SPRAGGE, C.—I have read and compared carefully the evidence of the different witnesses, and have examined the maps put in, with the exception of one, which one is not among the papers. It is one referred to in the evidence of *Malsburg*, the engineer, as map *k*, and I have made notes of what appears from the oral testimony and the maps and the report of Mr. *Kennedy*, the engineer.

I do not propose to go through the voluminous evidence which has been adduced in the case; but to state shortly the result as it appears to me, which is, that it

is quite impossible to say that the back water in the tail race so far up as to affect, according to some of the evidence, the free working of the plaintiffs' mill-wheel is not caused by the deepening of the race made by the *Wadsworths* themselves; that they have deepened it from time, to time and have increased the depth substantially and materially, is proved incontestably. It has not been a mere clearing out of loose stones, or an equalizing of the depth of the two sides of the race as represented in some of the evidence, but a material, and, I think, a systematic deepening of the race. The setting of the wheel lower than it was before, may probably have been the reason for this; but, whatever the reason, the fact is clearly proved. The bed of the race at its confluence with the river is lower by more than a foot than the bed of the river at the same point, and we have in evidence the relative depth of the bed of the river and of the race from that point up to a point parallel with the plaintiff's mill—the bed of the race throughout being lower by a foot, and more, than the bed of the river. 1876. Wadsworth v. McDougall. Judgment.

If the bed of the race had been kept of the same level, or of about the same level as the bed of the river it is certain, as I read the evidence, that the defendants' dam could not so back water as to affect the plaintiffs' wheel. If the race had not been deepened since the issue of the patent, the effect of the dam might or might not have been the same. I incline to think from the evidence that the injurious results contended for by the plaintiff as the effect of the dam would not have occurred; but it is not necessary to come to that conclusion in order to deny to the plaintiffs the relief they seek.

The gist of their case is, that the defendants' dam is an obstacle in the river, which prevents its flowing in its natural course to an extent that prevents it flowing freely from the plaintiffs' wheel. But that wheel is placed in an artificial water-way, the bed of which has

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been made by themselves deeper than the bed of the river. The placing of the dam across the stream is not itself a wrong. The plaintiffs have no ground of complaint unless they prove injurious consequences to themselves resulting from it. Assume that they prove back-water or slack-water at their wheel, which would not be there if there were no dam: that would not suffice—they must go further and prove affirmatively that this back or slack-water was occasioned by the dam; and further, that it would be occasioned by the dam if the tail-race had not been deepened, as it has been; and these two latter propositions must, in my opinion, be proved clearly and distinctly to entitle the plaintiffs to the relief they ask. I think they have failed to prove this, and that their bill was, therefore, properly dismissed with costs.

Judgment.

I desire only to add that while in my judgment the plaintiffs have not proved a case which entitles them to a decree for the lowering of the defendants' dam—the defendants are bound so to use their dam as not to occasion damage to the plaintiffs. I gather from the evidence that the quantity of water coming down the river is at times so great as to flow to a considerable height over the dam. The dam should be provided with waste-gates or there should be other means of exit for the water so as not to occasion damage to the plaintiffs. It is not shewn that the defendants have not all proper appliances for that purpose, and I only allude to it lest it should be assumed by the defendants that the Court decides anything more than that the dam properly used is not proved to be the occasion of wrong to the plaintiffs. Our judgment is only as to the dam itself, not to every possible user of it that the defendants may make. They are still bound to observe the maxim "*Sic utere tuo ut non alienum lædas.*"

BLAKE, V. C.—It is not necessary to consider, in the present case, the amount of damages a plaintiff must

recover at law in order to entitle him in this Court to an injunction preventing the continuance of that in respect of which the verdict at law was recovered. *James McDougall* alone was a defendant in the action at law; in the present suit *Robert* and *Thomas McDougall* are co-defendants, and it is, therefore, necessary for the plaintiffs to prove their case, irrespective of the verdict in order that they may obtain the relief they ask against the three defendants. I read and considered the evidence in the cause before reading the certificates given by Mr. *Kennedy* the referee named by the Court. From these depositions I conclude that there has been a very great change in the conformation of the river and surrounding land within the past twenty-five years; that the changes that have taken place within that time have arisen to a considerable extent from the acts of the plaintiffs; that the ice-jams, and penning back of the water took place before the building of the dam in question, much as it has done since its erection. *Parker*, *Shuttleworth*, *Langstaff*, and the *Burkes* speak positively as to these matters. They shew not only that the effect complained of cannot be traced to the dam, but that the digging out by the plaintiffs of their race, and lowering it over a foot below the level of the bed of the river is the true cause of the backwater complained of.

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Judgment.

I think the case of the plaintiffs fails; that Mr. *Kennedy* is correct in the conclusions at which he has arrived, and that the decree made must be affirmed with costs.

PROUDFOOT, V. C., concurs.

Per Curiam.—Decree affirmed with costs.

SOLICITORS.—*Cameron, McMichael, & Hoskin*, for plaintiffs; *Crowther & Tilt*, for defendants.

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CAMERON v. WIGLE.

Railway company—Paying for lands required for railway—Tenant for life.

Although a tenant for life has authority—under the Railway Acts (C. S. C. ch. 66, and 24 Vic. ch. 17)—to contract for the sale and to convey the fee simple of land required for the use of a railway, the company are not warranted in paying him the full amount of compensation agreed on, notwithstanding our statute omits to provide for the application of the amount as is done in the Imderial Act, 8 Vic. ch. 18. And where a railway company did so pay the amount they were compelled afterwards at the suit of a party interested in the remainder to make good the amount of his interest.

Hearing on bill and answer. The facts of the case and points relied on, are clearly stated in the judgment.

Mr. *Alexander Cameron*, for plaintiff.

Mr. *Hoskin*, Q. C., and Mr. *Hoyles*, for defendants *Wigle* and *Quinn*.

Mr. *Cattanach*, for defendants *The Canada Southern Railway Company*.

June 21. Judgment. SPRAGGE, C.—The question made at the hearing is between the plaintiff and the defendants *Wigle* and *Quinn*, on the one hand, and *The Canada Southern Railway Company* on the other.

One *Stephen Brooker*, the owner of a lot of land in Colchester, devised the same to his wife, *Elizabath Brooker* for life, remainder to his three daughters. The interest of the three daughters has been acquired by the plaintiff and the defendants *Wigle* and *Quinn*. On the 5th of October, 1871, the widow conveyed 4 $\frac{38}{100}$ acres of the lot to the railway company for the purposes of the railway, the company paying to her $244, which the answer states was full compensation for the fee simple of the land conveyed, and the answer takes the ground that under the General and Special Railway Acts it was competent for the widow, being tenant for life under the

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will, to contract with, sell, and convey to the company the future estate of the heirs or devisees of the testator, as well as her own life estate in the land conveyed; and that by the conveyance executed by her the fee simple in the land conveyed became vested in the company.

The question was argued upon the assumption that the tenant for life contracted, under section 11 of the Railway Act (*a*), with the company for the sale to them of the fee simple of the piece of land in question for the sum of $244, and that the conveyance executed by her purported to convey the fee simple; and this was probably the case, as it was taken to be so by counsel for all parties.

Chapter 66 is to be read in connection with the Act explaining and amending the same, 24 Vic. ch. 17. Without the aid of this later Act, I should incline to think that a tenant for life could not, under section 11 of ch. 66, contract for or convey the estate of parties entitled in remainder. He, and others named in the Act, may contract "on behalf of those whom they represent," the most comprehensive term used, but it would be an undue straining of that term to hold that a tenant for life represents a remainder man. Judgment.

The Imperial Act, 8 Vic., ch. 18, enables a tenant for life to contract for, sell and convey not only his own interest but the interest of those entitled in remainder, reversion or expectancy; and provision is made for the application of the purchase money where it exceeds a certain sum. In such case, *i. e.*, where a contract has been made with a person having a partial or qualified interest, or where lands have been taken under the Act, there being only an interest of that nature in the party empowered to convey, the purchase money is to be paid into the bank; and the statute then directs how the title to the land purchased or taken shall be vested in the promoters of the undertaking, and how the claims of

(*a*) C. S. C. ch. 66.

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parties having an interest in the land or in the fund shall be ascertained and dealt with *(a)*.

There are several other provisions in the Imperial Act, providing for the protection of parties having various interests in the land, and the whole of that branch of the Act is framed upon the idea that all interests are to be compensated for.

To return to the Acts of Canada. The later of the two Acts to which I have referred embraces several objects. The provision material to the point in question here is in the latter part of section 1,—that any conveyance made under the first sub-section of section 11 of the General Act shall vest in the railway company receiving the same, the fee simple in the lands therein described, freed, and discharged from all trusts, restrictions and limitations whatsoever;—and I apprehend that this is not confined to the classes of persons enumerated in the preamble of the later Act, but applies to all conveyances authorized by the sub section referred to, to be made. The effect then would appear to be that a contract may be entered into by a tenant for life for the sale to the company of land required for railway purposes; and that a conveyance of such land by the tenant for life to the company will vest such land in fee simple in the company. The right of the railway company cannot, I think, be placed higher than that.

Judgment.

It does not follow that the tenant for life is entitled to receive, or the railway company authorized to pay to him, or to any person having a partial or qualified interest in the land, its full fee simple value. If the statute authorized this it would be a most violent and unnecessary interference with the rights of property.

It may be conceded for the purposes of this case that the tenant for life had power to contract for sale, (which would involve the agreement for price) and to convey. The adequacy of price is not in question in this suit, the

(*a*) Sec. 68.

case being heard upon bill and answer; and, the agreed price being stated to be the full value. Whether the payment of this full value to the tenant for life was a good payment is quite a different question. 1876. Cameron v Wigle.

There is a good deal in the Act, ch. 66, indicating the intention of the Legislature that this should not be the case. Sub-section 5 of the same section is an indication of this. It is not very accurately framed; but, as I read it, it contemplates agreements for compensation between the railway company and parties having various interests in land touching the amount of compensation to be made to them, in respect of their various interests.

Sub-section 22 of the same section deals with compensation for land taken by the company under the powers of the Act. It is as follows: "The compensation for any lands which might be taken without the consent of the proprietor, shall stand in the stead of such lands; and any claim to, or incumbrance upon the said lands, or any portion thereof, shall, as against the company be converted into claim to the compensation, *or to a like proportion* thereof, and they shall be responsible accordingly, whenever they have paid such compensation, or any part thereof, to a party not entitled to receive the same, saving always their recourse against such party." Judgment.

The 23rd sub-section carries out the same idea. It enables the company to pay compensation into Court in certain cases, and one of the cases is thus expressed: "If the company has reason to fear any claims or incumbrances." In the case before me the company had more than reason to fear claim or incumbrance. The person with whom they dealt was tenant for life, and they do not set up that they did not know her to be such. The instrument under which she held her title was, the will of her husband devising the land to her for life, remainder to the three daughters—they, therefore, had direct notice of the title in remainder, as well as of the tenancy for life; and, very plainly as it appears

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to me, their proper course was, to pay the money into Court. Their still more proper course would have been to make the application indicated in sub-section 5 to the parties entitled in remainder, with a view to agreement for compensation; having omitted that, their next course was, to pay compensation into Court.

Sub-section 24 points out the mode in which parties interested are to be notified, so as to be brought into Court, and have their claims to compensation investigated and adjudged upon.

Sub-sections 27, 28, and 29, make similar provisions in regard to lands taken in "Lower Canada."

It is to be observed that under these sections of the Act the railway company pays into Court interest for six months on the compensation money paid in, and are in a sense kept before the Court, and may be ordered to pay the costs; and while in the event of an order for distribution being obtained in less than six months, a rebate of interest is to be allowed to the company; on the other hand is this provision, that if from any error, fault, or neglect of the company such order "is not obtained until after the six months have expired, the Court shall order the company to pay to the proper claimants the interest for such further period as may be right." The words "distribution" and "proper claimants" are significant. They point to a portion of the compensation moneys being payable in respect of one interest in the land, and other portions in respect of other interests.

Judgment.

I do not think there is anything in the use of the word "may," in sub-sec. 23, looking at the several classes of cases in which compensation money may be paid into Court. The Legislature could not have intended, while providing this machinery for ascertaining and adjudicating upon the rights of different parties interested, to leave it to the option of the railway company to pay the whole compensation to one having a partial, and perhaps a very small proportionate, interest in the land acquired by the company.

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This machinery is borrowed, as I judge, from that provided by the Imperial Act for the like purpose. I have referred to the latter because in it the plan of compensation to different interests is more clearly and distinctly carried out than in the Canadian Act. If in the Canadian Act it were less distinct than it is, the Court would struggle against an interpretation that would involve such an absurd anomaly, and so palpable an injustice, as to give to a tenant for life the whole value of the inheritance.

I think the plaintiff, and the defendants *Wigle* and *Quinn*, are entitled to an inquiry of what proportion of the compensation money paid to *Elizabeth Brooker* was at the time of such payment properly payable to her in respect of her interest as tenant for life; and what proportion was properly payable to those entitled in remainder in respect of their interest, and that they are entitled to an order for payment of the latter amount by the railway company to them, with interest from the date of the payment to *Elizabeth Brooker*.

Judgment.

As to costs. A suit for partition would have been necessary, by reason of one of the tenants in common, *Wigle* being *non compos mentis*. The costs, beyond what would have been necessary in a suit for partition, must be paid by the railway company.

I am told that the point raised in this case has never come up for adjudication. It seems strange that it should come up for the first time some twenty-five years after the passing of the Act, unless, indeed, it has been the practice of railway companies to make compensation according to the various interests of parties entitled, or to pay money into Court, and proceed under the provisions of the Act to which I have referred.

SOLICITORS.—*Cameron & Caswell*, for plaintiff; *Hoskin*, for defendant *Wigle*; *Bethune, Osler, & Moss*, agents for *Horne* (Windsor), for defendant *Quinn*; *Crooks, Kingsmill, & Cattanach*, for *The Railway Company*.

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LOVELESS V. CLARKE—RE FOSTER.

Administration—Residue of personalty—Compensation—Executors.

Where a testator provides by his will for the payment to executors for their services, any presumption that any undisposed residue of personalty is intended for them beneficially is effectually rebutted: the fact that by law they are entitled to be paid a compensation without any provision made therefor by the will is immaterial.

This was an application for an order for the administration of the personal estate of *Joseph Foster*, deceased, made by *Abigail Loveless*, claiming as one of the next of kin of the testator. The will contained a direction for the payment of debts out of the personalty and a clause (set out in the judgment) for compensation to the executors, but no other direction for the application of the residue of the personalty.

Mr. *W. Cassels*, for the executors. The Imperial Statutes 11 Geo. IV. and 1 Wm. IV. chapter 40 are not in force in this Province. The rule therefore applies that the executors take the undisposed of personalty beneficially.

Mr. *Hoyles*, for the applicant. It is a question of intention. The provision in the will for compensation to the executors for their trouble and expenses shews testator's intention to have been that they should take as trustees for the next of kin, not beneficially.

Judgment. SPRAGGE, C.—The question in this case is, whether the executors named in the will of *Joseph Foster* take the residue of his personal estate beneficially or as trustees.

The will contains several devises of realty. As to personalty, the only provision is, that the debts shall be paid thereout, by the executors, and then follows this passage: "And that executors take a reasonable compensation for their trouble and expense, and the

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registry of this my will, funeral expenses, and any other really necessary expense."

It is argued that this provision in the will indicates intention on the part of the testator, that as to the residue of the estate the executors should take as trustees, and I incline to agree in this. It is treated in the cases as a question of intention; and where the testator has given pecuniary legacies to his executors, it has been held to be an indication of such intention; as in fact in one of the cases it could not be intended that the executors should take all "all and some." *Foster* v. *Munt* (*a*), and *Farrington* v. *Knightley* (*b*), were cases of legacies to executors; in the former case of £10 to each "for their care," in the latter of £50 each to two executors. In *White* v. *Evans* (*c*) the direction was that £3 a year should be given to *Bushby*, one of the executors, "during his life for his care in seeing my will duly executed." Lord *Alvanley* held *Bushby* "clearly a trustee," and asked, "Is there any case where one executor is clearly a trustee and the other is not?" *Dean* v. *Dalton* is (*d*) also a case of direction in a will for compensation to executors for services as well as reimbursement of expenses, and it was held to be a "demonstration of intention to make them trustees."

Judgment.

I do not think that the circumstance of executors being entitled to compensation in this Province for their services without any provision being made by will, makes any difference. It may be inferred that the testator was ignorant of the provision made by law; but is none the less an indication of his intention.

The cases upon this point are extremely numerous, and somewhat conflicting; I had looked at a considerable number of them, when my attention was called by Mr. *Hodgins* to a case decided in this Court by the late Vice-Chancellor *Mowat*; who held, in *Thorpe* v. *Shil-*

(*a*) 1 Ver. 473.
(*b*) 1 P. W. 544.
(*c*) 4 Ves. 21.
(*d*) 2 Br. C. C. 634.

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lington (*a*), that the Imperial Statute (*b*) which amended the law upon this subject "having been passed before 1837, is binding on this Court," and that decision I should follow; apart from the provision to which I have adverted which, I incline to think, would be sufficient to take the case out of the statute.

In *Davidson* v. *Boomer* reported in the same volume of *Grant*, I assumed the Imperial Act to be in force in this Province; and I think it was not contended before me that it was in force; but I held *upon the terms of the will* that there was a trust. In *Thorpe* v. *Shillington* the point that the Imperial Act is in force in this Province was directly decided, and it does not appear from the report that there was any indication on the face of the will of the intention of the testator that the executor should take, otherwise than beneficially.

Judgment.

The order for the administration will go.

SOLICITORS.—*Bethune, Osler, & Moss*, agents for *Deroche*, Napanee, for plaintiff; *Blake, Kerr, & Boyd*, agents for *Reeve & Morden*, Napanee, for defendants.

(*a*) 15 Gr. 85.

(*b*) 11 Geo. IV., 1 W. 4 C. 40.

SILVERTHORNE v. CAMPBELL. 1876.

Sale of land for taxes—Land improperly assessed as non-resident—Costs.

An erroneous assessment of land as non-resident or unoccupied, is not a ground for impeaching a sale for taxes.

The plaintiff purchased a lot in 1870, in which year and the preceding the lot had been returned as non-resident and unoccupied, though occupied by a tenant of the then owner. The plaintiff, however, made no inquiry or search as to taxes, but in succeeding years regularly paid them. In fact the taxes for 1869 and 1870 had not been paid, and the land was in due course sold for such arrears: *Held*, following the decision in *Bank of Toronto* v. *Fanning*, ante volume xviii., page 391, that the sale was binding on the owner; and a bill filed after the expiration of a year from the time of sale to set it aside was dismissed with costs: although the Court considered the case one of great hardship upon the plaintiff.

Examination and hearing at the Spring Sittings, 1876, at Simcoe.

Mr. *Barber*, for the plaintiff.

Mr. *Livingstone*, for the defendant.

The facts appear in the head-note and judgment.

SPRAGGE, C.—This case seems to be governed by the case of The *Bank of Toronto* v. *Fanning* (*a*) in Appeal. The *ratio decidendi* in that case was the effect of the more recent Assessment Acts, in curing not irregularities only, but the very serious error of land, in fact occupied, being returned as unoccupied or non-resident. March 31st. Judgment.

Mr. Justice *Wilson*, referring to 27 Vic. ch. 54, says: "The object of the statute was to make the sale valid, although the assessment may not have been quite regularly made, or although there were some other informality or irregularity in the way of the sale being such as would otherwise be a perfectly legal sale, so long as any taxes were in arrear for five years, and the land had not been redeemed. The re-enactment of this

(*a*) 18 Gr. 391.

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clause by the 29 and 30 Vic., ch. 53, sec. 131, and by the 32 Vic., ch. 36, sec. 130, with the addition to it, 'It being intended by this Act that all owners of lands shall be required to pay the arrears of taxes due thereon within the period of five years (three years by the last Act), or redeem the same within one year after the Treasurer's sale thereof,' is very conclusive on this point. In my opinion the irregular or wrongful assessment of this lot in 1857 as an unoccupied or non-resident lot, instead of its having been rated as an occupied or resident lot, cannot now be impeached. There was in fact a portion of taxes due upon the lot for five years, and as the sale was made after the passing of the 27 Vic., ch. 19, that statute has given validity to the title, which, in my opinion, might otherwise have been invalid. It is not necessary to say what would, or will, or may constitute an occupant or an occupation, as I am assuming for the purposes of my opinion that the land was occupied in 1857, and was improperly assessed as an unoccupied lot."

Judgment.

The learned Judge goes on to say: "If I had been obliged to do so, it is probable my opinion would have been upon this evidence that the land was not vacant or unoccupied property."

In the judgment appealed from it had been held that the land had been properly assessed as unoccupied. It will be seen, therefore, that the learned Judge in sustaining the judgment proceeded entirely upon the effect of the Assessment Acts, and not at all upon the facts of the case.

This view of the effect of these Acts was concurred in by *Richards*, C. J., by *Mowat* and *Strong*, V. CC., and *Galt*, J.; and *Draper*, C. J. inclined strongly to concur in the same opinion. C. J. *Hagarty*, and Mr. Justice *Gwynne* sustaining the judgment appealed from upon the facts, and expressing no opinion, one way or other, upon the legal point. I must therefore take it to be authoritatively decided by the highest Court in this

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Province, that an erroneous assessment of land as non-resident or unoccupied, is not now a ground for impeaching a sale for taxes. Assuming that *Street* v. *Fogul* (*a*), *Allan* v. *Fisher* (*b*), *Snyder* v. *Shibley* (*c*), decided that such erroneous assessment would be ground for avoiding a tax sale, the contrary must now be held to be the law. This being so, it is obvious that the minor irregularities complained of can be no ground for avoiding the sale. This, in fact, had been decided by previous cases.

I should, I confess, have been very well pleased to have been able to decide in accordance with the previous cases, for this is a case of great hardship upon the plaintiff, who, if without remedy, and I can afford him none, suffers the loss of a valuable farm, which passes into the hands of the defendant for the paltry sum of about $20, and it appears to have been through mere inadvertence, through lack of viligance only on his part, and perhaps through the careless, perfunctory discharge of duty in the assessor, that the plaintiff has been subjected to this great misfortune.

Judgment.

It is not necessary that I should decide the question of fact whether there was or not an occupancy of the land in the year 1870, when the land was returned "non-resident." The evidence is not very clear upon the point. The owner, the plaintiff, was not resident on the lot, and it is admitted that the taxes for that and the preceding year were not paid, for subsequent years they were paid; and I believe the statement of the plaintiff, that he did not know of any taxes being in arrear. He purchased it seems in 1870, and very unwisely omitted to ascertain whether any taxes were in arrear. The penalty is a serious one.

The Bill must be dismissed, and there is nothing to take the case out of the rule that the costs follow the result.

SOLICITORS.—*Ausley & Seager*, for plaintiff; *Tisdale, Livingstone & Robb*, for defendant.

(*a*) 32 U. C. R. 119. (*b*) 18 U. C. C. P. 63. (*c*) 21 U. C. C. P. 518.

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STRETTON v. STRETTON.

Specific performance—Statute of Frauds.

An agreement for sale of lands referred to them as certain lots in "Stretton's Survey." No survey had in fact been then made, but a rough sketch of the proposed survey was in existence:

Held, that such sketch could not be considered as the survey referred to in the agreement; and as parol evidence was necessary to shew the particulars as to size and position, without which such sketch was unintelligible, the Court refused to enforce the agreement, but offered to make a decree for performance of the agreement admitted by the answer without costs; or dismiss the bill without costs—the defendant having improperly denied the agreement alleged by the plaintiff, which was clearly established by the evidence, though incapable of being enforced owing to the defence of the Statute of Frauds.

Hearing at Goderich.

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

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

The facts are stated in the judgment.

Judgment.

BLAKE, V. C.—There are not any acts of part performance sufficient to take this case out of the Statute of Frauds. The agreement entered into between the parties seeks to define the land by reference to a survey called *Stretton's* survey. This proposed survey had not at the time of the agreement been made, but a rough sketch is produced, and it is argued that this must be taken as the survey referred to, and that in connection with the agreement it sufficiently defines the land, the subject of the contract. I cannot hold this sketch to be that which is referred to in the agreement as a survey, and if this be so there is not anything to connect this document with the contract so as to enable the Court to make out the agreement from these papers. But even if I were to look at the agreement and this sketch it is impossible therefrom to define the land the

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subject of the contract. Oral testimony must still be adduced to shew the particulars as to size and position, without which the sketch is not intelligible. What the lots were, would therefore be ascertained virtually by parol in the face of the Statute of Frauds. It would seem clear that independently of the decisions which have so much impaired the effect of this statute, the bill of the plaintiff could not be sustained. Amongst other authorities I have considered *Fry* on Specific Performance, pages 330, 341, 361, 612–614, *Hodges* v. *Horsfall* (*a*), *Webb* v. *London and Portsmouth Railway Co.* (*b*), *Stuart* v. *London and Northwestern Railway Co.* (*c*), *Nurse* v. Lord *Seymour* (*d*), *Randall* v. *Hall* (*e*), *Barkworth* v. *Young* (*f*), *Clinan* v. *Cooke* (*g*), *Harvey* v. *Mount* (*h*), and the authorities referred to in note *q* at page 199 of the 1st volume of the American edition of *Sugden's* Vendors and Purchasers. None of these would warrant me in the conclusion that the requirements of the statute have here been complied with. "The rational rule seems to be that the memorandum must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence." *Sugden's* Vendors and Purchasers, American edition, Vol 1. page 198, note .. Judgment.

Concurring in this view I do not feel I should be justified in extending these authorities which seem to have arisen from the hardship which would have resulted if the language of the statute had been strictly observed. I am of opinion that the case of the plaintiff fails. The defendant would have been entitled to his costs had he confined himself to the legal ques-

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(*a*) 1 R. & M. 116.
(*b*) 9 Hare 129.
(*c*) 15 Beav. 513, 1 DeG. M. & G. 721.
(*d*) 13 Beav. 254.
(*e*) 4 DeG. & M. 343.
(*f*) 4 Drew. 13.
(*g*) 1 Sch. & Lef. 33.
(*h*) 8 Hare 439.

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tion on which he has succeeded; but he has in his answer untruthfully denied the agreement which, although impossible of enforcement, owing to the Statute of Frauds, yet the evidence clearly established did exist. He has in no way explained how it is that his answer in so many material points has been contradicted by Mr. *Cooper*, a truthful witness who acted in the transaction as the conveyancer of the parties. The defendant has thus disentitled himself to the costs of the suit. The plaintiff can take a decree either dismissing the bill or for a specific performance of the agreement admitted by the defendant. In either case there will be no costs.

Judgment.

SOLICITORS.—*Seager* and *Wade*, for plaintiff; *Doyle*, Goderich, for defendant.

DAVIDSON v. ROSS.

Insolvency—Pressure—Unjust preference—Construction of Statute—Re-enactment of Statute.

Two cousins, *H.* and *R.*, entered into partnership in trade, *R.* furnishing all the capital (about $1,400). After eighteen months *R.* retired from the business, assigning as a reason therefor his having become possessed of the family homestead, the management of which it was necessary for him to superintend. On *R.'s* retirement he sold his interest to *S.*, a brother of *H.*, for about $1,280, paid partly by two promissory notes, one for $80 at a short date, and the other for $1080 at a year, indorsed by two other brothers, and the residue by $70 in cash, supplied by one of the indorsers—*S.* having been without any means of his own. Shortly afterwards (about three or four months) *S.* withdrew from the business, making way for *J.*, a brother-in-law of *H.* and *S.*, who put $1,000 into the business, but paid nothing to *S.* for the transfer of his interest. The smaller note was duly paid, but the larger note was not met at maturity, and it was alleged that there was an understanding for an extension of the time for payment; *R.* omitted to give the indorsers notice of dishonour, and some months afterwards, claiming that the partnership effects were, under the circumstances and a prior verbal arrangement, answerable for the note, applied to *H.* & *J.* (the new firm) for payment thereof, which, being unable to meet, they assigned to *R.* certain accounts, and executed in his favour a

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chattel mortgage on nearl the whole of their assets, as security for its ultimate payment. Within thirty days after the execution of these instruments *H.* and *J.* were placed in insolvency by other creditors.

Held, per Curiam, on appeal, [reversing the decree of the Court below], that such assignment and mortgage were void, as an unjust preference made in contemplation of insolvency, within the 89th section of the Insolvent Act of 1869 (32 & 33 Vic. ch. 16): and per PATTERSON, J., [in this affirming the judgment of the Court below,] that under the circumstances stated *R.* might properly be considered a creditor of *H.* and *J.*; but, per DRAPER, C. J., that the facts shewn did not prove that *R.* was such creditor.

Held, per DRAPER, C. J., and PATTERSON, J., that the presumption referred to in the 89th section of the Insolvent Act of 1869 is not a rebuttable one, and. therefore, that any act done or security given by a debtor within the thirty days therein mentioned, whereby one creditor obtains an unjust preference over the other creditors, is void: but, per BURTON and MOSS, JJ., although an act so done is presumed to be done in contemplation of insolvency, circumstances may be shewn which would rebut such presumption, and render the act—whether in payment of, or security for the debt—valid; but *per Curiam* mere pressure will not under any circumstances validate such transaction.

Per PATTERSON, J.—The rule, that when an Act of Parliament has received a construction either from long practice or by judicial interpretation, and is afterwards re-enacted in the same terms, the Legislature is deemed to have had that construction in view in the re-enactment, cannot apply to an Act of the Dominion, where different constructions are shewn to have obtained in some of the Provinces of the Dominion.

Statement.

The bill in this case was filed by *Alexander Davidson*, the official assignee of the insolvent estate of *Howard Douglas* and *William A. Johnson*, who had carried on business for a short time in the village of Bronte, County of Halton, against *William Wallace Ross*: the interim assignment having been made to one *Applebe* on the 10th July, 1875, and by him transferred to the plaintiff in pursuance of a resolution passed at a meeting of creditors, held on the 9th August, 1875. The object of the bill was, to set aside an assignment of certain accounts and book debts due the insolvents, as also a chattel mortgage on their stock in trade and personal effects, made by them to the defendant on the 21st of June, 1875.

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The bill, amongst other matters, alleged that *Douglas* and *Johnson* were, on the 21st June, hopelessly insolvent, and transferred to defendant, then a farmer residing in the County of Simcoe, but who had been a partner of *Douglas* till February, 1874, certain accounts and book debts, amounting to upwards of $1,300. That on the same day *Douglas* and *Johnson* also made a chattel mortgage to the defendant, upon the whole of the stock in trade and chattels, including the household furniture of each of them. That the assignment and mortgage were made to secure payment to the defendant of $1,080, but that the insolvents were not indebted to the defendant in any sum, and the giving of the securities was entirely voluntary. That if the defendant should be found to be a creditor, then the plaintiff charged the securities were given in contemplation of insolvency, and within thirty days before the execution of the assignment in insolvency, and were made to enable the defendant to obtain an unjust preference over the other creditors of the insolvents. That the securities were given with the intent fraudulently to impede, obstruct, and delay, and to defraud the creditors of the insolvents with the knowledge of the defendant, who was well aware of their inability to meet their engagements. That the property assigned, and that covered by the mortgage, constituted the whole assets of the insolvents with the exception of a small sum in book debts; and that the assignment and mortgage were a fraudulent preference within the Insolvent Act of 1869. The defendant put in an answer denying that he was aware when he got the securities, of the inability of *Douglas* and *Johnson* to meet their engagements, but that on the contrary he believed they were able to meet them: alleged that he was a creditor of *Douglas* and *Johnson* to the amount of $1,080 and interest, and denied knowledge of any fraudulent intent in giving the securities, or that they were made in contemplation of insolvency.

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The cause came on to be heard at the sittings of the Court at Woodstock, in the autumn of 1875, when the plaintiff gave evidence that the estimated value of the assets of the insolvents shewed stock to the amount of $3,922.54; accounts not assigned, $1,037.50; notes in hands of creditors, $753: in all, $5,713.04. The accounts assigned to the defendant amounted to about $1,250, and the chattel property to $250, the whole of the stock being covered by the defendant's mortgage. The claims against the insolvents amounted to $9,740.18.

The defendant was examined on his own behalf, and the evidence given by him was as follows:—"I live in the County of Simcoe, and was in partnership with *Howard Douglas;* it began 18th of July, 1871 or 1872, or thereabouts; I now say it was in July, 1873, I am not certain of it however; I left it in January, 1874; it was formed in July, 1872; I put in $1,400 about; *Howard* put in no cash to any amount; he put in a horse and buggy and some other things, in all they amounted to $200 or $300; I had not been brought up to the business, and his knowledge of the business was to stand in the place of capital; the reason I left the business was, that business at home compelled me to give it up; I only took out of it my board and clothing; I took no cash out of it; *Spencer Douglas* took my place, he to pay me what I put in, namely, $1,400; he gave me his note, indorsed by *W. J. Douglas* and *Somerfield Douglas*; one note for six months of $80 and interest at 8 per cent., the other $1,080 in one year at the same rate of interest, and I was to extend the time for the last note for four months if they wanted it, and this accounts for the sixteen months referred to in my answer; at the time I went into the business I mortgaged my farm for $1,000, and when they gave me the note for $80 it was made payable so as to meet the interest on the mortgage; the indorsers were a party to this arrangement for the extension for four months; the note was paid at maturity by *Douglas* and *Johnson;* I also got a horse

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a set of harness and a buffalo robe; it was one we had in the business; the indorsers were brothers of *Spencer Douglas;* I did not come in contact with the new firm again till April, 1874, when *Spencer Douglas* told me they were talking of a dissolution; he asked me if I would take the new firm for the debt; I said I would; I do not think the dissolution could have taken place if I had not consented to the arrangement; the dissolution followed; I thought I was as safe with *Douglas* and *Johnson* as with *Douglas* and *Brother*. On the 10th June, 1875, I was going to Bronte on a visit to collect a note; I wanted the money to pay the mortgage; the mortgage was due in a few days; I presented the note and demanded payment of it from *Douglas* and *Johnson; Somerfield Douglas* and *Spencer Douglas* were present; I presented it to *Johnson;* he said he had not the cash, that times were hard, but if I gave them a little more time they would pay it, and they offered to renew the note; I would not take a renewal; I thought I ought to have better security; they did not dispute their liability; they said they would pay it; they then proposed to give me an assignment of accounts, and a chattel mortgage; they first offered an assignment of the accounts and I refused this, but offered to take it together with a chattel mortgage; I think I proposed the chattel mortgage; I had not much faith in the book debts; I consulted Mr. *Green*, and he told me I would be perfectly safe; I expected to remain two weeks, and it was done before I left: though I don't recollect if I was there two weeks; I had no idea that the Insolvents were on the verge of insolvency; I thought they were perfectly good; if *Douglas* and *Johnson* had repudiated the note, I should have gone for the maker of it; I considered the indorsers were released because I had failed to notify them; the business was done in Bronte. * *

Statement.

I was examined on oath before the County Court Judge of Halton. On or about the 10th June, 1875, I went to Bronte; I had probably been in the neighbour-

hood about a week; I stopped at my wife's friends, no connection of the *Douglases*; I had not seen the indorsers before that day at that visit; I had got a letter from *J. Douglas*; I have not got the letter; I don't think I ever said the effect of the letter was that I had better come down and look after this note; it was merely a friendly letter; there was nothing in it about *Douglas* or *Johnson*; I did not see the indorsers till that day; *Spencer Douglas* was a clerk in the store; *Somerfield Douglas* I met going to the store; they told me at first that times were hard; in a few days after I consulted Mr. *Green*, who thenceforth became my agent to close the matter; I asked him if a chattel mortgage would be good; something was said about a chattel mortgage in the store, and it was arranged with both partners. The understanding was, that the period for the extension of the note should be 3, 4, or 5 months and for no definite time; I was mistaken if I said that the note was made for 18 months; I say still that I would have looked to the indorsers if I had not got the security; I was stopping 1½ miles from the village; it was the first time I had been in the village on that visit; * * the mortgage fell due in June. I said I wanted the chattel mortgage and assignment as better security than the note. Mr. *Gibbs* holds the mortgage on my place; he lives at Bell Ewart; I paid him after I got the assignment and chattel mortgage, and another party holds my note for the money I borrowed to do so; I did not know anything of *Douglas* and *Johnson* being sued, nor until I saw the account of the insolvency. When I got home I pushed them in a way; I told them I must have it, but I would not have sued them; the *Douglases* are cousins of mine; *Johnson* is no relation; I stopped a while at Bronte with Mr. *Stevens*, a relation of mine; I think the firm of *Douglas* and *Ross* were very little, if any, behind when I left it. The reason I left the business was, I got possession of the homestead, and had to go home to manage it; my sale was to *Spencer Douglas*; I don't know what his

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circumstances are; I don't know whether he has any property except what he works for; I never heard of his having any property; I have known him for four years; he is the maker of this note. *Douglas* and *Johnson* had no written authority from me to continue their business after I got the mortgage; they did, however, continue their business: they appeared quite willing to assign the accounts to me; they gave as their reason for giving them, that I could collect them better than they could; this was the chief reason they gave for assigning; they selected, and I was to have the privilege of taking such as were good; I rejected none they selected; I should suppose the accounts are worth $500; no money passed on this transaction. I am not certain if the assignment and chattel mortgage were executed on the same day; they were executed at this visit, in time for me to return. It is difficult to place a value on such accounts. I understood they were to carry on the business; these accounts were to be re-assigned by me on payment of the debt due me; it was in April, 1874, *Spencer Douglas* told me he was going out of the business; it was at Bronte; he gave me no particular reason; I understood that *Johnson* had $1,000 which he was going to put in; did not take stock when I went out.

Statement.

Somerfield Douglas, a witness for defendant, swore: "I live in East Flamborough, and am a farmer; I remember when *Spencer Douglas* came into the firm of *Douglas & Brother*; I think he put in about $70; I put it in for him; he bought out *Ross*; I was present when most of the arrangement was made; *Ross* said it was necessary that he should go out of the business; that he had to go home to attend to the farm. I indorsed the note "F.," [the note for $1080] I understood that after all the liabilities of the firm were paid, there would be about $2,500 of a surplus, and that the half interest of the business he was to get, and I secured it for him; I think the note was to run for a year; *Ross*, however, was to let it run till such time after it fell due until he wanted the

money; I consider I was liable as indorser up to the time the assignment was made to the defendant; I got no notice of presentment or non-payment; I was not present when the note was given up; I was in the store in May or June last, I think when *Ross* was there; I was in the store very often; I did not go there to see about this note; I remember *Ross* coming in; I think he presented the note to *Johnson* first, and then to *Howard Douglas* or *Spencer*; he wanted a settlement and made a demand for payment; they did not say much at first in reply; *Ross* seemed to wish to have a settlement. I remember they acknowledged their liability on the note; I don't know anything else that happened after that; I don't think *Spencer Douglas* is worth anything, nor was he at the time the assignment was made."

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Mr. *Walker*, for the plaintiff.

Mr. *Muir*, for the defendant.

The additional facts of the case appear in the judgment.

PROUDFOOT, V. C.—[After stating the facts to the effect above set forth:] The cause was heard before me at the Autumn Sittings at Woodstock, when, after hearing the evidence, I determined that there was a *bonâ fide* debt due from the insolvents to the defendant; that the securities were not given voluntarily, but under pressure; and that the defendant had no knowledge of the insolvency or inability of the debtors to meet their engagements, nor of any design or intention to evade or violate the insolvency law, and that the insolvents had no such intention. The only question reserved was, whether, under the circumstances of this case, the securities were given in contemplation of insolvency, and if the defendant had obtained an unjust preference within the meaning of the Insolvency Law of 1869. All the parties,

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the insolvents and the defendant, were examined before me, and I was satisfied of their truthfulness and their desire to tell everything connected with the transaction. The defendant said, that when he applied for payment and got the securities, he thought the firm perfectly good; had no idea of their being insolvent; never heard the least hint of it; had not heard of their being sued. *Howard Douglas*, one of the insolvents said that when he assigned to *Ross*, he (*Douglas*) did not know they were behind: "We could not meet our payments, but I thought we were solvent; I wanted time in May; we were unable to meet our payments in April; gave some customers' notes to creditors." *Johnson*, the other insolvent, said that when the securities were given to the defendant, he (*Johnson*) "did not know we were in such a bad state as we were really in; we intended going on with the business; we were always behind in meeting our payments."

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The insolvents were not men well fitted for mercantile business, not accustomed to keeping books, seldom took stock, and I have no doubt they did not know how deeply they were involved, but thought that their embarrassment was only temporary, caused by the difficulty they found in collecting their accounts. In the Spring of 1875, they intended going on with the business, and the defendant never thought of preventing them, notwithstanding the mortgage. One action had been brought against them, but they hoped to be able to arrange that, and still go on. It has been held that the phrases "contemplation of insolvency" and "unjust preference" are under our Statutes to receive the same construction as similar expressions have received in England: *Tuer* v. *Harrison* (*a*), *Newton* v. *Ontario Bank* (*b*); and in England it has been held that when a bankrupt entertained a *bona fide* hope that he would be extricated from his difficulties without being made a bankrupt, that a

(*a*) 14 C. P. U. C. 449.

(*b*) 18 Gr. 662.

payment made by him was not a fraudulent preference: *Gibson* v. *Boutts* (*a*), *Atkinson* v. *Brindell* (*b*). In *ex parte Bolland* in *re Cherry* (*c*), a jury had found that the bankrupt when he made the payment was unable to pay his debts as they became due; that the payment was not made with the view to give the creditor a preference, and the Court of Appeal held that the second finding disposed of the whole case, and that the payment could not be impeached. I think the transaction in this case was not in contemplation of insolvency. But it was said that the Statute of 1869, sec. 89, declares that if the assignment be made within thirty days of the insolvency it shall be presumed to have been so made in contemplation of insolvency. It has been held, however, that this is a rebuttable presumption, and not a hard and fast rule: *Campbell* v. *Barrie* (*d*); and I have already stated my conclusion from the evidence that it was not done in contemplation of insolvency. It was also contended that the assignment and mortgage, comprising all or nearly all the property of the insolvents, was in itself an act of insolvency, and that no pressure on the part of the defendant could make it valid. The accounts assigned to the defendant did not amount to one-fifth of the assets, and the chattel mortgage, though covering the greater part of the assets, was only as declared on its face, "a collateral or further security in case said *Ross* be unable to collect said accounts," and the proviso was for payment of $1,080, with interest, from 9th January, 1874, within two months, or for payment by the insolvents of the difference between the amounts which *Ross* might realize from the accounts assigned, and the sum of $1,080 and interest, and *Ross* was required to use reasonable diligence to collect the accounts. There was no proviso for the mortgagors retaining possession till default. It was sworn to by all

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(*a*) 3 Scott 229.
(*b*) 2ing. N B. C. 225.
(*c*) L. R. 7 Chy. 24.
(*d*) 31 U. C. R. 270.

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the parties, however, that the intention was, that the business should be carried on, and no interference in fact was made by the defendant with the usual course of business, which was carried on until forced to make an assignment by the proceedings of other creditors.

The assignment of the whole of a debtor's property is not necessarily an act of bankruptcy. It is so or is not so, according to circumstances. It depends upon whether the parties intended to contravene the bankrupt laws or not: *Bell* v. *Simpson* (*a*), *Pennell* v. *Reynolds* (*b*), *Mercer* v. *Peterson* (*c*), *Campbell* v. *Barrie* (*d*), *Archibald* v. *Haldan* (*e*).

Adams v. *McCall* (*f*) was cited to prove that the intention of the assignors and the knowledge of the assignee were wholly immaterial under a provision in the Act of 1864 similar to the Act of 1869, sec. 89; that the only question was if an unjust preference by the creditor was obtained by means of the assignment, and *Payne* v. *Hendry* (*g*), was referred to as establishing that the result only was to be looked at; that if any inequality was created in favour of the creditor the preference was unjust, within the meaning of the insolvent laws. Except for the respect due to any opinion of the learned Chancellor, who decided the last case, it may be laid out of the question as an *obiter dictum*, for the case clearly came within the 86th section of a dealing with a person who had knowledge of the insolvency. As regards *Adams* v. *McCall*, the evidence was so strong of a fraudulent intention that, although the jury found in favour of the *bona fides* of the transaction, a new trial was granted. The expression of opinion of the Court is, of course, entitled to the highest consideration, but the current of authority seems to me contrary to their interpretation placed on the section.

Judgment.

(*a*) 2 H. & N. 410.
(*b*) 11 C. B. N. S. 709.
(*c*) L. R. 3 Exch. 104.
(*d*) 31 U. C. R. 279.
(*e*) 31 U. C. R. 295.
(*f*) 25 U. C. R. 219.
(*g*) 20 Gr. 142.

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In *McWhirter* v. *Thorne* (*a*) it was held that "contemplation of insolvency" in our Statutes meant the same thing as "contemplation of bankruptcy" in England, and "given by way of payment by such person to any creditor whereby such creditor obtains, or will obtain an unjust preference over the other creditors" means no more than a transfer or payment, made by way of fraudulent preference to one creditor over the others. *Tuer* v. *Harrison* (*b*) placed a similar construction on the language of the insolvent debtor's act, Con. Stat. Upper Canada, ch. 26, sec. 18; and in *Newton* v. *Ontario Bank* (*c*) this Court held that the contemplation of insolvency must have been in the view, both of the debtor and creditor; and in this last case in Appeal (*d*) *Wilson*, J., held that where the act was done under pressure it was not voluntary, and not within the Act; and at page 298, *Mowat*, V. C., says: "That where the debtor makes the transfer by the pressure of the creditor, the transfer is good."

Judgment.

In *McWhirter* v. *Royal Canadian Bank* (*e*), a mortgage made under the urgent pressure of the creditor of a part of the assets, was held good; but a second one made of the remainder, after the creditor became aware of the insolvency, was set aside. And, in *Archibald* v. *Haldan* (*f*), already referred to, a mortgage on the whole of the debtor's property, where the insolvent knew of his insolvency, but the creditor did not, was supported; and in *The Bank of Australasia* v. *Harris* (*g*), an Act of the Province of Queensland had declared that all alienations and mortgages of real or personal estate made by an insolvent, within sixty days preceding an order of sequestration, and having the effect of preferring any creditor to another, were made void. The Privy Council held that this meant a fraudulent prefer-

(*a*) 19 U. C. C. P. 302.
(*b*) 14 C. P. U. C. 449.
(*c*) 13 Gr. 658.
(*d*) 15 Gr. 283, 297.
(*e*) 17 Gr. 480.
(*f*) 31 U. C. R. 295.
(*g*) 15 Moo. P. C. 97.

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ence. If this be a true construction of an Act which prohibits any preference, a *fortiori* must it be the meaning of our Act forbidding an unjust preference. In *Nunes* v. *Carter* (*a*), a decision upon a Jamaica Act which invalidated all transfers by a person in insolvent circumstances, without regard to preference of creditors, if made within six months of the declaration of insolvency, Lord *Westbury* referred to the Queensland case, and then proceeded to define a fraudulent preference. "It arises where the debtor, in contemplation of bankruptcy, that is, knowing his circumstances to be such as that bankruptcy must be, or will be the probable result, does, *ex mero motu* make a payment of money or delivery of property to a creditor not in the ordinary course of business, and without any pressure or demand on the part of the creditor." See further on the subject of pressure as depriving the act of its voluntary and fraudulent character: *Ex parte Topham* (*b*), *Keays* v. *Brown* (*c*), *McFarlane* v. *McDonald* (*d*), *Clemmow* v. *Converse* (*e*).

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These cases suffice to shew that the result of the transaction, as producing inequality among the creditors, is not alone to be looked at; there must be something more—the fraudulent intent—to invalidate it. And that which is usually called pressure, and to which the debtor is supposed reluctantly to yield, need be nothing more than a request, so that the transaction be not *ex mero motu*, *Johnson* v. *Fesenmeyer* (*f*), *Strachan* v. *Burton* (*g*).

In *Archibald* v. *Haldan* (*h*), already referred to, the mortgage was held good although it contained no proviso for the mortgagor to remain in possession till default, and though it covered all the goods. I was referred to *ex parte Foxley* (*i*), as a clear authority that a convey-

(*a*) L. R. 1 P. C. 342.
(*b*) L. R. 8 Chy. 619.
(*c*) 22 Gr. 10.
(*d*) 21 Gr. 319.
(*e*) 16 Gr. 547.
(*f*) 3 Deg. & J. 13-24.
(*g*) 11 Exch. 650.
(*h*) 31 U. C. R. 295.
(*i*) L. R. 3 Chy. 515.

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ance of all a trader's property, with trifling exceptions, to a creditor, to secure a previously existing debt, was void and could not be sustained by pressure. In that case the debtor had been sued by his creditors, and the mortgagee was his solicitor, who, necessarily, had notice of his embarrassments, and, indeed, that is one of the points on which the decision of the commissioner, approved by the Court, proceeded; the mortgage specified no time for payment, and might have been enforced at once; there was no agreement as to continuing the business; there was no pressure; the whole proceeding took place at the request of the bankrupt. I have referred also to *ex parte Stevens re Stevens* (*a*), where a bill of sale of the whole of the mortgagor's property was held to be an act of bankruptcy and void. The bill of sale was given in renewal of a former one, which had not been registered to avoid publicity. The mortgagee had notice of the embarrassments of the mortgagor, and the construction put upon the transaction by the Court was, that the bill of sale was not registered, so that the creditor might register it as soon as he saw the debtor's affairs coming to a crisis. These two cases are so wholly dissimilar in all essential particulars from this case, that I cannot consider them as laying down a rule that must govern it. It was also contended that the insolvents did not defend *Kerr & Co.'s* action, and that this was a fraud upon the insolvent law; *Re Jones* (*b*).—However that might be as between the judgment creditor, and the other creditors, I do not think it can have the effect of invalidating transactions with other parties who had no knowledge of it. The case cited did not determine that the judgment was void, it was considered only in reference to the insolvent's right to a discharge. I do not think that the assignment and mortgage in this case can be impeached under section 86, for that requires knowledge by the mortgagee of the inability of the debtor to

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(*a*) L. R. 20 Eq. 786.

(*b*) 4 Pr. Rep. 317.

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meet his engagements, or having probable cause for believing such inability to exist, or after such inability has become notorious. I have determined on the evidence that the defendant had no such knowledge or reason to believe the inability of *Douglas* and *Johnson* to meet their engagements, and it had not become notorious.

As the defendant does not claim to be the absolute owner of the assigned and mortgaged property, I would under the 87th section, have given the plaintiff a decree for redemption had the bill been so framed, but the plaintiff does not seek that relief. If he desire it, however, the bill may be amended, and a decree for redemption taken if it be done within a month.

The 88th section is applicable to frauds concocted by the debtor to cheat his creditors, with the knowledge of the person contracting with the debtor; and in my view of the entire *bona fides* of the parties to this suit, that no fraud was intended by the debtors, and that none was intended by the defendant, I think this clause wholly inapplicable.

Judgment.

Looking at the large amount of litigation arising out of these clauses in the insolvent law, and which will probably continue while the validity of transactions is made to depend on the intent of the parties, it is worth considering whether a clear and precise rule, avoiding all transfers or incumbrances on a debtor's property within a specified time before the insolvency, as in the Jamaica Act, would not be preferable. Great injustice would no doubt result from such a rule in many cases, but these are questions for the Legislature.

Unless the plaintiff elects to redeem within a month, the bill will be dismissed with costs.

The plaintiff having omitted to make an election to redeem, a decree was drawn up and entered on the 16th of March, 1876, directing the bill to be "dismissed out of this Court, with costs to be paid by the said plaintff to the defendant forthwith after taxation thereof."

From this decree the plaintiff appealed.

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June 16th.

Mr. *Boyd*, Q. C., and Mr. *Walker*, for the appeal.

The evidence here clearly shews that the defendant was not, at the time of the making of the assignment of accounts and chattel mortgage impeached by the bill in this case, a creditor of the insolvents, as the claim of the defendant in fact was not against the insolvents, and there was really no privity of contract between the defendant and the insolvents, and under the facts appearing in the evidence the defendant had no right to call on them for payment, and therefore the impeached transactions were, in the words of the Act, "gratuitous and without consideration." Then, again, the evidence of the parties themselves establishes that at the time of the impeached transactions, the insolvents were unable to meet their engagements, and that the defendant knew such inability, or had probable cause for believing such inability to exist; and the impeached transactions injured, obstructed, and delayed the creditors of the insolvents, and are, therefore, presumed to have been made with intent to defraud such creditors. But even if the defendant can be regarded as a *bonâ fide* creditor of the insolvents, then by the execution of the chattel mortgage and the assignment of the accounts, in the pleadings mentioned, by way of security for payment to the defendant, he obtained an unjust preference over the other creditors of the insolvents, and such chattel mortgage and assignment of accounts thereby became and were, and now are null and void, and should be so declared. Besides, this is not a case of taking something out and out, by way of payment or satisfaction of a claim, so as to bring the case within the 89th section of the Insolvent Act of 1869, but it is a case of taking a security from insolvent debtors, such security covering so much of the debtors' assets, and containing such covenants, that the defendant, independent of the delay it would occasion other creditors, might have taken pos-

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session and put an end to the business, and we submit that an assignment though made under pressure, is fraudulent if the necessary effect of enforcing it would be to stop the trader's business, and so defeat and delay creditors. The impeached transactions constituted an act of insolvency, inasmuch as the insolvents, being then unable to meet their liabilities in full, made a sale or conveyance of the principal part of their assets without the consent of their creditors, and without satisfying their claims. Counsel also submitted that the Courts of this Province having adopted the doctrines of the English decisions that pressure in certain cases validates the transfer of securities by an insolvent to his creditor, should also follow those decisions in holding that pressure, in a case like the present, is of no avail when the whole, or nearly the whole, of the assets are transferred; that in such a case it should be held that the necessary effect of such a transaction is a fraud upon the Insolvent Act; and, therefore, that notice or knowledge in fact to the creditor of the circumstances of the insolvent, is of no consequence. In addition to the cases cited in the Court below, counsel referred to and commented on *Young* v. *Fletcher* (*a*), *Pennell* v. *Davidson* (*b*), *Smith* v. *Cannan* (*c*), *Siebert* v. *Spooner* (*d*), *Woodhouse* v. *Murray* (*e*), *Timms* v. *Smith* (*f*), *Insolvent Act of* 1869, *sec.* 13, *s. s. i.*, *secs.* 86, 88. 89.

Argument.

Mr. *Muir*, for the respondent, contended that the evidence demonstrated satisfactorily that the defendant was a *bonâ fide* creditor at the time of the making and giving of the securities in question; and that from the facts proved, it could not be presumed that the assignment and chattel mortgage were made and given by the insolvents with intent to defraud their creditors, as they

(*a*) 3 H. & C. 732.
(*b*) 18 C. B., 355.
(*c*) 2 E. & B., 35 & 45.
(*d*) 1 M. & W., 718.
(*e*) L. R. 1, Q. B, p. 638.
(*f*) 1 H. & Colt., 849.

were not gratuitous or without consideration, or for a merely nominal consideration; and defendant was not aware that the insolvents were unable to meet their engagements, nor had he probable cause for believing that such inability existed; and these instruments were not made and given after the inability of the insolvents to meet their engagements had become public and notorious. Neither were they made or given by the insolvents in contemplation of insolvency, but were made and given long after the indebtedness to the defendant had become due, and upon a demand for payment thereof madeby him, and the mortgage was given only as an additional collateral security to the assignment, to be resorted to in case the defendant failed to realize the whole amount of his claim from the debts due the insolvents, in the collection of which he was bound to use due diligence, and the instruments did not cover more of the property of the insolvents than was reasonable, under the circumstances, to satisfy the demand of the defendant; and was not such a transaction as was calculated to raise any suspicion against its entire good faith.

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Argumr et.

The evidence also shews that the insolvents were unaware of the existence of any serious financial embarrassment at the time of the making and giving of the assignment and chattel mortgage; and the charge of fraud made against the defendant by the plaintiff wholly failed to be established.

In addition to the cases previously cited, he referred to *ex parte Winder*, in *re Winstanley* (*a*), *Bills* v. *Smith* (*b*), *Re Craven and Marshall* (*c*), *The Royal Canadian Bank* v. *Kerr* (*d*), *Allan* v. *Clarkson* (*e*), *The English Bankruptcy Act*, 1869.

DRAPER, C. J.—On the 10th of July, 1875, the insolvents *Howard Douglas* and *William A. Johnson*,

Sept. 28th. Judgment.

(*a*) L. R. 1 Ch. D. 290.
(*b*) 11 Jur. N. S. 157.
(*c*) L. R. 10 Eq. 648.
(*d*) 17 Grant 47.
(*e*) 17 Grant 570.

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executed a voluntary assignment under the Insolvent Act of 1869, 32 & 33 Vic., ch. 16.; and on the 9th of August following, the plaintiff was appointed the assignee of their estate.

The defendant relies upon an indenture dated the 21st of June, 1875, which states that in consideration of $1,080 paid to the insolvents by defendant, they sold and assigned to him certain horses, goods and chattels, waggons, harness, teas, coffee, dry goods and groceries, and other stock in trade then in the store and premises occupied by them, together with any household stuff or utensils respectively held by them—subject to a proviso that if they should within two months pay him the said sum of $1,080 with interest at 8 per cent. from the 6th January, 1874, or in case the insolvents should pay to the defendant any difference between the sum which defendant may realize from certain accounts due to the insolvents, and by them assigned to the defendant, and the said sum of $1,080 and interest (provided that defendant should use reasonable diligence to collect, and the indenture is declared to be an additional and collateral security in case defendant cannot collect the accounts), then the indenture should cease. The insolvents covenanted to pay defendant the sum of $1,080 with interest. If they should make default, or should attempt to sell or dispose of such goods &c., or in any way part with the possession thereof or remove them out of the county of Halton, without defendant's consent first had in writing, the defendant may enter to remove the goods, &c., and after taking possession may sell or may have, hold, &c., the said goods.

Judgment.

The firm now represented by the insolvents *Douglas & Johnson* was formed in July, 1872, of the insolvent *Howard Douglas* and the defendant. *Howard Douglas*, called as a witness for defendant, swore he put in no money; he put in a horse and buggy, and the defendant put in about $1,400. The firm continued until February, 1874, when *James Spencer Douglas* bought him out.

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James Spencer Douglas appears to have had no capital. He only put in $70, and *Somerfield Douglas* swears he advanced it for him. On leaving the firm the defendant got from *James Spencer Douglas* two promissory notes, indorsed by his brothers *Somerfield* and *William J. Douglas*, one for $80, payable at a short date and duly paid, and the other for $1,080 payable a year from date; each note bearing interest at 8 per cent;—and, as proved by *Howard Douglas*, defendant also, while a partner, got his living out of the firm—and a horse, harness, and cutter which belonged to the firm. *Spencer Douglas* only remained a partner three or four months, and then made way for the insolvent *Johnson*. He (*Spencer*) says he only got his board and clothing—and got nothing when he withdrew—though he continued in the employment of the new firm.

The parties all around appear to be a family connection. The four *Douglases* are brothers. The defendant *Ross* is a cousin, and the insolvent *Johnson* is a brother-in-law.

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When the note for $1,080 became due, *Ross* omitted to notify either of the indorsers. As for the maker it seems that he was treated as of little or no account. *Ross* subsequently appears to have considered himself secured by the mortgage of the goods and chattels of the firm, and an assignment of the larger or better portion of the debts due to it. The possibility that he might be held liable for the debts of *Douglas* and *Ross*, does not appear to have been considered; at least I find no allusion to it.

Nor is it stated or shewn, so far as I can find, that there ever was a partnership deed, or other note or memorandum in writing of the original partnership, or of any subsequent changes. The defendant swears he was in partnership with *Howard Douglas*, "It began 18th July, 1871 or 1872, or thereabouts. I now say it was in July, 1873. I am not certain of it however. I left it in January, 1874; it was formed in July, 1872."

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Nothing shews the term, if any, for which the partnership was created, or upon what terms as regarded the firm; the defendant left it and *Spencer Douglas* entered into it, and the same may be said as to the last firm, that of the insolvents.

The transfer from the defendant to *Spencer Douglas* is only shewn by their statements and acts. The defendant swears "My sale was to *Spencer Douglas*." *Howard Douglas* swears, "The sale from *Ross* was to *Spencer Douglas* and I thought myself responsible;" and *Spencer Douglas* swears, "I was once in the firm of *Douglas & Brothers* * * * I went out of my own free will. I sold to *Johnson*. I got nothing; my interest in it is worth something. I do not know how much *Johnson* was to give * * If I had been obliged to pay this note (*i. e.*, the note for $1,080) I should have looked to the firm. It was clearly understood that this note was to be paid out of the partnership means of *Douglas & Johnson*." How the creditors of *Howard Douglas* and his successive partners were to be paid does not appear to have entered into the consideration of any of these parties. *Howard Douglas* certainly states "We supposed that *Spencer* and I were liable on the note as partners," but if that was the intention why was not *Howard* a party to the note, or why was it not made by the new firm of *Douglas* and *Brother*, instead of *Spencer Douglas* being sole maker? I think the plain import of the evidence is, that the defendant sold his interest in the firm of *Douglas & Ross* to *Spencer Douglas*, and that *Howard Douglas* agreed that he would accept his brother *Spencer* as a partner in place of his cousin, the defendant, and at the time that arrangement was completed, I cannot find any proof that the new firm of *Douglas & Brother* was or became indebted to the defendant for the share and interest which he sold, as he swears, to *Spencer Douglas*. Nor do I find in the evidence any stronger proof that the present firm, the insolvents, were debtors to the

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defendant for the amount which *Spencer Douglas* agreed to pay him as the consideration for his share in the original firm. In addition to the two notes made by *Spencer Douglas*, the defendant appears on going out to have withdrawn from the firm some chattels and property, worth about $300. I am unable to deduce from all these facts that as against the creditors of the firm, the defendant, a partner while some greater or less part of those liabilities was incurred, can obtain and hold a preference over those creditors as being himself a creditor of the insolvent firm of *Douglas & Johnson*.

The Insolvent Act of 1869, 32 & 33 Vic., ch. 16, sec. 13, enacts that a debtor shall be deemed insolvent, if, among other things, "being unable to meet his liabilities in full he makes any sale or conveyance of the whole or the main part of his stock in trade or of his assets, without the consent of his creditors, or without satisfying their claims." The inability of the insolvents to meet their liabilities is, I think, abundantly shewn by the fact that one or two of their creditors had sued them, and that they required time to meet their engagements. It is not pretended that their creditors assented to their making the mortgage and assignment to the defendant.

Judgment.

The sections of the Act numbered from 86 to 93 inclusive are grouped together under the title of "frauds and fraudulent preferences." It is only necessary to notice the 86th and 89th, and the former only in aid of the proper interpretation of the word "presumed," which occurs in both.

The 86th section strikes at contracts or conveyances gratuitous or without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming insolvent to any person, creditor or not, within three months next before any proceeding in compulsory liquidation; and all contracts by which creditors are obstructed or delayed, made by a debtor unable to meet his engagements and afterwards becoming an insolvent,

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

In my opinion this presumption is conclusive, the facts set forth in the statute being admitted or proved. That being so, the intent to defraud is affirmed by the statute without other proof.

The 89th section on which the question before us immediately turns is as follows : " If any sale, deposit, pledge, or transfer, be made of any property, real or personal, by any person *in contemplation of insolvency* by way of security for payment to any creditor, or if any property, real or personal, movable or immovable; goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, &c., shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee in any Court of competent jurisdiction ; and if the same be made within thirty days next before the execution of a deed of assignment or the issue of a writ of attachment under this Act it *shall be presumed* to have been made in *contemplation of insolvency.*"

Judgment.

The first part of this section avoids any such sale, &c., as is therein defined, provided that the creditor to whom it is given obtains or will obtain an unjust preference. The test of avoidance is the effect which the sale, &c., will have, whether it will confer on the creditor receiving it an unjust preference, and nothing is made to turn upon motive or intent. If the effect is or will be something which *ex æquo et bono* ought not to be obtained by the creditor, the sale, &c., is void, and the sale, &c., is inevitably (it " *shall be* ") presumed to have been made in " contemplation of insolvency."

Two things are required under this section : 1st. That the sale, &c., should be made in contemplation of

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insolvency. 2nd. That the creditor to whom it is made obtains or will obtain an unjust preference over the other creditors, and if such sale be made within the thirty days it shall be presumed to have been made in contemplation of insolvency. I think the statute makes the proof that the sale, &c., was so made incontrovertible evidence of the contemplation.

I confess I am at a loss to understand the conduct of the defendant in regard to this transaction. He sold his interest in this partnership to *Spencer Douglas* for 1,300 who was to pay him what he had put in, and who, immediately after entered into partnership with his brother *Howard*, contributing towards the capital of the new firm the interest just purchased by him from the defendant. Defendant states that he received in payment goods to the amount of $300, and notes made by *Spencer* and indorsed by his brothers *Somerfield* and *William*. No where does he set up that he sold his interest to the new firm. The notes were one for $80, which was paid as *Spencer Douglas* says after he left the firm, and one for $1,080 dated 9th January, 1874, payable one year after date, but it seems there was a verbal agreement to extend the time for payment for four months if they wanted it. The defendant in his evidence states "It really was *Spencer Douglas* that bought out my interest; there was an agreement that these notes were to be paid out of the estate; *Howard Douglas* was a party to that agreement, it was verbal." Assuming this as between all the parties interested in the note to have been agreed to, the note would have fallen due about the 12th of May, 1875. The defendant, however, allows the time to run out, giving no notice to the indorsers, and on the 21st June, 1875, he takes from the insolvent firm a mortgage of the principal part of their partnership property and an assignment of their book debts, together with their separate furniture as a security for payment of a debt due by that firm to him, not mentioning the note for

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$1,080, or the sale of his interest to *Spencer Douglas*, but assuming, in which the insolvents apparently agree, that they, the new firm, were his debtors for the amount which he had put into the firm of *Douglas & Ross*, and which he (defendant) had as he swears sold to *Spencer Douglas*. This act was in itself an act of insolvency under the statute of 1869, for it is now obvious that *Douglas & Johnson* were unable to meet their liabilities in full and had then been sued by one creditor at least, if not by more than one. On the 10th of July following they execute an assignment to the interim assignee. I do not see how in the face of these facts and in the absence of any entries in their books sustaining any different state of things, the defendant can contend that the firm of *Douglas & Brother* were indebted to him for his interest and share in the previous partnership which he had sold to *Spencer Douglas*, taking indorsed notes in payment. The defendant's neglect alone lost him his recourse against the indorsers, but his having lost it can give him no claim on the new firm. No doubt what the insolvents have said as to their liability is consistent with the defendant's representation and would tend to support the mortgage and assignment to him as against them, but how can the creditors of either of these firms? how even can *Spencer Douglas* be affected by this or prevented from asserting that the verbal admissions or undertakings of *Howard Douglas* or *Spencer Douglas*, or of *Johnson* can affect them or enable the defendant to sell his interest as a partner, receiving promissory notes in payment, losing that security by his own ignorance or negligence, and then to claim as a creditor of the present insolvents for the balance unpaid of the price for which he sold?

Judgment.

On the whole if it were necessary to decide the case upon that ground I should hold that the defendant is not proved to be a creditor of the insolvents. Suppose *Douglas* and *Johnson* had not become insolvents, in what form and upon what ground could the defendant

have maintained an action against them for the $1,080? If defendant was really selling his share and interest to *Douglas & Brother*, why is it that the defendant swears that it was really *Spencer Douglas* that bought his interest, (adding however there was an agreement that these notes were to be paid out of the estate, which agreement was verbal), and the preceding part of his statement be true? There could only have been some collateral agreement to pay in case the indorsed notes were dishonoured. It was not a debt grounded upon a sale to the new firm of the interest of the out-going partner of the old firm, there is not a tittle of evidence of any such sale, and if *Douglas & Brother* were such purchasers why did they not give the notes of the new firm instead of *Spencer Douglas* being the sole promissor? Nor does the fact that the insolvent *Johnson* paid $1,000 into the firm make any difference, in my opinion, as to the partnership liability of the insolvents to the defendant. The former had then in hand a portion of the goods which had formed the stock in trade of *Douglas & Brother*, and *Johnson* influenced, and as it turns out deceived by the representation that the firm was in a flourishing condition, may have thought that putting in this additional capital would be a good investment. He soon discovered his mistake, and while a partner he withdrew $500. According to *Spencer Douglas*, *Johnson* came into his place about May, 1874, and in July, 1875, the assignment in insolvency was made.

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But if the defendant is to be treated as a creditor of the firm of *Douglas & Johnson*, when they executed the deed of 21st June, 1875, that is, within thirty days of the making of the deed of insolvency, I am of opinion that the first mentioned deed gave, and was intended to give, an unjust preference to the defendant, as a creditor, over the other creditors, and that the presumption that it was made in contemplation of insolvency, is, under these circumstances, made conclusive by the statute.

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I have conferred with my brother *Patterson* on the subject of pressure, and agreeing in his conclusion on this point I shall add nothing to the judgment which he will deliver in respect thereof.

I think the appeal should be allowed with costs. The decree reversed.

Judgment.

BURTON, J.—The bill is filed by the official assignee who was appointed assignee of the estate of *Douglas & Johnson* to set aside a mortgage given by the insolvents of all their stock in trade and an assignment of a number of accounts, constituting in effect all but a trifling portion of the insolvents' assets, to secure a note of $1080 given by one *Spencer Douglas* and indorsed by *W. J. Douglas* and *Somerfield Douglas*, and which this defendant alleges the insolvents had assumed. The mortgage and assignments were made within 30 days next before the execution of the deed of assignment in insolvency. The bill alleges that the deeds were so executed with intent fraudulently to impede, obstruct and delay these creditors with the knowledge of the defendant, and also impeaches the transaction as a fraudulent preference. The defendant *Ross* sets forth facts in his answer which are entirely at variance with his own evidence at the hearing and with the evidence of the witnesses produced on his behalf. He alleges that prior to the month of February, 1874, he formed a partnership with *Howard Douglas*. That in that month the partnership was dissolved, and he sold all his interest in the business to one *Spencer Douglas*, taking in part payment the note in question, and that *Spencer* immediately afterwards formed a partnership with *Howard* under the style of *Douglas & Brother*, contributing as his capital the interest so purchased from defendant. He alleges that in the fall of 1874 *Spencer* sold out to *Johnson*, who became a partner with *Howard Douglas*. It does not appear that the firm of *Douglas & Brother* ever assumed the payment of the note given by *Spencer*.

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Shortly after the firm of *Douglas & Johnson* was formed it is alleged that the defendant received a circular, which is not however produced in evidence, stating that they would assume and pay all outstanding claims *against the late firm of Douglas & Brother*—and from subsequent correspondence, which is also not produced, he was led to understand that the new firm would pay the note.

On the 10th June, 1875, he went to Bronte for the purpose of obtaining payment of the note, which he says would mature within two or three days, although in point of fact it was payable in the preceding January, and demanded payment of *Douglas & Johnson* who, he says, admitting their liability, requested a few days to pay, and offered a new note. This offer he declined, but they offered to give an assignment of book debts together with a chattel mortgage which, after consultation with his legal adviser, he accepted, adding that in the course of a few days it was executed, and feeling that his position was safe, and his claim secured beyond all reasonable doubt *he considered it unnecessary to notify the indorsers, and handed over the same to the maker.* In a subsequent paragraph he denies all knowledge of the insolvent circumstances of *Douglas & Johnson*, but believed them to be perfectly solvent, and but for that belief would have *allowed the note to go to protest, and would have looked to the maker and indorsers, who were in good financial standing, for payment.*

Judgment.

The defendant was cross-examined upon his answer, and was examined at the hearing, as were also the insolvents, and the maker and indorsers of the note in question.

The learned Judge appears to have been very favourably impressed by the manner in which the defendant and the other witnesses gave their evidence, and it was urged, and properly urged, that great weight was due to the decision of a Judge of first instance who had an opportunity which we do not possess of forming a judg-

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ment upon their demeanor and manner, and no one has a greater deference and respect than I have for any judgment of the very able and learned Judge who pronounced this decree, but I can, upon a careful perusal of this evidence, scarcely avoid feeling that their manner of giving evidence may to some extent have influenced his opinion and prevented his detecting, at the hearing, the contradictions and inconsistencies in the evidence which we have had the opportunity of considering more deliberately in our own chambers after an elaborate and able discussion, both of the evidence and the learned Judge's opinion of it, by the counsel engaged.

In a case wherein there is a conflict of testimony, where the evidence on each side is evenly balanced, the value of seeing the witnesses and observing their demeanor cannot be over estimated, and in such a case where the Judge has come, on the balance of testimony to a clear and decisive conclusion, it would require, as it has been said, a case of extreme and overwhelming preponderance to induce a Court of Appeal to interfere with the decision of the Judge. This is not, however, a case of conflicting evidence; such evidence as was given was given by the defendant and witnesses called on his behalf; and giving to that evidence all the weight to which the learned Judge considered it to be entitled, we have to consider whether it is sufficient (assuming the presumption to be a rebuttable one) to rebut the presumption raised by the statute that the transfer was made in contemplation of insolvency, and to shew that it is not impeachable as a fraudulent preference.

Judgment.

The statute under which we sit requires, and the parties to this litigation are entitled to, our decision as well on questions of fact as on questions of law, and the evidence being all on one side, the difficulty which would exist in the case of conflicting evidence does not arise here, the simple question is, as to the proper effect of that evidence.

The case is presented to the Court with the statute

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presumption that the transfer, sought to be impeached, was made in contemplation of insolvency, that is to say, that the insolvents had then present to their minds, that their affairs were in that position that would in all probability lead to a liquidation in insolvency, and that they should therefore do nothing which would have the effect of preventing that equal distribution of their assets, which it was the object of the insolvent law to secure.

Where then upon this testimony is there anything of sufficient weight to rebut this presumption? It is not a question of whether upon this evidence alone, apart from the presumption, the Judge as a jury might have come to the conclusion that the transfer was or was not made in contemplation of insolvency; but whether the evidence is of that clear and conclusive nature as should rebut the presumption which the law, for obvious reasons, raises against transactions of this nature occurring on the very eve of insolvency.

According to *Howard Douglas's* testimony it would seem that when *Spencer* retired and *Johnson* joined the partnership, *they were in want of money.* When the note was demanded, he said they had not the money. At that time *Kerr & Co.*, and, as I gather, *Brown, Routh & Co.*, had sued, for he says he instructed *Green* to defend the one but not the other. He said *they required time in May*, and were asking for it. He adds, "I knew at the time we made the assignment to *Ross*, we were behind."

Judgment.

In April preceding *McInnes & Co.*, and *Turner & Co.*, were pressing, and they gave customers' notes to them as security to get time. The other partner admits that there were two suits against them at the time of the giving the mortgage, and that the business was always behind ever since he went in. They say, however, that they did not credit they were in such a bad state as they afterwards proved to be.

This is the substance of the evidence given as to the circumstances of the insolvents, and the question is not

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whether that evidence was sufficient to warrant the conclusion that the transfer was made in contemplation of insolvency, but whether it was sufficient to rebut the presumption that it was so made, arising from the fact of its being made so shortly before the insolvency. I can discover nothing in the evidence tending to rebut the presumption but rather to strengthen it, and the evidence, for reasons which I am now going to refer to, is not, I think, satisfactory, nor does the defendant present a case which would call upon us to strain the law in his favour.

Referring to the statements in the answer, it will be seen that the defendant spoke of the maker and indorsers of the note as men in good financial positions, and that after getting the security he considered it unnecessary to notify the indorsers and he handed over the note to the maker.

It is clear upon the evidence that they were men of no substance, and that the indorsers were in fact discharged before this time, and it is also shewn that the note was not handed over to the maker.

Judgment.

The extension of time for payment of the note was, according to the defendant's own evidence for no definite period, and so far as the indorsers were concerned they were discharged when the note fell due as originally drawn, and defendant says, "I knew they were discharged, and I intended that they should be, for I felt that *Douglas & Johnson* were perfectly good," and again, "If *Douglas & Johnson* had repudiated the note, I should have gone for the maker. I considered the indorsers were released, because I had failed to notify them," whereas in another portion of his evidence after his attention had been drawn to his previous statement, he says, "I should still have looked to the indorsers if I had not got the security."

These contradictory statements do not tend to impress one favourably, or to remove the suspicion attaching to a transaction occurring so shortly before

the insolvency, when the parties benefited were so nearly related, and when the evidence of the indebtedness of the insolvents to the defendant *Ross* is of so vague and unsatisfactory a character. 1876. Davidson v. Ross.

In his examination he greatly qualifies the statement in his answer, and says *something* was said about a chattel mortgage in the store, and it was arranged with both partners. I said I wanted the chattel mortgage and assignment *as better security than the note.*

The insolvent *Howard Douglas* states it very differently. He says the defendant insisted on having accounts or the money, and he (the witness) said he would see about it, nothing being said about a chattel mortgage. He took the account to his solicitor, *and it was there and then arranged that a chattel mortgage should be given, it not having been previously arranged with Ross that it should be given.* In fact his impression is, that nothing had been said about a chattel mortgage until he presented it to his partner for execution.

Judgment.

The other insolvent says, that when pressed for security he told him he had nothing, he confirms his partner's statement that he never heard of the chattel mortgage till presented to him for execution. He says at the interview in the store they merely proposed to assign accounts; that defendant did not like it at first, but finally consented.

It is not very clear why *Howard Douglas* should have felt called upon to assume the note given by *Spencer Douglas*, at all events he says, "He undertook to pay the note when it was presented in June, and not before."

Some of my learned brothers, I believe, are of opinion that the presumption referred to in the 89th section is not a rebuttable one, but should be read as Mr. Justice *Wilson* construes the similar words in the 86th section, as deemed to be made in contemplation of insolvency. It is difficult to understand when the same expression is used not only in the same statute, but

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under a heading such as we find here relating to the same subject matter, "Frauds and fraudulent preferences;" that it means one thing in one place and an entirely different thing in another, and as preferences are usually given on the eve of insolvency, I can see many reasons which might have weighed with the Legislature in fixing a short time, within which, to prevent many nice and difficult questions, and to remove inducements to commit perjury, all inquiry should be avoided and a declaration made that all transfers within that period should be deemed to be made in contemplation of insolvency:—a somewhat similar provision was contained in the English Insolvent Law, 7 Geo. IV., ch. 57. It might be attended with some hardships, but it is questionable whether on the whole it would not be better than the present law, if correctly interpreted, which leads to so much uncertainty and confusion; but I am not at all satisfied that Mr. Justice *Wilson's* construction is not the correct one, and as a similar construction has been placed upon the clauses in some, if not all, of the other Provinces, I think that the Legislature in passing the Act of 1875 may not unreasonably be held to have adopted the construction placed by the Courts on the language of the previous statute, and that it must be left to it to make a change if such a change is deemed necessary.

Judgment.

But it is urged that even though it be shown that the insolvents made the transfer in contemplation of insolvency, still if it was not their voluntary act, but was influenced in any degree by the importunity of the creditor, it cannot be impeached. In my opinion it is not made out that the giving of the chattel mortgage was the result of pressure or importunity on the part of the creditor, but this, I believe, is the first occasion on which the construction of section 89 has been brought under the consideration of the Court of Appeal, and we have to decide whether the construction placed upon it by the Courts in this Province is the correct one.

The construction in favour of the view that pressure,

validated the transaction was first adopted by the Common Pleas in *Mc Whirter* v. *Thorne* (*a*), in which case Mr. Justice *Gwynne* laid it down that the test to determine whether a transaction is void under this section is precisely the same as is applied under the English Bankrupt Laws, and that if it were otherwise the term unjust in the Act in context with preference would be without meaning. 1876. Davidson v. Ross.

That decision has been followed by other Judges who felt bound by it, but not without some expression of dissent. It is entirely opposed to the view taken of the Act by the learned Chief Justice of this Court in *Adams* v. *McCall*, to the opinion of the Chancellor in *Payne* v. *Hendry*, and that of *Blake*, V. C., in *Keays* v. *Brown*: although having been concerned in that case I am in a position to say that it was not necessary to resort to the doctrine of pressure to sustain that decree, as the insolvents when they made the transfer did not do so in contemplation of insolvency, and the creditor furnished further goods at the time of the transfer, thus evincing his confidence in their ability to continue business. Judgment.

Before the English Bankruptcy Act of 1869, payments by way of fraudulent preferences were in England held to be void, but were not forbidden by any express enactment. Before that Act it was necessary in order to constitute a fraudulent preference that two things should concur: the payment must have been voluntary on the part of the debtor, and it must have been in contemplation of bankruptcy. With reference to the first of these conditions it was held that any pressure, if submitted to *bonâ fide* was sufficient to deprive the payment of that voluntary character which would tend to make it impeachable. The law of 1869 did away with the necessity of any inquiries as to whether it was made in contemplation of bankruptcy, and provided that if a debtor was unable to pay his debts as they became due

(*a*) 19 U. C. C. P. 303.

1876. Davidson v. Koss. from his own moneys, then every transfer, conveyance &c., made by him in favor of any creditor *with the view of giving such creditor* a preference over the other creditors should be void, provided bankruptcy occurred within a certain time. So that the motive with which the transfer was made had to be inquired into, and the Court held that the law of fraudulent preference was not in that respect altered by that Act, and that however desperate the circumstances of the debtor were, the creditor might by pressure secure a payment which could not be impeached as a fraudulent preference.

The case which has generally been relied on for holding that although our Act omits all reference to the motive or intent to give a preference, it should be construed as if those words were inserted, is *The Bank of Australasia* v. *Harris* (*a*), under the Insolvency Act of Queensland, the 8th section of which avoided all alienations or transfers made by a debtor in contemplation of insolvency, *having the effect of preferring any then existing creditor.*

Judgment.

I have never been able exactly to understand how the question of fraudulent preference arose in a suit not between the assignee and the Bank, but between the Bank and *Harris*; but the decision of the Privy Council proceeded on the ground, that reading that section in connection with others the true construction of those words was that they indicated fraudulent preference. Can the other clauses of our Insolvent Act be called in aid of a similar construction of section 89?

The 88th section expressly refers to the "fraudulent intent" as being requisite to bring its provisions into operation, but the next section which is the one with which we are now dealing, uses a different form of words, and is intended to apply to a different class of cases. The policy of the insolvent law being, upon the insolvency occurring, to secure an equal distribution of

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

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the estate among the creditors, it would seem to be against the spirit of that law that a person in contemplation of insolvency, or knowing himself to be insolvent, should do anything to interfere with that distribution, and it is not unreasonable to suppose that having before them the decisions upon the English bankrupt law which permit the law to be thus easily defeated, the Legislature had designedly refrained from using any words making the intent to prefer material, but had declared any transfer under such circumstances, which had the effect of creating an unjust preference, void.

It must not be overlooked that in the sister Province of Quebec, to which the original Act as well as the present applies, the law even before the Insolvency Act, never allowed a creditor to get a preference over another even by execution, and that seems to have been present to the mind of the framers of the section under consideration which makes the inequality of the division of the estate the main ground for cancelling the payment. Of course the payment in full of a debt in contemplation of insolvency involves the intention of granting a preference, but this is not made an essential condition, the leading idea being that the payment is annulled because it is contrary to the policy of the insolvent law and because of the injustice it operates. Then again under the law of Quebec several persons, such for instance as the butcher, the baker, and the domestics of the household are entitled to be paid in full by preference over others. To pay these in full would be to give them a preference over the other creditors but it would not be an unjust preference, and therefore valid, although the debtor might have contemplated insolvency when he made it.

Judgment.

In the same way we can easily conceive cases under the Act in which a transfer might be preferential, though not unjust *e. g.* in cases where the insolvent had before he became involved contracted to make the

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transfer. A transfer made under such circumstances even after the insolvency became inevitable, would be a preference though not an unjust one.

I think, therefore, that the construction placed upon the word "unjust" as equivalent to fraudulent, is not warranted either by a comparison with the rest of the Act, or consistently with the general policy of the law; but rather that it was inserted to distinguish those creditors who had no right to a preference over others, from those who had, and to extend the prohibition of preferential payments made with fraudulent intent on both sides, to payments by means of which without fraudulent intent on the part of the creditor he would, *de facto*, receive a preference to the injury of the other creditors.

The words taken literally will not bear the construction which has been placed upon them, and there is nothing in the policy of the law to call upon the Court to place upon them a similar meaning to that given to the language of the English Act, which following the decisions under the bankruptcy law there, has still made the intent to give a preference essential. On insolvency the entire property of the insolvent is the security of all his creditors, and, therefore, when he is unable to pay all in full he has no longer the right to pay any one of them in full, and a payment, therefore, in full to one creditor (not specially entitled by contract or in law) is an unjust preference of him over the others, although the recipient may be unconscious of the fact of the debtor's inability to pay in full, but he would be deprived of his advantage, not as a punishment for fraud but because his retention of it would operate as an injustice towards others, and would be contrary to the principle of law regulating the distribution of the estate of an insolvent. Why, if it is the duty of an insolvent to do nothing to interfere with that distribution of his estate which the law declares to be proper, the mere circumstance of the importuning him should validate a trans-

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action which would be otherwise void, has always seemed to me to be contrary to the policy of a bankrupt law. Where, however, as in England, the intent to prefer is made an ingredient, anything which tends to rebut the fraudulent intention and to shew that it was not the voluntary act of the debtor is material, but when we find the Legislature declaring that certain acts if done with intent to defraud or to delay creditors shall render the estate liable to compulsory liquidation, and other acts if done with like intent, void ; and we find another section omitting all reference to intent, but declaring that if the effect is to give a preference it shall be void if that preference is an unjust one, we should conclude that they had some object in making the change, and that the omission of all reference to intent was designed, and that we are not driven and ought not to place a similar construction upon that section to that placed upon the English Act, where the intent to prefer is still retained as a necessary ingredient, of what is there held to be a fraudulent preference. I think the decision we propose to give is more in accordance with the policy of the insolvent law, and gives full effect to the words of the section in question, and will bring our own administration of the insolvent law into harmony with its administration in the sister Province of Quebec.

Judgment.

For these reasons I am of opinion that the decree should be reversed, and a decree made in the terms of the prayer of the plaintiff's bill.

PATTERSON, J.—In July, 1872, the defendant, according to his own evidence, began business in partnership with *Howard Douglas*, putting about $1,400 into the business, and *Douglas* not putting in any money. In January, 1874, the defendant retired and *Spencer Douglas* took his place, giving him as part of the consideration between them, his note for $1,080 at one year. *Spencer Douglas* remained only three or four months, when he retired and *Johnson* came in.

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Johnson appears, from his own evidence, to have put $1,000 in cash into the business, and it appears that there was an understanding that the new firm, consisting of *Howard Douglas* and *Johnson*, became responsible for the payment of the $1,080 note to the defendant, although there was never such a novation of the contract as to make them legally liable or to discharge *Spencer Douglas* from his primary liability.

In June, 1875, the defendant demanded payment of the note from *Howard Douglas & Johnson*, and they, being unable to pay the money, assigned to him on the 21st June, by way of security, certain property and debts comprising the greater part of their assets.

On the 10th July, 1875, *Douglas & Johnson* made an assignment under the Insolvent Act of 1869.

The plaintiff is the creditors' assignee, and he asks to have the assignment of 21st June declared void.

This appeal is from a decree of *Proudfoot*, V. C., who held (*a*) that there was a *bond fide* debt due from the insolvents to the defendant. (*b*) That the securities were not given voluntarily but under pressure. (*c*) That the defendant had no knowledge of the insolvency or inability of the debtors to meet their engagements, nor of any design or intention to evade or violate the insolvency law. (*d*) That the insolvents had no such intention. (*e*) That the transaction was not in contemplation of insolvency, and that the presumption, from the occurence of insolvency within thirty days, that it was in contemplation of insolvency had been rebutted. (*f*) That therefore the transaction was not avoided by section 89 of the Act: And that it did not come within section 86, 87, or 88.

Judgment.

I agree with the learned Vice Chancellor that the defendant may not improperly be considered a creditor of the insolvents. Although the evidence is not always so clear as one could wish, I gather that the original capital of the defendant remained in the business, and that *Johnson* instead of paying *Spencer Douglas* or

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assuming the debt due by *Spencer* to the defendant, put his $1,000 into the business. The firm having thus the defendant's $1,400 and *Johnson's* $1,000, were apparently the proper parties to pay the $1,080 note to the defendant.

I am not so clear that the transfer of the securities was made under pressure, slight as the influence may be which has come to be called pressure; or, that it was not the voluntary act of the insolvents. If it were necessary, in my view of the case, to decide this point I should examine the evidence and state fully my view of it, as the witnesses are reported by the learned Vice Chancellor to be equally worthy of credit; but this is unnecessary, as I think that upon other grounds the plaintiff is entitled to succeed.

In my opinion the question of pressure does not form a material consideration in the construction of the words "in contemplation of insolvency," as used in section 89 of the Insolvent Act of 1869; at all events to such an extent as to make it necessary to hold that proof of pressure disproves contemplation of insolvency, or that an act may not have been done in contemplation of insolvency, although done under pressure and not as the voluntary act or on the mere motion of the insolvent.

Judgment.

The policy of the insolvent law, being to secure the just and ratable distribution of the assets among the creditors of the insolvent, is opposed to the doctrine that one creditor, by pressure which may consist of mere importunity or even of a request which does not amount to importunity, can secure to himself an unequal share.

Section 89 makes two things necessary to avoid the transaction, viz., that it is made in contemplation of insolvency, and that the creditor obtains an unjust preference. These do not seem to have always been kept separately in view in the cases which have arisen for decision under the statute.

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In the case before us there was nothing in the nature of the debt or the position of the parties to entitle the defendant to a preference over the other creditors of the insolvents. As between the defendant and the other creditors it was manifestly unjust that the defendant should be paid in full and the others get little or nothing. We may therefore confine the discussion of this branch of the case to the other point, viz., the contemplation of insolvency.

This section has been occasionally treated as if similar in effect to some provisions of the English bankrupt or insolvent Acts; and decisions as to what constitutes or negatives a fraudulent grant or fraudulent preference or other offence against those Acts have been followed as if applicable in principle to our Act. In my judgment this has been taking a mistaken view of the effect of our statute.

I am not now referring to other sections of the statute such as sections 86 and 88, where fraud is expressly mentioned, or where the intent of the parties is expressly made material; nor to such enactments as Con. Stat. of U. C., ch. 26, sec. 18, which was in question in *Tuer* v. *Harrison* (*a*), or section 57, of the Insolvent Debtors' Act, Con. Stat. of U. C., ch. 18, which repeats section 27th of 8 Vic., ch. 48, a clause obviously taken from the English Insolvent Debtors' Act, 7 Geo. IV., ch. 57, sec. 32, but only to this section 89, in which neither fraud nor intent is spoken of, but which deals with and avoids transactions in which the two constituents concur, viz., that the debtor contemplates insolvency, and that the creditor obtains an unjust preference.

Judgment.

The English Acts in question are 21 Jac. I., ch. 19, sec. 79 of which made a bankrupt liable to stand in the pillory two hours and have one of his ears nailed to the pillory and cut off, for fraudulently conveying away

(*a*) 14 C. P. 449.

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any part of his estate; 6 Geo. IV., ch. 16, section 3, which made any fraudulent gift, delivery or transfer of goods, if done with intent to defeat or delay creditors, an act of bankruptcy; 7 Geo. IV., ch, 57, sec. 32, which enacted that if any prisoner, being in insolvent circumstances, should voluntarily convey, &c., to any creditor, every such conveyance should be deemed fraudulent and void, provided always that no such conveyance should be so deemed fraudulent and void, unless made within three months of the commencement of the imprisonment, or with the view of petitioning for a discharge under that Act; 12 & 13 Vic., ch. 106, sec. 67, which re-enacted 6 Geo. IV., ch. 1, sec. 63 in the same words as the original Act; and 32 & 33 Vic., ch. 71, sec. 92, the Bankruptcy Act of 1869, which provides that every conveyance by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making the same become bankrupt within three months, be deemed fraudulent and void as against the trustee of the bankrupt; but, this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.

Judgment.

All these Acts contain words which have no equivalent in our section 89, viz., "Fraudulent conveyance," "fraudulent grant," &c., "with intent to defeat or delay his creditors," "voluntarily convey," "with a view of giving such creditor a preference:" and the same thing may be said of section 70 of the Bankruptcy Act of 1861, 24 & 25 Vic., ch. 134, though I am not sure that I have seen any decisions under that clause.

It had been settled by decisions long before 6 Geo. IV., that a transfer made *voluntarily* and *in contemplation of bankruptcy* for the purpose of preferring a particular creditor was void: *Crosby* v. *Crouch* (*a*),

(*a*) 11 East, 256, 260.

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DeTastet v. *Carroll* (*a*), and after the Act of 6 Geo. IV., it was still held that the two requisites remained: *Gibbins* v. *Phillipps* (*b*), *VanCasteel* v. *Booker* (*c*); and a transfer was held not to be *voluntary* if made under pressure, as in *Morgan* v. *Brundrett* (*d*), *Bills* v. *Smith* (*e*), *Johnson* v. *Fesenmeyer* (*f*).

Mogg v. *Baker* (*g*), decided that a payment made at the request of a creditor was not *voluntary* within the meaning of that word as used in 7 Geo. IV., ch. 57, sec. 32; and in *exparte Bolland*, (*h*), and *exparte Topham* (*i*), the judgments of Sir *G. Mellish*, L. J., shew that the Act of 1869 has not altered the English law as to fraudulent preference, but that unless a payment, &c., is voluntary it is not avoided.

The cases on this subject are numerous. I have only cited a few to shew the principle on which the English decisions proceed.

Judgment.

I understand the ground of all the decisions respecting pressure to be that a transaction is not *voluntary* when it originates in the will of the creditor, at whose instance it is done, and not in the will of the debtor who only yields to the solicitation of his creditor; and it is not done *with intent* to prefer, &c., if the motive is to escape the pressure which is exercised or even to comply with a *bonâ fide* demand which is made, and not to prefer one creditor to another; even though that may be the necessary and obvious effect of what is done.

I do not understand on what principle we should read the words "contemplation of insolvency," as being as comprehensive as other expressions in English Acts, which include not only contemplation of bankruptcy, but along with that, though distinct from it, the voluntary character of the transaction or the fraudulent

(*a*) 1 Starkie 89.
(*b*) 7B. & C. 529.
(*c*) 2 Ex. 691.
(*d*) 5 B. & Ad. 289.
(*e*) 6 B. & S. 314.
(*f*) 25 Beav. 88; 3 DeG. & J. 1 3.
(*g*) 4 M. & W. 348.
(*h*) L. R. 7 Chy. 24.
(*i*) L. R. 8 Chy. 614.

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intent. Pressure is held to negative not the contemplation of bankruptcy, but the voluntary nature of the transaction—that is to say, that ingredient of fraudulent preference which is required in addition to contemplation of bankruptcy, and not the contemplation of bankruptcy which alone has its equivalent in our Act.

In section 89, the fact of preference is made material, but not the intent to prefer; and the preference which is prohibited is one which is unjust as among the creditors, not one which may be intentional or unintentional on the part of the insolvent.

In considering what is the meaning of "contemplation of insolvency," as used in section 89, I see no reason to differ with the learned Judges who have held that this expression ought to be construed just as "contemplation of bankruptcy" would be construed in England; but I do not adopt the language occasionally used, as *e. g.*, by *Mowat*, V. C., in *Royal Canadian Bank* v. *Kerr* (*a*), where he speaks of the expressions "contemplation of insolvency" and "unjust preference" receiving the same construction as similar expressions *in the English Bankrupt Acts*, and by *Gwynne*, J., in *McWhirter* v. *Thorne* (*b*), where he says: "The term '*contemplation*' of insolvency under our Act must receive the construction of the term 'contemplation' of bankruptcy *under the English Acts*;" because I do not find those terms in the English Acts. I understand the term to be, not the language of any statute, but an expression adopted by the Courts to designate something which enters into their definition of the "fraudulent grant" or "fraudulent preference" which the statutes forbid.

Judgment.

It might not be unreasonable to suppose that our Legislature borrowed the term "contemplation of insolvency" from the language of the English Courts

(*a*) 17 Gr. at p. 55.

(*b*) 19 C. P. at p. 309.

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where the term "contemplation of bankrupty" has been so long and so generally employed. If that were clear, we should naturally rely for guidance in construing the expression on the English decisions under the bankrupt law. But we must not forget that the law is the law of the whole Dominion, and not of this Province alone; and that in 1864, when our present Insolvent Act originated, as well as in 1843 when the Bankrupt Act 7 Vic. ch. 10, was passed, section 19 of which contained the same phrase, only one part of the Province of Canada looked to the English law for rules of decision in civil cases; and that therefore the assumption that the Legislature derived the phrase from that source may not be entirely warranted.

I do not understand any English decision to have placed a construction on this word "contemplation" at variance with that which I put on it. It is true that language may appear from the reports to have been used by some Judges, which may seem to imply that they imported the fraudulent intent into the meaning of the word "contemplation;" but if we bear in mind that, as I have tried to point out, they were dealing not with that word as used in any statute; but with the larger term "fraud," or its equivalent, which necessarily includes intent or motive, we shall not allow ourselves to be misled by giving too much force to the phraseology they are reported to have used.

Judgment.

Thus in *Morgan* v. *Brundrett* (*a*), *Parke*, J., uses this language: "The meaning of those words ('contemplation of bankruptcy') I take to be, that the payment or delivery must be *with intent to defeat* the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made (as may be inferred from some of the late cases) in *contemplation of insolvency*." *Patteson*, J., says: "The recent cases have gone too great a

(*a*) 5 B. & Ad. 289.

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length. They seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent but yet not contemplate bankruptcy." In *Atkinson* v. *Brindall* (*a*), *Williams*, J., had charged the jury that to entitle the assignees to recover, the bankrupt must have had a bankruptcy in contemplation at the time of the payment; and that it would not avail them that he was in insolvent circumstances and *contemplated insolvency*. This charge was held to be correct, *Tindall*, C. J., quoting the judgments given in *Morgan* v. *Brundret*, and *Bosanquet*, J., saying "The principle on which money paid by way of fraudulent preference is recovered is that the payment is a fraud on the bankrupt laws, but the trader can only contemplate a fraud on the bankrupt laws when he *contemplates defeating* the distribution provided, on his having recourse to those laws." In *Abbott* v. *Burbage* (*b*), *Tindall*, C. J., said: "The question was whether the parties *contemplated bankruptcy as a probable event*. The fact of insolvency is not enough to warrant the inference that bankruptcy was contemplated; for these questions can never arise except in cases of insolvency, and insolvency does not necessarily end in bankruptcy." *Parke*, J., said: "The real question in cases of this sort is, whether bankruptcy is in the contemplation of the party. In all cases of insolvency bankruptcy may be apprehended; but that is not enough to avoid the transfer or conveyance." And *Bosanquet*, J., said: "It appears here that so far from contemplating bankruptcy as either inevitable or even very probable, the parties were with the assistance of their joint creditors, struggling to avoid it."

Judgment.

(*a*) 2 Bing. N. C. 225.

(*b*) 2 Scott 656.

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I do not read the judgments last cited which, however I have not quoted in full, as suggesting that intent or motive is involved in the term "contemplation," and the scope of the judgments in all three cases is evidently the same, viz., to point out that contemplation of bankruptcy means contemplation of proceedings under the bankrupt law, and not merely insolvency or inability to pay one's debts. The word whose definition is discussed is "bankruptcy." If by reading the language of the judgments in the first two cases literally the learned judges who delivered them would seem to include intent in the definition of "contemplation," we have only to notice that they speak not only of contemplation of bankrupty, but also of contemplation of insolvency, by which it is clear they mean only the looking forward to impending poverty. The language used can scarcely be treated as strongly indicating that "contemplation" in the one use of it includes intent, when in the same breath they use the same word in a different sense.

Judgment.

A more instructive illustration and one more legitimately applicable to our present argument is to be found in our Bankrupt Act of 1843, 7 Vic., ch. 10.

Section 19 of that statute enacted that all payments securities, &c., made or given by any trader in contemplation of bankruptcy, *and* for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general creditors of such bankrupt and all other payments, securities &c., made or given by such trader in contemplation of bankruptcy to any person or persons whatsoever, not being a *bonâ fide* creditor or purchaser for a valuable consideration without notice, should be deemed utterly void and a fraud under that Act.

It is obvious that the word "contemplation," in this clause, neither included nor was intended to include any imputation of intent to defeat the operation of the law.

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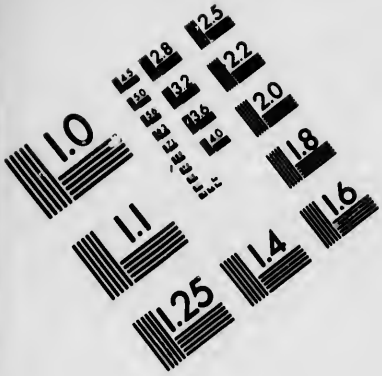
As far as authority is concerned, therefore, we seem to be at liberty to give the expression its natural grammatical meaning.

Let us suppose, for argument sake, that a creditor becomes aware that his debtor is about to make an assignment under the Insolvent Act, or that proceedings under that Act are immediately to be taken against the debtor, and that in order to secure himself he goes to the debtor and insists on payment before the assignment is made or the proceedings taken, and that the debtor, with no desire to prefer this creditor, and with no wish or voluntary intention to prefer him, but only by reason of the pressure of threats or violence, yields to the creditor's demand and makes the payment—making it all the more unwillingly because he knows that it will prevent the general distribution of his assets which the law intends and which he desires to make,—it would be doing violence alike to language and to justice to hold that such a payment was not made in contemplation of insolvency.

Judgment.

I take the object of the law to be to make it the duty of a trader who, from the knowledge which he has of his own affairs or of the intentions of his creditors, has reason to apprehend either that proceedings under the Insolvent Act will be taken against him, or that he may have to resort to the Act for relief, to do nothing which will prejudice the ratable distribution of his assets, by giving one creditor an unjust preference over the others, and, I apprehend, that if under such circumstances he gives a preference, he does so in contemplation of insolvency, whether he does it from a desire to favour the preferred creditor, or only because that creditor has succeeded by urgency in overcoming his reluctance to give the preference.

In my judgment, therefore, we must read contemplation of insolvency as signifying simply having insolvency in prospect. I am not at present prepared to give a wider meaning to the word insolvency in section 89



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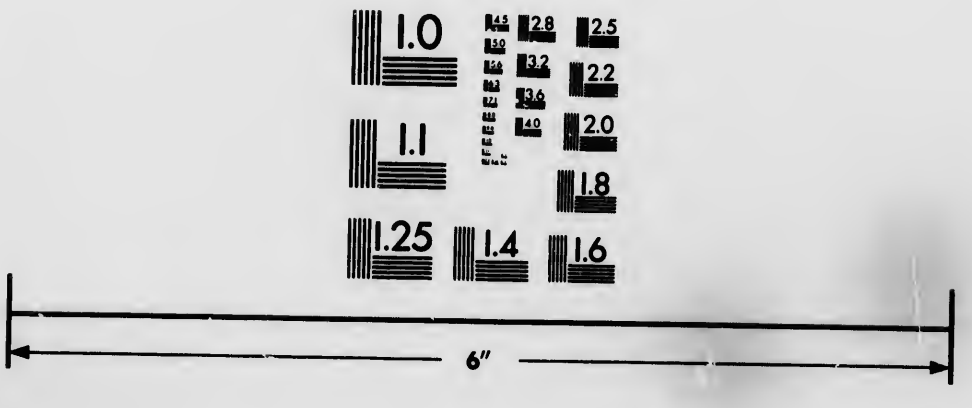

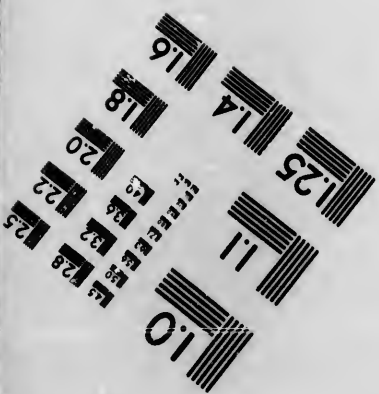

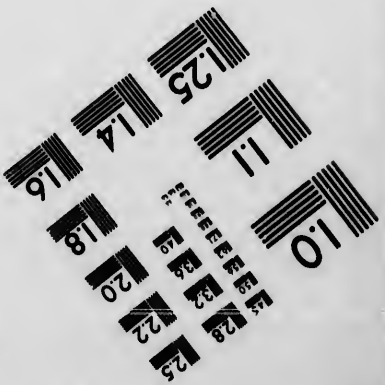

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then as referring to proceedings under the Insolvent Act. This would seem to be the proper reading, because the word appears to be used in the sense of "bankruptcy," and because the section can only have operation in proceedings under the Act. But I do not desire to close the door against argument in favour of a wider construction of the word, in the event of the question arising. I believe similar expressions are not always so confined in construction in the American Courts, and I observe that in the case of *Marsh* v. *Sweeny*, in the Supreme Court of New Brunswick, (reported in 2 *Pugsley* 445,) it was held by *Ritchie*, C. J., that contemplation of insolvency did not necessarily mean contemplation of an assignment under the Act; but might refer to the knowledge of the insolvent that he could not carry on business after the transfer in question.

I believe that in holding that a transfer may be obtained by pressure, and yet be made in contemplation of insolvency, we overrule only four reported cases, viz., two cases in the Queen's Bench *Campbell* v. *Barrie* (*a*), and *Archibald* v. *Haldan* (*b*), and two cases in Chancery, viz., *McFarlane* v. *McDonald* (*c*), and *Keays* v. *Brown* (*d*).

Judgment.

Reading the statements of facts in these cases, it is impossible not to feel that in all of them, except, perhaps, *McFarlane* v. *McDonald*, the object of the insolvent law would have been better served, and justice better administered by the construction of the words for which I am now contending. By this construction we carry out suggestions thrown out in some of the later cases by learned Judges, who, while making them, nevertheless felt themselves bound by the authority of earlier decisions. I refer to such remarks as those of *Spragge*, C., in *Payne* v. *Hendry* (*e*), and in *Clemmow* v. *Converse* (*f*), and of *Blake*, V. C., in *Keays* v. *Brown*

(*a*) 31 U. C. R. 279.
(*b*) 31 U. C. R. 295.
(*c*) 21 Grant 319.
(*d*) 22 Grant 10.
(*e*) 20 Gr. at pp. 149, 151.
(*f*) 16 Grant 551.

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(*a*), and in *Davidson* v. *McInnes* (*b*). In the case of *Newton* v. *Ontario Bank* (*c*), in this Court, the question of pressure was discussed, and was mentioned as one reason for sustaining the assignment of certain securities; but that branch of the case was really decided on the fact found, that when the transaction took place, there was no contemplation of insolvency on the part of the debtor, although the bank agent who obtained the securities feared that the debtor would not be able to stand.

The other reported cases decided either in Chancery or by the Common Law Courts were decided also on other grounds—thus *McWhirter* v. *Thorne* (*d*), in which *Gwynne*, J., pronounced an able and elaborate judgment differing from the views I have now expressed, was decided by the verdict of the jury which negatived contemplation of insolvency as a fact, on the express denial of the insolvent. The judgment of the Court was refusing a new trial. *City Bank* v. *Smith* (*e*), went on two grounds, viz., that there was no unjust preference, and that the defendant could not set up *jus tertii*.

Judgment.

Roe v. *Smith* (*f*) was decided on the grounds that the person who had obtained the securities from the insolvent was not a creditor, and was not preferred, and that the transaction was in the United States, and beyond the jurisdiction.

Clemmow v. *Converse* (*g*) was decided under the Act of 1864, section 8 sub-section 3, which corresponded with section 88 of the Act of 1869.

In *Allan* v. *Clarkson* (*h*) the transfer was supported as being the completion of a pre-existing contract, as well as by reason of pressure.

In *The Royal Canadian Bank* v. *Kerr* (*i*) the mortgage was held not to have been given in contemplation

(*a*) 22 Gr. 14.
(*b*) 22 Gr. 217.
(*c*) 15 Grant 288.
(*d*) 19 C. P. 302.
(*e*) 20 C. P. 98.
(*f*) 15 Gr. 344.
(*g*) 16 Gr. 547.
(*h*) 17 Gr. 570.
(*i*) 17 Gr. 47.

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of insolvency, and in *Davidson* v. *McInnes* (*a*) the transfer was held to be void although made under pressure—both parties knowing of the insolvency.

The question then has to be answered apart from the effect of "pressure." Is it shewn that the transaction attacked was in contemplation of insolvency?

It was within thirty days of the assignment, and is therefore presumed to have been in contemplation of insolvency.

If the defendant is at liberty to rebut this presumption, has he rebutted it? I think not.

In my opinion the evidence tends strongly to the inference that, if we credit the insolvents with ordinary intelligence however much we may doubt their business capacity, they must have contemplated insolvency. Still I am not prepared to say that I should find that fact affirmatively upon the evidence before me. The *onus*, however, is on the defendant to shew with reasonable certainty that they did not contemplate insolvency. The evidence certainly does not lead me to that belief.

Judgment.

I do not stop to point out by reference to the evidence the grounds on which I take this view of it; because in my opinion the presumption under section 89 is conclusive and cannot be rebutted by evidence.

In this view I differ from learned Judges who have decided the cases to which I have to refer, and for whose opinion I have the greatest respect. It will therefore be proper for me to state the grounds on which I so construe the statute: although, as up to this point, I believe we all agree the decision of the question is not necessary for the disposal of this appeal.

I confess that I approach the question without any desire to hold that the presumption is rebuttable. I am unable to understand on what principle the animus of the insolvent, in giving a preference, is made an element

(*a*) 22 Gr. 217.

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in the validity of the transaction by which the preference is given. If a man is in fact insolvent, and if the object of law is to distribute his assets among his creditors in proportion to the amounts due to each of them, there is no difficulty in perceiving the justice of interfering to prevent one creditor securing himself to the prejudice of the rest; yet one can also perceive, though perhaps not so readily, the propriety of permitting a creditor to retain an advantage he happens to have got, if he got it fairly and without knowing that the debtor's insolvency was impending. What I cannot perceive is, why it should make any difference that the debtor knew or did not know that insolvency was certain or was likely soon to ensue. His condition could not be affected. In any case he had to surrender all he had. The animus of the debtor was necessarily material when the immediate consequence of the transaction was bankruptcy, a penal consequence touching him personally, and therefore dependent on his conduct being fraudulent, and when the transaction was avoided only because it was an act of bankruptcy. But since the statutes have, in the interest of the general creditors, assumed to avoid preferential assignments, the reason for retaining the law in that condition is not apparent.

Judgment.

I believe that it is a wrong principle which allows the attitude of the insolvent towards one of his creditors to govern the rights of the creditors as among themselves, and I therefore do no violence to my convictions or idea of justice when I give to the statute the construction which suspends the operation of that principle for thirty days.

I think the first suggestion that the presumption under section 89, or under the equivalent enactment in the Act of 1864 was not conclusive, was made by the present Chancellor, in *Newton* v. *Ontario Bank* (*a*).

(*a*) 18 Gr. at p. 658.

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The case was not decided upon that ground. His lordship said: "If the insolvency must be in the contemplation of the debtor only, and the presumption incontrovertible it might work very great injustice. It would amount to this, that a person who had advanced money to a trader or manufacturer in the honest belief of his entire solvency, taking a bill of lading or other security, say four weeks before the trader chose of his own will, or induced by the pressure of others, to make an assignment in insolvency, could not shew that it was not in contemplation of insolvency. He might be able to shew conclusively that insolvency was not contemplated by his debtor any more than by himself, and still be precluded from doing so if the presumption were incontrovertible."

I venture to think that this illustration does not suggest any strong ground for holding the presumption controvertible. In the case put there would undoubtedly be hardship if the creditor were not protected, as he possibly would be, by reason of there not only being no unjust preference, but no preference at all, on the principle held in the same case in Appeal (*a*), the relation of debtor and creditor arising only out of the transaction impeached. But even if the clause applied to the transaction and the presumption were rebuttable the risk of hardship would still be run, because if the debtor *did* contemplate insolvency, though unknown to the creditor, the transaction would be voidable, whether within or beyond the thirty days. The hardship springs from the vice inherent in the principle of the enactment.

Judgment.

The first reported case in which the decision was actually rested on the doctrine which I question was, I believe, *Allan* v. *Clarkson* (*b*).

The doctrine was accepted and acted on in that case by *Strong*, V. C., without question, but the decision

(*a*) 15 Gr. 283.

(*b*) 17 Grant 570.

seems quite capable of being sustained without the presumption arising. The mortgage attacked was given on the 3rd of July, and the insolvency occurred on the 2nd of August, within the thirty days; but it appeared that the mortgage was executed in completion of a transaction which was effected in April, and apparently that was the date which should have governed: *McFarlane McDonald* (*a*).

In *Campbell* v. *Barrie* (*b*), *Wilson*, J., considered the question, and arrived at the conclusion that the presumption under section 89 may be rebutted, although he considered that under section 86 it was conclusive. The reasoning employed by the learned Judge, in his very instructive judgment, does not convince me that the same word should be construed differently in the two sections. If I understand the judgment correctly he concedes the conclusive character to the presumption under section 86, because the policy of making it conclusive in the circumstances dealt with in that section, commends itself to his judgment, and he thinks that the same construction under section 89 would, in cases which he puts, be a harsh construction. Referring to the statute and to a number of English decisions the learned Judge, with his usual care and accuracy, states the result in several propositions, which may be fairly put into the following shorter form:— Judgment.

(*a*.) Two things are necessary to make a sale void under this section, viz: 1. Contemplation of insolvency. 2. Unjust preference, (page 285).

(*b*.) To be made in contemplation of insolvency, means, under the English decisions, to be made with intent to defeat the general distribution of effects which takes place in insolvency, (page 287).

(*c*). It is the giving of an unjust preference that tends to defeat the general distribution of effects, (page 288).

(*b*) 21 Gr. 319, 325. (*b*) 31 U. C. 279.

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(*d.*) Therefore being made in contemplation of insolvency is equivalent to being done to give an unjust preference, (page 288.)

(*e.*) And, therefore, "Presumed to be made in contemplation of insolvency," means presumed to give an unjust preference, or defeat the equal distribution, &c., (page 288.)

The result thus shewn, viz., that the *two* requisites, in terms required by section 89, in order to avoid a transaction are, after all, only one—the unjust preference being absorbed by the contemplation of insolvency, or the contemplation of insolvency merged in the unjust preference, which ever it is—seems strongly to support my conclusion that the principle of the decisions under the English Law is not applicable to our statute.

Construe "contemplation" as I have tried to shew it should be construed, and we restore the "unjust preference" provision and remove the supposed hardship. The presumption that the debtor contemplated insolvency will then not deprive the creditor of his security, unless, in fact, it gives him an unjust preference. If his preference is unjust, he cannot complain of hardship when forced to surrender it.

Judgment.

There is nothing in the context, nor anything in the wording of sections 86 and 89 to require a different construction in one section from that given in the other. In my view the structure of the two enactments is alike. Sections 86 and 88, should be read as one enactment, which in effect they are; section 87 coming in by a sort of parenthesis between them. Section 88 provides *inter alia* that all contracts made by a debtor with intent to defraud his creditors, with a person who knows of that object, and which have the effect of delaying &c., are void.

Section 86 enacts that certain contracts are presumed to be made with intent to defraud creditors.

We have, then, two enactments, one comprised in sections 88 & 86, and the other in section 89, of exactly similar structure.

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In each case certain transactions are avoided. In one case one of the elements of the prohibited contract is, the intent to defraud. In the other, one element is the contemplation of insolvency. The enactment in each case is, that these elements shall be presumed to exist in the circumstances mentioned in the respective clauses. When these circumstances do not occur, the existence of the element in question must be proved by evidence: *Adams* v. *McCall* (*a*), per *Draper*, C. J.

I can see no reason for reading the word "presumed" as meaning in one section anything but what it means in the other, or for refining on what seems to me the plain meaning of the enactment. I may say, adopting the words of Lord *Penzance* in *Allison* v. *Bristol Insurance Co.* (*b*), to which his lordship the Chief Justice has called my attention. "It is, I think difficult to maintain when one and the same word is used several times within the short space of eight or ten consecutive lines of a written document, that it means one thing in one place, and a totally different thing in another. Nothing but the absence of any other reasonable construction ought to lead to such a result."

Judgment.

In my opinion the presumption under both clauses is conclusive. It is not contended that this reading does violence to the language used, and it is in accordance with what is spoken of by Lord *Westbury* as an "established principle" in *Nunes* v. *Carter* (*c*). The question in that case was the construction of a Jamaica Statute. After referring to the different periods to which under different statutes the English Bankrupt Law had given relation back to the Act of Bankruptcy so as to avoid transactions, Lord *Westbury* said: "There was every reason for supporting *bonâ fide* transactions, but according to the then notion of the law it was expedient and for the public interest, that transactions by

(*a*) 25 U. C. R. 224.
(*b*) L. R. 1 Ap. Cas. at 243.
(*c*) L. R. 1 P. C. 342.

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traders should be subject to be overruled and avoided if they were found to have occurred within a certain period before bankruptcy, although the transaction, so far as the creditor was concerned, was on his part a perfectly innocent proceeding. * * * Similar rules may be found in the Insolvent Law and Bankrupt Law of almost every country in Europe. * * We are therefore of opinion that the true construction of this Jamaica Act is in conformity with the established principle upon which these enactments, whether in bankruptcy or insolvency were founded, viz., the principle that it is expedient to avoid transactions if made within a certain period of time before the adjudication in bankruptcy or insolvency."

We may not be at liberty to refer to the principle of the English Bankrupt Law as governing the construction of our statute, because the English Bankrupt Law was not adopted by our Act of 1792, and because a bankrupt law has only at intervals formed part of our system of jurisprudence, and for the reason already suggested, that the English law is not recognized to the same extent in all parts of the Dominion. But the decision in *Nunes* v. *Carter* may be referred to as an instructive instance of the application of the principle stated, not merely to determine in which of two equally appropriate meanings a phrase should be read, as it might be applied in the present case, but to give to an enactment a construction not apparent on the face of it.

Judgment.

The clause there in question declared that conveyances, &c., made in circumstances somewhat similar to those stated in our section 89, should be deemed fraudulent and void against the official assignee, provided that they should not be void unless made within six months before the commencement of the imprisonment, or declaration in insolvency, or with a view to applying for a discharge under the Act. This was construed as enacting that the transactions made within the six months were void.

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I have not overlooked the fact that the Insolvent Act of 1875, re-enacts the clause we have been discussing, and that it is a well settled and very reasonable rule, that when an Act of Parliament has received a construction either from long practice or from judicial interpretation, and is afterwards re-enacted in the same terms, the Legislature is deemed to have had that construction in view in the re-enactment: *Mansell* v. *Regina* (*a*), *Sturgis* v. *Darell* (*b*), *St. Losky* v. *Green* (*c*), *Jones* v. *Mersey Docks* (*d*), *Exparte Campbell* (*e*).

I do not think the rule can operate to prevent our considering and construing the statute in the present case, because, setting aside the consideration that we are construing the Act of 1869, and not that of 1875, what construction are we to suppose the Legislature to have adopted? that which prevailed in Ontario, or that which prevailed in Quebec, or in any of the other Provinces? If we knew that the Act had received the same construction in each Province, the rule might well be invoked. We do not know that that is the case, and I believe that as a matter of fact the doctrine acted on in our Courts as to pressure has never been recognized in Quebec; and I should infer from the New Brunswick decision to which I have referred that it was not applied in that Province.

Judgm. cont.

I agree that the appeal must be allowed with costs.

Moss, J.—I concur in the opinion that the appeal should be allowed.

The chattel mortgage and assignment of debts are impeached under section 89 of the Insolvent Act of 1869. The language of that oft-quoted section material to be considered upon this appeal is as follows: "If any transfer be made of any property, real or personal, by

(*a*) 8 E. & B. 54.
(*b*) 4 H. & N. 622.
(*c*) 9 C. B. N. S 370.
(*d*) 30 L. J. M. C. 239.
(*e*) L. R. 5 Chy. 703.

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any person in contemplation of insolvency by way of security for payment to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such transfer shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee in any Court of competent jurisdiction: and if the same be made within thirty days, next before the execution of a deed of assignment under this Act, it shall be presumed to have been so made in contemplation of insolvency."

I think that any person unlearned in the law reading this language for the first time, and applying to it the ordinary rules of construction, would pronounce the legislative intention to be, that two ingredients must be found, and two only need be found, in such a transaction between a creditor and a debtor, who afterwards becomes subject to the Insolvent Act, in order to bring it within the ambit of this clause. These are, that the transfer has the effect of bestowing upon the creditor an unjust preference, and that it was made by the debtor in contemplation of insolvency. Neither of these constituents by itself suffices for the avoidance of the transaction. Unless they co-exist, it cannot be successfully impeached under this section. Although the transfer may in fact and in its result upon the claims of others, give an unjust preference to a single creditor it cannot be impugned unless the debtor acted in contemplation of insolvency. Even if made by a debtor in contemplation of insolvency, it is nevertheless valid, unless its effect be to give an unjust preference. When, therefore, the precise meaning of the phrases "unjust preference" and "contemplation of insolvency" is apprehended, there is a key to the solution of all questions arising under this section.

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I am of opinion that a preference is unjust, whether it springs from the debtor's mere volition or is procured by importunity of the creditor, if it has the effect of preventing the ratable distribution of an insol-

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vent estate by transferring assets in security for, or satisfaction of a claim, which would not be entitled to priority over the claims of general creditors upon insolvency supervening.

I think that the transfer is made in contemplation of insolvency, whatever may be the debtor's motives, or whatever influences may have been exerted upon him, if he knows, or as a reasonable man ought to know, that the condition of his affairs is such that he will probably, although perhaps not certainly, become an insolvent under the Act.

I shall endeavour to explain as concisely as I can, and after the full judgments of my learned brethren any great degree of detail is unnecessary, the reasons upon which I have arrived at these conclusions. As to the term "unjust preference," I agree with what I understand to have been the opinion of Vice-Chancellor *Blake*, in *Keays* v. *Brown* (*a*), that a Judge interpreting this section unfettered by authority would be apt to declare every preference unjust, which frustrated the object of the Insolvent Act. That object was to secure the just and equitable distribution of an insolvent's assets among his creditors. It aimed at preventing a single creditor from obtaining more than his fair proportion either by the favour of the debtor, or by his own act or contrivance. This, in fine, was an injustice which the statute was designed to redress.

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It has been thought that unjust should be read as synonymous with fraudulent. It is obvious that in common acceptation the terms are by no means identical. Acts are constantly done, which, by general consent, are pronounced unjust, but which are free from the slightest tincture of fraudulent intent. The author of the injustice may be so far from designing fraud, that he may sincerely believe his motives to be pure and laudable. The qualities by which the act in itself should be

(*a*) 22 Gr. 10.

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characterized as just or unjust are, or at least may be, wholly independent of motive. It would not, I think, suggest itself to the mind that payment in full of a particular creditor, who was not previously entitled, either by the general law or special compact, to such an advantage was less unjust to other creditors, who were compelled to accept a partial payment, because the debtor acted without any evil intent, but from ignorance, or stupidity, or recklessness. Whatever may have been his motive, his act is productive of an injustice, against the occurrence of which the Legislature wished to guard. The position that the section in question does not include the element of fraudulent intent is strongly fortified by a consideration of the 86th and 88th sections, in both of which express reference is made to frauduleut intent. The Legislature have thus shewn that they had these terms distinctly in view, and it seems not unreasonable to believe that their omission from the next section was designed. We should hardly attribute to them the intention of introducing this important qualification of the nature of the prohibited act under the cover of the epithet "unjust." One argument advanced in favour of reading unjust as equivalent to fraudulent is, that otherwise its employment seems to be insensible. That objection has, I think, been completely met by my brother *Burton*, and is removed by the definition I have given. There may be preferences, which are not unjust, because the particular creditor is entitled by law to priority of payment over general creditors. There may be no injustice in transferring assets to a particular creditor by way of security, although it interferes with a ratable distribution, because there may have been a prior valid, but unfulfilled agreement to give such security. The result of these considerations seems to be that in the absence of any binding authority to the contrary, we should attribute to unjust preference the significance which I have indicated. Then is there any such authority? This question is of great importance,

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for the answer to it must determine whether the doctrine of pressure as unfolded in English bankruptcy cases is to hold a place in our jurisprudence. If unjust preference in our insolvency law means the same thing as fraudulent preference in English bankruptcy law, it is clear that a valid preference may be obtained by pressure on the part of the creditor. For example: Lord *Westbury*, in delivering the opinion of the Privy Council in *Nunes* v. *Carter* (*a*), is reported to have said: "A fraudulent preference is well known to the bankrupt law. It arises where the debtor in contemplation of bankruptcy * * does, *ex mero motu*, make a payment of money, or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor." By a long series of decisions it has been settled that no particular degree of pressure is required. A mere request, if proved to have operated on the debtor's will, is held sufficient. In *Ex parte Tempest* (*b*) Lord Justice *James* thus expressed himself: "The principle is, that in order to constitute a fraudulent preference the act must be the spontaneous act of the debtor, not *bonâ fide* originating in a demand or some other step of the creditor. * * A creditor cannot be deprived of what he has got, if he got it by asking; if he got it by the purely voluntarily act of the debtor he must lose it." Although the debtor was hopelessly embarrassed, and although the creditor was fully aware of his desperate condition, yet if the creditor asked for payment or security, and obtained it as the result of such request, the transaction was protected.

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The dangerous facilities which such a doctrine affords for the commission of fraud are too obvious to need comment. A short reference to the history of the doctrine of fraudulent preferences may serve to shew at the same time how it has become so firmly rooted in

(*a*) L. R. 1 P. C. 548. (*b*) L. R. 6 Ch. 70.

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English jurisprudence, and why English precedents do not require its introduction into our system. It has already been pointed out that its origin is due not to legislative, but to judicial action. No such term is to be found in the statute of James I. It was once described by Lord *Ellenborough* (*a*), as an excrescence upon the bankrupt laws. In another case he explained that originally the act of bankruptcy drew the line of separation between the property which might be disposed of by the bankrupt and that which vested in the assignee; but that it occurred to those who presided in the Courts that it was unjust to permit a party on the eve of bankruptcy to make a *voluntary* disposition of his property in favour of a particular creditor, leaving the mere husk to the rest. Lord *Eldon* is reported to have stated in the House of Lords, that it was a bold doctrine when first started, and in some degree a fraud on the Act of Parliament, because if the act were insufficient in that respect recourse should have been had to the Legislature.

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By numerous decisions prior to the statute of Geo. IV. it was established that in order to constitute a fraudulent preference two ingredients must be found in the transaction. Firstly, it must have been the voluntary and spontaneous act of the debtor; and secondly, it must have been entered into in contemplation of insolvency. The Act of 6 Geo. IV. does not directly deal with fraudulent preferences, although it incidentally uses the term in protecting certain *bonâ fide* payments, nor does it refer to contemplation of insolvency. It expressly places amongst acts of bankruptcy any fraudulent gift, delivery, or transfer of goods, if done *with intent* to defeat or delay creditors. But very soon after the passage of that enactment it was held in *Gibbins* v. *Phillips* (*b*), that the test for determining the character of the transaction remained the same. This view was confirmed by many subsequent decisions. The Bank-

(*a*) 1 Stark 89. (*b*) 7 B. & C. 529

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ruptcy Act of 1861 provided "that if any person should *with intent* to defeat or delay his creditors make any fraudulent conveyance, gift, delivery, or transfer of any part of his real or personal estate, such person should be deemed to have thereby committed an act of bankruptcy." The Bankruptcy Act of 1869 gave legislative recognition of the use of the term "preference" in this branch of the law. It declared that every conveyance, or transfer of property, or charge thereon made,—every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, *with a view* of giving such creditor *a preference* over the other creditors, should, if bankruptcy occurred within three months, be deemed as fraudulent and void as against the creditors.

Judgment.

In *Ex parte Tempest* (*a*) the Lords Justices expressed the opinion that to make that section apply the transaction must be one which would have been an act of fraudulent preference under the old law, and this view has been acted on in other cases. As a consequence the doctrine of pressure seems to be in full force in England.

But it will be found on an examination of the cases, that the reason uniformly given for allowing pressure to remove a transaction from the category of fraudulent preferences is that it rebuts the presumption of fraudulent intent.

The act was not deemed fraudulent, unless it was voluntary and spontaneous on the part of the debtor. Any influence which interfered with or controlled the will of the debtor, destroyed spontaneity and repelled the inference that the debtor's intentions were fraudulent.

The language of *Cockburn*, C. J., in delivering the judgment of the Court in *Bills* v. *Smith* (*b*), is explicit on

(*a*) L. R. 6 Ch. 75.

(*b*) 6 B. & S. 314.

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this point. He says, that the true question is, whether the intention with which the payment was made was to defeat the operation of the bankrupt law, and that it is this intention to act in fraud of the law, which stamps the preference of the particular creditor, however morally honest, with the character of fraud. He states broadly that the intention of the party making the payment to defeat the law was always considered as the cardinal point on which the whole question turned. Again, he says: "The effect of pressure, therefore, in legalizing the payment is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction." Thus it appears that in English law it is the motives and intentions by which the debtor was actuated, and not the effect of his acts, which are material. To whatever extent his act of preference interfered with the policy of the law in seeking to secure equitable distribution, the act was not illegal, unless it sprang entirely from his own free will. It is not difficult to perceive that this consequence naturally flowed from the origin of the doctrine. A fraudulent dealing with his property by a bankrupt was an act attended by highly penal results. The Legislature had placed a fraudulent conveyance by him among the list of crimes. The Courts assumed to make a fraudulent preference in contemplation of bankruptcy equally illegal. It was extremely natural, therefore, that in treating this new offence they should keep in view the maxim, *actus non facit reum, nisi mens sit rea.* But in the section of our statute under review there is not the trace of an allusion to the intent. It is the act itself which is struck at, however innocent may be the actor's motives. This was the construction placed upon the corresponding section in the Insolvent Act of 1864, by the Court of Queen's Bench, in *Adams* v. *McColl* (*a*). The judgment, which was

(*a*) 25 U. C. R. 219.

delivered by the Chief Justice of this Court, who then presided in the Queen's Bench, contains this passage: "We take the policy of the Act to be, to distribute the insolvent's effects ratably among all his creditors, and that if one of them obtains payment in full by the means stated in this fourth section, while the others get nothing it is an unjust preference contrary to its letter and true spirit." I may be permitted to say that this view has been felicitously expressed by the learned Chancellor, in *Payne* v. *Hendry* (*a*): "In our Act the language points to the effect. A debtor in contemplation of insolvency does certain acts, it may be without any fraudulent intent, and it may be without concert with any creditor; but if the effect be an unjust preference over other creditors, it is avoided by the Act." This construction with which I entirely agree, sweeps away the notion of fraudulent intent as an ingredient of unjust preference, and with it the whole foundation of the doctrine of pressure.

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The next point is, the examination of the definition of "contemplation of insolvency." There does not seem to me to be much room for controversy, whether we adopt the ordinary etymological sense of the words, or the judicial explanations in England of the corresponding phrase "contemplation of bankruptcy," as forming a part of the definition of a fraudulent preference. In both these modes we are equally led to the conclusion that a man acts in contemplation of insolvency when he has insolvency in prospect—when it is before his mental vision.

In *Gibson* v. *Muskett* (*b*), *Tindal*, C. J., held, that money was paid in contemplation of bankruptcy if it was paid under such circumstances that any prudent man taking a reasonable view of his situation and the surrounding circumstances at the time might fairly expect bankruptcy would follow.

(*a*) 20 Gr. at 151.

(*b*) 4 M. & G. 160.

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In *Aldred* v. *Constable* (*a*), the Court seems to have thought that there was contemplation of bankruptcy if the debtor considered that he was likely from the condition in which he then stood to become a bankrupt.

In *Nunes* v. *Carter* (*b*), Lord *Westbury* states that an act is done in contemplation of bankruptcy where the debtor knows his circumstances to be such that bankruptcy must be, or will be the probable result, though it may not be the inevitable result. These definitions are in accord with the interpretation which we have placed on the similar language in our statute.

Having thus ascertained the proper significance of the section, it remains to apply it to the facts of this case. I may repeat that there are but two questions to be answered. The first is, "Had the transaction the effect of bestowing upon the defendant an unjust preference?" I think this must clearly be answered in the affirmative if the definition given of unjust preferences be accepted. That definition renders it unnecessary to consider the arguments advanced against the findings of the learned Vice-Chancellor, that the securities were not given voluntarily, but under pressure: and that the defendant had no knowledge of the insolvency, or of any intention to violate the insolvency law. Even if sustained by the evidence, they are not sufficient to support the transaction. It clearly had the effect of preventing the ratable distribution of the insolvents' estate. Indeed, it placed in the defendant's power nearly all the available assets. The exception was little more than nominal, and of no real value to the general body of creditors. The defendant's claim was in no sense entitled to priority, or of superior merit to those of other creditors. His Lordship, the Chief Justice, has shewn that there are strong reasons for at least doubting whether the insolvents were under any obligation to the defendant. If a creditor at all he was certainly not entitled, either by the general

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(*a*) 4 Q. B. 474. (*b*) L. R. 1 P. C. at 348.

law or by special compact, to higher consideration than the other creditors. 1876.

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The second question is: Was the transfer made in contemplation of insolvency? It was made within thirty days before the date of the assignment. His Lordship the Chief Justice and my brother *Patterson* are of opinion that this circumstance of itself answers the question, on the ground that the presumption arising from the act being done within that period is *juris et de jure*. That contention was not raised at the bar. The learned counsel, who ably argued the plaintiff's case, contented themselves with pointing to the evidence, which tended to shew the insolvents' knowledge of the desperate condition of their affairs. They assumed that the presumption was rebuttable, but they argued that it had not been rebutted. While I fully recognize the cogency of the arguments adduced by my brother *Patterson*, I am unwilling to express a decided opinion without the assistance of argument at the bar. There are considerations—I will not say sufficient to preponderate, but certainly of great weight—which have been suggested in support of the view that the presumption is rebuttable. Further reasons, which do not suggest themselves to my mind, might be advanced upon argument. Decisions which are entitled to the highest respect have been pronounced against the conclusive character of the presumption. Nevertheless, if it were necessary for the determination of this case to form an opinion it would be my duty to do so; but I have so strong a conviction that the presumption, if rebuttable, has not been rebutted, that I feel relieved from any such necessity. Judgment.

It is to be borne in mind that the case is very different from one in which a plaintiff undertakes to prove the commission of a fraud without the assistance of any statutory presumption. In such a case the onus is cast upon him of proving with satisfactory clearness every essential constituent of the fraudulent proceeding. He

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has to meet the general presumption of the law in favour of innocence and honesty. It is matter of every day experience that Courts declare an impeached transaction to be surrounded with circumstances of grave suspicion; but that the evidence not having carried the case beyond the region of suspicion, and fraud being a thing to be distinctly proved and not to be presumed, the transaction cannot be set aside. Facts must be proved which can lead the judicial mind to no other conclusion than that of fraud. If the evidence in such a case leaves the matter in doubt, the complainant must fail. If the case proved is consistent with honesty, the defendant must succeed. So in the absence of the statutory presumption, the plaintiff would be obliged to prove facts from which the only fair and reasonable conclusion was, that the insolvents executed this chattel mortgage in contemplation of insolvency.

But this rule is all reversed by the statutory presumption. The onus of proving clearly that the insolvents did not act in contemplation of insolvency is cast upon the defendant. If the evidence he adduces does no more than leave the matter in doubt, he must fail. If the case proved is consistent with the unjust preference being given in contemplation of insolvency, the complainant must succeed. I incline to the view that even if the onus were on the plaintiff, the evidence would lead to the conclusion that the insolvents must have known that their condition was desperate, and that insolvency was imminent. But at least I am clear that they have not shewn the contrary in any satisfactory way. They were in fact hopelessly insolvent. The successive firms had long been in difficulties; they had fallen behind in their payments; they were being sued by creditors, whose patience was exhausted; and they denuded themselves of nearly all their available property in favour of the defendant. *Howard Douglas* said that he knew at the time of the assignment that they were behind. His statement that he never intimated to *Ross* that they

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were in insolvent circumstances, almost implies that he himself knew that was the actual condition of the firm. *Johnson*, the other partner, admitted that the business was always behind from the time he went into the firm. Although these statements are qualified by their distinct disavowal of any knowledge that they were then actually insolvent, it is quite impossible, I think, to hold that such evidence rebuts the presumption. 1876. Davidson v. Ross.

If the presumption can be displaced by evidence, sound policy seems to require something more than the mere assertion of an insolvent, however persuasive his demeanour, that he did not anticipate a result which must have appeared inevitable to any man of ordinary common sense in his position. Judgment.

The conclusion is, that there was an unjust preference, and that it was given in anticipation of insolvency.

SOLICITORS.—*Bruce, Walker,* and *Burton*, for the plaintiff. *J. J. C. Greene*, for the defendant.

BROWN v. CAPRON.—[IN APPEAL.*]

Parol evidence to establish a trust—Parol evidence of delivery of deed and return of same.

In April, 1853, the plaintiff and her husband joined in a deed conveying two building lots to her father, who paid to or advanced for the husband the full value thereof, intending and promising at the time to settle the same on the plaintiff, who with her husband continued in possession, or in receipt of the rents and profits until May, 1864, when the father sold one of the lots to other members of his family: the plaintiff with her husband remaining in the full enjoyment of the other lot until after the death of the father in September, 1872. Meanwhile, and on the 4th April, 1864, the plaintiff and her husband had joined in another deed to her father, which recited the deed of April, 1853; the promise and proposal of the father to settle the lands on the plaintiff; that it was then considered inexpedient so to settle the same; the desire of the father to make

Present.—DRAPER, C. J., BURTON, J., PATTERSON, J., and HARRISON, C. J.

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further advances to the husband, and the request by him and the plaintiff that the father would sell the lands; the plaintiff and her husband thereby releasing to him all claims to, or interest in those lands. The plaintiff alleged that shortly after the execution of the deed of April, 1853, the father, in pursuance of his promise, did execute and deliver to her a deed of the lands, which she held for several years and until she gave it up to a messenger, another son-in-law, sent by her father, the father having stated that it would be safer for the plaintiff that the deed should be in his hands. No steps were ever taken to enforce a re-delivery of such deed or a further conveyance of the lands to the plaintiff until February, 1874, when the present suit was instituted, seeking to obtain a re-conveyance of the lot remaining unsold on payment of what should be found due in respect of advances made for the husband, and an account of the proceeds of the lot disposed of. The only evidence of the existence of such reconveyance was that of the plaintiff and her husband, and of a person resident in the United States, which latter, from its unsatisfactory character, the Court refused to adopt.

Held, that the recitals contained in the deed of April, 1864, were not sufficient to create the father a trustee; and therefore the right to redeem, or trust, if any existed, could only be established by parol: and though the husband was a competent witness to corroborate his wife's testimony, which, under the Act, required corroboration after the death of the father, his testimony was so at variance with that of his wife and other witnesses that the Court declined to adopt his statement, and the evidence consequently failed to establish such right or trust, this Court therefore reversed the decree of the Court below, enforcing the claim set up by the plaintiff and dismissed the bill with costs.

Statement.

This was an appeal by certain of the defendants from a decree of the Court below, and the order affirming the same on rehearing, whereby, amongst other things, it was declared "that the conveyance of the fourth day of April, one thousand eight hundred and sixty-four, of the lots * * * in the said bill mentioned, executed by the plaintiff and her husband, the defendant *James Anson Brown*, to *Hiram Capron*, the testator in the pleadings mentioned, operated merely to create the said *Hiram Capron* a mortgagee of the said lands with power of sale to secure the amount then due to him by the said plaintiff and defendant *James Anson Brown*, and any advances he might thereafter make to or for them, or either of them, and that the plaintiff is entitled to have an account taken of the proceeds of the sale of

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the said lot number three in the pleadings mentioned, and of the amount due to the said *Hiram Capron* and his representatives, under the declaration aforesaid, and upon payment of the same to redeem the said lot number four, and doth order and decree the same accordingly," and which further ordered the usual accounts to be taken and gave the usual directions in an ordinary redemption suit.

The grounds alleged in support of the appeal were, amongst others, (1) there never was any deed made by the deceased, *Hiram Capron*, to the plaintiff of the Toronto property, (2) that if such deed ever was executed it was never delivered, and was not intended to be delivered; (3) that if the plaintiff ever had the same in her possession (if ever executed) it was merely held by her as an escrow or conditionally until her father should express his intention that she should have it absolutely, and the said *Hiram Capron* never arrived at that intention and never expressed it; (4) that at one time the said *Hiram Capron* may have had an idea of giving the property to the plaintiff at some future day, but he never did so, and never matured the idea of giving it to her; (5) that even if it ever was given to the plaintiff, such deed was subsequently re-delivered (without registration) to the said *Hiram Capron*, with the intention of putting an end to the same, and to any effect it may have had, and so that the same should cease to have any operation as a deed, and the same did cease to have any operation; (6) that the intention and effect of the instrument in the bill mentioned, signed by the plaintiff, was in any case to revest the property and all interest therein in *Hiram Capron*, and to put an end to any claim on the part of the plaintiff; (7) that the circumstances and the transactions between the plaintiff and *Hiram Capron*, and between the plaintiff's husband and *Hiram Capron*, were such as to shew also that the intention of such instrument was to revest all estate and interest in the said *Hiram Capron*; (8) that for these

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and other reasons the correspondence between the plaintiff and the said *Hiram Capron*, and between her husband and the said *Hiram Capron* ought to have been admitted in evidence, but the greater part of it was ruled out by the learned Judge at the trial, and so many other papers accounts and entries ought to have been admitted in evidence; (9) that there was no resulting trust upon or by virtue of the said instrument in favour of the said plaintiff; (10) that no rule of law makes any surplus revert or go to the plaintiff, but such surplus (if any) went to the said *Hiram Capron* as a beneficiary; (11) that no trust of any kind was intended to be impressed, or was impressed by such instrument upon the property in the hands of *Hiram Capron* in favour of the plaintiff, nor was any duty cast on him in respect thereof, but the said *Hiram Capron* was absolutely free to act as he should think fit in reference to the property, and in fact it became his own; (12) that in any event absolute and uncontrolled discretion was meant to be given, and was given to *Hiram Capron*, to do as he should think fit with the property, without any liability to account or be otherwise liable in any manner whatsoever.

Statement.

In support of the decree the plaintiff assigned as reasons (1) that the evidence establishes and the learned Judge who heard the cause rightly determined, that the deceased *Hiram Capron* did execute and deliver to the plaintiff a deed of the property in question; (2) that there was an absolute and unconditional delivery of the deed to the plaintiff with the intention of thereby passing the property comprised therein to her, and there was no subsequent re-delivery thereof with any intention of putting an end to its effect as a conveyance of the property; (3) that the evidence establishes, and the learned Judge who heard the cause rightly determined, that the intention and effect of the deed in the bill of complaint set forth was only to convey the said property to *Hiram Capron* upon trust, as in the said bill set

forth, and that by virtue thereof the said *Hiram Capron* became and was a trustee of the property as declared by the decree pronounced by the said Court of Chancery; (4) that the learned Judge who heard the cause rightly rejected as evidence the correspondence referred to in the eighth of the appellants' reasons as having been rejected; (5) that the other papers, accounts and entries referred to in the eighth of the appellants' reasons, were not tendered in evidence at the trial, but even if they had been they would have been inadmissible as evidence; and (6) that the decree rightly declares that the said property was held by the said *Hiram Capron* in trust as therein declared, and ought to be affirmed.

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Mr. *Fitzgerald*, Q. C., and Mr. *Boyd*, Q. C., for the appellants.

Mr. *Bethune*, Q.C., and Mr. *Moss*, for the respondent.

The facts of the case and the other points relied on by counsel are mentioned in the judgment.

Judgment Sept. 15th.

BURTON, J.—The plaintiff has entirely failed to sustain the important allegations contained in the third paragraph of her bill, viz., that *Capron* applied to her and her husband for a conveyance of the lands in question, and promised that if they would so convey them he would gratuitously bestow and settle them on the complainant *Charlotte Brown*, for her own separate use, and that in pursuance of such representation, and relying on it, the deed of the 30th April was made.

On the contrary, it appears that the application came from *Brown*, who required money to commence business, and the agreement itself under which the deed was executed is produced, and with the other evidence establishes that Mr. *Capron* paid the full value of the land, and that the promise to settle it, if any was made,

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formed no part of the consideration for that conveyance, This property was originally the property of the husband *James A. Brown*, although, with that want of accuracy which will be found throughout Mrs. *Brown's* evidence, she refers to it as belonging to herself and her husband previous to the conveyance to her father in 1853.

The plaintiff relies on the deed of the 4th April, 1864, and no reason is given or suggested for false recitals in that instrument. Mr. and Mrs. *Brown* in that deed declare that he sold the property in 1853 to *Capron* for $4,000; that at the time of that conveyance *Capron* promised or proposed to his daughter to settle it upon her; that under present circumstances it was not expedient to carry out that proposal, and *Capron* being desirous of raising money on the lands for the purpose making still further advances to *Brown*, who had requested *Capron* to sell and absolutely dispose of the lands so promised to be settled, and to that end they had offered and agreed with him to release all claim which they had at law or in equity by reason of said promise or proposal of settlement, and then they severally release any estate, right, title, or claim thereto. This deed professes to deal simply with any equitable claim which the plaintiffs, or either of them, might be assumed to have under the promise or proposal referred to, and nothing more; it is not executed as the law requires for the passing of real estate of married women, and immediately or very shortly after its execution, Mr. *Capron* conveyed a portion of the property to another daughter, a sister of Mrs. *Brown*. In the interval between the conveyance to *Capron* and the execution of this deed *Capron* had expended large sums in improving the property, these moneys having been sent generally to *Brown* to disburse for him, and in a receipt given on the 12th November, 1854, by *Brown* to Mr. *Capron* for a portion of these moneys, *Brown* refers to them as moneys to be applied for building a cottage *on said Capron's lot.*

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The testator died some eight years after the execution of this instrument and the conveyance to his other daughter of a portion of the property; and although it is said that Mrs. *Brown* threatened a Chancery suit during his lifetime, he appears to have treated it as an idle threat, and we are now called upon after his death, in the face of this deliberate declaration, without any suggestion of a reason or motive for any misstatement in it, to hold that the statements are untrue, and that *Capron* did in fact execute either in 1853 or shortly afterwards a conveyance to his daughter. If such conveyance was in fact executed, where was the necessity of resorting to this scheme for the purpose of raising money? What was to prevent the plaintiff selling and conveying direct to Mrs. *Brooke* or any other purchaser? It is not shewn that at that time there were any claims of creditors which would have interfered with such a course.

Judgment

The plaintiff's case depends entirely upon the existence of such a conveyance, and under the circumstances the evidence to prove its existence and to account for its non-production should be of the clearest and most satisfactory kind; and I am compelled to say, with great deference to the opinion of the learned Judge, who heard the case, that it falls far short, in my opinion, of what should be required in dealing with property after the decease of the party whose title is sought to be defeated.

Mrs. *Brown*, it is fair to assume, believes that such a conveyance as she speaks of was in fact executed, but it would be most unsafe to rely upon the evidence of a person whose knowledge of such matters is no doubt very limited, and who is speaking of a transaction over twenty years old. If in point of fact her father intended, as I have no doubt he did, that this particular property should go to her, he however retaining dominion over it until his death and having that intention, handed back to her the deed which she and her husband had executed in

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his favour, it required but a slight stretch of fancy for her to believe that the deed so handed to her was a conveyance in her favour. It is not attempted to be shewn by the subscribing witness or by the evidence of the party who prepared the deed, that such an instrument ever existed; and although the bill alleges that a memorial accompanied the deed, there is no evidence of it, nor is its non-production accounted for.

The only direct evidence of the existence of the deed is that of Mrs. *Brown*, and under the Evidence Act her testimony is not admissible unless corroborated by some other material evidence.

She says that the deed to her was made shortly after the deed of 1853, and that she was living on the property at the time: that her father brought it to her already executed, and that no one was present. On cross-examination she says that they moved on to the property in 1856, and that her father gave this deed to her some two or three years before they moved, *no one being present*: that her father handed to her *one* deed, and no other papers, and that he opened it and read it to her: she does not know whether she signed it, nor the names at the seals, nor how many. She then contradicts herself, and remembers that her name was there. She first states that the deed was never out of her drawer from 1853 to 1864, when she gave it to Mr. *VanIngen*, and afterwards says Mr. *Lynes* got it on one occasion to shew to a lawyer, and that he, *Lynes*, when returning it, and after the purpose for which it was shewn to the lawyer was abandoned, read it to her.

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Mr. *Lynes*, who is the only witness called to corroborate her evidence, is unable to say when it was that he took the deed to the lawyer—June, 1857 or 1858, he says, at first, but on cross-examination he says 1858 or 1859, or it may be later, but he says it was a month or six weeks before *Brown's* failure, which was in 1861. He is unable to speak of the date or witnesses, but is under the impression it was all in writing, and that it

purported to be signed by *Capron*, but does not know his handwriting. He differs from her as to reading it over when he returned it. He says he reported to her the advice he had received.

The husband is now a competent witness to corroborate his wife's evidence, but he contradicts her statement that no one was present when her father handed her the deed, and professes to have been present on that occasion, but does not remember it being read; and he also says he was present when *Van Ingen* got it, although in that respect, his memory is at variance with *Van Ingen*, who says no one was present.

If we hesitate to accept the evidence now offered to prove the existence of a deed, which the present complainant and her husband in the month of April, 1864, by an instrument under seal deliberately declared had no existence, they are themselves to blame; they have both had an opportunity of explaining under oath if that declaration was untrue for what purpose it was made; the mouth of the only other party who presumably could give an explanation is sealed in death, and as has been well said by one of the ablest Judges on the English Bench, "The interests of justice and the interests of mankind alike demand that the evidence of the survivor in her own interests, unless corroborated, should be wholly disregarded."

Judgment.

But the conduct of the deceased in expending large sums of money upon the property is explicable, on the ground that the property still remained under his control and dominion, although his ultimate intention may have been to settle it on the complainant, but is quite inconsistent with the deed alleged to have been made. Those moneys were expended through the complainant's husband who gave receipts for the amounts, and in them described the property as *Capron's* lot, a designation it would not have been likely to acquire if it had been only momentarily as it were vested in him or purchased with a view to its re-settlement. Against

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these almost overwhelming circumstances is the evidence of a man who speaks with so much uncertainty as to dates that he ranges over a period extending from 1857 to 1861, without being able to fix one definitely, and who never having had his attention drawn to the circumstance since, is called upon at this distance of time to speak of the contents of a deed, which it is no more than probable that he never opened or, if he examined at all, did so very cursorily. I cannot say that his evidence is of that clear and satisfactory nature as to outweigh the parties' own statements, made at a time and under circumstances when there was apparantly no object in deceiving. I think the proper conclusion to arrive at is, that the alleged deed from *Capron* is not proved, and that the complainant has no greater rights under the deed of 1864 than she would have had under the promise to settle the lands referred to in it. The appeal should, I think, be allowed, and the bill dismissed with costs.

Judgment.

PATTERSON, J.—The plaintiff is the daughter of the late *Hiram Capron*, who died in September, 1872, leaving him surviving his widow *Charlotte B. Capron*, a son, *Banfield Capron*, and five daughters, viz., the plaintiff, *Jane Anne Capron*, *Emily Brooke*, *Helen Van Ingen*, and *Cornelia Jones*. This bill is filed against the executors and trustees under *Hiram Capron's* will, and against the widow, the four sisters of the plaintiff, the husbands of those of them who are married, and the plaintiff's husband.

The plaintiff asks in the alternative to be allowed to redeem a property on Jarvis street, Toronto, or for specific performance of an alleged agreement to convey to her certain lands in Norwich, and to pay her $1,000 in consideration of her equity of redemption in the Jarvis street property.

There is no pretence that any agreement for a conveyance of the Norwich property is proved, and therefore, the injury relates only to the Jarvis streeet property.

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The allegations in the bill are that the plaintiff's husband, at the request of her father, conveyed the property, which was known as lot 3 and lot 4, to the father, on his promise that he would gratuitously bestow and settle it on the plaintiff for her separate use, and that her father accordingly did convey to her in fee; that this was in 1853, and that in 1864 her father persuaded her to give him the deed, which had up to that time remained in her possession unregistered; that about the same time, viz., on 4th April, 1864, she and her husband made a conveyance of the land to her father, under which he sold one of the lots; and that the last mentioned deed was executed only to enable *Hiram Capron* to raise money on the land for the purpose of making advances to her husband, placing him in the position of mortgagee; and the plaintiff claims a right to an account of the lot which was sold, and to redeem the one which remains unsold.

Judgment.

The evidence shews a very different state of facts in connection with the conveyance in 1853 from the plaintiff's husband *James A. Brown* to *Hiram Capron*, from that stated in the bill.

The agreement, which is dated 13th April, 1853, is in evidence, and is simply an agreement by *Brown* to sell the lots to *Capron* for £1,000, payable £500 in thirty days; £414 10*s.* by assuming a mortgage held by Mr. *Cawthra*, and a balance of about £86 within two years from date.

The payment of the £1,000 is proved.

The conveyance from *Brown* to *Capron* is also in evidence and bears date 13th April, 1853.

There is no evidence of an agreement by *Capron* to convey the property to the plaintiff except that of the plaintiff and her husband, each of whom speaks of some such agreement as part of the bargain. This evidence is altogether uncorroborated; but would be inadmissible on other grounds, viz., as relating to an interest in lands, unless the subsequent possession could be treated

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as part performance ; and also as adding to or varying the written agreement.

There is no suggestion that the £1,000 was not the full value of the land, while the evidence shews affirmatively that it was its full value. I have no doubt whatever that no such agreement formed any part of the consideration for the conveyance. *James A. Brown* in his evidence uses the expression, when cross-examined respecting this agreement, "He said he intended to give it to my wife," and there cannot be any doubt upon the whole evidence that while there was such an intention on *Capron's* part, there never was any agreement as part of the transaction of 13th April, 1853.

The plaintiff, however, alleges that a conveyance to her was actually executed and delivered to her, and it is very important for her case to prove that allegation. There is no attempt to prove a transaction anything like that charged in the bill. From the bill it would appear that the husband was settling the property on his wife,

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the father being used merely as a conduit for conveyancing purposes; the evidence is offered to prove that the property being the father's, he voluntarily settled it upon his daughter.

After a careful examination of the evidence I am satisfied that the plaintiff has failed to establish the existence of the alleged deed.

The plaintiff herself says, that when the deed of 13th April, 1853, was executed to her father "It was agreed that my father should deed the property back to me. He did deed it back shortly afterwards. The deed was made to me absolutely. I was living on the property at this time * * My father wished me to give him the deed he had given me to keep for me, so that Mr. *Brown's* creditors could not get it. Mr. *Henry Van Ingen* came down, and I gave him the deed. The deed remained in a bureau in my room until I gave it to Mr. *Henry VanIngen*. My father brought the deed to me at my own place. I think my husband was present when

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it was brought to me, but I would not be certain. It was already executed when by father brought it to me * * * I don't recollect whether the deed of 1853 from my father was signed by any one but my father." On cross-examination she said "We moved on the place shortly after the deed was given to me; I think it was in 1853. It is over seventeen years since my father gave me the deed. We went to Toronto in 1850 to live; about 1856 we moved on to the property on Jarvis street in question. My father came to me and gave me the deed before we moved. Some two or three years perhaps. None else was present. My husband was then in business with Mr. *Stephenson*. I think he was in business with him eight or nine years. My father handed me one deed; he opened it and read it to me. He asked me to put it away: that it was mine * * I put the deed away in the bottom drawer of the bureau in my bedroom. It was kept there until Mr. *Van Ingen* called for it. My father never came to me about the deed again. It was kept there from 1853 to 1864. * * * Mr. *Lynes* got the deed at one time to take to a lawyer, Mr. *McMichael*, to try to raise money on it. Mr. *McMichael* advised him not to do it. Mr. *Lynes* brought it back in a day or two. Mr. *Lynes* said, that Mr. *McMichael* was a very good man, and advised him not to do it. Mr. *Lynes* read the deed to me when he brought it back to me. He said it was all right as he had got it. He said the property was mine. I put it away in the drawer * * * Mr. *VanIngen* had got the deed given up to him before this (*i.e.*, before the deed of April, 1864.) * * * My father bought the property from my husband and paid him £1,000 for it. My father then conveyed it to me * * My husband wanted money to go into business when he sold the property to my father. That was the reason why he sold. He wanted the money to go into business with *Stephenson*. * * * It was not a great while after my father

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spoke about giving him the deed to keep for me that *VanIngen* came down."

James Anson Brown said "The property was conveyed to my wife in the autumn of 1853. I saw the conveyance to my wife. It was signed by Mr. *Capron*. He had no wife at the time he signed it. The deed was given to my wife alone. She kept it for some years. Mr. *VanIngen* got the deed to give it to Mr. *Capron*. I got into difficulty; and Mr. *Capron* was afraid my creditors would get hold of the property. I was present when Mr. *VanIngen* got the deed. I have never seen it since. It embraced lots three and four." On cross-examination he said "I first saw the deed at our own house on Gerrard street. Mr. *Capron* brought it there. He said to Mrs. *Brown*, here is the deed of your property: you had better take it, and put it away. The deed may have been read over aloud by some person, but I do not remember. I don't remember that Mr. *Capron* read it over. There was but one deed. I saw the deed again when Mr. *VanIngen* got it. Mr. *Lynes* got it first, I saw the deed when Mr. *Lynes* brought it back. I was present when Mr. *VanIngen* got the deed. I did not read it this time * * * The deed Mrs. *Brown* got was not registered. Mr. *Capron* said there was some new law coming in force, and that I had better not register it at present."

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William Henry VanIngen's evidence is very short. "Mr. *Capron* asked me, as I was going to Toronto, to call upon Mrs. *Brown*, and ask her for his deed. She handed me a paper wrapped up in a newspaper. I did not open the parcel. I handed it to Mr. *Capron*. It was about the size of an ordinary deed. There were *Banfield* and *William Capron* present when I handed *Hiram Capron* the deed. Very shortly before Mrs. *Brown* came to Paris, I got the deed from Mrs. *Brown*. I never saw the deed. No one was present when I got the deed from Mrs. *Brown*."

Mrs. *Capron*, the widow, proved that she had heard

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Mr. *Capron* ask Mr. *VanIngen* to bring up a deed, and she saw a parcel wrapped up in a newspaper, brought by *VanIngen* and handed to *Capron*, and Mr. *Capron* said, "Here are the papers sent for."

These are the only witnesses who gave *viva voce* evidence respecting the deed.

If the account given of it by the plaintiff and her husband can be acted on, there would certainly be direct evidence of the existence of a conveyance from *Hiram Capron* to the plaintiff; not to her separate use, but an ordinary conveyance under which, as far as one can judge, she would take an estate in fee, her husband taking a life estate unaffected by any of the later statutory changes of the law respecting the property of married women. It is, therefore, necessary, both under the statute 36 Vic., ch. 10, and the rule lately quoted in this Court by *Richards*, C. J., in his judgment in *Orr* v. *Orr* (*a*), that their evidence be corroborated by some other material evidence.

Judgment.

The only corroboration, so far, is as to the circumstance that *VanIngen*, at the request of *Hiram Capron*, obtained from Mrs. *Brown* a document wrapped in a newspaper, which was spoken of as a deed. This corroborates only Mrs. *Brown*, for *VanIngen* shews that when Mr. *Brown* swore to *VanIngen* having got the deed, he was swearing only to hearsay.

The other evidence on the subject is either documentary or is given under a commission, which places it before us in the same position as before the learned Judge at the hearing.

Charles Lynes deposed, that in 1857 or 1858 he got from plaintiff a deed relating to land in Toronto, in which to the best of his knowledge and belief *Hiram Capron* was the only grantor, and plaintiff the only grantee, describing the brick house and lot on Jarvis street, on which plaintiff and her husband resided, for

(*a*) 21 Gr. 415.

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the purpose of raising money to assist Mr. *Brown* to sustain his business. He said further: "When I received said deed no one was present except the said *Charlotte Brown*. It was not read over to me. I took it to *Cameron & McMichael*, lawyers, of said Toronto. I went there to borrow money on it. I was advised by Mr. *McMichael*, one of said firm, a good man, not to allow her to sacrifice her property to sustain her husband's business; whereupon I took the said deed and returned it to her, reporting to her the advice given to me * * * and within a day or two thereafter I did inform said *Capron* of the facts." On cross-examination he said "I do not know in whose handwriting the deed was * * I do not know the date thereof * * My impression is, the deed was all in writing. I think so for the reason that in those days we did not have any printed forms for deeds in use; there may have been some * * I cannot give the date when I received said deed from said *Charlotte Brown* any nearer than I have stated, that it was in or about the month of June, 1858 or 1859. I may be mistaken in the month or year. It may have been later than June. *James A. Brown* was then carrying on business in partnership with one *Stevens* or *Stephenson*; the business was grocery business. They continued that business a month or six weeks or less after I so received that deed. That partnership had not been dissolved when I received that deed. I am certain of it. I know that they failed in business a short time after that * * * I went to Paris on purpose to tell *Capron* of *Brown's* business condition in which he was interested as a creditor at that time. No one was present at that conversation except *Capron* and myself. This was before, or at, or about the time of the failure of said *James A. Brown*. If before, it was within a week before said failure. I went to Paris, and told him that *Brown's* business was in a very bad shape, and that I had tried to raise money on *Charlotte's* deed, that *McMichael*, like a good man,

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had advised me not to allow her to mortgage her property, and that as *Brown* owed him he had better come down to Toronto, and look into his business matters for himself, and secure himself if he could. He did not say anything in relation to the deed."

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There is in *Lynes's* evidence, as there is also in that of the other witnesses, an uncertainty as to the dates which is, perhaps, not to be wondered at when people are speaking of events ranging over twenty years. At the same time it makes the evidence harder to deal with, and possibly, when dates are important, may create difficulties in the way of the plaintiff, on whom rests the onus to establish her proposition with reasonable certainty.

The facts spoken of by *Lynes* are that in or after June, in 1857, or 1858, or 1859, *and a few weeks before Brown & Stephenson's failure,* he took to Mr. *McMichael* a deed relating to the property in question, made by *Hiram Capron* to the plaintiff, to see if money could be raised upon it to assist *Brown* in his business, and he was advised not to allow the plaintiff to mortgage her property for her husband's debts. This advice so impressed him with the conviction that the solicitor giving it was a good man, that he conveyed the same impression to the plaintiff who swears to it, and *Lynes* himself swears both to the goodness of the man and to the fact that he communicated that opinion to Mr. *Capron* immediately after he had received the advice on which it was founded—a singular, if not suspicious coincidence in the recollection, after so long a time of an expression, which may be material as tending to shew the nature of the deed by pointing to the ground of the advice given.

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How far can *Lynes's* evidence be taken to materially corroborate the plaintiff in her evidence of any fact further than that *Lynes* took a deed to Mr. *McMichael* with the object of raising money, and returned without having effected that object? What have we from other

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evidence in the case? There is the fact that in 1853 a deed was made concerning the land, from *Brown* to *Capron*, as to which there is no dispute, and the fact that the land was looked on as dedicated to the plaintiff, who in that sense would not be a stranger to that deed.

There is *VanIngen's* evidence that when *Capron* sent for the deed he told him to ask for *his*, *i.e.*, *Capron's* deed—which does not point of necessity to a deed made by him, and which was his daughter's property, though capable of being so understood. There is the fact which appears from one of the documents in evidence, that as late, at all events, as March, 1857, the mortgage to Mr. *Cawthra* was not paid off, but that *Brown* was paying the interest on it, and getting credit for his payments in his account with *Capron;* and as far as there is anything before us to shew, it may not have been paid off for some time later. This is scarcely what one would expect if in 1853 *Capron* was actually settling the property on his daughter. There is a receipt dated 12th November,

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1864, in which *Brown* calls the property *Capron's* lot. There is the fact that up to 1859 *Capron* was expending considerable sums of money in buildings on the property, and nothing to shew or suggest that those moneys were intended to go absolutely to the advancement of the plaintiff without any testamentary or other control remaining with her father. There is the very suggestive fact, that in the deed of 4th April, 1864, to which I have further to allude, no mention is made of the alleged conveyance of 1853, but the recitals exclude the idea of such a conveyance having existed; there is the absence of any apparent motive for *Capron* asking in 1864 for the deed. The reason given for this by both plaintiff and her husband is not satisfactory to my mind. I do not express an opinion whether or not *Brown's* creditors could have seized under *fi. fa.* his interest in his wife's land under this supposed deed. Possibly they could. That, however, was not the only danger *Capron* may be supposed to have been desirous to avert.

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It may have been as important to protect her against her own impulse to burden her property with her husband's debts—and so one could understand *Capron's* interfering promptly when *Lynes* told him that his daughter or her husband was trying to raise money on the property—but there was no interference for years, or until that danger was over. The reason given by *Brown* for not registering the deed, is as little satisfactory to my mind. Indeed, I cannot say I understand what new law he alludes to, as spoken of in 1853. There is also the evidence of *Brown* which shews that his business with *Stephenson* lasted until 1861, and thus throws a fresh element of uncertainty into *Lynes's* evidence. Then there is the not unimportant statement by *Lynes* that he *thinks* the deed he speaks of was a written deed, because printed forms were not much in use in those days, shewing a want of accuracy in his recollection of the instrument itself, as well as a bad guess at a reason for the statement he had hazarded; and there is the statement that the deed described the brick house and lot on which the plaintiff and her husband resided; whereas the deed, if it ever existed, must have described two lots on which there was no brick house at its date or for years afterwards. On the whole, it seems impossible to treat the evidence of *Lynes* as amounting to more than what I have indicated, viz., that on one occasion he took a deed of some kind to try to raise money on it, and did not raise any.

Judgment.

The only conclusion which seems proper upon the evidence is, that the plaintiff has failed to establish that the alleged conveyance to her ever existed. All the other facts shewn, such as the occupation of the land by the plaintiff and the receipt of the rents by her father's permission, are explicable on the ground of the acknowledged intention of the father to give her the Toronto property, without resorting to the supposition of either a conveyance or a contract to convey; and I may refer to the passage in *James A. Brown's* evidence, where, in speaking

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of *Capron* giving the deed to his daughter, he says, that *Capron* said: "Here is the deed of your property: you had better take it and put it away"—to the plaintiff's account of the same incident, "My father handed me one deed; he opened it and read it to me; he asked me to put it away, that it was mine"—and to the message sent through *VanIngen* to ask for *Capron's* deed—as singularly consistent with the theory that the deed which the plaintiff had in her bureau was the conveyance made by her and her husband to *Capron*.

Unless, therefore, the plaintiff can maintain her decree under the deed of 1864, she must, in my judgment, fail altogether.

Let us look at this deed. It recites the original title of *Brown*; the sale and conveyance by *Brown* to *Capron* in consideration of $4,000 advanced at various times to *Brown*; that at the time of that sale and conveyance *Capron promised or proposed to his daughter and Mr. Brown* to settle the lands on Mrs. *Brown*;

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that under present circumstances it not being expedient to carry out the said promise or proposal, and *Capron*, desiring to raise money on the lands for the purpose of making still further advances in money to *Brown*, *Brown* and wife have requested *Capron* to sell and absolutely dispose of the lands, and to that end have offered and agreed to release to him all claim which they or either of them have or might hereafter have or claim either at law or in equity of, in, to, or out of the lands, *by reason or means of said promise or proposal of settlement* of said lands by *Capron* on his daughter, as aforesaid; and then, in consideration of one dollar, *Brown* and his wife release and quit claim the lands to *Capron* and his heirs.

It is not very important to inquire why this document was considered necessary. If a motive for obtaining it had to be looked for, it might probably be truly inferred from the sale which followed very soon after the date of the deed to two members of the family, who may have

been reluctant to purchase what had been looked on as the plaintiff's portion, without some express renunciation on her part of her claims to it. All that is material is, to see what claim is really asserted or admitted by the document itself. The recitals are so distinct as to leave no doubt on this subject. The only claim asserted is, the promise or proposal of *Hiram Capron* to settle this property on his daughter; and it is only their claims under that promise or proposal which they profess to deal with: claims which however reasonable and however justly founded on the knowledge of the intentions of their father, are not such as to furnish the foundation of a legal right.

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The construction which I put on the instrument itself is very much that for which the respondent contends. I think the effect of an instrument of this character is very much that of a mortgage. Its purpose is the raising of money by a sale of the land or a part of the land. The right of the respondent to the unsold portion of the land or to the unexpended purchase money of what is sold, is just the same right which existed to the whole land before the execution of the deed. But the deed, while it leaves that original right untouched, does not make it a right of any higher character; when the right to the whole was not enforcible at law, neither is the right to the residue.

Judgment.

I think the appeal should be allowed with costs and the bill dismissed with costs.

DRAPER, C. J., and HARRISON, C. J., concurred.

SOLICITORS.—*Bethune, Osler*, and *Moss*, agents for *Wilson* and *Smyth*, of Brantford, for plaintiff; *Fitzgerald* and *Arnoldi*, agents for *H. Hart*, of Paris, for defendants.

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COOK v. MASON.

Set-off by mortgagor's assignee—Effect of bill dismissed at hearing for non-appearance of plaintiff—Res judicata.

A purchase of lands had been made by plaintiffs and one *C.* jointly, each to pay one-half the purchase money: the plaintiffs paid more than their share and had a lien on *C.'s* interest for the excess; they also had lumber dealings together, the accounts of which were unsettled, and the balance thereon was claimed by each to be in his favour; in accounts of these lumber dealings the plaintiffs had charged *C.* with his share of the purchase money: they afterwards filed a bill claiming that the land account and the lumber account were unconnected; that they should be paid their advances for *C.* on the land, and that in default his mortgagees and assignee should be foreclosed.

Held, that as against the lien of the plaintiffs on the land these mortgagees were entitled to set off the amount, if any, due by the plaintiffs on the lumber dealings.

The plaintiffs put in evidence that *C.* had, on a former occasion, filed a bill against them seeking an account of the lumber dealings, and charging that the land agreement had been cancelled; that it was after answer and before decree in that suit that *C.* had mortgaged his interest to *M.* & *W.*, (who were not made parties to the suit and had not any notice of it); and that the cause having been set down for examination of witnesses and the plaintiff therein not appearing, bill was dismissed with costs. The present plaintiffs, however, did not in their bill set up these proceedings. The Court declined to hold the defendants the mortgagees concluded by them as *res judicata*.

Examination of witnesses and hearing.

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

Mr. *Attorney-General Mowat*, for the defendants.

The facts of the case and the points relied on are clearly stated in the judgment.

Judgment.

SPRAGGE, C.—There is little or no dispute upon most of the facts upon which the questions between the parties turn. In March, 1866, the plaintiffs and *John Cameron* purchased jointly the lands in the plaintiffs' name, the plaintiffs to be interested to the extent of one-half and to provide one-half of the purchase money,

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Cameron to be interested in the other half and to provide the other half of the purchase money. A conveyance of the land was made from the vendor to the plaintiffs; a portion of the purchase money was paid down, and a mortgage given for the balance; a portion of the purchase money, but less than half, was paid by *Cameron*, the balance was paid by the plaintiffs. The plaintiffs were partners in the business of lumber merchants. *Cameron* in a bill filed by him against the plaintiffs in April, 1868, styled himself a timber merchant.

In the year 1866–7, *Cameron* was engaged in getting out and forwarding timber of various kinds to Quebec, and accounts between him and the plaintiffs arose out of dealings between them in respect of that timber. Upon those dealings *Cameron* claimed a balance in his favour, while the plaintiffs claimed that the balance was in their favour.

On the 4th of March, 1869, *Cameron* made a mortgage to the defendants *McLennan* and *Wallbridge*, of his interest in the lands which were purchased by the plaintiff and himself, to secure the sum of $5,000, and it is now claimed by those defendants that the purchase money of the lands payable by *Cameron* has been satisfied *pro tanto* by any sum that may be due to *Cameron* by the plaintiffs upon the dealings in timber between them.

Judgment.

On the 14th of April, 1869, *Cameron* made an assignment in insolvency and the defendant *Mason* is made a party defendant as his assignee.

The bill claims that the dealings in timber between the plaintiffs and *Cameron* were entirely unconnected with the land purchase, and prays that the plaintiffs may be paid the balance due to them in respect of the one-half share of purchase money payable by *Cameron* with interest; and in default thereof that the interest of *Mason* as assignee and the interest of the other defendants as mortgagees may be foreclosed, and that the entire interest of *Cameron* and of the defendants may be vested in the plaintiffs absolutely. The defendant *Mason* makes no defence or claim in this suit.

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For the plaintiffs it is contended, in argument, that the land account and the timber account were unconnected; that there was no agreement for set-off; and that there has been no adjustment of accounts; that the debts continue to subsist separately; and that, consequently, if there was, at the date of *Cameron's* insolvency, any balance due to him on the timber account, it belongs to the assignee.

The language of Sir *Wm. Grant*, in *Pettat* v. *Ellis* (*a*), favours this contention. He states the difference in the matter of set-off between our law and the civil law; that by our law the debt still subsists, and, he adds, that it is only by a process in our Courts that the adjustment takes place, while by the civil law it operates *ipso jure*. The question in that case was not between the original parties, but after the death of a mortgagor to whom a legacy had been bequeathed by the mortgagee, and there was interest due on the mortgage and also on the legacy, the bill was by the devisee of the mortgagor to have the interest due on the legacy set off against the interest due on the mortgage, and the Master of the Rolls negatived his right to this; observing, however, that if the parties had settled the accounts the day before the death of *King* (the mortgagor and legatee) then, in his opinion, the account must have been taken in the way contended for by the plaintiff. After his death, as is observed in a note to the case, a settlement upon the basis claimed by the devisee would have been to the prejudice of the personal representative of *King*.

Judgment.

In the earlier case of *James* v. *Kynnier* (*b*), Lord *Loughborough* allowed a set-off where there had been mutual credits notwithstanding the intervention of the bankruptcy of one of the parties. His lorship asked, "Is there any doubt that, where there are upon account mutual credits between two parties, though they cannot set off at law, it is the common ground of a bill?" The case before me appears to me to be one of mutual

(*a*) 9 Ves. 563. (*b*) 5 Ves. 108.

credit; the plaintiffs paying a portion of the purchase money payable by *Cameron* became his creditors for the excess beyond their share, and if their position was that of salvors, as I take it to have been, that I apprehend would make no difference, and *Cameron*, on his part, would stand creditor of the plaintiffs for any balance due to him on the timber dealings; that balance consisting of the excess of value of timber delivered beyond the advances made in respect of that dealing by the plaintiffs.

The case that comes nearest to the one before me is that of *Norrish* v. *Marshal* (*a*). The bill was filed by a mortgagor against a derivative mortgagee who had neglected to give notice to the mortgagor of the assignment of the mortgage to him. The plaintiff claimed that he had satisfied the mortgage. The mode of satisfaction is what is material to this case. The contention by the assignee of the mortgage was, that the mortgagor could not contend as against him that by collateral dealings he had discharged the mortgage debt. It was conceded that if the mortgagee had filed a bill to foreclose, the mortgagor might have said: "Your mortgage is discharged by the goods I have sold you." An advance of money, it was said, might be set off, but a sale of goods, it is apprehended, cannot be set off as against an assignee of the mortgage. The language of Sir *John Leach* upon this contention was, "It is next said that the mortgage is taken to have been satisfied, not by direct payment made in that respect, but by the balance of a general account, partly composed by the supply of goods, and that though the assignee of a mortgage may be affected by direct payments made to the assignee on account of the mortgage, he is not to be affected by the balance oaf a general account so compsed. The principle is, that as against an assignee without notice, the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the

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(*a*) 5 Madd. 475.

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way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee."

The mortgage to *McLennan* and *Wallbridge* operated as a conveyance of all the equitable rights and interest of *Cameron* in these lands—he had none other than equitable rights—subject indeed to redemption, but still subject to that, a conveyance of all his rights and interest in the land; and the mortgage carried with it a duty on the part of *Cameron* as between himself and his mortgagees to disencumber the estate of the lien of these plaintiffs in respect of excess of purchase paid by them. If, as between *Cameron* and the plaintiffs, *Cameron* had the right to reduce the purchase money by applying to its reduction any sum due to him by them on the timber dealings, that right would, I apprehend, pass to the mortgagees under the authority of *James* v. *Kynnier* and *Norrish* v. *Marshal*; if indeed the right of the mortgagees would not be to say, as it was the right of *Cameron* to say, that the lien of the plaintiffs stood reduced by the amount due to him on the other account between them.

Judgment.

It appears to me, indeed, that the case is relieved from difficulty in the matter of set-off by the dealings of the plaintiffs themselves. I find an account of the plaintiffs against *Cameron* in respect of the land purchase, bringing down a balance against *Cameron* on that account of $2,777.20; and I find also an account of the plaintiffs against *Cameron* in respect of the timber dealings, and I find the balance on account of the land purchase carried into the account of the timber dealings; and in that account made to increase the balance due to them from *Cameron* from $1,396.41 to $4,173.81. It matters not which way they claim the balance to be on the timber account, so long as they bring it into the land account. It is to be assumed that the whole of these transactions between them were carried into the one account, in order to the ascertaining and adjusting of the amount due upon both, and it is to be assumed that if

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the balance due on the timber account had been the other way *Cameron* would have been credited with that balance on the land purchase account. The account in which the above aggregate balance is made to appear is brought down to 31st December, 1866, and with the initial letters "E. & O. E." and is dated Toronto, May, 1867. These initial letters themselves are not without their significance; they seem to imply that whatever errors and omissions there may be in the accounts they are to be adjusted upon the footing of the balance upon both being taken into account.

There is one other point made in the case by the plaintiffs. They produce the pleadings in the suit of *Cameron* against themselves, and a decree in that suit dismissing the bill. The cause was set down by the defendants in that suit for examination and hearing, and they appeared by counsel; and no one appearing for the plaintiff the bill was dismissed. The date of this decree is 17th March, 1869, consequently after, though not long after the mortgage to *McLennan* and *Wallbridge*. That bill sought an account of the timber dealings alleging that it had been agreed that the agreement between the parties for the joint purchase of lands should be cancelled. The decree in that suit is not set up by the plaintiffs in this suit and so does not operate by way of estoppel, in this suit. It does not appear that the mortgagees *McLennan* and *Wallbridge* had notice of the pendency of that suit, and I think I ought not to conclude them as to the matters in question in this suit as *res judicata* in that snit.

Judgment.

The defendants *McLennan*and *Wallbridge* are entitled to their costs of this hearing. Other costs and further directions are reserved.

SOLICITORS.—*Blake, Kerr*, and *Boyd*, for plaintiffs; *Mowat, Maclennan*, and *Downey*, for defendants *McLennan* and *Wallbridge*.

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Trustee and cestui que trust—Parol evidence—Statute of Frauds—Part performance—Practice—Amendment in appeal—Discretion of Court.

A purchase was negotiated by *M.*, the husband and father of the plaintiffs respectively, of a village building lot, and he obtained from the vendor a bond securing the conveyance thereof to his father. *M.* thereupon went into possession, built upon and otherwise improved the property, and died in possession thereof. Amongst his papers there was found, after his death, a receipt from the vendor, as follows: "Received from *Mark McManus* payment in full for a building lot of one hundred and four feet square, on which he has a store erected. The deed to be given when demanded;" but no evidence was forthcoming of this document ever having been shewn to the father, who, it was proved, was unable to read or write, in consequence of which he was in the habit of always having his business transacted by *M.* From the evidence of the vendor it was evident that the whole payment for the lot came from the father. After the death of *M.* his widow and infant daughter filed a bill seeking to declare the father, who had obtained a conveyance, a trustee of the property. The defendant denied the existence of any trust, and the only evidence against such denial was that given by the widow, who swore that the defendant had stated in answer to a question as to what would become of the property, that "it was all right and whatever was *Mark's* should be hers," meaning the infant plaintiff.

Held, that there was not sufficient shewn to take the case out of the Statute of Frauds, and the defence thereof was a bar to any relief being given.

Quære, whether possession by a son of property to which his father holds the legal title, is a circumstance of such force or significance as to deprive the father of the protection of the Statute, and expose him to the danger of being made a trustee upon verbal testimony.

On the argument of an appeal in a suit seeking to have the defendant declared a trustee of lands, it appeared that the evidence, if implicitly relied on, tended to make the defendant a mortgagee rather than a trustee. A motion was then made to amend the bill in order to make that case; the Court, however, refused the application as not being an exercise of sound discretion to permit the amendment at that stage of the suit.

This was an appeal by the defendant from a decree of the Court of Chancery pronounced by *Proudfoot*, V. C.,

*Present: Draper, C. J., Burton, Patterson, and Moss, JJ.

at the sittings of the Court at Walkerton, in the autumn of 1875, whereby it was declared: "(1.) That the defendant *James McManus* held the lands and premises in question since the 1st of September, 1869, as trustee for the plaintiff *Alice McManus*, and that the said plaintiff *Alice McManus* is entitled to a conveyance of the said lands from the defendant free from all incumbrances made, done, or created by him, subject however to the lien hereinafter mentioned * * * (2.) And this Court doth further order and decree that it be referred to the Master of this Court, at Walkerton, to inquire and state what moneys, if any, have been expended by said defendant while trustee in respect of, or in connection with the said lands and premises, and which are properly chargeable against said lands, which have not been repaid by said *Mark McManus*, and the said defendant is hereby declared entitled to a lien on the said lands for whatever amount the said Master shall find him entitled to in respect of such expenditure. (3.) And this Court doth further order and decree that the defendant execute a conveyance of the said lands and premises to the plaintiff *Alice McManus*, her heirs and assigns, forthwith after said conveyance shall be tendered to him for execution, such conveyance to be settled by the said Master, who is to have regard to the declarations hereinbefore contained in settling the same; and do also deliver up to the said plaintiff, or to whom she may appoint upon oath, all deeds and documents relating to the said lands and premises in his custody or power." And the decree further ordered the defendant to pay the costs of the suit.

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Statement.

The other facts are stated in the judgment.

Mr. *Boyd*, Q. C., and Mr. *W. Cassels*, for the appellant, contended that the proper conclusion from all the evidence and documents was, that the appellant bought the land, paid the consideration money, made all the improvements thereon at his own expense, and was,

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therefore, entitled to obtain and hold the conveyance in his own name; that the statements of *Mark McManus*, made in the absence of the appellant, as set forth in the evidence of *Elliot* and elsewhere, were not admissible as against the appellant. In fact the decree, in effect, engrafts a trust by parol evidence upon the bond to convey, and the deed executed in pursuance thereof, in contravention of the Statute of Frauds: *Langstaff* v. *Playter* (*a*) *Morley* v. *Davison* (*b*), *Robertson* v. *Smith* (*c*); that the alleged admissions of the appellant after the death of *Mark McManus* were not binding upon him, and cannot be enforced in equity: *Bayley* v. *Boulcott* (*d*).

Argument.

Mr. *Bain*, contra. The evidence, if believed, distinctly shews that the property was purchased by *Mark McManus*, and that any part of the purchase money paid by the appellant was for the benefit of *Mark*, and by way of advancement; and that prior to the execution of the deed to the appellant the equitable title of *Mark* to the land was complete, and he would at any time have been entitled to a conveyance of the land in his own name. It is also clearly established that after the execution of the bond, *Mark*, with the knowledge of the appellant, remained in possession of the property, erected buildings and made other improvements thereon, and otherwise dealt with the property as his own; that he paid no rent to the appellant for the property, and the appellant derived no benefit from it. In this state of facts parol evidence was properly admitted to establish a trust in favour of the appellant: *Cook* v. *Fountain* (*e*), *Birch* v. *Blagrave* (*f*), *Platamore* v. *Cooper* (*g*), *Dummer* v. *Pitcher* (*h*), *Davies* v. *Otty* (*i*), *Robertson* v. *Smith* (*j*):

(*a*) 8 Gr. 39.
(*b*) 20 Gr. at 103.
(*c*) 21 Gr. 303.
(*d*) 4 Russ. 345.
(*e*) 3 Sw. 585.
(*f*) Aml. 264, at .
(*g*) Coop. 250.
(*h*) 2 M. & K. at 278.
(*i*) 35 Beav. 208.
(*j*) 21 Grant 303.

but even if the Court should be of opinion that all the money expended in the purchase of the land and on the improvements made thereon was not paid by *Mark*, the evidence certainly shews the payment by him of large sums of money and goods, and there would thus be a resulting trust in his favour to the extent of the sums so expended by him: *Wray* v. *Steele* (*a*), *Goodfellow* v. *Robertson* (*b*). Here it is shewn that the property was purchased by *Mark McManus* for his own use, and that the buildings erected and other improvements made thereon were erected and made by and for the benefit of *Mark*, and that it was not intended the appellant should have any beneficial interest in the property; that no rent was paid by *Mark* to the appellant, and there is no evidence of any claim to the property ever having been made by the appellant during the lifetime of *Mark*. Then the evidence in support of the appellant's contention, itself establishes that the bond was made to the appellant merely to secure him in respect of any moneys he might thereafter expend upon the land, and upon the understanding that it should be conveyed to *Mark*, and it was a fraud on the part of the appellant to claim to hold the property for his own benefit and to refuse to convey. Under such circumstances parol evidence to establish the trust and agreement was admissible: *Lincoln* v. *Wright* (*a*), *Haigh* v. *Kaye* (*b*), *Booth* v. *Turle* (*c*), *Childers* v. *Childers* (*d*). The statements of *Mark McManus*, though made in the absence of the appellant, should be received in evidence as being part of the *res gestæ*: *Taylor* on Evidence 538. They are at all events admissible as evidence to shew the intention of *Mark* in having the bond made to the appellant instead of himself, and the interest which the appellant was to take thereunder: *Childers* v. *Childers*, already cited.

Argument.

(*a*) 2 V. & B. 388.
(*b*) 18 Grant. 572.
(*c*) 4 DeG. & J. 22.
(*d*) L. R. 7 Chy. 469.
(*e*) L. R. 16 Eq. 182.
(*f*) 1 DeG. & J. 482.

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June 29th.

The judgment of the Court was delivered by

Moss, J.—This is an appeal by the defendant against a decree of Proudfoot, V. C., declaring him to be a trustee of a freehold for the plaintiff.

The bill, which is filed by the infant child and the widow of one *Mark McManus*, alleges that on the 1st September, 1869, *Mark McManus* became the purchaser of the land in question, and upon such purchase of the land, "upon which are erected valuable buildings," entered into possession, and remained in possession until his death, since which time the plaintiffs have been in possession: that *Mark* paid the whole of the purchase money for the land: that at the time of the purchase no conveyance was made by the vendor, *Adam Scott Elliot*, who, however, gave a bond to the defendant, *Mark's* father, for the execution of a conveyance to the defendant: that the defendant consented to the bond being made to him, and agreed with *Mark* to hold the land in trust for him and to convey upon request; and that after *Mark's* death the defendant obtained a conveyance to himself, and in fraud and breach of his trust refused to convey to the infant plaintiff, the heiress of *Mark*. The prayer was for a conveyance to the infant plaintiff, and for further relief.

Judgment.

It will be observed that the case thus made is one of express trust on the part of the defendant.

The defendant, by his answer, denied that *Mark* was the purchaser, or that he paid any part of the purchase money, or that the defendant ever agreed with him to hold the bond or lands in trust, or to convey upon request. He further set up that he was himself the purchaser, and that he erected the buildings at his own expense, with the view of allowing his son to reside and carry on business in them, instead of removing from the neighbourhood; and that he allowed his son to remain in occupation upon the condition of his doing the road work, paying taxes, and keeping the buildings in repair

He admitted that *Mark* did disburse some moneys towards the erection of the buildings, but only as the defendant's agent and on his account; and he alleged that these moneys were repaid. The Statute of Frauds was pleaded. 1876. McManus v. McManus.

Witnesses were examined on both sides, and a decree was made declaring the defendant to have been a trustee for the infant plaintiff, since 1st September, 1869, and ordering a conveyance to her subject to any lien the defendant might establish in the Master's office for moneys expended by him while trustee, in respect of or in connection with the land.

There was no writing manifesting the alleged trust which was established wholly upon parol evidence.

The appellant stated as a ground of appeal, that such evidence was not properly admissible, and that the Statute of Frauds was a bar to the relief sought. Upon the argument, however, this point was but faintly touched. The evidence had placed it beyond doubt that *Mark* had been in possession during his life time, and the plaintiffs since his death. It seemed to be tacitly conceded that this possession (coupled it may be with other facts to which our attention was not directed,) was sufficient to remove the bar of the statute, and to open up the case for the admission of the parol evidence. This may be the result of the authorities, as *Blake*, V. C., seemed reluctantly compelled to hold in *Robertson* v. *Smith*, but we cannot help thinking that if ever the question is debated, it will deserve serious consideration, whether possession by a son of property to which his father holds the legal title, is a circumstance of such force or significance as to deprive the father of the protection of the statute, and expose him to the danger of being made a trustee upon verbal testimony. Even if it be established law that possession by a stranger entitles him to shew by parol that the holder of the legal interest is his trustee, the rule may not be applicable to the case of a son in possession of property ostensibly his father's. The- Judgment.

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possession of a stranger may justly lead to the inference that he has some beneficial interest in the property by contract or trust; the possession of a son may be explicable on the simple ground of relationship. Analogies will readily suggest themselves derived from actions for wages; or the effect of length of possession, according as the litigants are strangers or related as parent and child. But we are relieved from the necessity of determining this question without the benefit which we would derive from arguments at the bar, because we are of opinion that the parol evidence was wholly insufficient to support the plaintiff's case. No one who has watched the administration of justice in our Courts will doubt the wisdom of a rule declaring that, if under certain circumstances a plaintiff is, notwithstanding the statute, to be exempt from the necessity of producing written evidence of a trust in his favour, he shall at least establish its existence by verbal testimony of a clear, satisfactory and convincing character. The perils which encompass relaxations of the statute are great enough to justify a Court in exacting an amount of verbal testimony which shall produce a strong degree of conviction. If a trust is to be established by parol despite the statute, sound policy requires that its existence should be brought within the range of reasonable certainty, and not left within the shadowy region of conjecture.

Judgment.

If, in consideration of special circumstances, and for the vindication of justice, a man receives the indulgence of submitting evidence apparently excluded by the statute, he may well be required to justify the action of the Court in his favour by bringing forward clear, distinct and precise testimony by presenting a case not resting upon a very nice balance of conflicting statements, by producing in short proofs little, if at all, inferior to a written document in their efficacy.

In this case it appears from the evidence of *Elliot*, who was called on behalf of the plaintiffs, that sometime in 1868, *Mark McManus* came to him and purchased

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the land in question. It was then of little value, the purchase money being only $20, and no writing was given by *Elliot*. According to his statement, *Mark* did not say that he was buying for his father. On 23rd February, 1869, he gave *Mark* a receipt in the following terms :—

"Received from *Mark McManus* payment in full for a building lot of one hundred and four feet square, on which he has a store erected. The deed to be given when demanded."

This receipt, which does not appear to have been ever shewn to his father, was found among *Mark's* papers after his death in December, 1874. The father, although possessed of considerable property, was unable to read or write, and *Mark* was in the habit of transacting his business. The evidence of *Elliot* left it beyond doubt that the consideration for the land proceeded wholly from the defendant. *Elliot* had no recollection of the receipt *per se*, and there is room for believing that he had but little independent recollection of the transaction. In his examination in chief, he stated that he thought the defendant had paid him part of the purchase money. On his cross-examination it was plain that the whole payment, which was not in money, but in oats, had come from the defendant. On the 1st September of the same year, *Mark* got *Elliot* to sign a bond for the conveyance to the defendant of the land. To this bond, *Mark* was the attesting witness. It was given by *Mark* to his father, in whose possession it remained till he got the deed. *Elliot's* recollection of the circumstances connected with the making of the bond, was that *Mark* came to him and said that he was indebted to his father and wanted to secure him: that he wanted the deed to come out in his father's name: that he was not sure how his business would come out. It was also proved that at least two years after the date of the bond, *Mark* built a harness shop upon the premises. It was a frame building and rested upon posts. He put

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up a verandah and painted some portions of the house at a cost of $30. A witness was also called on behalf of the plaintiffs with reference to the erection of the buildings. He swore that he was employed by *Mark* to put up the frame and do the carpenter work for $135, which was paid by *Mark;* that the defendant was there, but he had no conversation with him; and that he was boarded by *Mark*; but the provisions came from defendant, whose daughter cooked for them. The only other evidence on the part of the plaintiffs, apart from that of admissions by the defendant subsequent to *Mark's* death, which we shall consider presently, was that of a person who stated that he had rented from *Mark* the harness shop for some term, the length of which is not mentioned, and of another person that he had been employed by *Mark* for a few days in working at the building of this shop.

Judgment.

If the case had rested here, without any opposing evidence, we should have thought it formed too slender a foundation to support the decree in the face of the defendant's sworn denial. The onus is upon the plaintiffs of establishing by clear and satisfactory testimony, that the defendant accepted the bond and held the land in trust for *Mark* in fee simple, and under an agreement that he would convey it upon demand. In this they do not appear to have succeeded. There is no direct evidence of any word or act upon his part indicating the acceptance of such a trust. There is not, in our judgment, any sufficient proof even of an intention on the part of *Mark* to create the alleged trust. It is true that according to *Elliot's* recollection *Mark* made the contract for purchase apparently on his own account, and without any reference to his father; but the consideration of the purchase came wholly from the defendant. On the ordinary doctrine of resulting trust this would have made the father the beneficial owner, but for the relationship of the parties. That relationship raised a presumption of advancement; but it is diffi-

cult to consider any mode in which that presumption could be more effectually rebutted than by *Mark's* directing the bond to be made, not to himself, but to his father. This unexplained would have established the defendant's beneficial interest beyond question, and would have left no room for the contention that he was a mere trustee. What then is the explanation offered to reduce this beneficial ownership to a trust? Nothing but the statement by *Elliot* that *Mark* assigned as a reason for taking the bond to his father that he was indebted to him and wanted to secure him; that he wanted the bond to come out in his father's name; that he was not sure how his business would come out. This statement is deposed to many years after the transaction. It depends solely upon the recollection of a single person who had no such interest as would keep it freshly present to his mind. It was made in the father's absence, and was never communicated to him. Even if now accepted in its entirety, as an accurate version of what occurred, it does not prove the alleged trust. Instead of making the father a trustee, it would make him a mortgagee. The learned counsel for the respondents appreciating this difficulty, suggested that the record might be amended so as to make that case. Counsel for the appellant resisted the application, and claimed that, if it were granted, there should be a right reserved to the appellant to put in a further answer, and to raise new grounds, which were suggested. We do not think we should be exercising a sound discretion in permitting such an amendment to be made at this stage of the suit.

Judgment.

The evidence with respect to outlay and expenditure falls far short, in our opinion, of establishing a fair presumption that *Mark* was the owner. His father co-operated with him in the undertaking. It is not clear that even the moneys paid did not come from his father —at least to a considerable extent. In fine the whole of the evidence adduced by the respondents on this

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head is quite as consistent with the appellant's theory as with theirs.

The respondents also relied upon evidence of admissions alleged to have been made by the appellant. Their learned counsel did not go the length of contending that taken by themselves they would suffice to create a trust, but he urged that they were strongly corroborative of the other evidence. These admissions are said to have been made by the appellant to the respondent *Isabella McManus*, the widow of *Mark*, on three occasions. She is the only witness who speaks of what was said on two of these occasions. The brother-in-law *William Armstrong* also speaks of the third occasion. She was cross-examined before the Local Master previous to the trial, and was also examined as a witness in open Court. Both statements have been made evidence in the cause. The first conversation is stated by her to have taken place in the early part of 1855, about two weeks after her husband's death. On her first examination she thus narrated what occurred: "I made the first demand on the defendant. I said to him, 'What about the place'? He said: '*It was all right; whatever was Mark's should be hers*,' meaning *Alice*. Nothing more was said at this time." This, if correctly remembered and reported by the witness, was a very vague statement of his intention, and certainly by no fair construction of language could be held to involve an admission of the trust alleged. But on her examination in Court, when it may be, as suggested, the necessity of something more decided was present to her view, her version was, that he said: "It was all right for the child; that *it belonged* to *Mark* and would be the child's." Nothing can better illustrate the dangerous character of such evidence of admisssions than the different turn which she has thus given to the conversation. It is quite impossible to accept as a satisfactory basis for judicial action her latter statement when contrasted with the former.

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The second conversation is said to have taken place on the day the deed was obtained from *Elliot*. She says that the appellant came to her and said he was going to take out the deed in the child's name on that day. This the appellant has denied; but assuming that her statement is entitled to prevail, it amounts to no more than a declaration of intention on his part, which he could not be compelled to fulfil. The third conversation was on the same day after she had heard that the appellant had taken the deed to himself. On her first examination, her account of it was, that she spoke to him and he said: "*It was safe for the child in his name*," and that she said he should have done as he said at first, put in her name, to which he made no reply. At the trial her account was that she said to him he had not done as he said he would, to which he replied "*That she need not fear; that whatever was Mark's was the child's; that the place would be the child's.*" Her brother-in-law's version of what the appellant said on this occasion was, for her "to make her mind easy; that he would do as he said at first; that he would make it all right for the child." According to his recollection, the appellant did not say that the place was safe for the child in his name. The simple juxtaposition of these varying statements shews that they are wholly useless to prop up a tottering case. Which of them is to be accepted? Mrs. *McManus's* two accounts are entirely different; and *Armstrong's* agrees with neither. The manner in which her second statement is expanded bears a suspicious resemblance to the altered version of the earliest conversation, and gives additional point to the suggested explanation of this improvement in recollection. But even if this most favourable view be accepted, the statement of the appellant is, in our opinion, by no means such as should deprive him of his property. It is probable that he had intended it to be for *Mark* originally, and that he still intended it to be for *Mark's* child. He may thus have

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used language expressive of such an intention; but that is no reason for fastening upon him a positive trust. The dangerous temptation to strained, exaggerated, and misleading testimony which confessedly attends upon judicial relaxation of the Statute, would be intensified four-fold if the proofs here offered should be accepted as an equivalent for the requirements of the statute.

We think, therefore, that the plaintiffs' bill should have been dismissed on the mere ground that their case was not satisfactorily proved by their own evidence. We have arrived at this conclusion irrespective of the evidence given on behalf of the appellant. We have treated the case as if the learned Judge had wholly discredited the witnesses called by the appellant, although we are not informed whether in fact this was his view. If he did so, it must have been from their demeanour, or other circumstances which, though observable in Court, cannot be reproduced on the recorded depositions. Their statements do not involve any self-contradictions, or inherent improbability. Their veracity was not impeached in any formal manner. Their evidence, which is directly opposed to the truth of the plaintiffs' case, or to the existence of any trust in the father, would certainly have tended to excite doubt, and to create difficulty, even if the plaintiffs' case had been stronger. It is to be remembered that in such cases as the present it is for the plaintiff to satisfy the mind of the Court with reasonable certainty. If he fails to do this, the Court is certainly justified in making the negative declaration that it cannot find that the alleged trust has been established.

Judgment.

In this judgment we do not conceive that we are in the least degree infringing upon the salutary rule, which renders appellate tribunals reluctant to interfere with the conclusion, upon questions of fact, of the Judge who has seen the witnesses. We are not reversing the decision upon any balance of testimony, or upon any assumption that the learned Judge gave too much or too little weight to any class of testimony. While fully

recognizing the greater facilities which he possessed for forming a correct opinion upon the mere credibility of the witnesses, we are of opinion that the evidence when read most favourably for the respondents falls short of what the law requires. 1876. McManus v. McManus.

The appeal must be allowed with costs, and the bill dismissed with costs.

SOLICITORS.—*Ferguson, Bain,* and *Meyers,* agents for *Barrett* and *Klein,* Walkerton, for plaintiff. *Blake, Kerr,* and *Boyd,* agents for *H. B. O'Connor,* Walkerton, for defendant.

WELLS V. HEWS.

Interpleader suit by Assignee in insolvency—Costs—Section 125 of Insolvent Act of 1875.

A writ of attachment issued, under which the assignee in insolvency seized goods which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant and the creditors who had sued out the writ, on which relief was afforded to the assigneee, without requiring him to apply to the Judge of the Insolvent Court under sec. 125 of the Act of 1875; and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit; and the assignee was given a lien on the goods in his hands for his costs.

Statement. Motion for injunction which was turned into motion for decree. The bill was filed by *James Pendleton Wells,* official assignee of the estate of *Archibald McLean,* an insolvent, against *Samuel R. Hews* and *John Gordon Mackenzie* and others, members of the firm of *J. G. McKenzie & Co.*, and alleged that:

Nov. 28th.

(1.) On the 6th of October, 1876, a writ of attachment under the provisions of the Insolvent Act of 1875 issued out of the County Court of the United Counties of Prescott and Russell, at the suit of the defendants composing the firm of *J. G. McKenzie & Co.* directed to the official assignee of the County of Prescott, by which he was commanded to attach

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the estate and effects, moneys and securities for money, vouchers, and all the office and business papers and documents of every kind and nature whatsoever of and belonging to *Alexander McLean*, of the Village of Pendleton, in the County of Prescott, and Province of Ontario, if found in the said county, and the same safely to hold, &c., until the attachment thereof should be determined in due course of law. (2.) Under this writ the plaintiff as such official assignee seized and attached and took possession of, amongst other things, the stock in trade, chattels and effects of the said *McLean* in his store in the said Village of Pendleton, and retained possession under the said writ. (3.) On the 12th day of October, 1876, the plaintiff received a letter from the solicitor of the defendant *Hews* to the following effect: "On the 27th July last *Archibald McLean*, of Pendleton, sold and delivered to *Samuel R. Hews* all his estate in trade of which invoices were then made. *Hews* paid

Statement.

$150 and gave his notes for balance payable six, twelve, eighteen, and twenty-four months, and has paid on those notes something over $700. There was a regular change in the business from the 27th July. Every one of the customers knew that from that date they were dealing with *Hews*. The goods were purchased by him, and the business to all intents and purposes was thenceforth his. He tells me *Fraser* has recently taken possession of the whole under an attachment against *McLean*, closed up the store, and stopped *Hews's* business. Now this appears to me to be a very high-handed and serious business, and you are hereby notified that you will be held responsible to *Hews* for the damage he has sustained and may sustain from the loss of the goods and business. I hope you are indemnified." (4.) That *Hews* threatened and intended to take proceedings against the plaintiff to recover damages for such seizure and attachment, of which fact the plaintiff had informed the solicitor of *Mackenzie & Co.*, but such solicitor refused to authorize him to abandon the seizure;

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and further, that the bill was not filed in collusion with *Mackenzie & Co.* or the defendant *Hews*, but was filed *bonâ fide* and simply for the protection of the plaintiff.

The prayer of the bill was: (1.) That the defendants might be decreed to interplead and settle between themselves their rights in respect of such goods, chattels, and effects, the plaintiff offering to deal with the same as the Court should direct. (2.) That the defendant *Hews* might be restrained from commencing or prosecuting any action at law or other legal proceeding against the plaintiff in respect of such goods, and for other relief.

The plaintiff moved and obtained an injunction, and on motion to extend it the same was turned into a motion for decree. Upon this motion *Hews* did not attend, but *McKenzie & Co.* appeared after having answered the bill, claiming that the case was not one in which an order of interpleader would be granted.

Argument.

Mr. *Bethune*, Q. C., and Mr. *Moss*, for the plaintiff, claimed that full relief and protection to the plaintiff could only be obtained by coming to the Court as he had done, and that under the ordinary jurisdiction of the Court, as well at that conferred by the Administration of Justice Acts, this Court had full power to give the relief prayed.

Mr. *Beaty*, Q. C., and Mr. *J. C. Hamilton*, for *J. G. McKenzie & Co*, objected to the jurisdiction, on the ground that the assignee is not a mere stakeholder in the proper meaning of that term, and that the relief sought should have been applied for to the Judge of the Insolvent Court, citing the Insolvent Act of 1875, sec. 125: *Commercial Building Society* v. *Munro* (*a*), *Crombie* v. *Jackson* (*b*), *Burke* v. *McWhirter* (*c*), *Henderson* v. *Watson* (*d*), *French* v. *Taylor* (*e*), *Prudential Ins. Co.* v. *Thomas* (*f*), *Daniell's* Chy. Practice, vol. ii., 1412.

(*a*) 37 U. C. R. 464.
(*b*) 36 U. C. R 275.
(*c*) 35 U. C. R. 1.
(*d*) 23 Grant 355.
(*e*) 23 Grant 436.
(*f*) L. R. 3 Chy. 74.

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On the question of costs the plaintiff's counsel cited *Symes* v. *Magnay* (*a*), *Campbell* v. *Soloman* (*b*); *Daniell's* Chy. Practice 1416; *Morgan & Davey* on Costs, 153.

BLAKE, V. C., held that the bill had been rightly filed, and, as the claimant did not appear to maintain his right to the property, made a decree debarring him from all claim; ordered him to pay the costs of the plaintiff and the co-defendants; and gave the plaintiff a lien on the goods seized for his costs of suit.

SOLICITORS.—*Bethune, Osler,* and *Moss,* agents for *J. Burgen,* L'Orignal, for plaintiffs. *Beaty, Hamilton,* and *Chadwick,* agents for *E. T. Dartnell,* L'Orignal, for *McKenzie* and *Co.*

MCLEAN v. BURTON.

Mortgagor and mortgagee—Timber cut on mortgage premises—Registry laws—Reducing value of premises—Damages for cutting timber.

Semble, that standing timber is within the provisions of the registry laws; and that the purchaser of a right to cut the same is affected with notice of the conveyance from the original owner and a mortgage back from his vendee.

Unless a mortgagor prove demonstrably, so as to leave no room for doubt, that the mortgage premises remain ample security for the mortgage debt, the Court will restrain him from cuttting over the whole land.

The jurisdiction as to restraining the cutting and removal of timber was not preventive only; the Court would in a proper case interpose where the timber could be followed. The Administration of Justice Act (1873, sec. 32) it would appear, however, has removed any technical difficulty of this sort.

Where timber is cut without any intentional wrong, and there is no evidence of *mala fides* or intentional wrong, the injury actually sustained by such cutting, is the measure of damage to the owner or mortgagee of the land.

Statement.

This was a suit to restrain the defendants *Burton* from cutting or removing timber from a lot of land purchased by defendant *Symons* from the plaintiff, the right to cut

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(*a*) 20 Beav. 47. (*b*) 1 S. & S. 462.

which, it was alleged, they had purchased from *Symons*, between whom and his vendor, the plaintiff, an agreement had been entered into at the time of the sale, that the timber should be felled for the purpose of clearing up the land only.

Examination of witnesses and hearing at Chatham.

Mr. *Boyd* and Mr. *Douglas*, for the plaintiff.

Mr. *Moss*, Q. C., for defendants *Burton*.

The bill was *pro confesso* against defendant *Symons*. The cases cited are mentioned in the judgment.

SPRAGGE, C.—It is not proved that the defendants *Burton* had notice of the agreement as to the cutting of wood on the mortgaged premises between the plaintiff and his vendee and mortgagor *Symons*; but if this wood is within the provisions of the registry law,* they had, or are affected with, notice of the conveyance from the plaintiff to *Symons*, and of the mortgage from *Symons* to the plaintiff, and the fact against them is, that with that notice they purchased from him liberty to take timber over the whole of the land. It is contended for the *Burtons* that at any rate, and assuming the law to be against them upon the points raised, the land is not left an insufficient security to the mortgagee, and they give evidence to shew that the land was really worth half as much again as the plaintiff sold it for, and that although the mortgage debt and interest now exceed the whole purchase money of the land it remains, after being denuded of the timber sold by the mortgagor, still a sufficient security. This might be the case, but I should require very strong and convincing evidence to satisfy me upon the point. It may easily be tested in the way suggested by Mr. *Boyd*, namely, by directing that the land should now be sold, and that the defendants should be required to pay no more than would be necessary to make up the

Judgment.

* See *Ellis* v. *Grubb*, 3 U. C. O. S. 611.

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sum due on the mortgage; and if the land has not become a scanty security they may not be called upon to pay anything.

I think I ought not to refuse relief upon that ground. If Mr. *Moss* is right upon this point the Court would not restrain a mortgagor himself from so cutting over the whole land. I should say that he ought to be restrained unless he proved demonstrably, so as to leave no room for doubt, that the land still remained ample security to the mortgagee.

Then it is said that even if the Court would restrain a mortgagor from cutting, still after severance, and after bestowal of labour in converting growing trees into timber, the Court will not interpose though the timber can be followed; that it has become a chattel and the jurisdiction by injunction does not apply. Mr. *Boyd* says, that the point has lately been before Vice-Chancellor *Blake*, who, after consideration and looking into authorities, decided in favour of the jurisdiction. I have myself exer-

Judgment.

cised the jurisdiction where a house had been removed from mortgaged premises, and I think it has been exercised where machinery has been severed from the freehold; I speak from recollection. Mr. *Moss's* contention is, that the jurisdiction is preventive only; but it is, I incline to think, preventive in a wide sense.

Since writing the foregoing I have seen my brother *Blake*. It appears that he has not had occasion to decide directly the point in question. The jurisdiction to restrain the removal of timber wrongfully cut down has been exercised in several cases. One is an anonymous case before Lord *Thurlow* (*a*), where his Lordship stated the only difficulty he felt to be what should be done with the timber cut, he observes that trover might be brought for it; but, being informed by the Registrar, as he says, that many orders of the kind had been made he granted the order. In *Mitchell* v. *McGaffey* (*b*), in this Court, an

(*a*) 1 Ves. Jun. 93. (*b*) 6 Gr. 361.

order was granted to restrain the cutting down of growing timber and the removal of that already cut down. The suit was by a vendor of growing timber against purchasers who were in default. 1876. McLean v. Burton.

In *Neale* v. *Cripps* (*a*), Lord *Hatherley*, then Vice Chancellor, granted a similar injunction. The circumstances were different but the same objection should prevail, if a sound one, that as timber severed the only remedy is at law.

It certainly has been the constant practice of the Court to restrain in a proper case not only the further cutting of timber, but the removal of timber already cut. In a case proper to restrain further cutting, and where the party cutting has cut unlawfully what he has cut, it would be sending him to law for part of the relief to which he is entitled to allow this objection to prevail, and sending him to law, too, where the remedy would be less effectual, inasmuch as though he would be, or might be, entitled to recover damages, he would not have the benefit of the security to which by his contract he is entitled. Further, the mortgage is for unpaid purchase money and the lien of the vendor continues notwithstanding the giving of the mortgage. There has been a wrongful severance of part of the thing sold from the residue. That wrongful act cannot, in reason, operate to destroy the lien of the vendor on the part so severed, and if it do not, the vendor is entitled to the usual remedy to realize his lien, and as incidental to it, to prevent its being placed beyond the reach of such remedy. And further, if the cutting and removal were wrongful, he is only following that which has been so wrongfully dealt with, into the shape in which it has been placed by the wrongful act of the defendants. Judgment.

The rights of the mortgagor, in respect to the money that may be realized by the sale of the timber removed, present no obstacle to the exercise of the jurisdiction. Assuming it to be applicable towards the discharge of

(*a*) 4 K. & J. 472.

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the purchase money, as I apprehend it would be, it does not touch the right of the vendor to have his security preserved, and where that is wrongfully interfered with to have that to which it has been converted stand in its place.

The Administration of Justice Act, 1873, sec. 32, would appear to get rid of the technical difficulty raised in this case, or at all events, of such difficulties in the future. It was not invoked in this case, and as I have not the pleadings before me, I cannot say that there may not be something to prevent the application of sec. 32 to this case. *Primâ facie* it would apply, but without that section I should hold the plaintiff entitled to an injunction to restrain, not only the further cutting of timber, but the removal of the timber already cut from the place where it is, and to a decree for its sale, the proceeds to be applied upon his security.

The decree will be with costs.

Judgment.

Since the hearing, a question was raised by Mr. *Moss* as to what is the proper measure of damages in relation to timber removed from the premises, and in relation to timber removed and sold by the defendants. His contention is, that all that the plaintiff is entitled to in either case is, the value of the timber as standing timber, not its value increased by the money and labour bestowed upon it by the defendants.

The general rule is, that in the absence of *mala fides*, or as it is sometimes expressed, of intentional wrong, the injury actually sustained is the measure of damages.

The Act "for the protection of persons improving land under a mistake of title," is an affirmance of the same principle. That Act, indeed, may in some cases bear hardly upon the owner of land, while restricting compensation to the owner to the injury sustained by him can scarcely in any case be a hardship to him.

Taking the value of the trees cut and removed as standing timber may not always be an adequate compensation: *e. g.*, the trees cut may not have attained a

growth at which it would have been proper to cut them. I think the injury sustained is the proper measure of compensation. This point was not spoken to at the hearing, and it may be that counsel for the plaintiff may desire to be heard upon it. In that case what I have said may be taken as my impression only. If counsel do not desire to speak to the point, compensation will be allowed upon the principle that I have indicated.

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SOLICITORS.—*Robinson* and *O'Brien*, agents for *Douglas*, Chatham, plaintiff. *Bethune, Osler*, and *Moss*, for *McCarthy, Boys*, and *Pepler*, Barrie, for defendant.

BARTON V. MERRITT.

Conveyance to wife of purchaser.

The plaintiff and *M.* became sureties for *W.*, who absconded, and the sureties satisfied the claim by giving their note for $215, upon which judgment was subsequently recovered against them; whereupon *M.* absconded from the province. A year previously a conveyance of land had been made to the wife of *M.*, which the plaintiff alleged was so conveyed to her as the appointee of her husband and for the fraudulent purpose of defeating the plaintiff in recovering contribution. The evidence adduced satisfied the Court that more than a year before the parties had entered into such suretyship the contract for purchase had been made in the wife's name, who paid the down instalment; and that the subsequent earnings of the sons, and moneys belonging to the wife, had been expended in erecting a house upon the premises and paying the balance of purchase money thereof. A bill seeking to charge the land as the property of the husband was under such circumstances dismissed with costs.

Examination of witnesses and hearing at the Spring Sittings of 1876, at Simcoe. Statement.

Mr. *Duncombe*, for the plaintiff.

Mr. *Robb*, for the defendant *Zilpha Merritt*.

The bill was taken *pro confesso* against the defendant *John B. Merritt*.

The facts appear in the judgment.

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Barton v. Merritt.

SPRAGGE, C.—The bill in this case is filed to set aside a conveyance made to the defendant, *Zilpha Merritt*, wife of the defendant *John B. Merritt*, by one *Nelson Green*. The plaintiff's case is, that on the 1st of April, 1873, the defendant *John B. Merritt*, having previously paid to said *Nelson Green* half of the purchase money of said land, caused a conveyance of the same to be prepared and executed to the defendant *Zilpha Merritt*, although the said *Zilpha Merritt* had in no way contributed to the payment of said purchase money "for the express purpose as defendant *John B. Merritt* declared to the plaintiff, of evading payment of his debts in general, and of avoiding any payment or responsibility in connection with his suretyship aforesaid in particular."

The dates are material. On the 11th of July, 1873, *Wesley Barton*, a brother of the plaintiff and of the defendant *Zilpha Merritt*, was arrested at the suit of one *Carpenter* on a writ of *ca. sa*; and was released the the same day upon the plaintiff and *John B. Merritt* becoming his bail. *Wesley Barton* made default, and the suit was settled by the bail, his sureties giving their note on the 25th of September, 1873, for $215. They made default in payment, and were sued upon the note, and judgment was recovered against them on the 17th of March, 1874; and shortly after this *John B. Merritt* left the Province, and has not returned.

Judgment.

It appears that *Wesley Barton* left the Province, but it is not shewn when, only that he had left before *John B. Merritt;* for the wife of the latter says that one object of her husband going to the States was, to endeavour to get *Wesley Barton* to pay the debt.

The plaintiff's case is, that *Zilpha Merritt* was the appointee of her husband; and was so for the fraudulent purpose of defeating his co-surety in recovering contribution against him. The defendant *Zilpha Merritt's* case is, that she *did not become* entitled to the land in question in April, 1873, but was so as long before as the 3rd of October, 1871: that the land was not paid

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for with the money of her husband, nor the materials for the house provided, nor the house paid for, so far as these have been paid for at his expense; and I think the evidence bears out her case.

The land purchased was a village lot, and the first payment made on it—$10—was the wife's money; at any rate, was recognized to be such by the husband at a time when, so far as appears, there was no reason for making the purchase appear otherwise than what it really was. A receipt for this $10 is produced, and is in her name, and is dated 3rd of October, 1871, and I have no doubt from the evidence that the money was paid at that time. The money was paid by the hands of the husband. They had two sons who were earning money on their own account, and subsequent payments on the land, and, as I gather from the evidence, payments on account of materials furnished, were made in part from these earnings, and in part from money belonging to the wife. The amount paid was not large, a mortgage being given to secure payment of the principal part of the cost of the house. The earnings of the sons applied in this way were not paid over to the father, but given to the mother in order to their being so applied for her benefit; and in my opinion the sons had a right so to apply their earnings: *Rex* v. *Chillesford*, *Rex* v. *Winslow* (*a*), *Perlet* v. *Perlet* (*b*), *Ex parte Macklin* (*c*). I had occasion to consider the point in *Delesdernier* v. *Burton* (*d*). I incline to think upon the evidence that none of the moneys of the husband found their way into this land, or the house built upon it.

Judgment.

The conveyance to the wife, then, of April, 1873, was not an appointment to the wife of the property of the husband to defeat a creditor, but the carrying out of an agreement made eighteen months before. It appears, indeed, from the evidence of *Nelson Green*, that the

(*a*) 4 B. & C. 94.
(*b*) 15 U. C. R 165.
(*c*) 2 Ves. Sen. 675.
(*d*) 12 Gr. 569.

1876. husband would have preferred that the conveyance should have been made to himself.

Barton v. Merritt.

The plaintiff's bill must be dismissed, and the costs must follow the result.

PRESTON v. LYONS.

Reputation of marriage—Revocation of will—Evidence negativing fact of marriage.

The presumption which arises of a marriage having taken place between the parties by reason of a man and woman having for many years co-habited and lived together as husband and wife is r rebuttable one; and after the death of the man the evidence of the woman alone, on which the Court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of marriage, because if married at the time alleged, the will. under which she claimed all the property of the man, would under the Act have been revoked.

Statement. This was a bill by *Caroline Preston*, setting forth that *William Lyons* duly made and published his will on the 30th of June, 1864, whereby he devised to the plaintiff six acres of land in Anderdon, of which he was the owner, valued at the sum of $1800; that *Lyons* died on the 9th of June, 1874; that his will was duly proved on the 13th of July, 1875, and registered on the 5th of November following, and that the tenants duly attorned to the plaintiff.

The bill further stated that the defendant *John W. Lyons*, who claimed to be the heir-at-law of the testator, having discovered that the will was not registered, and having concocted the fraudulent scheme and design of depriving the plaintiff of the property, executed a mortgage to one *Boyle*, who instituted proceedings in ejectment against the plaintiff; and on the 11th of October, 1875, also procured the defendant *Labadie* to take a

conveyance from him as such heir-at-law for the alleged consideration of $1700; $1200 in cash and $500 secured by mortgage on the property; that *Labadie* pretended he had paid the $1200, whereas the bill charged he paid $200 only.

This conveyance was registered on the day following its execution. The bill charged that before payment of any portion of the purchase money by *Labadie* he had become aware of the existence of the will of the testator and the devise thereunder to the plaintiff.

The prayer of the bill was, that it might be declared that the plaintiff was the legal owner of the premises; and a cancellation of the deed to *Labadie*, or that the value of the premises might be ascertained and paid to her.

The defendants answered. *Labadie* set up that *John W. Lyons* was the heir-at-law of the testator; denied any fraudulent scheme between them; set up that after the expiration of a year, no will having been registered, he was at liberty to purchase and did purchase from the heir-at-law, and claimed the benefit of the provisions of the Registry Laws, the title having been a registered one. *John W. Lyons* set up that subsequently to the date of the will the plaintiff intermarried with the testator, whereby the will was revoked, and that the real estate thereby devised devolved upon himself as heir-at-law of the testator; and alleged that the mortgage to *Boyle* and the conveyance to *Labadie* were both executed in good faith.

Statement.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Sandwich, in the spring of 1876, before Vice Chancellor *Blake*.

The defence principally relied on was, that of a revocation of the will by reason of the alleged marriage. The plaintiff herself was examined and denied distinctly having ever been married to the testator, although she admitted that at one time he had expressed an intention of marrying after they had been living together and reputed to be man and wife. "I went to live with

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Preston v. Lyons.

him 6th August, 1864; the neighbors called me Mrs. *Lyons*; I never objected to this; I always expected to marry him; I was not particular what they believed. I have gone to church with Mr. *Lyons* occasionally. I have gone to visit * * with him. I did not go to Detroit in August, 1874 * * The year after I went to *Lyons's* I went to Detroit with him to his sister's * * * I never told any person we were married. I never said so to Mrs. *Spears*, or that I was married but that *John W. Lyons* could not prove it. I always wrote to my sister as 'Caroline *Preston*.' Mr. *Lyons* was a Baptist. He was a deacon; I always went by the name of Mrs. *Lyons* and never contradicted it. The year *Lyons* died we were to be married. He was to go to Virginia, and I was to accompany him to Niagara Falls, and there be married. He said it would not do to be married there after living together so long, and was preparing for the journey when he took sick. He always spoke of marriage; it was spoken of before I went to live there. I never joined the church, because I was living with *Lyons*, and was not married. Mr. *Lyons* wanted to marry me at first, but I did not on account of some reports about me being married, and having three children."

Statement.

Several witnesses were examined on the part of the defendants with the view of establishing the fact of marriage, but which, in the opinion of the Court, they failed to do.

The defendant *Labadie* in his evidence swore "I finally closed on the 12th of August. I think I told them to search the title on the 11th. Mr. *White* (a defendant), and Mr. *Ouellette* told me there was a flaw in the title, but Mr. *White* said he would make it right and quiet it. I got the deed; it was not then registered. I gave it to Mr. *Ouellette* and he registered it.* I bor-

* The certificate of registry shews it to have been registered at 11.50 on the 12th.

rowed the $200; it may have been from *White*. I gave a note of $160, another of $500 odd, and a memorandum of some kind for the balance. I gave all to *Lyons*. I have not paid either note. The notes were I think at 60 or 90 days. It was understood that these notes were not to be paid until these things were all cleared up. I closed the bargain with that understanding. I don't know where these notes are; I never paid them; there was something said about notifying tenants."

1876.

Preston v. Lyons.

The other facts appear in the judgment.

Mr. *Bayly*, for the plaintiff.

Mr. *Moss*, for the defendants.

Judgment.

BLAKE, V. C.—There is no doubt of the truthfulness of those witnesses who deposed to the facts connected with the manner in which the plaintiff was living with *William Lyons*, deceased, for over ten years prior to his death. The defendant desired not only to shew the fact of marriage, which he attempted to prove by reputation, but he proceeded to endeavor to shew that a marriage actually took place at a particular house and time in Detroit, and that the ceremony was performed by a minister named by one of the witnesses. This witness was to my mind very unsatisfactory. His story was a very unlikely one, and his mode of telling it impressed me most unfavorably. When the witnesses for the plaintiff were produced in reply, the whole of the story of *Webb* turned out to be a fabrication. The marriage could not have taken place at the time or place specified, nor is it at all probable that the minister named could have performed the ceremony.

The alleged marriage by reputation which the defendant attempts to prove is by him traced to a particular occasion, and on that he relies as the foundation for the reputation which he argues establishes his case. I find no such marriage as to time, place, or minister, as that

1876. Preston v. Lyons.

alleged took place; no other occasion was pointed out, to take the place of this, when it was clearly proved that the witness was in error; no absence at a time that would have answered the defendant's contention is even hinted at. The evidence which establishes a marriage by reputation is at best unsatisfactory, and is not conclusive to the mind, as, for so many and obvious reasons, parties, in this country at all events, give themselves out as married, and so represent it to the world when the relationship of husband and wife apparently exists. This is not lessened when, as here, the man held a position in the church, which he desired to retain, and from which he would have been dismissed had it been known that he, while unmarried, was living with the plaintiff as her husband. I think the plaintiff a truthful witness. She gave her evidence very satisfactorily. This weighs considerably with me in coming to the determination that the proper conclusion from all the testimony is, that a marriage between the deceased *William Lyons* and the plaintiff has not been proved, subsequent to the signing of the paper which is propounded by the plaintiff as the will of the deceased *William Lyons*.

Judgment.

In finding as I do, I by no means desire it to be understood that I do not give the fullest credit to those persons, apparently very respectable, who gave their views in favour of the marriage, based upon that which from day to day they saw as to the course of conduct pursued between plaintiff and *Lyons*. I only conclude they were mistaken in the opinion which they formed.

I disposed of the other branch of the case at the hearing. *Labadie* has merely allowed his name to be used to aid in placing the property where it was hoped the plaintiff could not get it. His own testimony shews his position. All the circumstances of the case, from the mode and time of his falling in with the defendant *Lyons*, and the means taken for apparently satisfying the purchase money, shew that he had to do with a transaction which it would have been better for him and

others had they left alone. I grant a decree with costs against the defendants. Those who thought they had an interest in the property should have openly litigated the matter with the plaintiff, in place of resorting to the schemes which have been proved before me, in order to endeavor by unfair means to obtain the premises from her.

1876.

Preston v. Lyons.

Declare that plaintiff is absolutely entitled in fee simple to the lands and premises in the pleadings mentioned as devisee under the will of *William Lyons*, deceased, as against the defendants, &c., declare that the defendant *John W. Lyons* never became entitled to said lands as heir-at-law of said *W. Lyons*, deceased, and that no title passed to the defendant *Charles F. Labadie* under the conveyance to him from the defendant *J. W. Lyons*. Order and decree same accordingly.

Minutes.

Order defendant *Labadie* to execute a release to plaintiff and her heirs of said lands. Such release to be settled by Master, &c.,, and deliver up to plaintiff the conveyance from the defendant *J. W. Lyons*.

Order defendants to pay pla intiffher cost~ &c.

SOLICITORS.—*R. Bayly*, London, for the plaintiff. *Bethune, Osler*, and *Moss*, agents for *White* and for *Arkell*, for the defendants.

1876.

SKINNER V. AINSWORTH.

Dower—Specific performance—Wife refusing to join in conveyance.

Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal set aside on her decease.

Statement.

This was a motion by Mr. *Ewart*, on the petition of the plaintiff, setting forth that on the 9th of November, 1874, a decree was made in this cause, whereby it was declared, amongst other things, that the contract in the bill set forth ought to be specifically performed, with the variation that the mortgage therein mentioned should be made to the accountant of the Court instead of to the defendant; and it was ordered that the plaintiff should pay into Court $700, and execute to the accountant a mortgage on the lands in question, securing $400 as soon as the defendant should have executed to the plaintiff the conveyance of such lands thereby directed to be made; that the plaintiff had paid the $700 into Court and had procured a conveyance to be prepared and settled by the Master of the Court and tendered to the defendant and his wife for execution, but the wife of the defendant refused to execute the same, for the purpose of releasing her dower in the premises to which she would become entitled in the event of her surviving her husband.

The petition further stated that one *Henry O'Hara* had a mortgage on the lands in question created by the defendant, on which there was due between $400 and $500; that by an order made on 3rd February, 1875, it was amongst other things ordered that, upon production of an affidavit shewing the amount due on such mortgage, the same should be paid out of the money in

1876.

Skinner v. Ainsworth.

Court to satisfy the same, and in case of a deficiency that the defendant should pay the same together with the costs of that application.

By the contract of sale, executed between the plaintiff and defendant, it was stipulated that the interest on the mortgage for unpaid purchase money should be reserved, payable to "*Anne Ainsworth* of the city of New York," wife of the defendant. It appeared in evidence that this *Anne Ainsworth* was not the wife of the vendor, and that the person filling that character was still alive, and the petitioner now prayed that it might be referred to the Master to ascertain and fix an amount by which the purchase money to be paid to the defendant should abate by reason of the right to dower; and that the mortgage so to be executed by the plaintiff to the accountant might be for a sum less than the $400 by the sum so to be ascertained by the Master; and by the amount by which the moneys in Court would fall short of the amount necessary to pay off *O'Hara's* mortgage and the plaintiff's costs of this application, and of the order in respect of the payment of the mortgage.

Mr. *Hector Cameron*, Q. C., contra, submitted that the prayer of the petitioner could not be granted, as for aught that now appeared, no claim might ever be made upon the plaintiff in respect of dower, as in the event of her pre-deceasing the defendant, the plaintiff would never become liable for any sum: *Wilson* v. *Williams* (*a*), shews the only relief to which a purchaser under such circumstances is entitled.

Judgment.

SPRAGGE, C.—I understand it to be conceded on both sides that the person called in the contract of sale *Anne Ainsworth*, of the city of New York, wife of the vendor, was not the wife of the vendor, but that another person is. The decree directs specific performance with

(*a*) 3 Jur. N. S. 810.

1876.

Skinner v. Ainsworth.

the variation that the mortgage to be given under the contract of sale should be to the accountant instead of to the vendor, but still that a mortgage for the payment of $400 should be given.

The decree directs a conveyance free from incumbrances. It appears that the wife of the defendant refuses to join therein to bar her dower, and the prayer of the petition is, that it may be referred to the Master to ascertain and fix an amount by which the purchase money to be paid to the defendant should abate by reason of said right to dower, and that the mortgage to be executed by the plaintiff to the accountant as aforesaid may be for a sum less than the said sum of $400, by the sum so to be fixed by the Master as aforesaid, and by the amount by which the moneys in Court will fall short of the amount necessary to pay off the said mortgage, and by the plaintiff's costs of this application, and of the said order in respect of the said mortgage.

Judgment.

The last part of what is prayed is in part provided for by order made on petition of the plaintiff on 3rd February, 1875, and if what is now prayed in that respect had been then asked for, it would no doubt have been granted, and there is no difficulty upon that point now. But what the plaintiff asks further is, that a sum to be fixed by the Master by way of compensation for the absence of release of dower be deducted from the balance of purchase money. That was not the course taken in *Wilson* v. *Williams* (*a*). In that case Lord *Hatherley*, then Vice Chancellor, observed that it was uncertain whether the wife would ever claim; for she might die before her husband, and that contingency, he remarked, might be very easily provided for by simply directing a sufficient portion of the purchase money to be set aside, allowing the vendor to receive the interest during the joint lives of himself and his wife, and the principal upon her decease; and he

(*a*) 3 Jur. N. S. 810.

directed a reference to fix the amount unless the parties would agree upon what amount was proper. *Wilson* v. *Williams* is the case referred to on the question of compensation by the absence of bar of dower in Lord *St. Leonard's* book, in *Dart*, and in *Fry*, and lays down a just and reasonable rule. 1876. Skinner v. Ainsworth.

In this case there can be no question as to the amount. It will be the whole balance of purchase money which indeed he is entitled to retain under the contract of sale.

It would certainly be a great hardship upon the plaintiff if he could be called upon to answer the dower of the person who is really the wife of his vendor and also to pay to the person called *Anne Ainsworth* in the contract, the interest on unpaid purchase money, but the latter, I apprehend, he could not be called upon to pay. Not by the vendor as it was made payable on an untrue representation; and not by *Anne Ainsworth* by reason of the absence of privity between herself and the plaintiff.

Judgment.

The only thing to be ascertained is, the amount by which the mortgage to be given is reduced below $400 by the means mentioned in the order of February, 1875, if so reduced at all, and that can be done by an account to be taken by the Registrar.

This is, as I have already intimated, not a case for costs.

SOLICITORS.—*Mowat, Maclennan*, and *Downey*, agents for *Loscombe*, Bowmanville, for plaintiff. *Cameron* and *Applebe*, agents for *St. J. Hutcheson*, Bowmanville, for defendant.

1876.

CAMPBELL v. EDWARDS—[IN APPEAL.*]

Rectification of agreement—Operation of contract—Proper sense of words used.

A Court of Equity will not give relief by way of rectification of a written agreement, merely on the ground that one of the parties misunderstood its true construction and legal effect at the time of execution.

Every party to a contract has a right to assume that the other parties intended it to operate according to the proper sense of the words in which it is expressed.

W. J. E. contracted with the plaintiffs for the manufacture by him into logs of all the pine timber, on a certain timber limit owned by the plaintiffs, during a period of six years from 1st October, 1867, for an aggregate sum of money equal to the sum of $1.29 for every standard log delivered and accepted, the plaintiffs advancing to *W. J. E.* "three-fourths thereof as the work progressed, and the balance on delivery of the logs, namely, for each and every log accepted and delivered as above mentioned, and cut on any lots numbered * * * the sum of $1.12½; for similar logs cut on any of the lots numbered * * * the sum of $1; for similar logs cut on any of the lots numbered * * * the sum of $1.50; for similar logs cut on the remaining lots of the said limit the sum of $1.29; and the balance, if any, on the completion of this contract. And should it be found that the aggregate of the said advances will amount to more than $1.29 for each such standard log, then the parties of the second part [the plaintiffs] shall be at liberty to reduce their advances by such excess, so that on completion of the contract they shall not have advanced and paid * * more than the said sum of $1.29 for each such standard saw log." *W. J. E.* entered upon the task of carrying out the contract, and worked for two years thereunder, when he died intestate, and letters of administration were, by his father, obtained to his estate; an arrangement having in the meantime been entered into between the plaintiffs and the father, whereby the plaintiffs were to assume all the debts and liabilities of *W. J. E.* incurred in connection with the contract, and account for the value of the logs got out by the deceased "at the contract price." In a suit brought by the administrator against the present plaintiffs, he claimed and recovered judgment for $1,880,54, being the balance remaining due to the intestate's estate, computing the price of the saw logs at $1.29 each, which the Court of Common Pleas determined was the sum properly chargeable under the agreement. The plaintiffs, insisting that the words "contract

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Present.—DRAPER, C.J.; STRONG, J.; BURTON, J.; and PROUDFOOT, V.C.

price" meant the sums of $1, $1.12½, and $1.50, according to the section from which the logs were obtained, filed a bill in the Court of Chancery, seeking to have their agreement with the administrator varied in this respect, and obtained a decree for that purpose, although the administrator swore that he had never entered into such an agreement. On appeal to this Court, that decree was reversed with costs; and the bill ordered to be dismissed with costs.

1876.

Campbell v. Edwards.

The bill in this case was by *Archibald Hamilton Campbell* and *John Cooley Hughson*, of the town of Peterborough, in the county of Peterborough, lumber merchants, trading under the name and style of *A. H. Campbell & Co.*, and *William McDougall* and *John Ludgate*, of the said town of Peterborough, lumber merchants, trading under the name and style of *McDougall & Ludgate*, against *James Edwards*, setting forth (1) that by a memorandum of agreement bearing date the 6th day of January, 1868, and made between one *William Jamieson Edwards* of the first part, and the plaintiffs of the second part, it was agreed between the parties thereto: that the party of the first part should cut and make into saw logs the whole of the pine timber on the lands or limits in said agreement mentioned and described and should draw and drive the same to the Little Lake, in the town of Peterborough, during the period of six years, to be computed from the 1st day of October in the year 1867, for an aggregate sum of money equal to the sum of $1.29 for every standard log accepted and so delivered; and that the said party of the first part should cut and manufacture into saw logs all the merchantable white and red pine then standing and growing on the said lands or limits, and should deliver the same to the parties of the second part in the Little Lake, in Peterborough, as soon after the opening of the navigation in each year as possible: the portion of the limit on which timber should be cut in each year to be notified to the party of the first part, who bound himself to cut on such portion only, provided sufficient timber should be found thereon to make the quantity which he bound himself annually to deliver, and which with the exception of

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Campbell v. Edwards.

the first year, should not be less than 30,000 standards, and such additional number as might be sufficient in each year to insure the whole of the timber being cut within the said term of six years, and the parties of the second part thereby agreed to advance and pay to the party of the first part on account of the price of cutting and delivering the said timber on the said limit, the following sums: three-fourths thereof as the work progressed and the balance on delivery of the logs, namely, for each and every standard log accepted and delivered as above mentioned and cut on any lots numbered from 1 to 10 inclusive, in the 5th, 6th, 7th, 8th, and 9th concessions, the sum of $1.12\frac{1}{2}$; for similar logs cut on any of the lots numbered 11 to 22 inclusive, in the same concessions, the sum of $1; for similar logs cut on any of the lots numbered from 1 to 20 inclusive in the 10th, 11th, 12th, and 13th concessions, the sum of $1.50; for similar logs cut on the remaining lots of the said limit, the sum of $1.29; and the balance, if any, on the completion of the contract; and that should it be found that the aggregate of the said advances would amount to more than the sum of $1.29 for each of such standard logs, then the parties of the second part should be at liberty to reduce their advances by such excess so that on completion of the contract they should not have advanced and paid to the said party of the first part more than the sum of one dollar and twenty-nine cents for each accepted log delivered to them as above mentioned; (2) that the said *William Jamieson Edwards* entered upon the task of carrying out the said work so agreed to be performed by him for the plaintiffs, and continued the same until the month of November, 1868, when he suddenly died, leaving the defendant his father, surviving him, his next of kin, and entitled to administration of his estate; (3) that at the time of his death *William Jamieson Edwards* had completed two years' operations under the contract, and the accounts between the plaintiffs and the deceased had been closed and adjusted between

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them ; all the logs got out and delivered in such years having been taken into account at the rates respectively above set out according to the section of the said limits from which the same had been cut, and the said *William Jamieson Edwards* was then engaged in cutting and manufacturing a further quantity of the said timber into saw logs on the third year of his operations under the said contract ; (4) that on the 3rd December, 1869, the defendant being such next of kin as aforesaid and entitled to letters of administration of the estate of his said son and then intending to take out such letters of administration when the proper time arrived, agreed with the plaintiffs for the termination of the said contract, the terms of such agreement being that the plaintiffs should assume the operations then going on, and possess themselves of the plant, &c., provided therefor ; and should pay all the debts of the deceased, incurred in connection with the business under the contract and should perform all contracts of hiring and for purchase of produce, &c. ; that the accounts for the first and second year should be inquired into, and any errors that should appear therein should be adjusted, but values of logs got out during such years to be the same at which they had been credited, being the rates mentioned as payable during progress of contract, of $1.00 $1.12½, $1.29, and $1.50, per standard log respectively, having regard to the section of the said limits from which the same had been taken as mentioned in the contract of January, 1868 ; and that an account should be made up of the value of the logs being got out in the then current year, having in the same manner regard to the different sections of the said limits wherever the same had been cut by the deceased, and to the sums which would have been payable to him had he lived and carried on the operations of that year to completion, and of the value of the plant, produce, &c., and of the moneys advanced by the plaintiffs under the contract in respect of the said year's operations then in progress ; and of the

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moneys to be paid by the plaintiffs to liquidate the debts of the deceased, and to pay past wages of men and of all other things which ought properly to be included in such accounts, and that if by such accounts the plaintiffs should owe anything they should pay the same to the defendant; and, if by such accounts the estate of the deceased should owe anything to the plaintiffs the same should not be demanded by them; (5) that such agreement was arrived at in consequence of a proposition having been made by letter to the solicitor of the plaintiffs, suggesting a basis of a new agreement between them and the defendant, and upon receipt thereof * a

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* The following is the letter with memorandum indorsed thereon:—

PETERBOROUGH, 3rd December, 1869.

C. A. WELLER, ESQ.,

Solicitor for A. H. Campbell & Co., and McDougall & Co.

DEAR SIR,—

Re Edwards Contract.

Mr. *James Edwards* has, this morning, been speaking with me about this matter, and, from the view he entertains with reference to the position and contract of the above named gentlemen, I think that we can at once settle a basis upon which the whole matter can be speedily and satisfactorily adjusted to the satisfaction of all parties.

Mr. *Edwards* proposes to administer to his son's estate as soon as the proper period has elapsed and suggests that, probably, the following basis would be fair and equitable: You to assume the operations now going on, and to possess yourselves of the plant, &c., provided therefor (the same to be now your property, and to be conveyed to you by a proper conveyance, so soon as *Edwards* becomes administrator), and to pay all the debts of the late *W. J. Edwards* (incurred in connection with the business under the contract), and you to perform all contracts for hiring and for purchase of produce, &c. The accounts of 1867-68, and of 1868-69 to be inquired into, and as full information as possible to be furnished by each party to the other, (and an account made up of the value of the logs got out by the deceased at the contract price, and of the value of the plant, produce, &c., and of the moneys advanced by you under said contract, and the moneys to be paid by you to liquidate such debts, and to pay the past wages of the men, and of all other things which ought properly to to be included in such account, and if by such account you shall owe anything the same is to be paid by you, and if by such account the estate shall be in debt to you the same shall not be demanded by you; and if on such inquiry (and taking such accounts) the parties do not

meeting between the defendant and the plaintiffs took place to discuss the proposition in such letter mentioned, and at that time the true agreement between the parties as above set out in paragraph number four, was made, and alterations and interlineations were made on the said letter, intending to make the same correspond with the real agreement between the parties, and it was then agreed between the plaintiffs and the defendant that such formal instrument as might be necessary to carry out their said agreement according to the intent of the parties, should thereafter be prepared and executed by them, and a memorandum to that effect was then signed on the back of the said letter, by the plaintiffs and

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agree as to the result, then the same to be referred to arbitration, either to some one mutually agreed upon or to persons selected, one by each party (which two will appoint a third) and such arbitrator, or arbitrators (or any two of them), shall determine whether anything should be paid to *James Edwards*, as administrator on such accounts or not, and it is further proposed that the contract should be determined at once and the estate released from all claims upon it by *A. H. C. & Co.*, and *McDougall & Co.* And, if such basis as above agreed upon, there would be no difficulty in determining the whole satisfactorily. If you, upon consideration of these points, agree to them we can have a memo. signed, or if you have any variations to suggest we can consider them. *

Yours very truly,

(Signed) JAS. F. DENNISTOUN,

(*Memorandum indorsed.*)

The within named *James Edwards* and the within named *McDougall & Co.* and *A. H. Campbell & Co.*, agree to the within terms and to carry the same out according to their intent, and to execute such formal instrument on the within basis as may be desired, and in the meantime the within to be considered and taken to be the executed agreement between them.

Peterborough, December 3, 1869.

In presence of—

C. A. WELLER,
JAS. F. DENNISTOUN.

J. EDWARDS,
W. McDOUGALL & Co.,
A. H. CAMPBELL & Co.,
Per J. S. HUNTOON.

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* Several interlineations and erasures appeared in the original, which, however, it is not considered necessary to particularize here.

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by the defendant; (6) that thereafter the plaintiffs and the defendant acted upon their said agreement so really and truly made between them, but no more formal instrument was ever prepared and executed by them; (7) that afterwards and after it became apparent that on taking the said accounts in the manner in which it had been agreed that they should be taken, there would be a large balance due from the estate of the late *William Jamieson Edwards* to the plaintiffs, but which was not to be demanded, the defendant then unjustly and improperly asserted that, under the wording and terms of the said indorsement, so as aforesaid made upon the back thereof, that he was entitled to have an account taken of all the logs got off the said limits at the rate of $1.29 per standard log, without regard to the true agreement between the plaintiffs and defendant and without regard to the rates at which the said logs, in respect to the first two years' operations under the said contract had been settled for, which mode of taking the accounts would

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produce a balance in favour of the estate of the deceased, to be paid by the plaintiffs to the defendant; (8) that the plaintiffs having refused to submit to the accounts being taken in any manner other than in accordance with the true agreement between them and the defendant, the defendant commenced an action in the Court of Common Pleas at Toronto, against them, wherein that Court determined that according to the language and wording of the said letter as interlined and the said memorandum indorsed thereon, the accounts should be taken on the basis of $1.29 per standard log as contended for by the defendant, and the defendant had already obtained a judgment against the plaintiffs for a large sum of mony, and threatened to enforce payment thereof under execution unless restrained by an injunction; (9) the plaintiffs charged that the agreement made between them and the defendant was as above set out in the fourth paragraph of their bill of complaint, and that in so far as the language in the letter, altera-

tions and interlineations therein, and indorsement thereon, varied from such true agreement; such variation occurred by mutual error and mistake of the plaintiffs and of the defendant, and that the instrument ought to be reformed so as truly and properly to state the agreement as it was truly and in reality made between the plaintiffs and the defendant.

The prayer of the bill was (*a*) that the true agreement between the plaintiffs and the defendant might be declared, and that the memorandum and letter might be reformed and that such proper formal instrument as would evidence the true agreement might be directed to be executed by the parties (*b*); that the defendant might be restrained from further prosecuting his said action at law, or enforcing his said judgment (*c*); that the plaintiffs might be paid their costs of defence of the said action-at-law, which they had wrongfully and unjustly been put to by the defendant, as also their costs of this suit and for further relief.

Statement.

The defendant answered the bill admitting the allegations in the first and second paragraphs thereof, but denied (2) that the accounts between *William J. Edwards* and the plaintiffs for the first two seasons' operations under the contract between them had been closed prior to the death of the former, as in the third paragraph mentioned, and alleged that any accounting had between the deceased and the plaintiffs in reference to the said two seasons' operations, was merely for the purpose of discovering and settling between themselves the amount which the deceased was entitled to receive from the plaintiffs in respect of the said two seasons' operations, by way of advances, as provided in the said contract in the said first paragraph of the bill mentioned, and not otherwise; and at the time or times of any such accounting between the said parties, it was understood and agreed between them, in terms of the said contract, that upon the completion thereof the deceased was to be allowed the difference between the prices at which the

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said logs so taken into such accounting were credited being the prices in the third paragraph of the bill mentioned, and the contract price of $1.29 in the contract also mentioned; so that nevertheless the whole amount to be thus paid or advanced to the deceased should not exceed the sum of $1.29 each for all the logs to be by him gotten out, pursuant to the contract; (3) that the agreement made and entered into between the plaintiffs and the defendant, on the death of *William Jamieson Edwards* was not as stated and set forth in the fourth paragraph of the plaintiffs' bill of complaint, but that the true agreement then made and entered into between them was to the following effect, namely: That the plaintiffs should assume the operations then being carried on under the said contract, and possess themselves of the plant, &c., provided therefor, which were thereupon to become the property of the plaintiffs, and to pay all the debts of the deceased, by him incurred in connection with the business under the said contract, and to perform all contracts of hiring and for the purchase of produce, &c.; that the accounts of 1867–8 and 1868–9 should be inquired into, and as full information as possible be furnished by each party to the other, and an account made up of the value of the logs got out by the deceased at the contract price; and of the value of the plant, produce, &c., and of the moneys advanced by the plaintiffs under the contract, and the moneys to be paid by them to liquidate such debts and to pay the past wages of the men, and of all other things that ought properly to be included in such account, and that if by such accounts anything should be due to the defendant as such administrator, the same should be paid, and if thereby anything should be found due to the plaintiffs the same should not be demanded, and that the said contract should be determined; (4) the defendant also denied that it was part of such agreement, or that it was ever understood or agreed between the plaintiffs and the defendant that in taking such accounts the values of the logs got out by the

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deceased, under the contract should be according to the rates mentioned in the said contract, for the regulation of the advances thereunder, but on the contrary it was distinctly understood and agreed that the values of the said logs should be taken into such account at the contract price of $1.29 per standard log;* (5) that the agreement so arrived at as aforesaid between the said plaintiffs and the defendant, was thereupon reduced to writing and signed by the parties, having before the execution thereof been revised by the professional adviser of the plaintiffs, who was present and took part in the discussion at the time of such agreement, and the agreement so executed truly stated the real contract between them and in accordance with what the defendant understood the contract to be, and that he had not at any time since acted upon the contract as referring to the sectional or advance prices mentioned in the said original contract, but had always understood the contract to refer only to the contract price of $1.29, and acted upon such agreement accordingly; (6) that the said contract between the plaintiffs and the defendant, further contained a provision that in the event of the parties not agreeing in the taking of such accounts the same should be referred to arbitration; (7) that upon the taking of such accounts disputes having arisen between the plaintiffs and the defendant—such disputes having reference particularly to the value at which the logs should be taken into account—such value was thereupon, pursuant to the arbitration clause in the contract by the mutual bonds of the plaintiffs and the defendant, reciting the said original agreement and that of the 3rd of December, 1869, and according to the terms thereof, referred to the award of certain parties therein named, who proceeded to inquire into the same and examined witnesses thereon, and examined also the plaintiffs *Archibald Hamilton*

Statement.

* In his evidence given at the hearing he stated—"I presumed that the whole logs taken out were referred to in the expression 'contract price.'"

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Campbell and *John Ludgate*; and the defendant upon the question as to whether or not the parties intended, by the agreement of the 3rd of December, 1869, and by the words, "at the contract price," therein, that the said saw logs, so gotten out by the deceased, were to be taken into account at the contract price of $1.29, or at the sectional or advance prices mentioned in such contract; (8) that such disputes were so referred in the month of March, 1871, and the plaintiffs from time to time, hindered and delayed the progress of the reference so that after the defendant had procured several enlargements of the time for making the award by the arbitrators the time therefor expired in February, 1872, whereupon the action-at-law mentioned in the bill of complaint was commenced; (9) that the plaintiffs appeared and pleaded to such action-at-law, and at the assizes in and for the county of Peterborough, in the spring of 1872, the matters in difference in that suit were referred to the Judge of the County Court of the

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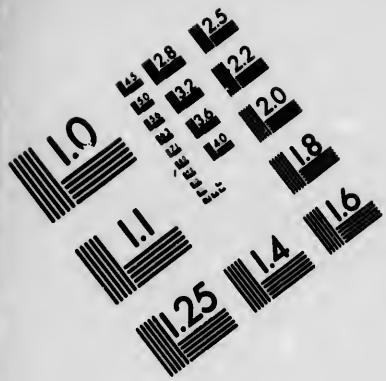
county of Peterborough, who was required by the agreement of reference upon the application of either party to state a case for the opinion of the Court of Common Pleas, as to any matter or matters of law arising upon the pleadings or evidence, it being understood by and between the parties that the particular matter in respect of which the said arbitrator should be asked to state a case was with reference to the interpretation of the said contracts relatively to the contract price; (10) that pursuant to such reference the said Judge stated two cases for the opinion of the Court in the said action-at-law, namely: First, as to whether the plaintiff in that action was entitled to credit for the logs got out by the deceased at the contract price of $1.29 per standard log, or at the sectional or advance prices mentioned in the contract; and second, as to whether, in view of the arbitration clause in the agreement of December, 1869, the defendant could maintain such action at law, before the amount had been ascertained by arbitration as pro-

vided for in that agreement; (11) that the Court of Common Pleas determined both of these questions in favour of the now defendant; but the last one was decided upon the ground that the point had not been taken at a sufficiently early stage in the a at law, and that if the objection had been pleaded t t action, or had been made a foundation for a motion for nonsuit, or of a motion to a Judge in chambers to stay proceedings in the suit, it must of necessity have failed; (12) that notice of taxation was duly given in that action and of the entry of judgment therein, and judgment therein was duly entered on the 5th day of July, 1872, and the plaintiffs herein did not, nor did any person in their behalf attend upon such taxation of costs or entry of such judgment, or in any way object to the same; (13) that not until within a few days before the filing of the bill of complaint herein did the plaintiffs pretend or suggest that there had been any error or mistake in the agreement of December, 1869, and the defendant submitted (*a*) that the plaintiffs from their laches and delay in applying for relief, and from their acquiesence in the agreement of December, 1869, carrying into operation the intention of the parties at the time, were not entitled to relief; (*b*) that the plaintiffs having submitted to the said arbitrators the question as to the value of the said logs and as to whether the same should have been credited at the contract price of $1.29 or at the sectional or advance prices mentioned in the contract, and having thereafter permitted the said action at law to proceed without availing themselves of their right in answer to such action to have the matter determined by the said arbitrators as a condition precedent to the right of action were not entitled to relief, and (*c*) that the plaintiffs having acted on the agreement of the 3rd of December, 1869, according to its purport, and having expressly reaffirmed the same by the submission to arbitration before mentioned of the disputes concerning the same; and by the reference thereupon, and subsequently in the action at law, were not entitled to any relief in this suit.

Statement.



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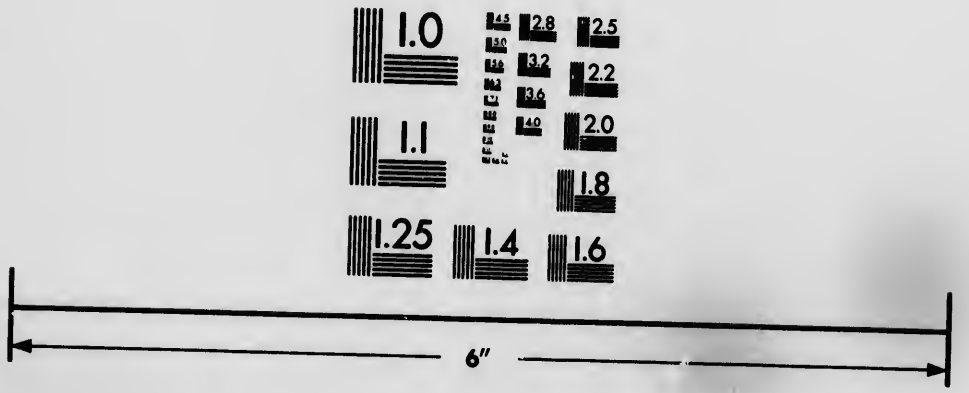

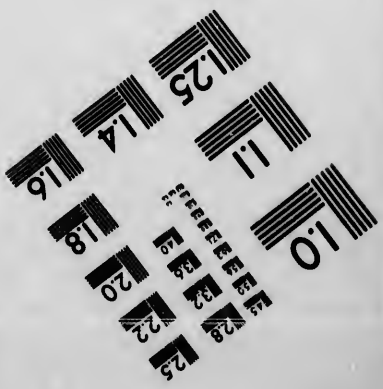

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The plaintiffs joined issue, and the cause was brought on for examination of witnesses and hearing at the town of Peterborough, before the Chancellor, on the 10th and 11th days of April, 1874. Several witnesses, including the plaintiff *Ludgate*, and the defendant, were examined. The former swore, "I understood the expression 'contract price' to mean the prices in the different limits. I don't recollect the question coming up for discussion. *

* Defendant, I think, sent me an account claiming $1.29 for all the logs got out during all three seasons. I should not have assented to the arrangement come to in Mr. *Weller's* office if I had understood that $1.29 was to be paid for all the logs." The defendant substantially reiterated the statement in his answer with the exception noted above, and in the course of his examination swore, "From the first time I saw the contract to the end, I had only one impression, and that was, that my son was to get $1.29. * * * The parties seemed all to be agreed, and there was very little discussed. *

Statement.

* I presumed that the whole logs taken out, were referred to in the term 'contract price.'"

The effect of the other testimony given appears sufficiently in the judgment.

Mr. *J. D. Armour*, and Mr. *Hall*, for the plaintiffs.

Mr. *W. H. Scott*, and Mr. *Edwards*, for the defendants.

At the conclusion of the case the Chancellor gave a verbal judgment in favour of the plaintiffs, and thereupon a decree was drawn up, whereby it was declared,

That the true agreement made and entered into by and between the plaintiffs and the defendant on the 3rd day of December, 1869, was in terms set out in the fourth paragraph of the plaintiffs' bill of complaint and not in the terms of the letter and memorandum indorsed thereon, in said bill of complaint also mentioned, and that the same should be reformed so as truly to set forth the said agreement: Order and decree the same accord-

ingly: Order and decree that an instrument embodying such true agreement be prepared and executed by the said parties, to be settled by the Master of this Court at Peterborough in case the parties differ about the same: Order and decree that the defendant do within one month after service of a copy of this decree pay to the plaintiffs the sum of $2,153.33, together with interest thereon from the 2nd day of December, 1872, to the day of payment: Order and decree that the said defendant do pay to the plaintiffs their costs of this suit, and of the motion for injunction made by them herein forthwith after taxation thereof. 1876. Campbell v. Edwards.

From this decree the defendants appealed.

Mr. *Attorney-General Mowat* and Mr. *W. H. Scott*, for the appeal. The case made by the bill is an alleged mistake in the memoranda of the 3rd of December, 1869. Those writings have reference to a previous agreement, under seal, dated 6th of January, 1868, between the respondents and the deceased, whose administrator the appellant is. By that agreement the deceased was to cut the whole of the pine timber on the lands therein mentioned, "for an aggregate sum of money equal to the sum of $1.20 for every standard log accepted and so delivered." The plaintiffs were to advance and pay on account of the price of cutting and delivering the timber on said limit, certain sums, three-fourths thereof as the work progressed, and the balance on delivery of the logs, naming what have been called the sectional or advance rates, "and the balance, if any, on completion of this contract." There had been the operations of two seasons under this agreement, viz.: 1867–8 and 1868–9; and at the end of each year the respondents had prepared an account of the transactions of the year, crediting so much of the price as by the agreement was payable then. In November, 1869, *W. J. Edwards* died, and upon his death his father, the appellant, was anxious to carry on the cur- Argument.

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rent year's operations, but not to go on afterwards. The respondents, on the other hand, were desirous that the logs should be got out, but that the appellant should not go on with the contract. The appellant thereupon consulted Mr. *Dennistoun*, who up to that time had been solicitor for the respondents, and he continued to be such solicitor afterwards, but he was allowed by them to act for the appellant in the matter of the proposed arrangement. Negotiations took place and ultimately Mr. *Dennistoun* wrote a letter containing a proposal of settlement. That letter was considered and discussed, clause by clause, between the Solicitors for both parties, and in their presence; alterations were made by mutual consent and the letter was finally settled in its present form, as embodying what all the parties had agreed to; and an indorsement was signed by all parties assenting to the proposals contained in that letter. The letter provided "That the accounts of 1867–8 and 1868–9 should be inquired into, and as full information as possible be furnished by each ty to the other; and an account made up of the v of the logs got out by the deceased, at the contract price, * * * and if on such inquiry and taking such accounts, the parties do not agree to the result, then the same to be referred to arbitration, either to some one mutually agreed upon, or to persons selected, one by each party, which two will appoint a third, and such arbitrator or arbitrators, or any two of them, shall determine whether anything should be paid to *James Edwards*, as administrator, on such accounts or not; and it is further proposed that the contract should be determined at once, and the estate released from all claim upon it by *A. H. Campbell & Co.*, and *McDougall & Co.*" The position now taken by the plaintiffs is, that important unexpressed stipulations were made and agreed to and intended to be mentioned in this letter. They say, in fact, that it was agreed that the prices of the logs should be the rates which had been credited in

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the interim accounts, and that the interim rates should be the final rates. But there was no evidence proving any such agreement.

Evidence to reform a written contract must, by the settled rule of equity, be such as to shew positively and clearly that there was the alleged mistake, and that the mistake was mutual. Conjecture will not do. Probability is insufficient. And it is not now even alleged that the price stipulated for was more than the work of the three years was fairly worth. The evidence must be far clearer than might be necessary to establish the alleged agreement by parol if there had been no writing; and the presumption in favour of the writing now in question is strengthened by the circumstances of deliberation and professional aid, under which it was prepared, considered, and settled. The evidence, however, not only fails to shew clearly and distinctly the stipulation, said to have been unexpressed through mistake, but absolutely negatives there having been such a stipulation; for all the witnesses, including the only one of the respondents who presented himself for examination, agree that such a stipulation was not even spoken of. What Mr. *Ludgate* now thinks or says as to what at that time he understood or supposed; or what his solicitor Mr. *Dennistoun* thinks now was his unexpressed understanding years ago, when the transaction took place—is wholly immaterial for the present purpose: *Fowler* v. *Fowler* (*a*); *Townshend* v. *Standgroom* (*b*); *Sugden*, Vends. & Purs. 14th Ed. 171; *Snell's* Equity 353; *Wright* v. *Goff* (*c*); *Bradford* v. *Romney* (*d*), *Metropolitan* v. *Brown* (*e*), *Cotton* v. *Corby* (*f*); *Forrester* v. *Campbell* (*g*); *Taylor on Evidence* 6th Ed. vol. II. 999; *Elwes* v. *Elwes* (*h*). The only evidence on which the Court in making the

Statement.

(*a*) 4 D. & J. at 264.
(*b*) 6 Ves. 328.
(*c*) 22 Beav. at 214.
(*d*) 30 Beav. at 438
(*e*) 26 Beav. 454.
(*f*) 8 Grant at 106.
(*g*) 17 Grant 379.
(*h*) 3 D. F. & J. 667.

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decree appears to have relied, was, the circumstance of the appellant's son Charles having, shortly after the date of the letter, acquiesced in a valuation made of the comparatively few undelivered logs cut in the third season, such valuation having been made on the basis of the interim rates. But a valuation of even those logs, on that basis, was not authorized by any instructions from the appellant, and that, such as it was, appears to have been, not a completed valuation, but a preliminary proceeding not intended to be binding unless subsequently adopted and agreed to by the parties. Moreover the appellant expressed to his son his dissatisfaction with the valuation, when told by him what had been done; and the appellant is not alleged to have had any communication from the respondents on the subject until they rendered their accounts to him; he may have been, and probably was, in daily or weekly expectation of receiving these, and he had applied for them several times before receiving them; but, as soon as the accounts were delivered to him, he promptly stated his objection to them, and delivered new accounts, calculated for the three years on the basis now contended for; and which he had always insisted was the proper basis of charge. The alleged acquiescence of the son Charles as to the undelivered logs was not binding even as to them: it certainly did not affect the logs delivered in the preceding two years; and the delay on the appellant's part in making any communication to the respondents with reference to this subordinate part of the transaction until he had received the respondents' accounts can afford no such evidence of the alleged mistake as is necessary for reforming a written instrument.

Argument.

They also contended that the bill should have been dismissed, for that independently of other considerations, the respondents never, until a few days before the filing thereof, pretended that there had been any error or mistake in the agreement of December, 1869; and therefore, by reason of this fact, and of their long

acquiescence in that agreement, as shewing the intention of the parties at that time; and by reason of the laches and delay of the respondents in applying to the Court of Chancery,—they were too late in calling for the aid of that Court to afford them any relief. Besides, the respondents having submitted the matter in question to the decision of the arbitrators, and having afterwards permitted the action at law to proceed without availing themselves of their right in answer to such action to have the matter determined by arbitrators, as a condition precedent to the institution of that action; and having subsequently consented to an arbitration in that action; and an award having been made therein, and judgment thereon entered for the appellant, the respondents were not entitled to any further relief. And furthermore, the respondents having acted on the agreement according to its purport, and having expressly reaffirmed the same by the submission to arbitration; and having subsequently agreed, in the action at law, to the reference to Judge *Dennistoun*; and that arbitrator having made his award, and judgment having been entered thereon, the respondents are not entitled to further relief in equity. On all these grounds they submitted that the decree pronounced by the Court below was erroneous and ought to be reversed, and the bill in that Court dismissed with costs.

Argument.

Mr. *Bethune* and Mr. *Boyd*, contra. At the time of filing the bill of complaint no moneys were sought to be recovered by the respondents from the appellants, the object thereof being only to restrain the enforcement of the judgment at law in the proceedings mentioned; and on a motion made in the Court of Chancery for an interim injunction, that relief was refused on the appellant undertaking to refund the amount of such judgment, should the Court at the hearing determine that the respondents were entitled to the relief asked by them in their bill, and the respondents accordingly did pay the amount of such judgment to the appellant, and

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the refunding of the moneys so paid, and interest, was properly ordered by that Court, it having at the hearing determined that the respondents were entitled to the relief prayed by them, and that the payment of the moneys so paid by them should not have been enforced against them. The evidence fully establishes the allegations in the bill that the true agreement entered into between the parties was, in the terms set out in the fourth paragraph thereof. They also insisted that the respondents had not been guilty of laches, as they had always contended that the true agreement was as set out in the bill, and that a construction should be placed on the letter and memorandum set forth in the pleadings, in accordance therewith, that this contention was always urged, and so soon as the Court of Common Pleas interpreted the agreement differently, the respondents took proceedings to have the true agreement declared, and for suitable relief in the premises.

The judgment of the Court was delivered by

Judgment.

STRONG, J.—The legal construction of the agreement which the plaintiffs seek to have reformed, and which the decree directs the rectification of, has been determined by the Court of Common Pleas, and is *res judicata* between the parties. According to that construction the words "contract price," in the letter of the 23rd of December, 1869, mean the price of $1.29 per standard log agreed upon between the plaintiffs and *W. J. Edwards* in the memorandum of agreement of 6th January, 1868, and are applicable to the logs cut and delivered under the agreement in the two first seasons of 1867–1868 and 1868–1869, as well as those which had been cut in the then current season of 1869–1870, during which *W. J. Edwards* died, and the agreement, which is the subject of this suit, was entered into. The jurisdiction which Courts of Equity exercise in cases of mistake in the terms of written instruments is administered in two distinct classes of cases. First. When it

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appears that the parties never concurrently assented to the same terms of contract, the Court will rescind an instrument which incorrectly purports to record an agreement which the parties never entered into. But to entitle a party to this relief of rescission it must appear that no agreement was, in fact, ever arrived at, for if there was a contract then the proper relief is not to rescind the instrument altogether, but to rectify it in such a way as to make it express the real meaning of those who executed it; and it must also be shewn that the instrument in its original form has not been so acted upon as to make it impossible for the Court to restore the parties to their original positions. Second. When it appears that there was, in truth, an agreement, but that the writing by a mistake mutual and common to both parties has failed to state the true contract, the Court, upon being satisfied by the admission of the defendant, or by proof which leaves no shadow of doubt upon its mind, will rectify the instrument so as to make it accord with the real contract.

Judgment.

There is no question in the present case of relief on the first head, for not only does the bill make no case for rescinding the letter of the 3rd of December, 1869, on the ground of want of assent to the same terms, but it asserts distinctly, and the evidence establishes that there was a concluded agreement, whether the document correctly states it or not. Moreover it would now be beyond the power of the Court to replace the parties in their original positions, which alone would constitute a defence.

Then to entitle the plaintiffs to succeed we must find that there was error common to both parties in the use of the words "contract price," in the agreement of December, 1869.

A party seeking rectification from a Court of Equity on the ground of mutual mistake must be able to shew by the clearest evidence, "irrefragable evidence," to use Lord *Thurlow's* language; that neither of the

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parties intended the agreement to be such as the writing expresses it to be. It must also be shewn with equal clearness that there was another agreement assented to and concluded by both parties which ought to be by an amendment of the instrument substituted for that which in its unrectified form it erroneously states. That the evidence establishing the mistake must be of the strongest kind, before the Court will feel at liberty to alter a writing which the parties have authenticated with their signatures, is, as might indeed be expected, well established by the highest authorities. Mr. *Taylor*, in his work on Evidence (*a*), says "If the defendant denies the case set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce, the plaintiff's position will be well nigh desperate, though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed."

Judgment.

In *Fowler* v. *Fowler* (*b*), Lord *Chelmsford* thus states the law: "The power which the Court possesses of reforming written instruments where there has been an omission or insertion of stipulations contrary to the intention of the parties, and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention and of the clearest and most satisfactory description." And again in the same case, at page 265, the same learned Judge says, "It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable,

(*a*) page 988. (*b*) 4 De G. & J. 264.

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continued concurrently in the minds of all parties down to the time of its execution and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new agreement." I have made this long extract because it points out with great precision a test which it appears to me the evidence in the present case will not stand.

The plaintiffs must be able to shew what terms should be substituted for those contained in the agreement of the 3rd of December as it stands, according to the intention not only of themselves but of the defendant also. The decree directs the substitution of an agreement in the terms of the 4th paragraph of the bill which, though not very precise in its language may be regarded as pointing to a substitution of the words "sectional prices," for "contract price," and a restriction of the account of the value of the logs to the then current season's work. Now, does the evidence establish with that overruling force which is essential in this class of cases, that the defendant ever assented to such an agreement as that which the plaintiffs thus propounded in the 4th paragraph of their bill? The defendant himself positively denies that he ever agreed or intended to agree to any price other than that which the Court of Common Pleas have, unavoidably as it seems to me, held to be indicated by the words "contract price," viz., $1.29 per standard log. Then if this agreement which the plaintiffs undertake to establish is supported by any evidence we must find it in the depositions of the plaintiff *Ludgate* or in those of Mr. *Weller* or Mr. *Dennistoun*. *Ludgate* says, "I don't recollect any discussion taking place at, before, or after the meeting as to the meaning of the words 'contract price.' I don't recollect whether or not anything was said at the meet-

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ing as to whether the account to be taken was to be of the current year or was to include previous years' operations. I understood the expression 'contract price' to mean the price in the different limits. I don't recollect the question coming up for discussion." Mr. *Weller* says, "The contract was not before us, and I don't know that I h d ever seen the contract up to that time. I had heard that there were several prices according to the various sections in which the logs might be cut. In using the words 'contract price,' nothing was said as to the figure of the contract price." Mr. *Dennistoun* states "There was no discussion as to the accounts of 1867–1868 and 1868–1869, as to the prices to be allowed for the logs. They were assumed to be correct so far as prices were concerned. I never contended that they should be disturbed as to that. The accounts to be taken referred to everything that had not previously been taken into account. Mr. *Weller* suggested that the valuation of the logs to be made should be on the basis of the contract, and that is why he put in the words 'contract price' it was a small matter as the logs to be valued were few."

Judgment.

This evidence contains nothing to shew that the defendant ever agreed to such a contract as that set out in the 4th paragraph of the bill, and established by the decree. The plaintiff *Ludgate* says, nothing was said as to the meaning of "contract price," and Mr. *Weller* that "nothing was said as to the *figure* of contract price," which is the same thing. Mr. *Dennistoun* does not say that there was any discussion as to what was meant by the expression, much less does he say that it was proposed and agreed to by the defendant that the prices to be paid should be according to the sectional rates of advances fixed by the original contract between the plaintiff and *W. J. Edwards*. Mr. *Dennistoun* states, it is true, that such was his own understanding of the arrangement, and gives what *he* understood to be the reason which led Mr. *Weller* to insert these important words.

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There is, however, nothing in all this to shew that the defendant was assenting to any different agreement from that which he signed. If the defendant had not been present in person, and if the whole matter had in the defendant's absence been concluded by Mr. *Dennistoun*, and the agreement had been signed by him, there might have been some ground for saying that his evidence shewed mistake binding on the defendant, though even in that supposed case the evidence would not in my judgment have come up to the required standard. The defendant, however, made the agreement directly, not through Mr. *Dennistoun's* agency, and the inquiry must be what the defendant intended, not what was in Mr. *Dennistoun's* mind. What has to be shewn, is that the *defendant*, as well as the plaintiffs, concurred in the contract which the plaintiffs seek to substitute for the writing. I think this has not been done, and that the plaintiffs' case entirely fails in proof. My conclusion from the whole evidence would be, that whilst the defendant rightly regarded the words, "contract price," as meaning the only price mentioned in the agreement of 6th January, 1868, that of $1.29 per log, the plaintiffs deliberately used that term, supposing that a reference to the first agreement would settle its meaning.

Judgment.

If such is the true result of the evidence, the plaintiffs shew no title to relief.

When a party assents intentionally to a contract, but under a mistake as to the effect and construction of the terms in which it is expressed, he can have no relief in equity, for in such a case there cannot be said to be any mistake in the instrument (*a*). Neither can a party to a contract insist on its rescission because he assented to it through carelessness, for a Court of Equity respects the solemnity of a contract once really assented to as much as Courts of Law.

(*a*) *Powell* v. *Smith*, L. R. 14 Eq. 85.

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In *Mackenzie* v. *Coulson* (*a*), Lord Justice *James* puts very tersely and clearly a distinction which is very applicable to the present case, he says, "But if this contract be a good contract at law what is there to vary it in equity? If all that the plaintiffs can say is, 'We have been careless, whereas the defendants have not been careless,' it is useless for them to apply to this Court for relief. The defendants positively say that they would not have accepted the policy on any other terms. Indeed the whole theory of the bill is founded on a misapprehension. Courts of Equity do not rectify *contracts:* they may and do rectify *instruments* purporting to have been made in pursuance of the terms of contracts."

I cannot find that conclusive evidence which is required to disturb the arrangement which is recorded by the parties as their deliberate agreement, in the valuation made by the defendant's son *Charles Edwards*, and the defendant's conduct as regarded that valuation. The defendant may have thought it would be time enough to object when he received the accounts, and it was a mere matter of calculation which could be set right by computing the price of the logs of that season at the $1.29. This circumstance of itself is wholly insufficient to warrant any interference with the written contract, though if the question in dispute was as to the terms of a verbal contract it might be very material. At the most, however, it would only shew, under the present circumstances, that the defendant acted on a mistaken construction of the contract, and it cannot supply the fatal defect in the plaintiffs' case, the want of proof of any other agreement than that contained in the letter and memorandum indorsed.

Judgment.

As to the disagreement between the 4th paragraph of the answer and the defendant's statement in his deposition, the utmost effect which can be given to that is, that

(*a*) L. R. 8 Eq. 368.

it weakens the force of the defendant's denial and detracts from his credit, but it still leaves it incumbent on the plaintiffs to prove their case, which, in my opinion, they have failed to do. 1876. Campbell v. Edwards.

The decree should be reversed with costs, and the bill dismissed with costs.

SOLICITORS.—*Mowat, Maclennan,* and *Downey,* agents for *Scott* and *Edwards,* Peterborough, for the appellant. *Blake, Kerr,* and *Boyd,* agents for *Dennistoun, Dennistoun,* and *Hall,* for respondents.

RE SHIPMAN—WALLACE V. SHIPMAN.

Deficiency of personal estate—Personal representatives—Administration of Justice Acts.

Since the Administration of Justice Acts an executor or administrator is not entitled to come to this Court for the purpose of administering the estate of the deceased, even where the personal assets are insufficient for the satisfaction of the debts.

Hearing on further directions. This was a proceeding for the admininistration of the estate of a testator, in which the proceedings were taken upon the application of the executors who had proved the will. The grounds upon which they sought to have the estate administered were, that the debts shewn to be due by the testator exceeded the amount of his personal estate; that it would be necessary to resort to his real estate in order to satisfy them, and that the executors could not safely proceed to distribute the personal estate without the aid of the Court. The master's report shewed that the debts exceeded the amount of the personal estate come to the hands of the executors. Statement.

Mr. *Moss,* for the executors, claimed that they were justified in taking the course they had done, as it

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Re Shipman.

appeared that the debts were in excess of the personalty, citing *Re Ette* (*a*), *Doner* v. *Ross* (*b*). It further appeared that the defendant, who was the residuary legatee and devisee, had consented in Chambers to the granting of the administration order.

Mr. *W. Cassels*, for defendant, urged that since the Administration of Justice Acts executors or administrators no longer require the protection of the Court of Chancery even when there appears to be a deficiency, for now upon being sued at law they can plead the deficiency and obtain an administration from the Court of Law. He referred to *Parsons* v. *Gooding* (*c*).

Judgment.

BLAKE, V. C.—Observed that inasmuch as under the Administration of Justice Acts the executors could, upon being sued at law by any creditor, sufficiently protect themselves by a plea, shewing the deficiency and claiming an administration, there was no longer any necessity for them to come to Chancery for protection. The reasons which existed for making the order in *Re Ette* no longer held good; that case was no longer a warrant for personal representatives coming to this Court for an administration merely because of there appearing to be a deficiency of assets; and that acting on this principle he had on two occasions recently declined to grant orders for the administration of estates, at the instance of the personal representatives.

It appearing that the defendants had consented to the order for administration and had obtained the benefit of the proceedings, the executors were allowed their costs.

(*a*) 6 Prac. Rep. 159. (*b*) 19 Grant 229.
(*c*) 32 U. C. Q. B. 499.

FRENCH v. SKEAD. 1876.

False representation—Liability of party making an erroneous representation—Crassa negligentia—Unpaid valuator.

In order to a party recovering damages against one who has been guilty of deceit, it is not necessary to shew that the person practising it has benefited thereby: but no action will lie for a false representation, unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it, and he does act upon it and sustains damage in consequence.

In order to facilitate an intending borrower obtaining a loan of money the defendant, who was well known to the plaintiff, the proposed lender, gave a certificate in the following words: "I beg to state that I know the farm belonging to Mr. *James Wheelen*, of Brudenell, situate opposite the church and in a thriving settlement. I consider it worth at least $1,200; and have reason to believe that it has cost him a much larger sum, and I am sure the investment of $400 will prove a safe one." At this time the property was worth not more than $400 or $500, and on a sale under execution at the suit of the plaintiff it realized only $130.

Held, per Curiam, that in the absence of *mala fides* the defendant, being an unpaid valuator, was not liable to make good the loss sustained by the plaintiff by reason of this erroneous valuation. [SPRAGGE, C., dissenting, who considered that the defendant had been guilty of such gross neglect in reference to the matter as rendered him liable to indemnify the plaintiff.]

Statement.

The bill in this case was filed by *Albert French* against *James Skead*, setting forth that the plaintiff by virtue of a mortgage, dated 1st of April, 1869, was the mortgagee, and one *Wheelen* was the mortgagor of lots numbers 282, and 283, in range B, north of the Ottawa and Opeongo road, in the township of Brudenell, containing 112 acres, for securing the repayment of $400 and interest; that the plaintiff's solicitors a short time before the date of the mortgage, and before the loan in question was effected, informed *Wheelen* that if he would procure a written valuation from the defendant, satisfactory to them, they would advise a loan in accordance with his application, whereupon *Wheelen* procured the following document from the defendant:—

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"OTTAWA, March 23rd, 1869.

"MESSRS. KENNEDY & CHRISTIE, Ottawa.

"GENTLEMEN,—I beg to state that I know the farm belonging to Mr. *James Wheelen*, of Brudenell, situate opposite the church and in a thriving settlement. I consider it worth at least $1,200; and have reason to believe that it has cost him a much larger sum; and I am sure the investment of $400 will prove a safe one.

"Yours, &c.,

"J. SKEAD."

That no reliance was placed on the statement of *Wheelen*, but that wholly upon the above representation of the defendant as to the value of the premises the money was advanced; that two years interest was promptly paid; that in the spring of 1874 an action was brought to recover the balance due on the mortgage, when it was discovered that *Wheelen* was unable to pay the mortgage money, and that the lands were worth only $130. The bill proceeded to allege that at the time the defendant made the allegation as to the value of the land he well knew the premises formed a wholly inadequate security for the $400, but "that the defendant with such knowledge, falsely and fraudulently represented the value of said lands as aforesaid;" that the plaintiff offered to assign the security to the defendant upon payment of the amount secured, which he refused; that the plaintiff proceeded to a sale and disposed of the premises, which realized only $130, having first notified the defendant of the proposed sale. The last clause of the bill was as follows: "The plaintiff charges that the defendant either falsely and fraudulently represented the value of the said land to be $1,200, when, in fact, it was and is only worth $130, or made a representation whereby the plaintiff was induced to loan his money as aforesaid, when he, the said defendant, was ignorant of the value of the land, which amounts, as the plaintiff submits, to a constructive fraud as against the plaintiff, and renders the defendant equally as liable to the plaintiff as if the defendant falsely and with intent to-

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defraud misrepresented facts to the plaintiff." And the bill asked that an account might be taken of the amount due on the security after deducting the $80 and $130, and that the defendant might be ordered to pay such amount with the costs of the suit.

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The answer denied all fraud, and alleged that the letter was written truthfully expressing the opinion then entertained by the writer as to the value of the farm, and truthfully representing all the facts deemed material respecting the same, and stated that the property was worth more than the amount realized at the sale thereof.

From the evidence there could be no doubt that the plaintiff advanced the $400 on the faith of the representation made by the defendant, and that the defendant made this statement in good faith, and that he had no interest whatever in misleading the plaintiff or in making any other than a truthful representation as to the value of the property, and that he did not obtain directly or indirectly any benefit from the representation or from the money advanced by the plaintiff. It appeared from the evidence of the defendant that he first knew the land in question fifteen or twenty years before: that he had been at the house built thereon and through the front fields often: that he based the estimate of the value of the land on the fact that there were 60 or 70 acres cleared and that there were a house and barns, and also fences on the lots, and a good government road ran through them; that he had himself cleared 800 or 900 acres in Madawaska and knew something of the cost of clearing; that he owned land in the next township; that he concluded clearing cost $20 per acre, and that with the clearing and comfortable log-house, barns, stables and fencing, the lot was worth $1,200; that the land becomes exhausted if not attended to, and stumps and stones appear and must be taken out; that there are a few nice farms near it, though too many are the other way; that he thought $1,200 the then selling value of the lot; that the clearing, the im-

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provements and the productive nature of the land were all from which he concluded it was worth $1,200 ; that the lot was timbered with hard wood ; that the lot after 1869 was allowed to run to common and disimproved very much.

William Bordige stated "That in 1869 the lot was worth $400 ; that it was middling stoney."

Thomas Crowley says "You could only take two or three crops from the land ; that it is now worthless ; that in 1869 it was not worth more than $400. The lot is half a mile from Brudenell Corners, where there is a church that cost about $6000."

The cause came on for hearing before the Chancellor, at the sittings of the Court at Ottawa.

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

Mr. *Fitzgerald*, Q. C., and Mr. *Christie*, for the defendant.

Judgment.

SPRAGGE, C.—The general question is, what is necessary to entitle a party to relief in a suit of this nature.

Representation by defendant in a material matter: that the plaintiff dealt upon the faith of the representation; that he was misled by it ; that it was untrue in a material point. Here it appears upon the face of the instrument that it was given to the owner of land in order to his using it with investors of money to induce them to lend money upon the security of it. The defendant states that he knows the land ; that it is in a thriving settlement ; that in his opinion it is worth $1200 ; that he has reason to believe that more had been spent upon it, and felt sure that it was a safe investment for $400.

Primâ facie this would appear to be a good investment. The plaintiff took it to be so and advanced to the borrower $400, taking a mortgage upon the land in security. There were some circumstances known to the defendant upon which he based his estimate of the value

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of the land which were material elements in forming an estimate of value. One was the number of acres cleared —some 60 or 70—and the cost of clearing about $20 an acre; and if there had been no circumstances to detract from this apparent value the defendant's estimate appears to be a sound one. But there was this very material circumstance, that the soil from the time of its being brought into cultivation was in a course of deterioration—a light soil over rock, wearing out in the course of three or four years. This was known to the defendant and is a fact stated in his own evidence as well as in the evidence of other witnesses.

The question is, was this a true representation of value for the purpose of investment on mortgage, mortgages being ordinarily made payable in this country at a future date of some years. In this case it was for five years The defendant sets forth some of his bases of value. The investor was not to suppose the existence of any circumstances materially affecting this estimate, and would naturally attach to it the character of permanence. The habit of the plaintiff was to invest only when the value of the property was three times the amount to be invested. This was, I assume, unknown to the plaintiff, but the fact has this bearing upon the case, that the defendant's representation led him to believe that the value of the property brought it within his rule.

Judgment.

I believe the defendant really believed the property to be of the value stated in his letter, and it appears that he was not a paid valuator. Upon this Mr. *Fitzgerald* argues that he is not liable to make good his representation and refers me to the case of *Peck* v. *Gurney* (*a*), and particularly to pages 108 and 113. I find no such doctrine enunciated in that case. There is no doubt that in the great majority of cases upon this subject the representation is made to serve the purposes

(*a*) L. R. 13 Eq. 79.

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of the person making it; but that is not a necessary element. If it were, representations made heedlessly and in the absence of knowledge of their truth or falsehood, and though made ever so evidently for the purpose of being acted upon, and however clear the evidence that they have been acted upon, would not be reached by the law.

This, in my judgment, is not the law. The decree must be that the defendant pay the mortgage debt to the extent that it has not been realized by the sale of the mortgaged property, and the decree must be with costs.

The defendant thereupon set the cause down to be reheard before the full Court.

Mr. *Moss*, for the plaintiff.

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

The points relied on and authorities cited by counsel are fully stated in the judgment.

Judgment. Jan. 16, 1877.

BLAKE, V. C.—[After stating the facts as above set forth.] The Chancellor in his judgment says "I believe the defendant really believed the property to be of the value stated in his letter." There is nothing in the evidence to lead me to suppose that the defendant acted throughout otherwise than honestly and to the best of his judgment in giving the certificate which is complained of. It appears to me also that he did not speak in ignorance of the facts connected with the lot and material to aid him in forming a correct conclusion as to its value. The opinion or inference he drew from the circumstances thus known to him was incorrect. It is to be observed that the defendant did not do that which is frequently required of valuators, namely, accurately describe the particulars of the lot. He does not give the number of

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acres cleared, the number of acres under crop, the class of wood and buildings on the lot, the fences, the productive nature of the soil, &c. He simply alleges that he knew the farm—that was true; that it was in a thriving settlement—this also was, so far as we can ascertain from the evidence, correct; that he had reason to believe that it cost a larger sum than $1,200—the only evidence on this point leads to the conclusion that this statement likewise was true. Then comes that on which the plaintiff's case is built: "I consider it worth at least $1,200 * * * and I am sure the investment of $400 will prove a safe one." There is no doubt, as the result of the evidence, that the land was not worth more than from $400 to $600, when the certificate was given. But then the question of value is one of opinion, and I am not aware of any case that has gone the length of saying that when a man having no interest in the matter, and receiving no reward for his opinion, gives it honestly on the question of the value of property or the solvency of a man, that he is liable, if it turns out that his judgment has been at fault in the conclusion at which he has arrived. The plaintiff did not take the precaution of demanding the basis for this conclusion. He might then have ascertained that the defendant was placing far too much on the locality and improvements, and that the value of the land, apart from those matters, would not warrant the advance he proposed. He might have found that the value, in the eyes of the defendant, arose from the fact that there was a demand for hay by lumbermen in the neighbourhood, and he might have answered that as that was temporary *he* would make no advance on land so situated, or he might have found that the defendant was basing his value on a proposed line of railway or some other local improvement which gave but a temporary or uncertain value to the property. The plaintiff did not seek to discover the ground for the valuation, and the defendant did not present it on the paper. It is not ev[illegible]s if the defendant

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had displayed in his certificate all the attractive features of the land and withheld that which might be injurious. He does not pretend to furnish any of these particulars. He simply gives his opinion as to the value, and without further inquiry by the plaintiff this is accepted. In speaking of false representations as to character and credit which are matters of opinion, Mr. *DeColyar* gives us the following as the result of the authorities, page 31, "No action will, however, lie for a false representation unless the party making it *knows* it to be untrue and makes it with the intention of inducing the party to act upon it, and the latter do so act upon it, and sustains damage in consequence. It is not, however, necessary that the defendant should benefit by the deceit."

There is no doubt of the liability of a party, making to another a representation of a fact, (as distinguished from a mere matter of opinion) when warned that the person seeking the information is going to act upon such statement. This liability is not confined to cases where the misstatement is made fraudulently. If the person making the statement knew it was a misstatement, of course he is responsible to the person acting upon it, for the detriment that ensues to him; if he was not aware whether that which he was stating as a fact was the truth or not, he is equally liable, for he should not have misled another by making a representation for him to act on unless he had informed himself as to that of which he was speaking and made himself aware of its truth.

Judgment.

In *Evans* v. *Collins* (*a*), Lord *Denman*, C. J., says, "The party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allega-

(*a*) 5 Q. B. 804. 819.

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tion that the defendant knew his representation to be false is, therefore, immaterial; without it the declaration discloses enough to maintain the action." When this case came before the Exchequer Chamber, *Tindal*, C. J., delivering the judgment of the Court states (page 826): "The question, therefore, before us is, whether the defendants, having reason to believe and actually believing a fact to be true, and representing it as such to the plaintiffs, are liable to an action if it turns out in the event that they were mistaken—that is, whether falsehood in a statement without fraud is actionable * * * The current of the authorities from *Pasley* v. *Freeman* (*a*) downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action. In *Pasley* v. *Freeman* the defendant knew that the statement which he had made was false, and the action was held to be maintainable. In *Haycraft* v. *Creasy* (*b*) the defendant made a false representation, but did not know it to be false; on the contrary, he believed it to be true; and it was held no action would lie; and in the latter case nothing could be stronger than the terms of asseveration used by the defendant, or more calculated to deceive the plaintiff, namely, that he could positively state the solvency of the party of his own knowledge and not from hearsay: the three Judges, upon whose authority the case was decided for the defendant, holding that in the absence of fraud, the assertion amounted to no more than *an expression of firm belief and conviction, and not absolute knowledge*, in the strict sense of that word; and this doctrine has been upheld by many cases of a later date, referred to in the argument, and has been contradicted, so far as we are aware, by none. * * The plaintiff in all those cases, being ignorant of the state of his debtor's solvency, makes inquiry of those who have better means of knowledge than himself; and yet in all those cases,

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(*a*) 3 T. R. 51.

(*b*) 2 East 92.

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if the answer given is honest, though untrue in point of fact, the action has been held not to be sustainable," and so the judgment in the Court below was reversed.

In *Barly* v. *Walford* (*a*) the Court thus refers to this case: "The judgment which was given in this Court in *Evans* v. *Collins*, affirming the proposition that every false statement made by one person and believed by another and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber, which did not deny the authority of *Humphrey* v. *Pratt* (*b*) in the House of Lords, but thought it might be distinguished from *Evans* v. *Collins*."

In *Swift* v. *Winterbotham* (*c*), the Court approves of the following language of *Pollock*, C. B., in *Bedford* v. *Bagshaw* (*d*), "Generally a false and fraudulent statement must be made with a view to deceive the party who makes the complaint * * * There must always be evidence that the person charged with the false statement and the fraudulent conduct had," &c.

Judgment.

In *Richardson* v. *Silvester* (*e*), *Blackburn*, J., says, "Then, if there is a false representation knowingly made to the plaintiff, and he acts on it, and is injured, he has a cause of action. That was decided in *Gerhard* v. *Bates* (*f*)." The cases of *Barley* v. *Walford* and *Evans* v. *Collins* are also authorities to the same effect. In the last case the judgment of the Court of Queen's Bench was reversed, and the law was settled that a mere misrepresentation, untrue in fact, but honestly made, would give no cause of action. The three propositions laid down by Mr. Justice *Brett* in *Carr* v. *The London and North Western R. W. Co.* (*g*), shew that the rule at law as to representations made of the existence of a

(*a*) 9 Q. B. 197.
(*b*) 5 Bligh N. S. 154.
(*c*) L. R. 8 Q. B. at p. 253.
(*d*) 29 L. J. Ex. at p. 65.
(*e*) L. R. 9 Q. B. at p. 86.
(*f*) 2 E. & B. 468.
(*g*) L. R. 10 C. P. 307, 316.

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certain state of facts, and acted on, is brought into harmony with the rule in equity.

In *Evans* v. *Bicknell* (*a*), Lord *Eldon* lays it down that "If a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make the representation good, *if he knows it* to be false." This doctrine was followed by Sir *William Grant* in *Burrowes* v. *Lock* (*b*), and extended to meet a case where wilful fraud was no ingredient in the equity of the person who claimed indemnity."

In *Ingram* v. *Thorp* (*c*), there was a distinct representation of a fact. It was said that the property was worth three or four times the amount to be secured, and that it was entirely unincumbered, or, if not, that it was charged only with the payment of a small annuity. The property was worth between £4,000 and £5,000, and, as a fact, it turned out that it was charged with an annuity of £150, calculated to be worth £1,740, and with a mortgage for £2,500. The Vice-Chancellor there held that the party making the representation was not in any event bound to make good the ultimate loss. He says, p. 73, "The question is not what the property will realize now, but what it was worth at the time the representation was made." He continues, "The misrepresentation with respect to the property, the subject of the mortgage, as alleged by the bill is, that there was no incumbrance upon it except an annuity, and that the property was more than sufficient in value to pay the debt. The sufficiency may or may not be matter of opinion, but I do not concur in the observation, that, because value is matter of opinion, therefore, a man who says his property is sufficient to pay a debt may not be shewn to have made a fraudulent representation. It may be so plainly deficient as to make it impossible for the party to have believed what he stated * * *

Judgment.

(*a*) 6 Ves. 174, 183. (*b*) 10 Ves. 470. (*c*) 7 Ha. 67.

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Although value might in some sense be a matter of opinion, yet the disproportion between the alleged and actual value might be such as to make fraudulent a merely general representation as to the sufficiency of the proposed security." (p. 77.)

In *Whitmore* v. *Mackeson* (*a*) the Master of the Rolls did not seem to think there was any rule peculiar to a Court of Equity in cases of this class, and he refused the plaintiff relief and left him to his action at law.

In *Peck* v. *Gurney* (*b*) most of the leading cases on the subject of representation and the liabilities of parties making the same are collected. There the prospectus was knowingly and wilfully incorrect. The directors, while setting forth in glowing colours the prospects of the proposed company, fraudulently withheld one fact when they must have known that if it were made public the company could not have been floated. It could not there be said that the facts were truly represented. The Master of the Rolls states, "They knew that any disclosure of the circumstances of the old firm would render it impossible to form the company, and accordingly it was a *sine qua non* that these should not be divulged. It is immaterial whether by a *suggestio falsi* or *suppresio veri* the result is brought about; in either case the guilty party is liable, and it is immaterial whether it were fraudulently or mistakenly done."

Judgment.

See also *Smith's* Leading Cases, page 168. *Addison* on Torts, page 836. *Cleland* v. *Leech* (*c*).

I think that as in the present case the defendant honestly gave his judgment on a matter of opinion, in respect of which he had no interest, that the plaintiff is not entitled to any relief against him, and that the bill should be dismissed with costs, including the costs of the rehearing.

(*a*) 16 Bea. 126. (*b*) L. R. 13 Eq. 79.

(*c*) 5 Ir. Ch. 478.

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PROUDFOOT, V. C.—After much consideration, I have felt constrained to come to the conclusion that the decree in this case cannot stand. I have had an opportunity of reading the judgment just delivered by my brother *Blake*, and desire to express my entire assent to the conclusion at which he has arrived. The Chancellor exonerates the defendant from all misconduct or any design fraudulently to mislead the plaintiff, but proceeds upon the ground that the defendant had not disclosed a material fact as to the nature of the property, viz., the quality of the soil. Had the defendant been asked for the particulars connected with the property so as to enable the plaintiff to form a judgment as to the value for himself, and had designedly or heedlessly failed to state the nature of the soil, I think the decree would have been right. But that was not what he was asked, all that the plaintiff sought was the written valuation of the defendant, and that he obtained. The defendant may have been mistaken in his judgment, but it was an honest mistake on a matter of opinion, and for that he cannot be made responsible. Judgment.

SPRAGGE, C.—It must be admitted that the authorities establish the proposition that where a man makes a representation in a matter stating only his opinion in regard to it, and not misstating any matter of fact in relation to it, he will not be liable in the absence of fraud although he knows that his opinion is asked with a view to its being acted upon; and, I confess, that the cases, nearly all of which were cited to me for the first time on the re-hearing, go further in that direction than I expected to find them. I do not think, however, the cases are clear against his liability where legal fraud as distinguished from moral fraud is to be imputed to him.

An examination of these cases and the opinions of my learned Brothers, have shaken the opinion that I formed at the hearing. The doubt that I confess remains with me

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is this, whether looking at the fact that the defendant knew that he was applied to as one who knew the property in question, and that his opinion as to its value for investment was sought, for the guidance of an investor, *i.e.*, sought to be acted upon, and looking also at the terms of his representation it is to be regarded as mere matter of opinion. He is not asked, nor does he make representation as to the probable value of land which he has not seen, and as to which his judgment as to its value may be little more than speculative. He begins with stating a fact, that he knows the farm: that is true or not. If not, it is a misstatement of a material fact, inasmuch as his opinion would have more weight from the fact of his knowledge than if he were ignorant. By the words, "I know the farm," he must be taken to have meant that he knew all about it: that would affect its value as an investment. He cannot be taken to have meant only its locality and the number of acres cleared, but also such other elements of value for an investment as an investor would naturally take into account. I do not mean that he should be held strictly to an accurate statement of value, but knowing that his statement of value is to be acted upon he should not be careless as to whether he is correct or not. I grant that according to the cases it must be apparent that his carelessness was gross; so gross as to amount to gross negligence, that *crassa negligentia* of which Sir *James Wigram* says in *West* v. *Reid* (*a*), "A Court of Justice would treat it as fraud, would impute a fraudulent motive to it, and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent." *West* v. *Reid* was not, indeed, a case of representation, but of a party affected with notice. I quote it as expressing tersely and accurately the doctrine of Courts of Equity as to gross negligence upon which the Court would impute fraud in the absence of moral fraud. I incline to think that where the carelessness in regard to

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(*a*) 2 Hare 249.

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the correctness of the information conveyed is of that character and to that extent, it applies to cases of representation *i. e.*, where the three elements are present which are the foundation of relief.

Mr. Justice *Story* (*a*), in stating that the representation must not be a mere matter of opinion, puts it as "Matter of opinion equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment," and he adds, "Not but that misrepresentation even in a matter of opinion may be relieved against as a contrivance of fraud in cases of peculiar relationship, or where the party has justly reposed upon it and has been misled by it." Most emphatically do the latter words apply to this case; the plaintiff reposed, and relied justly and entirely upon the representation of the defendant, and most certainly was he misled by it. Mr. Justice *Story* does not refer to any decided cases in support of the position that I have last quoted, and it is perhaps scarcely borne out by the English authorities. I quote it as the opinion of an eminent jurist, and as enunciating a doctrine peculiarly applicable to this country, where a great deal of money is invested upon the faith of representation as to value. Companies and societies which are investors may have their own valuators, but a great many investments have been made, and probably are still being made, upon the faith of certificates of opinion of value, and where the investors have no ready means, without personal inspection, of testing the truth of the representation. I cannot but think that the rule propounded by Judge *Story* is a salutary one, and not more strict than is necessary in a country of the wide area of Canada; and I see no injustice in applying it where the party making the representation is guilty of such gross carelessness as falls within the definition of *crassa negligentia* given by Sir *James Wigram* in *West* v. *Reid* (*b*).

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(*a*) E. J. sec. 197.

(*b*) 2 Hare 249.

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With great deference for the opinion of my learned Brothers, I cannot but think the representation made by the defendant in this case an instance of such gross carelessness as to fall within that definition. While setting forth some material elements for forming an estimate of value, he omits the all-important circumstance that the soil, from the time of the land being brought into cultivation, was in a course of deterioration, being a light soil over rock, wearing out in the course of three or four years. No circumstance could be more material to a person lending money upon mortgage. It is morally certain that if made known to the plaintiff he would not, to use a common phrase, "have looked at it." Yet this, although known to the defendant, was kept to himself, while circumstances tending to shew the investment a good one were duly certified. If this circumstance withheld was present to the mind of the defendant, it would be difficult to say it was not a fraud to conceal it; if not present to his mind, or if present and he thought it not necessary to mention it, it was negligence so gross that he ought, in my mind, to be visited with the consequences of it.

Judgment.

In most of the cases upon representation the party making the representation had an interest in the matter concerning which he made it. As to that there are two considerations: one that it is hard to make a person liable who is not compensated for what he does and is to derive no benefit from it, in the absence of an actual fraudulent intent; the other is, that a representation from such a person carries with it more weight, is more implicitly trusted; this is known to the person making it as it is to every one, and he owes it to the person who, he may properly expect, will act upon it, to take reasonable care that he shall not be misled to his detriment, by *allegatio falsi* or *suppressio veri* in what he represents.

I do not think this case rests by any means wholly on the defendant expressing a wrong opinion as to the

value of the land and its being a good investment; though, knowing what he did as to the character of the soil, I feel it difficult to understand how he could believe it to be a good investment; but it rests upon this also, that there was a *suppressio veri*; I am willing to believe from mere oversight and thoughtlessness, but at the same time, in a matter so important, that it was *crassa negligentia* in the defendant not to disclose it.

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Upon the whole, though I am shaken in my opinion, I cannot say that I have changed it.

SOLICITORS.—*Rose, McDonald*, and *Merritt*, agents for *French*, Prescott, for plaintiff. *Fitzgerald* and *Arnoldi*, agents for *Pinhey*, *Christie*, and *Hill*, Ottawa, for defendants.

KITCHEN v. BOON.

Parol evidence of consideration—Varying consideration stated in deed—Purchase by the acre—Statute of Frauds.

On a sale of land it was verbally agreed to sell the same at a certain price per acre, the purchaser paying the amount computed on fifty acres. The vendor stipulated to refund the excess should the property be shewn to contain less than the fifty acres; and the purchaser at the same time agreed to pay for any excess above that number of acres at the agreed rate.

Held, that the provisions of the Statute of Frauds did not operate to prevent the vendor shewing these facts by parol and recovering for any excess of acres, although a conveyance of the land had been executed to the purchaser.

Statement.

This case was heard at Simcoe before Vice-Chancellor *Proudfoot* at the Autumn sittings, 1876. The bill was filed by a vendor, who had executed a conveyance of some land to the defendant, to enforce a parol agreement entered into between them that any excess of acres above fifty was to be paid for at the rate of $12.50 per acre.

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When the land was sold and the deed executed, it was not known how many acres there were in the parcel. It was established to the satisfaction of the Court that a verbal agreement had been come to between the parties, that if there were more than fifty acres they were to be paid for at $12.50 per acre, and if there were fewer, an abatement of purchase money was to be made at the same rate.

A survey had been made and it had been ascertained that there were sixty-eight and a half acres in the parcel.

The defendant refused payment on the ground that he bought for a sum in gross, $650, and not by the acre; that the plaintiff after conveyance had no remedy, and that the Statute of Frauds was a bar to the claim.

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

Mr. *Barber*, for defendant.

Follis v. *Porter* (*a*), *Clarke* v. *Burnham* (*b*), *Mason* v. *Scott* (*c*), *Langstaff* v. *Playter* (*d*), *Morley* v. *Davison* (*e*), *Pherrill* v. *Pherrill* (*f*), *DeGear* v. *Smith* (*g*), *Anderson* v. *Trott* (*h*), *Sugden's* Vend. & Pur. 489; *Addison* on Contracts 7th ed. p. 407; *Dart* 4th ed. 679, were, amongst other authorities, referred to.

Judgment.

PROUDFOOT, V. C.—I have found that the first ground of defence is not true, that the sale was by the acre, and there was an agreement to pay for the excess.

I apprehend that the Statute of Frauds affords no defence. It has long been well settled that although one consideration be stated in a deed, another may be shewn, and when once established what the true consideration is,

(*a*) 11 Gr. 442.
(*b*) 2 Gr. 644.
(*c*) 22 Gr. at 618.
(*d*) 8 Gr. 39.
(*e*) 20 Gr. 96.
(*f*) 18 Gr. 476.
(*g*) 11 Gr. 570.
(*h*) 19 Gr. 619.

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Kitchen v. Boon.

a lien results to the vendor for as much as may remain unpaid. Here the true price, the true consideration for the deed, was $12.50 per acre, and for the difference between that sum and the amount paid the plaintiff is entitled to a lien.

Rex v. *Scammonden* (*a*) establishes that other considerations than those expressed in the deed may be proved. In *Filmer* v. *Gott* (*b*), where the consideration mentioned in the deed was £10,000 *and natural love and affection*, the Lords Commissioners of the Great Seal directed an issue to try whether natural love and affection formed any part of the consideration, the estate being worth near £30,000. On an appeal to the House of Lords this was affirmed, and the jury on the trial of the issue finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

These cases were followed in *Mulholland* v. *Williamson* (*c*), where a deed for the expressed consideration of £1,000, was sustained against creditors, although the true consideration was not money at all, but a settlement on marriage, *Boyd* v. *Shouldice* (*d*) and *Clifford* v. *Turrell* (*e*) are to the same effect.

Judgment.

I think the plaintiff entitled to a decree declaring him entitled to a lien for the unpaid purchase money. The Registrar will take the account.

SOLICITORS.—*Duncombe* and *Jackson*, Simcoe, for the plaintiff; *Ansley* and *Barber*, Simcoe, for defendant.

(*a*) 3 T. R. 474. (*b*) 4 Bro. P. C. 230.
(*c*) 12 Gr. 91, In App. 14 Gr. 291. (*d*) 22 Gr. 1.
(*e*) 1 Y. & C. C. C. 188.

1876.

KERR v. STRIPP.

Married woman—Separate estate—Separate contract.

Where real estate is acquired by a married woman after the passing of the Married Woman's Property Act of 1872, such property is liable for her contracts to the same extent as if she were a *feme sole*; but the Court will not make any personal order against her, as would be done in the case of man or a *feme sole*.

This case was heard in Hamilton at the sittings of the Court in October, 1876, before Vice-Chancellor Proudfoot.

The defendant, a married woman,—was married in August, 1874, and then owned and had since acquired real estate in fee.

On the 5th of May, 1875, the defendant's husband made a note for $348, which was indorsed by the defendant, and on 20th September, 1875, she made three promissory notes for $850 each. All these notes had been transferred to the plaintiffs.

Statement. The following admissions were made at the hearing: "1st. The defendant, who is a married woman, made and indorsed the notes produced, such notes being made and indorsed by her wholly for her husband's accommodation, in order to be used by him, and plaintiffs are holders of them, and would not have accepted them without the defendant's indorsation (and signature). The wife was not present when they were transferred.

2nd. The defendant was married to her present husband in August, 1874, there was no marriage settlement, and at the time of the making and indorsing of the notes had the real estate mentioned in the bill, which had been conveyed to her in fee, a part before and a part after marriage, in ordinary statute form absolutely."

Mr. *E. Martin*, Q. C., for the plaintiff. The defendant here, it is admitted, is the owner of real estate acquired since 1872, part of it having been so acquired after her marriage, in 1874; and such property by the Act of 1872, is constituted separate estate

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of the married woman. The only question here, therefore, is, is the contract a separate one of the wife? The notes here sued upon were made no doubt for the accommodation of the husband; but even so, the plaintiffs are entitled to hold them without regard to any understanding that may have been entered into between the parties. *Wagner* v. *Jefferson* (*a*) may be relied on by the other side, but that case is clearly distinguishable, as here the plaintiffs are shewn to have relied on the signature of the wife alone for giving credit: citing *Lewin* on Trusts, page 123, and the Administration of Justice Act of 1873, sec. 1.

Mr. *Gibbons*, for the defendants, referred to section 1401 of *Story's* Equity Jurisprudence, as shewing clearly where and under what circumstances a wife will be liable in equity upon her separate contract. Under our Married Woman's Act she is now liable at law, and is bound by her bond, though not by a note. So far as equity is concerned, the statute now imposes no greater liability than existed before its passage.

Judgment.

PROUDFOOT, V. C.—Upon the facts stated I think the plaintiffs entitled to a decree. The Married Woman's Property Act of 1872 conferred upon the property of married women, acquired after that Act came into force, or when the marriage was after that Act, the quality of separate estate: *Adams* v. *Loomis* (*b*), *Boustead* v. *Whitmore* (*c*).

It was held in *Hulme* v. *Tenant* (*d*) that a bond of a married woman, jointly with her husband, shall bind her separate property, though there was no reference in it to her separate property.

So in *Stuart* v. Lord *Kirkwall* (*e*) it was decided that the separate estate was bound by a bill of exchange accepted by a married woman; and in *Bullpin* v.

(*a*) 37 Q. B. R. 551.
(*b*) 22 Gr. 99.
(*c*) 22 Gr. 222.
(*d*) 1 Bro. C. C. 16.
(*e*) 3 Madd. 387.

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Clarke (*a*), and *Field* v. *Sowle* (*b*), the same rule was applied to a promissory note made by her.

In *Vaughan* v. *Vanderstegen* (*c*), *Kindersly*, V. C., observes:—"It may therefore, I think, be considered to be now the doctrine of this Court, that the engagements and contracts of a married woman having property settled to her separate use, at least such of them as are in writing, are to be regarded as debts, or in the nature of debts, and that her property so settled is liable to the payment of them as such; and that this principle is entirely founded on the doctrine of Courts of Equity, by which she is constituted a *feme sole* as to that separate property."

Mr. Justice *Story* (Eq. Jur., sec. 1400) says:—"The fact that the debt has been contracted during the coverture, either as a principal or a surety, for herself or for her husband; or jointly with him seems ordinarily to be held *primâ facie* evidence to charge her separate estate, without any proof of a positive agreement or intention so to do."

Judgment.

I was asked for an order for sale of the property, and for a personal order against the wife for any deficiency. The latter order I cannot make.

In the same case of *Vaughan* v. *Vanderstegen* (*d*), it is said "That a contract for payment of money made by a married woman having separate estate, though called a debt, is only a debt *sub modo*. When compared with the debt of a *feme sole* or a man, it lacks most of the qualities of a debt. It cannot be enforced against her person either at law or in equity; even in a Court of Equity it cannot be enforced against property, real or personal, held generally in trust for her; and, though of course she is a necessary party to a suit to enforce it as against property held in trust for her separate use, the suit must be against the trustees in whom that property is vested; and the decree cannot go against her to

(*a*) 17 Ves. 365. (*b*) 4 Russ. 112.
(*c*) 2 Drew. at 188 (*d*) at p. 184.

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pay it, but only against the trustees to compel them to pay it out of the separate estate. If she should survive her husband, although the creditors may have the right, in equity, still to enforce the payment of the debts contracted during coverture out of any remaining estate or interest which was settled to her separate use, yet her person and her general property remain as completely exempt as before from all liability, and she could not be sued for it at law, notwithstanding her having become discovert."

I do not think the Act of 1872 has enlarged the liabilities of married women beyond what they were before, in regard to her separate estate: that she is only liable now in regard to her separate estate, and that a personal order against her must be refused.

SOLICITORS.—*Martin* and *Parke*, Hamilton, for plaintiffs; *McMahon*, *Gibbons*, and *McNab*, London, for defendants.

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BIRDSELL v. JOHNSON.

Advancement—Exchange of lands—Corroborative evidence—Parol evidence.

The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction; or else immediately after it, so as, in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations.

A testator devised to his grandson *A.*, an infant, 30 acres, part of his farm, the remainder thereof he devised to his eldest son, the father of *A.* By the evidence of the father it was shewn that on *A.* coming of age, by agreement between them, his father conveyed to him 50 acres of equally valuable land in lieu of the portion devised to him; the father at the time saying that he would charge him with the difference in value as an advance; and that it was supposed by the parties that no conveyance from *A.* to his father was necessary, as he being the heir at law of the testator, all that was necessary was to destroy the will, which was done. Up to the time of his death *A.* never made any claim to the 30 acres; on the contrary it was proved that on several occasions he had admitted the fact of the exchange.

Held, under the circumstances stated, sufficient appeared to shew that the conveyance to *A.* had been by way of an exchange of lands, and not as an advancement by the father to his son.

What is sufficient corroboration of the evidence of the surviving party to a transaction against the representatives of the other party thereto considered and acted on.

Statement.

This case was heard at Simcoe, in October, 1876, before Vice-Chancellor *Proudfoot*. The bill was by the heiress-at-law of a devisee, against the heir-at-law of the testator, who died in 1832, claiming 30 acres of land devised. The defendant alleged that he conveyed 50 other acres to the devisee at his request, in lieu of the 30 devised.

The effect of the evidence given and the other facts of the case are fully stated in the judgment.

Mr. *Duncombe*, and Mr. *W. Cassels*, for the plaintiffs The Statute of Limitations does not afford any defence

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to the defendant in this case, as it is shewn that the defendant admitted his son's right down to the year 1857. Then the alleged exchange, that is, the conveyance by *Joseph* to his son *Abraham*, is proved only by the depositions of the father, which statement it is contended is not corroborated in such a manner as to satisfy the mind of the Court of its correctness. The deed itself is no corroboration of it. Indeed the evidence mainly relied upon for corroborating the defendant's statement are admissions said to have been made by the defendant; this is evidence which the Court will certainly scan very closely as at best it cannot be said to be very satisfactory. Here no part performance is shewn to take the case out of the statute, and parol evidence cannot be received for establishing such a defence: *Orr* v. *Orr* (*a*). The deed itself is certainly not one of exchange.

Mr. *Robb*, for defendant. The fact of the exchange is sufficiently proved; the agreement itself is proved by the father, and corroborative evidence, especially that of *William Black*, the brother-in-law of the deceased, sufficient to satisfy the words of the Act has here been given. Besides, length of possession alone is sufficient to defeat the claim set up by the plaintiff. The defendant, it is shewn, has been in possession since 1832. The agreement with the deceased was before 1855, the date of the deed that was made by *Vanbuskirk* of the 50 acres adjoining the 50 acres conveyed to the deceased by his father; and upwards of twenty-one years have elapsed since the conveyance was made. The witness, *William Bates*, indeed fixes the date of such agreement as having been in 1852 or 1853.

Judgment.

PROUDFOOT, V. C.—*John Johnson*, the testator, died in 1832, leaving a will by which he devised to his grandson, *Abraham Johnson*, 30 acres off the south part of the farm; the rest of the farm was devised to *Joseph*

(*a*) 21 Gr. 000.

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Johnson, the father of *Abraham;* to the widow was left the use of a garden. She died in 1859. *Abraham* was born in 1830, and lived with his father till his marriage in 1852. When he came of age *Joseph* told him to take the 30 acres devised to him. *Abraham* said it was too small for a farm, and asked *Joseph* to give him 50 acres off another lot. *Joseph* told him this was more valuable than the 30 acre parcel—it was worth as much per acre, and he would charge the difference against him as an advance. *Joseph* made the deed of the 50 acres to *Abraham*, 11th February, 1857. And as *Joseph* was heir-at-law of *John*, it was thought needless to make a deed to him of the 30 acres, but that the same end would be obtained by destroying the will, which was done.

The foregoing statement is taken from the evidence of the defendant *Joseph Johnson*, and unless corroborated, cannot be acted on.

Judgment.

Henry Johnson, a brother of *Abraham*, gave evidence of a conversation with him the year before he died, in which *Abraham* told him he could have had the land devised to him when he came of age, but that he preferred the place he was on instead of the 30 acres, as he could get land adjoining.

William Black, a brother-in-law of *Abraham*, gave evidence of a conversation with him in 1857, when *Abraham* told him he could have had the 30 acres in the corner of his father's farm, under his grandfather's will, but that he got the 50 from his father in exchange for it.

This witness drew *Abraham's* will, in which he disposed of two parcels of 50 acres each, (the one 50 being that which he had got from *Joseph*, and another he had bought), and his personal property; and when witness asked him if there was anything else, he said no, that was all the property he was possessed of, and he did not own all that, as he owed $500.

William Bates relates a conversation he had with *Abraham* in 1852, when *Abraham* told him of the 30

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acres devised to him by his grandfather, and that he had exchanged them with his father for the 50 acres he was then on, with which he was better satisfied, as he could get the adjoining 50 from *Vanbuskirk*. This witness at that time lived with *Abraham*.

Isaac Butler was in possession of the 50 acres *Abraham* was to get, and was asked to give up possession that he might work it. It was said that *Joseph* wanted to exchange the 50 acres for the 30 acres willed to *Abraham* by his grandfather.

Oran Rogers relates a conversation with *Abraham*, the fall before he died, when he said he did not consider his father had given him anything, for he had traded the 30 acres willed to him, and if he had to repay what he had been advanced, he would not have got anything.

The plaintiff and her husband were both examined in regard to a conversation with *Joseph* last winter or spring. The only phrase used by him as bearing on the question was, "It was a sticker to him how *Abraham* got the 50 acres, if he (*Joseph*) did not give them to him." Stress was laid on the word *give*, as shewing it was not an exchange.

Judgment.

Mary Bailey testified to purchasing a small lot 13 years ago from *Joseph*, to which he could not make a title satisfactory to her, as she had heard about the will.

Caleb Pursley gives evidence of a conversation with *Joseph* about two weeks prior to the hearing, when *Joseph* told him he had given 50 acres of land to *Abraham*, and had kept the 30 acres for himself,—he thought he had paid for them by the land he gave.

The witnesses seemed respectable; and I saw no reason from their demeanour to distrust their statements. I am quite aware of the danger of relying on the evidence of conversations at such a distance of time. But they are in this case so uniform, proved by persons who well knew the parties, and in one instance, that of the preparation of *Abraham's* will, when there was a reason for making the inquiry, and when, if

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Abraham still retained any interest in the 30 acres, he would have stated it; that I think myself justified in finding *Joseph's* evidence corroborated. I think it well proved that the deed of the 50 acres to the son was not an advancement, but given in lieu of the 30 acres devised.

The evidence on behalf of the plaintiff is of the most trifling description, and quite consistent with the case made by the defendant.

In *Devoy* v. *Devoy (a)* it was held that the presumption of advancement from a transfer of stock by a father into the joint names of himself, his wife and child, may be rebutted by the evidence upon oath of the transferor that no trust was intended, but that the transfer was made under a misapprehension of its legal effect. Sir *John Stuart* observes, p. 406, "Where the conduct of the father only raises a presumption, and the question is, as to the amount of evidence necessary to rebut the presumption, it is too much to say that the evidence upon oath of the actor, although subject to the qualification with which it must be received as that of an interested witness, is to be wholly rejected. If it be admissible at all, it rebuts the presumption." And in *Dumper* v. *Dumper, (b)* there was a decision to the same effect.

Judgment.

The evidence of acts or declarations of the father to rebut the presumption of advancement, must be acts or declarations antecedently to, or contemporaneously with, the transaction; or else immediately after it, so as to form in fact part of the same transaction; *Dumper* v. *Dumper*, *supra*. But the subsequent acts and declarations of the son can be used against him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations: *Sidmouth* v. *Sidmouth (c)*, *Scawin* v. *Scawin* (*d*), *Pole* v. *Pole* (*e*).

(*a*) 3 Sm. & G. 403.
(*c*) 2 Beav. 455.
(*e*) 1 Ves. 76.
(*q*) 3 Giff. 583.
(*d*) 1 Y. & C., C. C. 65.

If the defendant has asked by his answer to have the plaintiff declared a trustee for him of the thirty acres, there will be a decree to that effect. If not, the bill will be dismissed, with costs.

SOLICITORS.—*Duncombe* and *Jackson*, Simcoe, for plaintiff. *Tisdale, Livingstone*, and *Robb*, Simcoe, for defendant.

WALKER v. WALTON.

Mechanics' Lien Acts of 1873 *and* 1874, *O.—Cancelling lien—Demurrer.*

The effect of the Mechanics' Lien Act of 1874 is, to cancel a lien that had been created under the Act of 1873, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by the 4th section of that Act; no proceeding to realize the claim having been taken for more than thirty days after the machinery, the foundation of the claim, had been supplied; the provisions of the Act of 1873 being inconsistent with, and repugnant to the provisions of the later Act, which repeals all Acts inconsistent therewith.

Statement.

The bill in this case was filed under the Mechanics' Lien Act, to realize the claim of the plaintiffs for machinery supplied to the defendant *Walton*, on the 12th of August, 1874. On the 14th of August, 1874, the plaintiff registered a lien under the Act of 1873. The price of the machinery, $925, was to be paid as follows: $600 in three months from the 4th of August, and on payment of $300 at that date the time for payment of the other $300 to be extended for three months longer; the balance of $325 to become due in nine months from the 4th of August. The plaintiffs filed their bill on the 7th of July, 1875, and within the period of ninety days from the expiry of the period of credit as prescribed by the 4th section of the Act of 1873. They claimed a balance of $500.36. The defendants demurred to the bill for want of equity.

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It was agreed by counsel that the only question for argument should be whether the bill could be supported under the Lien Act.

Nov. 22nd.

Mr. *A. F. Campbell*, for the demurrer. This bill is filed too late. The effect of the 14th section of the Act of 1874 is, to destroy the lien, as no proceedings were taken to realize the lien within thirty days from the time when the machinery was furnished. Section 14 has this effect even although the plaintiffs had no opportunity to take proceedings under the Act of 1874.

Mr. *J. H. Macdonald*, contra. If the Act of 1874 has the effect contended for, the moment that Act was passed the lien which the plaintiffs had acquired under the Act of 1873 was destroyed. The Act of 1874 does not repeal the Act of 1873. A later Act has never been construed to repeal a prior one, unless there be a contrariety or repugnancy in them or a plain intention expressed to repeal it. The law does not favour a repeal by implication unless the repugnancy be quite plain. The Court will give a statute an *ex post facto* operation only when the words coerce the Court to do so. If the same words occur in different parts of a statute they must be taken to have been everywhere used in the same sense. The 14th section of the Act of 1874 is not necessarily inconsistent with the 4th section of the Act of 1873. The word "lien" in the 14th section means a lien created by virtue of the 2nd section of the Act of 1874, and does not mean or refer to the lien created under the Act of 1873 by registration.

Judgment.

Nov. 29th.

BLAKE, V. C.—The bill in this cause, which was filed on the 7th July, 1875, states that the defendant *Walton* owned certain leasehold premises set forth: that the plaintiffs on the 12th August, 1874, supplied machinery to this defendant, and placed the same in building, then and now on the said premises; that there was no arrangement that the plaintiffs were not to have a lien: that on the 14th of the same month a statement in pur-

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suance of the Mechanics' Lien Act of 1873 was duly filed, claiming $925 and interest at 8 per cent. until paid. This sum, &c., became due as follows:—$600 in three months from the 4th of August, and on payment of $300 at said date the time for payment of the balance to be extended for three months further, with interest at the same rate; the balance, $325, to become due in nine months from the 4th August; that the sum of $500.36 and interest from the 15th May, 1875. is due; that the co-defendant *Hughes*, claims some interest in the premises as assignee of *Walton;* and the plaintiffs ask that this sum of $500.36 may be paid them, and in default for a sale.

To this bill the defendants demur, alleging as cause of demurrer that the proceedings were not instituted to realize the claim and a certificate of proceedings was not duly registered within the time limited by the Act. The second Mechanics' Lien Act seems to be a substitution for the first. The twentieth section of the Mechanics' Lien Act of 1874 is, "All Acts inconsistent with the provisions of this Act are hereby repealed." The right claimed by the plaintiffs does not exist except it be by either of these statutes. It cannot be supported by any clause of the former Act which is inconsistent with the later Act, for the Act of 1874 specially repeals, without exception, any such enactment. Section 14 of the Mechanics' Lien Act of 1874 provides that "Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed, or materials or machinery furnished, unless in the meantime proceedings shall have been instituted to realize the claims under the provisions of this Act," &c. By the later Act the lien ceases unless certain proceedings be taken within thirty days from the period of the completion of the work. The Act of 1873 allowed a more extended period and gave the creditor ninety days from the time of the expiry of the credit. These two provisions are inconsistent the one with the other. The

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former provision, which is repugnant to the later, falls to the ground: it is only under this clause thus repealed that the plaintiffs attempted to sustain the bill—as it is no longer in force, the ground on which the pleading is based falls, and the demurrer must be allowed, with costs.*

SOLICITORS.—*Rose*, *Macdonald*, and *Merritt*, for plaintiffs. *Mulock* and *Campbell*, for defendants.

KAY v. WILSON.

Vendor and purchaser—Mortgagor and mortgagee—Laches.

In 1835, *D.*, the owner of land, sold and conveyed the same to *S.* for £310, and a mortgage was executed by the purchaser for the whole of the consideration money. In 1838 *S.* sold and conveyed his equity of redemption to *K.* In 1842 the original vendor filed a bill of foreclosure against *S.*, on which a final decree of foreclosure was obtained in August, 1845; but to this suit *K.*, through some oversight, was not made a party. Sixteen months afterwards *D.* effected a sale of the same property to another purchaser, who, in October, 1854, mortgaged to the defendant *W.*, and he in September, 1860, obtained a final order of foreclosure, by reason of default in payment, and subsequently conveyed to his co-defendant During the time *W.* held the land he paid a sum for taxes exceeding the original purchase money; *K.* never having paid anything on account thereof, or of the money or interest secured by the mortgage from *S.* to *D.* (of 1835). In 1876 *K.* died, and the plaintiff, his heir-at-law and devisee, in June of that year, for the first time discovered the conveyance of 1838 from *S.* to *K.*, and thereupon filed a bill seeking to redeem.

Held, under the circumstances stated, that whether the original transaction between *D.* and *S.* could only be looked at as one between mortgagor and mortgagee, or merely as one between vendor and vendee, the plaintiff was not entitled to relief, and the bill filed by him was, therefore, dismissed with costs; and *Semble*, that *S.* having been an innocent purchaser at a time when registration was not notice, would have afforded a good ground of defence, if it had been taken by the answer.

This was a suit to redeem, and came on for examination of witnesses and hearing before The Chancellor at

* The plaintiffs have since filed a petition in Appeal.

the sittings of the Court at London, in December, 1876. The facts are sufficiently stated in the head note and judgment.

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

Mr. *J. D. Armour*, Q. C., for the defendant *Wilson*.

Mr. *Atkinson* and Mr. *Douglas*, for the other defendants.

Judgment. Dec. 29th.

SPRAGGE, C.—At the conclusion of the argument I said that I thought that the principles upon which, in *Skae* v. *Chapman* (*a*), I proceeded in denying redemption to the plaintiff apply in this case, and I referred to passages in the books of Mr. *Powell* and Mr. *Coote*, on mortgages. and to the principle as enunciated by them on which the equity of redemption is founded—relief from forfeiture. I referred also to the language of Lord *Kingsdown* in *Smyth* v. *Simpson*, quoted by me in *Skae* v. *Chapman*.

The circumstances in *Skae* v. *Chapman* differ from the circumstances in this case, but the original dealing between the parties to the transaction out of which this case arises, and what has been done, and what has been left undone since, make this case to my mind a clear case for refusing redemption.

In 1835, 13th October, more than forty years ago, one *Drake* sold to one *Sharp* the land in question for £310. None of the purchase money was paid down, but a conveyance was made by the vendor to the purchaser, and a mortgage for the whole purchase money, payable in three years without interest, was executed by the purchaser. On the 2nd of June, 1838, *Sharp*, the purchaser, conveyed his equity of redemption in this with other land to *Thomas Kay*, a merchant of Montreal. No money having been paid *Drake* filed his bill to foreclose in 1842, making *Sharp* defendant, but omitting (evidently through mistake) to make *Kay* a defendant, and on the

(*a*) 21 Gr. 534.

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19th of August, 1845, a final order of foreclosure was obtained against *Sharp*. In December, of the following year, *Drake* sold to one *Steers*, who dealt with the land as owner and paid the taxes upon it. In October, 1854, *Steers* mortgaged to the defendant *Wilson*, and default having been made in payment of the mortgage money, *Wilson* filed a bill to foreclose and obtained a final order of foreclosure on the 25th of September, 1860. Subsequently he sold to the other defendant. Mr. *Wilson* paid a very large amount for taxes, in all $1354, a large portion of which was on account of drainage made by the municipality, the land lying very low and a large portion of it being before drainage unfit for cultivation.

It is in evidence that the land was sold originally at about its value. No payment either on the mortgage or for taxes was ever made by *Thomas Kay;* he died recently. The present suit is by his heir-at-law, who is also devisee and executor under his will; and he says in his evidence that he never heard of these lands till June of the present year, when he found the conveyance from *Sharp* among his father's papers.

Judgment.

It appeared to me at the hearing, and it still appears to me, that the real position of *Drake* and *Sharpe* was that of vendor and purchaser, who chose to put their transaction of sale and purchase into the shape of conveyance and mortgage, but the relation of vendor and purchaser still subsisting between them, and that the real position of *Thomas Kay* was that of assignee of the purchaser.

It is too clear for argument that if the purchase had remained *in fieri* and the assignee of the purchaser had come now to this Court to complete his purchase, his bill would be dismissed. It would be out of the question, under all the circumstances that have occurred, to permit him to claim as purchaser. Yet that is precisely what he is doing under the name of redeeming the mortgage given for purchase money.

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Nothing is more probable than that *Kay* abandoned the intention, if he ever entertained it, of completing the purchase. If he did not, his plain duty both as purchaser and mortgagor was, to pay the purchase money, or, at least, the interest upon it, and to pay the taxes. All this he has neglected to do for over forty years; very onerous payments have been made by Mr. *Wilson;* he has since sold; improvements have been made, and other interests have sprung up.

There does not appear to me to be a *scintilla* of equity in the plaintiff's case, and to allow him now to pay his purchase money under the name of redeeming his mortgage would be very inequitable to the defendants. In my opinion the Court has power to refuse redemption where it is just to refuse it, and would work injustice to grant it, and, in my opinion, this is such a case.

This is shortly the ground upon which at the hearing I thought the bill should be dismissed, and further consideration has confirmed me in the opinion that I then expressed.

Judgment.

The bill is dismissed, with costs.

The plaintiff would probably have failed upon another ground, if it had been taken by answer, viz., that *Steers* was an innocent purchaser, for though the conveyance *Drake* to *Sharp* and the mortgage back were registered, and registration was notice at the date of the mortgage to *Wilson;* registration was not notice at the date of the purchase by *Steers* from *Drake.*

Taking the view of the case that I do, I express no opinion upon the other points argued.

SOLICITORS.—*MacMahon* and *Gibbons*, London, for plaintiff; *Atkinson* and *Fraser*, Chatham, for defendant *Hardy; Armour* and *Holland*, Cobourg, for defendant *Wilson; Douglas*, Chatham, for defendant *Blackburn.*

1876.

BOTHAM v. ARMSTRONG.

Insolvent—Indorser—Preferred creditors—Sec. 133 of the Insolvent Act, 1875.

A trader being in embarrassed circumstances, sold out his business, and out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, and shortly afterwards went into insolvency. The evidence did not shew that the indorser was aware or was party to the payment in any way, and it was by no act of his that the note was so paid.

Held, under the circumstances, that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note; but,

Where the payment of a note had been procured by the indorser, he was under the 89th section of the Insolvent Act of 1869, [in effect the same as section 133 of the Act of 1875], held liable to make good the amount thereof.

This was a suit to compel the defendant to make good the amount of a promissory note on which he was an accommodation indorser for his brother, the insolvent.

The cause came on to be heard at the sittings of the Court in London, at the autumn sittings of 1876.

Mr. *Gibbons*, for the plaintiff, relied upon the 133rd section of the Insolvent Act of 1875, as entitling the assignee to call upon defendant to make good the amount of the note.

Mr. *J. W. Bowlby*, for the defendant.

Judgment. Nov. 8th.

BLAKE, V. C.—The defendant was indorser on a promissory note made by his brother, the insolvent. This note matured on the 19th of October, 1875. In the previous September the insolvent sold out his business, and out of the proceeds satisfied amongst other debts this note before it became due. It was not argued that the defendant was aware of the settlement of this note. He is still liable on another note which he indorsed for his brother. In the month of December, proceedings in insolvency were taken against the insol-

vent, and the assignee has filed this bill, not against *Watts & Co.*, the persons to whom the note in question was given, but against the indorser, the defendant, who on the evidence knew nothing of the payment of the note, and who thought from not receiving any notice of protest that it was settled. It was by no act of the defendant that the note was paid. If it were, the case might have been brought within *Churcher* v. *Cousins* (*a*), and *Churcher* v. *Stanley*.* No notice of dishonour of the note has been given to him. The holder could not now look to him for payment. Whatever may be the rights of the plaintiff against the persons who have received the money paid by the insolvent in satisfaction of this note, I cannot see any principle on which I can, on the evidence before

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Botham v. Armstrong.

(*a*) 28 U. C. R. 540.

* NOTE—The following is a copy of a memorandum in the note book of the late Vice Chancellor MOWAT, of his ruling in the case of *Churcher* v. *Stanley*, heard before him on circuit; and noted by him at the time:—

Judgment.

MOWAT, V. C.—*Hodgins* was confessedly insolvent at the time of the transfer of the notes; and I am satisfied that the transfer was made by him in contemplation of insolvency, within the meaning of the 89th section of the Act of 1869.

Then, what is the position of the defendant? Was there a transfer of the notes to him? He certainly got the benefit of the transfer as effectually as if it had been made to him directly a week previously. He was also a party to the transfer to the Bank. He induced the Bank to give up the existing note by indorsing the new notes after *Hodgins;* and by giving his own note for the balance.

In considering the question of fact, I lay aside the evidence of the defendant and *Hodgins* as, under all the circumstances, not entitled to reliance on this point.

I think that the defendant had cause for believing that *Hodgins* was unable to meet his engagements.

In *Churcher* v. *Cousins*, 28 U. C. R. 540, the transfer to the defendant appears to have been inferred from the fact of all parties, including the defendant, having gone together to the Bank and having been together at the time of the transfer to the Bank in payment of the note of the insolvent on which the defendant there was indorser. The defendant there does not seem to have indorsed the new note.

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me, make the defendant liable to pay it. I must dismiss the bill with costs.†

An inference, such as was drawn in that case from the facts proved, was in accordance with the policy of the Act, and tends to prevent evasion of the statutory provisions against preferences.

But here there are additional circumstances. The defendant was an actual party to the transfer; and he indorsed the new note, without which it probably would not have been accepted by the Bank.

Mr. *Simpson*, the cashier, says it was the defendant who delivered to him the notes; it was in that way Mr. *Simpson* treated the transaction at that time, as the Bank entries shew; and it was the defendant who gave the new notes which closed the old indebtedness. I think the Bank's view was not matter of form, but was in accordance with the reality of the transaction with the defendant. I think on the whole evidence that I should infer the existence of an antecedent agreement or understanding between the insolvent and the defendant, that the three notes should be applied so as to give the defendant a preference over other creditors. In short, I think that the facts warrant the inference that there was a sale or transfer of the notes either by way of payment, or as security for payment, within the meaning of the 89th section.

Judgment.

Decree for plaintiff for amount of the three notes, with interest from the time the same became due. No reference will be necessary. Plaintiff entitled to costs.

† This decree was affirmed on a rehearing, 12th December, 1876.

1876.

NASH v. GLOVER.

Public highway—Lengthened possession of original road allowance—Statute of Limitations—Extinction of right.

The public cannot release their rights; and there is no extinctive presumption or prescription: therefore where an original allowance for road had been taken possession of, and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:

Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same.

Examination of witnesses and hearing at Hamilton, at the autumn sittings, 1876.

The bill was filed to restrain the defendants, *George C. Glover* and *John Ira Flatt*, from taking possession of an original road allowance in the township of Saltfleet, and from removing the timber and other trees therefrom: the township council having sold the wood thereon to *Glover*, who subsequently sold the same to *Flatt*. The circumstances are fully stated in the judgment.

Mr. R. Martin, and Mr. *Lemon*, for the plaintiff.
Mr. B. Osler, Q. C., for defendant *Flatt*.
Mr. Moss, for defendant *Glover*.

PROUDFOOT, V.C.—This was a case heard at Hamilton, in which on all questions of fact I found in favour of the defendant, and only reserved the consideration of the effect that ought to be given to the possession by the plaintiff of an original road allowance, for a long term of years—forty or upwards. Judgment.

The original road allowance I found to be established as contended for by the defendant, and it has been in possession of the plaintiff or those he represents for the term mentioned above, but, within the last few years, the municipality of Saltfleet has passed a by-law for opening it.

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The survey of Saltfleet was made in 1788. In 1810 the Act relating to public highways, 50 Geo. III. ch. 1, was passed, by the 12th section of which it was enacted, that all allowances for roads made by the King's surveyors in any township, shall be deemed common and public highways, unless such roads have been already altered according to law, or until such roads shall be altered according to the provisions of that Act. By the 12 Vic. ch. 80, all the sections of that Act were repealed, as many of them had been before, except the 12th section.

The Consol. Stat. U. C. ch. 54, sec. 313, in effect re-enacted the 50 Geo. III. ch. 1, sec. 12; and section 333 provided that in case a person be in possession of any part of a Government allowance for road laid out adjoining his lot and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, &c., such person shall be deemed legally possessed thereof as against any private person, until a by-law has been passed for opening such allowance for road, by the council having jurisdiction over the same. A similar enactment is to be found in the Municipal Act of 1866, sec. 335.

Judgment.

I apprehend that under these Acts there is no power in the executive to extinguish an original road allowance; that the only mode in which that can be accomplished is, the manner pointed out by the Act. The road allowances are perpetual, until altered or extinguished by the proper legal authority. The Acts recognize the power of the municipality to open road allowances, notwithstanding possession has been had.

In *Re McMichael* and *The Corporation of the Township of Townsend* (*a*), was an application to quash a by-law to open a road allowance. A travelled road had been opened adjoining the original road allowance, and used since 1824, and the road allowance had been enclosed since 1858, a period of fourteen years. The Court refused to quash the by-law.

(*a*) 33 U. C. R. 158.

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The possession there, indeed, was only for fourteen years, but the language of the statute and the principle of the decision would apply to any length of possession.

In *Dawes* v. *Hawkins* (*a*),, a highway had been abandoned and enclosed in part for forty-four years, and entirely for twenty-five years, and another travelled by the side of the original road. *Erle*, C. J., says, "The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land, by reason of a wilful obstruction, is no more the user of a highway as of right than the user of a deviation over the adjoining land by reason of the highway being founderous." And *Byles*, J., says, "It is also an established maxim, 'once a highway, always a highway.' For the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute."

Judgment.

These observations are peculiarly applicable to the present case. The travelled road was supposed to be the original allowance, and the parties using it deviated without knowing it, and such user it seems would not give them the right to continue to use the deviating line, it not being a user as of right, nor would it amount to an abandonment of the original road allowance, although that would be inoperative, as the only means of extinguishing a highway is by the modes pointed out under our statutes.

The case of *Rex* v. *Allan* (*b*), was referred to as a clear authority that the Crown can change existing road allowances. In that case part of what was laid out as Lot street, in what is now the city of Toronto, was, on account of a large ravine and creek with some wet spots,

(*a*) 8 C. B. N. S. 848; 7 Jur. N. S. 262. (*b*) 2 O. S. 90.

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ordered by the Governor in Council to be sold, and it was sold to the adjoining owner in 1798, who enclosed it. At that time the only statute on the subject was the 33 Geo. III. ch. 4, (1793) which applied to the laying out, mending and keeping in repair the public highways and roads within the Province; and it was held by the Court not to apply to the street in question, as it was not a highway when the Act passed, and was not laid out by Commissioners under that Act. The statute of 1810 had not yet been passed, so that there was nothing to prevent the Crown granting the road allowance if so minded, and the Act of 1810 was not retrospective: *Field* v. *Kemp* (*a*), is to the same effect.

This whole subject was investigated in *Regina* v. *Hunt* (*b*), and it was held that after a road has once acquired the legal title of a highway, it is not in the power of the Crown, by grant of the soil and freehold thereof to a private person, to deprive the public of their right to use the road.

Judgment.

And in *Mountjoy* v. *The Queen* (*c*), it was decided that a patent granted of land, part of which included a street laid out two days before the patent issued, did not affect the survey which had been made of the road; and as the road had been established under the Act of 1810 and had not been altered according to that Act, that the patent did not and could not make a grant of it; and that the party who had taken possession of it was guilty of a nuisance for the obstruction of the highway.

There are other cases to the same effect, and they establish that an original road allowance cannot be extinguished except by proceedings under the Acts referred to; that a grant even by the Crown cannot extinguish it; that the right of the public remains *in perpetuum;* though it may lie dormant, it may be revived, until steps under the Acts have killed it.

I do not find, however, that the Crown intended to grant

(*a*) 3 O. S. 374.
(*b*) 16 U. C. C. P. 145.
(*c*) 1 E. & A. 294.

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or have granted the original allowance to anyone. The description of lot 27 begins at the north-west angle of the lot; then south 18° west 50 chains, more or less to the allowance for road in rear of the said concession; then south 72° east 20 chains, more or less, *to the allowance for road between lots 27 and 26,* (the road in question); then north 18° east 50 chains to the allowance for road in front of the said concession; then north 72° west 20 chains, more or less, to the place of beginning. But I understand it to be contended that the site of the original allowance between lots 27 and 26, as established by the survey of *Passmore*, does not give 20 chains to the allowance for road between the lots. In such a case the patent will be construed in the manner pointed out by Sir *J. B. Robinson*, in *Dixon* v. *McLaughlin* (*a*): "I consider the effect of the manner in which this line is laid down in the patent is, that you are to go on the course mentioned 35 chains and 50 links unless you find that you sooner come to the allowance for road between lots 30 and 31, in which case you are to stop when you get there, or if you find that the distance to the allowance is more than 35 chains 50 links you are still to go on to the allowance, which, wherever you may find it, is to be your guide, and not the distance expressed."

Judgment.

The bill is dismissed, with costs.

On the 30th of March, 1872, the defendant applied to Vice-Chancellor STRONG to postpone the hearing of this case until after the trial of an action for trespass, and an action of replevin brought to try the same question as that in this suit, unless the plaintiff submitted that these actions should be dealt with as the Court might direct, their decision being dependent on the result of this cause. The plaintiff, by his Counsel, consented to be bound in the actions by such decree in this suit and to abide by such order as this Court might make in the actions.

(*a*) 1 E. & A. 370.

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The decree being in favour of the defendant, verdicts in these actions will be entered for him.

SOLICITORS.—*Martin* and *Carscallan* for plaintiff; *R. R. Gage*, for defendant *Glover; Osler, Wink*, and *Gwynne*, for defendant *Flatt.*

RE WHITE—KERSTEN V. TANE.

Undue influence—Bona fides—Mental capacity.

W., the holder of a policy of insurance on his life, who had fallen into habits of intemperance, which greatly enfeebled his bodily health, although his mental faculties remained sufficiently unimpaired to enable him to understand business, assigned this policy to T., his brother-in-law, a clergyman, for his own benefit; and on the following day executed his will, appointing *T.* his sole executor, and thereby bequeathed his effects, which were of but trifling value, to several of his relatives. No entry of the assignment of the policy was made in the books of the insurance company, and the premium afterwards paid was paid in the name of *W. T.*, on applying for payment of the insurance money, represented himself as the assignee and executor of the deceased.

Held, on rehearing, affirming the decree of BLAKE, V. C., as reported *ante* vol. xxii. p. 547, that the circumstances were not such as shifted the onus of proof, and called for evidence on the part of *T.*, that the assignment was *bona fide*, and that he had not exercised any influence over the deceased in obtaining the same.

Statement. The facts of this case are fully stated in the report on the original hearing, *ante* volume xxii. page 547. After the decision there reported the plaintiff reheard the cause before the full Court.

Mr. *Maclennan*, for the plaintiff. It is impossible to read the evidence in the case, and come to any other conclusion than that the deceased had the most unbounded confidence in the defendant, which placed him just in that position towards the testator that the Courts have always held require him to shew distinctly that the

testator fully understood and comprehended the nature of the step he was about to take; and that the act was one taken voluntarily, and without any influence on the part of the defendant, who was obtaining so great a benefit at the hands of the testator. 1876. Re White.

In considering the case in this view, it will not be out of place to consider for a moment the habits of life of the deceased; habits that had grown on him from year to year, and had at last rendered him almost totally helpless, and left him an easy prey to any designing or grasping person with whom chance might place him upon terms of intimacy.

In this state of things, having temporarily recovered, and feeling his own helpless condition, the testator looked about for some one in whose hands he could safely place his effects with a view of securing them against the rapacity of the world, and being unable to find any one in London willing to befriend him, and in whom he could repose such confidence, he writes to his brother-in-law, the plaintiff, residing in Brockville, who immediately proceeds to London, and on the first of the month (November) undertakes to place himself in relation to the testator in the position of assuming to act for him in reference to his affairs; and of advising him as to the best mode of disposing of his effects. On the day following we find in the books of Mr. *Shanly* a charge against the deceased, "for incidentally advising the Rev. Mr. *Tane* in respect to your affairs—Power of Attorney." On the 3rd the will is drawn, and defendant in his own evidence states, that *White* had requested him to act as executor. By this will the testator bequeaths everything to defendant as executor, giving nothing to him beneficially, leaving apparently all that he had to bequeath to those who had any claim upon his bounty: one of whom was a brother who shortly before had sought to borrow £5 from the testator, and which he was unable to advance him. *Tane* says he knew nothing of the will, but on the very next day following its execution Statement.

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he obtained from *White* an assignment of his policy of life assurance, which was in fact the most, if not the only valuable portion of his estate; and this it must be borne in mind was after the power of attorney had been signed appointing the defendant to act in reference to his affairs and to manage the auction sale of his effects. *Tane* now tells us in his evidence that the testator was always apprehensive of outliving his means; and yet at that very time he accepts from this weak, helpless man an assignment of an instrument, forming the greater portion of his assets, for his own individual benefit. Under all these circumstances, the evidence, it is submitted, establishes sufficiently that the assignment or transfer was not the voluntary act of the testator, and warrants the Court in calling upon the defendant to sustain the assignment by the clearest evidence of his utmost good faith in the transaction. The evidence shews that the defendant spoke to *Beddome & Dempster* before and after obtaining the assignment, and *Dempster* swears that *Tane* had said he "had succeeded in obtaining the assignment of the policy," &c., and *White* had applied to both of these witnesses to purchase the policy. The evidence of these gentlemen also tends to shew that the assignment was never intended as a gift; but simply as a security for any advances *Tane* might be obliged to make to *White* or on his account. Mr. *Shanly's* evidence tends also to the same conclusion. [PROUDFOOT, V. C.—Then you abandon the ground of undue influence, I presume?] Without going that length the plaintiff has a right to say that, if this is a correct view, then *Tane* must establish the advances he has made and the amount now due. On the other hand, if it was really a voluntary gift then it is contended that the transfer was obtained unfairly by the defendant. A very reasonable construction, however, to be placed upon the whole transaction is, that *White* was, as the evidence very plainly shews he was, settling up his affairs; his will was made by which defendant was named his sole executor, and the assign-

Statement.

ment of the policy was in reality intended to be in aid of that will—that is, on the same trusts as are expressed in the will. The fact that no transfer of the policy was ever entered in the books of the insurance company is strong evidence of this; and the only premium paid subsequent to such transfer was paid in the name of *White*, so that one is led irresistibly to this conclusion. Indeed *Tane's* own statement is sufficient to justify the Court in requiring him to prove the *bona fides* of the matter. In the first place *Shanly* says he knew nothing of its object —and had only a vague impression that it was for a security, and that impression he retains till the present time. It may be reasonably asked: how did *Shanly* receive that impression? And it is only too plain from all the circumstances and evidence in the case that he was left under that impression from his conversations with the defendant himself. Then the defendant after the death of *White* applies to the company for payment of the insurance money, and makes his application not only as assignee but also as sole executor of *White*; had he not filled that character it would have been impossible for him to have obtained payment of the policy upon his own uncorroborated oath. In fact all three witnesses, *Beddome*, *Dempster*, and *Shanly*, agree substantially in their version of the transaction; the only contradiction, or even implied contradiction, is, on the part of the defendant himself.

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The delay in instituting proceedings, though mentioned in the judgment, was not attributable to the plaintiffs— all of whom were under age at the time of their uncle's death, and two of them are infants still. Then again, they were not in a position to institute proceedings until probate was obtained by the defendant: besides *George White* was first made aware of the fact of the assignment by a letter from Mr. *Shanly* in June, 1867; the transaction, therefore, is not in any better position now than if it had been attacked immediately after it took place.

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The assignment really indicated being intended for the benefit of *White*, as both it and the policy were allowed to remain in the hands of Mr. *Shanly*, the solicitor for *White*. If intended for the personal benefit of *Tane* it would undoubtedly have been taken away by him for safekeeping: *Huguenin* v. *Baseley* (*a*), and cases there cited. *Coulson* v. *Allison* (*b*), *Harvey* v. *Mount* (*c*), *Hunter* v. *Atkins* (*d*).

Mr. *Moss*, for the defendant. The law as enunciated by the other side is correct, but the evidence in this case does not establish such a relation between the plaintiff and defendant, as calls upon the defendant to shew more than he has done in this case. The testator, although he had fallen into habits of intemperance, is shewn by Mr. *Shanly* to have been fully sensible of the step he was about to take; and the witness says he would not have permitted the testator to execute the assignment had he entertained any doubt as to his perfect capacity to do so.

Statement.

As to any influence having been exerted by the defendant it is out of the question, as the parties, although connections and on terms of friendship, were resident nearly four hundred miles apart—the one in London, the other in Brockville—and very rarely had any personal intercourse with one another. Then it must be borne in mind that *White* had become so reduced in circumstances that the payment of the annual premiums on the policy was an exceedingly heavy charge upon his limited means, and it is very questionable if he would have been able to pay the amount that would be necessary to renew it for another year. It is in evidence that it was with the greatest difficulty he had been able to make good the last annual payment. Under all these circumstances there was not anything at all surprising in the fact that *White* should have taken this means of

(*a*) 2 W. & T. L. C. 556.
(*b*) 2 D. F. & J. 521.
(*c*) 8 Beav. 439.
(*d*) 3 M. & K. 113.

evincing in some degree his sense of his brother-in-law's good will, who had kindly offered him a home in his house in the event of his becoming unable to maintain himself. There is really nothing shewn warranting the charge of undue influence against the defendant: *Pratt* v. *Barker* (*a*) is a strong case in favour of the defendant. 1876. Re White.

SPRAGGE, C.—I agree in the judgment pronounced at the hearing by my brother *Blake*, and that of my brother *Proudfoot*, on rehearing, which I have had an opportunity of perusing.

The transaction is quite intelligible under the circumstanes. It was not an unmixed benefit that was acquired by Mr. *Tane*. He took it with the intention of meeting the premiums payable on the life assurance. A premium was falling due shortly; the one for the previous year had been met by Captain *White* with difficulty and with money which he borrowed for the purpose. Mr. *Tane* had in effect offered him a home if he should need one, and Captain *White* would probably feel the weight of obligation to be lightened if he made over his policy of life assurance to Mr. *Tane*. Judgment.

Further, in the loss of his wife one great motive, probably the chief motive for keeping the policy on foot, had ceased to exist, and Captain *White* might well feel that he could not do better under the circumstances than to make over the policy to Mr. *Tane*. It was not, as I judge, a mere act of bounty; but what Captain *White* deemed probably the best and wisest thing that he could do. I entirely agree that there was nothing in the relations between the two to prevent Mr. *Tane* from accepting the assignment of the policy.

I agree that the decree should be affirmed with costs.

BLAKE, V. C., remained of the opinion expressed on the original hearing.

(*a*) 4 Russ. 507.

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PROUDFOOT, V. C.—I entirely agree in the judgment of my brother *Blake*, pronounced at the hearing.

I do not think the evidence establishes any such general fiduciary relation between the testator and the defendant as to require the application of rules different from those applicable between strangers to any transaction between them. The defendant was the testator's brother-in-law, but there seems to have been no great intimacy between them. They lived some 300 miles apart, and their intercourse was not frequent. The defendant visited the testator soon after his wife's death, and was asked by the testator to attend to the auction sale of his chattel property; and to enable him to do so a power of attorney was given to him. In regard to these chattels his position would probably have prevented him becoming the purchaser. But further than this the inability cannot extend. He was not a general agent. He had not the management of the testator's property, and in my opinion it would be an unprecedented stretch of incapacity from fiduciary relations to consider it applicable to the circumstances here.

Judgment.

But supposing this relation to have existed, and that it was incumbent upon the defendant to shew that the testator had independent advice, it seems to me he has done so. Mr. *Shanly*, the solicitor who prepared the documents, was employed by the testator, took his instructions from him, and saw him execute them. And Mr. *Shanly* testifies to his competency, and that he would not have allowed him to execute them had he not been competent.

On the argument we expresed our opinion that the evidence failed to establish any case of undue influence.

The decree should be affirmed with costs.

RE CREDIT VALLEY RAILWAY COMPANY AND SPRAGGE. 1876.

Railway company—Taking lands taken for railway—Arbitration—Costs.

Where arbitrators are appointed to award compensation for lands taken for the purposes of a railroad, and assess the damages sustained by the proprietors by reason of the severance of the lands, the arbitrators may properly take into consideration the increased value to the estate by reason of the construction of the railroad, although benefited only in the same way as other farms in the neighbourhood through which the railroad does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity of the lands, and which the Company had bound themselves to place there in consideration of a bonus paid by such town.

Although the Statute (C. S. U. C. ch. 66) directs that when the sum awarded for lands taken for a railroad is less than that tendered, the costs shall be borne by the owners; the same rule does not apply as to the costs of an appeal to this Court, they being then in the discretion of the Court, who, under the circumstances, dismissed an appeal without costs.

Statement. Dec. 6th.

These were two appeals from awards of arbitrators under the Railway Acts: one in regard to the compensation for lot one in the 9th concession of Blenheim; and the other in regard to lot three in the same concession. The appeals were brought under the statute 38 Vic. ch. 15, secs. 4 and 5, O., which gives the right of appeal to a Judge of the Superior Courts of Law or Equity, on any question of law or fact, who shall decide the question of fact upon the evidence as in a case of original jurisdiction.

The grounds of appeal were, that the awards were contrary to the evidence adduced before the arbitrators as to the amount of compensation to be paid for the land taken, and for the damages sustained by reason of severance, and the otherwise injuriously affecting the land of the petitioners by the exercise by the Railway Company of their statutory powers; that the award allowed compensation for the lands taken only, and allowed no compensation, or no sufficient compensation, for the damage sustained by taking the land or for damage done to the remaining land by reason of severance; and that in taking into consideration the increased

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value (if any) that should be given to the remaining lands by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, the arbitrators took into consideration matters which they should not have considered.

Mr. *H. O'Brien*, for the appellants.
Mr. *Wells*, contra.

Judgment.

Jan. 10th.

PROUDFOOT, V. C.—The Act incorporating the Credit Valley Railway Company, 34 Vic. ch. 38, O. embodied the clauses of the Railway Act, C. S. C. sec. 66, relating to "lands and their valuation," among others; and by the 35 Vic. ch. 25 sec. 5, O., it was enacted that arbitrators under the lands and their valuation clause in the Railway Act were authorized and required to take into consideration the increased value that would be given to any lands or grounds through or over which the railway will pass by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and to set off the increased value that will attach to the said lands or grounds against the inconvenience, loss, or damage that might be suffered or sustained by reason of the Railway Company taking possession of or using the said lands or grounds. And by section 6, the Act was made to apply to any railway company theretofore or which might thereafter be incorporated by the Legislative Assembly of Ontario.

A similar provision is to be found in *The Public Works Act* (*a*), *The Dominion Railway Act of* 1869 (*b*), *The Great Western Railway Act*, (*c*), *The Toronto Esplanade Act* (*d*), and probably in others.

The award is made by two of the arbitrators, the third, the one appointed by the owners, agreeing as to

(*a*) C. S. C. ch. 28, sec. 53; 9 Vic. ch. 37, sec. 29.
(*b*) Sec. 9, sub-sec. 18. (*c*) 9 Vic. ch. 81, sec. 26.
(*d*) 20 Vic. ch. 80, sec. 4.

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the value of the land taken (independently of the consideration of the same being taken as a strip and in order to be used for the purposes of the railway) at the rate of $65 per acre; but not agreeing as to the amount to be allowed as compensation for damages by reason of the piece being taken in a strip, and in order to be used for the purposes of the railway. The award states that the arbitrators took into consideration not only the value of the interest of the owners in the land taken, but also the damage to be sustained by the owners by reason of severance, and by the otherwise injuriously affecting the land not taken by reason of the exercise of the Railway Company of their powers, and also the question of the increase in value that would be given to any lands through which the railway will pass by reason of the passage of the railway through the same, and by reason of the construction of the railway; and then as to lot one, they award to the owners $225 for the land taken and damages; and as to lot three, they award $160 for the land taken and damages, both sums being less than the sums offered by the company before the arbitration.

Judgment.

It does not appear whether the arbitrators gave the owners the benefit of the increase in value on the land taken, but as all the arbitrators agreed on the price, and no question on that point is raised by this appeal, I assume they did. Nor does the award specify how much was allowed for damages, nor what was deducted for increase in value. But it was not necessary that these should be specified, and so long as the arbitrators took into consideration the matters they were entitled to consider, their award cannot be disturbed, unless it is not warranted by the evidence: *The Commissioner of Public Works* v. *Daly* (*a*).

The English Railway Act does not authorize arbitrators to consider the increase in value of the property not taken and, without it, they cannot take such

(*a*) 6 U. C. R. 33 and 43.

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It was contended, however, that the "increased value" contemplated by the Act, means an increase to the particular land through which the road runs, and peculiar to itself, and not a rise in the value participated in by the tract of country generally through which the road passes; that it is unjust to make the owners of land taken pay for the increased value, while the adjoining owner shares in the increase and pays nothing towards it.

The language of the Act is very comprehensive. The arbitrators are to consider not only the increased value "given to lands or any grounds through or over which the railway will pass by reason of the passage of the railway through or over the same," which might, perhaps, bear the limited construction contended for; but also "by reason of the construction of the railway," which does not seem to me capable of such a limitation.

Judgment.

The clause in the Great Western Railway Act is, "That in all arbitrations under this or any other Act relating to the said railroad, the arbitrators shall take into consideration the benefit conferred on the property on which they are arbitrating, as well as the damage done to any particular portion thereof," which, though expressed in more general terms, I take to be in effect the same as that now in question.

In *The Great Western R. W. Co.* v. *Baby* (*b*), the late Sir *John B. Robinson*, in reference to this clause says, "It is very evident, I think, what is meant by the clause cited. We cannot expect it to be so literally and stringently carried into effect, as that the lands taken shall not in general be valued somewhat more highly than they would have been if there had been no railway, because it is hard to distinguish nicely how much of the general improvement in the price of lands may be attributed to that cause; but in this case before us, if not in

(*a*) L. R. 2 C. P. 638. (*b*) 12 U. C. R. 106 and 120.

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all the four cases, the arbitrators seem to have thought it just to make the company pay according to a valuation which would have been altogether imaginary and fictitious if it were not for the effect of what the company have done or are doing on the particular piece of land taken, or in its immediate vicinity." And at page 119, he says, "They," the arbitrators, "cannot have taken into consideration the benefit conferred on the property on which they were arbitrating, that is, on lots 79 and 80, or such parts of them as still belong to the devisees." The same construction was adopted in three other cases reported in the same volume, the same company being plaintiffs, and *Hunt, Dougall, & Dodds*, defendants.

It seems to me plain, that the benefit to the property in these cases which the Court thought the arbitrators should have considered, was not confined to benefits peculiar to the land itself, a portion of which had been taken, but comprehended advantages from works in its vicinity in which all the neighborhood shared.

Judgment.

Under the Toronto Esplanade Acts it is clear that the increased value could not have been confined to the increase peculiar to the lots themselves, for the filling in of one lot, the others being left untouched, would have been an injury instead of a benefit, and the increase must have arisen from the work in which all shared the benefit. One cannot read the case of *The City of Toronto* and *Leak* (*a*), without seeing that each lot owner was receiving a benefit from the work done on property in the vicinity and had to pay for the extent to which his own lot was thus benefited.

As the Act requires me to decide upon the evidence as in the case of original jurisdiction, I have now to ascertain if the award be sustained by the evidence. There is a considerable apparent conflict of testimony, but it is more in appearance than in reality, the witnesses for the owners estimating the damages without taking into account the increase in value generally from

(*a*) 28 U. C. R. 223.

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the construction of the road. Some (*Hall*) thought the road would not benefit farmers, as it had no outlet, and was only to run to the city of Toronto; or, if a benefit, it would not benefit these lots more than the rest of the country. In truth, it is clear from the course of the examination throughout that these witnesses were asked only to value the increase in which the neighbourhood did not participate. One of them, *Brown*, on cross-examination was led to say, that the farm might sell for $12,000 if there was a station at Ayr; that it was possible the farm might be benefited by a station being near it. The farm having been valued by another witness, *Beattie*, at $11,000, *Brown*, on re-examination, says "When he spoke of the farm being benefited by the station, he meant that it would be benefited in the same way as other farms in the neighbourhood through which the railway does not pass." Dr. *Lett* says: "If there is a station at Ayr, the whole country will be generally benefited, but not these lots in particular."

Judgment.

The witnesses for the company took the general increase in value into account, and, I think, they were justified in so doing. There is evidence that lot one is increased in value, from the construction of the railway, $5 an acre, or $1,000 in all; and lot three, $2½ an acre, or $500 in all; so that the arbitrators may well have allowed nearly the highest amount the witnesses for the owners place the damage at, and yet have arrived legitimately at the sum fixed in their award by deducting the increase in value.

The increase in value is based to some extent on the supposititon of a station being placed at Ayr. It was stated, and not denied, that the company have become bound to place a station there in consideration of a bonus from the town; so that if the road is constructed at all there will be a station at Ayr. If the road is not completed within the time limited by their Acts, the lands will revert to the owners: *Grant* on Corp. 295. I think the arbitrators were justified in assuming that a station will be built there, as the basis of their award.

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The Statute, C. S. C. ch. 66, sec. 11, sub-sec. 12, determines how the costs are to be borne when the compensation awarded is less than that tendered; but as to the costs of this appeal I think they are in the discretion of the Court; and considering that the amount awarded was less than that tendered, and the conflicting evidence in regard to the amount of compensation, the appeal is dismissed, without costs.

SOLICITORS.—*Robinson, Robinson,* and *O'Brien,* for the appellants. *Morrison, Wells,* and *Gordon,* for the company.

WIGLE v. MCLEAN.

Trustee and cestui que trust—Declaration of trust—Parties.

A mortgagee executed a declaration that he held the security in trust to pay the first instalment payable thereon to two creditors named and out of the balance secured by the said mortgage "remaining after the said first payment of $3,510 to pay over to each one of the parties hereinafter named * * * [naming eight creditors whose claims amounted to the whole of the balance secured by the mortgage], it being expressly understood and declared that each of the said instalments as they shall become due and paid * * * shall be assigned and distributed ratably amongst each of the said parties, and in the just proportion that each of their debts bears to the aggregate of the sums and the amount of each instalment:"

Held, that neither of the eight named creditors was entitled to share in the first instalment, and that the amount of each of the other instalments as received was to be ratably divided amongst them.

Where a bill was filed by one of two creditors, both of whom claimed to be paid in priority to the other creditors, of an estate, against the representatives of the trustee and one of several creditors who claimed that all should share *pro rata*:

Held, that all parties interested were sufficiently represented.

Motion for decree.

Statement.

On the 15th April, 1871, *Thomas Pickcupp, Richard Eede,* and *Joseph Dixon,* executed a mortgage upon the property known as the Kingsville Woollen Mills, to

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secure $10,444, and interest at 10 per cent. per annum. The mortgage was made to one *George Eede*, who on the same day executed a declaration of trust in which he declared that he held the mortgage in trust for the plaintiff, the defendant *Jacob Eede* and other persons named therein. This declaration of trust is sufficiently set out in the judgment. *Theodore Wigle* filed the bill to have the declaration of trust construed, and to have the premises sold, and proceeds divided among the parties entitled thereto.

Nov. 22nd.

Mr. *Arnoldi*, for the plaintiff.

Mr. *Moss*, for the defendant *Jacob Arner*.

Mr. *J. B. McArthur*, for the defendant *John Arner*, the administrator of *George Eede's* estate.

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

Mr. *Moss* objected that several of the persons interested in the estate, were not before the Court, contending that all the *cestuis que trustent* should be parties to the suit.

Mr. *Arnoldi* contended that the trustee being represented by his eldest son and the administrator of his estate, and the plaintiff representing himself and *Solomon Wigle*, who it was alleged should be paid in priority to the other *cestuis que trustent*; and *Jacob Eede*, who claimed that all parties should share *pro rata* in the proceeds of the sale, representing himself and all others, besides the plaintiff and *Solomon Wigle*, all parties and interests were sufficiently represented.

BLAKE, V. C., considered all parties were sufficiently represented.

The cases cited are mentioned in the judgment.

Judgment.

Jan. 24th.

BLAKE, V.C.—The bill states that *Thomas Pickcupp*, *Richard Eede*, and *Joseph Dixon*, on the 15th of April, 1871, gave a mortgage on the premises in question, to *George Eede*, to secure payment of $10,444, payable as follows: $3,510 on the 1st of August, 1872, and the remaining $6,934 in seven equal successive annual payments,

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commencing for the first on the 1st day of August, 1873; that *George Eede*, by an instrument bearing the same date, declared that he held the said premises on the trusts following: "In the first place, out of the first payment of $3,510 and the interest accrued upon the said sum at the rate of 10 per cent., expressed in the said mortgage, to pay over to *Theodore Wigle*, of the township of Gosfield, Esquire, the sum of $2,402.66 and interest upon the said sum at the rate of 10 per cent., from the day of the date of these presents, and from and out of the said first payment, to pay over to *Solomon Wigle*, of the said township of Gosfield, Esquire, the sum of $1,107.34 together with interest thereon, at the rate of 10 per cent. per annum from the date of these presents. And from and out of the sum of $6,934, the balance of the moneys secured by the said mortgage, remaining after the said first payment of $3,510, to pay over to each one of the parties hereinafter named the sum of money set opposite to his name, respectively, together with interest thereon at the rate of 10 per cent. per annum, from the date of these presents, that is to say," &c. Then follow the names of eight creditors whose claims amount to the seven instalments, or $6,934, as the amounts payable to the two creditors firstly named amount to $3,510, or the sum payable as the first instalment of the mortgage. Thereafter is found this clause in the declaration "And it being expressly understood and declared that each of the said instalments as they shall become due and be paid, together with interest, payable with each one of the said instalments shall be assigned and distributed ratably amongst each of the said parties, and in the just proportion that each of their debts bears to the aggregate of the sums and to the amount of each instalment." This clause cannot refer to the first instalment, which, by an earlier clause in the declaration, is specifically applied to the debts due *Theodore* and *Solomon Wigle*. Reading the clause in such a way would be repugnant

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to the portion of the instrument which provides that the instalments shall not be all applied ratably in satisfaction of such creditors, and gives the last named creditors the first instalment as a means of satisfying their debts. Doubtless it was intended that in place of one of the eight creditors exhausting one of the seven instalments in payment of his demand each of these seven instalments should be ratably apportioned until with the last of them, the balance due these creditors should be satisfied. On the question of priority of payment demanded by the plaintiff, the only point argued before me, I have looked at *Page* v. *Leapingwell* (*a*), *Wright* v. *Parker* (*b*), *Cullum* v. *Erwin* (*c*), *Mohler's* Appeal (*d*), *Donley* v. *Hays* (*e*), *Cowden's* Estate, (*f*), *Hilliard* on Mortgages, vol. i. 245; *White & Tudor's* Leading Cases, (Am. Ed.) 3 , 369 and 647; and *The Bank of England* v. *Torleton* (*g*). In this last case the following seemingly correct deduction is drawn from the authorities on this point: "Hence it may be regarded as settled, that all debts secured by mortgage and due at the date of the decree of foreclosure, unless a preference be given to some of them by the terms of the mortgage deed, or unless the original creditors in assigning any of them designed to impart a right of prior satisfaction to the assignee, should be paid *pro rata* in case of a deficiency in the mortgage fund to pay the whole of them, whether the controversy be between the surety of the mortgagor and mortgagee, or between the different assignees of the latter." This conclusion tallies with that found at page 647 of the Leading Cases where it is said "The cases agree, that the question is one of contract or intention, and only differ as to the meaning which should be deduced or imputed, when from negligence or design none has been expressed."

Judgment.

(*a*) 18 Ves. 466.
(*b*) 2 Aik. 212.
(*c*) 4 Ala. 452.
(*d*) 5 Barr, Penn. 419.
(*e*) 17 Ser. & R. 400.
(*f*) 1 Barr, Penn. at p. 378.
(*g*) 28 Miss. 173.

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The present case is by no means clear; but I cannot help thinking that, where a creditor accepts of a settlement of his debt by means of an instrument which in referring to his claim, says, "In the first instance, out of the first payment" it is to be paid—and which proceeds to say that out of "the balance of the moneys secured by the said mortgage remaining after the said first payment," certain other creditors are to be paid—and when the instrument proceeds to declare that these instalments shall be divided ratably amongst these latter creditors, and does not embrace the first instalment, nor the creditors to be paid thereout in such ratable appropriation, the creditors firstly named are not intended to occupy the same position as those to be paid out of "the balance." Some weight might be given to those expressions whereby the instrument of trust deals with the one set of creditors in different terms from the other; and I do not see that I can give any other force to them than such as will allow the plaintiff and his co-creditor the priority which is claimed for them. The plaintiff is entitled to this declaration and to a decree making it effective. Judgment.

The terms of the decree were not discussed; if any difficulty arises in settling the minutes, it can then be disposed of.

SOLICITORS.—*Cameron* and *Caswell*, for the plaintiff; *Bethune*, *Osler*, and *Moss*, agents for *Horne* and *Killan*, Windsor, for defendant.

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ADAMS v. LOOMIS.

Husband and wife—Alimony suit—Valuable consideration—Married Women's Property Act, 1872.

Held, affirming the decree pronounced *ante* volume xxii page 99, that the compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife.

Held, also affirming the same decree, that a wife's conveyance of her equitable estate is valid without the husband joining in the deed; and, the husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband.

The Married Women's Property Act, 1872, applies to cases where lands have been acquired by married women after the passing of that Act, although the marriage took place before the Act came into force. [Per PROUDFOOT, V. C.]

After the decision in this case, which is reported, *ante* volume xxii., p. 99, the defendant set the cause down to be reheard.

Argument.

Mr. *J. D. Armour*, Q. C. and Mr. *Maclennan*, Q. C., for the defendant. There is nothing shewn in this case establishing a valid consideration for the agreement entered into between *Loomis* and his wife: *Westmeath* v. *Salisbury* (*a*). The contract stated in the bill is in itself void, as having been entered into between husband and wife; and even had it been valid by having had a trustee named between the parties it would have been rendered void by their subsequently cohabiting and living together, which the evidence shews they did for at least thirteen months after the execution of the so-called agreement, which really was not binding in any way at law. There is nothing to indicate that what was done was done with a view of investing anything for the separate use of the wife.

The question really is, whether there is any equity to compel the defendant to complete the transaction. The rule of the Court is against this where the party's conduct has not been marked by the strictest good faith; when that is not established it will leave parties to the effects of their contracts. Mrs. *Loomis* could not have

(*a*) 5 Bligh. N. S. 339.

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been compelled to bar her dower, and, therefore, the whole agreement fails: *Vansittart* v. *Vansittart* (*a*). Again, by the agreement, indorsed notes are to be given by the wife; this portion of the arrangement clearly the Court could not enforce, as the wife could not be compelled to procure indorsers. In *Vansittart* v. *Vansittart*, one stipulation was, that a trustee was to be procured, and the Court there held that this could not be enforced. The agreement (Exhibit A.) prepared by the defendant affords convincing evidence how utterly incapable the defendant was of protecting himself in any transaction. By the agreement then made the defendant was about parting with a large portion of his property; it was extremely material, therefore, that he should understand his rights, and that his attention should be called to the arrangements necessary to be made for his benefit and protection.

The case of *Maguire* v. *Maguire* (*b*), is a clear authority for the position, that although chattels are vested in a married woman, this of itself does not confer upon her any *jus disponendi*. Therefore the assumed deed to *Adams* became utterly void; this being so, *Adams* took no interest whatever in the chattels. Besides a bill of sale of "one [illegible]f of chattels," &c., is void for uncertainty; it certainly never was intended to vest in the wife an undivided one-half of the chattel property; and it never was separated.

Argument.

One ground alleged for upholding the decree in this case is, that the defendant had acted in such a manner as to lead plaintiff to complete his purchase; that, however, is clearly erroneous, as the evidence shews that the defendant procured the services of three or four persons to see plaintiff, and endeavour to persuade him to withdraw from the contemplated purchase.

If the decree here is upheld, it will be simply establishing that a married woman can in equity enter into

(*a*) 2 D. & J. 249.

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

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a binding contract, which certainly could not be done at law. *Bindley* v. *Mulloney* (*a*), *Hope* v. *Hope* (*b*), *Gibbs* v. *Harding* (*c*), *Hamilton* v. *Hector* (*d*), *Lloyd* v. *Lloyd* (*e*), *Bensley* v. *Burden* (*f*), *Right* v. *Bucknell* (*g*), *Featherstone* v. *McDonald* (*h*), *Merrick* v. *Sherwood* (*i*), *Steels* v. *Hullman* (*j*), *Mitchell* v. *Weir* (*k*), *Royal Canadian Bank* v. *Mitchell* (*l*), *McCargar* v. *McKinnon* (*m*), *Frazer* v. *Hilliard* (*n*), *Dingman* v. *Austin* (*o*), *McFarlane* v. *Murphy* (*p*), *Re Hilliker* (*q*), *McCandy* v. *Tuer* (*r*), were, amongst other cases, referred to.

Mr. *Boyd*, Q. C., for the plaintiff. The rule of equitable estoppel applies here. The acts of the defendant subsequent to the agreement evidence a scheme on his part to defeat his own deed. A very pertinent case on this point is that of *Henderson* v. *Henderson* (*s*). There is nothing in this agreement against the policy of the law, as the parties might again come together: *May* on Fraudulent Conveyances (*t*), *Shepard* v. *Shepard* (*u*), *Moore* v. *Ellis* (*v*), *Marsh* v. *Milligan* (*w*), *Nutbrown* v. *Thornton* (*x*), *Bishop* on Married Women (*y*), *Wright* v. *Wright* (*z*), *Acre* v. *Livingstone* (*aa*), *Doe Hennesy* v. *Meyers* (*bb*).

Judgment.

SPRAGGE, C.—A point strongly contested in argument by counsel for defendant on the rehearing was, whether

(*a*) L. R. 7 Eq. 343.
(*b*) 8 D. M. & G. 731.
(*c*) L. R. 5 Ch. 336.
(*d*) L. R. 6 Ch. 701.
(*e*) 2 C. & L. 592.
(*f*) 2 S. & S. 519.
(*g*) 2 B. & Ad. 278.
(*h*) 2 U. C. C. P. 262.
(*i*) 22 U. C. C. P. 476.
(*j*) 33 U. C. R. 471.
(*k*) 19 Gr. 568.
(*l*) 14 Gr. 412.
(*m*) 15 Gr. 361.
(*n*) 16 Gr. 101.
(*o*) 33 U. C. R. 190.
(*p*) 21 Gr. 80.
(*q*) 3 Ch. Cham. 72.
(*r*) 24 U. C. C. P. 101.
(*s*) 19 Gr. 464.
(*t*) App. 514.
(*u*) 7 John C. R. 57.
(*v*) Bun. 205.
(*w*) 3 Jur. N. S. 979.
(*x*) 10 Ves. 159.
(*y*) Sec. 717.
(*z*) 1 Ves. Sr. 409.
(*aa*) 26 U. C. R. 282.
(*bb*) 2 O. S. 424.

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there was a consideration for the agreement between the husband and wife, which was carried out in the conveyances subsequently executed. It seems to me clear that the withdrawal of the suit for alimony, the bill in which accused the husband, to use his own words, of acts which would have entitled his wife to alimony, is a sufficient consideration. It was for the husband to judge whether the grounds stated in the bill were valid; they were such as to induce him to enter into the agreement in question. In *Wilson* v. *Wilson* (*a*), referred to by my brother *Blake*, the husband contended that the wife could not succeed against him in her suit in the Ecclesiastical Court; but the Court held that he was the person to judge of the sufficiency of his reasons for entering into the compromise, and held him bound by his agreement.

The nature and character of the estate which the wife was to have under the agreement, is in my view of the case a question of paramount importance. The second agreement, the one upon which the conveyances were founded, was drawn up by the husband himself after a great deal of discussion and deliberation, and after changes in writing made by himself, in order to get it to express exactly what he intended. It is a paper very carefully, though not scientifically drawn. It is impossible to read it, and the evidence given in reference to its preparation and completion and the surrounding circumstances, without seeing that the husband and wife dealt with one another upon the footing of an absolute and equal division between them of the estate, real and personal, which was in law the property of the husband, intending that, upon the agreement being carried out, the husband should thereafter hold one portion and the wife the other portion, each entirely independent of the other; that allotted to the wife to be as free from control or claim on the part of the husband, as that allotted to the husband was to be free from claim of any kind on the part of the wife, and each to deal with and dispose of his and

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(*a*) 1 H. L. 538 & 5 H. L. 58.

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her portion as he and she might desire. That they intended it to be an absolute division is further evidenced by the fact of a sum being to be paid by the wife, $1,073, by way of owelty of partition. Their dealing was very much of the character of that of two tenants in common, meeting and agreeing upon a partition; and it has not unfrequently been the case in this country, where property has been acquired during perhaps a long married life, to regard it as earned by the joint labour of both, and to deal with it as in reason belonging equally to each; and such considerations would seem to have been in the minds of these parties. I do not mean to say that the Court could carry out such an agreement for partition if left incomplete, but here was the consideration of the withdrawal of the suit for alimony; and taking into account the relations of the two parties, an absolute division of the property would appear to them to be reasonable, and the evidence shews that they intended it; and that the portion allotted to the wife should be her "separate property" in the strict technical sense of the term.

Judgment.

That being the case, she had, according to what I conceive to be the settled doctrine of the Court, the right of alienation. The point was a good deal discussed in connection with the clause, introduced in proper cases against anticipation, in *Tullett* v. *Armstrong* (*a*), at the Rolls, and upon appeal before Lord *Cottenham* (*b*), and was expressly decided by the majority of the Court in Ireland, in the affirmative, in *Adams* v. *Gamble* (*c*). The point was decided in the same way by Lord *Westbury* in *Taylor* v. *Meads* (*d*). In his judgment (*e*), the Lord Chancellor quotes the language of Lord *St. Leonards* in his book on Powers (*f*), "When a married woman has property settled to her separate use, without any restraint on alienation, she is deemed a *feme sole*

(*a*) 1 Beav. 1.
(*b*) 4 M. & C. 377.
(*c*) 12 Ir. Ch. 102.
(*d*) 34 L. J. Chy. 203.
(*e*) at 208.
(*f*) Ch. 5, sec. 1, subsec. 41.

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and may dispose of it accordingly;" and Lord *Westbury* adds "I must hold therefore that a *feme covert* not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos*, or by will."

I think, therefore, that the aid of the Married Women's Act, 1872, is not required to enable the wife to alien the property allotted to her upon the agreement to which I have referred, and which was the subject of the conveyances in her favour of 21st January, 1873. I prefer to rest my judgment as to the power of alienation in the wife upon this ground rather than upon the statute.

I agree with my brother *Blake*, that, assuming that there was no estoppel at law, there was still a good assignment in equity; and that that is all that is necessary for the plaintiff's case.

I have not gone over the whole ground taken by my learned brother in his judgment. I need only say that, with the exception of his construction of the Act of 1872, as to which I express no opinion one way or the other, I agree in what he has said.

Judgment.

BLAKE, V. C., remained of the opinion expressed on the original hearing.

PROUDFOOT, V. C.—I think the agreement between *Loomis* and his wife was not voluntary. The stopping of the prosecution of the suit for alimony, and her promise to pay $1,073, the difference in the value of the divisions of the land, appear to me to form a sufficient consideration to support the arrangement between them.

I also think that the agreement contemplated each having an interest of the same extent in the respective pieces of property. *Margaret* was *to have* the east half, and *C. H. Loomis* was *to have* the west half. The same language is applicable to each, and if the husband's estate was to be a fee so was the wife's. It is true that

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the offer of the 24th December, made by the husband, was of a lease of 200 acres. But this was modified by the subsequent agreement by which she was to get 100 acres, as I think, in fee simple. There is nothing to shew that she was merely to have the dominion over the property. This agreement was effected as to the land by the husband conveying the 100 acres to *Hilton* for the consideration of $1.00 on the 21st January, 1873, and *Hilton* on the same day conveying to the wife. The deed to *Hilton* is to him, his heirs and assigns for ever, giving an estate in fee. If it had been intended to limit the estate of the wife as is now contended, I would have expected to find some indication of that intention in this deed, and that only so great an estate should be given to *Hilton* as he was to give the wife; and this deed to *Hilton* does not seem to me to be at variance with the intention of the parties.

Judgment.

This property then became the separate property of the wife. I cannot read the Acts passed for increasing the capacity of the wife with regard to property as having put it out of her power to acquire property to her separate use by post-nuptial settlement. Being separate estate under agreement with the husband the usual incidents of such property attach, and she could contract for the sale of it, and convey it without joining her husband. *Place* v. *Spawn* (*a*).

I am very much inclined to think that *Dingman* v. *Austin* (*a*), and *McCready* v. *Higgins* (*c*), have been pushed much further than the Judges who decided them intended. To make the Act apply to all married women on the date it came into operation is not to make it operate retrospectively. It is only when these married women had property before the passing of the Act, in which their husbands under the then state of the law had an inchoate estate, that applying it to them would make it operate retrospectively. And this was what

(*a*) 7 Gr. 406. (*b*) 33 U. C. R. 340.
(*c*) 24 U. C. C. P. 233.

these cases determined. But when the wife had no property before the Act, but acquired it afterwards, I see no reason why the Act should not apply, and if it does apply I think the statute confers on the wife's property all the qualities of separate estate, including among them the power of alienation by a deed in which the husband does not join.

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Whether *C. H. Loomis* is estopped by his deed or not, upon which I express no opinion, I think he is estopped by his conduct from denying the wife's right to sell to *Adams*. He knew of the agreement with *Adams*, and permitted *Adams* to go on with the purchase, and gave no intimation of any infirmity in the title of the wife, or of any right that he had to impeach it; and, indeed, he requested *Adams* to befriend him so that he might get paid the $1073, in effect out of the purchase money. To permit him to turn round now, and say his wife had no power to sell, would be to enable him to commit a fraud, and to inflict a heavy loss of money invested with his own sanction.

Judgment.

I think the decree should be affirmed, with costs.

SOLICITORS.—*Blake*, *Kerr*, and *Boyd*, agents for *Smith* and *Symons*, Cobourg, for plaintiff; *Bethune*, *Osler*, and *Moss*, agents for *Armour* and *Holland*, Cobourg, for defendant *C. H. Loomis*.

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HISCOX v. LANDER.

Nuisance—Executive Councillor—Commissioner of Public Works—Parties—Practice—Re-hearing.

By the statute 32 Vic. ch. 28, O., all the public buildings and works are placed under the control and management of the Commissioner of Public Works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the Legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London Lunatic Asylum was erected under the provisions of an Act of the Legislature, and the drains of it were constructed in such a manner as to discharge into a stream crossing the lands of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was, to carry the sewage to the river Thames, at an estimated cost of $30,000:

Held, that the Commissioner of Public Works could not be restrained by injunction from allowing the nuisance to continue. [SPRAGGE, C., dissenting].

Per SPRAGGE, C.—The stream which had thus been polluted had not been acquired by the Commissioner under the Act, and it was not a drain to carry off water from a public work which had been constructed by the Commissioner, and therefore it was not such an act as the Statute authorizes, even if it had been properly done. *Semble.*

To such a suit the medical superintendent of the asylum is not a proper party.

Where a cause is re-heard at the instance of some of the defendants against whom relief has been granted, it is necessary that a defendant against whom the bill was dismissed at the original hearing should be before the Court on the re-hearing

This was a cause heard before the Chancellor at the sittings of the Court at London, in the Spring of 1875; the facts of which are fully stated in the judgments.

Mr. *Moss*, Q. C., for the plaintiff.
Mr. *Blake*, Q. C., for *The Attorney General.*
Mr. *Maclennan*, for the defendant *Fraser*.
Mr. *Holmes*, for defendant *Lander*.

Judgment.

SPRAGGE, C.—The evidence satisfies me that the sewer in question, constructed by the department of Public Works, has occasioned a nuisance of a very serious character to the plaintiff; that the water of the stream run-

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ning through his land has been polluted to an extent that, if the question were in an ordinary case between subject and subject, would entitle the plaintiff to a decree. I expressed myself to this effect at the hearing, and at the close of the evidence this was freely acknowledged by the learned counsel for the defendants. But it is said there is no remedy in this Court against these defendants by reason of their public character.

It is agreed on all hands that this is not a case in which a petition of right would be an appropriate remedy, and in this I concur.

I will first consider the case as if the sewer complained of had been constructed while the defendant *Fraser* was Commissioner of Public Works, and the question of the remedy, if any, against him. There is, I apprehend, nothing in the fact of the act being done by a person acting in a public capacity that *per se* exonerates him from liability. No one can say, "My acts cannot be called in question in a Court of justice because they were acts done by me in my public character." That of itself is no answer. The answer must be that the act for which the party is called in question is an act authorized by the Legislature. This is put clearly by Mr. Justice *Blackburn*, in *The Mersey Docks Trustees* v. *Gibbs*, (*a*). "If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. If damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statute authorizing the doing of such things. But no action lies for what is *damnum sine injuria;* the remedy is to apply for compensation under the provisions of the statute legalizing what would otherwise be a wrong." And he adds that this is the case "whether the thing is authorized for a public purpose, or a private profit." And further on he says, "The principle is, that the act

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(*a*) L. R. 1 E. & I. App. 112.

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The Court did interpose in the case of *Rankin* v. *Huskisson* (*a*), to restrain the Commissioners of Woods and Forests from erecting certain buildings. The report says, that one of the points raised, but not pressed, was, that the Court had no jurisdiction to grant an injunction against the Commissioners of Woods and Forests, they being Ministers of the Crown.

In Lord *Canterbury* v. *The Attorney-General* (*b*), Lord *Lyndhurst* explains the office of the Commissioners of Woods and Forests, shortly thus; that the Queen in "Imitation of the course pursued by her predecessors, gave up her territorial possessions to the public during her life; and Parliament, in exchange, made a provision for the civil list and the personal expenses of the Sovereign out of the consolidated fund"; and that "for the purpose of managing these territorial possessions and of executing such works as the civil service requires, Par-

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liament has created certain public officers, viz., the Commissioners of Woods and Forests."

Under the Act creating the Department of Public Works for Ontario, 32 Vic. ch. 28, all the lands and public works and personal property enumerated in section 10, and which comprehend lunatic asylums, are vested in the Crown, and placed under the control of the Department, and the Commissioner is made the administrator of the Department. The construction, alteration, and repair of the public works of Ontario are within the province and duties of the Department. The office and duties of the Commissioner appear to correspond in most essential parts with those of the Commissioners of Woods and Forests in England, and I apprehend that in cases—probably in all cases—in which the Commissioners of Woods and Forests would be amenable to the jurisdiction of the Courts in England, the Commissioner of Public Works would be amenable here. His

(*a*) 4 Sim. 13. (*b*) 1 Ph. at 323.

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public character is no protection. He must shew that what he has done is authorized by the Legislature.

The Act (sec. 23) authorizes the Commissioner to acquire and take possession of any land or real estate, streams, waters, water-courses, &c., the appropriation of which is in his judgment necessary for public works, and among other purposes, for draining. It is to my mind at least doubtful whether this section authorizes the use of any land, streams, &c., for draining or for other purposes specified in it, other than land, streams, &c., acquired, possessed, and appropriated, by the Commissioner. Section 24 contains this clause, "And may enter upon any land for the purpose of making proper drains to carry off the water from any public work, or for keeping such drains in repair."

The stream which has been polluted by the sewer in question has not been acquired by the Commissioner under section 23, and it is not a drain, to carry off *water*, that has been constructed by the Commissioner; so that if there were nothing else in the case I should very much doubt whether authority is to be found in the statute for doing what has been done in this case, even if it had been done carefully and skilfully.

Judgment.

But assuming this point in favour of the defendants, there comes in this principle, for which I refer to the same judgment of Mr. Justice *Blackburn*: "Though the Legislature has authorized the execution of the works it does not thereby exempt those authorized to make them, from the obligation to use reasonable care, that in making them no unreasonable damage be done;" and he refers to the language of Mr. Justice *Crompton* in *Birne* v. *The Great Western R. W. Co.* (*a*), "The distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."

(*a*) 2 B. & S. 402.

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Among other cases referred to by Mr. Justice *Blackburn* is that of *Jones* v. *Bird* (*a*), before Mr. Justice *Bayley*, who held that the defendants—who in that case were the persons actually constructing a sewer authorized by statute—were not protected merely because acting *bona fide*, and to the best of their skill and judgment. He said, "That is not enough; they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case." The learned Judge reviewed the authorities upon this particular point, and his opinion was, that the weight of authority was in favour of what he calls the stricter rule laid down by Mr. Justice *Bayley*.

The language that I have quoted from the judgment of Mr. Justice *Blackburn*, is quoted and adopted by Lord Justice *Mellish* in *The Attorney-General* v. *The Colney Hatch Lunatic Asylum* (*b*). That case appears to me to govern the case that I have to dispose of, though the other authorities to which I have referred establish principles which lead irresistibly, I think, to the same conclusion. In the *Colney Hatch* Case the defendants were, in the language of Lord *Hatherley*, a body of magistrates charged with a public duty. "It is true," he says (*c*), "that they act as a public body, wishing to discharge their duties in a proper manner. But (he adds) that cannot give them any right to throw this sewage into their neighbour's property. * * * What is the clause in the Act of Parliament which tells me that these visiting magistrates, building a house for the accommodation of lunatics, have also acquired the right to transfer the whole sewage and nuisance created by these lunatics into their neighbours' grounds? I find nothing of the kind, nothing leads one to suppose for a moment that Parliament could have any such intention. Of course, it cannot be deduced from the power given to

Judgment.

(*a*) 5 B. & A. 837. (*b*) L. R. 4 Chy. 146. (*c*) P. 158.

erect a large building, that as a necessary consequence all the refuse from the building is to be thrown on the neighbouring ground. I cannot therefore conceive how the fact of their being visiting magistrates can justify them in acting thus." The Colney Hatch Asylum contained 2,200 inmates. I will quote some further passages from the judgment of Lord *Hatherley* at p. 157: "The nuisance is this, that daily these 2,200 persons are adding their *quota* to this continuing evil. The answer is, of course, that you must not allow those 2,200 persons thus to aggravate, day by day, the evil that exists. Is it impossible to prevent this? Were there not means of preventing such a nuisance before drainage was ever heard of? Formerly those who resided in the country had cesspools, and those were from time to time emptied, but nobody in the country ever thought of turning all the sewage of his house into his neighbour's garden. No doubt it is more difficult to provide this sort of accommodation for 2,200 people than it is to provide it for twenty or thirty people, but the principle is exactly the same. Captain *Galton*, in his report, distinctly says, that the difficulty may be met on the spot simply by using about thirty acres of land for depositing the sewage on it, whereas there are seventy acres now available for that purpose, which lie on an incline, and are suitable for such an arrangement. Or, again, it might be met in the way suggested by Lord Justice *Selwyn*, in the course of the argument, by that which is now approved of by so many engineers, namely, the use of earth closets. It is unnecessary to pursue the subject further than that. To my mind it is made out clearly that there is no physical impossibility in restoring things to the state in which they were before the erection of the asylum. It is only a question of expense, and this Court is not in the habit of listening to any argument on the ground of expense, when it restrains the doing of a wrong. * * * * I entertain a very strong opinion that when the nuisance is established all the Court has to do is, to say

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that it must cease; and unless it should be plainly shewn that it was such a case as I have already described, where the ocean had broken in, and could not be carried back again, or such damage had occurred as to shew the proper remedy must be by an action for damages, and not by injunction, the Court is bound to grant the injunction; and it is no part of the duty either of those who make the complaint or of the Court to find out how that order can be best obeyed."

But, it is argued, there cannot properly be an injunction against Mr. *Fraser*, the present commissioner, because the nuisance has not been created during his incumbency of office, and what has been done by him has been in mitigation of the evil. The same point was made in the *Colney Hatch* case. Lord *Hatherley's* answer was: "It is a continuing wrong; and, moreover (he adds), as these unfortunate inmates are persons having no control over their own acts, and they and all the officers of the asylum are placed under the control of the visiting magistrates, the visiting magistrates must be responsible for their acts. There would be no nuisance if these persons did not daily commit it: there would be no nuisance if they were removed from the place, or if the deposits were turned into a cesspool on the property. It is in the power of the magistrates to correct that which is an evil, and they are therefore wrongdoers, if it is allowed to be continuous."

Judgment.

What was done in that case was, to grant an injunction restraining the defendants (here it would be the commissioner, Mr. *Fraser*, as the person having control of the matter), their servants and agents, from allowing any sewage from the asylum to pass into the stream or otherwise so as to be a nuisance; the injunction being suspended for a given time, and liberty being given to apply; and that I think will be the proper course in this case.

I confess that at the hearing I felt pressed by the difficulty suggested by Mr. *Blake*, in the way of granting

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an injunction against Mr. *Fraser*, that he had not created the nuisance, and had not the means at his disposal—about $30,000 was named as the probable cost—of abating it: that was, of abating it in a particular mode; but Lord *Hatherley* refused to admit difficulty or expense as valid reasons against the removal of the nuisance. He adverted to suggestions that had been made in regard to modes of curing the evil, saying at the same time that it was no part of the duty of the parties complaining, or of the Court, to find out how it was to be done; and would admit nothing short of physical impossibility to be an answer to the complaint of those aggrieved by the nuisance.

The judgment of Lord *Hatherley*, though sounding at first as perhaps somewhat over imperative, commends itself, after all, as most just and proper: for what is the alternative—it is the allowing the continuance of a filthy and daily increasing nuisance, offensive to every sense, and injurious to health. It was so in the *Colney Hatch* case, and is so in the case before me. If the plea addressed to me on behalf of Mr. *Fraser* be a good answer to the bill now, it will be so always, and in the mouth of any future commissioner. Lord *Hatherley's* position is irrefragable. It is, he says, a *continuing* nuisance, and those who have the control of the building from which it proceeds must find means to abate it, or shew it to be impossible. I mean, of course, "abate" in the legal sense of the term: to remove the nuisance —to cause it to cease—not merely to mitigate it.

Judgment.

I do not find that in the *Colney Hatch* case there was any direct evidence, any more than in this case, that the asylum had been negligently or unskilfully constructed: but in the case of this asylum, it is clear beyond question that in the matter of sewage at any rate there has been want of care or skill, or both. The existence of the nuisance proved in this case is cogent evidence of this; and the case is thus brought within the rule established by the cases to which I have referred.

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In taking the course that I have indicated as the proper one, following the form of decree in the *Colney Hatch* case, I do no wrong to Mr. *Fraser*. Filling the office that he does, and having control of public works it is his especial duty in any and every way that is feasible and proper, and by every means in his power, to abate this nuisance; and to do so with all possible diligence and promptitude; and I have no reason to suppose that he will fail to do so. The duty of the Court, at any rate, is quite clear: it is, to take such a course as will secure the speedy and effectual removal of the nuisance.

Some time should be named by which this work may be done. If the parties cannot agree I will, after hearing them, fix a time. I have at present nothing before me that will enable me to say how long or how short a time may be necessary. I treat it only as a question of time: I will not anticipate the possibility of its being shewn to be impracticable.

Judgment.

As to parties, I look upon Mr. *Fraser* as necessarily the principal defendant. The *Attorney-General* is properly made a party to protect the interests of the Crown. Dr. *Lander* ought not, in my opinion, to have been made a party. His office of medical superintendent gives him no control over the matter which is the subject of complaint. This appears from the statute by which his office is regulated and its functions defined, and by his own evidence. He is entitled to his costs.

I must give the plaintiff his costs against Mr. *Fraser*. There was no intentional wrong on his part: but in my judgment he misconceived his position in holding that because he had not originated the evil, he was therefore not responsible; whereas, he was responsible for allowing it to continue.

The defendants *The Attorney-General* and *Fraser* thereupon set the cause down to be re-heard.

Mr. *Maclennan*, Q. C., and Mr. *Boyd*, for the defendants who rehear, were about to open the case when

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Mr. *Bethune*, for the plaintiff, objected that Dr. *Lander*, against whom The Chancellor had directed that the bill should be dismissed, was not represented; the fact that the bill had been ordered to be dismissed was no ground for dispensing with his presence on this re-hearing. The Court, acquiescing in this view, directed case to stand over in order to afford parties an opportunity of serving defendant *Lander* with notice in order that he might be represented by counsel on the re-hearing.

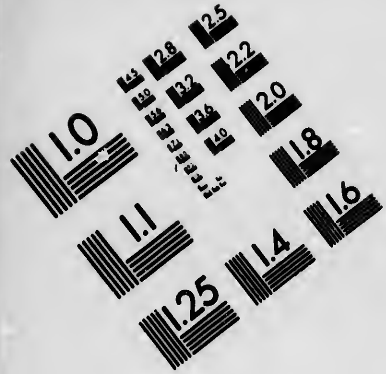
The cause again coming on

Mr. *Attorney-General Mowat*, and Mr. *Boyd* for the defendants, who re-hear. The question involved, in this proceeding, is one with which Parliament alone is qualified to deal properly and effectually, and can alone redress the wrong sustained by the plaintiff, if any such exist.

In England the Postmaster-General was held not answerable for any losses sustained by the public by reason and in consequence of the acts of those in his employ; and that too though they were employed by him, and could at any moment be dismissed at his instance. Argument.

The matter stands in precisely the same position as acts committed by a naval or military commander. Here the defendants are in fact representing the Crown—not a corporation, and are, therefore, not liable to be proceeded against at the instance of any private person. The distinction between the suit, referred to in the judgment on the hearing, of *The Attorney-General* v. *The Colney Hatch Asylum* (*a*), and the present is, that there the proceeding was at the instance of *The Attorney-General* suing on behalf of the Crown for the wrong done. In that case the visiting magistrates had the power, and were directed to build the asylum; and were further empowered to levy rates and enforce payment thereof, and apply the moneys received in payment of the work done; here these defendants have no such

(*a*) L. R. 4 Ch. 146.



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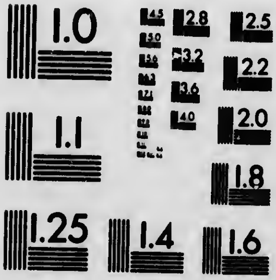

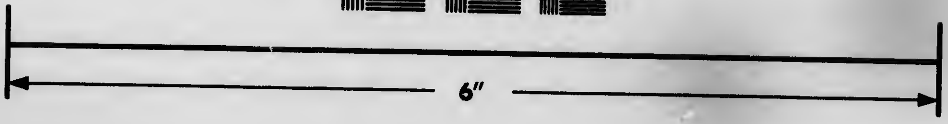

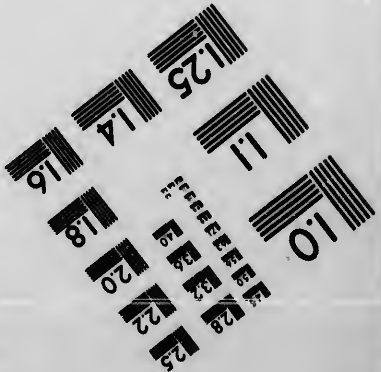

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power, and cannot, except by the permission and sanction of Parliament, incur any important outlay. The executive councillors are merely a portion of the persons committing this alleged illegal act, as the whole body of the Legislature are really the parties answerable for any damage; and if a bill is sustainable at all, it must be one against the whole assembly, while here the plaintiff has made only two out of the eighty-four members parties:—*The Attorney-General* and *Commissioner of Public Works*.

In *Buron* v. *Denman* (*a*), the captain of a ship of war, at the instance of the Governor of Sierra Leone, had proceeded to the Gallinas in order to obtain the release of two British subjects detained as slaves, and when there, in consequence of having entered into a treaty with the ruler of that country, had destroyed the barracoons of the plaintiff and liberated his slaves, all of which service was communicated to, and ratified by the Lords of the Admiralty and Secretary of State; the Court held, that although the plaintiff could have maintained trespass for the seizure of his slaves, the ratification of the acts of the defendant, the commander of the vessel, rendered his act one of state, for which the Crown alone was responsible. Here the act complained of was one done by a minister of the Crown himself, and therefore the government alone must be responsible, notthe minister who created the alleged nuisance; and *a fortiori* his successor in office cannot be held liable because he has not seen fit to incur a great outlay in order to change the whole system of drainage of the Asylum, so as to remedy the effects of an act done by his predecessor in office. In fact, to enforce the decree in this case it would be necessary that the Court should require estimates to cover the outlay to be submitted to Parliament.

Argument.

Reference was also made to *Nurse* v. Lord *Seymour* (*b*) as establishing the view that under the circumstances

(*a*) 2 Ex. 167. (*b*) 13 Beav. 307.

here appearing the defendant *Fraser* as Commissioner of Public Works could not be held responsible. 1876.

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Mr. *Bethune* and Mr. *Moss*, for the plaintiff. There is not anything in the case of *Nurse* v. Lord *Seymour* to assist in the decision of this case. We are seeking here to make *Fraser* answerable for his own acts only, not for the acts of any other person. The effect of the defence made by the defendants is, to admit that a nuisance of a very grave character has been committed, and the question arises, is it to be determined that the plaintiff is entirely without redress? The Act of our Legislature under which this structure has been erected gives the defendant *Fraser*, or whoever may be the Commissioner of Public Works for the time, control over all such buildings, much in the same way as the visiting magistrates had power conferred upon them in *The Colney Hatch Case*. The 15th section of the statute enacts "The Commissioner shall direct the construction, maintenance, and repair of all public works in progress, or constructed, or maintained at the expense of the Province, and which are by this Act, or may be hereafter placed under the control of the department."

Argument.

Suppose for a moment that the sewage was not discharged into the stream on the lands of the plaintiff, but that noxious vapours arose therefrom so as to constitute a nuisance to the plaintiff, the Court could then interfere just in the manner it has done: As controller of public asylums *Fraser* is not a minister of state: *Feathers* v. *The Queen* (*a*); *Attorney-General* v. *Johnston* (*b*); *Banister* v. *Bigge* (*c*).

It is now claimed that *Fraser*, in acting merely as a servant of the Crown, is not subject to the jurisdiction of this Court. *Baker* v. *Ranney* (*d*) shews, however, that the learned Attorney-General was not always of that way of thinking. However, what the plaintiff here contends

(*a*) 6 B. & S. 296.
(*b*) 2 Will. 87.
(*c*) 34 Beav. 286.
(*d*) 12 Gr. 228.

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for is that, state officer or no state officer, the defendant has committed an illegal act, and for redress thereof he is clearly amenable to this Court; *Felkin* v. *Herbert* (*a*).

Mr. *Vidal*, for the defendant *Lander*, submitted that, so far as his client was concerned, the decree should be allowed to stand, the defendant *Lander* having as he contended been improperly made a party to this bill, 1. Because he could not be held personally responsible for any of the matters complained of in it, as a reference to the statute defining his duties will shew. 2. Because no one should be made a party to a bill in Chancery against whom there could be no decree, and there can be no decree against *Lander*, because the Court will not make a decree against a party when it is clear that he can by no possibility comply with the terms of it; and this is the position of this defendant, as he is utterly powerless to abate the nuisance complained of in this suit.

Argument.

Mr. *Boyd*, in reply. The plaintiff's own witnesses say that $30,000 would be required to construct a proper sewer from the Asylum to the river Thames, the only mode, it is suggested, that exists for remo[illegible]; the nuisance. The officers of corporations even are liable only to such an extent as the funds at their disposal will enable them to act in obedience to the decree of the Court: *Addison* on Torts p. 740. Here it is shown, that the abating of this nuisance will involve a very heavy outlay of money, and before such relief will be granted it must be shewn that the funds necessary for the purpose are at the disposal of the commissioner. It is true, that at the last session of the Legislature an appropriation was made for this very work; but at the time the bill was filed and the decree pronounced no such appropriation had been made.

At the close of the case THE CHANCELLOR intimated that the Court were unanimously of opinion that there was not any case made out against the defendant *Lander*.

(*a*) 11 L. T. N. S. 173.

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As to him therefore the decree already made would stand. As to the other defendants the Court took time to look into the authorities.

In addition to the cases already cited, or cited in the judgments, counsel referred to: *Churchward* v. *The Queen* (*a*); *Attorney-General* v. *Gee* (*b*); *Goodwin* v. *Roberts* (*c*); *Attorney-General* v. *Kohler* (*d*); *Regina* v. *The Lord's Commissioners* (*e*); *Thompson* v. *Gibson* (*f*); *Young* v. *Davis* (*g*); *Holliday* v. *St. Leonards* (*h*); *Dixon* v. *Combermere* (*i*); *Kerrison* v. *Sparrow* (*j*). *Dicey* on Actions p. 462; *Story* on Agency, pp. 302, 322; *Addison* on Torts, pp. 16, 744.

BLAKE, V. C.—The bill in this case states, that the plaintiff owns certain lands adjacent to which is the land on which is erected the London Lunatic Asylum, the property of the Crown. That prior to August, 1873, and since, the asylum has been occupied by upwards of 550 patients, and a large and increasing quantity of sewage has been discharged; that in the month of August last mentioned, the defendants *Lander* and *Fraser* entered upon plaintiff's land, and dug a ditch to a stream of pure water, and converted the same into a sewer for the asylum, and the whole of the sewage of the asylum has thereby been emptied into that stream and upon the plaintiff's land; and the stream, which passes through his land, has been thus rendered impure and dangerous to health; that in July, 1874, the defendants diverted a stream so as to make it enter upon and overflow the plaintiff's land; that the asylum and all works connected therewith were at the time of the injuries complained of, and now are under the control of *Fraser*, and that he is, and was then, the officer in

Judgment.

(*a*) L. R. 1 Q. B. at 199.
(*b*) L. R. 10 Eq. 131.
(*c*) 23 W. R. 917.
(*d*) 9 H. L. 654.
(*e*) 4 A. & E. 286, (976-84)
(*f*) 7 M. & W. 456.
(*g*) 7 H. & N. 760.
(*h*) 11 C. B. N. S. 192.
(*i*) 3 F. & F. 527.
(*j*) Geo. Cooper's Reports 305.

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charge; that the defendants refuse to abate the nuisance. And the bill asks that the defendants may be ordered to abate the nuisance thus caused.

The defendant *Lander*, answers, that he is only medical superintendent, and has nothing to do with the matters complained of, and cannot control them. The defendant *Fraser* answers, that the asylum was built in 1869 and 1870, under the supervision of the then Commissioner of Public Works, and that the sewers now in use were then built; that the subsequent Commissioner of Public Works caused the drain first made to be altered so that it entered the lands of the plaintiff on the other side of the highway, which alteration was beneficial to the plaintiff, and in no way injured him; that the former Commissioners acted in pursuance of 32 Vic. ch. 28; that the Government of Ontario will probably, if the Legislature provides the funds, continue the drain to the river Thames, and submitted that the plaintiff has no right against him personally.

Judgment.

The Attorney General claims the benefit of the defence of his co-defendant *Fraser*.

The evidence shews that the asylum building was finished in 1870, and that the alterations in the drains were made in 1873, prior to the appointment of the present Commissioner of Public Works, so that the building and drains stand now as they did when Mr. *Fraser* accepted office, and if he is liable it must be because he has not caused a change in the system of drainage from that which existed when he became Commissioner of Public Works. It also appears on the evidence that the only means of abating the nuisance would be, by adopting the rather doubtful course of carrying a drain to the river Thames, which may have the effect, not of abating the nuisance, but of conveying it from one place to another. This drain, if it does effect the object the engineer contemplated, would cost $30,000. The Act which defines the duties and powers of the Commissioner of Public Works is ch. 28 of 32 Vic.;

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and secs. 4, 7, 10, 13, 14, 15, 23, 24, and 25, of this statute shew the large powers of management or control that are conferred on this officer. Large however as these may be, they appear to me to be controlled by section 40, which reads as follows: "Nothing herein contained shall give authority to the Commissioner to cause expenditure not previously sanctioned by the Legislature, except for such repairs and alterations as the immediate necessities of the public service may demand;" so that, although the Commissioner is the proper officer, as to the public works of Ontario, to oversee, to enter into contracts, to control and to acquire land, yet these are dealings only in cases permitted by the sanction of the Legislature, unless where the "immediate necessities" of the public service demand certain "repairs and alterations." The large powers vested in the Commissioner are not to be exercised absolutely, they are qualified by the power of the Legislature, which, by its appropriations, defines the object to which they may be applied. In the present instance, for years before the acceptance of office by Mr *Fraser*, the Government and the Legislature adopted and sanctioned the system of drainage at present in use in the public building in question, and they have not thought proper to make any alteration in this respect. They have not made any appropriation to cover the requisite expenditure, and I doubt very much whether under these circumstances Mr. *Fraser* could under section 40 justify the laying out of $30,000 as being "for such repairs and alterations as the immediate necessities of the public service may demand." His answer to any personal demand is, "I have no money out of which to make it good. The Government of which I am a member has received no appropriation for the service you demand. Even if we had money it has not been entrusted to us for this specific purpose, and, unless thus voted, we have no right to dispense the public funds, to so large an amount, in this manner. In any

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event we have a discretion in the matter, and we are not responsible to you, but to those who have confided it in us, for its due exercise." I should have thought this position of the defendants unanswerable. There is no doubt that members of a Government cannot shield themselves behind their office for many acts of commission done in supposed fulfilment of their duty; but, on the other hand, it seems equally clear that their liability is not the same as if they were the members of a company or other body of a like nature, against which relief for malfeasance or misfeasance is sought.

The Court of Queen's Bench, in *The Queen* v. *Commissioners of Woods and Forests* (*a*), says "But a private company to whom an Act is granted for their profit differs materially from Commissioners appointed under a public Act, to do on behalf of the Executive Government certain things for the benefit of the public; and the principle that imposes liabilities upon a private company, as arising in consideration of the statute granted to them, has no application in the case of such public Commissioners." This distinction is also dealt with by the House of Lords in *The Mersey Docks Trustees* v. *Gibbs* (*b*). Mr. Justice *Blackburn*, in answering certain questions propounded to the Judges by the Lords, says "A great many cases were cited at your Lordship's bar as supporting this position, many of which are really not applicable to such a case as the present. *Lane* v. *Cotton* (*c*) and *Whitfield* v. *Le Despencer* (*d*) (the cases of the Postmaster-General) and *Nicholson* v. *Mounsey* (*e*) (the case of the captain of the man-of-war), are authorities that where a person is a public officer in the sense that he is a servant of the Government, and as such has the management of the Government business, he is not responsible for any negligence or default of those in the same employment as himself." Lord

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(*a*) 15 Q. B. at 774.
(*b*) L. R. 1 E. & I. Ap. at 111.
(*c*) 1 Ld Ray. 646.
(*d*) Cowp. 754.
(*e*) 15 East 384.

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Wensleydale in discussing this point says, "If this question had been *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Court could not be supported. It would appear to me that this case falls within the principle of those cases which have decided, that when a person is acting as a public officer on behalf of the Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business. This was the principle of the decision in *Lane* v. *Cotton* and *Whitfield* v. *Le Despencer* and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them. Thus the Postmaster-General, who has the management of one department of the public service, the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the whole community, and causes profit to the Government, is not responsible for any of the servants of the post-office department, though he might appoint or dismiss them; and whether the Postmaster-General be one individual, as he is now, or two persons fill the one office, as in the case of *Whitfield* v. Lord *Le Despencer*, or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the post-office, neither individuals nor a corporate body would be responsible for the neglect of their servants." To this suggestion Lord *Westbury* says p. 128 "With regard to what has been suggested by my noble and learned friend (Lord *Wensleydale*), that it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants; that may be quite correct where an officer, fulfilling a public duty, is directly appointed by the Crown, and is acting as the servant of the Crown; but it has no application to the

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case of trustees incorporated for the purpose of public works, and standing in relation to the public in the way these trustees do in the present case." I refer to these authorities, as it is well to consider whether heads of departments in a Government and their servants are to be dealt with as are trustees incorporated for the purpose of public works and their servants, before the authorities which deal with the latter class can be held to govern the former in their dealings with the public. The cases of the Viscount *Canterbury* v. *The Attorney-General* (*a*), and *Rankin* v. *Huskisson* (*b*), do not assist the plaintiff. It may be admitted on the part of the defendants, and, I think, there is no doubt the law of the land is such, that if they were proceeding illegally, by active steps on their part, to injure the plaintiff or his land, no matter what position they held, this Court would restrain such an act. But allowing all this, does not bring the plaintiff any nearer to his right to a decree, granting what he now asks.

Judgment.

In *The Mersey Docks* Case there was on the part of the trustees possession of the docks and receipts of the tolls, and they were bound to receive and expend the money in the very manner which would have prevented the wrong complained of.

In *The Colney Hatch* Case, the Act of Parliament empowering the Commissioners, shews their wide powers and jurisdiction. Sections 2, 3, 16, 17, 26, 31, 33, 34, 35, 36, 37, 38, and 83, of 8–9 Vic. (Imp.) ch. 126, compelled and enabled them to provide a building for a lunatic asylum, to contract for the land, which was to be conveyed to their appointee, to repair and pay by order on the treasurer, to sell the lands bought, and apply the purchase money, to raise a levy or rate on the county for their expenditure, and to obtain and repay loans and advances of money. In that case the parties responsible possessed, in connection with the asylum, 70 acres of land, which it was shewn could be so used as to

(*a*) 1 Ph. 306. (*b*) 4 Sim. 13.

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abate the nuisance. They had two modes of dealing with the sewage, the one caused, the other ended the nuisance. They had full power to deal as they thought proper in the matter, and they had the means to raise all the money needed for the alteration, to carry out that which was demanded. They had not the money in hand; but the Court would not listen to such an answer, and made the only decree which it seems could be made, and that was for the plaintiff giving him the relief asked. There was in that case the power and the duty; and the Court enforced the right against them. The question of means was considered by Chief Justice *Cockburn* in *Coe* v. *Wise* (*a*), where he says, "In my judgment, however, the main criterion in these cases is, whether there is any fund at the disposal of public trustees or commissioners available for the payment of damages in respect of injury occasioned by negligence."

In *The King* v. *The Lords of the Treasury* (*b*) the Court issued a mandamus because the officers of the Crown admitted they had the money in hand applicable to the pensions in question; they had assumed a duty in connection with it, and the Court considered them as trustees of the fund for a specific purpose which they were bound to carry out, and therefore an order was made against them. But in the same volume, at pp. 976, 984, and 999, we find how peculiar must those circumstances be which would warrant the interference of the Court against the officers of the Crown for a supposed dereliction of their duty. Judgment.

In the present case the Legislature approved of a site for the asylum, and of the building which was to answer the object contemplated, and voted an amount which they thought the sum which should be expended to carry out this object. The people, by the machinery which regulates such matters in our land, name Mr. *Fraser* as the person who is to oversee this establishment so far as the structure is concerned; and, while

(*a*) 5 B. & S. 440, 470. (*b*) 4 Ad. & El. 286.

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allowing him a considerable latitude in his dealing therewith, limit his power by the requirement that he should not expend money thereon, unless on an emergency, without the sanction of the Legislature. If Mr. *Fraser* obeys the decree of this Court he will be compelled either to take public funds, if his colleagues will allow him to lay his hands upon them, which have been voted for other purposes, or which the government hold as trustees for the people, and expend them in a manner for which there is no present warrant; or if he can raise the money he must proceed with the work, in hopes that the Legislature may, when it meets, recoup him the amount thus expended. If this is done, well and good; but if the House refuse the demand, and insist on no such expenditure being made unless it originates in the Legislature, and punish the member of the government by declining to make good the amount he has advanced, he would seem to be without remedy.

Judgment.

Mr. *Fraser* may justly say, he objects to be placed in this position, and if he has any discretion in the matter, and is of opinion that the law of Parliament which controls the expenditure of public money would be invaded by abstracting $30,000 of the money of the people of which he is joint custodian, without the permission which our system of government requires, I am confident this Court has no right to interfere with such exercise of his discretion. The duty that is cast upon Mr. *Fraser*, is to manage his department as well as that can be accomplished, using the means which the Legislature places at his disposal; but beyond that he is not bound to go. In the *Colney Hatch* case, so much relied on by the plaintiff, we find combined the duty and the means of performing it. In the present case, unless we return to the disused law, which by the way brought on a rebellion, of requiring men to make bricks without straw, I do not see how it is possible to grant the relief against the defendants which the plaintiff demands. I do not think,

looking at the rules which govern the expenditure of public moneys in this land, and seeing that no funds are applicable to the present demand, that any personal relief can be obtained against Mr. *Fraser* personally or the government of which he is a member. I think the plaintiff has entirely misapprehended his position, and that, whatever other relief he may be entitled to, it is clear he cannot obtain it as it is asked by his bill, which must be dismissed, with costs.

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PROUDFOOT, V. C.—I concur in the judgment just delivered by my brother *Blake*, and do not think I can usefully add anything to it. I did not arrive at that conclusion without the most anxious consideration, so that relief, if possible, might have been given to the plaintiff, who has suffered a grievous injury. I am not certain that he is without remedy, but I do not think he is entitled to that which he seeks by this bill.

SPRAGGE, C.—The Commissioner of Public Works in his answer, after saying that he has given instructions (he does not say when given) in order to ascertain whether it is practicable to continue the main sewer of the Asylum to the river Thames, which is, as he is informed, the natural main drainage channel of the land upon which the Asylum is situated, adds, that he believes that the Government of Ontario will, if such construction is found practicable, as soon as means therefor are provided by the Legislature of Ontario, continue the said main sewer to the river Thames. This is the only reference in the answer to the necessity of funds being provided for removing the nuisance; and it only refers to it incidentally and by implication, and only in the event of a particular mode being adopted for removing the nuisance. There is no plain statement that the Commissioner has not at his disposal means by money or labour to remove the nuisance in any mode; it was stated in evidence that the probable cost of continuing a sewer to the Thames,

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would be about $20,000. I should scarcely have thought that such a project could be seriously entertained; it would obviously be only shifting the locality of the nuisance. One good might possibly result from it, as the nuisance would probably be changed from what it is, a gross private nuisance, to a gross public nuisance, and under sections 19 and 40 of the Public Works Act, the Commissioner might do something to abate it promptly, and without obtaining the previous sanction of the Legislature for the expenditure involved in it. This point, of going to the Legislature and of the hands of the Commissioner being tied till money was granted, was so little thought of that section 40 was not referred to by counsel, either at the hearing or rehearing, though certainly it was stated as an objection to the issue of an injunction that the Commissioner had not at his disposal the means of continuing a sewer to the river Thames.

Judgment.

Care was taken in the judgment pronounced not to place the Commissioner in the false position of ordering him to do that which it was not in his power to do. The issue of an injunction was suspended until it could be seen when the nuisance could be abated. It was not to be assumed that it could not be abated, by means at the disposal of the Commissioner; that carrying all the filth that had polluted air and water, to the Thames, and so creating another nuisance, was the only mode of remedying this. Throughout the *Colney Hatch* case there is not one word as to the plaintiffs shewing that the defendants had the means at their disposal of abating the nuisance created by their predecessors. If in that case it had been shewn, upon the matter coming again before the Court, that it was physically impossible for the defendants with the means at their disposal to abate the nuisance, no injunction would have issued; nor, of course, would there in this case if such physical impossibility were shewn: if shewn, for example, that there is no mode of abating the nuisance to accomplish which means are at the disposal of the Commissioner. This

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has not been shewn as yet; it is only shewn, or in strictness is only alleged, that there is one mode—that a very objectionable one—of removing it, that would cost more money than the Commissioner has at his disposal. The decree *pronounced* (for I find upon inquiring that no decree was drawn up) was in effect as far as it went only a declaratory one. If it turned out that *in no mode* within the means of the Commissioner could the nuisance be abated, the Court certainly would not act so unreasonably as to punish him for not abating it; it was a continuing wrong if he could abate it, and did not; it could not be a wrong if he did not abate it, because he had not the power.

I should have thought it scarcely necessary for me to say that I did not contemplate that the Commissioner should lay his hands upon public money not applicable to such a purpose, or commit any other unconstitutional act. My language fairly interpreted will not bear such a construction. The language of Sir *Alexander Cockburn*, in *Coe* v. *Wise* (*a*), is quoted as follows: "In my judgment, however, the main criterion in these cases is, whether there is any fund at the disposal of public trustees or commissioners, available for the payment of damages in respect of injuries occasioned by negligence." This was said in a case at law, where an action had been brought against Commissioners for damage sustained through the negligence of their servants, there being no proof that the Commissioner had negligently or improperly employed unskilful or incompetent agents. I do not see its application to a case like this, where for aught that appears the great wrong committed in this case is capable of being remedied by means at the disposal of the Commissioner.

Judgment.

That this may be the case is not impossible or even improbable. In the *Colney Hatch* case Lord *Hatherley*

(*a*) 5 B. & S. 471.

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and Lord Justice *Selwyn* both refer to the report of an expert, Captain *Galton*, who reported that the difficulty might be met by disposing the sewage over a portion of the lands of the Asylum. Whether such a mode of meeting the difficulty is feasible in this case I do not know. It may be for aught I know. Suppose it shewn to be so, and at a cost of money at the disposal of the Commissioner; or suppose it shewn that there is some other mode of remedy by means at his disposal, and the issue of an injunction is suspended in order that it may be shewn, I see no sufficient reason for the Court refusing relief.

I said in my judgment, given at the hearing, all that I think it necessary to say on the question of jurisdiction. The great wrong suffered and its being endured year after year without redress does not, I concede, give this Court jurisdiction; but it is a great defect in our jurisprudence if there be no remedy in such a case—if, as the junior learned counsel is stated by the report of the case to have said at the hearing, "The plaintiff must only await the pleasure of the Government."

Judgment.

In my former jugment I referred to another point which appears to me to entitle the plaintiff to relief upon another ground, viz., that what has been done is *ultra vires*. I put it thus :—

"The Act (sec. 23) authorizes the Commissioner to acquire and take possession of any land or real estate, streams, waters, water-courses, &c, the appropriation of which is in his judgment necessary for public works, and, among other purposes, for draining. It is to my mind at least doubtful whether this section authorizes the use of any land, streams, &c., for draining or for other purposes specified in it, other than land, streams, &c., acquired, possessed, and appropriated, by the Commissioner. Section 24 contains this clause, 'And may enter upon any land for the purpose of making proper drains to carry off the water from any public work, or for keeping such drains in repair.,

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"The stream which has been polluted by the sewer in question has not been acquired by the Commissioner under section 23, and it is not a drain to carry off *water* that has been constructed by the Commissioner. So that, if there were nothing else in the case, I should very much doubt whether authority is to be found in the statute for doing what has been done in this case, even if it had been done carefully and skilfully."

If what has been done is not authorized by the Public Works Act the construction of this sewer was a mere act of wrong-doing, and the Commissioner is a wrong-doer for continuing it, and should be enjoined against continuing it. I have again examined these sections of the Act, and it appears to me that the construction I put upon the Act is the proper one, and if so the injunction to which the plaintiff is entitled is an immediate and direct one. The Commissioner can have no protection when acting only under colour of his office, and doing acts not warranted by the statute from which he derives his authority.

Judgment.

Per Curiam.—Bill dismissed, with costs. [SPRAGGE, C., dissenting.]

SOLICITORS.—*Bethune, Osler,* and *Moss* agents for *Meredith* and *Meredith,* London, for plaintiff; *Maclennan Downey,* and *Ewart,* for the defendants *The Attorney-General* and *Fraser; Vidal,* agent for *Holmes,* London, for defendant *Lander.*

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PRINCE v. LOUGH.

Practice—Demurrer filed—Demurrer ore tenus—Costs.

Where a demurrer was filed which on argument was overruled and a demurrer then put in *ore tenus* was allowed, the Court allowed the latter without costs, although costs were given to the plaintiff of the demurrer that was overruled, following the decision in *Roche* v. *Jordan*, *ante* volume XX., page 373.

The defendant *Lough* mortgaged his land to one *Caldwell* to secu e certain promissory notes. *Caldwell* transferred the notes to the plaintiff, but did not assign the mortgage, and afterwards he became insolvent. The plaintiff filed his bill and asked the remedies of a mortgagee and for payment of his debt. The defendants *Lough* and the assignee in insolvency *Perkins*, demurred for want of equity, on the ground that as there was no assignment of the mortgage to the plaintiff he had sued in a wrong capacity. This demurrer was overruled, as under the Administration of Justice Act the plaintiff was entitled to sue on the notes.

Statement.

The defendants then demurred *ore tenus*, on the ground that *Caldwell* should have been a party, for though a mortgagee he had by the transfer of the notes, for which the mortgage was a security, made himself a bare trustee, and being so his estate did not pass to the assignee in insolvency, as trust estates, under section 16 of the Insolvency Act of 1875, do not vest in the assignee.

Mr. *O'Sullivan*, for demurrer. The general principle is, that the interest of a trustee does not, on his insolvency, pass to the assignee. The latter part of section 16 of the Insolvent Act of 1875, expressly excepts from the property vested in the official assignee, "The property which the insolvent may hold as trustee for others" (*a*). Here the insolvent was a

(*a*) 38 Vic. ch. 16, sec. 16.

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mortgagee and his interest in the mortgaged lands is presumed to have passed to the official assignee, who is made to represent him in this suit. This is contrary to the section cited and to the reported cases: *Ex parte Ellis* (*a*), *Bennett* v. *Davies* (*b*), *Ex parte Chion* (*c*), *Pennell* v. *Deffell* (*d*), and *Archbold's* Bankruptcy, page 328, and 333.

Mr. Fitzgerald, Q. C., contra.

BLAKE, V. C.—In this case a general demurrer for want of equity was filed. It was argued that on the bill as it stood the whole relief prayed for could not be granted. This seems clear; but in answer to a general demurrer for want of equity, it is only necessary to shew that one complete case for relief is made out. Such a case appears plainly on the bill, and, therefore, I overruled the demurrer that was filed. Thereupon the defendant demurred *ore tenus*, alleging as ground of demurrer that the bill asked, amongst other things, for the sale of certain lands without having before the Court a person who is a necessary party to such relief. This demurrer, for want of parties, to the extent that it has been raised, must be allowed. The mortgagee was trustee for the plaintiff. Under the Insolvent Act the property of which he was thus trustee did not pass to the assignee in insolvency. The mortgagee would therefore be a necessary party to a bill asking for a realization of the debt by sale of the mortgaged premises.

Judgment.

Following *Roche* v. *Jordon* (*e*), the demurrer for want of equity will be overruled, with costs. The plaintiff will have leave to amend as to the other ground, without costs.

(*a*) 1 Atk. 101.
(*b*) 2 P. Wms. 316.
(*c*) 3 P. Wms. 197.
(*d*) 4 D. M. & G. 372, 379.
(*e*) 20 Gr. 578.

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THE CORPORATION OF THE TOWNSHIP OF MCKILLOP V. SMITH.

Demurrer—Pleading.

Where a bill by a municipality seeking to restrain the defendants from obstructing a highway in one paragraph alleged that the defendants "have fenced or allowed the same to be fenced," and in another paragraph that they were "in the occupation and possession of the said side line * * and have prevented and still prevent the inhabitants * * and the public at large from travelling on and over the said side line * * and have refused and still refuse to open the said line or to allow the plaintiffs to do so," and that the defendants claimed they were entitled to the road.

Held, on demurrer for want of equity, that the allegations taken together were sufficient to entitle the plaintiffs to the relief; although had the only allegation been that the defendants had "fenced or allowed the same to be fenced," it would not have entitled the plaintiffs to the injunction prayed for.

Statement.

This bill was filed on behalf of the Township of McKillop against *Wm. Smith* and *James Haney*, alleging that *Smith* was the owner of lot 16 in the 8th concession of said township, and that he had lately entered into some contract or agreement for the sale of it to the other defendant. That when the township was originally laid out a side line was set out between lots 15 and 16, running from the 7th to the 8th concession, and that the same was intended for a public road; that when lot 16 was originally granted it was so granted according to the original survey of the township; that the township council had passed a by-law ordering the said side line to be opened up for the use of the public. The ninth and tenth clauses of the bill were in these words: "The said defendants are in the occupation and possession of that portion of the said line which runs from the eighth to the seventh concession roads of the said township, and have fenced or allowed the same to be fenced in, and have prevented and still prevent the inhabitants of the said township and the public at large from travelling on and over the said side line, and

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that portion thereof lying between the said seventh and eighth concession roads, and have refused and still refuse to open the said line or to allow the plaintiffs to do so. The defendants claim and pretend that they are entitled to the said side line and to use the same, and have neglected and refused, and still neglect and refuse to remove the said fence, and to allow the inhabitants of the said township and the public at large to travel on or over the same, although and the facts are that they have for a long time past had due notice and knowledge of the said by-law, and have been frequently requested to remove the said fence, and to allow the said side line to be used."

The prayer was, that the defendants might be ordered to remove the fence and to throw the side line open to the use of the public, and might be restrained from continuing or permitting the said fence or any fence to be or remain in such a position as to inclose the said side line.

The defendants filed a demurrer for want of equity.

Jan. 24th.

Mr. *Maclennan*, Q. C., for the demurrer, contended that there was no sufficient allegation in the bill to shew that the defendants put up the fence complained of, or prevented, by any active proceeding on their part the road from being used, and that the plaintiffs had themselves sufficient power and authority to abate the nuisance, if any such existed.

Mr. *A. Hoskin*, contra.

Judgment.

Feb. 14th.

BLAKE, V. C. The defendants urge that the statement in the ninth paragraph of the bill, "and have fenced or allowed the same to be fenced," is not sufficient to warrant the conclusion that the defendants have been guilty of an act against the commission of which this Court would grant relief. I think this expression standing alone is open to the objection urged, that "allowed" means permitted; and that as the owner of premises abutting on this road allowance was

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not bound to interfere with a neighbour who chose to enter upon it and erect a fence, so the defendants are not responsible for allowing the act complained of. But I am of opinion that eliminating these words from the pleading, there is yet sufficient left to sustain it against the demurrer.

The bill in the eighth paragraph alleges that "The side line between the said lots numbers 15 and 16 is an original allowance for and is a public road, and has been dedicated to the use of the public," and that the proper corporation in that behalf has duly ordered it to be opened for the use of the public. The ninth paragraph alleges that the defendants "Are in the occupation and possession of the said side line, which runs from the 8th concession road to the 7th concession road * * * and have prevented and still prevent the inhabitants of the said township and the public at large from travelling on and over the said side line * * * and have refused and still refuse to open the said side line or to allow the plaintiffs to do so." And the tenth paragraph states "The defendants claim and pretend that they are entitled to the said side line, and to use the same, and have neglected and refused and still neglect and refuse * * * to allow the inhabitants of said township and the public at large to travel on or over the same." The bill prays "That the defendants may be ordered to throw the said side line open to the use of the public," and that they may be restrained "from preventing the inhabitants of the said township and the public at large from going on and over the said side line."

Judgment.

We have the statement that there is a public road—to the use of which the public are entitled—and that the defendants have taken possession of and are in occupation thereof, and prevented the public from travelling thereon, and that they claim they are entitled to the side line, and refuse to allow the inhabitants of the township to travel over the same.

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On these allegations the Court is bound to prevent the rights of those entitled to the road being interfered with, and to restrain the exclusive use and occupation by the defendants of a piece of land intended for the benefit of the public. I think the demurrer should be overruled, with costs.

SOLICITORS.—*Cameron*, *McMichael*, and *Hoskin*, agents for *Benson* and *Meyer*, Seaforth, for plaintiffs; *Mowat*, *Maclennan*, and *Downey*, agents for *Cameron*, *McFadden*, and *Holt*, Goderich, for defendants.

BALL V. CANADA COMPANY.

Lessor and lessee—Privilege of purchase—Condition.

Where there is a contract between the owner of lands and another person, whether lessee or not, that if such other person shall do a certain specified act he shall be at liberty to buy the property, in such a case, time is of the essence of the contract, and until the performance of the act which has been so stipulated for the relation of vendor and purchaser does not exist between the parties: Therefore, where *The Canada Company* granted the plaintiff a lease of certain lands, whereby, amongst other things, they agreed that if the lessee duly paid certain rents and taxes, and should not cut or sell, or suffer, or permit to be cut or sold any timber or other trees growing on the lands, except for the purposes of clearing and the use of the premises, he should be at liberty to purchase the same at a certain named price, and it was admitted that default had been made as well in regard to the payment of rent and taxes as to the cutting of timber, it was *held* that the right to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon.

This was a special case submitted for the opinion of the Court under the Statute 28 Vic., ch. 17, and was as follows:—

(1.) In the early part of May, 1871, the plaintiff called at the office of the defendants, in Toronto, and made inquiries as to the pric[illegible] the lands hereinafter

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mentioned, which were the property of the defendants, and was then informed of the price and terms.

(2.) Soon after, and on the 16th of May, 1871, the plaintiff wrote to the defendants: "I wish to purchase the following lands in the township of Vespra, in the county of Simcoe:

Lot 31, con. 2, Vespra, 100 acres.....	$ 800
Lot 4, con. 3, Vespra, 200 acres.....	1,200
Lot 4, con. 5, Vespra, 200 acres.....	1,200
Lot 5, con. 6, Vespra, 200 acres.....	1,200
	$4,400

These prices were named to me when I called at your office on Saturday last, and I was then informed that I could have the lands on paying one-third cash down, and for that purpose I enclose you a draft on Toronto for $1,469, and I would be glad to know at once if I am to have the lands, and an agreement for the sale at your earliest convenience." In answer to this the chief commissioner of the defendants wrote on the 19th of May, 1871, "We are in receipt of your letter of the 16th instant, enclosing cheque for $1,469 (£367 5s.), the amount required for the Vespra purchase, or rather lease. I enclose the counterpart lease for execution. It is fully understood that no timber whatever is to be cut or sold from the land until the purchase money is paid in full; but to accommodate you, you can take deeds of either lot at any time as required." The plaintiff thereupon on the following day wrote: "Yours of the 19th instant, enclosing lease of lands in Vespra, with power to purchase, I received this morning and now return you lease executed. I observe that the lease carries the rent from the 1st of February last, by which means I would be paying for over three months' interest, whilst I have had no claim to the lands. I will leave this, however, to be arranged by you if you can do it. You will oblige by sending me the duplicate executed by the company."

Statement.

To this letter the defendants replied on the 25th of the

same month: "We are in receipt of your letter of the 20th instant, with counterpart lease duly executed for lots in Vespra. Although the term commences from the 1st February, 1871, the rent only commences from the date of the lease. The lease will be sent to you as soon as completed."

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Before the completion of the lease the defendants gave to the plaintiff a receipt for the money paid by him, in the following terms: "No. 263, Canada Company's office, Toronto, 22nd May, 1871. Received from *Francis R. Ball*, the sum of three hundred and sixty-seven pounds five shillings, being amount at his credit with the Canada Company, paid by him in consideration of the grant to him of a lease of lots 31, 2nd concession; 4, 3rd concession; 4, 5th concession, and lot No. 5, in the 6th concession of Vespra, by the Canada Company, which said sum is over and above all rents and payments reserved, covenanted, or agreed for in the said lease. —W. B. ROBINSON, Commissioner."

Statement.

(3.) The lease of the said lots was duly executed by the defendants and the plaintiff, and bears date the 17th of May, 1871, [and a copy was annexed as part of the case]. By the lease the plaintiff, amongst other things covenanted "to pay rent * * and pay taxes, and not to assign or sublet without leave, which said leave should also be necessary to all subsequent assignments, or sublettings; and not to alter or remove any land mark or boundaries of the land thereby demised; and not without leave of the lessors, in writing, to open any hole, or dig or bore for oil, or allow any work intended for or connected with the obtaining, extracting, dressing, refining, or manufacture of any mineral or oil to be carried on upon the said demised premises, and not to commit waste, but to use the land in a proper husbandman-like manner, and during the first three years of the said term, every year to clear, fence, and render fit for cultivation, not less than ..... acres of the said land, also to repair and keep up fences, and leave the

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premises in good repair. And also, will not at any time during the said term hew, fell, cut down, destroy, sell, or carry away, or permit or suffer to be hewed, felled, cut down, destroyed, sold or carried away, without the consent in writing of the lessors, any timber or timber trees growing on said land, further than may be necessary for making regular clearings on the said land, and rendering the same fit for cultivation, except for fire wood, fences, and building timber for the use of the said premises, and to be used thereon."

(4.) On the 8th of April, 1872, the plaintiff paid £33, being the rent from the date of the lease to the 1st of February, 1872, since which time no rent has been paid by plaintiff or by any one on his behalf.

(5.) In May, 1872, the defendants paid the taxes on the said lots, amounting to $28.80 ; and in April, 1873, they paid taxes amounting to $5.20 on lot 31, 2nd concession, Vespra, for the year 1872.

Statement.

(6.) The plaintiff did not make any of the improvements by clearing so much of the land each year according to the covenants contained in the said lease.

(7.) The plaintiff, contrary to the provisions of the said lease and the terms set out in the letter of the defendants, dated the 19th of May, 1871, cut and removed the timber from portions of the said land without the knowledge or consent of the defendants.

(8.) In the month of December, 1873, the plaintiff was applied to by letter from the defendants to pay the rent due and the first named taxes, which had been paid by the defendants.

(9.) In the month of November, 1874, he was again applied to in the same manner.

(10.) The said letters were not answered, nor did the plaintiff ever offer to pay either the rent or taxes.

(11.) The plaintiff has never paid any rent after the first payment in 1872, before mentioned, nor the said taxes, and not having made the clearings required, and having cut and removed timber from the lands in the

month of November, 1875, the defendants cancelled the lease, and gave notice thereof to the plaintiff, and forthwith issued a writ in ejectment against the plaintiff to obtain possession of the lands. 1876. Ball v. Canada Co.

(12.) The plaintiff thereupon at once offered to pay the rent and the balance of the purchase money, and taxes in arrear, which the defendants refused, alleging that for the reasons aforesaid the lease was forfeited; that the defendants had a right to the possession of the lands, and that the plaintiff had no interest remaining therein.

(14.) The defendants submit that the plaintiff having made default in the payment of rent due in the years 1873, 1874, and 1875, and also in the payment of the taxes, though requested and required to pay the same, and having broken the covenants to clear the said lands and not to cut timber thereon, they had good right to cancel the said lease; and having cancelled it, that the plaintiff cannot at law, or in equity, compel them to give him a deed of the land, as his right to obtain such a deed was dependent upon the performance of the covenants which the plaintiff admits were broken by him. Statement.

(15.) The plaintiff submits and contends that notwithstanding the non-payment of rent and taxes under the lease, and the violation of the said covenants respecting clearing and cutting of timber, and the cancellation of the lease by the defendants in consequence, that he has still an equity in the lands; that the lease was in reality a sale, although in form a lease; and that he is entitled upon the payment of the arrears of rent and taxes, and the balance of the purchase money, as agreed in the lease, and as offered by him, to obtain a deed from the defendants.

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

Mr. *J. Hillyard Cameron*, Q.C., and Mr. *Huson Murray*, for the defendants.

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The cases cited are mentioned in the judgment.

BLAKE, V. C.—In the lease, which is made a part of the special case, there is this clause: "And the lessors covenant with the lessee that if the lessee shall at any time during the continuance of the said term (no default nor breach of covenant having been at any time made by the lessee, and not otherwise) pay to the lessors the sum of £732 15s., in addition to all rents due or accruing hereby, calculated with the interest thereon to the day of such payment, and all taxes and rates as aforesaid, then and immediately upon such payment, and upon reasonable demand in writing, at the costs and charges of the lessors, the lessors shall convey the estate in fee simple to the lessee." The lessee covenanted that he would during each year of the term demised pay £43 19*s.* 4*d.* and all taxes, and that he would not cut down or carry away any trees, further than what might be necessary in clearing the land, and for fencing, firewood, and building. I do not deal with any other covenant or requirement of the lease, because it is admitted that the covenants to which I have referred have been broken. The option to purchase arose on the payment of £732 15*s.* at a time that no default or breach of covenant had arisen, and "not otherwise." The plaintiff admits that the covenants as to payment of rent and taxes and the cutting of timber have been broken, and yet he asks that specific performance shall be enforced against the defendants. In this case there was no contract as to the purchase of the premises; there was an option given which could be enforced on certain terms. The parties chose to define the terms on which this right to purchase should arise, and not having fulfilled them, this Court cannot now vary the agreement of the parties and say on entirely different terms the defendants shall be compelled to convey the premises to the plaintiff. It is not a case of penalty or forfeiture. The plaintiff pays down a sum of $1469, which entitles him to a lease for seven

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years on certain defined terms, and also gives him an option on the conditions specified in the same instrument. I understand the rule of the Court to be well settled, that where there is an agreement for sale and purchase, time not being of the essence of the contract, a very considerable latitude is allowed in the fulfilment of the terms on which specific performance should be enforced; but I understand the rule to be equally well settled, that where there is a right or option to purchase given, which is to arise on certain specified conditions, there, in order to obtain a specific performance, a literal compliance with such conditions must be shewn, unless, owing to no default on the part of the person having the option, they could not be performed.

The law was thus distinctly laid down in this Court in *Forbes* v. *Connolly* (*a*): "The defendant's right to resist a conveyance must rest then upon the plaintiff's default in the payment of rent, and we think, upon a covenant of this nature, where the covenantor cannot enforce a sale, but it is entirely in the option of the covenantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and that a party entitled to purchase or not at his option, must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option. This distinction is fully recognized by the English authorities, and is applicable to this case—the plaintiff had a privilege, and was not bound to purchase, but he did not observe the terms upon which alone he could exercise his privilege, and the law is, that in such case his privilege is gone. It may not be generally known that in contracts of this nature so much strictness is required; they may probably be often regarded as mere contracts of purchase. In the great majority of cases the privilege

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(*a*) 5 Gr. 657.

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is exercised because manifestly to the advantage of the party having it to avail himself of it; but it is not always so, and cases may frequently arise where the not being bound to purchase, or to renew a lease, or the like, may be of great advantage—at all events the law is, that such agreements are not upon the same footing as ordinary contracts of purchase."

In Lord *Ranelagh* v. *Melton* (a), Sir *Richard Kindersley* says: "Now I apprehend that the rule applicable to these cases is perfectly clear. There is no doubt that if the owner of lands and a person disposed to purchase from him enter into a contract, constituting between themselves the relation of vendor and purchaser, and there is a stipulation in such contract that the purchase money shall be paid on a certain day, this Court, in the ordinary case, has long established the principle that time is not of the essence of the contract; in other words, that the fixing a precise day for paying the money or completion does not put the parties into such a position that the vendor may say, 'If payment is not made on that day I will not complete.' On the other hand, it is well settled that where there is a contract between the owner of lands and another person, whether he be a lessee or not, that if such other person shall do a certain specified act, he shall buy the property, then time is of the essence of the contract. For the parties cannot be regarded as vendor and purchaser until the act to constitute that relation has been performed, the agreement being thus: 'If you will do a certain act, I will convey to you my land,' this Court looks upon it as a condition on the performance of which the party who claims the benefit of the performance of the conditions is to be entitled to certain privileges and benefits; but, in order to entitle him to them, he must perform the conditions strictly, and if there is a day fixed for the performance of them, and it is passed over by one single day, that prevents his having the right. Apply that rule

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(a) 10 Jur. N. S. 114.

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to this case, which really brings it to the construction of the agreement. If the agreement fixes the day, and the act is not done (I am not speaking of cases where fraud or circumstances may prevent its being done), the party making default shall not have the benefit of being the purchaser."

In *Weston* v. *Collins* (*a*) the Lord Chancellor, reversing the decree of Sir *John Romilly*, thus states the law: "The covenant by the defendant, on which this suit is founded, is so worded as to impose on the lessee or his assigns the obligation of doing certain things, as precedent conditions to any obligation arising on the part of the lessor. If the lessee chooses to comply with the conditions, the lessor is bound, but previously there is no mutuality of contract, for whilst the lessor is bound to accept the requisition of the lessee, if the conditions are fulfilled, there is no obligation on the part of the lessee to fulfil them, or to avail himself of the lessor's engagement. It is in fact a conditional offer by the lessor, and the condition must be observed before the offer becomes binding. It is a mistake to apply to a condition of this kind the rules which are applicable in this Court to ordinary contracts for the sale of real estate. In the ordinary contracts of purchase, both parties are at once bound, and unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase money or for the conveyance of the estate is not deemed of the essence of the contract; but here from the very form of the stipulation, certain things must be done before a binding agreement can arise. If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to request that it shall be first done on the one side before any obligation arises on the other—the things required must be done in the order of sequence which are stipulated."

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(*a*) 11 Jur. N. S. 190.

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In *Joy* v. *Birch*, in the House of Lords (*a*), the exception to the ordinary rule as to the enforcement of contracts in this Court, is recognized. There the Lord Chancellor says: "It is a well established rule that under a clause of repurchase of this description, being for the purpose of determining an interest, the terms of the proviso of repurchase must be strictly complied with * * In *Denis* v. *Thomas* Sir *John Leach* said, 'Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time; there the party claiming the privilege must shew that the money was paid accordingly.' In *Barrett* v. *Sabine* it was held, that where there is a clause or provision in the conveyance for the vendor to repurchase, the time limited for that purpose ought to be precisely observed. It was therefore necessary for the party claiming the right to repurchase strictly to comply with the terms of the provision; he was bound to give a regular notice, and he was also bound to pay according to that notice, unless he was prevented from doing so by the situation of the party to whom the notice was given, or who was to receive the money."

Judgment.

See also *Austin* v. *Tawney* (*b*). The cases on the subject are collected in *Fry* S. P. s. 733; *Sugden* V. & P. p. 188; 1 *Dart*, p. 194; and *Watson's* Compendium, vol. ii., p. 941.

Green v. *Low* (*c*), and cases of that class, cited for the plaintiff, do not assist his contention. It was there held "That the right to purchase was independent of the right to a lease." So far as the lease was concerned, by reason of the plaintiff's neglect to insure (a condition upon which it was to have been granted), the right to it was gone; but, there being an independent agreement for sale and purchase, and not dependent upon this condition, the plaintiff was held entitled to its performance. So, in *Hunt* v. *Spencer* (*d*),

(*a*) 4 Cl. & Fin. 57—89.
(*b*) L. R. 2 Ch. 143.
(*c*) 22 Bea. 625.
(*d*) 13 Gr. 225.

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the two covenants in question were found to be separate and distinct, and the performance of the one not to depend, in any manner, on the fulfilment of the other, and therefore specific performance was decreed.

But I have failed to find any authority for this Court waiving, except under special circumstances, such as those before mentioned, the conditions on which the right to purchase is given.

It is true the plaintiff approached the defendants with the view of purchasing, and not leasing the lots in question. He was then informed of the price and terms of sale. Shortly afterwards, on the 16th of May, 1871, he wrote, expressing his wish to purchase these lots, enclosing his draft for $1469, said to be one-third of the purchase money, and saying he would be glad to know if he was to have the lands, and asking for an agreement for their sale. On the 19th of the same month, the defendants acknowledge the $1469, "the amount required for the Vespra purchase, or rather lease;" the counter part of the lease is enclosed, and the plaintiff is warned expressly in the letter "that no timber whatever is to be cut or sold from the land until the purchase money is paid in full." Then, lest this should be considered hard by the plaintiff, there is added, "but to accommodate you, you can take deeds of either lot at any time as required." This last option allowed the plaintiff, if he pleased, to pay such an amount as would, after deducting the portion of the $1469 which should be properly attributed to the lot he was about to pay for, make up the whole purchase money thereof, and to demand a deed for such lot. Thereupon he would have had the liberty to cut the timber on such lot, and his rights as to the other lots would have remained untouched. But the plaintiff does not exercise this right. Without making any such arrangement as that indicated, he breaks the covenants on which all his rights depended, and thereby, to my mind, deprives himself of any such relief as that which he asks. He does not pretend that he did not under-

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stand the lease, and the terms on which he and the defendants were dealing with the land. He does not pretend that he did not comprehend that he was paying the $1469 for the lease with the option it contained—that this money was not looked upon as purchase money paid on the land, but as a portion of the price paid for the obtaining the lease with the option it contained The receipt given calls his attention distinctly to this, "Received from Francis R. Ball the sum of £367 5s., being amount at his credit with the Canada Company, paid by him in consideration of the grant of a lease," &c.

If *Casson* v. *Roberts* (*a*), cited by the plaintiff, could be said to assist him, it could scarcely be now followed after the decision of the Lords Justices in *Ex parte Barrell* (*b*).

I doubt that under any circumstances the Court would be justified in giving the plaintiff relief, as the breaches of the covenants by the plaintiff were wilful—after notice given by the defendants—and of such a nature. *Sanders* v. *Pope* (*c*), *Hill* v. *Barclay* (*d*), *Wadman* v. *Calcraft* (*e*), *Bargent* v. *Thompson* (*f*), *Bamford* v. *Creasy* (*g*).

Judgment.

I think the decree must be, on the case stated, for the defendants.

SOLICITORS.—*Boswell*, *Stephens*, and *Robertson*, for the plaintiff; *Murray*, *Barwick*, and *Lyon*, for the defendants.

(*a*) 31 Bea. 613.
(*b*) L. R. 10 Ch. 512.
(*c*) 12 Ves 282.
(*d*) 16 Ves. 402. 18 Ves. 56.
(*e*) 10 Ves. 67.
(*f*) 4 Giff. 473.
(*g*) 3 Giff. 675.

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LIFE ASSOCIATION OF SCOTLAND v. WALKER.

Trustees and cestui que trust—Commission—Practice—Further directions —37 Vic. ch. 9, (Ont.)

The rule of decision in Equity, which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the *cestui que trust* or his assignee can compel a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains, and trouble under the Act of Ontario, 37 Vic. ch 9.

Where on a reference to a Master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the Master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but not stating that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim.

Hearing on further directions.

Statement.

The defendants *James Thomas Pennock* and *William Pennock*, in February, 1874, were owing the plaintiffs $5,752.17, with interest at 6 per cent., from the 4th of October, 1873.

The *Pennocks* were entitled to an undivided half-interest in certain lands in the township of Buckingham in the county of Ottawa, Quebec, which had been agreed to be sold to the Buckingham Plumbago Company (limited). The defendant *Walker* was entitled to the other undivided half-interest, and the title to the whole stood in *Walker's* name.

On the 27th of February, 1874, an agreement was entered into between *Walker*, of the first part; the two *Pennocks*, before named, of the second part; *John C. Pennock*, who had become a partner with these two, as agents for the plaintiffs, of the third part; and the plaintiffs of the fourth part; which recited a previous agreement between the same parties, except *John C.*

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Pennock, of the 19th of November, 1873, containing recitals of the indebtedness of the *Pennocks* to the plaintiffs in the sum or $5,753.17, with interest at 6 per cent. from the 4th of October, 1873; the interest of the *Pennocks* in these lands held for them by *Walker*, and an agreement by the *Pennocks* with the plaintiffs that the plaintiffs should hold a pledge or lien upon the share or interest of the *Pennocks* in the premises; and that *Walker* should not reconvey the property to the *Pennocks* until after the payment to the plaintiffs of the said indebtedness with interest; and that *Walker* should pay the same out of any moneys which should come into his hands from the sale of the interest of the *Pennocks* in the property after the payment to *The Ætna Insurance Company*, of Connecticut, of their claim against the *Pennocks* amounting to $5,000, or thereabouts, for which they held a first charge; that the plaintiffs had agreed to give the *Pennocks* time for payment for three months from the 4th of October, 1873; and witnessing that the *Pennocks* gave such lien, subject to any contract *Walker* had made or might make for the sale of the land, and *Pennock* agreed to pay to the same effect as in the recitals; and the plaintiffs agreed to give the time. The indenture now in recital further recited that the *Pennocks* had not paid the debt and interest, or any part thereof, and the same with interest on the 4th of January, 1874, amounted to $5,841.12; and the *Pennocks* had applied for an extension of time for six months from the 4th of January, 1874, for payment, with interest at 7 per cent., and had proposed that all commissions on old business should be applied in reduction of the debt, to which all parties agreed, and witnessed that the *Pennocks* gave a lien upon their interest in the lands, subject to any contract that had been or might be made by *Walker* for sale; and *Walker* agreed to hold the interest of the *Pennocks* in the lands or the money to arise from their sale as a lien or pledge for the debt and interest, subject to the previous lien of

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The Ætna Insurance Company; and *Walker* further agreed to pay the debt and interest out of any money that should come into his hands from the sale of the interest of the *Pennocks* whenever it should be disposed of, so far as it would extend after payment of *The Ætna Insurance Company*. The plaintiffs agreed to give the six months time; and the commissions from old business were to be applied in reduction of the debt.

In 1875 *Walker* sold the lands to the other defendants, *The Dominion of Canada Plumbago Company*, for £80,000 stg.

The bill prayed that the lands and mine might be declared to have been charged with the debt and interest, or, at all events, that *The Dominion of Canada Plumbago Company* were bound to see that the purchase money was applied in payment of the plaintiffs' claim, and that the unappropriated stock and other property of the company were bound to make good to the plaintiffs their debt and interest; and for an account of *Walker's* dealings with the said lands and mine, and with the proceeds of the purchase money and the property representing it, and for a sale.

Statement.

The case came on for hearing *pro confesso*, before *Blake*, V. C., on the 29th of March, 1875, who made a decree referring it to one of the Masters at Ottawa to take an account of what was due to the plaintiffs after deducting commission on premiums on policies in the plaintiffs' company, issued before 1st of January, 1871, obtained through the agency of the *Pennocks*, and the Master was to inquire as to the dealings of the defendants with the land and mine, and to inquire and state the consideration and terms of the alleged sale to *The Dominion of Canada Plumbago Company*, and to take an account of the purchase money, securities and stock of the company, and other the consideration paid to, or received by, defendant *Walker* or the *Pennocks*.

The consideration of further directions and costs was reserved until after the Master made his report.

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The Master's report dated 5th of October, 1876, found due to the plaintiffs for principal and interest $4,964 91.

The Master also found that the lands and mine were sold by *Walker* to *The Dominion of Canada Plumbago Company* for £80,000 sterling, payable as follows: £40,000 stg. of the fully paid up stock of the company, £20,000 stg. of the stock having £7 10s. per share of £10 paid thereon, and £20,000 stg. secured by mortgage on the lands and mine, and payable out of the surplus profits of the company over 10 per cent.

The Master also found the defendants *James T. Pennock* and *Wm. Pennock* entitled to a half share of the consideration after payment of all costs, charges, and expenses incidental to the sale of the lands and mine, including the commission, travelling expenses, brokerage fees charged, incurred or paid by the defendant *Walker*; that no regular books were kept by the defendant *Walker* shewing a debit and credit account of his dealings with the consideration of the said sale of the lands and mine.

Statement.

In a schedule was set out the disposition of the £60,000 stg. of stock by *Walker*, from which it appeared that £21,000 of stock was assigned to brokers and promoters; £500 to *J. T. Pennock* to qualify him as a director of the company; 325 shares were sold for $11,741.06 in cash and promissory notes, of which *Walker* paid to the *Ætna Insurance Company* $5,966.68: that *Walker* was obliged to take up some of said notes to the value of $1,200, while a portion of the notes had not matured; and that *Walker* had assigned 65 shares to one McCuaig in payment or security for a debt due by the *Pennocks*.

The Master added a special clause to his report, at the request of the solicitor of the plaintiffs, in respect to the sale of stock of the company, beyond the consideration for the purchase of the lands, which the Court did not consider to be warranted by the decree, as the decree only dealt with the price of the lands.

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

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

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PROUDFOOT, V. C.—[After stating the facts as above set forth.]—At the hearing on further directions the question principally discussed was the right of *Walker* to deduct his costs, charges, expenses, and commission before the interest of the *Pennocks* was ascertained. I think the Master was quite right in finding him so entitled. The real interest of the *Pennocks* could only be what remained after payment of the expenses of bringing the property to market and payment of the trustee's commission. The expenses incurred by a trustee in the execution of his office are treated by the Court as a charge or lien upon the estate, and the *cestui que trust*, or his assign, cannot compel a conveyance in equity without a satisfaction of the trustee's just demands. *Lewin* on Trusts, 5th ed. 453; and I am quite prepared to hold that the same rule applies to the commission or allowance to a trustee for his care, pains, and trouble, under the 37 Vic. ch. 9 (Ont.) There is nothing in the agreement of the 27th of February, 1874, to interfere with this. It declares the debt to be a lien upon the estate and interest of the *Pennocks* subject to any sale, and subject to the prior lien of *The Ætna Insurance Company*. Nothing can be plainer, it seems to me, than that this charge and covenant are only upon the interest of the *Pennocks*, which cannot be ascertained till after payment of those charges. Nor is the payment to the *Ætna Insurance Company* of their full claim, without deducting these charges, any admission they did not exist. *Walker* might be well satisfied that after paying this lien enough would be left to satisfy them.

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But the report is defective in not ascertaining the amount of the charges, costs, expenses, commission, and brokerage, and there must be a reference back to ascertain it.

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I do not know what is meant by the clause in the report that *Walker* kept no regular books shewing a debtor and creditor account of his dealings with the consideration of the said sale. The Master does not say that he was unable to ascertain what they are on that account. He does not report them, however, except as to the general disposition of the stock received for the lands; but it is evidently incomplete, as the dealings must include the account of the charges, costs, &c., &c., already referred to.

Again the report is defective in regard to the shares sold, and what has been realized from them. The nominal amount for which they were sold was $11,741.06, but payment was taken in cash and in promissory notes; no specification of the amount of each, but $1,200 of these notes had to be taken up by *Walker*, and other notes had not matured; so that it is impossible to know, from the report, how this part of the account stands. *Walker* would be entitled to half

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of the cash realized for his share. It cannot be considered he was bound to pay all the cash on the *Pennocks'* account, and confine himself to the stock and securities; and he seems to have paid away more than half on their account, irrespective of the $1,200, of the notes he has been obliged to take up.

In the disposition of the stock *Walker*, however, seems to have erred in assigning the £500 to *James Thomas Pennock*, and the £650 to *McCuaig* on account of the *Pennocks;* but the report does not shew the worth of the stock, and he cannot be charged with it at par. The report must go back on this ground also.

There would seem to be in *Walker's* hands of paid-up stock £31,500, of that paid up to £7 10s., £3,100, and the mortgage of £20,000; but until the accounts I have specified are taken it is impossible to say what the interest of the *Pennocks* may be, and I cannot direct a sale till that is ascertained.

There will be no costs of this hearing.

SOLICITORS.—*Fitzgerald* and *Arnoldi*, agents for *Pinhey*, *Christie*, and *Hill*, Ottawa, for plaintiffs; *Blake*, *Kerr*, and *Boyd*, agents for *Walker*, *McIntyre*, and *Ferguson*, Ottawa, for defendants. 1876.

BILLINGTON v. THE PROVINCIAL INSURANCE COMPANY.

Fire insurance—Agent of company—Agent of assured—Prior insurance—Notice to agent of Company—Amendment at trial.

On the 6th of February, 1875, the plaintiff applied to the agent of the defendants at Dundas, to effect an insurance for two months from that date, for which he paid the premium demanded, and obtained an interim receipt, but before a policy was issued the property was destroyed by fire. It was shewn that it was not usual to issue policies on interim receipts for short risks; but after the fire occurred a policy was issued, on which were indorsed, amongst other conditions, one, that notice of all previous insurances upon the property should be given to the company, and indorsed on the policy, or otherwise acknowledged by them in writing; and another that if the agent of the company made the application for the insured he should be considered the agent of the insured and not of the company, which rule of the company, their manager said, was established in order to prevent collusion between their agents and parties effecting insurances; but no intimation of such a condition appeared on the receipt given to the plaintiff. When the insurance was applied for the plaintiff informed the agent of the existance of a prior insurance on the same property in another company (the same person was, in fact, agent for both companies), and expressed great anxiety to have the same properly acknowledged by the company; but it appeared that the agent had omitted to communicate the fact of such prior insurance to his principals, as he promised the plaintiff to do. It was proved by the manager of the company that it was the duty of the agent to receive applications for insurance, and that such applications would necessarily give notice of the existence of other insurances. In an action brought to recover the amount of the policy, the company raised several defences of false representations by and fraudulent conduct on the part of the insured, all of which were either abandoned or disproved at the trial; the defence being finally rested on the want of notice of prior insurance, and the questions of agency and over-valuation:

Held, under the circumstances stated, that the plaintiff was entitled to recover the amount of loss sustained by him, together with his costs of suit, the amount of which the company were ordered to pay forthwith.

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In an action on a policy to recover the amount of loss sustained by the insured, a plea was put in that the papers as to the proof of loss were insufficient; but the Court being of opinion that the defects, if any, were cured by the Act, 38 Vic. ch. 65 (Ont.), gave the plaintiff liberty at the trial to reply the particulars required to bring the case within that Act, if necessary to do so.

The Ontario Statute (38 Vic. ch. 65) is not *ultra vires*, so far as it affects companies incorporated by Acts of the Legislature of Canada. As to any such company transacting business in Ontario, on any subject within the powers of the Provincial Legislature, that body may impose what conditions it pleases on the operations of the company.

This was an action originally instituted in the Queen's Bench, tried before Vice-Chancellor *Proudfoot*, at Hamilton, at the Autumn Sittings (1876.) The first count of the declaration was upon a policy of insurance under the seal of the defendants, dated 9th February, 1875, insuring against loss or damage by fire, to the amount of $6,000, on agricultural machinery in progress of construction, finished and unfinished, owned by the plaintiff and contained in a two-storey stone building with a one-storey frame addition, &c., from the 6th of February, 1875, to the 6th of April, 1875, the loss to be estimated according to the true and actual cash value of the property at the time the same should happen, and to be paid within sixty days after notice, and proof thereof should be made by the plaintiff. It was alleged that the plaintiff continued to be interested in the property when it was destroyed by fire, and while the policy was in force; and that all conditions were fulfilled, &c., necessary to enable the plaintiff to maintain the action.

Statement.

A second count was added, when the cause was first brought on for trial, by leave of Mr. Justice *Burton*, which, after setting out the policy as in the first count, continued, "And the plaintiff says that at the time of the effecting of the said insurance he had an insurance on the stock in the Gore District Mutual Insurance Company, to the extent of $1,000, of which the defendants had notice before and at the time they effected the risk,

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and the defendants agreed to accept the risk and to insure the plaintiff's property, having such knowledge, and to mention the same in the policy, or to have the same indorsed thereon, which they omitted or neglected to do by mistake, of which the plaintiff had no knowledge until the property was destroyed; and the policy or contract of insurance ought to be reformed and amended by the mention therein of the existence of the Gore District Mutual Insurance Company policy," and then alleged the fulfilment of all conditions entitling the plaintiff to maintain the action.

To the first count of the declaration the defendants pleaded: (1.) *Non est factum.* (2.) False representations as to value; this was abandoned at the hearing. (3.) That the double insurance—that in the Gore District Mutual Insurance Company—was not notified to the defendants and mentioned in or indorsed upon the policy, whereby such policy was and is void. (4.) That the papers as to the proof of loss were insufficient. (5.) That the plaintiff had not procured a certificate from a magistrate or notary public most contiguous to the place of the fire, and not concerned in the alleged loss or related to the plaintiff, &c., that the plaintiff had, really and by misfortune and without fraud or evil practice, sustained damage or loss by the fire to the amount mentioned in the certificate. (6.) That the plaintiff was guilty of fraud and false swearing in the proof of papers; this also was abandoned at the hearing.

Statement.

To the second count, the defendants pleaded: 1st: That at the time of effecting the insurance by the plaintiff with the defendants they had no notice of the policy for $1,000, nor did they agree as in that count mentioned, nor did the defendants by mistake omit to mention the policy of $1,000 in the policy of the defendants or to indorse the same thereon; and that it ought not to be reformed.

The second plea to this count set out two conditions of the policy, one, that notice of all previous insurances

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upon the property insured should be given to them and indorsed on the policy or otherwise acknowledged by the company in writing, at or before the time of their making insurances thereon, otherwise the policy should be of no effect; the other, that if the agent of the company made the application for the insured he should be considered the agent of the insured and not of the company; and alleged that the plaintiff made his application for the insurance through one *R. W. Suter*, the agent of the defendants at Dundas; that it was in writing and was forwarded to the head office of the defendants at Toronto, and the policy of the defendants was issued thereon; that the application contained no statement or mention of the $1,000 policy in the Gore District Mutual Insurance Company, nor had the defendants or their directors, or any of the officers of the company, at the head office, any knowledge or notice of that policy before or at the time of the making of the application or of the issuing of the policy of the defendants, although the plaintiff had communicated the existence of it to the said *R. W. Suter* at the time he made his application, but *Suter* had no authority from the defendants to change or vary or waive the said conditions, and *Suter* did not give the defendants notice thereof, nor had the defendants notice of it unless notice to *Suter* was notice to them, which they denied; that immediately after the plaintiff's application the defendants' policy was made and delivered to the plaintiff, and he was fully aware and had the means of knowing that the policy for $1,000 was not indorsed or otherwise acknowledged by the defendants in writing, and that the plaintiff had been guilty of laches in not seeking sooner to reform the said policy.

Statement.

The defendants further alleged that the conditions were made expressly with the intention of preventing fraud and collusion between the insured and the agents of the company, by requiring the knowledge of the company to be evidenced in writing; and as one of these conditions was, that if the application were made

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by *Suter* he was to be the agent of the plaintiff and not of the company, the defendants were not bound by notice to him or his knowledge.

The plaintiff replied equitably to the third plea to the first count, setting out the condition on the policy avoiding it if notice were not given of a prior insurance, and alleged that he applied for the insurance by defendants to an agent of the defendants authorized to receive applications for insurance and the payment of the premiums, and to grant interim receipts on behalf of the defendants; and when he made the application he informed and notified the said agent of the existence of the insurance in the Gore District Mutual Insurance Company for $1,000, and instructed the agent to have the same indorsed on the policy or otherwise acknowledged by the defendants in writing, which the agent undertook to do. That the defendants omitted or neglected to have the existence of the other insurance indorsed on the policy or otherwise acknowledged in writing, and the loss occurred before the policy was delivered; and the plaintiff had no notice, till after the loss, that the existence of the said insurance was not indorsed on the policy or otherwise acknowledged in writing.

The defendants rejoined to this replication to the same purport as in their second plea to the second count. The action had been made a remanet, and afterwards, by order, was transferred to this Court.

Mr. *B. Osler*, Q. C., and *Mr. Moss*, for the plaintiff.

Mr. *J. Hillyard Cameron*, Q. C., and *Mr. Huson Murray*, for the defendants.

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

Judgment. Jan. 31, 1877.

PROUDFOOT, V. C.—[After stating the facts as above set forth.] The first plea, *non est factum*, I find for the plaintiff. The second and sixth pleas, imputing

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false representations and fraud and perjury to the plaintiff were abandoned at the hearing and must be found for the plaintiff; they were not attempted to be supported by any evidence, and ought never to have been put on the record. The fourth, as to insufficiency of proof of loss, I think, must also be found for the plaintiff. The papers sufficiently complied with the condition on the policy in regard to them, or if not the defects have been cured by the Ontario Statute, 38 Vic. ch. 65, sec. 1. The evidence proved the facts to bring it within that section.

It was insisted that this Act was *ultra vires;* that the defendants having been incorporated by an Act of Canada, the Ontario Legislature had no power to pass any Act affecting them. The Act had been passed for more than a year before the insurance was effected, and has not been disallowed under section 90 of the British North America Act. Independently of that, if a company incorporated by Canadian Act does business in Ontario, on any sub-

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ject within the powers of the Provincial Legislature, I conceive that Legislature may impose what conditions it pleases on the operations of the company. And the question here is one respecting property and civil rights, which are, by the 92nd section of the British North America Act, assigned to the Provincial Legislature. The plaintiff asked leave to reply the particulars requisite to bring it within the Act, if necessary. And *if necessary*, he may do so.

The fifth plea must also be found for the plaintiff; the certificate was found to have been given by the magistrate most contiguous to the fire.

The case then is to depend on the third plea to the first count, and the equitable replication to it, and the rejoinder; and on the second count in the declaration and the subsequent pleadings to it. These raise the question, whether notice to the local agent at Dundas is notice to the company, and whether there is any mistake to justify the reformation of the policy. The following are the material parts of the evidence:—

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The manager of the defendants gave evidence that "*Suter* was their agent at Dundas: his power was to receive applications for insurance, receive premiums, and grant interim receipts, but not to receive notices of other insurances and transmit them; it is his duty to receive the application and part of that would be the existence of other insurances."

Suter gave evidence in similar terms as to his duties: That he received the application of the plaintiff about 6th February, 1875; he was aware of the policy in the Gore District Mutual Insurance Company, but the plaintiff was not aware, nor was he, whether it covered the building, or the property proposed to be insured; he was agent also for the Gore District Mutual Insurance Company, and took the application for the insurance in it. The policy could not be found, it was intended to make a further search for it, and state it in the application; plaintiff wanted it mentioned in the application if it was necessary; he received the premium and gave plaintiff an interim receipt; it is not usual to issue policies on interim receipts for short risks, and the policy in this case was not in fact issued till after the fire.

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The plaintiff said he made the application to *Suter*, and gave him all the data to fill in, and paid the premium, and got an interim receipt, but not a short date receipt. (The manager says one was sent to him.) At the time of the application the Gore District Mutual policy was mislaid. He spoke particularly about it, and wanted to have it written in the application. He knew a part of it was on stock, and wanted *Suter* to wait till it was found. *Suter* was desirous of sending it off that night. Plaintiff wished him to insert the whole amount of the policy, $3,000, as if it was all on stock. *Suter* said he had all the papers at his office, and would fill it in. Plaintiff was very particular in insisting on his placing this policy in the application. It had been assigned to a Building Society on the 10th February, 1874. $2,000 is on the building and $1,000 on stock. The property

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was destroyed 21st March, 1875. The application was signed in plaintiff's office. *Suter* promised he would put the Gore District Mutual policy in the application before sending it off. Neither plaintiff nor *Suter* had any design to conceal this insurance from the defendants. Plaintiff knew that any concealment would vitiate the policy.

Ferrier, the plaintiff's book-keeper, was present when the application was signed. He was asked by plaintiff to look in the safe for the Gore District Mutual policy, and did so, but could not find it. Plaintiff wanted to get it entered in the application. *Suter* said he had all the papers in his office, and promised when he left to put them in the application. He told plaintiff he might rest assured he would do so.

The manager was recalled by plaintiff, and said that before suit the whole issue was as to the amount of loss. He also conceded verbally, but without prejudice, that the defendants were willing to pay; the only difficulty was as to the amount. The only two points there was any contention about were double insurance and over-valuation.

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Suter, recalled for the defendants, does "not recollect engaging to put $3,000 in the application if he did not find the papers of the Gore District Mutual policy *

* * Plaintiff was particularly anxious to put in the extra insurance. *Suter* had not the papers of that insurance in his office. The slip showed the amount in gross but not the apportionment of it." He was very busy the day the application was made.

If under these circumstances,—in the absence of any pretence of fraud, or concealment, or collusion—with the greatest anxiety on the plaintiff's part to have the previous insurance inserted in the application, and the promise of the agent to insert it—the law will not permit the plaintiff to recover, it is a misfortune to which he must submit, but it is the duty of any Judge, before whom such a case comes, to be very clearly satisfied that such is the law.

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It may be noticed, though perhaps not important, *Jacobs* v. *The Equitable* (*a*), that the form of the application in this case contains no warning to the plaintiff that the defendants' agent was his agent for the purposes of the application. There is a condition indeed to that effect in the policy, but it was not shewn that the plaintiff knew it, and he did not receive the policy till after the fire.

In this case I think the notice to the agent was sufficient. His duty was to receive applications, a material part of which was the existence of previous insurances, and also to receive premiums. He was then the agent to receive such notice. If it were not a material part of the application, then notice to the agent, and it might be verbal, would suffice. On this subject it is important to bear in mind the distinction that may very properly be drawn between notice of prior and of subsequent insurances. Since it is the duty of the applicant when he makes application to disclose existing insurances, it could not be intended, unless under a very peculiar condition, that he should inform the agent, and also send a distinct notice to the head office. In *Hendrickson* v. *The Queen Insurance Co.* (*b*), *Mowat*, V. C., says: "It was by the local agent, undoubtedly, that the notice of antecedent insurances was meant to be received, for it cannot be supposed that the application for insurance in this company was to be made to him, and that a direct communication to the Montreal office was to be given as to any antecedent insurance." And hence, he argued, that the local agent was the proper person to notify of subsequent insurances also. In this the majority of the Court of Appeal do not seem to have agreed with him, though the decision appears to have turned principally on the want of satisfactory proof of any notice at all. *Hagarty*, C. J., considered the notice insufficient because something more was required than merely saying, I have

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(*a*) 17 U. C. R. 35.

(*b*) 31 U. C. R. 547, 556.

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effected another insurance—that the policy should have been produced so as to have the indorsement made. Some companies require notice to be given in writing to some particular officer. Here all that is required is notice *to the defendants*. And notice to their agent is notice to them, while he is acting within the scope of his duty, as it seems to me he was in regard to an *existing* insurance, whatever may be said as to subsequent insurances. *Patterson* v. *The Royal Insurance Co.* (*a*), *Wyld* v. *The Liverpool Insurance Co.* (*b*).

If he neglected to inform them, it is not to prejudice the plaintiff. Suppose the agent had pocketed the premium, and never informed the defendants of the application, they would still have been liable on the interim receipt. Is the plaintiff to be in a worse position because the agent has communicated to the defendants only a part of the information given to him by the plaintiff? In preparing the application the agent may be the agent of the plaintiff, but in receiving the application and in receiving the premium he was the agent of the defendants. *Wing* v. *Harvey* (*c*) is a clear authority that when the agent has authority to receive premiums, and they are paid to him upon the condition that the policies were to be considered as valid and subsisting, notwithstanding a breach of a condition contained in them, the principals are bound. Here the plaintiff communicated to the agent all that was required, and paid the premium upon the condition that the double assurance would be communicated to the defendants, and in the faith that it was done, which seems to me to bring it within the case of *Wing* v. *Harvey*.

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The condition, however, requires not only that notice of the further insurances be given to the company, but that they are to be indorsed on the policy or otherwise acknowledged in writing. This was not done. In

(*a*) 14 Gr. 169. (*b*) 23 Gr. 442.
(*c*) 5 D. M. & G. 265.

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Noad v. *The Provincial Insurance Co.* (*a*), the effect of this condition was discussed. The plea there relied on the other insurances not being notified or indorsed on the policy. The plaintiff replied that the defendants were notified, and of their own wrong neglected to indorse them on the policy. On demurrer the replication was held bad. *Robinson*, C. J., says: "I refer to *Angell* on Insurance, secs. 88 to 95, from which we may gather that a condition of this nature must be strictly complied with, by having the indorsement made, and that when the company on receiving notice refuses or neglects to make it, the insured cannot enforce his policy in the face of such a condition not complied with, whatever remedy he may have in equity or otherwise against the company for declining to indorse it. But here a difficulty would occur, that where a policy is framed according to the intention, [*quære* Statute] what is necessary to be indorsed is, *the consent of the company*, or, at any rate, the indorsement when made is to be taken as evidence of their consent. It is reasonable, therefore, to require the indorsement, perhaps, even where the policy does not express that to be the object of requiring it; and if we so view it, then there could be no remedy against the company for refusing to indorse, though there might be for neglecting to indorse, if it could be proved that they did in fact assent to the double insurance." The Chief Justice was deciding upon the strict legal effect of the condition—there was no equitable replication, if that under the Common Law Procedure Act would have been of any avail—and that the plaintiff might have remedies in equity, notwithstanding the non-indorsement, is clearly recognized.

Judgment.

Under the Administration of Justice Act, such equities may, and must, be raised in the action at law; and the question here is, whether the equitable replication to the third plea does give the plaintiff a remedy. The repli-

(*a*) 18 U. C. R. 584.

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cation is in effect that notice of the insurance was given to an agent authorized to receive applications, at the time the application was made, and to receive premiums and grant interim receipts; that the agent was instructed to insert the other insurance in the application, and to have it indorsed on the policy or otherwise acknowledged in writing; that before the policy was delivered the loss occurred, and the plaintiff had no notice till after the loss that the indorsement or acknowledgment was not made.

Now it seems to me this does shew a good answer to the defence of the unperformed condition, in equity, at all events. For it is a principle in the law of contracts, that he who prevents a thing from being done, shall not avail himself of the non-performance which he himself occasioned (*a*). The act to be performed here was to be the act of the defendants; the plaintiff did all he could do, he gave information to the proper officer to be indorsed or acknowledged, and the defendants were to indorse or

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acknowledge it; there was no policy then in existence for the plaintiff to produce to have the indorsement made. The defendants being thus aware of the existence of the other insurance, and, until the loss occurred, intimating no objection to it, must be taken to have assented to the risk, although doubly insured. They did not indorse or acknowledge it, and gave the plaintiff no opportunity of seeking redress for the omission, or of protecting himself by insuring elsewhere. The condition is, that the plaintiff is to cause the indorsement, &c., to be made, and *Robinson*, C. J., says: "He has an equity to have this done;" if so, this Court will take it as actually done, and enforce payment of the money.

I further think the defendants have waived their right, if they ever had it, to avoid this policy for non-compliance with the condition as to indorsing or otherwise acknowledging in writing the double insurance.

(*a*) *Addison* on Contracts, 6th ed. 947.

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Such conditions have generally been construed as rendering the policy not absolutely void but voidable at the option of the insurers, and such right may be waived by express agreement or by the acts of the parties (*a*).

In *Wing* v. *Harvey* (*b*), a life policy was subject to a condition making it void if the assured went beyond the limits of Europe without license. An assignee of the policy, on paying the premium to a local agent of the assurance society, at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died. It was held that the society were precluded from insisting on the forfeiture. The agent was entitled to receive premiums, and received these on the faith that the policies continued valid and effectual notwithstanding the breach of the condition.

The Canada Landed Credit Co. v. *The Canada Agricultural Insurance Co.* (*c*) is to the same effect. The defendants contended that the policy was void for a breach of a condition that no assignment should be valid until approved by the directors, and that until such approval they should not be bound by the policy. The loss occurred, and the assignment not having received the approval of the directors the defendants called for proof of the loss. It was held that this was a waiver of the condition, as they continued to treat it as a subsisting insurance. Many instances are given there by *Mowat*, V. C., of forfeitures waived in a similar manner.

Judgment.

In a number of cases in our Courts of Common Law it was held that when the policy was under seal there could be no waiver by parol. Such as *Scott* v. *The Niagara District Mutual Insurance Co.* (*d*), and *Lyndsay*

(*a*) *Bunyon* on Fire Insurance, 57.
(*b*) 5 D. M. & G. 265.
(*c*) 17 Gr. 418.
(*d*) 25 U. C. R. 119.

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v. *The Niagara District Mutual Insurance Co.* (*a*). The alleged dispensation with the condition precedent is treated as the setting up a new contract by parol, as discharging an instrument under seal. But when the policy is not under seal the condition may be waived by parol: *Smith* v. *Commercial Union Insurance Co.* (*b*). In such a case the seal, or the want of it, is of no importance in equity, and the statement of the rule by *Wilson*, J., in the last case, pages 82, 83, is confined to the effect at law; and both in *Wing* v. *Harvey*, and *The Canada Landed Credit Co.* v. *The Canada Agricultural Insurance Co.*, both policies, I apprehend, were sealed. But under the Common Law Procedure Act, though equitable defences and equitable replications were allowed, there was no authority for an equitable declaration. So that when there was a declaration upon the policy, and the breach of the condition was pleaded, the plaintiff could have no remedy, for he could not set up the waiver in the declaration, which would be suing on an equitable case, and he could not reply the waiver to such a plea, as that would be a departure from the declaration, as was well explained by *Wilson*, J., in *Smith* v. *The Commercial Union Insurance Co.*, *supra*, in commenting on the *Thames Iron Works Co.* v. *The Royal Mail Steam Packet Co.* (*c*), and by *Burns*, J., in *Jacobs* v. *The Equitable Insurance Co.* (*d*).

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Crawford v. *The Western Assurance Co.*, (*e*), is also an authority for the position that a waiver of a condition ineffectual at law is a proper subject of a suit in this Court.

But this system of pleading has been changed now, and an action at law may be maintained on an interim receipt, formerly only enforcible in equity. The Administration of Justice Act, 1873, sec. 2, enabling

(*a*) 28 U. C. R. 326. (*b*) 33 U. C. R. 69.
(*c*) 8 Jur. N. S. 100; 13 C. B. N. S. 358.
(*d*) 17 U. C. R. 35. (*e*) 23 U. C. C. P. 365.

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actions for a purely money demand to be brought in a Court of law, though the plaintiff's right to recover may be in equity only; and the claim for insurance money is a purely money demand. *Kelly* v. *The Isolated Risk Insurance Co.* (*a*). The cases referred to, which were successfully resisted at law on account of the want of jurisdiction, would now receive a different solution.

In this case the fact of the double insurance was notified to the agent at the time of the application; it was further brought directly to the notice of the company by the papers proving the loss; the company received the premium, and afterwards issued the policy without noticing, indorsing, or acknowledging the double insurance; the inference is irresistible that they did not intend to insist upon the forfeiture.

A very similar case occurred in the *Peoria Marine and Fire Insurance Co.* v. *Hall* (*b*). In a fire policy it was provided that the keeping of gunpowder "without written permission in the policy," should render it void. The agent took the insurance on a stock of goods knowing that gunpowder was kept and was to be kept. It was held that the policy was not avoided, whether permission to keep it was indorsed or intended or neglected to be indorsed or not. *Christiancy*, J., said "If the agent knew the powder was kept and to be kept, the keeping of it would not render the policy void whether the permission was indorsed or intended or neglected to be indorsed or not. It is insisted that the printed condition was notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that this assent could only be given by the company itself. This at first view would seem plausible, and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to the principal. The company must be re-

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(*a*) 26 U. C. C. P. 299. (*b*) 12 Mich. 202.

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garded as knowing what he knew. If he knew that powder was kept at the time of the insurance or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition, and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss."

It was said, however, that in the United States agents had more extensive powers than they have here, and that they are in the habit of issuing policies themselves without reference to the head office. But it seems clear from the language of the judgment it could not have been so in that case. What the agent took there could only have been the application for insurance, and the policy was afterwards issued by the company.

Judgment.

Many other American cases are referred to in the judgment as supporting the decision.

The propriety of such decisions commends them to every one's sense of justice. And a similar result would doubtless have been reached in the cases in our common law Courts but for the obstacles caused by the technical rules which then prevailed. Where not so hampered, as in *Smith* v. *The Commercial Union, supra,* full effect was given to the acts of the defendants as dispensing with the condition. One of the conditions there required the plaintiff to deliver in an account in writing of his loss within fourteen days after the fire. The plaintiff admitted he did not perform it, because before that time the defendants took possession and prevented him from making up a full account of his loss. Another condition required notice in writing to be given of every erection, alteration and extension of the premises insured, and the same to be allowed by indorsement on the policy, otherwise the assured was not to be entitled to any

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benefit under it. The plaintiff gave the notice but alleged that the defendants waived the indorsement. The waiver was held effectual in both cases. This case was on demurrer, so that it does not appear what the acts of waiver were further than as stated in the pleadings. *Crawford* v. *The Western Insurance Co.*, *supra*, also was upon demurrer: the plea set up a change in the use of the mill contrary to the conditions; the replication on equitable grounds alleged that the mill had been insured before in the defendants' company, and before the policy sued on was executed the defendants' agent inspected the premises, was informed of and saw the alteration, and on account of it made the plaintiff pay an increased premium, and in consideration of that the defendants executed the policy. This was held to be bad, as it did not aver any fraud and relied on an equity arising not since but prior to the execution of the policy. The claim of the plaintiff was considered to be one eminently suited to a Court of Equity. In *Hatton* v. *The Beacon Insurance Co.* (*a*), the defence was that another insurance had been effected of which no notice was given, nor was it indorsed on the policy contrary to the condition of the policy. At the trial it was admitted by the defendants that verbal notice of the interim receipt, the other insurance, was given to their agent, and that the agent told the plaintiff that there was no necessity to give a formal notice until it was known whether the policy would be granted. The plaintiff had a verdict. On a motion for a nonsuit, as there was no replication that the condition was waived, the plaintiff was in no condition to rely upon the waiver if it could have helped him, and in strictness a nonsuit should have been entered; but as it was admitted the agent had notice and said the indorsement was unnecessary, a new trial was granted with leave to amend the pleadings. *Robinson*, C. J., saying "But the plaintiff must consider

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(*a*) 16 U. C. R. 316.

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that, if he cannot prove that after the risk was accepted by The Monarch office, he gave notice to the defendants and applied to have a note of it indorsed on the policy, there may be no use in him contending further." If he could do that the necessary implication is that he would recover, from which it would seem that even at law there might have been a waiver.

There is in this case no allegation of waiver contained in the pleadings, but leave was asked to amend, and, if necessary to amend, I give leave accordingly.

Upon this replication, I think the plaintiff entitled to a verdict.

It was also contended on behalf of the plaintiff that his having assigned the policy in the Gore District Mutual Fire Insurance Co., to a building society as collateral security for a loan, made it the insurance of the building society as a security for their debt, and that the plaintiff did not require to give notice of it; and it was argued that if the insurance company paid

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the building society they would be entitled to the assignment of the mortgage.

Mechanics' Building Society v. *The Gore District Mutual Fire Insurance Co* (*a*), decides this contention adversely to the plaintiff. That was an action on the policy of the Gore District Mutual Fire Insurance Company, which is noticed in the pleadings in this suit. *Wilson*, J., delivered the judgment of the Court, and discusses at length the question of insurances effected by a mortgagor and by a mortgagee. He says: "The plaintiff's interest became inseparable from that of *Billington*. They became interested to the extent of $2000, for themselves, and to the extent of the remaining $1000 by reason of the absolute assignment in trust for *Billington*. If *Billington* insured any of the property again, that would be a double insurance as against him, because as mortgagor and *cestui que trust* for all

(*a*) U. C. R., January, 1877, not reported.

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in excess of the mortgage he had an interest to the full value of the property, and that second insurance would be a forfeiture because a double insurance of all his rights under the policy." And again, "Now it avoids all difficulty on the part of the mortgagor to prove that he is the one entitled to the policy money when the policy is in the name of the mortgagee, by providing that the mortgagee may have the policy if the mortgagor assigned to him, the mortgagor still if necessary remaining liable on his premium note. That maintains the true and actual rights of the respective parties. It gives the mortgagee the benefit of an original policy, it assures to the mortgagor the substantial benefit of the policy, and it prevents the company from claiming to have that money repaid to them by getting in an assignment of the mortgage."

As to the second count and the pleadings arising out of it, I think they shew a case authorizing the reformation of the policy, if necessary, on the ground of mistake. The evidence is conclusive of the notice of the double insurance to the agent, indeed the defendants admit it in their second plea to this count, but rest their defence on the ground that the directors and the officers of the company at the head office were not aware of it, their agent having failed to inform them of it, and so there was no mistake in preparing the policy. I have already said that in my opinion the agent was the proper person to notify of the double insurance; but it was proved besides that actual notice was given to the defendants at their head office of that policy before they issued the one declared on. I prefer, however, to rest the decision on the notice to the agent, as the notice to the principal was not given till after the loss. The knowledge of the agent is that of the company. With that knowledge the defendants accepted the risk, and must be taken to have intended to issue a valid policy to the plaintiff, and therefore to indorse upon it, or acknowledge in writing, the double insurance. This has

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not been done, and the policy therefore is not that which the plaintiff intended to get, nor what the defendants intended to give. It therefore by mistake does not contain the agreement of the parties. The general rule is, that if there is an error in the reduction of the agreement into writing, so that the written instrument fails through some mistake of the draftsman to represent the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument so as to make it conformable to the real intent of the parties: *Kerr* on Fraud and Mistake 349. That the knowledge of the agent is the knowledge of the principal, is a fundamental rule resting upon general principles of public policy. The cases are collected by Mr. *Kerr*, pages 196-198. There is no distinction in point of legal effect between personal notice to the party and notice affecting him through the medium of his agent: *Toulmin* v. *Steere* (*a*). The principal is fixed with the knowledge of every fact material to the transaction which his agent either knows or has imparted to him in the course of his employment, and which it was his duty to communicate, whether it be communicated or not: *Sheldon* v. *Cox* (*b*) *Roddy* v. *Williams* (*c*), *Spaight* v. *Cowne* (*d*). The notice which affects a principal through his agent is usually termed constructive notice; but inasmuch as the principal is bound by the notice whether it be comunicated to him or not, and is not presumed to have the knowledge merely because the circumstances of the case put him on inquiry, such notice may more properly be treated as actual notice, or if it is necessary to make a distinction between the knowledge which a man possesses himself and that which is known to his agent, the latter may be

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(*a*) 3 Mer. at 224.
(*b*) Amb. 624.
(*c*) 3 J & L. at 16.
(*d*) 1 H. & M. 359.

called imputed knowledge: *Espin* v. *Pemberton* (*a*), per Lord *Chelmsford*.

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Applying these principles to this case, the defendants are to be taken to have had actual knowledge of the double insurance, and with that knowledge accepted the risk, and must now make the policy such as to enable the plaintiff to recover.

I think, therefore, that on all the issues arising out of the second count, the plaintiff is entitled to a verdict.

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There will be a reference to the Master, at Hamilton, to ascertain how much is payable to the plaintiff under the policy, and the defendants will pay that, and the costs of suit forthwith.

SOLICITORS.—*Bethune*, *Osler*, and *Moss*, agents for *Osler*, *Wink*, and *Gwynne*, Dundas, for plaintiffs; *Murray*, *Barwick*, and *Lyon*, for defendants.

(*a*) 3 D. & J. at 554.

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HELLEM v. SEVERS.

Will, construction of—Inconsistent words—Inconsistent bequests—Executrix beneficially interested—Costs—Inops consilii—Relieving executors.

A testator in a will containing inconsistent provisions devised certain real estate, after the death of his daughter, to his grandsons *J.* and *F.*, "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them, and to their male heirs after their or either of their decease, and to their heirs and assigns for ever," and in case of the death of *F.* without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson *H.*, for his life, and after his death to his heirs and assigns for ever.

Held, that the remainder after the death of the daughter went to *J.* and *F.* as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to *F.'s* part to *H.*

The same will contained the following devise: "My will is, that after the decease of my daughter *Bridget*, and after the decease of all my sons-in-law *James Esmond*, *John Emery*, and *John Severs*, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be divided into equal parts and paid to my grandchildren, equally amongst all my grandchildren; but in case of the death of any of my grandchildren before the death of my daughter *Bridget*, and before the death of all my sons-in-law leaving lawful issue, then the share that would have belonged to my grandchild if living shall go and belong to the lawful issue of such deceased grandchild."

Held, that the estate was not to be divided till twenty-one years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grandchildren living at his death took an immediately vested interest, subject to be divested *pro tanto* as the number of grandchildren should be increased by future births before the period of distribution.

The testator directed that *F.* should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral: *Held*, that the land was charged with the bequest.

Where a testator provided that the executrix was to have the sole management during her life, and the executors were to manage afterwards; and the latter filed a bill against the executrix without sufficient cause, they were not allowed their costs; but the matter having been brought to the notice of the Court a decree for an account was made as respected the executrix.

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The testator bequeathed to *M.* the interest due on the amount in the Savings Bank or Building Society after *Bridget's* death, and the interest annually on the mortgages till twenty-one years from the testator's death was given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 was given to him "as compensation for his coming from Hamilton quarterly, to submit the statements and accounts, and receipts and expenditure, and deposit receipts to the solicitor as above mentioned:"

Held, that these were not inconsistent bequests; the one being for the care and management of the estate; the other for a specific item of expense—the coming from Hamilton—and might both well stand together. But as *M.'s* care of the estate was only to arise after *Bridget's* death, and, therefore, might never come into operation, he was not entitled to claim the $100 until he did enter on the management.

Parties named executors, whose duties in respect to the management of the estate did not commence until after the death of *Bridget* and *M.* proved the will, and shortly afterwards and before the death of either of these parties, filed a bill to be relieved from the executorship: the Court, under the circumstances, refused to make any order to relieve them, they having deliberately accepted the office.

The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments the Court refused to order a transfer into Court.

Where a will, though prepared by a solicitor, was so inconsistently worded that but little benefit could be derived from his labours in construing it, the Court thought that as liberal an interpretation should be made of the language in order to ascertain the intentions of the testator as if he had been, in fact, *inops consilii*.

Statement.

The bill in this cause was filed by *George Hellem* and *James Herson*, two of the executors of the will of *James Malone*, against three other executors, *Bridget Severs*, *Michael Malone* and *William O'Keefe*, and the devisees, and prayed that *Bridget Severs* might be compelled to account for the rents and moneys received by her, and to shew how she had disposed of the same; and that the will might be construed, and the trusts declared, and that the plaintiffs might be relieved from the executorship, and the estate administered by this Court.

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

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Mr. *Meek*, for the plaintiffs.

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

Mr. *Delamere* and Mr. *Black*, for the defendant *Bridget Severs*, the executrix.

Nov. 13th.

In addition to the cases mentioned in the judgment, counsel referred to and commented on the following authorities: *Knight* v. *Knight* (*a*), *Re Babcock* (*b*), *Kerr* v. *Leishman* (*c*), *Dobbie* v. *McPherson* (*d*), *Smith* v. *Pybus* (*e*), *Jesson* v. *Wright* (*f*), *Bentham* v. *Wiltshire* (*g*). *Story's* Eq. Jur. Sec., 283. *Williams* on Executors, 7th ed., p. 674.

Jan. 10th, 1877.

PROUDFOOT, V. C.—The will is not very intelligible in some of its devises. I will consider the difficulties in construing it which were discussed before me: (1.) As to the estate of *Bridget Severs*. The will has the following devises in regard to her: "I give and devise to my daughter *Bridget Severs* * * * during her natural life the lands and premises following, together with the houses and the appurtenances thereon or thereunto belonging, that is to say, &c. * * * * *

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And also * * * * the said property to be free from the control of her husband, and not to be subject to the debt or debts of her present husband, or any other husband with whom she may intermarry. I wish my daughter *Bridget* to have the whole control and management of the whole of my estate, both real and personal, and to receive all the rents and to pay all my just debts and funeral and testamentary expenses, and all taxes and other legal charges against my said estate during her natural life. I wish my daughter *Bridget* to insure the buildings on the above mentioned land and premises in a further sum of $800 more than they are now insured for, which will make the insurance

(*a*) 3 Beav. 148.
(*b*) 9 Gr. 427.
(*c*) 8 Gr. 435.
(*d*) 19 Gr. 262.
(*e*) 9 Ves. 566.
(*f*) 2 Bligh 1.
(*g*) 4 Madd. 44.

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altogether $1,800, and to keep the said premises insured for that sum if she can effect an insurance for that amount on the said houses and premises; and in case of fire I wish the houses to be rebuilt out of the insurance money. I desire that my daughter *Bridget* shall pay in the moneys arising out of property for rents, &c., into one of the Savings Banks or Building Societies of the city of Toronto, within three days after she receives the same. And I hereby give and devise to her, my said daughter *Bridget Severs*, the sum of $10 per month for her own use, comfort, and benefit, to be deducted and retained by her every month out of the rents during her natural life. And my will is, that as soon as there is at least $100 at any time paid into the Savings Bank or Building Society, my daughter *Bridget*, as executrix, may take the money out of the Savings Bank or Building Society, and loan it out on mortgage on real estate or other good security as she may be advised or think best * * * And also my will is, that my daughter *Bridget* shall have a monument erected to her father and mother, and her two sisters *Catharine* and *Mary;* the monument to cost about $600, and to be paid for out of the rents and moneys deposited in the Savings Bank or Building Society and out of the mortgage moneys * * * And after paying all my debts and funeral and testamentary expenses, and for the monument and taxes, and $10 per month to my daughter *Bridget*, and all other claims and expenses against my estate, then, as soon as there is money in the Savings Bank or Building Society, or on the mortgages, my will is, that my daughter *Bridget* is to have the interest of the same half yearly for her own use and benefit, and comfort, as long as she lives. In case of the death of my daughter *Bridget* before the monument above mentioned is erected and finished, then my will is, that my executors are to erect one as above mentioned, or if commenced before my daughter *Bridget's* decease, then I wish my executors to have it completed and paid

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for out of the moneys above mentioned. I will and bequeath to my said daughter *Bridget* all my household furniture, and two clocks and beds, bedding and bedsteads, &c., during her life; and after her decease then I will and bequeath the same to my granddaughter *Catharine Severs*. I also give and bequeath to my daughter *Bridget* my Bible and all my other books during her life; and after her decease then I give and bequeath my said Bible and all my other books to my grandson *Francis Wiseman Esmond*. * * * I wish my daughter *Bridget* to employ Mr. *John S. Powell*, of Toronto, land agent and collector, to act for her as her agent in collecting the rents, the same as he was employed by me for that purpose. And my will is, and I hereby desire that the accounts and receipts and expenditure and deposit receipts, &c., and all other papers connected or belonging to my estate are to be submitted to my daughter *Bridget* during her life, and after her decease, &c., to a solicitor. And my will further is, that all my property be rented for the best rent that can be got for the same, to good tenants, with security, if thought advisable by my executrix and executors, and the cottage now occupied by me is also to be rented. If my son-in-law *John Severs* wishes to remain in it, he is to pay rent for it monthly, as long as he remains it; but if my daughter *Bridget Severs* should survive him, or if he leaves her, then my will is, that she is to have the cottage, together with the appurtenances thereon or thereunto belonging, during her natural life, free from rent."

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At the death of the testator his property consisted of the land and houses devised, and of $100 odd in the Bank, and the household furniture bequeathed. No debts were owing to or by him. The money was used for his funeral expenses. There seems to me no doubt of the estate conferred on *Bridget*. She took an estate for life in the lands devised, but not entirely for her own benefit. The rents were to be paid into the Bank or

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Building Society, and after paying the charges on them by the will, including $10 a month to *Bridget*, the interest was given to *Bridget* for life. The direction that the devise to her was to be free from the control of her husband and not to be subject to his debts, was said to indicate an intention to give her the life estate beneficially. I do not think it has that effect; the trusts of the rents are too plainly imposed to permit this construction. And besides, she had a beneficial interest, viz., the interest on the investments and $10 a month, and the language of the will is fully satisfied by confining the protection against her husband's debts to this beneficial interest. She was to have the entire management of the estate during her life; upon her death *Michael Malone*, a nephew of the testator and another executor, takes her place in the management, and it is only when *Bridget Severs* and *Michael Malone* die, or cease to be executors, that the duties of the other executors are to begin. The direction that the property is to be rented for the best rent, &c., by the executrix and executors, is quite consistent with this construction. The property is to be rented by *Bridget*, then by *Malone*, and then after their decease by the other executors. *Bridget* has only a life interest in the personalty.

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(2.) The next question is, as to the estate of the grandsons *James Emery* and *Francis Wiseman Esmond*. The clauses in the will are, "After the decease of my daughter *Bridget*, I give, devise, and bequeath to my grandsons *James Emery* and *Francis Wiseman Esmond* the whole frontage of the above mentioned land on Queen street (part of that given to *Bridget* for life) being thirty feet, more or less, by seventy-three feet in depth, to hold the same as joint tenants and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them and to their male heirs after their or either of their decease, and to their heirs and assigns forever * * * And in case of the death of my grandson *Francis Wiseman Esmond*

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without leaving lawful issue, then the portion that would have belonged to him if living, I give and bequeath the same to my grandson *Harry Severs*, to have and to hold the same during his natural life, and after his decease then to his heirs and assigns forever."

It appeared in evidence that the will was drawn by a solicitor. I regret that the Court has not derived much benefit from his labours, and as liberal an interpretation must be made of the language, to ascertain the intention, as if the testator had been in fact *inops consilii*. Effect cannot be given to every word employed, but by applying some rules of construction we can determine which are to be preferred. The first part of the devise, to hold to them as joint tenants and not as tenants in common, is capable of being limited or expanded by the subsequent words referring to the inheritance. The next clause, an expansion of the *habendum*, declares that they are to hold during their joint lives and to the survivor of them, and to their male heirs after their *or either* of their decease, and to their heirs and assigns forever. The true construction of this devise appears to me to be a joint tenancy for life with a tenancy in common in tail male.

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Where lands are devised to several persons, and the heirs of their bodies, who are not husband and wife *de facto*, or capable of becoming such *de jure*, either from their being of the same sex, or standing related within the prohibited degrees of consanguinity, inasmuch as the devisees cannot, either in fact or in contemplation of law, have common heirs of their bodies, they are "by necessity of reason," as *Littleton* says, "tenants in common in respect of the estate tail." As this reason, however, applies only to the inheritance in tail and not to the immediate freehold, the devisees are joint tenants *for life*, with several inheritances in tail; so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitled for life to his share under the joint tenancy, and the inheritance in tail

descends to the issue (if any) subject to such estate for life (*a*).

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The words *male heirs* are words of limitation, and the addition of the words "and to their heirs and assigns forever," is nugatory. The first limitation carries an estate tail (*b*).

The gift over to *Harry Severs* in case of the death of *Francis Wiseman Esmond* without leaving lawful issue, means an indefinite failure of *male* issue—the word "such" must be supplied—without leaving *such* lawful issue, to make it consistent with the previous special entail. Where the words, die without leaving issue, follow a devise to children, sons or a particular class of issue, they may be construed, according to the prior objects, as meaning "such" issue only (*c*). The testator could not have intended that *Emery* and *Esmond* were to take different kinds of estates, one in special tail, the other in tail general, by the language of the clause containing the devise to them. And I do not think the clause containing the gift over shews an intention to impose an executory devise on failure of issue living at the death of *Esmond*. Mr. *Hawkins*, in his work on Wills, at page 207, states the rule to be, that if the gift to the first taker be such as, standing alone, would confer only an estate for life or an estate tail, the restricted construction (of die without issue) will not be adopted. In *Ex parte Davies* (*d*), Lord *Cranworth* says, at page 120, "In case he shall die without leaving any lawful issue of his body," following a devise in fee, would have made him tenant in tail; the word "leaving" being held not to fix the time to his death. That case, however, turned upon the direction that if the devisee should die without leaving lawful issue, the estate should *at his death* be divided and given over. And so in *Doe* v. *Frost* (*e*), the decision was based on the phrase that *on*

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(*a*) 2 Jarm. 282.
(*b*) 2 Jarm. 397; *King* v. *Burchell*, 1 Eden 424.
(*c*) *Leake* on Real Property, 183.
(*d*) 2 Sim. N. S. 114.
(*e*) 3 B. & A. 546.

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the decease of the first taker the property was to go to the heir at law. In *Chisholm* v. *Emery* (*a*), there was what the Court held to be a constructive devise in fee to the granddaughter, and in case of her dying without lawful issue, the farm was to be sold and legacies were given out of the proceeds of the sale. This last fact was held to be inconsistent with the notion of an indefinite failure of issue, as the payment of the legacies could not have been intended to wait an indefinite failure. The only thing pointing to the limited construction in this case is the devise to *Harry Severs* for life, and after his decease to his heirs and assigns for ever. But Mr. *Jarman* observes (*b*): "It is every days practice to limit an estate for life in remainder after an estate tail, which involves precisely the absurdity which is here, in *Roe* v. *Jeffrey* (*c*), supposed to flow from holding the word to import an indefinite failure of issue. In that case the will declared that if the devisee in fee should depart this life and leave no issue, that the premises should be and return unto *E.*, *M.*, and *S.*, or the survivors or survivor of them, equally to be divided between them. Lord *Kenyon* said, 'That the dying without issue was confined to a failure of issue at the death of the first taker, for the persons to whom it is given over were then in existence, and life estates were only given to them.'" Mr. *Jarman* continues, at page 489: "At all events, it is clear that the doctrine of *Roe* v. *Jeffrey* applies only where *all* the ulterior estates are merely for life." Here, however, there is only one estate for life given over, if it be even that, for, under the rule in *Shelley's* Case, *Harry Severs* would be tenant in fee.

Judgment.

On the whole, as to this property, I think that *Bridget Severs* takes an estate for life for the purposes of the will, with remainder to *Emery* and *Esmond*, as joint

(*a*) 18 Gr. 456.
(*b*) On Wills, vol. 2, p. 488.
(*c*) 7 T. R. 589.

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tenants for life, with several inheritances in tail male, and with remainder in fee as to *Esmond's* part to *Harry Severs*.

(3.) As to the interest of the grand-children under the following bequest. Upon the death of his daughter *Bridget*, *Michael Malone* is to take her place in the management of the estate, and is to receive the interest due on the mortgages annually for the balance of twenty-one years from the testator's decease, unless *Bridget* should live these twenty-one years. And *Malone* was to receive the interest to recompense him for the trouble and expense of attending to the will. In a subsequent clause he says: "My will is, that after the decease of my daughter *Bridget*, and after the decease of all my sons-in-law *James Esmond*, *John Emery*, and *John Severs*, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be divided into equal parts and paid to my grand-children, equally amongst all my grand-children; but in case of the death of any of my grand-children before the death of my daughter *Bridget*, and before the death of all my sons-in-law leaving lawful issue, then the share that would have belonged to my grand-child if living shall go and belong to the lawful issue of such deceased grand-child." These clauses are clumsily drawn, but I think the intention of the testator may be extracted from them; that he did not wish his estate from accumulated rents to be divided till twenty-one years from his death, at least, and not then unless *Bridget* and his three sons-in-law were dead; or, otherwise expressed, the division was to take place upon the most distant of the events of the four deaths and the lapse of twenty-one years from testator's death. And so with regard to the devise of the cottage to *Catharine*, it was to take place on the death of *Bridget* or the lapse of twenty-one years. All the grandchildren living at the testator's death take an immediately vested interest in their shares, or rather in their right to the

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share, for the shares themselves were to be the result of accumulated rents, subject to be divested *pro tanto* as the number of grand-children is augmented by future births before the period for division (*a*).

(4.) The testator also bequeathed "As soon as *Francis Wiseman Esmond* arrives at the age of 14 years, my will is, that he be sent to the college at Toronto for three years, and that all the college fees for boarding, lodging, and tuition fees, &c., and also all his clothing, washing, and all other necessaries that may be requisite for him during the said three years, are to be paid for out of my estate by my executrix or executors or survivors of them."

As the estate of the testator consisted only of land, after taking out the specific bequest of the furniture and the $100 odd spent on his funeral, the land must be deemed charged with this bequest. Difficulties have often arisen in determining whether the land was charged with legacies where the estate consisted of both personalty and realty, but that vanishes when the estate is all real (*b*).

Judgment.

(5.) The bequests to *Michael Malone* are said to be inconsistent. The interest due on the amount in the Savings Bank or Building Society after *Bridget's* death, and the interest annually on the mortgages till twenty-one years from testator's death is given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 is given to him "as a compensation for his coming from Hamilton quarterly to submit the statements and accounts and receipts and expenditure and deposit receipts to the solicitor as above is mentioned." I do not think they are inconsistent: the one is for the care and management of the estate, the other for a specific item of expense—the coming from Hamilton. They may both well stand together. But as *Malone's* care of the estate is only to arise after *Bridget's* death, and may never come into operation, I do not think the $100 is payable until he does enter on the management.

(*a*) 2 Jarm. 144. (*b*) 2 Jarm. 573.

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Catharine Severs, the specific legatee in remainder of the household furniture, having died an infant, her interest in the bequest passes to her father under the Statute of Distributions. The devise to her of the cottage with the land devolves, under the abolition of Primogeniture Act, on the father : (*a*). The estate does not come to the grandchild through the mother, but under the devise from the grandfather direct.

There will be a declaration accordingly as to all these matters.

The bill charges that *Bridget Severs* has collected the rents and has not deposited them as directed by the will, but has contrary to the protest and wishes of the plaintiffs applied them to her own use, or contrary to the provisions of the will, and that she has refused to render an account of her dealings with the estate to the plaintiffs, and has not allowed the plaintiffs to interfere in the management of the estate ; that she has wasted the estate by renting the properties too low ; that she has not insured the buildings as required by the will.

Judgment.

Upon the true construction of the will I think *Bridget Severs* is entitled to the sole control and management of the estate during her life, and that the duty of the plaintiffs and the other executors, except *Malone*, arises only on her death and that of *Malone:* they are not entitled to any share in the management until these deaths take place, and are under no liability till then. The plaintiffs were examined, and it seems they thought they should have been consulted as to the leases, and as to the erection of the monument, and that the solicitor should have been requested to draw the leases. In all these respects I think they were wrong. The management of the estate being with *Bridget* during her life, she was entitled to lease without consulting them, and the will expressly declares that *she* is to put up the monument. She did, nevertheless, render an account

(*a*) C. S. U. C. ch. 82 sec. 27.

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to the plaintiffs, not one item of which has been impeached.

It seems that she did deposit rents in the Savings Bank in the name of *Herson*, one of the plaintiffs, and herself, and *Herson* refused to join in checking it out to pay for the monument, in consequence of which an action was brought, and the estate had to pay the amount and costs. *Herson* acted under the advice of the solicitor. I think his conduct entirely unjustifiable, and that he and *Hellem*, the other plaintiff, acting in concert with him, must be charged with the costs so incurred.

The plaintiffs, acting also on the advice of the solicitor, insisted on *Bridget Severs* joining in an action of ejectment against a tenant to whom she had leased a part of the property, on the ground that the lease not being made by all the executors was invalid. This action failed because it was held that she alone could lease, and the estate had to pay costs. This is entirely in accordance with my view of the will, and the erroneous advice of the solicitor will not protect them. I think the plaintiffs must pay these costs : *Doyle* v. *Blake* (*a*).

Judgment.

It is possible the plaintiff and the other executors, except *Bridget*, may never have an opportunity of meddling with the estate, and this bill so far as it seeks to protect them is premature ; and the charges in the bill against *Bridget Severs* have failed ; the suit has been instituted from pique, and from an erroneous impression that the plaintiffs should have been consulted. In this respect there is no ambiguity in the will ; and I cannot give the plaintiffs their costs. And as there is no present liability on the plaintiffs, and no necessity for the suit on their behalf, I do not think them entitled to seek their discharge. If when their liability shall arise there shall be any reason for seeking their discharge they may then apply by petition in this

(*a*) 2 S. & L. 243.

suit. At present I decline to relieve them from the executorship they have deliberately accepted. 1876.

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The matter having been brought to the notice of the Court, however, *Bridget* must give an account shewing the condition of the estate; but as she is entitled to the management and control of the estate, and to the interest of the investments beneficially, I do not think I can order the payment into Court of the rents, &c. She being entitled to the interest beneficially, distinguishes this case from *Kingsmill* v. *Miller* (*a*), and *Mitchell* v. *Ritchie* (*b*).

The will is in some respects very obscure and very absurdly drawn; and I think the defendants entitled to their costs out of the estate.

SOLICITORS.—*O'Donohoe* and *Meek*, for plaintiffs; *Delamere* and *Reesor*, for *Bridget Severs*; *Hoskin*, for the Infants.

BOLCKOW V. FOSTER.

Pleadings—Parties—Demurrer—Surviving partner.

Where a suit was brought, by a surviving partner against a party entitled to the equity of redemption in certain railway stocks and bonds, for the purpose of realizing the amount due on the mortgage, it was *held* to be unnecessary to make the personal representatives of the deceased partner parties: *Sykes* v. *The Brockville and Ottawa Railway Company*, ante vol. ix, page 9, not followed.

Where a sale of railway stock and bonds was effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently died; it was *held* that the right to enforce payment of the unpaid purchase money remained in the surviving partner, whether the subject of sale was to be treated as realty or goods and chattels.

(*a*) 15 Gr. 171. (*b*) 13 Gr. 450.

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In such a case the plaintiff in his bill set forth that he, as well on his own behalf as that of the firm, sold to the purchaser and the purchaser bought from the plaintiff and the firm; and then alleged the death of his partner "leaving the plaintiff sole surviving partner of the said firm; and the plaintiff is now solely entitled to all the interest of the said firm under the said agreement with the defendant," the purchaser.

Held, that this sufficiently stated the title of the plaintiff as the surviving partner of the firm.

Demurrer for want of parties, because the personal representatives of the plaintiff's deceased partner, *Vaughan*, were not before the Court.

The bill was by *Henry W. F. Bolckow* against the Hon. *Asa Belknap Foster* and the Hon. *John Joseph Caldwell Abbott*, and which, so far as is necessary to state it for the purposes of this demurrer, alleged that the plaintiff, as well on his own behalf as on that of the firm of *Bolckow & Vaughan*, sold to the defendant *Foster*, and the defendant *Foster* purchased from the plaintiff and the said firm, all the right, title, and interest of the said firm in the following securities:

Statement.

(*a.*) 11,365 shares of registered stock in the Brockville and Ottawa Railway Co., issued under the reconstruction Act of that company, passed by the Parliament of Ontario, each share being of the par value of $20.00.

(*b.*) The sum of $661,175.00, the amount actually advanced by the plaintiff and the said firm up to the 1st May, 1871, in constructing and stocking the Canada Central Railway, and in acquiring its charter, including also half the interest on the said amount as agreed, the said sum being at that time agreed by the company to be secured by its bonds bearing 6 per cent. interest, to be issued to the said plaintiff and the said firm at 80 cents on the dollar, having an exclusive first mortgage upon the land grant provided for by the Canada Central Railway Act, and an equal lien and privilege on the railway constructed and to be constructed; with a further issue of $500,000 in bonds having only a second

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mortgage on the said lands, together with all the interest and right of the said plaintiff and the said firm in the said bonds.

(*c.*) The amount of $800,000 of stock, being 8,000 shares of $100 each, subscribed for in the Canada Central Railway by the plaintiff and by others in his interest and under his control, on which subscription $40,000, being 5 per cent. on the amount thereof, had been paid up; which latter sum was, however, included in the amount mentioned as expended upon the said railway.

That the sum agreed to be paid by *Foster* for these securities was $888,475.00, to which sum was subsequently added by *Foster's* consent $3,835.06, being the difference in exchange paid by the plaintiff and the said firm on the construction account of the Canada Central Railway Company; that it was agreed between the plaintiff and *Foster* that the plaintiff should retain possession of the securities so sold as a security for payment of the purchase money and interest, and that in default of payment of any instalment of interest for 30 days after it should have become due in advance, the whole of the principal should become due and exigible; that after the date of the agreement the Canada Central Railway Company duly issued their bonds or debentures in payment of the indebtedness mentioned in clause (*b*) *supra*—which indebtedness was subsequently settled at the sum of $675,561.89, as provided for in the agreement and in accordance therewith; the bonds or debentures being numbered from 1 to 830, consecutively and inclusive, and being each for the sum of $1,000, with interest at six per cent. per annum; and that *Foster*, by his covenant in the agreement, agreed to pay the said principal and interest as in the second paragraph of the bill mentioned. Statement.

The bill further alleged that the time for payment of three instalments of interest had elapsed, and nothing had been paid on account thereof, whereby the whole of the purchase money had become due and exigible, but

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nothing had been paid on account of it; that the securities were all in the possession and control of the plaintiff, except the stock in the Canada Central Railway, which was after the date of the agreement transferred to *Foster* at his request, he giving his promissory note for $40,000 therefor, payable on demand, on payment of which the amount should be deducted from the purchase money of the said securities, and that such payment should not be later than the 1st of May, 1877; that the firm of *Bolckow & Vaughan* was composed of the plaintiff, and *John Vaughan*, who subsequently to the date of the agreement of the 31st of May, 1871, departed this life, leaving the plaintiff sole surviving partner of the firm, and the plaintiff was solely entitled to all the interest of the said firm, under the said agreement with *Foster*; and that the defendant *Foster* was entitled to the equity of redemption in the said stocks and bonds.

Statement.

The bill then went on to state that the defendant *Abbott* was the trustee under the deed of mortgage executed by the said railway company, dated 12th of August, 1871, whereby the company mortgaged all their railway and other property, to one *H. L. Redhead*, to secure the plaintiff and the other holders of the said bonds; and after the execution of the said mortgage the said *H. L. Redhead* resigned the position of trustee thereunder, in the manner in that behalf in the mortgage provided; and such proceedings were afterwards had that the defendant *Abbott* became and was duly appointed trustee in his place and stead, and *Abbott* was made a party that he might be bound by the proceedings in this suit in reference to the title to the said bonds; and the plaintiff prayed for payment of $888,475, and interest, and costs of this suit, forthwith by the defendant *Foster*, and that he might be ordered to pay the same forthwith; and that the plaintiff might be entitled to all remedies by execution against the goods and lands of the defendant *Foster*, and otherwise; and that the defendant *Foster's* equity of redemption in the

said stock and bonds might be foreclosed, or that the same might be sold by the decree of this Court. 1876. Polckow v. Foster

Mr. *Bethune*, Q. C., and Mr. *Boyd*, Q. C., for the demurrer.

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

The cases cited appear in the judgment.

PROUDFOOT, V. C. [After stating the facts as above set forth.] There is not much authority to be found on the subject of a surviving partner being required to join the executors of the deceased, in a suit for the recovery of the choses in action of the firm, but what there is is nearly uniform against such joinder being necessary. March 14th, 1877.

Gow on Partnership, 3rd ed., 348, App. 70 (1841), says: "It is undoubted, generally speaking, that the surviving partners in a firm may sue for a debt due to the firm, without making the personal representative of a deceased partner a party to the suit." And he cites *Scholefield* v. *Heafield* (*a*), as an exception, depending on the circumstance of real estate having been pledged as security, and the heir might have a right to claim exoneration from the personalty. Judgment.

Story's Equity Pleading, 3rd ed. (1844), sec. 167 n. 1, says: "Another question may arise, whether the surviving partners, suing in equity for a partnership debt or claim, are bound to join the personal representative of the deceased." And the same is repeated in the edition of 1857 without noticing the case of *Haig* v. *Gray* (*infra*), which had been decided in the meantime.

Collyer on Partnership, 4th Am. from 2nd London ed., sec. 834 (1853), without noticing *Haig* v. *Gray* (*infra*), says: "If any of the partners die, it may be doubted whether it is necessary to make the personal representative of the deceased a party (plaintiff), *Story's*

(*a*) 7 Sim. 667.

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Eq. Tl. sec. 167, and it is evident that there are cases in which that course has not been adopted: *Norris* v. *Kennedy* (*a*). And perhaps it may be stated that in an ordinary case it is not necessary to take this course. *Slater* v. *Wheeler* (*b*), *Scholefield* v. *Heafield*" (*c*).

Clarke, an able Scotch writer on the law of Partnership, Vol. 2 681, states the law of Scotland that, "Where a private co-partnery is dissolved by death, the power and title to wind up the concern for behoof of all having interest, vests in the surviving partners. The representatives of the deceased have no right to intermeddle in the matter. * * It has been conclusively settled in England, that the surviving partners are the proper parties to recover and discharge debts owing to the company, and that it is not necessary to make the executors of the deceased partner parties either to the action or the discharge. *Haig* v. *Gray* (*infra*), *Philips* v. *Philips* (*d*), *Brasier* v. *Hudson* (*e*). *Montague* on Partnership, 167; Lindley 418."

Judgment.

In none of the cases referred to by the text writers does the point seem to have been actually decided, except in *Haig* v. *Gray* (*infra*), for in *Norris* v. *Kennedy* (*f*), no objection was taken to the frame of the suit.

Haig v. *Gray* (*g*), decided in 1850, was a suit by a surviving partner against a debtor to the firm for an account of the dealings between the defendant and the partnership. The defendant demurred because the executor of the deceased partner was not brought before the Court. Knight *Bruce*, V. C., says, "I apprehend it to be generally true, that a debt having become due to a partnership of two persons, one of them having died, and the debt being in its nature demandable by a suit in equity, the surviving partner may sue for it in equity, (whether the amount is to depend on the result of an account or otherwise), without making the representative of the deceased partner a party."

(*a*) 11 Ves. 565. (*b*) 9 Sim. 156. (*c*) 7 Sim. 667.
(*d*) 3 Hare 281. (*e*) 9 Sim. 1. (*f*) 11 Ves. 565.
(*g*) 3 DeG. & S. 741.

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This case is cited by Mr. Justice *Lindley* (*a*), with no hesitation as being authority for what it decided.

I was referred to the case of *Sykes* v. *Brockville and Ottawa R. W. Co.* (*b*), in which *Esten*, V. C., held, on a bill by the survivors of several joint contractors to enforce a claim under the terms of a contract, that the personal representatives of the deceased partner were necessary parties. He says: "I think also that the representatives of *James Sykes* were necessary parties to the bill. It is true the right of action survives at law to the remaining partners, but the rule is different in equity, and the representatives of *James Sykes*, if dissatisfied with the result of the present suit, might institute a fresh one on their own behalf, and the defendants would be harassed by double litigation. It had been decided in the case of *Forsyth* v. *Drake* (*c*), that the personal representatives of a deceased partner are necessary parties to a bill of foreclosure on a mortgage made to the firm, or for its benefit."

Judgment.

Were it true that the personal representatives might institute a fresh suit if dissatisfied with the result of that brought by the surviving partners—or if *Forsyth* v. *Drake* had decided what it was cited for as deciding—the decision of *Esten*, V. C., would interpose an obstacle to my deciding anything at variance with it. But *Haig* v. *Gray* (*supra*), was not brought to his notice. Nor does his attention seem to have been directed to the cases which shew that in equity, as at law, the surviving partners are the proper persons to give receipts for debts due to the firm: *Philips* v. *Philips* (*d*), *Brasier* v. *Hudson* (*e*).

The right of suit, both at law and equity, appears to survive. The survivor has to pay the debts of the firm so far as the assets will extend, and he must have the right to collect the assets to apply them to that purpose. I have been unable to find any instance of a suit by the

(*a*) Partnership, 3rd ed., 517, 565 *n*. (*b*) 9 Grant 9 (1862).
(*c*) 1 Gr. 233. (*d*) 3 Hare 281. (*e*) 2 Sim. 1.

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executors of a deceased partner against a debtor to the firm. If the survivor will not sue, or is guilty of misconduct in winding up the business, the course is, to apply for a receiver, and for an injunction to restrain him from disposing of the partnership property and from collecting the debts. This is done on the application of the representatives of the deceased. They do not undertake the winding up of the estate themselves: *Story* on Partnership, sec. 344; *Gow* on Partnership, 3rd ed., 356.

In *Philips* v. *Atkinson* (*a*), the plaintiff's and defendant's testators had been partners in trade, a bill was filed for an account, and part of the prayer was, for a receiver. The defendant resisted the appointment of a receiver as an imputation on his character. But the Master of the Rolls said it was not at all so; that where there is a copartnership there is a confidence between the parties, and if the one dies, the confidence in the other partner remains, *and he shall receive;* but when both are dead, there is no confidence between the representatives, and, therefore, the Court will appoint a receiver.

Judgment.

In *Eastwick* v. *Conningsby* (*b*), the plaintiff was administratrix of a deceased partner, the defendant was the surviving partner, and it appeared that many debts due to the joint estate were outstanding. It was moved that an attorney might be appointed to sue for and recover these debts. The bill alleged that the defendant carrying on a distinct trade for himself, with the debtors to the joint estate to oblige them, forbore to call in their debts; and it was ordered as moved for, unless the defendant within a week gave security to the plaintiff to answer her moiety of the outstanding debts.

In *Hartz* v. *Schrader* (*c*), an injunction was granted against a surviving partner to restrain him from intermeddling with the estate, he being in embarrassed circumstances, and confined in prison for a separate debt.

(*a*) 2 Bro. C. C. 272. (*b*) 1 Vern 118. (*c*) 8 Ves 317.

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And *Forsyth* v. *Drake* (*a*), seems to have been misapprehended by the learned Judge. In that case the bill was filed by the heir-at-law and the executors of the will of the survivor of several joint mortgagees to foreclose the mortgage, and it was held that the personal representatives of the other joint tenants were necessary parties. The mortgagees had been in fact partners, but that case was not made by the bill, and the Court expressly decline to give an opinion whether a surviving partner in such a case could maintain the suit. "Assuming that a surviving partner might entertain a suit of this sort under such circumstances (upon which we give no opinion) no such case has been made by the bill."

With the greatest respect for the learned Judge, and with much distrust of my own opinion, I think that on this point the decision in *Sykes* v. *Brockville and Ottawa R. W. Co.*, is not in harmony with the course of decision and ought not to be followed. See also *McClean* v. *Kennard* (*b*).

Judgment.

It was also argued that the stock and bonds in this case were chattels, and the title did not survive, upon the principle of *Buckley* v. *Barber* (*c*). I do not think it of much importance to inquire into the nature of the property, because it cannot affect this case. The property was sold during the partnership, and all that remained to the partners was a right of action to recover the amount of the purchase money, with a lien upon the evidences of title.

But this lien only arose under the agreement set forth under the fifth paragraph of the bill, which states that "It was also agreed between the plaintiff and the defendant *Foster*, that the plaintiff should retain possession of the said securities so sold as a security for the payment of the purchase money and interest." There was no agreement that the firm should retain them, but only that the plaintiff should do so. The

(*a*) 1 Gr. 223. (*b*) L. R. 9 Chy. 336. (*c*) 6 Exch. at 1[illegible].

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plaintiff would then be a trustee for the other partner or his representatives to the extent of his or their interest, but they need not be parties to the suit. *Fraser* v. *Sutherland* (*a*). *Mitford*, 5th ed., 201.

It was further argued that the plaintiff did not sufficiently state his title to the property sold. The statement in the bill is, that the plaintiff as well on his own behalf as on that of the firm sold to *Foster*, and *Foster* bought from the plaintiff and the firm all the interest of the plaintiff and the firm in the property sold. The death of *Vaughan* is afterwards alleged, "leaving the plaintiff sole surviving partner of the said firm, and the plaintiff is now solely entitled to all the interest of the said firm under the said agreement with the defendant *Foster*."

If a bill were filed by *A* and *B*, who held shares in a railway company, and not connected as partners or joint owners, alleging that they held them severally, it is possible there might be such a misjoinder as would be fatal to the bill. *Jones* v. *Garcia del Rio* (*b*). But had this bill been filed during the life time of *Vaughan* the objection would not have been sustainable, as the plaintiff and the firm made a joint sale to *Foster* of their several properties, and it would not have been open to *Foster* to take exception to it. In the case of a surviving partner, however, he can join claims in his own right as well as in that of surviving partner. As where a plaintiff has two distinct claims against a defendant he is not entitled to bring separate bills for them: *Daniel's* Chancery Practice, vol. i. p. 280.

Judgment.

The allegation of his title as surviving partner seems to be stated with sufficient certainty. It would have been more accurate to have said that *as* surviving partner he is entitled, but I think that is the fair construction to be placed on the 12th paragraph of the bill. The property or part of it, was held in partnership, one partner dies, leaving the plaintiff surviving; the

(*a*) 2 Gr. 442. (*b*) T. & R. 297.

paragraph might have stopped there for the law would infer that he was then entitled. The rest of it may be considered as surplusage. 1876. Bolckow v. Foster.

In *Jerdein* v. *Bright* (*a*), the plaintiff claimed as assignee of a debt, but did not state how he became assignee, whether in bankruptcy or insolvency, or in what capacity, nor did it appear that the assignment was in writing, as required by the 9th section of the Statute of Frauds. That is no authority in favour of this demurrer, for the plaintiff states he is surviving partner, and then the law passes the right without any assignment. Nor is *Garrett* v. *Saunders* (*b*), of much value to the defendant. All that was decided there was, that the statement, that "*Hannah T. Williams*, the widow of the said *Charles W. Williams*, and the person entitled by law to receive the moneys secured by said mortgage, exhibited her bill of complaint," did not shew that she was executrix of her husband. I have referred to the other cases cited by the defendant on this subject: *Parker* v. *Nixon* (*c*), *Walburn* v. *Ingilby* (*d*), *Baker* v. *Harwood* (*e*), *Houghton* v. *Reynolds* (*f*), and do not think it necessary to examine them in detail, as they do not seem to me to be, from the difference of circumstances and language, in favour of the demurrer; indeed *Houghton* v. *Reynolds* is in favour of the bill. Judgment.

The certainty necessary in pleadings in equity was the subject of much discussion in *Grant* v. *Eddy* (*g*), and the rule adopted there, is, I think, sufficient to sustain this bill.

The demurrer is overruled, with costs.

SOLICITORS.—*Crooks*, *Kingsmill*, and *Cattanach*, for the plaintiff; *Blake*, *Kerr*, and *Boyd*, for the defendant.

(*a*) 2 J. & H. 325.
(*b*) 23 Gr. 566.
(*c*) 4 Giff. 306.
(*d*) 1 M. & K. 61.
(*e*) 7 Sim. 373.
(*f*) 2 Hare 264.
(*g*) 21 Gr. 46.

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CAFFREY v PHELPS.

Charging order—Railway stocks—Imperial statute 1 & 2 *Vic., ch.* 110.

The Imperial statute 1 & 2 Victoria, ch. 110, if in force in this Province, authorizes the issuing of a charging order against stocks standing in the name of a debtor "in his own right or in the name of any person in trust for him," but does not apply where such stocks have been fraudulently assigned in order to avoid execution.

Statement.

The defendants in this case, *George B. Phelps* and *Daniel D. Warner*, carrying on business under the style or firm of *George B. Phelps & Co.*, were railway contractors, resident in the United States, who had entered into a contract with the *Kingston and Pembroke Railway Company*, for the construction of the railway, and they had made a sub-contract with the plaintiffs for the construction of fences along a certain portion of the line of railway. After the making of this sub-contract, the defendants cancelled their contract for the construction of the railway, and the railway company refusing to recognize the plaintiffs' sub-contract with *George B. Phelps & Co.*, for the construction of the fencing, plaintiffs were deprived of the benefit of their contract, and filed their bill in this case against *George B. Phelps & Co.* to obtain payment for the work which they had done under the contract, and also the damages for the loss which they had sustained by reason of being deprived of the benefit of such sub-contract.

The bill was taken *pro confesso* against the defendants, and a decree made on the 24th of November, 1875, referring it to the Master at Kingston, to take an account of the amount due the plaintiffs according to the prayer of the bill.

On the 17th of December, 1875, the Master reported due to the plaintiffs for work done under the agreement and for damages $4,404.08, and costs were taxed at $168.12.

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On the 18th of December, 1875, a writ of execution was sued out upon the decree and report against the goods and chattels of the defendants, and placed in the hands of the sheriff of Frontenac, with directions to seize all the stock held by the defendants in the *Kingston and Pembroke Railway Company*, and the sheriff served the proper notices on the officers of the company, stating that he had seized the stock by virtue of the execution.

The plaintiffs then filed a petition in the cause, setting out their judgment and execution as above stated, and alleging that the defendants were entitled to certain shares of capital stock in the *Kingston and Pembroke Railway Company*, which they had transferred to other parties in trust for themselves, as follows: $4,500 in the name of *John L. Phelps*, a son of the defendant *George B. Phelps*; $2,250 in the name of *R. P. Flower*; and $29,250 in the name of Mrs. *Schley*, of New York.

The petition further alleged, that excepting the stock standing in the name of Mrs. *Schley*, the said stocks were so transferred with the intent of defeating, delaying, and hindering the plaintiffs, and the other creditors of the defendants, and without consideration; and that the stock standing in Mrs. *Schley's* name was held by her as mortgagee.

Statement.

The petition prayed that the stock standing in the names of *John L. Phelps*, and *R. P. Flower*, should be charged with the payment of the plaintiffs' debt, pursuant to the Imperial Statutes, 1 & 2 Vict. ch. 110, sec 14; and 3 & 4 Vict. ch. 82, sec. 1; and that the stock standing in Mrs. *Schley's* name might also be so charged, subject to her claim as mortgagee, and that no part of the said stocks might be sold or transferred, or otherwise dealt with, without notice to the plaintiffs.

Upon this petition, and the affidavits read in support of it, a charging order *nisi* was granted on the 11th of January, 1876, charging the above mentioned stocks with the payment of the plaintiffs' debt, and restraining

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the railway company from permitting any transfer of the stocks until the order *nisi* should be made absolute or discharged.

Subsequently, evidence was taken before the Master, at Kingston; and *George B. Phelps*, and his son *John L. Phelps*, were examined, under commission, at Watertown, New York, and upon the evidence thus obtained a motion to make absolute the charging order was granted on the 25th of April, 1876.

Upon that application the plaintiffs' counsel abandoned the charging order *nisi* as against Mrs. *Schley* and *R. P. Flower*, and upon hearing the evidence which had been taken, the charging order was made absolute as to the stock standing in the name of *John L. Phelps*.

This order was set down to be reheard on behalf of the defendants and *John L. Phelps*, and came on to be reheard before the full Court in December last.

Mr. *Moss*, for the defendants, and *John L. Phelps*, who reheard.

Mr. Maclennan, Q. C., and *Mr. G. M. Macdonnell*, for the plaintiffs.

On the rehearing it was pointed out by the plaintiffs' counsel that the judgment in *Allan* v. *Phelps* (*a*), proceeded on the ground that *John L. Phelps* had not been bound by the charging order, which was a misapprehension, as he was, in fact, the only party appearing to contest it, and relief was asked against the decree in that suit.

Feb. 15. Judgment.

SPRAGGE, C.—The question upon this rehearing is, whether the charging order granted in this case, charging certain stocks in the *Kingston and Pembroke Railway Company*, standing in the name of *John L. Phelps*,

(*a*) 23 Gr. 393.

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with the payment of a sum found due by the defendants to the plaintiff, under the report of the Master, at Kingston, in pursuance of a decree of this Court, was properly granted or not.

The order is objected to on three grounds: That the Imperial Statute, 1 & 2 Vict. ch. 110, under which the charging order was issued, is not in force in this Province. (2.) That assuming the statute to be in force, the ground upon which the assignment from the defendant *Phelps* to *John L. Phelps* is impeachable, if impeachable at all, is not within the statute, and (3.) That the evidence upon which the order was made is insufficient. It is unnecessary to consider the first and third objections, as we are all of the opinion that the second must prevail. Section 14 of the Act defines what shall be the subject of a charging order, "That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster, shall have any government stock, funds, or annuities, or any stock or shares of, or in, any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him," the same may be charged by order of a Judge; and the statute goes on to enact that "Such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor."

Judgment.

In *Re Onslow's* Trusts (*a*), Sir *Charles Hall*, V. C., held that these latter words restricted the judgment creditor to the same remedies as he would have had if the charge had been made by the judgment debtor himself, that "It was intended that the judgment creditor shall, after the charging order, only be in as favourable a position as if such instrument of charge had been executed to him by the debtor."

(*a*) L. R. 20 Eq. 677.

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Twenty years before, Lord *Cranworth*, in *Goldsmith* v. *Russell* (*a*), decided a question arising upon the same statute upon the same principle. A settlement was made by a debtor in insolvent circumstances in favour of his wife and children, through trustees, by whom a sale was made, and the proceeds of the sale converted into stock, and it was contended for the wife and children, that the suit being to affect stock, the plaintiff ought to have taken out a charging order under 1 & 2 Vic. ch. 110. Upon that contention Lord *Cranworth* observed: "In my opinion there is no ground for such an objection, inasmuch as no charging order could have been obtained, the stock not standing in the name of any one in trust for the debtor, nor of the debtor, whose act in making the settlement, and transferring the funds into the names of the trustees, is impeached by the bill." In other words, it is not sufficient to entitle a judgment creditor to a charging order, that the stock might be reached through a suit impeaching the transaction as void under the statute of Elizabeth; but it is not within the Act, unless the stock stand in the name of the debtor, in his own right, or in the name of trustees for the debtor; and this obviously must be so, if, as Sir *Charles Hall* puts it, the judgment creditor shall, upon the charging order, be only in as favourable a position as if the instrument of charge had been executed by the debtor, because as between himself and the assignee the assignment was good, and he could not revoke or undo it by making another charge in favour of another person.

Judgment.

To apply these principles to the case before us. The evidence points to a transaction impeachable under the statute of Elizabeth, as entered into and done with the intent of hindering creditors. It may be impeachable also as being, in fact, voluntary, though colourably for a valuable consideration; but assuming that it would be within the statute if made upon a secret trust in favour of

(*a*) 5 D. M. & G. 547.

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the settlor, the judgment debtor, does the evidence establish such a case—a case that if the debtor had, after the assignment to *John L. Phelps*, charged the stock in favour of the judgment creditors, that charge would have prevailed against the previous assignment.? I think the evidence does not go that length; there are some suspicious circumstances, but the direct evidence is all the other way, and suspicion is not, as has been observed in many cases, a ground for judicial decision.

I think the order should be reversed with costs, on the terms that the bill filed to enforce the plaintiffs' claim should be reinstated, and the decree made therein vacated.

BLAKE, V. C.—At the time the stop order in this suit was granted, the stock in question stood in the name of *John L. Phelps*, to whom it had been issued, by the fraud, it is said, of *George B. Phelps*, the debtor. Both *John L. Phelps* and *George B. Phelps* allege that *John L. Phelps* is the *bonâ fide* holder of the stock. This Court may be able, in order to prevent the defrauding of the plaintiffs, to follow the stock in the hands of the present holder, in favour of the plaintiffs, but, until these proceedings are taken, and the Court so declares, *John L. Phelps* is not the trustee of the stock, and even when this declaration is made the Court holds *John L. Phelps* to be a trustee, not for *George B. Phelps*, but for the creditors who claim the stock. It cannot be said that at the time the charging order was made this stock was, as to *George B. Phelps*, "standing in his name in his own right, or in the name of any person in trust for him." The case is, therefore, not brought within 1 & 2 Vic. (Imperial statute) ch. 110, secs. 14 and 15, and, I think, the order made must be discharged, with costs. I think, as a term of this order, the bill filed to charge this stock in the hands of him who is alleged to hold it in fraud of the plaintiffs, should be reinstated.

Judgment.

PROUDFOOT, V. C., concurred.

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Upon the settling of the order on rehearing the defendants refused to consent to the decree in *Allan* v. *Phelps* being vacated, whereupon a petition was presented that the decree might be vacated, when it appeared that the stock in question had meanwhile been transferred to the name of Mrs. *Schley*, and, thereupon, an order was made vacating the decree, reinstating the bill, and granting an injunction against Mrs. *Schley* and the railway company, restraining all dealings with the stock in question.

SOLICITORS. — *Mowat*, *Maclennan*, and *Downey*, agents for *Campbell* and *Macdonnell*, Kingston, for the plaintiffs; *Bethune*, *Osler*, and *Moss*, agents for *Britton* and *Price*, Kingston, for the defendants.

GUGGISBERG v. WATERLOO MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Insolvency—Notice of assessment—Premium note—Practice—Amendment at hearing—Administration of Justice Act.

N., in September, 1872, effected an insurance for three years with the defendants, a Mutual Insurance Company, acting through an agent, on two houses, which property *N.* had previously mortgaged to one *G.*, by whom the application stated the policy was to be held as security, and was so entered in the books of the company, and he with *N.* attended at the agent's office, and joined in signing the premium note. The policy was issued on the 14th of September, and the usual consent of the company to such assignment was indorsed thereon, "subject to all the terms and conditions therein referred to," one of which was, that if any assessment to be made on the premium note should remain unpaid, for a period of thirty days after notice thereof to the assured, the company would be at liberty to cancel the policy. On the 31st of May, 1873, *N.*, made an assignment in insolvency. On the 11th of August, 1873, an assessment of $10.80 was made on the premium note, of which notice was given to *N.* only; no notice whatever having been sent to or served upon the representatives of *G.*, who had died in the previous month of March. The property insured was destroyed by fire on the 25th of March, 1875, the company having, on the 25th of

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April previously, assumed to cancel the policy for non-payment of the assessment.

Held, under the circumstances stated, that the company had not any power to cancel the policy; that the same was still a continuing security in favour of the estate of *G.*, whose representative was entitled to recover from the company the amount secured by such policy.

The answer of the company relied upon the premises being vacant without notice to the company; at the hearing this proved to be incorrect, when an application was made to supplement their answer by relying on a change in the occupation and an increase in the number of tenants; but as it was not shewn that the change in occupation had increased the risk, or that the loss was occasioned by it, the Court, in the exercise of the discretion given to it under the Administration of Justice Act, refused to allow the amendment.

This bill was filed by *Dora Louisa Guggisberg* against *The Waterloo Mutual Fire Insurance Company* and *Alexander Davidson*, seeking to recover from the Insurance Company the sum of $1,200, being the amount of insurance effected on certain property destroyed by fire in the town of Preston.

The evidence had been taken at the sittings of the Court at Guelph, in the autumn of 1876, and the case was subsequently heard before *Proudfoot*, V. C., at Toronto. The effect of the evidence and the material facts of the case appear clearly in the judgment.

Mr. *R. N. Miller*, for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *W. H. Bowlby*, for defendants.

Judgment.

Feb. 21.

PROUDFOOT, V. C.—*Henry Nafe* applied to *Robert Jaffray*, the agent at Galt of the defendant company, on the 11th of September, 1872, to effect an insurance for three years, on two brick stores in Preston, for $1,200. He had then recently purchased them from *Frederick Guggisberg*, to whom he had given a mortgage for $1,000, part of the purchase money; *Guggisberg* accompanied him to the agent's office. The appli-

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cation says the policy was to be held as security by *Guggisberg*, and it was so entered in the books of the company; and, as the result of somewhat conflicting evidence, I find as a fact that *Guggisberg* joined *Nafe* in the premium note. The policy issued on the 14th of September, 1872. On the 27th of September, the company consented by indorsement on the policy "That the interest of *Henry Nafe* in the within policy, subject to all the terms and conditions therein referred to, be assigned to *Frederick Guggisberg*, per application of the said *Henry Nafe*;" and in October *Nafe*, by indorsement, assigned the policy to *Guggisberg*, as collateral security for the mortgage debt. *Guggisberg* died on the 25th of March, 1873. His will was proved by the plaintiff on the 21st of May, 1873. *Henry Nafe* on the 31st of May, 1873, made an assignment in insolvency to *Alexander McGregor*, who on the 20th of June, transferred *Nafe's* estate to the defendant *Davidson*. An assessment on the premium note of $10.80 was made on the 11th of August, 1873, of which notice was only given to *Nafe*. On the 25th of April, 1874, the company assumed to cancel the policy. The loss occurred on the 25th of March, 1875.

Judgment.

For the defendants it was argued that *Nafe* was the only person insured, and that having made default in paying the assessment, the policy became void; that his assignment in insolvency also avoided the policy; that there was a change in the occupation of the premises which was not made known to the company, and also avoided the policy. A defence founded on misrepresentation of value was abandoned.

The 35 Vic. ch. 12, O., which came into effect 1st April, 1872, made choses in action assignable, enabled the assignee to sue in his own name, made him liable to any defence that existed at the time of or before notice of the assignment to the person sought be made liable, but enabled the assignee to hold and enjoy the chose in action free from any claims, defences, or equities,

which might arise after such notice as against the assignor. 1876.

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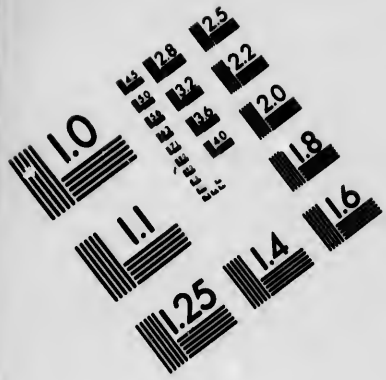
The 36 Vic. ch. 44, sec. 39, O., permits assignments to a mortgagee of policies of insurance, and provides that in such case the directors may permit the policy to remain in force, and to be transferred to him by way of additional security, without requiring a premium note or undertaking from such assignee, or his becoming in any manner personally liable for premiums or otherwise, but in such cases the premium note, or undertaking, and liability of the mortgagor in respect thereof, shall continue in no wise affected by the assignment.

In *Smith* v. *Niagara District Mutual Ins. Co.* (*a*), *Gwynne*, J., considered the effect of these statutes where the assignment contained a stipulation, that the assignee should be bound by all the terms and conditions of the policy, and the by-laws indorsed thereon, and that the policy should continue to be avoidable as though the assignment had not been executed, and he came to the conclusion that by force of these statutes, and of the terms of the assignment, that the original legal contract was still the contract in force, but which might be avoided by any act of the person thereby insured that, in the terms of the contract, it was provided should avoid the policy. Judgment.

In *The Mechanics' Building and Loan Society* v. *The Gore District Mutual Fire Ins. Co.*, *Galt*, J., followed the decision in the last case, but on re-hearing or appeal to the full Court of Queen's Bench, the decision was reversed.* In that case the breach of condition relied on was the effecting a subsequent insurance by the assignor, without notice to, or assent by, the company. The Court considered that the assignment transferred the policy absolutely to the assignee, which would not be avoided by the subsequent acts of the mortgagor. That was a stronger case than this, as

(*a*) 38 U. C. R. 570. * Case in hands of printer.

[redacted]



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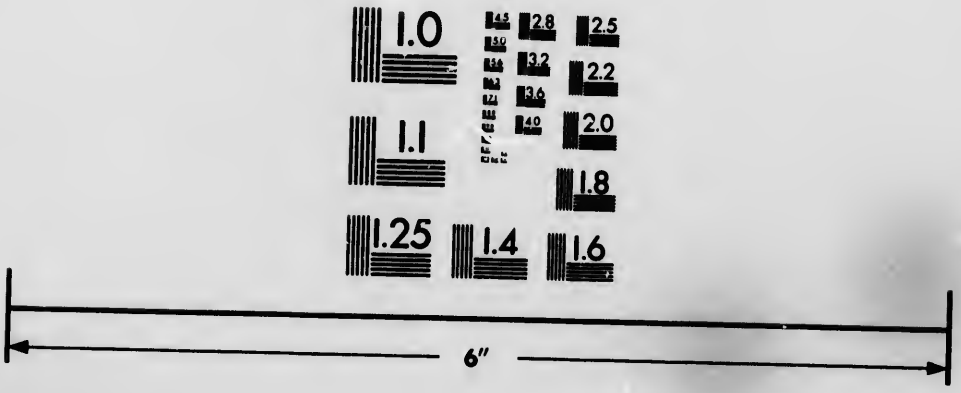

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that was an assessment to the extent of $2,000, on a policy for $3,000; and it was held that the terms of assignment only meant the assignee should be liable to all the conditions of the policy as the assignor was, and he not having violated the conditions was entitled to recover. *Wilson*, J., who delivered the judgment of the Court, says, "By the 26th section (of 36 Vic. ch. 48, O.,) the company shall be at liberty to cancel any policy by giving to the *insured* notice to the effect that they have cancelled or will cancel the same. Now, who is the *insured* under that section? Is it the assignee and holder of the policy, or the original insured, who as mortgagor, may or may not have one particle of real interest in it? It may probably be both where it is not an absolute assignment. But certainly the assignee of it must be entitled to have notice of it whether the assignor is so or not."

Consistently with what has been decided in the last case, I cannot hold that the insolvency of the mortgagor subsequent to the assignment can prejudice the assignee.

Judgment.

It is possible, however, that had the company required and obtained no security for the payment of the premium note on the assignment, the non-payment of the assessment might have avoided the policy, as the assignee should have taken care to see that the premiums were paid. But in this case the company had the joint note of the assignor and assignee, and notice of the assessment should have been sent to both, while it was only sent to the assignor. It is said that the post office address of the assignee was not inserted in the application. There is some doubt as to this, for his address is added in pencil, it is not shewn when or by whom; but it is not pretended the company did not know his address, and it was certainly known to the agent at Galt, and most likely to the other officers of the company. It is true he had died before the assessment was made. But the Consol. Stat. U. C., ch. 52, sec. 25, which was then in force, made every person insured by

the company, and the *heirs*, *executors*, *administrators*, and *assigns* of every such person continuing to be insured therein, members during the time specified in their policies; and, I apprehend, it was the duty of the company to ascertain who were the representatives of the person who was assignee of the policy, and had joined in the premium note, especially in reference to an act which was to avoid the policy. It does not rest there, however, for it is proved by *Nafe* that when he was notified of the assessment he told the officer of the company that it was no use notifying him, as he had become insolvent, that they should notify his assignee or the executor of *Guggisberg*, whom he said was a Mr. *Gordon* of Toronto. It is true that *Gordon* did not prove the will, but he was named executor, along with the plaintiff, and there is no reason to suppose that a notice to him would have been of no service, but at all events the information given by *Nafe* was sufficient to make it the duty of the company to endeavour at least to find who was to receive notice. The company having taken no steps to give notice to *Guggisberg* or his representatives, it is quite impossible to allow the forfeiture for non-payment of the assessment to stand.

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Judgment.

The answer relied upon the premises being *vacant* without notice to the company. As it turned out that this was untrue, the company asked leave to amend by relying on a change in the occupation, and an increase in the number of the tenants; and it was insisted that it was compulsory on the Judge to allow it as much under the Administration of Justice Act, as under the Common Law Procedure Act. I believe it has been held that the Court is bound under the Common Law Procedure Act to allow the amendment; but under the Administration of Justice Act it is discretionary, as has been held in *McManus* v. *McManus* (*a*); so that unless it should appear manifestly for the advancement of

(*a*) In Appeal 24 Gr. 118.

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justice, the Judge might not permit the amendment. I do not think this a defence that should now be permitted, and I refuse to allow the amendment. It was not shown that the change in occupation had increased the risk or that the loss was occasioned by it.

The plaintiff is entitled to a decree with costs.

SOLICITORS.—*Beatty*, *Chadwick*, and *Miller*, for the plaintiff; *Bowlby*, *Coloquhoun*, and *Clement*, for the defendants.

MCDONALD V. GEORGIAN BAY LUMBER COMPANY.

Foreign bankruptcy—Assignment thereunder—Lands affected though not specially mentioned—Cloud on title.

D., who was a naturalized British subject, possessed of a large quantity of lands in Canada, residing in the State of New York, was, with his co-partners, duly declared bankrupt by the Courts of that State, on the 15th of November, 187? and on the 14th of February following a trustee of their est as duly appointed. when the bankrupts executed a deed purporting to convey, transfer, and deliver" to him, without words of inheritance, all their and each of their *estate* and effects for the benefit of creditors. On the 26th of August, 1874, an execution against *D.*'s lands in Canada was placed in the hands of the proper sheriff, which was kept duly renewed. On the 24th of September, 1874, *D.*, by way of further assurance, and in pursuance of the said Act of Congress, and of the said deed of 14th of February, conveyed all his lands in Canada, specifying the several parcels, to the same trustee in trust for the said creditors:

Held, that the debts due the creditors of *D.* formed a sufficient consideration for the deed of the 14th of February, 1874, which bound the lands in equity; that the defects, in that deed if any, would have been aided by this Court, which, however, were sufficiently remedied by the deed of the 24th of September; and that the retention by the defendants, the execution creditors, of their writ in the hands of the sheriff, formed such a cloud upon the title of the trustee as this Court would decree the removal of.

On the 1st of November, 1873, a petition was filed in the District Court of the Southern District of the State

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of New York, under the provisions of an Act of the Congress of the United States of America, intituled "An Act to establish a uniform system of Bankruptcy throughout the United States, approved, March 2nd, 1867," against *Anson G. P. Dodge*, *W. J. Hunt*, and *Samuel Scholfield*, praying that they might be adjudicated bankrupts; and on the 15th of November, 1873, they were duly adjudicated bankrupts.

On the 14th of February, 1874, *John L. Cadwalader* was duly appointed trustee of the estates of the bankrupts, and on that day the bankrupts executed and delivered to the trustee a deed purporting to convey, transfer, and deliver all their and each of their estate and effects to the trustee, to have and to hold the same, in the same manner and with the same rights in all respects as the bankrupts or either of them would have had or held the same if no proceedings in bankruptcy had been taken against them or either of them, the same to be applied for the benefit of the creditors of the bankrupts in like manner as if they had been at that date duly adjudged bankrupts, and the said trustee had been appointed trustee under the Act of Congress. Statement.

On the 24th of September, 1874, the bankrupt *Anson G. P. Dodge* being seized in fee of a large quantity of lands in Canada, granted and conveyed by way of further assurance, and in pursuance of the said Act and of the said deed of the 14th February, 1874, to the said *John L. Cadwalader* in trust for the said creditors the said lands, specifying the different parcels.

Cadwalader resigned his office of trustee with the sanction of the Court, and on the 7th of December, 1874, the plaintiff was duly appointed by the Court trustee of the said estates in the stead of the said *Cadwalader*; and by indenture dated the 25th of January, 1875, *Cadwalader* conveyed the lands in Canada to the plaintiff as such trustee for the said creditors, and the plaintiff immediately went into possession of them.

The defendants on the 26th of September, 1873, sued

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out a writ of summons in the Court of Queen's Bench for Ontario, against *Dodge*, who was a naturalized British subject then residing out of the jurisdiction, and such proceedings were thereon had that judgment was signed on the 30th June, 1874, for $13,254.18 debt and costs, and on the 26th of August, 1874, a writ of execution against the lands of the said *Dodge* was placed in the hands of the proper sheriff, which was renewed on the 23rd of August, 1875.

The plaintiff charged that the writ was void and of no effect against the lands, but was retained by the defendants in the sheriff's hands and formed a cloud upon the title of the plaintiff, who had applied to the defendants to have the same removed, but which they had refused to do.

Argument.

Mr. *Crooks*, Q. C., and Mr. *Creelman*, for the plaintiff. The plaintiff here claims under a conveyance prior to the suing out of the execution at the suit of the defendants, which conveyance was executed by all the debtors on the 14th of February, 1874, while the execution issued upwards of six months afterwards, namely, on the 26th of August, and the waiver of bankruptcy proceedings furnished a good consideration for this conveyance. *Simpson* v. *Fogo* (*a*), shews that the adjudication in bankruptcy does not pass the lands in Canada. The debtors having conveyed all their estate in the lands in Canada, no lien by virtue of the execution could attach even though the deed conveying the lands had not been previously registered. An assignment or conveyance for the benefit of creditors is a deed for valuable consideration: *Burnham* v. *Daly* (*b*). Here the deed conveys the separate estate of each of the debtors as well as the partnership lands; and although no particular lands are specified in the conveyance, still the deed is good, and vests in the grantee all the landed estate owned by

(*a*) 1 H. & M. 195. (*b*) 11 U. C. R. 211.

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the grantors; and the grantee under such a deed can enforce any further assurances that may be necessary to enable him to register the conveyance: *Heward* v. *Mitchell* (*a*), *Perceval* v. *Perceval* (*b*), *Kemp* v. *Jones* (*c*), *Robson* v. *Carpenter* (*d*), *Robson* on Bankruptcy, 2nd ed., 393. *Cood* v. *Cood* (*e*), *Wigle* v. *Setterington* (*f*), *McLellan* v. *McDonald* (*g*) *McMaster* v. *Phipps* (*h*).

Mr. *Moss* and Mr. *Rye*, for the defendants. If, as has been asserted by the other side, the lands passed by the deed of the 14th of February, then the execution of the defendants never attached. In this view this suit was unnecessary, and for that reason alone, if no other existed, the bill should be dismissed. But this deed is operative only under the bankrupt laws of the United States, and if that law does not affect lands in this country, so neither can this deed, to which, as shewn by the *professional* evidence given on behalf of the plaintiff, effect is given by section 5103 of the bankrupt law, formerly section 43 of the Act; page 590 of the revised statutes. Apart from that section, this deed could not operate as a deed to convey, and no consideration whatever is stated in the deed. The operative words used in the instrument to transfer their lands are "convey, transfer, and deliver;" neither "feoffment, grant, nor bargain and sale" is made use of; neither does the deed make any mention of the lands conveyed or intended to be transferred. And the deed itself would seem to be inoperative by reason of the want of any oath, and it does not appear to have been confirmed by the Judge of the Bankrupt Court, as required by the Act. Neither can it operate as a contract. If a contract at all it is with the foreign creditors, and these defendants were not bound to prove under the bank-

Argument.

(*a*) 10 U. C. R. 535.
(*b*) L. R. 9 Eq. 386.
(*c*) 12 Gr. 260.
(*d*) 11 Gr. 293.
(*e*) 33 Beav. 314.
(*f*) 19Gr. 512.
(*g*) 18 Gr. 502.
(*h*) 5 Gr. 253.

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ruptcy, nor to give credit for what they might make on property in this country, so long as they did not realize more than 100 cents in the $ of the whole demand: *Cockerell* v. *Dickens* (*a*). Neither could the bankrupt have been compelled under this deed to convey lands in a foreign country; therefore, as to these lands there was really no contract. The question here is simply one of priority, and the defendants having obtained it, this Court will not interfere to deprive them of it: *Wheaton's* International Law, page 383.

This instrument clearly is not a contract that was to affect anything that the bankrupt law itself would not affect; and if a contract, it being without consideration, the party is not bound to convey: *Osborn* v. *Adams* (*b*), *Holme* v. *Remsen* (*c*), *Simpson* v. *Fogo* (*d*), *Benfield* v. *Solomans* (*e*), *Carey* v. *Crisp* (*f*), *Mitford* v. *Mitford* (*g*).

Mr. *Crooks*, Q. C., in reply. The jurisdiction which this Court has here, and which the plaintiff invokes, is to remove a cloud which the defendants have placed upon the plaintiff's title; and to perfect what is now an imperfect instrument. The conveyance executed by *Dodge* is either a deed or a contract. We contend it is a deed, not the Act of a foreign Court but of the bankrupt himself; and if not effectual at law, it is at all events valid and binding in equity: *McMaster* v. *Phipps* (*h*), *McGregor* v. *Robertson* (*i*).

Judgment.

PROUDFOOT, V. C.—The case involves questions of considerable importance in international law, but the principles on which it is to be decided are reasonably plain.

(*a*) 1 M. D. & DeG. 45.
(*b*) 18 Pick. 245.
(*c*) 20 Johns. 229.
(*d*) 9 1 H. & M. 195.
(*e*) 9 Ves. 77.
(*f*) 1 Salk. 108.
(*g*) 9 Ves. 87.
(*h*) 5 Gr. 253.
(*i*) 15 Gr. 543.

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The English law considers that an assignment under the bankrupt laws has a universal operation, as regards personal property, and vests it in the assignee, although it may be in a foreign country. Personal property is said to have no locality, and follows the person of the owner. The American Courts, generally, confine the operation of such an assignment to the territory where the party is declared bankrupt or insolvent: *Story's* Conflict of Laws, sec. 403. But in regard to immovables or real estate, the Courts both in England and America uniformly agree that it is exclusively subject to the laws of the Government within whose territory it is situate: *Story*, *Ib.* secc. 428; *Westlake's* International Law, secs. 67, 283.

While it is acknowledged that the proceedings *in invitum* in bankruptcy can pass no title to real estate beyond the territory in which the party is declared bankrupt, it has been held that there is a legal obligation in the bankrupt to execute an assignment of his real estate in foreign countries in aid of the bankruptcy: *Royal Bank of Scotland* v. *Cuthbert* (*a*). This extreme view did not meet with approval in the House of Lords, who held that there was no legal or equitable obligation in the bankrupt to make a conveyance to his assignees, although there was a moral obligation to do so: *Selking* v. *Davies* (*b*), an obligation which might be enforced by withholding the certificate, though the propriety of this course has been doubted: *Cockerell* v. *Dickens* (*c*). In the American Bankruptcy Court, therefore, no title passed by the proceedings there so as to vest lands in Canada in the assignee, though indirectly a conveyance might have been forced had the debtor been unwilling to make it, but this derives efficacy, not from the jurisdiction of the foreign Court, but from the act of the debtor.

Judgment.

(*a*) 1 Rose 462. (*b*) 2 Dow 230, 246, S. C. 2 Rose 97.
(*c*) 1 M. D. & DeG. 45, 79.

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The question then is, whether the instrument of the 14th of February, 1874, is operative either as a legal or equitable conveyance of the lands in Canada; for as was said by *Parke*, B., in giving judgment in *Cockerell* v. *Dickens* (*a*): "Under the general assignment made by *Palmer & Co.*, of all their property, which would operate wherever (but not elsewhere) the Imperial Parliament could give the law, the real estate in Java certainly would not pass; unless the law of that island made such a conveyance, being in the English form, operative in that country." Does this instrument contain the requisites to enable it to operate as a conveyance by the law of Canada. It does not specify the lands, but in *Robson* v. *Carpenter* (*b*), that was held no objection, and the present Chancellor, in giving judgment, said "In trust deeds for the benefit of creditors there is often a description of some land with a general conveyance of all other lands of which the debtor may be seized. If a *bonâ fide* purchaser from the debtor were not protected, the consequence would be most mischievous." The case of *Jenner* v. *Jenner* (*c*), is argued throughout on the supposition that estates may pass under such general words as, "All other the freehold hereditaments, if any, in the county of York, of or to which the grantor was seized or entitled for an estate of inheritance." And the same may be said of *Rooke* v. Lord *Kensington* (*d*).

Judgment.

There is no express statement of a consideration in the premises of the instrument, but if the consideration appear anywhere in it, I apprehend it will suffice: *Thomas* v. *Thomas* (*e*). The property is assigned to the trustee for the benefit of creditors. Their debts form a sufficient consideration for the transfer of property to pay them. If no consideration were mentioned in the deed, proof may be given of what the consideration was:

(*a*) *Supra*, page 79.
(*b*) 11 Gr. 293.
(*c*) L. R. 1 Eq. 361.
(*d*) 2 K. & J. 753.
(*e*) 2 G. & D. 226.

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Peacock v. *Monk* (*a*), *Hartopp* v. *Hartopp* (*b*), and there is ample evidence in the various deeds and papers produced to prove a valuable consideration for this instrument.

There are no words of inheritance in this deed, and they are not supplied by the statement that the trustee is to hold them "in the same manner and with the same rights in all respects as the debtors would have had, or held the same, if no proceedings in bankruptcy had been taken." So that the most that would pass to the trustee would be an estate for life. If the language of the deed would suffice under the Act of Congress to pass the fee in lands in the United States, it derives its force from the Act (section 43, or section 5103) which I am not at liberty to consider; here the whole effect must arise from the act of the parties.

The words "convey, transfer, and deliver," are not the words usually relied on in deeds here to pass an estate, but they seem to me sufficient for the purpose. The deed purports to convey all the estate and effects of the debtor to the trustee. The word *estate* means not only the nature of the interest in property, but means landed property itself; and appears to me wide enough to cover all the property of that description owned by the debtors: 4 *Cruise* Dig. 269 pl. 55, where it is said that since *id certum est quod certum reddi potest* lands will pass in a deed by the words "All that the estate in the tenure of *J. S.*, or all that estate which descended to the grantor from *J. S.*, or all the grantor's lands in the county of B."

Judgment.

It is clear, however, from the nature of the trust, to apply the property for the creditors, that the debtors meant to pass an estate sufficient for that purpose, which must have been a fee; the defect in the deed is such as would be aided in this Court; and if any such equity exist, the defendants, who are execution creditors only, would be bound by it: *McMaster* v. *Phipps* (*c*), *Story's* Equity Jurisprudence, sec. 97.

(*a*) 1 Ves. 127. (*b*) 17 Ves. 192. (*c*) 5 Grant 253.

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And the debtors having subsequently executed a deed of further assurance supplying all the defects in the deed of the 14th of February, the title of the plaintiff to the lands seems to me sufficiently made out.

The retention of the execution in the sheriff's hands seems to bring the case within the principle of *Ross* v. *Harvey* (*a*), where it was held that a deed which conferred no title on the grantee, but was registered before that to the plaintiffs, formed such a cloud on the title that the Court should decree a sale in which the first registered grantee should join.

There will, therefore, be a declaration that the lands specified in the bill are not liable to the operation of the writ of execution of the defendants; and an injunction restraining the defendants from selling or attempting to sell them, or interfering with the plaintiff's enjoyment of them; and an account of the damages sustained by the plaintiff by reason of the writ of execution being retained by the defendants in the sheriff's hands.

Judgment.

Defendants will pay plaintiff's costs to the hearing. Subsequent costs reserved.

SOLICITORS.—*Crooks*, *Kingsmill*, and *Cattanach*, for the plaintiff; *Bethune*, *Osler*, and *Moss*, agents for *McCarty*, *Boys*, and *Pepler*, Barrie, for the defendants.

(*a*) 3 Gr. 649.

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SUTER v. THE MERCHANTS' BANK.

Manufacturer, advances to— Warehouseman's receipts— Insolvency— Unjust preference— Vagueness of agreement—Lien on receipts when issued.

In May, 1874, *A.*, a manufacturer, opened an account with a bank, representing himself as being in good circumstances with a capital of $20,000 over all his liabilities, which was believed by *C.*, the Bank agent, who thought him doing a flourishing business, and *A.* then promised to keep *C.* always well supplied with collaterals for any accommation afforded him. In December, 1875, *A.* applied to *C.* for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the Bank for advances to be made to him; which proposal was acceded to by *C.* Advances were accordingly made, for which receipts were deposited with *C.* on the 19th of January, 25th of January, 1st of February, and 7th of February. On the 26th of February, *A*, in compliance with a demand by some of his creditors, executed an assignment in insolvency. On a bill filed to impeach these transactions as an unjust preference, the Court being satified that they all took place in good faith, and not in the contemplation of insolvency: *Held*, that the Bank were entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignments in insolvency; but in respect of such of them as were deposited within the thirty days the Bank could not claim any lien or priority.

Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security.

The promise, however, to keep *C.* well supplied with collaterals was of too vague and general a character to entitle the Bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold (without specifying any quantity), and *C.* was to judge of the amount of the advance to be made.

Held, that this agreement was not so vague or uncertain as to prevent the Bank obtaining security for advances.

The Dominion Act 34 Vic. ch. 5 sec. 47, enables a party making advances to a manufacturer to stipulate for obtaining a lien on warehouse receipts to be subsequently granted to the manufacturer.

It is incumbent on a party, seeking to impeach, as an unjust preference, a transaction between a debtor and his creditor occurring more than thirty days before insolvency, to prove that such transaction took place in contemplation of insolvency.

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A. owned a barley mill which he was endeavouring to sell to one *T.*, whose notes he was to accept in payment, and in December, 1875, he arranged with *C.* that these notes were to be handed over in security for all his notes then under discount. Subsequently, and on the 7th of February, 1876, the sale to *T.* having fallen through he executed a memorandum in writing transferring to *C.* "as collateral security against paper discounted for me, my right, title, and interest, in a barley mill * * * keeping the privilege of disposing of the same and handing to you the promissory notes of the" purchaser:

Held, that this was not an unjust preference: that the Bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security, on the sale falling through, to obtain an assignment of the mill itself.

This bill was filed by the assignee in insolvency of *John McKay*. The assignment was made on the 26th February, 1876, in pursuance of a demand by some creditors on the previous day.

Statement.

The bill stated that the defendants were the bankers of the insolvent, who was indebted to them prior to his insolvency to an amount which the plaintiff could not state; and while in insolvent circumstances, to the defendants' knowledge, he deposited, pledged, or transferred to the defendants as security for his indebtedness a large portion of his assets, viz., 20 cases of woollen goods, 18½ dozen of blue shirts and drawers, a barley mill, a carding machine, and several promissory notes; that part of these were so pledged within thirty days prior to the assignment and part before that; that the pledge was made in contemplation of insolvency, and the defendants thereby obtained an unjust preference; and that the defendants obtained the pledge in a manner not authorized by law, as by reason of their limited powers they could not take such a pledge; and prayed that the pledge might be declared void under the insolvent law, or illegal under the Banking Act.

The answer stated that the twenty cases of woollen goods were pledged to the defendants under four separate warehouse receipts, under the provisions of the Banking Act,

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as collateral security for debts incurred by the insolvent to the defendants in the course of their business, at the time of the acquisition of these receipts, or upon the understanding that such receipts would be transferred to the Bank; that these advances were not paid, and the defendants after due notice sold the goods, and applied the proceeds in part payment of the liabilities for which the receipts were held. The answer stated a similar understanding with regard to the blue shirts and drawers, which were manufactured by means of the money so advanced, but the plaintiff got possession of them and sold them. The defendants claimed the barley mill as pledged by the insolvent as collateral security for debts contracted by the insolvent in the usual course of business; and the carding mill as collateral security for the note of one *Clark*, but the plaintiff got possession of it, and sold it. That the notes referred to were all, except *Fraser's*, discounted by the bank in the usual course of business, and the makers became insolvent, when the insolvent *McKay* proposed to discount other paper to take them out of default, which the defendants agreed to do on the understanding that they should hold the past due paper as additional security for such discounts. That the defendants discounted the paper upon that agreement, and held the notes under it. *Fraser's* note it appeared was discounted by the defendants; it had been given for a boiler purchased by *Fraser* from *McKay*; the plaintiff took possession of the boiler, and while in his custody it was destroyed. The defendants denied that the securities, or any of them, were given in contemplation of insolvency, or that the defendants obtained an unjust preference, and alleged that when they got the securities they thought *McKay* perfectly solvent, and had a large surplus.

Statement.

The case came on to be heard at the sittings of the Court in Hamilton, in the Autumn of 1876.

The plaintiff's witnesses were *McKay*, the insolvent, and Mr. *Cooke*, the manager at Hamilton, of the defendants' branch there, and the plaintiff himself.

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The facts proved are sufficiently stated in the judgment.

Mr. *B. Osler*, Q. C., and Mr. *Wink*, for the plaintiff.

Mr. *E. Martin*, Q. C., for the defendants. *Perrin* v. *Wood* (*a*), *Re Coleman* (*b*), *Bank of British North America* v. *Clarkson* (*c*), *Royal Canadian Bank* v. *Miller* (*d*), *Risk* v. *Sleeman* (*e*), were amongst other cases referred to.

Feb. 21st, 1877.

Judgment.

PROUDFOOT, V. C., who, after stating the facts as above set forth, proceeded:—The evidence shews that the insolvent opened an account with the defendants in May, 1874, representing himself to be worth $20,000 over all his liabilities. Mr. *Cooke* believed this, and thought him doing a flourishing business. In the latter part of 1875, however, on account of *Harvey*, one of the principal customers for the insolvent's manufactures, ceasing to take any more of them, the insolvent found some difficulty in disposing of them and getting means to keep his manufactory at work, and he proposed to Mr. *Cooke* to warehouse his goods with Mr. *Buchanan*, a warehouseman, get his receipts, and pledge them to the bank for advances to be made to him. Mr. *Cooke*, not very willingly, agreed to this. The final arrangement was in December. Pursuant to this agreement the Bank made advances to the insolvent, some of them before receiving any of the warehouse receipts, and the insolvent warehoused goods with Mr. *Buchanan*, as follows:—Seven cases on the 19th of January, 1876, for which a receipt was given to be delivered to the order of the insolvent, and indorsed by him to the defendants; four cases on the 25th of January, 1876, for which a similar receipt was given and indorsed to the defend-

(*a*) 21 Gr. 492.
(*b*) 36 U. C. R. 559.
(*c*) 19 U. C. C. P. 182.
(*d*) 28 U. C. R. 593.
(*e*) 21 Gr. 250.

ants; six cases on the 1st of February, 1876, to be delivered to the order of the defendants; and three cases on the 7th February, 1876, to be delivered to the order of the defendants.

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All these receipts were handed to the defendants on or immediately after the days of their dates respectively.

In regard to the barley mill. This was a mill the insolvent was endeavouring to sell to one *Taylor*, and was sent to Grimsby for that purpose. Notes were expected to be obtained for the price. The insolvent arranged with Mr. *Cooke* that these notes were to be given to the defendants as security for all his notes under discount. The insolvent says the *Taylor* notes were to be discounted if he wanted them, but in the meantime they were to be left as collateral. He says also, Mr. *Cooke* was to have the privilege of discounting them or not as he pleased. Mr. *Cooke* says, he discounted paper on the faith of the *Taylor* notes being given to the Bank. The arrangement in regard to them, he thinks, was in December. He never promised to discount the *Taylor* notes to take up others. A letter of the 28th of December, 1875, written by a clerk of the insolvent to Mr. *Cooke*, says: "Mr. *McKay* has gone to Grimsby to arrange with Mr. *Taylor* in reference to the barley mill;" and unless there had been some agreement in regard to it I do not know why it should have been mentioned. On the 7th of February, 1876, the insolvent signed a paper transferring to *Cooke*, "as collateral security against paper discounted for me, my right, title, and interest in a barley mill, at Grimsby station, on the Great Western Railway, shipped to *John Taylor*, keeping the privilege of disposing of the same and handing to you the promissory notes of the said *Taylor*."

Judgment.

The notes claimed by the plaintiff are one made by *C. B. Jones* for $75; one made by *Irwin & Marshall* for $801; one made by *Stoddart* for $121; one made by *Munro* for $140; and one made by *Fraser* for $400.

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Jones's note was handed to the bank on the 26th of January; *Stoddart's* on the 4th of February; *Irwin & Marshall's* on the 6th of February; *Fraser's* on the 19th of February, and *Munro's* on the 21st of February. As the assignment in insolvency was made on the 26th of February, all these, with the exception of *Jones's*, came into the possession of the Bank within thirty days prior to the assignment. On the 8th of February, the defendants discounted the insolvent's note for $1,900, and with part of the proceeds *Stoddart's* note and *Irwin & Marshall's* note were retired. The $1,900 note is marked on the face "with collaterals." Mr. *Cooke* said, on his examination, that meant the *warehouse receipts*, the last of which was handed to him when the note was made. He says, however, that *McKay* consented to his retaining the other notes as collateral security for the *general account*. On his examination before the Master he says, he received no fresh security when the $1,900 note was discounted, except the past due notes retired that day, which were left in his hands as additional collateral security *for the* $1,900 and the *other account*. The insolvent, in his evidence, says, he does not remember Mr. *Cooke* stipulating as to *Irwin & Marshall's* and *Stoddart's* notes that he was to retain them to prove, in the insolvency of the makers; there was no agreement why they should not have been given to him, or now to his assignee. *Jones* had become insolvent, and *McKay*, the insolvent in this case, agreed that Mr. *Cooke* should retain it to prove on his estate.

Judgment.

I do not think there was any agreement before the thirty days that these notes should be held as collateral. Mr. *Cooke*, indeed, says, "That when the account was opened the insolvent promised always to keep him well supplied with collaterals," and from the first collaterals were received; but that is too vague and general a character to entitle the Bank to a lien on these notes. And from the variation in Mr. *Cooke's* testimony, and the qualification it receives from *McKay*, I am not

satisfied that any agreement was come to on the 8th of February, to permit *Irwin & Marshall's* and the *Stoddart* notes to remain as security for the general account. The only agreement, I consider, proved on that day was, in regard to the *Jones* note, and that having been received before the thirty days, did not need any such agreement to enable the defendants to retain it, unless it was given in contemplation of insolvency, a subject I will discuss further on. Nor do I think the defendants entitled to hold them under their general lien as bankers, for when they were *retired* the insolvent had the right to have them delivered up; and from the nature of the transaction and the entries in the books of the Bank. I think the $1,900 note with its collaterals, the warehouse receipts, were a substitution for these notes. As to the *Fraser* note and the *Munro* note, which were given to the Bank on the 19th and 21st February, not in pursuance of any agreement prior to the thirty days, the Bank cannot hold them.

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As to whether any of the transactions were made in contemplation of insolvency or not. It appears that the insolvent opened his account with the Bank on the 4th of May 1875, when he represented himself to be worth from $20,000 to $25,000 over all his liabilities. When in need of money in December, on account of *Harvey* ceasing to be a customer, he prepared a statement of his affairs for Mr. *Cooke*, dated 22nd December, shewing his assets to amount to $53,575 and his liabilities to $21,600, making a balance in his favour of $31,975. Among the assets is an account of *Harvey* for $5,000. On the 3rd of January, 1876, Mr. *Cooke* writes to the insolvent, "Your statement of assets and liabilities was duly received by me a few days ago, and has had my attention since. It appears to me an all important matter for your business future that you should be able to realize on the $5,000, due to you by Mr. *Harvey*. With his notes (or that amount of money) in hand you should have no difficulty in meeting your liabilities with regularity."

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Mr. *Cooke*, in his evidence, says, he went over the statement with the insolvent's clerk at one time, and with the insolvent himself at another. He thought him quite solvent; that he was quite able to go on without assistance, if he got the *Harvey* paper. When he made the advances on the warehouse receipts he thought he was solvent, and would be able to carry on his business. The insolvent wrote to him on the 21st of February, that he had resolved to call a meeting of his creditors the next day. This was the first intimation he had of his calling a meeting of his creditors. On the 16th of February, the insolvent wrote, in answer to an angry letter of Mr. *Cooke*, in reference to a draft of the insolvent on *Smith & Wilby*, which had been refused acceptance, "You need not get angry now as I am getting things to right. I have seen my principal creditors, and they are more than willing to give me all the time I want; and rest assured that you will not lose a cent by me. If I possibly can I will be down to day to see you, and have a statement of all my affairs, which, I am satisfied, will give satisfaction." Mr. *Cooke* also says: "That on the 8th of February, he did not know of his being pressed by creditors. Some of his paper had been protested, but on some he was not primarily liable. He satisfactorily explained the protests. The plaintiff says that the unsecured claims against the estate are $44,000, and that all the assets are only $2,100. The real estate, he says, is incumbered to $16,000, considered its full value. In his statement of assets of the 22nd of December, the real estate is valued by the insolvent as follows:

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Mill property, including dam.....	$25,000
Grant property.....	4,200
House and land, residence, ...	3,500
	$32,700

The mortgages are all stated among the liabilities. There is a great discrepancy between these statements.

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The mill cost $10,000, and there seems to have been machinery put in it afterwards, an engine and boiler, $2,200; cotton mill, $560; also a knitting machine that cost $4,400, and perhaps others. But, in December, the mill may have been well worth $25,000, as a going concern, while it may be difficult to dispose of it for half that now. There are not many who are able to carry on a business of that nature, or who may care to run the risk of it. The great difference, however, between the statement of the 22nd of December, and that of the assignee, consists in the $44,000 of unsecured liabilities. In the statement of the 22nd of December, only $5,200 seem unsecured. There is no evidence, however, of when these liabilities were incurred. It is not shewn that the debtor was insolvent in December or January; nor is it shewn that the assets mentioned in the statement of the 22nd of December did not exist; nor is any attempt made to shew that they were over-valued, unless it may be in regard to the real estate. The debtor himself thought he was solvent until about the 8th of February. He says also, that about a fortnight before the meeting called for the 22nd of February (which would be about the 8th), Mr. *Cooke* suggested to him the propriety of calling a meeting of his creditors. That was because he was hard pressed, and he told Mr. *Cooke* so. Mr. *Cooke* says he gave the advice about a week before the meeting. I do not think upon this evidence I can hold that any of the transactions prior to the thirty days took place in contemplation of insolvency.

Judgment.

It is incumbent on the plaintiff to prove the contemplation of insolvency in regard to the agreement of December to give the warehouse receipts as security for the advances made on them. The only witnesses in the case were the insolvent, the Bank Manager, and the plaintiff. There is no evidence contradicting the statement of the two former that there was such an agreement, and that it was acted on. In *Davidson* v. *Ross*

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(*a*), it is said that it is not an unjust preference when the transfer is made in pursuance of an agreement made before the insolvent became involved. And Mr. Justice *Patterson*, in commenting on a number of decisions, remarks of *Allan* v. *Clarkson* (*b*), that "The transfer was supported as being the completion of a pre-existing contract, as well as by reason of pressure," and so, while holding that pressure would not protect a transfer, it was not necessary to overrule that case.

It was argued, however, that the defendants could not acquire by anticipation a property in a non-existing receipt: 34 Vic. ch. 5, sec. 47, D. That section enacts that "No transfer of any such bill of lading, specification of timber, or receipt, shall be made under this Act to secure the payment of any bill, note, or debt, unless such bill, note, or debt, be negotiated or contracted at the time of the acquisition thereof by the Bank, *or upon the understanding that such bill of lading, &c., would be transferred to the Bank*, but such bill, note, or debt may be renewed or the time for the payment thereof extended, without affecting such security."

Judgment.

The first part of the section applies where the receipt, &c., is in the hand of the debtor, but the latter part seems to contemplate just such a case as this. I do not suppose it was intended only to apply when the receipt had been given, but was not yet come to the hand of the debtor. One object of the Act was apparently to secure the aid of Bank capital in furthering the great industries of the country, the lumbering, the agricultural, and the manufacturing; and these would obviously be very imperfectly benefited, if they could not get advances from the Banks till the whole cost of production had been incurred. In the case before me the money was wanted to work up the raw material and prepare it for market, and it appears to me the transaction is one contemplated by the Act.

(*a*) 24 Gr. 21 in App. (*b*) 17 Gr. 570.

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It was contended that the alleged agreement was not valid, as it did not specify the number of cases or their value. Mr. *Cooke* says, "*McKay* promised a certain number of cases, but he does not recollect what number." *McKay* says, the advances were to be on all the goods he manufactured and could not sell; but on cross-examination he says, "Mr. *Cooke* was not to advance to the full capacity of my mill; he was to judge of the amount of the advance." Mr. *Cooke* says, he made no agreement with *McKay* that he was to advance to the amount of unsold manufactured goods. I do not see anything so vague and uncertain in this arrangement as to prevent the Bank getting security for advances. The defendants were to judge of the amount they might from time to time advance, and whatever was so advanced on the faith of the warehouse receipts was to be covered by them. I do not think it established, however, that the receipts were to secure the general account, but only for the amount advanced on the faith of them.

Judgment.

The *Jones* note was transferred prior to the thirty days, and it is not shewn to have been in contemplation of insolvency, and, therefore, I think the Bank may hold it.

In regard to the barley mill, the arrangement was made in December, that the defendants should make advances on the faith of getting the notes expected from the sale of the mill as collateral security. The sale fell through, and in place of the notes, the mill itself was transferred on the 7th of February. This does not seem to me to be an unjust preference. The Bank made the advances in the expectation of having the proceeds of the sale: it was not extending their security, when the sale fell through, to transfer the subject itself which was to have been sold. Discounting notes, and receiving others by way of collateral security, is the legitimate and proper business of banking, and is not rendered illegal by anything in sections 40 and 41, of 34 Vic. ch. 5, D. The whole object of the insolvent's account

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with the Bank was to get money on customers' paper, or upon his own paper, with other paper as collateral. And even in the case of a mortgage of real estate, it might be upheld "when it appears that the mortgage was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage:" *Commercial Bank* v. *Bank of Upper Canada* (*a*). I cannot doubt that in the present case the insolvent was dealing with the defendants in the legitimate course of their business, and that the notes were not created for the purpose of giving colour to the contemplated lien.

Upon the whole, I think, the defendants are entitled to hold their lien on the warehouse receipts, and on the barley mill, for the sums specifically advanced on their respective securities, and on the *Jones* note. As to the *Irwin & Marshall*, *Stoddart*, *Munro*, and *Fraser* notes, the plaintiff is entitled to have them delivered to him.

Judgment.

As the plaintiff has failed in the most material part of his suit, the decree will be without costs; the defendants having also failed in a part of their claim, I cannot give them their costs.

There will be a reference to the Master, at Hamilton, to ascertain the amount of these special advances.

Further directions and subsequent costs reserved.

SOLICITORS.—*Osler*, *Wink*, and *Gwynne*, for the plaintiff; *Martin* and *Parke*, for the defendants.

(*a*) 7 Gr. 428, 430, in App.

WILSON v. WILSON. 1876.

Will—Mental capacity—Jurisdiction of Courts to set aside a will after probate—Costs.

The decree pronounced (*ante* vol. xxii., p. 39) setting aside a will purporting to be executed by the testator, affirmed on rehearing, except as to costs. In this respect the Court varied the decree by refusing the defendants their costs.

This Court has jurisdiction to set aside a will as having been executed under improper influence, or when the testator was not of sufficient capacity, without waiting for a revocation of probate. *Perrin* v. *Perrin* (*ante* vol. xix., p. 269) approved of and followed.

Rehearing of the cause at the instance of the defendants. Feb. 17th.

Mr. *Attorney General Mowat* and Mr. *O'Donohoe*, for the parties rehearing.

Mr. *Boyd* and Mr. *Donovan*, contra.

The facts of this case clearly appear in the report on the original hearing.

SPRAGGE, C.—Since the argument on rehearing I have very carefully read and compared the whole of the evidence. Jan. 16th, 1877.

It was a great point for the defendants to shew that it was on the same day the will was made, the 5th of July, that Dr. *Hodder* suggested that the testator ought to make a will, as his mental condition might shortly become such that he would not be competent to make a will; and counsel for the defendants urged very strongly that the evidence shewed it to be on that day. Judgment.

The evidence of *Charles Beatty* and Miss *Wilson* does, no doubt, place it on that day; but the evidence of Dr. *Hodder* himself, and of Dr. *Philbrick*, places it several days earlier—on or about the 28th of June—and Mrs. *Wilson* in her evidence places it distinctly on that day, and she is probably right. Dr. *Hodder* had resumed his

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visits on the 26th, when he found the sick man shewing evident signs of blood poisoning. He is asked as to his condition on the 28th, his answer is, that on the 27th or 28th he was in such a critical condition, and the doctor saw the disease progressing so unfavourably that he asked if he had made his will, and thought it was then fully time he should do so, if ever, for very shortly he might not be able to do so at all. He does not vary from this on his cross-examination, but adds as his reason for thinking that he spoke to the family only once on the subject, that it was his duty to speak once, and he took it for granted that his suggestion was carried out. Dr *Philbrick's* evidence is confirmatory of this

It was a cardinal point for the defendants to make out that this occurred on the 5th, for such a suggestion made on that day would be very strong evidence to shew that in the opinion of the medical men he was on that day of mental capacity to make a will. In fact, the suggestion assumes that he was so ; and if the defend-

Judgment.

ants are right as to the day, it would seem to follow, as put by their counsel, that the physicians must be in error as to his mental condition on that day.

To take first the evidence of Dr. *Hodder*, could he be mistaken as to the date when he made the suggestion ? May it have been the 5th, and not on or about the preceding 28th ? The evidence is very fully referred to, and *verbatim* extracts given from the most material parts of it, in the judgment of my brother *Blake* ; and I do not propose to repeat it. The extracts given shew the very decided opinion entertained by Dr. *Hodder*, and indeed by both of them, of the mental condition of their patient on that day. Entertaining that opinion, Dr. *Hodder could not* on that day have suggested that he should make a will, without the grossest inconsistency. A constant deterioration had been going on, which on the 5th was so profound that in the doctor's opinion it was utterly hopeless for him to attempt to make a will. I am not saying now what was the real mental condition

of the deceased; but that in the opinion of the doctor who is said on that day to have suggested that he should make a will, he was on that day in such a condition that it was utterly hopeless for him to attempt it. 1876. Wilson v. Wilson.

Again, Dr. *Hodder* could make no mistake as to its being on the 5th that he was in that state, for it was on that day that he gave up attending him, considering his case a hopeless one, and expecting that he would die during the night. His subsequent visit on the 7th, after finding to his surprise that the patient was still living, makes no difference upon this point.

Another reason against its being on the 5th that Dr. *Hodder* made this suggestion was, to use his own words, that he took it for granted that the will had been made, because he had spoken about it several days before.

Charles Beatty relates a rather long conversation as having taking place on the 3rd of July, in which he says, that Dr. *Hodder* told the sick man plainly of his critical condition, and said to him if you have any affairs to arrange, you had better arrange them; and Miss *Wilson* speaks more briefly to the same point. It is strange that Dr. *Hodder* was asked no question as to this. His answer when asked how the patient was on the 1st, 2nd, 3rd, 4th, and 5th of July, was, "getting worse, no improvement." In another place he said that if he had a lucid interval it must have been between the 1st and 5th if at all; adding that if a will was not made before the 1st, he should say that he was not in a fit state to make a will. Upon either of these answers being made, there was a fitting occasion for asking as to this alleged conversation on the 3rd, for if he had admitted that there was such a conversation it would have detracted from the value of his expressed opinion. Judgment.

But assuming that there was such a conversation on the 3rd, it is all the less likely that Dr. *Hodder* made the same suggestion again on the 5th, and it is the alleged suggestion on the 5th with which we have to deal. We have it from Dr. *Hodder* that he considered his duty done when he made such a suggestion once.

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I can come to no other conclusion upon the evidence than that Dr. *Hodder* did not on the 5th make the suggestion imputed to him.

The next point is, what is the proper conclusion from the evidence as to *Wilson's* mental condition on the 5th? Taking the evidence of the medical witnesses alone, the conclusion would be that he was not, and could not be on that day, so possessed of his mental faculties as to have testamentary capacity. I expressed myself in *Waterhouse* v. *Lee* (*a*), to the effect that although medical witnesses should depose that it was impossible that at a given time a person who had executed, what purported to be his will, could have been in a state of mind to comprehend what he was doing, I must still exercise my judgment between facts sworn to, and matters of scientific opinion; that facts might be established by such clear and convincing testimony in the face of opinion evidence by scientific men, that they must be accepted as established; although in the opinion of those well qualified to form a scientific opinion they are held to be improbable or even impossible, I see no reason to change or qualify my then opinion. I refer to it now because, testing this case upon that principle, I place it upon as high a ground for the defendants as it can properly be placed.

Judgment.

In this case, the opinion evidence is as strong as it can possibly be, so are also the grounds upon which the opinion is based. The case was of mental deterioration day by day—it may have been to some extent of an intermittent character—though that is not certain, but there was no rallying after the 28th of June. After that date there was no pause in the progress of the disease. It was gradually sapping the mental as well as the physical powers. The general condition is described as that of stupor, a stupor, however, from which he might be roused and from which he was roused on some

(*a*) 10 Gr. 176.

occasions, *e. g.*, on the occasion of the visit of Senator *Smith* on the 29th of June; that was the last occasion of which we have evidence, other than that of the defendants, of his being roused at any time up to the 5th of July. He may have been roused in the meantime, but we have no *independent evidence of it.* It is a very strong point upon the question of mental capacity that constant growing deterioration of mental power was a characteristic of the patient's disease: in the words of Dr. *Philbrick*, "The disease was one that progressed with the bodily decay, involving a mental decay."

The evidence of the medical men is indeed not merely the evidence of experts, and especially is this the case with Dr. *Philbrick*, the family physician. After the patient's relapse about the 27th or 28th of June, he says of his visits from thence to the 5th of July, that he was often in and out, sometimes five or six times a day. He had, therefore, every opportunity of forming a correct judgment, and there is to be taken into account the great advantage that a medical man must have over another in forming that judgment. He gives one instance, when the patient attributed his illness to a disease of the ear, and the doctor gives a graphic description of how he tried but failed to convince him that the disease was not in the ear but in the liver, and that he could not recover, but he says he could not make him comprehend it. This, he says, "was after the 28th some time; whether in June or the beginning of July he cannot say."

Judgment.

To take the evidence of *Charles Beatty* and Miss *Wilson* by itself one would think that the patient, though seriously ill and physically weak, was in full possession of his mental faculties. The extracts from their evidance in the judgment delivered shew that they so describe him. Then as to his physical condition; their description is entirely at variance with that given by the doctors; one says, that "there was no stupor nor anything like it;" the other says, "or anything approaching it, until the Tuesday after the will was made."

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Up to that time they scarcely admit that he was drowsy. *Beatty* who, as well as Miss *Wilson*, was in constant attendance upon him and had every opportunity of observing, says he never saw him in a chill until the 5th; while Miss *Wilson* speaks of chills and fevers having occurred frequently before that day. And these chills were not things that could pass unobserved; additional clothes were put over him and afterwards hot bottles were applied. Dr. *Philbrick* says, that "when the chills were on him you could scarcely tell whether he was dead or alive, and that until he rallied from them, he would be mentally prostrated."

Before leaving the evidence of Dr. *Philbrick* I should observe that his deafness may in some measure account for the difficulty that he experienced in rousing *Wilson* from his drowsy, and as it would appear half lethargic, condition; the patient was physically weak, and he would probably feel indisposed to make the effort that it would cost him physically and mentally so to raise his voice as to be heard by his physician, or to rouse himself at all; and if it were a question whether the doctor may not have misapprehended something that his patient said it would be more material. As it is, it does not go beyond this, that the patient may not have roused himself when addressed by Dr. *Philbrick*, when he may have been capable of rousing himself, and would have roused himself if addressed by some one whom it would have cost him less of an effort to answer. But the doctor had ample means of observation, and he used his eyes and all his other senses, and, in the many visits that he paid, observed closely the condition of his patient.

Judgment.

There is an evident tone of exaggeration in the evidence of *Beatty* and Miss *Wilson*. One instance of it on the part of *Beatty* is, the account he gives of the interview between the sick man and Senator *Smith*, his former partner, on the 29th of June. *Beatty* is asked if they had any conversation together—his answer is, "They conversed all the time;" to another question he

says, "They were talking politics half the time; they were talking about the probable result of *Gibbs's* election that was coming off." Mr. *Smith* told him of a commercial transaction and a customs duty transaction, and the witness is then asked if *Wilson* took part in the conversation, and his answer is, "Yes." This conveys the idea of two persons each capable of bearing his part in the interchange of conversation, and each actually doing so. Compare this with the account of the same interview given by Mr. *Smith* himself. I give it as taken down by the short-hand writer :—

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Q. Had you conversation with him ?

A. I had, yes.

Q. Did you talk on general subjects ?

A. Well, not very general.

Q. Were you talking about anything but his illness ? were you talking about other matters ?

A. Yes, I think after making some greetings that I was pleased to see him much better than I heard he was; and that I hoped there would be no danger of his recovery; that he would come out all right; I then introduced some other subject for the purpose of reviving him a little. Judgment.

Q. Did he take part in the conversation ?

A. Oh! he answered.

Q. He joined in ?

A. Yes; he said "Yes" and "No," and made some remarks; two or three remarks during my conversation; I do not recollect exactly what they were.

Q. You do not recollect exactly what you talked to him about ?

A. No. I do not.

This conveys an altogether different idea of *Wilson's* condition at that time from that conveyed by the evidence of *Beatty*. I think it may fairly be inferred that *Wilson* did on that occasion make an effort to rouse himself when his former partner came to visit him in his sickness; and it is material in two aspects, one as shew-

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ing that he *was* capable of rousing himself and the *extent* to which he was capable of rousing himself; the other as an instance of *Beatty's* exaggeration—of his so presenting a fact that occurred, as to convey a false impression of what really did occur. This interview was six days before the making of the will.

I could not rise from the perusal of the evidence given by *Beatty* and Miss *Wilson*, taking it in connection with the other evidence given in the cause, with the conviction that their evidence was given with the single purpose of telling the truth; and I find myself unable to believe that they spoke truthfully when they deposed that on the same day that the will was made Dr. *Hodder* suggested that a will should be made. It cannot be questioned that these two witnesses had and felt a very strong interest in supporting the will of the 5th of July. In *Sugden* v. *Lord St. Leonard's* (*a*), Mr. Justice *Hannen* comments upon the necessity of corroborative testimony in support of the evidence of interested parties: The evidence of these witnesses is substantially without corroboration.

Judgment.

There are one or two points arising upon the evidence of Dr. *Richardson*, which I will notice, because they relate to the visit paid by him on the evening of the day on which the will was made. The doctor made an effort, not a very determined one, to arouse him; the patient made no movement; the doctor then passed a candle before his eyes without producing any effect. He and Dr. *Philbrick* then agreed to apply a fomentation of nitro muriatic acid in order to arouse him, and this was applied. It occurred to me that possibly this application might have had the effect of rousing the patient from his stupor to a much greater degree of mental capacity than he had exhibited for some time before. But this idea is dissipated by the evidence of Mr. *O'Donohoe* himself. He saw *Wilson* first about three

(*a*) 29 W. R. 212.

in the afternoon, some five hours probably before Dr. *Richardson* paid his visit, and, he says, he remembers no change in his condition from any one of the interviews to any other of the interviews; that there was very little change from the time he commenced with him until he left him. 1876. Wilson v. Wilson.

There are portions of the evidence to which I do not refer now, because they have been noted and commented upon in the judgment of my brother *Blake*. Upon the physical and mental condition of *Wilson* up to the time of the preparation and execution of the will, the testimony of *Beatty* and Miss *Wilson* is in direct conflict with that of the physicians in attendance. I cannot call the evidence of the former such clear and convincing testimony as ought to prevail against scientific opinion, even if it were scientific opinion only. But it is more: it is the evidence of close observers from day to day, all the more valuable because of their scientific knowledge.

The man's condition on the 5th is the all-important point. Not to repeat the evidence, it is to be remembered that the disease and its consequences became on that day "more profound," that he was almost in a comatose condition—not in a comatose condition—for he could be aroused, but not capable of continuous thought, that at least is the opinion of Dr. *Hodder*, in which opinion Dr. *Philbrick* coincides, and we find that the will propounded was actually in course of preparation during Dr. *Richardson's* visit. From what Mr. *O'Donohoe* says, I should infer that he must have been with *Wilson* taking instructions probably twice before that visit. This being his condition, the evidence that he fully comprehended the will to which he put his hand ought to be of the most clear and convincing character; there should be no room for doubt in such a case that what he put his hand to was really the expression of his mental volition. Judgment.

I entirely agree with the remarks of my brother *Blake* upon the duty of a solicitor in preparing a will,

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and with his comments as to how that duty was discharged in the present case; but, apart from the performance, or neglect of duty, there is the fact in this case of the actual condition of this man up to and during the preparation of the will, whether known to Mr. *O'Donohoe* or not.

In *Darling* v. *Parker* (*a*), Sir *Herbert Jenner* says, what indeed common sense must approve, "Where a person is in the full possession of his intellects, the mere act of execution would lead to the inference that he knew the contents of the instrument he signed; where the person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained the real intention of the deceased." It would be difficult to conceive "a lower grade of capacity" than that to which this man was reduced, and yet what is there to satisfy the Court that the paper propounded as his will contains his real intentions? To much the same effect as the language of Sir *Herbert Jenner*, is that of Mr. Justice *Bosanquet*, in *Dufaur* v. *Croft* (*b*):

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"Now the question is, whether the evidence of what passed upon that occasion is sufficient to satisfy a Court of Probate that the contents of the codicil originated with the testator, or were adopted by him at a time when he was in a condition to exercise, and did exercise thought, judgment, and reflection respecting the act which he was doing, and the contents of the paper which he signed. If this were the case of a testator possessed of undoubted and unimpared capacity, the reading of the instrument in the presence of his family, pursuant to his desire, expressed by a gesture, his approval of it by an affirmative expression, and the signature of his name, might be sufficient to shew that the act was his own, though the instrument had been prepared by the person to be benefited by it. But in a case circumstanced like

(*a*) 2 Curt. 229. (*b*) 3 M. P. C. C. 136.

this, where the capacity is fluctuating and the intervals of reason very short, it is incumbent upon the party propounding the instrument, to shew by more than ordinary proof, that at the precise time when the act was done the testator was in the possession and exercise of his mental faculties."

We have before us, besides the will in question, the will executed in January, 1871, and my learned brother has, in his judgment, pointed out how much less favourable to the widow of the deceased and to his expected child, is the one in question than the former one, and that, although made at a time when it might be reasonably expected that if any alterations were made, they should be such as would be beneficial to the wife and child.

In addition to the cases referred to in the judgment is that of *Brouncker* v. *Brouncker* (*a*). In that case the paper in question was a codicil to the will which Sir *John Nichol* styled "A complete and long will in full form, containing a just and proper disposition of his property." The will had been executed three days before. The codicil was executed hastily, and made a much larger provision for his younger children at the expense of his eldest son. There is much in the case that is apposite to the case before us. Sir *John Nichol* says: "It is pleaded that the deceased had a strong affection for his eldest son; there is no particular proof of this, but it is clearly proved that he had no disaffection towards him; his affection is evinced by the will of the 21st January; and this, from the provisions it contains, is decisive of a firm intention to make an eldest son; it shews it to have been his deliberate and firm intention. The question then is, whether the deceased was in possession of a sound and disposing memory at the time of making this codicil, sufficiently so, to effect the almost entire subversion of his solemn will, executed only

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(*a*) 2 Phil. 57.

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four days before, and to leave his eldest son for the present destitute, or at best dependent on his mother during her life. The presumption of law is strongly in favour of the executed will; the Court must consider whether the capacity was adequate to the subsequent Act; the proof of the capacity must depend upon the nature of the Act, and all circumstances must be taken together, to ascertain the real testamentary intentions * * * * She read over to him what she had written. He asked her why she had not written 'it in the form of a codicil.' Not one word as to the contents or the reason of the alteration, nothing to supply the defect of instructions, and the two ladies themselves appear to have been in such agitation and hurry as scarcely to have understood what had been intended: there is nothing to satisfy the Court that the deceased was fully aware of the nature and extent of this alteration in the will; he merely takes notice of the form * * * * * The deponent then asked the deceased whether it would not be better to have three witnesses? The deceased apparently agitated and impatient, replied, 'It is not lands; it has nothing to do with lands; it is merely to make a trifling or small addition to the fortunes of younger children.' The deceased shewed great earnestness to have it done; the paper was placed on the table; he proposed Mrs. *Brouncker* to be a witness. The deceased in an uncommonly hurried manner, and as if he was working himself up to make an effort, signed his name; and the deponent and Mrs. *Strode*, without anything further being said, signed their names. To what does all this amount? That the deceased knew he was doing some testamentary act, so far as to be aware of something of these forms. He could call it a codicil; he knew it did not pass lands; and he could exert himself to sign his name; but it does not satisfy me that he knew the important alteration he was making; that he was doubling the fortunes of his younger children, and leaving his eldest son totally un-

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provided for; he hears Mrs. *Strode* describe it as a trifling addition; he repeats that it is a trifling addition to younger children."

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The application of these observations to the case before us is sufficiently obvious.

Upon the question of corroborative evidence I would refer again to the judgment of Mr. Justice *Hannen*, in *Sugden* v. *Lord St. Leonards*. The learned Judge speaking of the evidence of Miss *Sugden*, an interested party, says, "I must seek step by step for the corroborations in order to find what residuum there is, as to which I shall have to rely exclusively upon her testimony. Now, the first source of corroboration to which one would naturally resort would be, the other testamentary instruments admitted to be in the handwriting of the deceased, and I find that the various codicils corroborate Miss *Sugden's* evidence as to the provisions of the will in many very important particulars."

There the other testamentary papers were corroborative, the reverse is the case here. Upon the same point —the provisions contained in the will itself—I would quote a passage from Dr. *Ray's* book (p. 395) on the medical jurisprudence of insanity: "The testamentary capacity is to be determined in a great measure by the nature of the act itself. If it be agreeable to instructions or declarations previously expressed, when unquestionably sound in mind; if it be consistent and coherent, one part with another; and if it had been attained by the exercise of no improper influence, it will be established, even though the medical evidence may throw strong doubts on the capacity of the testator. On the contrary, when these conditions are absent, or are replaced by others of an opposite description, it will as generally be annulled, however plain and positive may be the evidence in favour of his capacity."

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What passed between the deceased and the barber, and between the deceased and Mr. *Walls*, one of the witnesses to the will, is not wholly immaterial; but still it does

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not amount to evidence of *testamentary* capacity. Their evidence shews that the sick man could rouse himself, or be roused to a certain extent; it proves nothing more. To quote again from Dr. *Ray*, "In some affections of the head, and they may be primary or sympathetic, the patient lies in a comatose state from which he may be aroused, when he will recognize persons and answer questions correctly, respecting his feelings, but drop asleep again as soon as they cease to excite him * * It would be a bold assertion to say that the mind under these circumstances is legally capable of making testamentary dispositions."

Again, in *Darling* v. *Parker*, the previously declared intentions of the testator, and a will made in contravention of them, are circumstances relied upon by the Court in pronouncing against the validity of the will. Sir *Herbert Jenner* makes these comments on the will and its contents, and what took place at its execution: "The witness [one of the attesting witnesses] says, that *Parker* held the paper in his hand, and gave it to the deceased, who signed his name, *Parker* saying something about a will; the witness and *Calcott* then signed it. He says he heard the deceased speaking to *Calcott*, but could not distinguish the words. This witness also says that the will was not read over in his presence, nor was anything said about what it contained. His belief that the deceased was ignorant of the contents of the will, is founded on the frequent declarations of the deceased that he would make a will in favour of his poor relations; and he says that he would not have attested the will if he had been aware of its contents. He says that the deceased's memory was completely lost, and that the most he could say of him is, that he was rational. It is said the executors labour under this disadvantage, that they cannot prove the instructions. Whose fault is that? Was any secrecy necessary to be observed? Not the least. There is, therefore, nothing to lay a probable foundation for this disposition; either

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a dispute with the deceased's relations, or a motive to leave these two persons any part of the property."

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And so in the passage cited from the Reports, in the Marquis of *Winchester's* Case (*a*), and adopted by Dr. *Lushington* in *Jones* v. *Godrich* (*b*) in the Privy Council, "It is not sufficient that the testator be of memory when he maketh the will, to answer to familiar and usual questions, but he ought to have a disposing memory, so that he be able to make dispositions of his estate with understanding and reason."

There is a great deal more to the like effect in the cases cited in the judgment already delivered, but they appear in the printed report of the case, and it would be idle to repeat them.

We are referred to the signature of the testator as some evidence of mental capacity—it is in a clear, free hand, but we have no evidence as to what it indicates in regard to the testator's capacity. It is a point I believe upon which doctors differ; they differed upon it in *Waterhouse* v. *Lee*, one doctor being of opinion that a signature indicates memory, and that a man could not sign his name from mere habit; the other doctor differed from this, his opinion being, that a person might write his name without being conscious of what he was doing. In this case I should say from the evidence that the testator was conscious that he was writing his name, and that he was doing so by way of executing a will; and I should say from the signature that his nerves were at the time sufficiently steady to enable him to write his name freely; but beyond that I cannot go. There are some circumstances deposed to in evidence in relation to the preparation of the will, into which, in my view of the case, it is not necessary to enter.

Judgment.

The grounds to which I have adverted and upon which I form my opinion are, in my judgment, sufficient for the decision of the case.

(*a*) 6 Coke 24

(*b*) 5 M. P. C. C. 80.

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My opinion is, that the decree should be affirmed with costs.

Upon the ground of jurisdiction, and also upon the question of estoppel, my brother *Proudfoot* will deliver his judgment. I agree with him upon both points; and I also agree with his observations in regard to the disposal of the question of costs. The inclination of my opinion would be, that the defendants should be refused their costs.

Judgment.

BLAKE, V. C.—I think the Chancellor's conclusion in *Perrin* v. *Perrin* (*a*) is correct. This Court had power to try the validity of last wills and testaments before the passing of the Surrogate Court Act. The jurisdiction given to the Court of Chancery was not by that statute taken away by express enactment or by implication, and, therefore, the plaintiff had a right to come to this Court, seeking the relief she asks. In *Re Chamberlain* (*b*), applies where the applicant is only an executor, not where, as here, she is also a beneficiary under the will and entitled to a share of the estate, if the will be set aside. The circumstances under which the defendants procured the plaintiff to apply for probate, render it impossible to allow her act to estop her from taking proceedings which she is at present prosecuting. A further perusal of the evidence and consideration of the case serves but to confirm my opinion that the paper propounded by the defendants is not the will of the deceased. It may be that the plaintiff is entitled to her costs from the defendants. I do not think their conduct can easily be justified, and do not dissent from thus disposing of this question.

PROUDFOOT, V. C.—I entirely agree with the Chancellor in the excellent analysis of the evidence he has made, and the conclusions he has drawn from it, and in

(*a*) 19 Gr. 259. (*b*) L. R. 1 P. & D. 316.

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the rules of law applicable to the facts so substantiated. I concur with him in his approval of the remarks of my brother *Blake* upon the duty of a solicitor in preparing a will, and with his comments as to how that duty was discharged in the present case.

It was also earnestly argued that until probate was revoked this Court had no jurisdiction to set aside the will. The Chancellor had already decided this question in *Perrin* v. *Perrin* (*a*), holding that this Court has such jurisdiction. The Chancery Act, sec. 28, passed in 1849, gave to this Court jurisdiction to try the validity of last wills and testaments, whether referring to real or personal estate. The Surrogate Act, passed ten years later, gives the Surrogate Court power to try the validity of such wills, and gives authority to remove cases of importance into this Court, and gives an appeal to this Court from the Surrogate Court. But it contains no provision ousting the original jurisdiction already vested in this Court. The Chancellor remarks that, "It has been held too often to be questioned now, that by jurisdiction being conferred upon another forum, over a subject matter of which this Court already had jurisdiction, the jurisdiction of this Court is not ousted:" and I consider that to be an accurate statement of the law. The recent work of Sir *Peter Maxwell* on the interpretation of statutes, page 105, contains a number of cases illustrating the proposition. He says: "It would not be inferred, for instance, from the grant of a jurisdiction to a new tribunal over certain cases, that the Legislature intended to deprive the Superior Court of the jurisdiction which it already possessed over the same cases." The case of *Allen* v. *McPherson* (*b*), was much relied on by counsel for the defendants, in which it was held that the Court of Chancery had no jurisdiction to try the validity of a will of which probate had been granted, that the proper course if dissatisfied with the

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(*a*) 19 Gr. 259.

(*b*) 1 H. L. C. 191

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decision of that Court was to appeal to the Privy Council. But I apprehend that case has no application. The House was not determining whether a clear and unambiguous power conferred on the Court of Chancery was terminated by the grant of a similar power to another Court. The whole difficulty was, to ascertain whether the Court of Chancery ever had the power; and the conclusion, to which the majority of the House came, was, that it did not have, and never had, the power.

The argument from the Imperial Probate Act, 20 & 21 Victoria, ch. 77, goes no farther than this. *Allen* v. *McPherson* decided that the Court of Chancery never had the power. The grant of it to another Court could not be held to take it away from a Court that never possessed it.

The Court of Chancery, however, had a well known jurisdiction to establish a will of real estate: *Story* Eq. Jur. sec. 1446; *Bryse* v. *Rosbrugh* (*a*). The Probate Act, sec. 61 *et seq.*, gave to the Probate Court authority to grant probate of wills affecting real and personal estate, citing the heirs and other persons interested in the real estate, and probate so given was to be conclusive evidence of the validity and contents of the will. In *Sugden* v. *Lord St. Leonards* (*b*), Sir *George Jessel*, in referring to the Probate Act, was of opinion that probate of a will, in solemn form, under that Act, did not alter the law of the Chancery as to establishing wills, though it erected a new tribunal. That I consider to be strictly applicable here. The jurisdiction of the Court to establish a will of real estate, is not more clearly vested in it, than the jurisdiction to try the validity of a will is by sec. 28 of the Chancery Act, and conferring the same power on another Court, cannot have the effect of taking it away from the Court of Chancery.

Judgment.

I think *Perrin* v. *Perrin* (*c*) is a true exposition of the law.

(*a*) Kay 71. (*b*) L. R. 1 P. D. 154, 236. (*c*) 19 Grant 259.

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Nor do I think that the plaintiff is precluded from impeaching the will by her having joined the other executors in obtaining probate of it. She did so on being told that she shared equally with Miss *Wilson* and her mother. She was asked by Miss *Wilson* and others to join in obtaining probate, and did just as they told her. She had every confidence in the persons making these requests, and that she was properly provided for; she had never read, nor heard read, the will, and she did not ascertain how the facts were till some time after. When persons are to be bound by conduct as waiving any right, it must be when they have acted with a full knowledge of the circumstances: *Lindsay Petroleum Co.* v. *Hurd* (*a*). Here the plaintiff's knowledge of the contents of the will was erroneous, an error caused by the defendants, leaving her under the impression that she was properly provided for, and, had she thought of it, there would have been no object in proving the first instead of the second will. As to her knowledge of the condition of the testator and of the capacity requisite for the execution of a valid will, that is a subject on which many wise men have differed, and she may well be excused from not knowing what the law was. But she did not, in fact, know that a second will had been executed till after the testator's death, and did not know the time of its execution, she had neither read it, nor heard it read, when the application was made for probate; and she may have supposed it was executed sooner than it was, and when the testator was capable of making one.

Judgment.

My brother *Blake*, in dealing with the question of costs, has dealt very leniently with the defendants, in giving them their costs out of the estate; and considering the whole of the circumstances connected with the preparation and execution of the will; the studied concealment of it from the plaintiff while in progress;

(*a*) L. R. 5 P. C. 221.

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the representation of at least one of the defendants by which the plaintiff was induced to apply with them for probate, I would have thought it a proper case in which the defendants should not have their costs at least.

SOLICITORS.—*Donovan*, for the plaintiff; *O'Donohoe* and *Meek*, for the defendants.

THE CORPORATON OF THE TOWNSHIP OF ELDON v. THE TORONTO AND NIPISSING RAILWAY COMPANY.

Bonus to railway—By-bargain—Preferential bonds—Illegal contract

A proposed by-law for granting to a railway company a bonus of $14,000, was assented to by the ratepayers of the township of Eldon; and to induce the Council afterwards to ratify the by-law, the company entered into a bond, undertaking that if certain other townships should deliver to the company certain debentures expected from them, the company would give to Eldon $6,000 of preferential bonds of the company: the company having a limited statutory authority to issue preferential bonds "for raising money to prosecute the undertaking." One of the townships failed to give the debentures expected from it, and the company, instead of giving its preferential bonds to Eldon, gave to the municipality an ordinary bond for the $6,000.

Held, that the company had no authority to give its preferential bonds for the purpose of carrying out its bargain with the municipal Council.

That the default of one of the other townships to give the debentures expected from it, disentitled Eldon to demand preferential bonds from the company, even if the company had had authority to grant them.

And that the giving of the bond which the company did give, was no waiver of the objection, as an answer to the municipality's demand of preferential bonds.

Statement.

The bill in this cause was filed by *The Corporation of the Township of Eldon* against *The Toronto and Nipissing Railway Company*, setting forth that by the Act, 31 Vict. ch. 41 (Ont.), the defendants were duly incorporated, and it was thereby declared lawful for any

municipality, through any part of which or near which the railway or works of the company should pass, to aid and assist the company by loaning or guaranteeing, or giving money by way of bonus or other means, to the company; or issuing municipal bonds to or in aid of the company, on the passing of by-laws for that purpose, and the adoption thereof by the ratepayers as provided by the Railway Act of the Consol. Stat. of U. C. and amendments, and that whenever any municipality should grant a bonus to the company for the purpose of the railway, the debentures of the municipality, should within six weeks, after repassing of the by-law authorizing the same, be delivered to trustees to be named as in the Act directed; that *The Municipality of Eldon* introduced a by-law, under the provisions of this Act, to grant a bonus of $44,000 in aid of the company, which was duly submitted for adoption by the ratepayers, and their sanction thereof was obtained; but that afterwards the Council considering it inexpedient that so large a bonus should be granted to the company, resolved that such by-law should not be read a third time, and that no further proceedings should be taken upon it, and that the amount of bonus to be given the company should be reduced by $6,000; and a by-law to that effect submitted to the electors of the municipality. Thereupon it was proposed and represented to the Council on behalf of the Company; that, as the company were in urgent want of funds for the construction and equipment of the road, they would reimburse the plaintiffs to the extent of $6,000, and secure the payment of that sum by the issue and delivery to the plaintiffs of the bonds of the company, which should be, and rank as first and preferential claims and charges upon the road, if, and upon the condition that they, the said Council, would finally pass the by-law and cause to be issued and delivered, to the trustees, debentures for the full amount of the bonus; that this proposition of the defendants was acceded to by the Council, the by-law finally passed and the deben-

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tures to the full amount of the bonus were issued and delivered to the trustees, and the full proceeds thereof received by the defendants, and by them applied in the construction and equipment of the railway; and as an intended security to the plaintiffs for the fulfilment by the defendants of their said agreement in that behalf, the company prepared and executed under their corporate seal a bond, bearing date the 24th of December, 1869, whereby the company purported to become bound to the plaintiffs, in a penal sum conditioned to deliver to the plaintiffs the first preference bonds of the company for $6,000, payable in twenty years with interest.

The bill further alleged, that afterwards and on the 3rd of October, 1871, "in pretended fulfilment of the above mentioned agreement and in compliance with the said bond," the defendants prepared and executed under their private seal a bond in the words, following :—

Statement.

"Know all men by these presents, that *The Toronto and Nipissing Railway Company* are held and firmly bound unto the *Corporation of the Township of Eldon* in the penal sum of Twelve thousand dollars, of lawful money of Canada, to be paid to the said *Corporation of the Township of Eldon*, their successors or assigns, for which payment well and faithfully to be made, we bind ourselves and our successors firmly by these presents, sealed with our corporate seal, and dated this third day of October, one thousand eight hundred and seventy-one.

Now, the condition of the above bond is such, that if the said *Toronto and Nipissing Railway Company*, their successors and assigns, do and shall well and truly pay or cause to be paid to the said *Corporation of the Township of Eldon*, their successors or assigns, the sum of six thousand dollars, of lawful money of Canada, on the first day of January, in the year of our Lord one thousand eight hundred and ninety, and in the meantime pay interest thereon at the rate of six per cent. per annum half yearly, on the first days of January and July in each year, such interest to be calculated from the first day of July last passed, and all

of such payments to be made at the office of the said company in Toronto; then the above written bond shall be void, but otherwise shall be and remain in full force and virtue. 1876.

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(Signed)

{ L.S. }

"JOHN SHEDDEN,
"President.
"JAMES GRAHAM,
"Secretary and Treasurer,
Toronto & Nipissing Railway."

Which bond was sent by the defendants to the plaintiffs, but the same was never accepted by the plaintiffs as the required bond under the said agreement, or in accordance therewith; but on the contrary was always repudiated by the plaintiffs, as the same was not a first preference bond; that the defendants pretended that the said bond was in accordance with the agreement actually entered into between the Council and the defendants, on the faith of which the said by-law was passed, and the debentures thereunder issued, but the plaintiffs insisted the contrary was the case, and prayed a specific performance of the agreement, and that the defendants might be ordered to execute under their corporate seal, and deliver to the plaintiffs a first preference bond of the company for $6,000 with interest, from the 1st of July, 1871, or that the defendants might be ordered to pay the sum of $6,000 with interest, together with costs of suit. Statement.

The defendants answered the bill and stated, amongst other matters, that shortly after the passing of the by-law, having understood that the Council were unwilling to grant a bonus to the extent sanctioned by the ratepayers, it was mutually agreed between the plaintiffs and the defendants, that the plaintiffs should read the by-law a third time, defendants agreeing and undertaking to give to the plaintiff, a bond, conditioned for the repayment of the sum of $6,000 of the bonus, on the 1st day of January, 1890; the said bond or bonds, if possible, to be a first preference lien. In pursuance of

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which agreement the defendants did execute a bond on the 24th of December, 1869, under the corporate seal of the company, in the penal sum of $6,000, which after reciting the passing of the said by-law for granting the sum of $44,000, which had not yet been ratified by the Council, and the request of the Council to give the said bond, expressed that

"The condition of the said bond is such, that if the Council of the Corporation of the Township of Eldon do and shall within fourteen days from the date hereof, ratify the said by-law granting the said sum of forty-four thousand dollars to the said company, and do and shall within that time deliver the debentures to be issued under the said by-law to the trustees appointed to receive the same, and if in accordance with the terms of an Act of the Legislature of Ontario, assented to this day amending the Act of Incorporation of the said company, the townships of Brock, Bexley, Laxton, Digby and Longford and Somerville, do and shall hand over to the said trustees the debentures under the several by-laws, as voted upon by the people of the several municipalities within the time limited by the said Act so assented to this day; then if the said company do and shall within one year after the delivery of the said debentures by all the said townships, deliver to the said corporation of Eldon first preference bonds of the said company, payable in twenty years, with interest at six per cent. per annum, for the sum of six thousand dollars, then the above bond shall be null and void, otherwise shall be and remain in full force."

Statement.

That subsequently to the execution of the said bond it was discovered that the company had not the power or authority under their Act of Incorporation to give to the plaintiffs first preference bonds, and that the same could not be issued, and the plaintiffs were thereupon notified to that effect; and the defendants being willing to give their own bond as originally agreed upon, that the plaintiffs agreed to accept the said bond, and the bond set out in the bill was thereupon executed by the defendants and forwarded to the plaintiffs,

which was accepted by the plaintiffs, and for more than a year afterwards they did not claim to repudiate the same; that on the 3rd of January, 1872, and long before any notice of the plaintiffs' refusal to accept the said bond, the treasurer of the municipality called at the office of the company, in Toronto, and demanded payment of the interest due on the bond, the interest being then and there payable, and the same was then and there paid to the said treasurer, and an acquittance given therefor, and the plaintiffs retained the said money so paid to their treasurer.

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The plaintiffs having replied, putting the cause at issue, evidence was thereupon taken before Mr. *Crickmore*, special examiner of the Court, and the cause was set down to be heard by way of motion for a decree in the terms of the prayer of the bill.

Mr. *Attorney General Mowat* and Mr. *Foster*, for the plaintiffs, contended that, under the circumstances appearing on the pleadings and evidence, the plaintiffs were clearly entitled to obtain from the defendants a first preference bond for the $6,000; that this stipulation is clearly expressed in the bond of 1869: and such was the understanding of all parties to the agreement. The minutes of the railway board do not afford any evidence that the undertaking to give such bond was in anywise conditional; and upon the faith of this undertaking being carried out, the debentures of the municipality were delivered to the company. After the execution of the bond of 1869, the company, it is established, had first preference bonds in their hands which they could have handed over to the company in fulfilment of their contract, but they failed to do so; and if by their own act they have disabled themselves from giving such first preference bonds, the Court should now order them to pay over the amount in cash. The defendants are too late now in setting up that the other municipalities dealt upon the faith of Eldon's subscription being

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$44,000. In 1871 the company did in fact give a bond, which was in pretended compliance with the bond of 1869; and in this there is no condition or stipulation as to other townships; so that, so far as this condition is concerned, it must be taken as having been waived.

Mr. *Blake*, Q. C., and Mr. *McMurrich*, for the defendants. The first bond was clearly given on a condition as to the other townships contributing, and if the plaintiffs desired to rely upon any waiver as to this, it should have been set out in the bill, and the giving of the second bond cannot be treated as a waiver of such condition unless the municipality accepted that bond as a performance of the condition of the first one. The plaintiffs, it is true, now assert that they always repudiated the second bond, and assert that any action they took under it was without sufficient knowledge as to the effect of the several instruments; this, however, is not so satisfactorily proved as to warrant the Court in relieving the plaintiffs from the effects of their own conduct. And if the plaintiffs now desire to go for the recovery of the money itself, their proper remedy is, an action at law for damages. At law, however, it is submitted the plaintiffs must have been nonsuited for nonperformance of the condition on their part, and on the same ground the bill here should be dismissed; besides, under the Act incorporating this company, the bonds could only be issued in order to raise money for the construction and equipment of the railway.

Argument.

SPRAGGE, C.—The bill was filed by the plaintiffs to have delivered to them first preference bonds, under the circumstances stated in the bill, or for payment in money. The principal question is, whether it was in the power of the defendants to give first preference bonds. Another question is, whether the condition under which the money or bonds were to be given was complied with by the plaintiffs, or whether the events happened, upon the

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happening of which alone, the plaintiffs would become entitled to the bonds. 1876.

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It appears that debentures from Bexley and Somerville, were received by defendants 11th of April, 1871; from Bexley in full; from Laxton, Digby, and Longford, $12,500, 29th of May, 1871; balance from Somerville, 29th of May, 1871.

The defendants produce a receipt from the Treasurer of Eldon for $180 as from defendants' company, being half a year's interest at 6 per cent., on the company's bond to Eldon for $6,000 to 1st of January, 1872, dated 3rd January, 1872. The first bond, the railway company to the township, dated 24th of December, 1869, is also produced. That bond was conditioned in a certain event to give the preference bonds, and that event did not literally or even substantially happen.

The second bond, set out in 7th paragraph of bill, 3rd of October, 1871, was for the payment of $6,000—correct in amount, in interest, and date of payment, but was not a first preference bond: See 31 Vic. ch. 41, sec. 22; authorizing issue of bonds, and 34 Vic. ch. 54. Judgment.

The Attorney-General desired to offer evidence to prove that it was not the real agreement between the parties that it should be made a condition to the giving of the bonds, that the township named should contribute the sums named in the by-laws.

This is opposed, and I hold the evidence inadmissible as it would be rectifying the instrument without any allegation that it was not the true agreement between the parties, a point upon which the defendants might well be, as they say they are, taken by surprise.

The Attorney-General then takes this position, that the railway company having, in fact, given the bond of October, 1871, as in pursuance of the bond of December, 1869, have waived the conditions upon which it was to be granted and cannot now insist upon them. On the other hand, the plaintiffs do not accept the latter bond as a performance of the engagement of the first.

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Declining to accept it, can they at the same time insist upon it as a waiver of the condition? Is it not in a sense reprobating and approbating at the same time?

The later bond appears to have been given without any explanation, and received without any. If received and accepted by the plaintiffs, the railway company could not insist upon the condition; but if the plaintiffs chose to repudiate it (assuming that they had a right to do so), both parties could be relegated to their former position. All that the plaintiffs could say would be, that the railway company, by giving this second bond, had manifested an intention to forego the condition, without the performance of which they were not bound to give it. But all that could be said was, that this was a proper inference from the act of giving the second bond, and involved the assumption that the second bond should be accepted. We cannot assume or infer an intention to forego the condition absolutely when the only evidence of such intention is the giving of this bond, which would be a nullity, according to the plaintiffs' contention, unless accepted by them. The plaintiffs must indeed go further than shew an intention to forego this condition. It is still in force unless actually waived. I take it that the plaintiffs would be estopped from insisting upon the condition if the defendants' bond had been not only given but accepted; but I think it would be both illogical and unreasonable to hold them to an inferential waiver of the condition; or in other words, to infer a waiver in favour of the plaintiffs when the plaintiffs themselves repudiate the act from which the waiver is to be inferred. It is as objectionable in principle, as to take a benefit without taking it *cum onere*.

Judgment.

I made the foregoing notes almost immediately after the argument, intending before disposing of the case to consider further the terms of the bond of the 24th December, 1869, in connection with the Act passed the same day in amendment of the Act of Incorporation, and referred to in the bond, and also the provisions in the

Act of Incorporation and the Act passed on the 15th of February, 1871, in relation to preference bonds. 1876.

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The Act passed on the 24th December, 1869, empowered the railroad company to build their road in sections, the first section being from the city of Toronto to some point in Uxbridge or Reach, to be determined by the company, these two townships lying south of the plaintiffs' township and nearer to the city of Toronto. The Statute then contains this provision, section 6, that in the "event of the municipal authorities of the townships of Brock, Eldon, Bexley, Laxton, Digby, Longford, and Somerville, not handing over to the trustees the debentures to be issued under the several by-laws as voted on by the people in the said several townships, before the first day of February next, under the terms of the said Acts, then the said company shall have power to construct a line of railway from the terminus of the said first section northwards, *via* Lindsay, to Lake Nipissing, or to any intermediate point that may hereafter be determined on by the said company and the Lieutenant-Governor in Council."

Judgment.

Brock lies to the south of Eldon, Somerville to the north-west, and the other four townships to the northward, while Lindsay lies to the south-east. From the geographical position of these townships and the provisions of section 6, it was material to Eldon that the other five townships should hand over to the trustees of the company the debentures referred to in that section, as upon failure to do this the company were left at liberty to take their railway by another route. Why it was made a condition to the railway paying or repaying to the township the $6,000 in question, by issuing bonds to that amount, I am unable to see, but it is very clearly made a condition in the bond and is emphasized by the use of the word "all"—"all the said townships." It may possibly have been introduced in order to make it the interest of Eldon to use influence with the other townships to hand over to the trustees the debentures men-

1876. tioned in that section, but this I confess is only surmise. I find it a condition clearly expressed in the bond, and I am not at liberty to discard it; that condition it appears was not performed.

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It was contended by the *Attorney-General*, that the railway company had in their hands, after the giving of their bond of the 24th of December, 1869, first preference bonds issued under section 22 of their Act of Incorporation, with which they might have complied literally with their bond of December, and that instead of handing them to the plaintiffs, they parted with them otherwise, so, of their own wrong, disabling themselves from performing the condition of their bond. But, assuming that the company had parted with such bonds, the Act authorizes the issue of those bonds only for a particular purpose, viz., "for raising money for prosecuting the said undertaking," and the clause contains this proviso: "That the amount of such bonds issued at any one time shall not be in excess of the amount of the paid-up instalments of the share capital of the company, together with the amount of paid-up municipal and other bonuses, and which have been actually expended in surveys and in works of construction upon the line," to which was added by an Act passed in 1871, "And in purchase of right of way, and in equipment, and in materials actually purchased, paid for, and delivered within the Province of Ontario or Quebec." The policy of these guards upon the issue of these preference bonds is to provide—as far as legislation could provide—that the railway company should have assets to meet them, and to give them better value in the market. The words, "for prosecuting the said undertaking," plainly mean the same as the declared purpose for which the company was incorporated, viz, to construct a railway from the City of Toronto to Lake Nipissing. A bond for the $6,000 in question would certainly not be a bond for the purpose of raising money for the construction of the railway. The bonus for the $44,000, of which the

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$6,000 was a part, had already been given for that purpose, and the bond for $6,000 was not for the purpose of raising money at all, but was primarily for the purpose of obtaining, by way of a loan, $6,000 more than the Council of Eldon was willing to give as a bonus; and to accomplish this a false colouring was given to the transaction. I do not mean that either the company or the council did anything with a dishonest motive, but what they did was not correct and straightforward; and it is to be regretted.

The borrowing powers of the company by the issue of preference bonds are measured by, *inter alia*, the amount of paid-up municipal bonuses. If $6,000 of $44,000 could be legal, $20,000 or $30,000 would be legal, and if one municipality could do this the whole might do it, and it would be difficult, if not impossible, to say how much of the bonuses voted were genuine and how much fictitious. Further, a municipality taking such a course places itself in this dilemma: Suppose $40,000 voted as a bonus to a railway company, and a by-bargain between the railway company and the municipality that the railway company shall stand indebted to the municipality for one-half the amount, payable, as in this case, at twenty years, with interest in the meantime, for what amount is the municipality to impose the special rate for the payment of interest and sinking fund? For the half or the whole? If for the half only, the law is not obeyed, and the municipal debentures are not the security contemplated by the law; and if for the whole, the ratepayers are taxed to double the amount on that account of the actual bonus; for the actual bonus is only that which is the sum given, to be retained, and not to be returned. The principle is, of course, the same whether the sum agreed to be returned by the railway company to the municipality be a half, or a larger, or a smaller proportion. I feel clear that preference bonds for the $6,000 in question could not have been issued by the railway company, and that if bonds had been issued,

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marked as preference bonds, or giving them any other designation under section 22, it would have been in contravention of the Act.

This point is material, because if the railway company have issued preference bonds, which they could have applied on account of this $6,000, in pursuance of their bond of December, 1869, and did not do so, or parted with bonds issued which they could have so applied, it might have been proper, apart from the question of the condition of the bonuses from other townships to which I have adverted, to have ordered the railway company to pay in money the $6,000 in question. But, as I construe the Act, the railway company was not in the wrong in not so applying preference bonds. *Both* parties were in error in stipulating for the delivery of such bonds inasmuch as it was an agreement to do an unlawful Act. That being the case, I do not see how a right can accrue to the Municipality to have the $6,000 paid to them presently in money, a thing not stipulated for in any event.

Judgment.

In my opinion the plaintiffs' case fails upon both the points that I have discussed. I do not find from the correspondence put in, or from any evidence, that these were taken by the defendants before the plaintiffs' bill was filed, or before answer. The ground taken was, that the bond of October, 1871, was in accordance with what was required by the bond of December, 1869, and was accepted as in fulfilment of it. It certainly was not in accordance with what was required by the earlier bond, and I do not find that it was accepted as in fulfilment of it. The points upon which the plaintiffs fail are made grounds of defence by answer. If those grounds had been taken before the bill was filed, I should dismiss the bill with costs generally; as it is, I dismiss it with costs subsequent to the answer.

SOLICITORS.—*Bethune*, *Osler*, and *Moss*, for the plaintiffs; *Leys* and *Pearson*, for the defendants.

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COCKBURN v. EAGER.

Injunction at instance of defendant—Riparian rights—Trespasser.

In a suit brought to have boundaries declared, the defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of a road along a portion of the shore of Muskoka bay. It appeared that the road in question was of great public utility and benefit; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; and that the defendants had built their mills—one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay:

Held, that the defendants were to be treated as plaintiffs seeking relief by bill, and (following *Giles* v. *Campbell*, ante vol. xix., page 226), that being themselves trespassers, they were not entitled to any relief against the plaintiff.

Statement.

This was a bill filed for the purpose of having the proper boundaries declared between the lands held by the plaintiff and defendants, respectively.

From the evidence and exhibits produced it appeared that on the 9th of February, 1872, *John Wright*, the original grantee of the Crown, conveyed to one *James Douglas*, lot number 9, west of Muskoka road, township of Muskoka, "save one acre, more or less, on which a school house is erected, and save and except the spring lot;" that on the 2nd of May, 1872, *James Douglas* conveyed the same land to *John P. Cockburn*, a son of the plaintiff, and that subsequently, 10th of November, 1875, *John P. Cockburn* conveyed to *Peter Cockburn*, the plaintiff; all which conveyances were duly registered. It also appeared that on the 4th of May, 1870, the said *John Wright* sold and conveyed to certain parties, named *Austin* and *Brown*, a half acre of the same lot number 9, known as the spring lot, and which was registered on the following day. *Austin's* interest afterwards, 30th of November, 1870, became vested in the defendant *Dugald Brown*; and the defendant *Benjamin Eager*, in July, 1875, purchased part of

1876. Cockburn v. Esger. lot number 8, on the west side of Muskoka road; and by their answer the defendants claimed a right to restrain the plaintiff from continuing a log road built on cribs in the waters of the bay on which the lands were severally situated, which right they also insisted on at the hearing.

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

Mr. *W. Cassels* and Mr. *Rye*, for the defendants.

At the conclusion of the case, *Proudfoot*, V. C., pronounced a decree in favour of the plaintiff as to the division lines between the respective parties, but took time to look into the authorities as to the right of the defendants to an injunction.

The other facts appearing in the case, are mentioned in the judgment..

Jan. 31st. PROUDFOOT, V. C.—I reserved at the hearing of this case the question whether the defendants were entitled to an injunction, prayed for by them, to cause the plaintiff to remove a road built by him of logs across part of the waters of South Bay, in lake Muskoka.

Judgment. The plaintiff is the owner of part of lot 9, in the township of Muskoka. The patent for the lot issued on the 16th December, 1867, to *John Wright*, from which an extract has been furnished to me in regard to the description of the property, which is as follows: "Containing by admeasurement eighty acres, be the same more or less, being composed of lot No. 9, in the range on the west side of the Muskoka road, in the aforesaid township of Muskoka; reserving the allowance for road along the bank of Muskoka bay, and free access to the shore thereof for all vessels, boats, and persons."

The reservation is contained in all the deeds subsequent to the patent, except in that to the plaintiff, in which the part sold to him is described as running to the water's edge of the bay.

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The patent for lot 8, of which the defendants are now the owners, describes it simply as lot No. 8, on the west side of the Muskoka road, mentioning no reservation.

The maps produced shew a reservation of a road all along the shore of the bay, and the containing lines of the lots are run only to the road and do not cross it.

The allowance for road, on account of its rocky and precipitous character, is wholly unfit for and can never be used as a road, except at an enormous expense.

The plaintiff has erected a mill, partly on this allowance in front of his land and partly in the water, and has constructed a road of logs, built on cribs in the water, from the point where Bay street, in the village of Gravenhurst, strikes the shore of the bay, to his mill, and thence westward to the Northern Railway wharf, passing in front of where lot 8, but for the intervention of the road allowance, would touch the bay: the log road passes between the defendant *Eager's* mill, which is built wholly in the bay, and the shore, and in front of defendant *Brown's* mill, which is built partly on the road allowance and partly in the bay, and between it and the open waters of the bay.

Judgment.

The defendants claim that as *riparian* proprietors they are entitled to free access to the waters of the bay, and that the log road, interfering with that access, ought to be removed.

The defendants asking relief by answer are to be considered as if plaintiffs seeking such relief by bill, and whatever would be a good objection to giving them relief on a bill for that purpose will equally operate as a bar when sought by answer.

The plaintiff's deed purports to convey to the water's edge, but his grantor only owned to the road, and could not convey the road, nor can the plaintiff have any greater right.

Lake Muskoka is navigable, and a steamboat enters this bay and has a wharf at the foot of Bay street, one terminus of the log road.

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The evidence shewed that the log road was beneficial to the public and a good deal travelled. The emigration agent at Gravenhurst says: "It is of great benefit to the public. The road allowance could not be made fit for travel except at an enormous expenditure. It is necessary to have the log road for the public." There is other evidence to the same effect.

The defendants claim relief as *riparian* proprietors. A *riparian* proprietor is one whose land runs to the water and is bounded by it: *Angell* on Watercourses, sec. 10. But the land of the defendants runs only to the road allowance, and does not reach the water. If land were created by alluvion it would not be an accretion to their property, but to the road allowance, the property of the Crown. The defendants have built their mills, one in the navigable waters of the bay, the other partly on the road allowance and partly in the bay. *Giles* v. *Campbell* (*a*) is a clear authority against the defendants. In that case the plaintiff had four lots of land, each of which was divided by the Eels River, along each bank of which the Crown surveyor had laid out a road allowance. The plaintiff's mills stood partly on the stream, and partly on the road allowance, on one side of the stream. He complained that the defendants had obstructed the stream and prevented the plaintiff from using his mills. *Mowat*, V. C., says: "All her Majesty's subjects, including the defendants, have by law an interest in the land as a road allowance or public highway, and the occupation of the ground for any other purpose is in law a wrong to all. I have failed to perceive any legal principle on which I could hold that the wrongful possessor of such land can complain in Court that that wrongful possession has been rendered less profitable by the wrongful use of the stream by the defendants."

Judgment.

That is a much stronger case than this, for I apprehend that the plaintiff owned the bed of the stream, yet,

(*a*) 19 Gr. 226.

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having built his mill partly on the road, he was denied relief. Here the defendants own neither the road nor the bay. They are themselves trespassers and cannot claim the intervention of the Court for their protection.

It may be that the plaintiff is in a like position; but what he has done, if a wrongful act, may be an injury to the public which may be rectified at the suit of the Attorney-General. But the evidence establishes that, though the plaintiff has encroached on the waters of the bay in making this road, it is a benefit, in place of an injury, to the public, as substituting a road that can be used for one that cannot.

Judgment.

However that may be, I think the defendants are not entitled to complain of it, and I refuse the injunction they ask.

SOLICITORS.—*Bethune*, *Osler*, and *Moss*, for the plaintiff; *McCarthy*, *Boys*, and *Pepler*, for the defendants.

MEMORANDUM.—On the 20th of February, 1877, the Court of Appeal [Present—HAGARTY, C. J. C. P., BURTON, J.A., PATTERSON, J.A., and HARRISON, C.J.O.] affirmed without costs the decree in *Taylor* v. *Taylor*, reported *ante* volume xxiii., page 495, [HAGARTY, C.J., dissenting]. On the same day [Present—BURTON, J.A., PATTERSON, J. A., MOSS, J. A., and BLAKE, V. C.] the decree in *Gilleland* v. *Wadsworth*, reported *ante* volume xxiii., page 547, was reversed with costs; and, on the 16th of March last, the Court [Present—HAGARTY, C. J. C. P., BURTON, PATTERSON, and MOSS, JJ. A.] affirmed the decree in *French* v. *Skead*, reported *ante* page 179.

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DAVIDSON v. MCINNES.

Insolvent Act—Preferential Assignment—Pressure.

The decree reported *ante* volume xxii., page 217, declaring that the assignment by the insolvent to the defendants was, under the circumstances appearing in the case, a preferential assignment, within the meaning of the Insolvent Act, and as such fraudulent and void against the general body of creditors, and that the facts negatived the existence of any pressure having been brought to bear upon the debtor, so as to induce him to make the assignment, affirmed, on rehearing, with costs.

Held, also, that even if pressure had been proved in the case, it could not, under the ruling in *Davidson* v. *Ross*, *ante* page 22, have validated the assignment

Dec. 14th. 1875. This was a rehearing of the decree by the defendants.

The facts are fully stated in the report on the original hearing, *ante* volume xxii., page 217, and in the judgment.

Mr. *Bethune* and Mr. *Bruce*, for the defendants, who re-hear.

Mr. *Boyd* and Mr. *Crerar*, contra.

Jan. 16th. 1877, SPRAGGE, C.—The judgment of my brother *Blake* at the hearing proceeds upon this, that assuming that there was pressure by the preferred creditors upon the debtor the case still comes within the enactment of the insolvency law against fraudulent preferences.

Judgment. I do not propose to go through all the authorities. They have been discussed by the Judges of this Court in other cases.

There is a case at Common Law, *Young*, Assignee, v. *Fletcher* (*a*), in which a bill of sale of chattels had been given under pressure, but with a promise that it should not be acted upon. The debtor was a coal dealer, but his principal business was that of a carman or carrier, who conveyed goods to and from railway stations and elsewhere; for which purpose he kept horses, carts, &c.

(*a*) 13 W. R. 722; 11 Jur. N.S. 449; 3 H. & C. 732.

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and these with (as the report states) all his property, were comprised in the bill of sale. It was held to be an act of bankruptcy. From the judgment of *Pigott*, *B.*, it would seem that the whole of the debtor's property was not conveyed, but the pith of the judgment is, that that was conveyed without which he could not carry on his trade; and that though done under pressure it was within the mischief of the bankrupt laws. Baron *Pigott* says, "This is not a case in which all the debtor's property was conveyed, or all, with but a colourable exception, which I take to be the same thing; but the deed conveyed the horses, mares, building materials, carts, household furniture, and all the property of the bankrupt. The question therefore is, whether the conveyance of a part of a trader's property is an act of bankruptcy under the circumstances of this case. Now the conveyance was such (and both the debtor and the defendant knew it) that if it were acted upon the debtor could not carry on his trade. Then my brother *Martin* left it to the jury to say whether the property comprised in the bill of sale substantially comprised all the property of the bankrupt, available for the purpose of enabling him to carry on his trade, and whether the defendant knew that putting the bill of sale in force would stop the trade of the bankrupt, and I see no objection to this direction. The section under which the question arises is the 67th of the Bankrupt Law Consolidation Act, 1849, which enacts that, 'A trader who shall make any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, with intent to defeat or delay his creditors, shall be deemed to have committed an act of bankruptcy.' Now, here there was a conveyance; and as the law takes every man to contemplate the necessary consequences of his act, we have to inquire what was the necessary consequence of this conveyance. It was to put an end to the debtor's business, and therefore to defeat and delay his creditors. The only question, then, which remains is, was it fraudulent? And all the

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authorities shew that there need not be moral fraud, but that the main point is, defeating that equality which it is the object of the bankrupt acts to give to the creditors."

There are some inaccuracies apparent in the report of the case; but the point clearly enunciated is, that where the necessary consequence of a conveyance of assets to a creditor is to put a stop to the debtor's business, and thereby delay his creditors, the transaction is in fraud of the bankrupt law.

The case of *Ex parte Foxley* (*a*) before the Lords Justices, was not a case of pressure; but if the doctrines enunciated in it are to be taken as sound, as undoubtedly they are, it is difficult to see how pressure can take out of the operation of the law transactions the necessary effect of which is to defeat or delay creditors. Lord *Hatherley* speaks of the assignment in that case whereby "the debtor conveyed substantially all his property to one of his creditors, without receiving any money or the equivalent advantage which would enable him to carry on his business or pay his other creditors, as the very kind of security which was struck at by the Act as tending to defeat or delay creditors." In another passage he quotes Lord Chief Justice *Cockburn*, who had referred to the language of *Parke*, B., in *Sierbert* v. *Spooner* (*b*), the Chief Justice saying, "The meaning of the learned Judge and the principle upon which the cases have been decided, is, that though there may be an absence of fraud in fact, that is, intentional fraud, yet when the effect of such a conveyance is to put it entirely out of a man's power to go on with his business, and to meet his creditors, then he must be taken to have intended the consequence of what he has done, and though not guilty of intentional fraud, or as we call it moral fraud, yet he is guilty of fraud against the policy of the bankrupt law, which is, that there should be an equal distribution among all the creditors."

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(*a*) L. R. 3 Ch. 515. (*b*) 1 M. & W. 718.

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Lord Justice *Selwyn*, after referring to several cases, says, "The consideration of these cases appears to me to shew that the exceptional case in which such an assignment will be supported is, where the object of the trader is to sustain his trade, and make provision for the payment of his creditors. Where this object does not exist, the exception does not arise."

I think that the effect of assignment by the debtor to the creditor, as held in England, is correctly put in Mr. *Archbold's* book on the Law of Bankruptcy, ed. 1859, p. 169, that an assignment of any part of the debtor's estate, if fraudulent, is an act of bankruptcy, equally with an assignment of the whole; the difference being, that if the whole property, or the whole with a colourable exception, be assigned, the onus lies on the debtor to shew that the assignment is *bonâ fide*; if only a portion be assigned, the onus lies on the petitioning creditor to shew that the assignment was fraudulent." Take with this the language of Chief Justice *Cockburn* which I have quoted, and it would seem to follow that such an assignment as we have here is a fraud upon our law of insolvency. I have not met with any case in which such an assignment has been taken out of the general rule by the application to it of the doctrine of pressure.

Judgment.

While, however, referring to this doctrine of pressure, I desire to say that the evidence does not lead me to the conclusion that there was any pressure in this case. If *apart from pressure* the case is brought within the general rule applying to fraudulent preferences the onus is upon the creditor to shew that what was done by the creditor was brought about by pressure exercised by him upon his debtor.

It appears to me that the proper conclusion from the evidence is, that the transaction impeached was not brought about by pressure exercised by the defendants. I should infer from the evidence that other creditors pressed the debtor for payment as much as the defendants did. The debtor says that others, some of whom he

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named, asked him for payment as well as the defendants; he speaks of only one pressing him, and that, not the defendants, but *Robertson* of Toronto; then his coming in on the 9th of February was not by reason of pressure, but because he had an offer from the *Fair Brothers*, and he came in of his own accord, not sent for by the defendants, nor expected by them, not to propitiate them by an offer; not to avert threatened proceedings, but to consult with them as to whether it was advisable in his own interest, as I understand his evidence, to accept the offer made to him. Then when the debtor and creditor meet there is not a demand by the creditor that the notes should be delivered to him; but an offer to give the notes comes from the debtor; he says so in so many words, and while he says that he then thought that he had enough to pay his then creditors, he adds, that he felt warm gratitude to the defendants, as they had always treated him well. All these circumstances negative pressure; and to me it seems clear that pressure is not made out.

Judgment.

I think that this case, as I thought in *Payne* v. *Hendry* (*a*) of that case, falls within section 86 of the Act of 1869, and that we do not need the aid of any other section of the Act. The first requisite to bring it within section 86 is, that creditors were by this transaction injured, obstructed, or delayed. Of that there can be no doubt. To look at the whole of the transaction: a country trader has an offer from persons contemplating the carrying on of a similar business, for the purchase of the whole of his stock-in-trade, to be paid for—$1200 in cash, and notes indorsed by a responsible person, payable at not long dates, to be given for the balance. The trader, who has been in the habit of giving long credits—from January to January—and who has a good deal due to him outstanding, is disposed to accept, but before doing so goes into Hamilton, and sees and con-

(*a*) 20 Gr. 142.

sults with one particular creditor. What ensued upon this we have seen. I speak now only of the *effect* of what was done. The whole of the trader's stock-in-trade was withdrawn from the reach of creditors. If that which represented this stock-in-trade had remained for the use of the general body of creditors, it would have been a different thing; but the money and notes given by the purchasers were also withdrawn, or rather never allowed to reach the creditors, with the exception of the defendants. The effect has been the same as if the whole of the stock-in-trade itself had been handed over by the debtor to one preferred creditor. 1876. Davidson v McInnes.

It seems to me to be clear beyond question that the necessary effect of such a transaction is to injure, obstruct, *and* (I put it in the conjunctive) delay creditors if "made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist."

The trader became insolvent, and the short statement of his assets and liabilities tells its own tale; liabilities proved $10,391; assets, not amounting to $4000. The defendants did not prove for their debt. Judgment.

There remains one other question; whether this arrangement made by the debtor was with such a person as to bring that person within the definition of the act. The state of affairs exhibited by the debtor to the defendants, as stated in evidence by one of themselves, was, that his liabilities were about $8000, his stock $4000, and his accounts $4500. The arrangement proposed by the debtor being accepted by the creditor, the same gentleman says, "I was going to leave him $4500 worth of book debts to pay $4000 worth of liabilities." The witness should have said "an amount," instead of "worth," when speaking of the book debts.

The same witness speaks of the business of the debtor exhibited by this statement as satisfactory, and speaks of his being "$500 to the good." How such an infer-

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ence could be drawn from the statement exhibited, I am at a loss to conceive; but this, at all events, must have been patent to the defendants as men of business, that the statement exhibited by the debtor shewed him to be unable to meet his engagements, whether that inability be taken in the popular or in the technical and proper sense of the term.

But assuming that the defendants were so sanguine as to believe in the ability of the debtor to meet his engagements, that will not satisfy the statute, if they had *probable cause* to believe in his inability. That they had such probable cause seems to me to be beyond all question. The assignee, who was for ten years in business in the country, states in his evidence that sixty per cent. of the whole amount of debts is a fair estimate of what may be generally collected. This certainly was not a case exceptionally in favour of the country trader, and the defendants had not probable cause for believing it to be so.

Judgment.

I understand Mr. *Bethune* to contend upon section 86 that the contracts dealt with in that section are contracts *in fieri*; but I do not understand this to be so, nor why it should be so, nor do I see what legal consequence in favour of the defendants could follow if they were so. What the statute enacts is, that, whether the person with whom the debtor makes such contract be a creditor or not, the contract is presumed to be made with intent to defraud creditors; that is, of course, when made with a creditor the presumption is, that it is presumed to be made with intent to defraud other creditors. I do not say that it may not be rebutted, but it is not rebutted in this case. Then if a presumption and not rebutted, the contract having been carried out cannot validate it; what is done in pursuance of it is tainted with the vice which attached to the contract itself. It would be an anomaly to allow these creditors to hold the fruits of a contract, when the contract itself is to be taken to have been made with intent to defraud the rest of the creditors.

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My opinion therefore is, that the transaction is void under section 86, and I incline to think it void also under sections 89 and 90; void under section 90 unless taken out of the thirty days rule by the previous provisional arrangement of the 9th of February, and against its being taken out of the rule by what took place on the 9th of February, is the case of *In re Foxley*, already referred to.

In my opinion the decree ought to be affirmed with costs.

I had prepared this judgment before the long vacation, and consequently before the decision of the Court of Appeal in *Davidson* v. *Ross* (*a*). What I have said on the subject of pressure was in view of the doctrine acted upon in the Courts before the decision in that case was given. That decision makes the case still more clear in favour of the plaintiff.

Judgment.

BLAKE, V. C.—If the defendants ever had a glimmer of hope that the transaction which the plaintiff impeaches by the present bill, could be supported when attacked as fraudulent within the Insolvent Acts in force, it must have been extinguished when the Court of Appeal decided *Davidson* v. *Ross*. The true effect of these Acts as laid down in this decision will close many of the avenues whereby creditors, who considered themselves fortunate, and who this Court stamped as fraudulent, escaped with large portions of their debtor's assets which now must be disposed of ratably. I think the decree should be affirmed with costs.

PROUDFOOT, V. C.—I have had an opportunity of perusing the judgment just given by the Chancellor, and I agree with him that the fair deduction from the evidence is, that there was no pressure by the defendants on the debtor, if that would have been of any avail, and

(*a*) Ante p. 22.

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I think the decree should be affirmed with costs.

SOLICITORS.--*Crear* and *Muir*, for the plaintiff; *Bruce*, *Walker*, and *Burton*, for the defendants.

FULTON v. FULTON.

Mortmain Acts—Void bequest—Bequest of interest with right of disposition—Present interest in bequest—Will, construction of.

Where land is specifically devised charged with a void bequest the charge sinks for the benefit of the specific devisee: therefore where a testator devised his real estate, consisting of * * to *A. F.*, eldest son of * * to exercise ownership over said lots during his natural life: he shall not sell nor alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to *A. F.*, the aforementioned heir, the shop on the church property, with all its goods and contents * * With respect to lot * * and lot * * they appear very rich in precious stones: they are a mine, and worth a great deal: they must, therefore, be assessed to the said *A. F.* with lot * * along with the shop and its contents. $4000 to be paid to the English Church of Cornwall": *Held*, that the $4000 was charged on the devise and bequest to *A. F.*; that so far as this was charged on land—freehold or leasehold—the bequest was void; so far as charged on personalty it was valid, and would be apportioned *pro rata* between the realty and personalty: and that *A. F.* was entitled to hold the several properties absolutely, subject only to such proportion of the legacy as was properly applicable to the personalty.

The testator bequeathed his money in the Bank of Commerce to "*H. F.*, son of *C.* and *A. F.*, when he becomes of age, to receive it in full with the interest. Should he not survive them, his next heir shall become inheritor":

Held, a specific bequest of the money and interest which vested presently.

After directing a particular disposition for a period of seven years of the interest of moneys invested, the testator declared that afterwards "the yearly proceeds or interest, as it accrues, to be the

property of my beloved niece *A. F.*, who will cause to be paid out of said moneys to the English Church in Cornwall $150: $50 per year for three years. Should she die, then the inheritance shall be in the person of the said *A.F.*, so far as the proceeds are concerned, while the sum invested remains intact for ever. She can name any of her brothers or sisters who shall enjoy it after her":

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Held, that *A. F.* took presently an absolute interest in the fund.

Motion for decree.

Andrew Fulton, on the 1st of February, 1876, made his will, whereby he gave, among other things, as follows: "Second, I will my real estate, consisting of lot number 6, north side of Fifth street; lot number 6, south side of Sixth street, and lot number 6, north side of Water street, in the town of Cornwall, with all the houses thereon to *Alfred Fulton*, eldest son of *Alfred Fulton* and *Elizabeth Fulton*, of Hogansburg, to exercise ownership over said lots during his natural life: he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to *Alfred Fulton*, the aforementioned heir, the shop on the church property with all its goods and contents. * * * Fourth, money loaned. I have in the Government of Ottawa, $6,700 at 6 per cent.; I have in the North Pacific Railroad bonds $4,500 at 7.30 per cent., with interest until 1st June, 1876, $1112.78; in all $5612.78. The Montreal Guano Company has failed, assigns to be made; a curator is appointed in Toronto. Four shares in the Life Assurance and Life Investment Company, $320: it pays nothing as yet. With respect to lot number 6, north side of Fifth, and lot number 6 south side of Sixth street, they appear very rich in precious stones; they are a mine and worth a great deal, they must, therefore, be assessed to the said *Alfred Fulton* with lot number 6, North Water street, along with the shop and its contents. $4,000 to be paid to the English Church of Cornwall. The money in the Bank of Commerce I bequeath to *Herbert Fulton*, son of *Christopher*

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and *Amanda Fulton*, when he becomes of age to receive it in full, with the interest. Should he not survive them, his next heir shall become inheritor. Fourthly. Of the moneys invested, the yearly interest of seven years, one-half to *Mary Fulton*, widow of *Philip Fulton*, while she remains his widow, then to her lawful children of my brother for the balance of the seven years, the sum to be less the amount of $10, which I wish to be given to the English Church in Cornwall; the other half to *Gertrude Wood*, the youngest daughter of *John R. Wood* and *Susanna Wood*, for the aforesaid seven years, subject to the amount of $10, to be given to the said church at the expiration of the said seven years, making in all $140, to be given to the said English Church, at the expiration of the said seven years or sooner. The stock to be reinvested in the best and safest manner by the persons charged with the transaction: this sum thus invested to remain intact for ever. The persons charged with the transaction, if they consider the stock as unsafe, may invest in a better every ten years, or so, in all time to come, or until considered safe, when it may rest at the expiration of the first ten years. The yearly proceeds or interest as it accrues to be the property of my beloved niece *Annie Fulton*, daughter of *Alfred* and *Elizabeth Fulton*, Hogansburg, State of New York, who will cause to be paid out of said moneys to the English Church in Cornwall $150; $50 per year for three years. Should she die, then the inheritance shall be in the person of *Annie Fulton*, so far as the proceeds are concerned, while the sum invested remains intact for ever. She can name any of her brothers or sisters who shall enjoy it after her."

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He appointed the plaintiffs his executors. The executors filed this bill, asking to have the will construed, (1.) As to the validity of the charge of $4,000, in whole or in part for the benefit of the Church of England, upon the property devised to the defendant, *Alfred Fulton*, and in the event of the same being declared

void, whether or not the same sinks for the benefit of the devisee. (2.) As to the estate given to *Alfred Fulton* in the lands, and in the shop, and the church property which is leasehold. And also as to the rights of *Herbert Fulton* to the principal and interest of the money in the Bank of Cornwall, and whether he is entitled to interest on the said deposit. 1876. Fulton v. Fulton.

The bill also stated, that the testator had no other money invested apart from the stock in the will mentioned, and the plaintiffs alleged that it was important to have declared the rights of the several beneficiaries therein, and chiefly whether the defendant, *Annie Fulton*, took the personal property absolutely and presently, or after an interval of seven years.

The bill prayed that the true and proper construction of the will in regard to these matters might be declared; and that the plaintiffs might have such directions given as would enable them to administer and dispose of the estate and that the rights of the defendants might be declared.

Mr. *Fitzgerald*, Q. C., for the plaintiffs. March 28ht.

Mr. *Attorney General Mowat*, Mr. *Hoskin*, Q. C., Mr. *Cattanach*, and Mr. *Arnoldi*, for the defendants.

PROUDFOOT, V. C.—[After stating the facts as above] March 28th. I think it was correctly assumed that the $4,000 are charged on the property given to *Alfred*. The second clause of the will imposes restrictions on *Alfred's* life estate prohibiting him from selling or alienating, so that the property might pass unincumbered to his heirs. There is nothing to shew that it was intended to pass to *Alfred* unincumbered, but only that he should not have the power of imposing burdens. Judgment. Then, in the fourth clause, the value of the devise, rightly or wrongly, is enlarged upon, shewing that the testator supposed the lots to be very valuable, and,

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therefore, they must be assessed to *Alfred*—$4,000 to be paid to the English Church of Cornwall. I think the testator intended that this valuable devise to *Alfred* should be charged with the $4,000, for the church.

So far as this is charged on the land, freehold or leasehold, it is void, under the Statute of Mortmain, so far as charged on personalty, it is good. The charge will be apportioned *pro rata* between the realty and the personalty (*a*). The will in this case comes under the operation of the Wills Act, 36 Vic. ch. 20, sec. 22, by which a lapsed devise of real estate, or of an interest therein, by reason of its being contrary to law, shall be included in the residuary devise. Here there is no residuary devisee, and the destination of the lapsed interest must be determined by the rules applicable to such a case before the statute. Mr. *Jarman* says (*b*), "Under this enactment the gift of a sum forming an exception out of real estate to a person who dies in the testator's life time, or the gift of which is void *ab initio*, will enure for the benefit of the residuary devisee. If, however, the will does not contain an operative residuary devise, or the sum excepted affects the property comprised in the residuary devise, such sum falls to the heir. *Of course the Act has no bearing on the question whether the sum be an exception or simply a charge.*"

Judgment.

In the previous pages he had been discussing the destination of a lapsed devise under the old law, and shewed that where the estate itself was devised, or some portion excepted, severed from the inheritance, had been devised, it lapsed for the benefit of the heir; but if the estate were devised, subject to a void charge, the charge lapsed for the benefit of the devisee: *Jackson* v. *Hurlock* (*c*), *Cooke* v. *The Stationers' Co.* (*d*). The same conclusion was arrived at in *Whitby* v. *Liscombe* (*e*),

(*a*) 1 Jarm. 202, 214.
(*b*) Wills, page 326.
(*c*) 2nd Ed. 263; Amb. 487.
(*d*) 3 M. & K. 262.
(*e*) 22 Gr. 203; 23 Gr. 1.

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where it was held that the devise, void under the Statute of Mortmain, lapsed for the benefit of the residuary devisee. Where the land is specifically devised, charged with such a void charge, the charge sinks for the benefit of the specific devisee, as in *Jackson* v. *Hurlock*, *supra*. In this case only a charge was intended. There is no direction for a sale by means of which the $4,000 might, perhaps, have been severed from, or excepted out of, the estate; and I am of opinion, therefore, that it sinks, so far as it is void, for the benefit of the devisee. Mr. *Williams* (*a*) was referred to as shewing that bequests to charities, void by the Statute of Mortmain, devolve on the heir. But his language is, that they devolve on the heir, or the next of kin, or the residuary legatee, according to the nature of the property bequeathed, *and the language of the will*. This is quite in agreement with Mr. *Jarman's* conclusions. If the language of the will severs the bequest from the inheritance, or makes it an exception out of the devise, then it goes to the heir. If it constitutes only a charge, then it goes to the devisee. Judgment.

It was contended, however, that the devisee, having accepted the devise, takes it *cum onere*, and is, therefore, bound to pay the amount. So far as the charge is void by reason of the statute, this is out of the question. So far as it is good, there is no doubt, he takes the devise *cum onere*, *i. e.*, he takes the estate so charged. But I do not apprehend he has incurred any personal liability to pay. In *Rees* v. *Engelback* (*b*), the testator bequeathed the lease of his premises, and the stock in trade, &c., to his executors, to permit his son to carry on the business on the terms and conditions that he should pay to the testator's daughter and widow during the joint life of daughter and widowhood of widow, each an annuity; and it was held that the son accepting the benefit was bound to make the payment. And in

(*a*) Executors, page 1003, 6th Ed. (*b*) 4 Russ. 478.

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Messenger v. *Andrews* (*a*), upon which that case was decided, there was a condition imposed on the legatee to pay testator's debts; and he was held bound by it. But here the devisee is not required to pay the charge, it is merely a burden on the devised property; and the chargee may realize it out of the estate.

The devise of the freeholds to *Alfred* for life, the land to remain an inheritance to his legal heir, whether male or female, in all time to come, I think is within the rule in *Shelley's* case, and confers a fee on *Alfred*. Heir, in the singular, has sometimes been held to limit the estate of the heir to a life estate, but the addition here, for all time to come, shews that it cannot be so limited (*b*).

If an estate in fee passes, then the restrictions against selling or alienating is repugnant to the nature of the estate and void: 2 Jarm. 15. *Holmes* v. *Godson* (*c*). As to so much of the bequest to *Alfred* as consists of personalty, I think he takes an absolute interest, subject to the ratable proportion of the charge for the church. If it had been comprised in a devise that conferred an estate tail in the real estate, the interest in the personalty would have been absolute (*d*). *A fortiori* where the devise would pass a fee.

Judgment.

The bequest to *Herbert* of the money in the Bank of Cornwall, when he comes of age to receive it in full with the interest, and should he not survive his parents, his next heir shall become inheritor, is a specific bequest of the money, vested presently in interest. The gift of the interest is of itself cogent evidence of the vesting, and there is no devise over; if *Herbert* dies it goes to the next heir. This would give a fee in real estate, and, therefore, an absolute interest in the bequest (*e*).

Of the money invested, *Mary Fulton* and *Gertrude Wood* take the interest for seven years, after that

(*a*) L. R. 12 Eq. 225. (*b*) 2 Jarm. 396; Co. Litt. 96 *n* (4.)
(*c*) 8 D. M. & G. 152. (*d*) 2 Jarm. 594
(*e*) *Williams* on Executors, 6th ed., 1079; *Hawkins*, 225-6.

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period the yearly proceeds or interest are given to *Annie Fulton*, who is to pay $50 a year, for three years, to the church. Should she dio then the inheritance shall be in *Annie*, so far as the proceeds are concerned, while the sum invested remains intact for ever. She can name any of her brothers or sisters who shall enjoy it after her.

The bequest to *Annie*, and in case of death giving her power to name the person who shall enjoy it, gives her an absolute interest. The case is not a contingency, the event is inevitable (*a*). The power to dispose of the proceeds as she pleases to her brothers or sisters, is either a clause enlarging her estate, or if it is not, then it is repugnant and void: *Fulton* v. *Shephard* (*b*), *Phillips* v. *Chamberlain* (*c*). A gift of the income, the interest or yearly proceeds, without limit as to time, passes the absolute interest (*d*).

I apprehend also that this legacy to *Annie* is vested in interest. It is not payable, indeed, till after the lapse of seven years, but there is no devise over in case of her death. And the peculiar phrase "the inheritance shall be in *Annie*," seems intended to provide for this case; if she should die before the expiration of the seven years she might name a person, a brother or a sister, to enjoy it (*e*).

Judgment.

I think this disposes of all the questions argued before me. There will be declarations accordingly. Costs of all parties to come out of the estate, including hearing at Cornwall.

SOLICITORS. — *Fitzgerald* and *Arnoldi*, agents for *Bergin* and *Carman*, Cornwall, for the plaintiffs; *J. Hoskin*, for the defendants.

(*a*) 2 *Williams*, 6th ed., 1170.
(*b*) 1 B. C. C. 532.
(*c*) 4 Ves. 51.
(*d*) *Hawkins*, 123.
(*e*) *Williams* on Executors, 6th ed., 1137.

1876.

ELLIOTT v. HUNTER.

Mortgagor and Mortgagee—Evidence of amount due—Practice.

Where a judgment creditor filed a bill impeaching a mortgage created by the debtor in favour of his brother, a partner in business, and after evidence the usual decree was made:

Held, that the production of the ordinary affidavit by the holder of the mortgage stating the amount due, was sufficient *prima facie* evidence, as in other cases; and that, if the party entitled to redeem desired to reduce the amount claimed, it rested on him to adduce evidence for that purpose.

This was a rehearing of an order made by *Spragge*, V. C., on appeal, from the report of the Master at Brantford, as reported *ante* volume xv., page 640. The bill was filed by the plaintiffs who were judgment creditors of the mortgagor, impeaching the mortgage executed by him in favour of his brother, the late *John Hunter*. It appeared in evidence at the hearing that the mortgagor and his late brother had been in partnership together, in the conduct of which it was alleged losses had been sustained, and that certain real estate had been sold by *John* to meet the debts of the firm at a loss; that the losses had all been paid by the deceased, and that to secure him the repayment of the portion of such moneys properly payable by the defendant *James Hunter*, he had created the mortgage now impeached. The cause came on to be heard at the sittings of the Court at Brantford, on the 20th of January, 1868, when *Spragge*, V. C., pronounced a decree referring it "to the Master of this Court, at Brantford, to inquire and report what, if anything, was due to *John Hunter*, the elder, by *James Hunter*, the elder, at the date of the mortgage made to him in the pleadings mentioned; and what, if anything, is now due to the defendant *John Hunter*, the younger, as administrator of his father, *John Hunter*, the elder, upon the said mortgage security." And further directions and costs were reserved until after the Master's report. *James Hunter* died after this decree issued.

Statement.

1876.

Elliott v. Hunter.

From the report, made in pursuance of this decree finding the whole amount due, the plaintiffs appealed, the judgment given on which was reported, and it was then ordered, "That the said appeal be allowed with costs, * * * and it is ordered that it be referred back to the said Master to review his said report, with liberty to the said *defendants* to give evidence to shew the amount due upon the mortgage in the pleadings and decree mentioned," which order was reheard at the instance of the administrator of the mortgagee, on the 12th day of March, 1869.

Mr. *Roaf*, Q. C., and Mr. *Bain* for the party rehearing. In support of the defendant's contention, *Seton* on Decrees, pages 107 and 364, was referred to as shewing that the decree in this case was the usual one in redemption suits; and, that, *primâ facie*, the mortgage itself is evidence of the debt, *Piddock* v. *Brown* (*a*), *Pollock* v. *Perry* (*b*) and *Warren* v. *Taylor* (*c*) were also cited.

Mr. *Moss*, contra. The evidence given at the original hearing establishes a case of suspicion as to the *bona fides* of the mortgage in inception. Had the Court not thonght some suspicion was cast upon the transaction the bill would have been dismissed. The decree directs an inquiry of what *was due* when the mortgage was given. This is not the common form in use. This shews the Court then thought some evidence had been given to impeach the transaction.

Judgment.

After taking time to look into the authorities, the Court [VAN KOUGHNET, C., SPRAGGE and MOWAT, V. CC.] unanimously directed "a reference back to the said Master; *the plaintiffs*, the mortgagors, to be at

(*a*) 3 P. Wms. 288, Cons. Stat. U. C. p. 863.
(*b*) 5 Gr. 391. (*c*) 9 Gr.

1876.

Elliott v. Hunter.

liberty to give evidence to reduce the amount claimed," the Court being of opinion that as the decree was in the usual form the *onus* of reducing the amount of the mortgage was cast on the mortgagor; the Court being also of opinion that, as the Vice-Chancellor, before whom the cause was heard had, although there were circumstances of suspicion in the case, allowed the usual decree in mortgage cases to issue, the Master could not shift the *onus* of proof.

A memorandum in the note book of the late Chancellor states, "The form of the decree did not justify the Master in finding nothing due. Considering that both parties are dead, that there is nothing to impeach the $4,000 mortgage, that subsequent incumbrancers are bound by the statement or settlement between mortgagor and mortgagee, and that the learned Judge has not found fraud, and that there was undoubtedly some consideration for the mortgage, I think the mortgage should stand, unless the plaintiffs can cut it down; and they should have the opportunity of doing this. If they desire it, the case can go back to the Master for this purpose.

Judgment.

NOTE.—This decision was given on the 3rd of July, 1869, and was not then reported, from the importance of the change made on the rehearing being overlooked; and it was not until recently that my attention was again called to the case by one of the local Masters. —A. G.

1876.

STEWART v. LEES.

Proof of execution of will—Attestation clause—Probate—Practice.

Where probate of a will is produced at the hearing, in pursuance of notice served under the statute 22 Victoria, cap. 93, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will and of its validity and contents; but if the notice to dispute has been served, and the will does not appear to be duly executed, the Court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of the Statute 4 Wm. IV. cap. 1, as to the execution of wills had been complied with.

The plaintiff and defendant were owners of adjoining lands: the plaintiff's land, called lot F, lying north of defendant's land, called lot G.

The question in dispute between them was, whether or not the boundary line between the lands was settled by a survey and plan made by one *A. Swalwell*, Provincial Land Surveyor, in 1854, and by a memorandum of agreement, signed on the back of this plan by the then owners of these same adjoining lands, by which they agreed to the survey as shewn by the plan. The memorandum of agreement bore date October 20th, 1854. Statement.

The plaintiff claimed his land as devisee under the will of his father, *William Stewart*, the patentee of the Crown of lot F, one of the parties who signed the memorandum of agreement.

Defendant claimed as purchaser from one *Heaney*, another of the parties who signed the memorandum of agreement.

Several questions of fact were raised on the pleadings and evidence.

The cause was heard at Toronto, on 11th and 12th June, after examination of witnesses at Ottawa, on 8th, 9th, and 10th of the month of May previous.

1876.

Stewart v. Lees.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *Maclennan*, for the defendant.

In proof of the will under which plaintiff claimed, it was shewn for the plaintiff, that he had given the requisite ten days' notice, under the statute, that he intended to adduce the probate as evidence in his behalf, of the devise to him and of the contents of the will, and also of the testamentary capacity of the testator; and that no notice of objection to the probate, as proof of these facts, had been given by the defendant, as required by the Statute. The probate was accordingly put in.

Statement

SPRAGGE, C., gave judgment on the 18th day of October, 1876, disposing of all the questions of fact in favour of the plaintiff; but, on the question of proof of plaintiff's title, he pointed out that the attestation of the will, as shewn by the probate, did not prove that the will was duly executed to pass real estate and intimated a doubt, whether the plaintiff, on that ground, was entitled to recover. Subsequently he gave liberty to have the question of the sufficiency of the probate, as proof of the devise to the plaintiff, spoken to, which was accordingly done by the same counsel for the parties, respectively, on the sixteenth day of January, 1877.

The attestation clause of the bill, as shewn in the Probate, was as follows:

"In witness whereof, I have hereunto set my hand and seal at Toronto, this twentieth day of March, 1856, A.D.

"Signed, sealed, published, and declared as the last will and testament of the said William Stewart who signed and subscribed the same in the presence of the undersigned witnesses.

WILLIAM STEWART
L. S.

"J. S. MACDONALD

"EW'D MALLOCH"

1876.

Stewart v. Lees.

March 16th.

SPRAGGE, C.—I have examined the authorities to which I have been referred and several others. I do not find that the point in question has been settled by any decision. I did not doubt that a will might be proved to have been duly executed notwithstanding an imperfect or erroneous attestation clause, but my strong impression was that, where a will was produced with such attestation clause, the presumption would be, in the absence of evidence to the contrary, that it was executed in the manner described in it and in no other manner; and that, since the passing of the Act 22 Vic. ch. 93, (Consol. Stat. U. C. p. 402,) the production of probate of the will, after notice under section 9, would be evidence, in the case of a will of real estate, of its due execution, so as to pass real estate, only where, upon production of the probate copy, it appears by the attestation clause, to have been duly executed so as to pass real estate; or that, at any rate, it is not to be evidence of an execution with the formalities still required by the Act 4 Wm. IV. ch. 1, where there was an attestation clause setting forth the formalities with which the will was executed and which did not comply with the act.

Judgment.

In cases to which I have referred and which are cited in Mr. *Jarman's* book (*a*) I find the maxim, *omnia presumuntur rite acta fuisse*, acted upon in some very strong cases. In the goods of Sir *Jeremiah Dickson* (*b*) there was nothing in the way of attestation clause beyond the word "witnesses", at the foot of the will, under which two names appeared. The report of the case says, as the attestation clause was imperfect an affidavit from the attesting witnesses was called for, in compliance with the rule of the Court, but it was impossible to trace them or discover who they were. Sir *Herbert Jenner Fust* admitted the paper to probate, although, as he observes, the affidavit required by the question would have to shew "that the will was duly executed according to the requisites of the Act."

(*a*) Vol. i., p. 79, 80.

(*b*) 6 No. Ca. 278.

1876.

Stewart v. Lees.

Mr. *Jarman's* text has this passage (*a*): "The presumption of compliance with the statutory requirements, however, will only be made where the will appears, on the face of it, to have been duly executed, or where, (the will being lost) proper evidence is adduced of its having been so executed." *Re Gardner* (*b*) is referred to as authority, but I have been unable to find it*. It seems to conflict with the case before Sir *H. Jenner Fust*.

The real question, however, is not a question of presumption but what effect the statute gives to the giving of notice where the party receiving it does not meet it by giving notice, on his part, that he disputes the validity of the alleged devise. The terms of the notice are material. They are, (to take the ordinary case of a will), that he intends to give in evidence, *as proof of the devise*, the probate of the will; and the statute enacts that such probate shall be sufficient evidence of such will and of its validity and contents, although not proved in solemn form, *i. e.*, if the counter notice by the opposite party be not given. Does this remove the necessity for any proof? If the probate purported to be of a will, appearing on its face to be duly executed, it certainly would; on the other hand, if the name of one witness only appeared—it would be, at least, doubtful—I apprehend, it would not. Here is a middle case. The names of two persons appear as witnesses to the execution, but the attestation clause does not shew the requisites of the Act to have been complied with. Still it would have been competent to the party asserting the execution of the will, apart from the Act, to give evidence of its due execution. Is the effect of the Act to save the necessity for such evidence? The probate is produced, according to the notice, as "proof of the devise;" and the statute makes it "sufficient evidence of such will, and

Judgment.

(*a*) Vol. I p. 79, 80. (*b*) 27 L. J. Prob.

* See 1 Sw. & T. 109.

1876.

Stewart v. Lees.

of its validity and contents." I think it must be held, (though at first, as I have said, my impression was the other way), that any proof, that it was competent to the party to give of the factum of execution with the formalities required by the Act of 4 Wm. IV. is dispensed with by the Act 22 Vic. ch. 93. To hold otherwise would be to require evidence in all cases where there was not upon the face of the will, a due execution; or, at any rate, where there was, *primâ facie*, an undue execution. Looking at the explicit and comprehensive language of the Act, I do not feel warranted in giving it so limited a construction; and, seeing how easy it is for a party disputing a will to put the opposite party to prove it by regular evidence, there is no necessity for so limited a construction.

Barraclough v. *Greenhough* (*a*) was a case under section 64 of the Imperial Act, 20-21 Vic. ch. 77 :—the section from which the provision in our Act was taken. It was held, reading that section with section 62, that it was conclusive as to the validity of the will, so that undue influence could not be shewn. This was reversed upon appeal (*b*), as going beyond what was or could have been the intention of the Act; but it does not appear to have been doubted that probate was under the Act, evidence of due execution. Counsel in the Court below put it thus; "All that was intended by section 64, was, that the probate should be evidence of the formalities required by the Statute of Wills, so as to dispense with proof of execution, and in the absence of evidence to the contrary, to make out the title of the party putting it in evidence." And Baron *Martin*, by whom the judgment of the Court was given in the Exchequer Chamber, says, "The true meaning appears to be, when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter notice within four days, the probate without more

Judgment.

(*a*) L. R., 2 Q. B., p. 3 (*b*) Ex. Ch. 612.

1876.

Stewart v. Lees.

will be admissible evidence of the will and its contents, as to realty, and will be *primâ facie* evidence of the validity of the will and the competence of the testator." If I had come to a different conclusion, I should have taken a like course to that taken in *Hilliard* v. *Eiffe* (*a*), and have given the plaintiff an opportunity of giving evidence of the due execution of the will.

SOLICITORS.—*Fitzgerald* and *Arnoldi*, agents for *Scott*, *Ross*, and *Stewart*, attorneys for the plaintiff; *Mowat*, *Maclennan*, and *Downey*, agents for *Lees* and *Gemmell*, Ottawa, for the defendants.

SMITH v. ROSE.

Administration—Payment by administrator—Funeral expenses.

S. assigned to the defendant certain promissory notes for his sole and only use, except such as might be used in liquidation of all necessary expenses in connection with his board and funeral expenses, and by his will appointed the defendant his executor. In taking the accounts in an administration suit, one of the local Masters refused to allow the defendant the expenses of taking out probate of the will, of advertising for creditors, of medicine and medical attendance for the testator and of a grave stone, as having been sufficiently compensated for by the notes.

Held, on appeal, that he was entitled to be allowed the amounts in passing his accounts, except the sum paid for the gravestone, which was a charge properly attending the funeral: not as necessary, but as suitable and proper to be allowed as a customary mark of respect.

Statement.

On the 7th January, 1876, *Samuel Smith*, by an instrument under seal, stating that he was feeble in body, but perfectly sound in mind, did thereby convey and assign to *Daniel Rose* the defendant, all and singular [a number] of notes of hand payable to him or to bearer, for his sole and only use, except such as must be used in liquidation of all necessary expenses in connnection with his board and funeral expenses. He also by the same

(*a*) L. R. 7 E. & I., App. 39.

instrument conveyed to the defendant's wife all the household effects and other articles belonging to him being in the house of the defendant, and then being used for his benefit; and stating, "This I do in token of gratitude for their kind attention to me in present affliction, and in full confidence of future care and kindness, if it may be needed." 1876. Smith v. Rose.

On the 8th June, 1876, a decree was made for the administration of *Samuel Smith's* estate. The defendant was his executor. In taking the accounts of the executor the master at Cornwall refused to allow him the expenses of taking out probate of will, of advertising for creditors, of medicine and medical attendance for the testator, and of a gravestone; on the ground that they were compensated for by the notes given to the defendant for board and funeral expenses. The defendant appealed, because none of these items come legitimately under these heads.

Mr. *J. H. Macdonald*, for the appeal, relied on *Menzies* v. *Ridley* (*a*), as shewing that the expense of a gravestone though a sum proper to be allowed to an executor in passing his accounts, was not one of the expenses properly attendant on the funeral of the testator.

Mr. *Moss*, contra.

PROUDFOOT, V. C.—It is admitted that the expenses of probate and of advertising for creditors are neither board nor funeral expenses, and to that extent the report is wrong. Mar. 28th, 1877.

As to the medicine and medical attendance. The defendant, in his answer, says that the deed giving the promissory notes was executed by the said *Samuel Smith* in consideration of the care and trouble of the defendant Judgment.

(*a*) 2 Gr. 246.

1876.

Smith v. Rose.

and his family, and the expense connected therewith, and in view of the care, trouble, and expense which they were thereafter to have in attending upon him. The defendant has chosen to amplify the language of the deed, so as to cover matters that would not come within the ordinary meaning of the phrases employed in it. But I do not think it is so enlarged as to include medicine and medical attendance. The *board, care, trouble*, and *expense*, are fully satisfied, without binding the defendant to provide medicine or the attendance of a physician. Had the agreement been, to provide maintenance, a different construction would probably best answer the intention of the parties. But there was no such agreement. Nor was there any agreement to provide necessaries, which would have extended to medical attendance.

When maintenance is allowed for an infant, it includes ordinary medical attendance, but not the expense of an unusual or protracted illness (*a*).

Judgment.

I think the sums charged for these particulars must be considered as ordinary debts of the testator, and the executor paying them is entitled to be allowed them, in passing his account.

The remaining item is the charge for a gravestone. No creditors intervene. Such an expense was allowed in *Menzies* v. *Ridley* (*b*), as a charge attending a funeral, not as necessary, but as suitable, as a customary mark of respect, and proper to be allowed, because it is so. The whole reasoning in that case proceeds on the ground of their being properly funeral expenses, and not merely charges against the estate, which will be allowed to the executor, in passing his accounts: See *Wood* v. *Vanderburgh* (*c*).

SOLICITORS.—*Bethune*, *Osler*, and *Moss*, agents for *Maclennan* and *Macdonald*, Cornwall, for the plaintiff; *Rose*, *Macdonald*, and *Merritt*, for the defendants.

(*a*) Chambers, 250. (*b*) 2 Gr. 544. (*c*) 6 Paige R. 277, 288.

1876.

SQUIRE v. OLIVER.

Sewage rates—Charge on land.

Held, on appeal from the Master, that the sewer rates in the City of Toronto, under by-law 468, do not form a charge upon lands.

This was a suit for specific performance of a contract of sale, brought by the purchaser against the vendor. A reference as to title had been directed, and, in proceeding thereon, the Master found that certain sewer rates, in respect to the property agreed to be sold, had not been paid, and that the same formed a lien or charge upon the land.

The defendant appealed from the report of the Master, on this as well as on other grounds.

The defendant, in person.

Mr. *J. H. MacDonald*, contra.

PROUDFOOT, V. C.—I do not think the sewer rates form any charge upon the land. The by-law 468, sect. 11, which is a consolidation of the previous by-laws on the subject, is similar in terms to the by-law 28, sect. 3, passed 8th September, 1859, and *Moore* v. *Hynes* (*a*) and *In re McCutchon and the Corporation of the City of Toronto* (*b*) decided that such rates did not form any lien on the land. On this point the appeal is allowed, with costs. On all the other grounds of appeal the defendant fails, and must pay the costs. Judgment.

(*a*) 22 U. C. R. 107. (*b*) U. C. R., 618.

1877.

In Re the Estate of the late Donald Robertson.

Dower—Mortgage.

Where a woman joins with her husband in executing a mortgage to secure money borrowed by the husband—no portion of which is received by her to her own use; and after the husband's death the land is sold at the instance of creditors, the widow is entitled even as against them to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage.

Semble, in the event of no surplus, the widow could only claim as any other creditor of her husband.

Sheppard v. *Sheppard*, ante vol. xiv. p. 174, approved and followed.

Appeal from the Master's report by the widow of the intestate.

This was an administration suit, and in proceeding in the master's office it had appeared that the intestate, the late *Donald Robertson*, mortgaged lands, and his wife, the present appellant, joined in the mortgage to bar her dower. The master found that the wife did not receive to her own use any portion of the money realized by her husband upon the mortgage of the lands. The lands were sold under the decree of the Court, free from dower, with the consent of the appellant; and the Master, in taking the accounts, computed the amount to which she was entitled in lieu of her right of dower, on the balance of the proceeds of the sale after deducting the amount of incumbrances, or, in other words, only on the equity of redemption.

Statement.

From this finding of the Master the widow appealed, claiming that she was entitled to an allowance out of the gross amount realized upon the sale.

Mr. *Attorney General Mowat* and Mr. *Ewart*, for the appeal.

Mr. *J. A. Miller* and Mr. *Charles Robertson*, contra.

1877.

Re Robertson.

April 14th, 1877.

PROUDFOOT, V. C.—This appeal is brought claiming that, even as against creditors of her husband, the dowress is entitled to have her dower computed on the whole value of the mortgaged lands.

The appellant only asks the allowance to be made out of the surplus proceeds of the sale of the lands, and does not urge a right to indemnity out of the other property left by her husband.

The question has been frequently discussed in our Courts, and the decisions are not, perhaps, all reconcilable. The late Chancellor *VanKoughnet*, in *Sheppard* v. *Sheppard* (*a*), decided it squarely in favor of the widow. In *Thorpe* v. *Richards* (*b*), the same Chancellor expressed a doubt whether he had not gone too far in *Sheppard* v. *Sheppard* in giving the wife the value of her dower in the entire estate, as against the creditors of her husband, but it was not necessary to consider it there. In *Baker* v. *Dawbarn* (*c*), *Mowat*, V.C., held that the widow was not entitled, as against creditors, to the exoneration of the mortgaged estates from the mortgage out of either the personal estate or the other real estate left by her insolvent husband at the time of his death. In this the learned Vice Chancellor followed his own earlier decision in *White* v. *Bastedo* (*d*). In neither of these two cases does there appear to have been any surplus from the mortgaged property after paying the incumbrances, and therefore the question discussed in this case does not necessarily arise, where the claim is only made in respect of the surplus.

Judgment.

In *Campbell* v. *Royal Canadian Bank* (*e*), the present Chancellor held that the widow was only entitled to dower out of the value of the land beyond the incumbrance upon it. But in that case, as well as in *Thorpe* v. *Richards*, *supra*, the mortgage was for purchase money; and there is a very obvious distinction between such a case, where,

(*a*) 14 Gr. 174.
(*b*) 15 Gr. 403.
(*c*) 19 Gr. 113.
(*d*) 15 Gr., 546.
(*e*) 19 Gr. 334.

1876.

Re Robertson.

to the extent of the mortgage debt, the husband was not the owner; and a case, such as the present, where the mortgage was given for money borrowed.

In *Doan* v. *Davis* (*a*), the Chancellor had the subject again under consideration, in a suit for partition, and came to the conclusion, that, where the mortgage was for money borrowed by the husband, the widow was dowable out of the whole value of the mortgaged property, and not, only of the value beyond the mortgage debt. This case was followed in *Lindsay* v. *Lindsay* (*b*). In neither do the rights of creditors appear to have been involved.

The only decision, therefore, directly in point, is that of *Sheppard* v. *Sheppard* (*c*), and that is in favour of the widow,—weakened, no doubt, to some extent, by the doubt which seems to have arisen in the mind of the Judge who decided it, and which led the Judge who decided *White* v. *Bastedo* to consider the decision itself of no value as an authority.

Judgment.

Reverting then to the principle on which the question is to be decided, I think it is settled by numerous decisions, that, when a wife joins in a mortgage of her husband's estate, as a security to the mortgagee and for no other purpose, she parts with her dower only so far as may be necessary for that purpose. *Forrest* v. *Laycock* (*d*), *Sheppard* v. *Sheppard*, *supra*, *Campbell* v. *Royal Canadian Bank*, *supra*.

In *Jackson* v. *Innes* (*e*), Lord *Redesdale* says, "It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for the

(*a*) 23 Gr. 207.
(*b*) 23 Gr. 207.
(*c*) 14 Gr. 174.
(*d*) 18 Gr. 611.
(*e*) 1 Bli. 126.

redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband according to the circumstances of the case."

1876.

Re Robertson.

The same principle is recognized in *Jackson* v. *Parker* (*a*), and the general opinion to be found in text books is confirmatory of it. *Vide Forrest* v. *Laycock* (*b*), *Fisher* on Mortgages, section 578, *et seq.*

In the *Royal Canadian Bank* v. *Campbell*, in Appeal, I have been favoured with a perusal of the judgment of *Draper*, C. J. He says, "Mrs. *Campbell* joined in the mortgage deed given by her husband in order to bar her dower. In the face of that act I do not see how she can claim any right of dower, against the mortgagee. ** It may be, however, remarked, that before the passing of the English Statute, it was distinctly asserted that widows could not redeem mortgages made subsequent to their marriage, where they had barred their dower (*c*), and Mr. *Fisher*, in his work on Mortgages (*d*), states this to be the law now, referring to *Powell* as above."

Statement.

As against the mortgagee, I apprehend, no one will question the position that the widow cannot claim the dower which, for the benefit of the mortgagee, she had barred.

In the note to Mr. *Powell's* book, which is cited, reference is made to a fuller discussion in a subsequent part of the work (*e*), where he states that a fine, although an absolute bar at law, may in equity, upon the ground of its having been levied for a particular purpose, be restrained from operating to exclude the widow from her dower, except to the extent of the particular purpose contemplated. And, after stating the cases of *Ruscombe* v. *Hare* (*f*) and *Innes* v. *Jackson* (*g*), he states the

(*a*) Amb. 687.
(*b*) 18 Gr., 620.
(*c*) Powell on Mortgages, 280, note *s*.
(*d*) 2d Ed. p. 307.
(*e*) p. 675, note c.
(*f*) 6 Dow, 1.
(*g*) 1 Bli. 126.

1876.

Re Robertson.

general rule deducible from them, as follows, (*a*), "The practical rule to be collected from a review of all the cases on this head, is, that if the wife concur with her husband in a fine of lands to which she is or may be entitled in right of her dower or jointure, for the purpose of improving the title of a mortgagee, and the mortgage deed contains no limitation of the estate beyond the security, and reserves the equity of redemption to the husband alone, then the fine, which the wife has levied to give effect to the mortgage, will operate for the security of the mortgagee only, and not absolutely to bar the wife of her dower or jointure as against the husband's heir, volunteer or purchaser." The passage quoted from *Fisher* rests on the earlier note cited from *Powell*, and ought to be qualified by the subsequent note.

In *Doan* v. *Davis*, *supra*, the Chancellor cites, with approval, the statement of the law given by Mr. *Boyd*, the then master, in *re McMorris* (*b*). "The widow's position in equity seems to be this; having barred her

Judgment.

dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the lands. * * * The wife simply bars her dower with a view to secure the debt due by her husband; when that debt is paid by the husband's estate she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as dowress in the whole estate mortgaged."

Whether the right of the widow is to be placed on the ground of a resulting trust, or of her occupying the position of a surety, it would seem she must be entitled to have her whole estate revested in her on the satisfaction of the mortgage in which she had joined only to secure her husband's debt. There is no appreciable

(*a*) Page 678, note *d*.

(*b*) 8 Can. L. J., 284.

distinction between a mortgage made by her of her own lands and a parting with her right of dower, for that purpose. In both cases she parts with her estate, and it can make no difference, that in the one case the estate is absolutely vested in her, and in the other that it depends upon the contingency of her surviving her husband. In the former case there is no question but that upon payment of the mortgage the estate revests in her, and, according to Lord *Redesdale*, the same result follows in the latter.

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As a surety, she is entitled to complete indemnity (*b*), and, while she only seeks indemnity out of the mortgaged estate, no reason occurs to me why, though there are creditors of the husband, she should be limited to dower in the surplus after paying the mortgage. If the mortgage were to exhaust the mortgaged property, and she were seeking indemnity out of the assets of her husband, there might be ground for contending that she should only claim as any other creditor of her husband. But the amount of her claim would be computed on the whole value of the mortgaged property. The cases cited shew that she is only a surety for the debt, and, if her estate is exhausted in paying the debt, she should have a right to make the debtor's estate pay it.

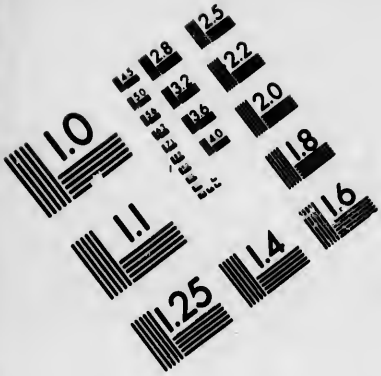
Judgment.

But I need not pursue this part of the subject further, for there is a surplus, and relief is only sought in regard to it. In *Sheppard* v. *Sheppard*, *supra*, the decision only affected the surplus. I think it was well decided, and that the doubt subsequently expressed in regard to it was not well founded.

The appeal is allowed with costs. The claim of the wife to payment to be limited to the surplus proceeds of the sale of the mortgaged lands.*

(*a*) Story, Eq. Jur., Sect. 327.

* See to the same effect *Dawson* v. *The Bank of Whitehaven*, L. R. 4 Ch. Div. 639.



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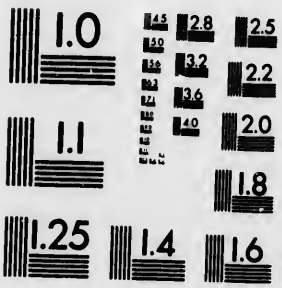

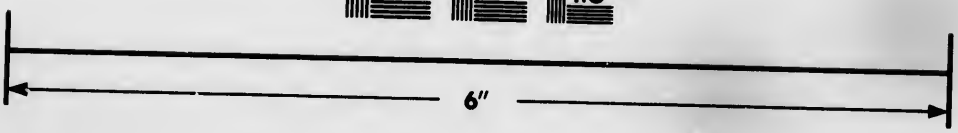

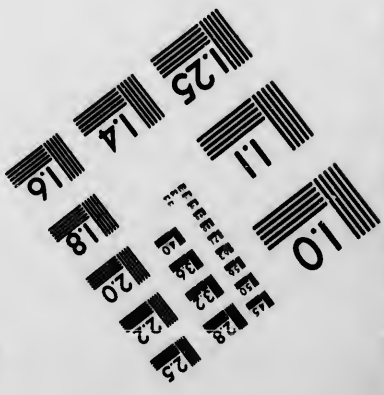

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HOVENDEN v. ELLISON.

Mechanics' lien acts—Lien of sub-contractor—Distribution of fund.

Where a bill is filed by a sub-contractor against the owner of property and a contractor with him, to enforce a claim against such contractor, the owner of the property and all persons claiming to have liens are necessary parties in the Master's office, whose costs will be ordered to be paid out of the amount found due the contractor, and the balance distributed ratably between the several lien holders, and a personal order made against the contractor for the deficiency, if any.

A suit brought by a lien holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act keeps alive all similar liens then existing.

Statement.

The bill in this case was filed by *Richard James Hovenden* and *Richard William Meldrum* (sub-contractors), against *Joseph Ellison*, (contractor), and *Robert Carrie* proprietor of certain property in the city of Toronto, the plaintiff's claiming that under the Mechanics' Lien Act of 1873 and the Mechanics' Lien Act of 1874, they were entitled to a lien or charge for the price of their work done and materials supplied upon the estate and interest of the Defendant *Carrie* in the land and upon the buildings, and erections upon and in respect of which such work was done and materials placed and furnished; but that, inasmuch as their claim arose in being sub-contractors, the amount they claimed in respect of such lien they limited to the amount payable to the defendant *Ellison* by the defendant *Carrie*.

The cause was heard *pro confesso* before the Chancellor on 13th December, 1876.

Mr. *Snelling* for the plaintiffs.

SPRAGGE, C. made a decree as follows:—"This Court doth declare that the plaintiffs are entitled to a lien and charge upon the land and premises in the plaintiffs' bill mentioned and upon the buildings and erections upon the same, by virtue of the Mechanics' Lien Acts of 1873 and 1874, for as much of the price of the work done

upon or materials furnished or provided in and about the buildings erected upon the said lands as remains justly due to the plaintiffs, to the extent of the amount, if anything, due by the defendant *Robert Carrie* to the defendant *Joseph Ellison* upon his contract, in said pleadings mentioned, which amount is to be ascertained as hereinafter directed, and doth order and decree the same accordingly. (2) And this Court doth further order and decree that it be referred to the Master in Ordinary of this Court to take the following accounts:—(1st) An account of the amount due from the said defendant *Robert Carrie* to the defendant *Joseph Ellison*, the contractor in the pleadings mentioned, in respect of all work done upon and materials provided for the erection of the buildings upon the lands in the pleadings mentioned. And, in the event of the said Master finding that there is any sum still due by the said defendant *Carrie* to the said defendant *Ellison*, or that there was any sum remaining due from the said defendant *Ellison*, after receiving notice of the registration by the said plaintiffs of their said lien, then the said Master is to take the following further account;—(2nd) An account of the amount due from the said defendant *Ellison* in respect of all work done and materials provided for the said building. (3) And in the like event, this Court doth further order and decree that the said Master do inquire and state, whether any person or persons and who, other than the said plaintiffs, has or have any lien, charge or incumbrance upon the said lands and erections thereon, under the Mechanics' Lien Acts of 1873 and 1874, or otherwise, and, in case the said Master shall find that any such person or persons has or have any lien, charge or incumbrance, he is to cause them to be made parties to this suit and to be served with process, under the general orders of this Court in that behalf, and is to proceed to take an account of what is due to the said plaintiffs upon and in respect of their said lien, and to such other incumbrancers, (if any), and to establish their priorities. (4) And this Court doth reserve further directions and the question of costs, until after the said Master shall have made his report."

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Judgment.

This decree was proceeded with accordingly. It was conceded that, under the 13th sect. of the Act 38 Vict., ch. 20, a suit brought by a lien holder is a suit brought for

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the benefit of all of the same class, and the effect of this is that a suit begun by one within the thirty days keeps alive all liens existing at the time of the institution of that suit. The bill in this case was filed on the 25 Oct., 1876. All persons, therefore, who had on that day liens should be made parties; their right to come in and prove in this suit being settled by the decision of *Bunting* v. *Bell* (*a*), and all lien holders were accordingly made parties, some of whom appeared and proved claims; others neglected to do so, and the Master made his report in pursuance of the decree, finding the amounts due the parties so appearing respectively. The cause was heard, on further directions on the 4th April, 1877, before Vice Chancellor *Blake*.

Mr. *Snelling*, for the plaintiffs.

Mr. *W. M. Clarke*, for the defendant *Carrie*

Mr. *McArthur*, for the creditors who had proved claims in the Master's office

Judgment.

BLAKE, V. C., made an order to the effect following:—That the defendant *Carrie* pay into Court forthwith the amount found due by him, less his costs to be settled by the decree: Declare that the charges on the premises are those in favour of the plaintiffs, *Robert* and *William Jones* and the *Gurneys*; and that on payment into Court of the above sum, the premises in question be freed from the charges in question in this suit. Costs to the incumbrancers out of fund. Balance to be divided *pro rata* amongst these incumbrancers, to be settled by the decree: with a personal order against defendant *Ellison* for deficiency, if any.

SOLICITORS.—*Snelling* and *Wardrop*, for the plaintiffs; *W. Mortimer Clark*, for the defendant, *Carrie*; *Crowther*, *Tilt*, and *McArthur*, for the creditors.

BURNS v. GRIFFIN. 1877.

Vendor and purchaser—Lis pendens—Lien for deposit.

Where the purchaser paid a deposit on effecting a purchase, which he afterwards rescinded in consequence of a good title not having been made out, and recovered judgment at law for the amount of the deposit which he was unable to realize under execution:

Held, notwithstanding the provisions of the Administration of Justice Act, that the purchaser had a right to institute proceedings in this Court to enforce his lien, his object being to obtain a *lis pendens* which he could not obtain at law, in order to prevent the vendor disposing of his lands as he had of his goods.

The costs of a suit at law to recover back a deposit paid on account of purchase money, do not form any lien upon the land, although the deposit itself does constitute such a lien.

The bill in this cause, filed 18th November, 1876, set forth that, on the 17th August, 1874, the defendant had agreed to sell to plaintiff certain lands in the township of Westminster for $2,175, on which plaintiff paid a deposit of $100 on account of the purchase money; that the agreement for such sale contained a proviso that possession was to be given to plaintiff within one month from time of sale, and the plaintiff declined to complete the purchase on account of the title, which was defective, not having been perfected within the time limited by the condition of sale; and the defendant never did perfect such title. The bill further stated that on the 16th November, 1875, the plaintiff recovered a verdict against the defendant, in the Court of Common Pleas, for the amount of such deposit and interest and County Court costs; that plaintiff had applied to the defendant and requested him to sign a written acknowledgment that plaintiff had a lien on the lands for such deposit, which he declined to do. The prayer of the bill was that the plaintiff might be declared entitled to a lien for the said deposit and costs. Statement.

The defendant, by his answer, insisted that the plaintiff had commenced his action at law and also this suit,

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without affording the defendant a reasonable time to make out the title, and submitted that the plaintiff having elected to sue in the Court of Common Pleas, he could there have obtained all the relief sought, and that he was not entitled to pursue him in this Court. The defendant craved the same benefit as if he had demurred to the bill.

It appeared that, after procuring his judgment to be entered, the plaintiff sued out execution and endeavoured to realize his claim thereunder out of chattels, but the defendant denied to the sheriff that he owned any goods or chattels and thereupon the present suit was instituted.

The cause came on to be heard at the sittings of the Court, at London, on the 29th May, 1876.

Mr. *MacMahon*, Q. C., for the plaintiff.
Mr. *Moss* and Mr. *R. M. Meredith*, for the defendant.

In addition to the cases mentioned in the judgment, *Mocher* v. *Reed* (*a*), *Barker* v. *Smark* (*b*), *Knox* v. *Traver* (*c*), were referred to.

Judgment.

BLAKE, V. C.—The lien which a vendor has on the premises, the subject of the contract, is not lost by his recovering a judgment against the vendee for the purchase money. *Flint* v. *Smith* (*d*). A vendee has also a lien for the amount of deposit which he may have paid under his contract, on the premises the subject of his agreement, in case the vendor does not carry out the sale. The rule is thus laid down in *Hurd* v. *Robertson* (*e*), "Damages for not completing the contract, and a right to a return of the deposit have been treated and spoken of as subject to the same rule, but in my opinion they stand on a very different footing. It has never been contended that any lien existed for such damages, although it would seem but reasonable that a deposit

(*a*) 1 B. & B. 319. (*b*) 8 Beav. 64. (*c*) 23 Gr. 41.
(*d*) 8 Gr. 339. (*e*) 7 Gr. 142.

on account of purchase money made in advance shall constitute in favour of the purchaser, the same lien upon the estate as by the law of the Court has always been held to exist in favour of a vendor for the unpaid purchase money. * * * I can see no reason to doubt that it would be only an exercise of a sound discretion to order a return of the deposit, and in the event of default being made in payment, to declare the plaintiff entitled to a lien upon the estate contracted for."

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Here it is not denied that the judgment recovered covered only the deposit and interest. In the case of the lien of the vendor the recovery of a judgment against the vendee does not prevent the enforcement of the lien on the land in case of non-payment; and I cannot see any reason on which I can base a difference in the case of the lien in favour of the vendee against the vendor. There is no technical rule which places the vendee in this respect in a different position to the vendor, and I cannot see any substantial reason for allowing the judgment in the one case to work an abandonment of the lien, and in the other not to stand in the way of its enforcement. See *Dinn* v. *Grant* (*a*), *Wythes* v. *Lee* (*b*), *Turner* v. *Marriott* (*c*) *Ewing* v. *Osbaldiston* (*d*), *Watson* v. *Rose* (*e*).

Judgment.

Here, as the purchase did not go off owing to any default of the purchaser, he had this lien, which I do not think was lost by the recovery of his judgment.

It has been held in *Denroche* v. *Taylor* (*f*), that where a *lis pendens* is required for the protection of the plaintiff he is entitled to come to the Court to obtain this protection which he cannot procure at law—notwithstanding that proceedings are then pending there.

Here the defendant has not acted reasonably. He misled the sheriff, whom he assured he had no goods, and

(*a*) 5 DeG. & S. 451.
(*b*) 3 Dr. 406.
(*c*) L. R. 3 Eq. 744.
(*d*) 2 M. & C. 53–56.
(*e*) 10 H. L. C. 672.
(*f*) Per Proudfoot, V.C., Nov. '74.

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by his conduct has driven the plaintiff to take these proceedings, which he now complains of as being burdensome and unwarranted. He has nobody but himself to blame for that which he calls a harsh step. I cannot say that the plaintiff was not justified in commencing his simple action in the Court of Common Pleas for the small amount due: and but for the conduct of the defendant the judgment would have been there realized. The plaintiff was justified in concluding that the defendant might act as to realty as he has done as to personalty, and cannot be blamed, as the Common Law Court could not give him this relief, for coming here to bind the lands of his debtor, so that his judgment should not be fruitless. Had the plaintiff recovered his judgment out of chattels, it might be that he should not get his costs here, but as it is, the relief asked must be given the plaintiff, with costs against the defendant on the lower scale.

Judgment.

In drawing up the decree, the costs of the common law action, as well as the amount of deposit, were inadvertently declared to be a lien on the lands, no objection being made thereto on the part of the defendant. This was varied on rehearing, as to the costs. In other respects the decree was affirmed, but, under the circumstances, without costs.

This case has since been carried to the Court of Appeal, and will be heard at the sittings commencing 15th June next.

SOLICITORS—*MacMahon*, *Gibbbons*, and *McNab*, for the plaintiff; *Meredith* and *Meredith*, for the defendant.

DUNGEY v. DUNGEY. 1877.

Will, construction of—Devise of lands, subject to payment of debts—Lands subject to mortgages.

The testator devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower; the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses.

***Held* that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her, freed from the debts of the testator.**

The bill in this cause was filed by *William Dungey* against *Priscilla Dungey*, the widow, and *John Elliott*, the surviving executor of *William Henry Dungey*, deceased, who, by his will, dated the 26th day of June, 1876, directed his "executors, as soon as they conveniently can after my decease, to sell and dispose of my said real estate, free from the dower of my wife if she consents to accept the provision hereinafter made for her in lieu thereof. I give, devise, and bequeath unto my beloved wife, *Priscilla Dungey*, one-third part or portion of the above mentioned land, or the one-third part or share of the proceeds of the same, if sold, instead of and in lieu of all dower out of the same. I give, devise and bequeath unto my father, *William Dungey*, the other two-thirds part or share of my said real estate, or of the proceeds thereof if sold, and also all of my personal estate and effects, rights and credits, whatsoever and wheresoever, and to which I am now, or may be in any wise, possessed of or entitled to at the time of my decease, to and for his own absolute use and benefit, with the exception of the sum of sixty dollars which I order and direct my said executors to pay to my said wife within three months after my decease; I having lately given her a note and debt worth about one hundred and forty dollars to pay the money which I received from her which she got from her father. The

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said gift and bequest to my said father, to be subject to the payment by my executors of all my just debts and funeral and testamentary expenses and the charges of proving and registering this my will;" and praying to have the lands sold and the proceeds distributed.

The defendant *Dungey* claimed that she was entitled to have certain mortgages on the lands paid off by the plaintiff out of the property devised and bequeathed to him. The defendant *Elliott* submitted to act as the Court might direct.

The cause came on by way of motion for decree.

Mr. *Bain*, for the plaintiff.

Mr. *Badgerow*, for the defendants.

Brownson v. *Lawrence* (*a*), *Eno* v. *Tatam* (*b*), *Moor* v. *Moor* (*c*), *Nelson* v. *Page* (*d*), *Sackville* v. *Smyth* (*e*), were referred to.

Judgment.

April 18th.

BLAKE, V. C.—The testator had some personal property and a farm. He gave to his wife one-third of the farm or its proceeds in lieu of dower. He also directed his executors to pay his widow $60 to make up, with $140 already paid her, $200, which the testator had received from her, it being a gift from her father. The whole of the personal estate with this exception and the balance of the land he gave to his father, "the said gift and bequest to my said father, to be subject to the payment by my executors of all my just debts and funeral and testamentary expenses and the charges of proving and registering this my will."

The plaintiff alleges that the personal estate amounts to $644 and the debts to $1,600, of which over $1,000 are secured by mortgages on the farm in question. If the will had been silent as to the mode of payment of the

(*a*) L. R. 6 Eq. 1.
(*b*) 32 L. J. ch. 311.
(*c*) 1D. & S. 602.
(*d*) L. R. 7 Eq. 25.
(*e*) L. R. 17 Eq. 153.

debts, the mortgages would have been primarily payable out of these lands. Two-thirds of these charges would have been payable out of the share devised to the father. The testator does not desire this result, and precludes its happening by making the interest in his estate devised and bequeathed to his father, "subject" to the payment of "all" his "debts." It is clear, therefore, that the widow, abandoning her claim to dower is, so to speak, a purchaser of one-third of the land freed from the payment of one-third of the testator's debts.

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Dungey v. Dungey.

The plaintiff can take a decree with this declaration; costs out of the estate.*

SOLICITORS:—*Rose*, *McDonald*, and *Merritt*, agents for *H. L. Ebbels*, Port Perry, for the plaintiff; *Badgerow* and *Strathy*, agents for *Drew* and *Jacobs*, Elora, for the defendants.

WRIGHT v. MORGAN.

Mortgage—Statute of Limitations—Disputing note.

Where a defendant desires to prevent the plaintiff from recovering interest for a longer period than six years, he must set up the defence of the Statute of Limitations: merely filing the usual disputing note is not sufficient for this purpose.

Statement.

Appeal from the ruling of the Master at Barrie, by the plaintiff.

This was a suit on a mortgage and the defendant had filed the usual disputing note. On proceeding to take the accounts, the Master allowed the plaintiff only six years' interest before the date of filing the bill.

Mr. *W. Mulock*, for the appeal, contended that, as the defendant had not pleaded the Statute of Limitations, but had contented himself with merely filing a disputing

*See also, as bearing on this case, Lewis v. Lewis, L. R. 13 Eq. 218.

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note, the plaintiff was clearly entitled to interest on the mortgage for all the time it had run, not exceeding twenty years. *Howeren* v. *Bradburn* (*a*), was authority for this.

Mr. *H. J. Scott*, contra. In *Howeren* v. *Bradburn*, the interest was allowed simply with a view of avoiding the multiplicity of suits, as the plaintiff there would have been at liberty to sue for the extra interest at law after obtaining the decree for the six years' interest. Here, however, that reason does not exist, as the suit is instituted by the assignee of the mortgage against the assignees of the equity of redemption, and, according to the Cons. Stat. of U. C., ch. 88 sect. 19, only six years' interest can be allowed. The covenant to pay the interest does not bind the defendants and they are, therefore, only liable for six years' interest. The only question before the Master was, could the defendant, who had filed only a disputing note, obtain the benefit of the statute.

Argument.

Order 437 is sufficient to warrant the Master in permitting the defendants in this case to set up that defence. By his bill the plaintiff makes no express claim for interest beyond the period of six years. In *Cattanach* v. *Urquhart* (*b*), the defence was one that went to the whole amount of the claim; and *Penn* v. *Lockwood* (*c*), also went to the whole consideration.

Counsel asked leave to answer in the event of the appeal being allowed.

Mr. *W. Mulock*, in reply, referrred to *Mitford's* Pleading, page 301, (5th ed.) to show that the statute in such a case must be pleaded. He also cited *Carroll* v. *Eccles* (*d*), *Holding* v. *Barton* (*e*), *Butler* v. *Church* (*f*) *Ridgway* v. *Wharton* (*g*), and *Darby* on the Statute of Limitations, 439.

(*a*) 22 Gr. 96. (*b*) 6 P. R. 28. (*c*) 1 Gr. 547.
(*d*) 17 Gr. 529. (*e*) 1 S. & G. App. xxv. (*f*) 16 Gr. 205.
(*g*) 3 D. M. & G. 692.

PROUDFOOT, V. C., allowed the appeal with costs and gave the defendant leave to move in chambers for liberty to put in an answer setting up this defence. 1877. Wright v. Morgan.

SOLICITORS—*Mulock* and *Campbell*, for the plaintiff; *Robinson* and *O'Brien*, for the defendant.

RE HARRIS—HARRIS v. HARRIS.

Costs of contentious suits in Surrogate Court.

Where a suit in the Surrogate Court is by order removed into Chancery, and that Court directs any of the parties to receive their costs, the costs to which they are entitled are those allowed by the Court of Chancery tariff—not the costs of the Probate Court in England, or of the County Courts here—no tariff of costs for contentious cases in the Surrogate Courts here having yet been established.

This was an appeal from the ruling of the Master on the taxation of costs in a contentious matter removed from the Surrogate Court into this Court, under the circumstances stated in the judgment. Statement.

Mr. *R. M. Meredith*, for the appeal, contended that the Master's ruling was incorrect and should be reversed, and the defendants' costs taxed according to the practice in the Probate Court of England—on the following, amongst other grounds: 1. By the decree herein (paragraph three) the defendants are declared to be entitled to costs of the cause, inclusive of costs in the Surrogate Court; but the view of the Master, if sustained, in effect reverses this decree; for the logical conclusion from the Master's decision is, that as between party and party there is no provision for costs, and if there is no provision in the Act for costs, neither party can be entitled to any, and consequently the decree must be wrong. The claim as on a *quantum meruit* can only be allowed

1877. between attorney and client, not between party and party (*a*).

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2. The Master was bound to tax Surrogate Court costs according to the practice of the Surrogate Court, from which the cause came and to which it now belongs. Taxation of interlocutory costs therefore should be on the Probate Court scale. This is a matter exclusively within the discretion of the Court below, and neither the Master nor this Court has power to interfere with that discretion. It is on this ground that no appeal lies as to costs. The ruling of the Master is in effect a reversal of the conclusions of the Court below in a matter within its discretion; a ruling the highest Court in the land has no power to carry into effect.

The word "Practice," in the 19th section of the Surrogate Act, includes the usual course adopted by the Probate Court in granting or refusing costs; and also the manner of taxation of such costs, that is the amounts allowed for services performed.

Argument. The word as ordinarily accepted and used, includes costs. We say it is the *practice* of such a Court to grant costs to a successful litigant; and, if so, upon what rate or scale is it their practice to allow such costs. No one would think of arguing that these questions are not correct. Every work of Practice, both on law and on equity, treats of costs—the mode of granting, the amount allowed, and the tariff, where there is one, as a part of a work on Practice. If not considered part of the practice, why so dealt with? No book of Practice can be found in which costs and the tariff of fees are not dealt with as part of the practice of the Courts. In *Archbold's* Q. B. Practice, 9th ed., 470, it is said, "We will now consider the practice of taxation between party and party;" and then goes on to shew the amounts allowed on such taxation; and in *Daniel's* Chy. Practice, (5th ed.,) 1239, *costs* throughout are spoken of as granted according to the practice of the Court.

(*a*) *Wharton* and *Tomlins*: Title, "Practice."

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The fallacy of comparing the services intended to be remunerated for in the Surrogate Court with those rendered in proceedings in the County Courts, will be apparent when we look for a moment at the questions raised: (1) at the amounts involved—here it is only $5,000, but the same principle would apply if it were $50,000; (2) the validity of the will, and (3) the title to lands—a jurisdiction quite equal to that of the Court of Chancery itself. By the act all the difficulties attendant on the practice in the Court of Probate in England—and they are numerous—are introduced, and it is difficult to see any satisfactory ground for withholding the same remuneration for those services as has been awarded for them in English practice. Under these circumstances the Courts of this Province will stretch the meaning of the word "Practice," if necessary, so as to include costs. The duties and expenses imposed by the Act, including fees to the several officers of the Court, are the same as those in England; and it is not asking too much when the Court is called upon to decide what the solicitor shall receive as remuneration for his services, to say that it shall be the same as in England.

Argument.

Mr. *George Murray*, contra. The word "Practice," as used in our Act of 1858—22 Vic. ch. 93—does not mean the scale of costs to be allowed.

The question really to be determined, is concluded by the Statutes themselves. Our Surrogate Court Act is modelled on the English Act.

In England the Statute 21 and 22 Victoria, chapter 95, sections 29 and 30, shews the desire of the Legislature to simplify as much as possible the proceedings there, and the same spirit pervades our Act. By the 13th section of the English Act, power is given to the Judges of the Probate Court to make rules and orders and frame scales of fees; and similar powers are conferred on the Judges here, by sections 13, 14, and 50, of our Act. In England, the Judges did establish a scale of

1877. Harris v. Harris. fees to be taken by all parties acting in the Court whether counsel, proctors, solicitors, or attorneys. Here the Judges have not deemed it expedient or necessary to fix a tariff for other than non-contentious cases, leaving the fees in contentious cases to be regulated by the tariff previously existing in the County Courts; and according to that tariff, the Master has acted in taxing the costs in this matter.

BLAKE, V. C.—The proceeding in question commenced in the Surrogate Court in the County of Middlesex, and was removed by order into this Court. The power of the Court of Chancery under these circumstances is thus defined by section 30, of the Surrogate Court Act, "Upon any cause or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court of Chancery." So that here this Court had full power to deal with this case as a chancery cause, and it has thought proper to pronounce a decree in favour of the present appellants giving them the costs of all the steps they have properly taken to defend themselves. There has been no table of fees fixed for contentious business by the Judges named under the Act; and as this Court has given these parties their costs of all the proceedings, as it had the power to do, these costs should be taxed in the manner, to my mind, clearly intended; that is, of a "cause or claim originally entered in the said Court of Chancery." If there had been another tariff, then the Master should have considered the question whether or not the whole proceedings were to be taken as a Chancery suit, and allow the Chancery tariff, or whether as to a part the Surrogate Court tariff should apply; but as there was but the one tariff, and that the tariff of the Court which gives costs, and this Court has not limited these costs, and has

Judgment.

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Harris v. Harris.

the right to make this tariff apply as if the proceedings were initiated in this Court, I think the Master should not have troubled himself with the consideration of the various matters which were raised before him, but should have proceeded with the taxation as of a suit in equity. I see no warrant for the allowance to the appellants of their costs, to be taxed according to a *quantum meruit*. If the Act in question gives the costs, then such costs, so given, the party entitled to them can claim; if the costs be not given, I cannot add a clause to the Act entitling a party to that for which the Legislature does not fully provide. So if the Legislature allows costs, on something being done, as here the fixing a tariff by certain commissioners, and does not otherwise provide for the fixing of costs, the Court cannot, until the costs be thus defined, settle the amount to be received by a party who, when the enactment is carried out, could claim them. I cannot place myself in the position of the commissioners who were appointed to make rules and arrange the fees which attorneys are to be entitled to receive. It is, therefore, a question whether, under this decree which gave the appellants their costs, it was intended that these costs should be taxed under the Chancery tariff in force in our land, or under the Probate Court tariff in England, and I think there can be no doubt but that the former tariff is the one to be adopted. I allow the appeal, with costs.

Judgment.

SOLICITORS—*Murray*, agent for *Warren Rock*, London, for the plaintiff; *Meredith* and *Meredith*, for the defendants.

1877.

ABELL v. WEIR.

Crown lands—Partition—Locatee.

The Court will not decree the partition of lands, the title to which is vested in the Crown; neither will it decree the sale of such lands at the instance of the representatives of a deceased locatee.

April 25th. Bill for sale of unpatented lands and division of the proceeds among the parties, the representatives of the deceased locatee of the Crown. There was an unpaid balance due the Crown, upon payment of which a patent would issue.

Statement. Mr. *Ewart*, for the plaintiff, asked for a decree in the terms of the prayer. [BLAKE, V. C., Is there any case in which a partition or sale of unpatented lands has been decreed?] Under the Partition Act of 1868-9, sections 4 and 6, all persons interested in lands are compellable to make partition, and by section 1 the word "lands" includes "estates" and "interests" in lands. Section 38 makes express provision as to equitable estates. Partition is constantly decreed when the legal estate is outstanding in a mortgagee. If the testator had been interested in the land under a binding contract for its purchase, partition would be decreed, for in such a case the position of the parties would be the same as if a conveyance had been made and a mortgage given back. The "infallible justice" of the Crown in dealing with locatees is equivalent to a binding contract: *Craig* v. *Templeton* (*a*); where upon that ground dower was awarded out of unpatented lands. *Bown* v. *West* (*b*) is also an authority that a locatee has an "interest" in the lands, and there are many cases in which such interests have been sold to satisfy creditors. *Jenkins* v. *Martin* (*c*) is distinguishable. There was no acknowledgment by the Crown in that case of the locatee's right. The interest was merely that of a squatter.

(*a*) 18 Grant 483. (*b*) 1 E. & A. 117. (*c*) 20 Gr. 613.

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Abell v. Weir.

BLAKE, V. C., refused to make a decree, suggesting that the party desiring partition, could pay the amount due the crown, and then come for partition and for a charge of the share of the purchase money advanced by him.

SOLICITORS.—*Mowat, Maclennan,* and *Downey,* for the plaintiff.

WARDELL v. TRENOUTH.

Specific performance—Compensation for deficiency of land, &c.—Pleading—Practice—Offer to complete contract.

In a suit for specific performance an objection that the bill does not contain an offer by the plaintiff to fulfil the agreement on his part, is too late when taken for the first time at the hearing; although effect would have been given to such objection if it had been taken by demurrer.

Where a purchase was made of 300 acres, "more or less," and upon a survey being made of the lands, they were found to contain only 244 acres:

Held, that this was such a difference as entitled the purchaser to compensation; and the fact that the lands were alleged to be of but comparatively small value, could not affect the right of the purchaser to an allowance for the deficiency.

The purchase was of a mill site and mill. Subsequently it appeared that the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser on negociating for such purchase:

Held, that this also was a subject for compensation.

Where the time for the completion of a contract had not arrived, some of the instalments of purchase being not yet due:

Held, that, under the circumstances, though there could not be a decree for specific performance, the purchaser was entitled to a declaration of right to specific performance and an inquiry as to title; the over due instalments of purchase money being paid into Court.

The defendant, on the 12th October, 1870, entered into a contract in writing with the plaintiffs to sell to

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Wardell v Trenouth.

them 300 acres of land on which was a saw mill, together with the machinery in the mill and the logs in the pond, as also the benefit of a certain agreement for the purchase of some standing timber from a third party on some other land. The whole purchase money, $3,000, was made payable by annual instalments of $300 each. The land sold consisted of parts of lots sixteen and seventeen, and the mill privilege was created by the Black river, which flows from east of lot sixteen to the west of seventeen, and the mill pond was partially on both lots, principally on lot seventeen. By an agreement made in 1867, the defendant had sold to *Henry W. Sage & Co.*, sufficient land on lot seventeen, running about south west from the mill pond, to make a canal to connect the Black river with a small lake to the south, for the purpose of running logs coming down Black river into this lake, together with the right to take sufficient water from the pond to float the logs through this canal, and this agreement had been assigned to the Timber Transportation Company.

Statement.

The canal was actually built and used before the contract in question was made, but it appeared in evidence that when the contract was being entered into, the fact of the grant of the right to take water for the canal was concealed by the defendant from the plaintiffs; and that the defendant actually represented to the plaintiffs that he had full control of the water, and that the canal owners must pay for it whenever they used it; and that he had been charging them $6 per day therefor: but this was shewn to be incorrect.

It was proved that the canal was in operation for a considerable part of the milling season, and that the taking of the water for the purposes thereof interfered seriously with the working of the mill.

It was also shewn that the land fell short of the 300 acres by about 56 acres; that the timber on lot sixteen, was reserved by the deed under which the defendant claimed to his grantors, and that in other respects the contract was not performed by defendant.

The cause was heard at Barrie, in September, 1876. 1877.

Wardell v. Trenouth.

Mr. *Fitzgerald*, Q. C., for the plaintiffs.
Mr. *Maclennan*, Q. C., for the defendants.

PROUDFOOT, V. C.—The contract in this case cannot be rescinded. The plaintiffs are no longer in a position to restore the property in the state they received it—and this by their own acts in pursuance of the contract of purchase.

The time not having arrived for the completion of the contract, the purchase money being payable by instalments, all of which are not due, and the deed not to be executed till money paid, there cannot be a decree for specific performance. *Towers* v. *Christie* (*a*).

But the plaintiffs are not bound to go on paying their purchase money if the title is bad. I think, therefore that they are entitled to a declaration of right to specific performance and to an inquiry as to title; but they must pay the overdue instalments of purchase money into Court: *O'Keefe* v. *Taylor* (*b*), *Thompson* v. *Brunskill* (*c*). Judgment.

I do not think that the plaintiffs, by taking possession, have waived their right to an inquiry as to title. The contract provides for the possession being taken; and it must have been intended that the plaintiffs are to deal with the property for the purpose for which it was bought. The clause in the contract that the plaintiffs are to be subject to voluntary or permissive waste, seems to me to establish this, as a remedy was thereby secured to the vendor for such waste, in case the contract should not be completed, *O'Keefe* v. *Taylor* (*d*), the general rule being, that acts of ownership after an authorized possession are unimportant.

The plaintiffs will also be declared entitled to specific performance with compensation for the deficiency in

(*a*) 6 Gr. 159.
(*b*) 2 Gr. 305.
(*c*) 7 Gr. 542.
(*d*) 2 Gr. 305.

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quantity, and for the undisclosed right of the Transport Company to take water for floating logs through the canal.

Where the land is sold by the acre the purchaser will be entitled to compensation, if quantity deficient,—*i. e.*, materially deficient; and the same rule applies, though neither bought nor sold by the acre—and this though the agreement contain the words *by estimation* or *more or less*, as in this case. The plaintiffs thought they were purchasing, and the vendor intended to sell 300 acres, which on survey turn out to be only 244. It is true, that the plaintiffs wanted the mill and site, perhaps principally, but they also wanted the land, and I have no means of determining how far the number of acres influenced them in the price they were to pay. They say it was of importance to them; and I do not think the conversations, in which they are said to have treated the land lightly in comparison with the mill, are sufficient to deprive them of the right (*a*).

Judgment.

Nor is the comparatively small value of the land alone to be taken into consideration. I think the area, as well as the value, ought to be taken into account. Here there is a deficiency of about one fifth in area, and I think that quite enough to entitle them to compensation. If the land be of such small value as alleged, the plaintiffs will receive so much less compensation.

As to the right of the Company to the water, I think, upon the evidence, I must come to the conclusion that it was not disclosed to the plaintiffs; and that the defendant could not be heard to say he did not know of his having made the grant to the Company. He seems to have said so to some of the witnesses; but on his examination he took another course, and maintained that he had acquainted the plaintiffs with the Company's right. He may perhaps have intended to do so, but I am satisfied he failed to communicate the right to the plaintiffs.

(*a*) Sug. V. & P. 13 ed. 239.

That this is a material circumstance affecting the value of the mill site there can be no question,—as when the water is used for the canal it interferes with the successful working of the mill; and I do not think that the registry of the grant to the Company affects the plaintiffs with notice, so as to prevent them from seeking relief in regard to it. There was no investigation of title, no delivery of an abstract; the plaintiffs bought on the faith that they were entitled to be paid for the use of the water; and, it turning out that they are not so entitled, they must be compensated for it.

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It was insisted, however, that the bill was defective in containing no offer by the plaintiffs to fulfill the agreement on his part. The objection I think would have been good, if taken by demurrer, but as it was first made at the hearing I think the bill may be amended in that respect.*

Judgment.

Plaintiffs to have costs to the hearing. Subsequent costs reserved.

SOLICITORS.—*Fitzgerald* and *Arnoldi*, for the plaintiffs; *Mowat*, *Maclennan*, and *Downey*, for the defendant.

* In this respect the brief handed in was inaccurate, as the bill on the files contained the offer.

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CROMBIE v. COOPER.

Will, construction of—After-acquired property—Imperfect enumeration—Residue.

Held, on rehearing [affirming the decree reported ante volume xxii. p. 267] that, although a will speaks from the death of the testator, and so would carry after-acquired lands, yet where a testator devised to his wife all the remainder of his real estate, and then proceeded to enumerate the lands comprised in such remainder, after-acquired lands did not pass as part of the residue.

This was a rehearing of the case as reported ante volume xxii. p. 267, at the instance of the plaintiff.

The facts appear sufficiently in the former report and the judgment.

Mr. *Attorney-General Mowat* for the plaintiff.

Mr. *G. H. Watson*, for the defendant.

In addition to the cases mentioned in the judgment, counsel referred to and commented on *Chalmers* v. *Stovill* (*a*), *Cox* v. *Bennett* (*b*), Lord *Lifford* v. *Keck* (*c*).

Judgment. SPRAGGE, C.—I have examined the different cases cited. The rule to be deduced from them seems to be, that where the will contains a particular description of the property devised, after-acquired property will not pass by general words. This rule is not disputed, but is clearly admitted by Sir *Richard Malins*, in the Cleeve Court Case—*Castle* v. *Fox* (*d*), who says, (p. 548), "It has been much pressed upon me that although as a general rule, it cannot be denied that under the 24th section of the Wills' Act all property acquired by a testator after the date of his will, will pass where there is a general description, that rule will not apply when there is a particular description," and again, (p. 551,) "The Legislature says, I must read the will as if it were

(*a*) 2 V. and B. 222.
(*b*) L. R. Eq., 422.
(*c*) 30 Beav. 300.
(*d*) L. R. 11 Eq. 542.

made immediately before the death of the testator. Doing that, I find he has a house in Grosvenor Square, and that must necessarily pass. But if he adds a description shewing that he meant a particular thing only—if, for instance, he says, 'I give my house No. 2 Grosvenor Square', and if he afterwards sells that house, and buys No. 6, I am equally clear that No. 6 would not pass." The learned Vice-Chancellor held the case before him out of the rule upon circumstances which do not apply to this case. The reasoning upon which the case was decided appears o me to be sound, and the case rightly decided, but neither the reasoning nor the decision has any application to the case before us.

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I agree in the judgment pronounced by my brother, *Blake* at the hearing, and in the judgment of my brother *Proudfoot*.

The most that can be said of the plaintiff's case is, that her construction of the will is doubtful; and that is sufficient for the disposition of this case. It is not a title that would be forced upon a purchaser.

I think the decree should be affirmed, with costs.

Judgment.

BLAKE, V. C.—I cannot find any authority for the proposition that where there is, as to real estate, an "imperfect enumeration," following general words of devise, the Court will withdraw from the heir at law the lands not specificially mentioned. Here, however, there is no room for the application of the rule, if any such there be, as there was a perfect enumeration of all the testator owned at the time the will was made. That which the testator calls "All and singular the remainder of my real estate," he defines by using the word "namely," followed by a description of all the realty then left to be devised. These general words thus limited and qualified cannot, it seems to me, be extended to cover property acquired afterwards, and clearly not in the contemplation of the testator, at the time he made his will. This being so, there are no words in the will which can operate

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on the land in question; the plaintiff has no title to it, and her bill must be dismissed, with costs.

PROUDFOOT, V. C.—There is a rule of construction of wills as applicable now as before the Wills' Acts (*a*), that an heir-at-law can only be disinherited by express devise or necessary implication (*b*).

Under the prior law, the will, under a general devise of real estate, applied to the lands the testator owned at its date and which he continued to own until his death. Under the present law it speaks as from the death, unless a contrary intention appears by the will. Whatever formerly would have sufficed to exclude its application to land which the testator owned at the date of the will and at his death, will be a sufficient contrary intention to exclude it now. The contrary intention may be gathered from the dispositions of the will, according to ordinary rules of construction, pointing to another date than the death: *Cole* v. *Scott* (*c*).

Judgment.

In *Gascoigne* v. *Burkley* (*d*) where a testator gave to his son *Henry* and his heirs all his lands, tenements, and hereditaments in possession and reversion, freehold and copyhold in the parish of Chiswick, or elsewhere in the County of Middlesex, ("which copyhold lands I have surrendered to the use of my will"), it was held by Lord *Harkwicke* that copyholds not surrendered did not pass. The general language of the will was satisfied by limiting it to the surrendered copyholds.

This was followed in *Wilson* v. *Mount* (*e*) Lord *Alvanley* there says, "It was not necessary to consider the parenthesis more than an assertion. It seems to me enough to say it may operate as a restriction. If he had said all his copyhold lands, I must have taken it that he meant whether surrendered or not; but upon

(*a*) 32 Vic. ch. 8 sec. 1; 36 Vic. ch. 20 sec. 21.
(*b*) 1 *Jarm.* Wills, 497, 2 *ib.* 763-5.
(*c*) 1 McM. & G. 518. (*d*) 3 Atk. 8.
(*e*) 3 Ves. 190.

this description it is at least doubtful whether he meant to pass this," and referring to a case cited from *Hobart's* Reports, he says: "The result of all is, that if a *videlicet* is repugnant to what has gone before, it shall be rejected, but if it can be reconciled and made restrictive it shall be so."

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In the present case the testator gives the *remainder* of his real estate, viz., specifying the parcels of which it consisted, and which was a correct enumeration at the date of the will.

I cannot perceive any valid distinction between the description of the property as "surrendered," and the specification of the particulars of which it was composed, as a criterion to determine what the testator meant to devise.

A different rule prevails in regard to personalty. It has always been presumed to have been the intention of the testator to pass whatever he might be possessed of at the date of his death. The tendency has always been to narrow the construction of a devise of realty. Per Sir *W. Page Wood*, V. C., in *Dean* v. *Gibson* (*a*).

Judgment.

The cases referred to, of *Bridges* v. *Bridges* (*b*), *Chalmers* v. *Stovil* (*c*), and *Dean* v. *Gibson* (*d*), were all cases of defective enumeration of personalty.

In *Cole* v. *Scott* (*e*), quoted with approval by Sir *W. Page Wood*, V. C., in *Douglas* v. *Douglas* (*f*), Lord *Cottenham* says, what every one must agree in thinking correct, that the intention of the testator is not to be altered; and if it be clear that the testator is not referring to a general class of property but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, where the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking.

(*a*) L. R. 3 Eq. 713.
(*b*) 8 Vin. Abr. 295 Pl. 13 Devise.
(*c*) 2 V. & B. 222.
(*d*) L. R. 3 Eq. 713.
(*e*) 1 McN. & G. 515.
(*f*) Kay 400.

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Applying that rule in this case, as well as the former one, that an heir is not to be disinherited by doubtful implication, I do not think the after-acquired estate passed, and at all events it is too doubtful a title to compel the purchaser to take.

I think the decree should be affirmed with costs.

SOLICITORS.—*Mowat, Maclennan*, and *Downey*, agents for *Chisholm* and *Haslitt*, Hamilton, for plaintiff; *Watson* and *Haggart*, for defendant.

COGSWELL v. SUGDEN.

Pleading—Practice—Demurrer—Declaratory decree—Chose in action.

The Court will not make a declaratory decree simply, without directing any relief to the plaintiff. Therefore, where the plaintiff was liable to pay to one *W.* $2,000 one year after the death of plaintiff's mother, who was alive, and the plaintiff had paid a large portion of such legacy to *W.*, who had made an assignment thereof, the Court refused to make any decree declaring the rights of the parties, or restraining an assignment of the legacy: the right to recover the legacy being a mere chose in action, any person accepting an assignment thereof took it subject to all equities, and took it for no more than the amount that was actually due in respect of it.

Statement.

This was a bill by *Asa H. Cogswell* against *John Sugden, Noah W. Sugden, Samuel T. Sugden, George F. Wilson*, and *John Hossie*, official assignee, and *John Idington*, made defendants by amendment, setting forth that his father, the late *Francis F. Cogswell*, devised to the mother of the plaintiff for her life lot No. 1 in the township of East Nissouri, remainder to the plaintiff, subject to the payment to *George F. Wilson*, one year after the death of plaintiff's mother, of $2000; that plaintiff purchased out the life-interest of his mother, and subsequently at the request of *Wilson*, and to assist him in his business, paid to *Wilson* several sums amount-

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Cogswell v. Sugden.

ing to $1500 on account of such legacy; afterwards and on the 7th April, 1878, *Wilson* assigned to the defendants *Sugden* his interest in the legacy, the defendants *Sugden* being well aware of the fact that plaintiff had paid large sums to *Wilson* on account thereof, such assignment being made to them as a security for *Wilson's* indebtedness to them, stated in the assignment to be $1500; that the *Sugdens*, before their insolvency, assigned to defendant *Idington* their interest in said legacy as security for a sum of money which he had become liable for on their account.

The bill prayed an injunction to restrain the defendants from assigning the said transfer and the legacy therein mentioned; that it might be declared that the assignment, so far as it related to moneys actually and *bonâ fide* and without notice of such assignment paid to *Wilson*, was void, and that the payments made by plaintiff to *Wilson* were good and valid payments on account of such legacy, and that *Wilson* should be ordered to give a proper discharge for so much of the legacy as plaintiff had paid.

Statement.

The defendant *Idington* demurred for want of equity.

Mr. *Moss*, in support of the demurrer. The Court will not pronounce a decree of a merely declaratory nature; such a decree never being made unless the plaintiff is entitled to some relief consequential on such declaration.

Mr. *Boyd*, Q. C., contra, submitted that the plaintiff had a right to have the amount of legacy discharged *pro tanto*, and instanced a suit for the perpetuation of evidence as one in which the Court bas always been in the habit of making a decree, although the plaintiff is not entitled to any further relief.

Clough v. *Radcliffe* (*a*), *Rooke* v. *Lord Kensington*

(*a*) 1 DeG. & S. 164.

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(*a*), *Jackson* v. *Turnley* (*b*), *Gould* v. *Close* (*c*), *Graham* v. *Johnson* (*d*) were, amongst other cases, referred to.

April 18th.

BLAKE, V. C.—I think the demurrer of the defendant *Idington* must be allowed. The plaintiff claims that he has paid a sum of money in part satisfaction of a demand against him, in respect of that which he alleges to be a chose in action, and he asks a declaration that this is a good payment and a satisfaction *pro tanto*, and asks that certain of the defendants may be restrained from dealing with the legacy in question. The liability of the plaintiff being represented by a chose in action, whoever takes this security takes it subject to all the equities, and takes it for no more than the amount that may be actually due upon it. The assignee stands in no better position than the assignor. If a declaration such as the plaintiff here demands were made, it would follow that in every case where a debtor had made a payment on a bond, he could come to this Court and demand a declaration of the actual amount due on the instrument. I would not be justified in incumbering the records of the Court with a finding so barren of practical benefit, unless some precedent were furnished to me.

Judgment.

SOLICITORS.—*Blake*, *Kerr*, and *Boyd*, agents for *Ball*, *Matheson*, and *Ball*, Stratford, for plaintiffs; *Bethune*, *Osler*, and *Moss*, agents for *Idington* and *Mickle*, Stratford, for defendants.

(*a*) 2 K. & J. 758. (*b*) 1 Drew. 617.
(*c*) 21 Gr. 273. (*d*) L. R. 8 Eq. 36.

KNOX v. TRAVER. 1877.

Fraudulent conveyance—Resulting trust—Father and son.

Although a debtor may be at liberty under the Statute of Elizabeth to prefer a creditor by creating a mortgage in his favour; still, if the reference given is only colourable to secure that creditor, and in reality for the fraudulent purpose of defeating other creditors, and such purpose is known to the preferred creditor, who lends himself to it, not for the purpose of obtaining security for his debt, but of aiding the fraudulent purpose of his debtor, the element of *bona fides* is wanting, which is necessary for the protection of the transaction under the Act.

Where money is advanced by a father for the purchase of land, the conveyance of which is taken in the name of his son, the presumption is, that the transaction is by way of advancement to the son. In such a case, there is no resulting trust in favour of the father.

Land stood in the name of a son who was in embarrassed circumstances, and the same was conveyed by him to his father, who asserted that he had advanced the money wherewith to pay the consideration, and he created mortgages thereon to secure his own liabilities in favour of *bonâ fide* creditors, with the sanction of the son. The Court, being satisfied that this was a scheme adopted for the purpose of defeating and delaying the creditors of the son, declared the conveyance to the father fraudulent as against creditors.

Statement.

This was a suit brought by *Uriah Knox* on behalf of himself and the other creditors of *Edwin Weeks Traver*, against *Jonathan Traver*, *Edwin Weeks Traver*, *Eliza Ann White*, and *Charles Arthur*.

The bill alleged an indebtedness by the defendant *Edwin Weeks Traver* to the plaintiff, and also to other creditors; that before and at the time of incurring said liabilities, the said defendant was the owner in fee of fifty acres of land of the value of $2,000; that after incurring such liabilities the said defendant made a voluntary conveyance of said land to his father, the defendant *Jonathan Traver*, with an intent on the part of both thereby to defeat, delay, and defraud the plaintiff and the other creditors of defendant *Edwin Weeks Traver*.

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The bill further stated, that after making such conveyance, the defendant *Edwin Weeks Traver* made a voluntary assignment under the Insolvent Act of 1869, and afterwards applied for his discharge, which was refused on the ground that he was not a trader.

That after the making of the deed from defendant *Edwin Weeks Traver* to defendant *Jonathan Traver*, and whilst the proceedings ininsolvency were pending, the said defendant *Jonathan Traver* for the purpose of more effectually carrying out the fraudulent purpose aforesaid voluntarily executed two mortgages of the said land, one to the defendant *White* and the other to defendant *Arthur*, a son-in-law of the defendant *Jonathan Traver*. The bill charged that such mortgages were merely colourable instruments, and made without consideration, and for the fraudulent purpose aforesaid.

The prayer of the bill was, that the said deed and mortgages might be declared void as against the plaintiff and the other creditors of *Edwin Weeks Traver*.

Statement.

The defence set up was, that the land mentioned in the bill was purchased by defendant *Jonathan Traver* and paid for with his own money, but the deed was taken to *Edwin Weeks Traver* for the purpose merely of qualifying him to vote at elections, and not with the intent that he should thereby become the owner. And denied that *Edwin Weeks Traver* ever was the owner in fact of the land: that about the time of such purchase the defendant *Jonathan Traver* agreed with his sons *Charles* and *Edwin* that if they continued to reside upon and cultivate the farm, of which this land formed a portion, and thereby assist him to pay for the land, the same should belong to them, but neither of them should have any claim thereon in case they engaged in any other business: that prior to the conveyance from *Edwin Weeks Traver* to *Jonathan Traver*, *Edwin Weeks Traver* did leave the farm and engage in other business, and thereupon the defendant *Jonathan Traver* demanded from *Edwin Weeks Traver* a conveyance of the

land, and that solely for the said reason he the said *Edwin Weeks Traver* executed the deed to the defendant *Jonathan Traver*. 1877. Knox v. Traver.

The defendants by their answers, further asserted that the said mortgages were given *bonâ fide* and for valuable consideration, and were taken by the mortgagees without notice of any fraud, if any existed.

The cause came on for the examination of witnesses and hearing before *Proudfoot*, V. C., at the sittings holden at Belleville in May, 1876, when a decree was made declaring the said deed and mortgages void, with costs.

The cause was afterwards re-heard before the full Court on behalf of the mortgagees.

Mr. *Wallbridge*, Q. C., Mr. *Fitzgerald*, Q. C., and Mr. *Francis*, for the mortgagees *Arthur* and *White*.

Mr. *Hodgins*, Q. C., and Mr. *G. E. Henderson*, Q. C., for the plaintiff.

SPRAGGE, C.—The plaintiff's position is, that the debtor to the defendants *White* and *Arthur* was *Jonathan Traver* (the father), and that the debt to the plaintiff is that of *Edwin* the son. Further, that the land upon which these mortgages were given was the land of *Edwin*, and not of *Jonathan*. If this be so, *Jonathan* was a volunteer; *Edwin* conveying to him his land in order to his pledging it for his own debt. My brother *Proudfoot* came to the conclusion upon the evidence that at the date of the conveyance of *Edwin* to *Jonathan*, *Edwin* was the owner of the land, and the correctness of this conclusion is not controverted; it is clear that the debt due the plaintiff is due by *Edwin*. The remaining point is, whether the debts to *White* and *Arthur* were due by *Jonathan* (the father), or by *Edwin*. If by *Jonathan* and not by *Edwin*, the plaintiff's case is clear, inasmuch as upon the evidence there can be no doubt that at the date of the conveyance to him by Judgment.

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Edwin, the circumstances of *Edwin* were such that the withdrawal of the land in question from the reach of creditors would have the effect of delaying and hindering them.

Two notes were given to Mrs. *White*, dated the 20th of July, 1872, at two years from date, with interest, each for $400, signed "*Jonathan Traaver*," "*Edwin W. Traver.*" The note to *Arthur* is by *Jonathan Traver* alone, dated 4th February, 1874, for $550, at two years after date with interest. The purchase money of the land was $1,200, of which $500 was paid down and a mortgage given for the balance $700; the down payment was by *Edwin*, and the mortgage also by him. *Jonathan* says, the purchase was for him, that he paid the down payment, and paid off the mortgage, and he explains how. If so, he was the debtor for the money borrowed for the purpose. But suppose him to be wrong as to the purchase being by him, and that the purchase was in truth by *Edwin*, and that he (*Jonathan*) borrowed the moneys wherewith the payments were made, it would be a case of purchase by *Edwin* with the moneys of *Jonathan*, and it would be a case of resulting trust in the land, were it not that *Jonathan* is father of *Edwin*, and the resulting trust is negatived. The transaction might have been that the son purchased for himself, the father to raise the money for him and to be repaid by the son; in that case as between themselves the son would be the principal debtor on the notes, and the father would be the surety, and the conveyance to the father would not be to a mere volunteer, but to indemnify a surety; but if the transactions were of that nature it would have to be shewn by evidence; it would be rebutting a presumption, and that requires evidence. *Jonathan's* own evidence is rather the other way. The conveyance was intended to be as it was to *Edwin*, for a purpose—it was said to give him a vote. He says: "*Edwin* was to give him a deed of it when he should be about to make his will." The drift of all this, and of a good deal that follows it, is to

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shew that he, and not *Edwin*, was the real purchaser and the owner, and this is consistent only with the hypothesis that he, and not *Edwin*, was the debtor for the money in question. But it is argued that he is *Edwin's* creditor, a creditor preferred by *Edwin* as *Edwin* had a right to do; but *Jonathan* in his evidence repudiates this, and it is not consistent with his position that he is the owner of the land, and with the evidence that he gives in support of that position.

From *merely reading* the evidence, I should judge it to be most unreliable, and that it would be very unsafe to found a decree upon the account given of the transaction by the *Travers*, father and son. It is peculiarly a case in which the opinion formed of the witnesses, and of the weight due to their testimony, by the Judge before whom the cause was heard, should be respected by the Judges who hear the case only by way of appeal.

Whether the father gives a true account of the application of the money borrowed by him may be very questionable, but assuming it to be true the matter would stand thus: Land is purchased, and the purchase money was intended to be paid and was paid by *Jonathan*, the father, in part through *Edwin* the son, and the balance directly by the father, the conveyance being made directly to the son; and there being no evidence that it was not intended to be so made. In such a case (as I have already observed) there would be no resulting trust, the presumption being, that the purchase and conveyance were intended to be by way of advancement to the son, and there is no evidence whatever to rebut that presumption. That being the case the son is absolute owner, and the purchase money paid by the father is not a debt due to him by the son. But the purchase money is paid, it is said, by money borrowed by the father from third persons. It will not be contended, I suppose, that these third persons had any lien upon the land in respect of the moneys lent by them to the father. The father gave notes for the moneys so

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borrowed; these notes were to be paid by him. In the notes given to one of the lenders, Mrs. *White*, the son was a party as a joint maker, signing his name under that of the father; those notes, as well as the one to *Arthur*, were to be paid by the father. In none of them was his position that of surety for his son, so that in no sense was the father a creditor of the son in respect of the purchase money of the land, or in respect of the money borrowed (assuming it to have been borrowed) to pay that purchase money. The circumstances that I have assumed would, therefore, have no effect upon the position of the son being absolute owner of the land. The money borrowed was not a charge upon the land, nor was the son liable in respect of that money, except as he made himself liable to Mrs. *White* as joint maker with his father of the notes to her; and as to them he was, as between his father and himself, surety only for their payment. This view of the case appears to me fully to answer Mr. *Fitzgerald's* position

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that the mortgages in question were given for money borrowed in order to pay the purchase money of the land in question, and are sustainable on that ground.

There is still a consideration applying to the mortgage to Mrs. *White*, which does not apply to the mortgage to *Arthur*, *i.e.*, that the son's liability on the notes to Mrs. *White* made her his creditor (he was not a party to the note to *Arthur*). The argument would be, that granting that the position of the father upon the conveyance to him by his son was that of a volunteer, a mortgage by that volunteer at the instance or with the assent of the son to a person to whom the son was liable would be good as against other creditors, although the debt was primarily the debt of the father, and the son's liability only that of a surety. It is not necessary to deny that it may be so as an abstract proposition of law, but I apprehend that it is not so where the transaction is tainted with *mala fides*, where in the language of the Statute of Elizabeth, the mortgage is a covinous and fraudulent

conveyance, devised with intent to delay, hinder and defraud creditors. The statute makes such conveyances "clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, expression of use, or any other matter or thing to the contrary notwithstanding."

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The 6th section of the Act saves only interests conveyed upon good consideration and *bonâ fide* to a person not having notice or knowledge of covin, fraud, or collusion; and our Provincial Act, 35 Vict, ch. 11, declaring the construction that these provisions of the statute shall receive in this Province, enacts that they shall "Apply to all instruments executed to the end, purpose and intent therein set forth, notwithstanding that the same may be executed upon a valuable consideration, and with the intention, between the parties to the same, of actually transferring to, and for the benefit of the transferee, the interest expressed to be thereby transferred, unless the same be protected under the sixth clause of the said Act, by reason of *bona fides* and want of notice or knowledge on the part of the purchaser."

Judgment.

It may be argued that what was done—the conveyance by the son to the father, and the mortgage by the latter to Mrs. *White*, was only a mode in which the son chose to prefer Mrs. *White* to his other creditors, and that a preference by a debtor of one creditor to another is not against the Statute of Elizabeth. But if the preference given has in it this element, that the transfer by mortgage to the one creditor is only colourable to secure that creditor, and really for the fraudulent purpose of defeating other creditors, and that such purpose is known to the preferred creditor who lends himself to it, not for the purpose really of obtaining security for his debt, but of aiding the fraudulent purpose of his debtor, the element of *bona fides* is wanting, which is necessary for its protection under the 6th section of the Act. It may be difficult in the

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case of a creditor to prove such a case, but it may be susceptible of proof, and the difficulty of proof does not alter the principle. If susceptible of proof, it becomes merely a question of evidence ; and upon the evidence in this case there is hardly room for reasonable doubt that the whole transaction was a fraudulent device by *Edwin* to defeat his creditors, and that Mrs. *White* lent herself to it ; that there was no *bona fides* in it, on the part of any one connected with it. The assumption upon which the whole thing was based, viz., that *Edwin* was principal debtor, was untrue, and was so to the knowledge of Mrs. *White*. She was really scarcely more than passive in the matter and allowed herself to be used as an instrument of fraud, and so is, in my opinion, within the Act.

As to the defendant *Arthur*, there being no debt due by *Edwin* to him he was as between *Edwin* and himself a volunteer, and on that ground simply the mortgage to him must be declared void as against the creditors.

Judgment.

BLAKE, V. C.—On the rehearing of this cause the defendants did not contend that the Judge, before whom the case was tried, had come to an incorrect conclusion in his finding that, as between *Jonathan* and *Edwin Weeks Traver*, the transaction was fraudulent, and that as between them on a bill such as the present and to satisfy creditors, the fifty acres in question is the property of the son. A careful perusal of the evidence shews how hopeless it would have been to have contended against this position. The evidence of the parties to the transaction, coupled with the admissions made by them, shews conclusively that *Edwin Weeks Traver* bought and paid for the land, and that, fearing the result of his patent right speculations, he conveyed the land to his father in order that he might, while thus apparently without any property, settle on his own terms with his creditors, and thereafter procure a reconveyance to himself. While *Edwin Weeks Traver* is endeavouring

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to carry out this scheme, and at the time that his application for a discharge in insolvency is pending before the Insolvent Court, and when he has become aware that, it being doubtful that he is a trader within the meaning of the enactments in question, in all probability his application for a discharge would be refused, the defendants, Mrs. *White* and *Arthur*, are approached and requested to take mortgages on the fifty acres in question. Mrs. *White* describes herself as an intimate friend of the *Traver* family, and *Arthur* is a son-in-law of *Jonathan Traver*. The former is given a mortgage for $800, and the latter for $600. Mrs. *White's* answer and examination do not agree in several important particulars. She admits, however, that at the time she got the mortgage she knew the *Travers* were in difficulties; she knew *Edwin* owned the fifty acres, and that he had conveyed the property to the father in consequence of the patent right business; that she did not like giving up the notes and taking the mortgage; that, however, they got the mortgage signed and registered and given to her. The debt was a debt of *Jonathan Traver*. Mrs. *White* knew this, although *Edwin* was security for its payment; and yet, at the solicitation of the family, she allows the property, which she is aware belongs to *Edwin*, to be withdrawn from his creditors, when, to her knowledge, he is in insolvent circumstances, in order to charge it with a debt due by the father.

Judgment.

I entirely agree in the conclusion arrived at in the Court below, that the transaction was a mere scheme which cannot stand when impeached by a creditor of him whose property has been thus withdrawn. Nor do I think the transaction, so far as *Arthur* is concerned, stands in any better position. He knew that *Edwin W. Traver* really owned the land. He knew why it was conveyed to the father. He knew of the son's embarrassments. He did not ask for the mortgage, nor did he keep it when it was executed. At the close of the argument I made the following note of the conclusion I then arrived at: "All

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proceeds on the proposition that the land is *Edwin's*; this has been so found and the parties do not attack this part of the decree. Therefore it is the case of the land of *Edwin Traver* being abstracted to answer the debts of *Jonathan*. This cannot be allowed, at all events, where the parties had notice of the reason that the land stands in the name of the grantee. There is no sufficient evidence here that this money went into the purchase of the land, and, therefore, there is nothing to warrant the charging of this land with the debt of the father." A perusal of the evidence and further consideration of the case strengthens me in the above conclusion. I think the decree should be affirmed with costs.

Judgment.

HAOUDFOOT, V. C., concurred.

Per Curiam: Decree affirmed with costs.*

SOLICITORS.—*Henderson* and *Henderson*, for the plaintiff. *Wallbridge*, and *Francis*, and *Forbes*, for the defendants.

* The defendants have since filed a petition of appeal.

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JIBB v. JIBB.

Statute of Frauds—Parol agreement—Father and son.

The plaintiff alleged that having remained at home working for his father until he was of the age of 25 or 26 years, he then told him that he must have wages, whereupon the father agreed that he would purchase a certain farm, and that, if plaintiff would remain at home and work until the land was paid for, he would convey the same to the plaintiff; that the plaintiff accordingly remained with and worked for his father until the farm was fully paid for, and of which the father put the plaintiff in possession. In answer to a bill for a specific performance of the alleged agreement, the father positively denied the agreement alleged by the bill, although he admitted that he had bought the land intending to devise it to the plaintiff, and that he had executed a will so disposing of it, and alleged that he intended not to alter the disposition thereby made thereof. The Court, under these circumstances, refused the relief prayed, and dismissed the bill, with costs.

Orr v. *Orr*, *ante* volume xx., p. 425, remarked upon and followed.

Statement.

The bill in this case was filed by *Robert Jibb* against his father *Joseph Jibb*, setting forth that the plaintiff had lived with, and continued to work for the defendant until about the age of twenty-six years, when, becoming dissatisfied, plaintiff was about to leave, whereupon the defendant agreed that if plaintiff would remain and continue to work for the defendant until the defendant should pay the balance of purchase money due and owing by him in respect of the north half of lot No. 11 in the 8th concession of Haldimand, he, the defendant, would convey the same to the plaintiff: that, depending on such promise and undertaking of defendant, the plaintiff did continue to work for defendant until he had paid such balance of purchase money; whereupon the defendant put plaintiff into possession of the said land, and the plaintiff had continued ever since in possession thereof and had made very many improvements thereon. The bill further alleged that the defendant had frequently promised plaintiff to convey said land to him, but recently had refused to do so and had, on the contrary, instructed

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proceedings to be instituted to turn the plaintiff out of possession; and prayed a specific performance of the alleged agreement.

The defendant answered the bill, alleging that when he made the purchase of the land in question he did intend the same for the plaintiff, and it was still his intention to devise the same to the plaintiff, but denied positively ever having promised or agreed to convey the the same to plaintiff.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Cobourg in September, 1875.

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

Mr. *J. A. Boyd* and *J. W. Kerr*, for the defendant.

The facts of the case and authorities cited appear in the judgment.

Judgment.

May 9th.

SPRAGGE, C.—I infer from the date of the mortgage, that the date of the purchase by the father from *Warne* was the 15th December 1860; the last instalment of which, ($400), was payable with two years' interest on the 15th December 1863. It appears that the last payment on the mortgage was made on the 12th November 1864, when $374 were paid in full. Plaintiff states his visit to the land with his father with a view to purchase by the father at about September, 1860—then 25 or 26 years old—and that he went out a second time in about ten days. Between the two visits plaintiff says he told his father that he could not go on that way any longer, that he must have wages. In answer his father said he would buy him the farm if he would stop at home till it was paid for, and would give it to him; and he then told his father he would stay at home. He says his father told him the price was $2,000, but did not say how it was to be paid for. He said plaintiff was to have it for what he had done for him or for his wages;

says he remained with his father till it was paid for. His father told him when it was; he was then 29 or 30 years old. Father said you are at liberty now. Plaintiff had married about a year before this; two or three weeks afterwards he asked his father if he could go on to the place; the father assented, and took him to the place with his own horses and waggon, He gives evidence of improvements made by him, his father assisting; says his father used to keep telling him that he would give him the title before long. This would appear to be after he had been put into possession; says he never asked for a deed till about two years before his evidence, *i.e.*, before September, 1875. He gives an account of what passed between his father and himself in relation to a deed—that he at first promised it, then stated that his family objected, and then refused. Says, on cross-examination, that when put into possession, his father told him "he would give him a deed right away."

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The father denies the agreement set up by the plaintiff or that he promised him a deed; admits only this, that before the last payment he proposed to his son that he should make that payment or take it upon himself, and if he would he, the father, would let him have the land; which proposal the son declined on the score of his inability to do it. The son denies that this proposal was made.

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On cross-examination the son places his demand for wages at three, or four, or six years before he and his father went to look at the farm; says he asked how long it would be before the farm would be paid for; father would not tell him; got married without knowing; supposed it would be five or six or seven years. In another passage he says he never asked his father time or terms of payment; notes the illness of father, which he puts at about eleven years before examination; he was told that a will was being made, but never said that he had been promised a deed; says he was told by his mother that lot in question was being willed to him. If this is true it is the less strange

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that he did not say that he had been promised a deed, though still he would probably say it.

Warne, the vendor of the land, gives evidence that the father stated that he was buying the land for his son *Robert*. That would be no more than a declared intention. He adds this, that he asked why the deed was not drawn in the son's name; and the answer was, that he was to put in his time till it was all settled, till the land was paid for. He professes not to be able to give the exact words but the meaning. He says his memory is rather poor, but the son was to put in his time till all was settled. I thought this witness meant to speak truthfully, but that he gave his evidence under the influence of a feeling that the son had not been well used by his father.

The evidence of *Anthony Shewin* is not very material. It is of conversation with the father after the purchase of the farm, and amounts to this, that the father said he had bought it for his son *Robert*, but he was not going to put him on the place till it was paid for. The evidence of *Staples* is to much the same effect, with the addition that the son might have had the place a year ago if he would have paid £50, and a conversation evidencing that the father did not know the difference between a conveyance and a will. The evidence of *Thomas Beavan* is of a promise by the father in the fall of 1874 to give the son a deed. Other witnesses speak of the declared intention of the father in the purchase of the place, that it was for his son; and one *Robert Montgomery*, of the father saying in the autumn of 1873 that he was ready to give a deed at any time, but that the mother objected. The evidence of *George D. Nixon* is to the same effect. Several witnesses speak of the plaintiff as a very hard-working young man.

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For the defence is the evidence of two sons-in-law of the defendant, to the effect that before and at the time of the will being made the plaintiff did not speak of his being entitled to a deed, but only to his looking for the

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place after his father's death. He was very anxious that a will should be made.

The defendant in his evidence utterly denies the agreement stated by his son. He admits that he purchased the place *intending* that his son should have it at his death "if he behaved himself," and that he made known that intention to his son; and he says this —that when there was about £100 due on the lot he told his son that the land was to be his if he paid it off, and that his son declined this. I gather from his evidence that there was some talk about his giving his son a deed within the last two years, and that he probably would have given him a deed but for the opposition of his family, and that he had told him he would give him a deed if he would pay the £100 remaining then on the land. He says that he has made his will devising the land to the plaintiff and that he does not mean to change it.

Judgment.

The evidence of the plaintiff's mother, which was given with intelligence and great apparent truthfulness, is, in matters known to her, confirmatory of that of her husband. I will refer to some passages in it. "I heard the defendant say in *Robert's* presence that he intended the Haldimand farm for him at his death. I heard plaintiff and defendant talking when plaintiff was about getting married. Defendant asked him what he was going to do with his wife. Plaintiff said, she was going to stay where she was. Defendant said, 'I tell you what I will do with you: if you'll make the last payment of about £100 on the Haldimand lot you may have it, and I'll have nothing further to do with it;' and plaintiff said no, he could never pay for it, and that if he took it, *Joseph* would want the homestead, and that defendant would be turned out of doors. I never heard plaintiff ask for a deed. I remember the Friday. *Robert* came in in a great passion. He said he had come to see what we were going to do. I talked with him. I asked him to be quiet, reminded him that he had always said he

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only wanted it at defendant's death. I told him that if he held his noise, he was sure of it. I told him how the will was made, and he said that was all he wanted. About ten years ago, when the will was made, plaintiff was there. He asked me how the father had left it, and I told him that the Haldimand place was clear or pretty nearly clear to him, and that *Joseph* was to have the homestead and pay the girls. Several times, after plaintiff was married, both before and after he went on the place, he asked me to get his father to make a will. He said, if he did'nt, he would only come in with the rest."

The evidence of *Joseph Jibb*, a son of the defandant, is also confirmatory.

What the plaintiff sets up, and what he must establish by proof, is, that there was an agreement between his father and himself that, if he remained with his father and worked on the homestead until the land in question was paid for by the father, the father would give it to him and, as he says, would convey it to him by deed.

Judgment.

He does not say that any third person was present at this alleged agreement, and the only confirmatory evidence, if it can be called confirmatory evidence, is that of *Warne*, the vendor of the land, to which I have already adverted, the fact of the father stating that he was buying the land for his son and *Warne* asking why the deed was not in the son's name, when the father said that his son was to put in his time till it was all paid for. It would be going rather far to infer from this that the father had bound himself to convey the land after he had "put in his time," even assuming the words correctly remembered after the lapse of fifteen years by a man who confessses that he has a bad memory and who was speaking of a matter of no interest to himself. It would be most unsafe to rely upon such testimony.

Then this alleged agreement is denied by the father as positively as it is asserted by the son, and I see no reason to believe the son rather than the father. The interest of the son to establish an agreement is greater

than that of the father in resisting it; for the father had his own homestead, and had placed the son in possession of the place in question, and which, no doubt, he had destined for him. Further, the son is not quite consistent in the date that he assigns for the making of this agreement, placing it at first in the interval of ten days between the first and second visit to the place with a view to purchase, and then at several months before the first visit. Again, his period of service before he should become entitled was, according to his own account, most indefinite and his father, he says, refused to tell him. This was consistent with his father declaring his intention to buy the land for him and to give it to him at some future time, probably at his death, but scarcely consistent with there being such an agreement as is stated by the plaintiff. It is perhaps not altogether inconsistent with it, but it consorts rather with declared intention than with agreement. And again, his not stating his agreement on occasions when, if in truth there was an agreement, it would, in all human probability, have been stated. Judgment.

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There is then oath against oath as to the fact of agreement, with the circumstances to which I have adverted against the fact, and there is besides some evidence, to which I have referred, in favour of the transaction being of the character stated by the father.

There seems upon the evidence no doubt that the father purchased this land with the avowed intention of giving it to his son at some future time, but there is all the difference in the world between an intention, however clearly and frequently expressed, and an agreement upon consideration. Upon this point, which is a very clear one, I will only refer to the language of *Richards*, C.J., in *Orr* v. *Orr* (*a*): "If children are not disposed to reside with their parents and give to them that comfort and assistance which their duty requires, trusting to the

(*a*) 21 Gr. 425.

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affection of the parent to bestow on them a share of their world's goods, then if they wish to shew that an agreement has been made which is to bind the parent by force of law, and not by the better feeling of affection, Courts ought to require that such agreements shall be established by the clearest evidence; and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind hinself so that he cannot change that intention, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property, if he finds his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views." This language expressed the views of the Court of Appeal, and I agree that it is a correct enunciation of the law, though, in thinking in that case that an agreement was proved, I differed from the other members of the Court.

Judgment.

If in this case the father had been dead, it is clear that the agreement alleged by the son could not have been established upon the evidence given in this case, putting that of the father out of the question. The case cannot be stronger for the son when the father is living, and denies the agreement.

There is nothing in the case made of a promise to make a deed supposing it to be established. If made it was without consideration and could not be the foundation for a bill. The litigation in this case, being as it is between father and son, is very much to be regretted. It is only to be hoped that the father will not resent it by doing what he declared in his evidence he had no intention of doing—altering his will to the prejudice of his son. The bill must be dismissed, and with costs.

SOLICITORS.—*Armour* and *Holland*, for the plaintiff. *J. W. Kerr*, for the defendant.

YATES v. THE GREAT WESTERN RAILWAY CO. 1877.

Patent of invention—Simplicity of invention—Novelty—Laches—Parties—Practice.

The great simplicity of an invention is not a ground of objection to a patent therefor. It is rather a recommendation in favour of it.

In May 1864 one *F.* obtained a patent for an "improved chair for preventing bolts or nuts from becoming loose or insecure;" and the invention was by the patent itself described as consisting "in the lipped chair in combination with the heads or nuts of bolts," and in the specifications the invention was described, partly, as follows: "The chair is constructed with a raised edge or lip, and extending over a part or the whole length of its surface. This lip is formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts D after they are placed in position and firmly screwed to the straps and rails, as shewn. It will be seen that the upper portion of the chair at E forms a seat or cheek, for receiving the sides of the nuts, or heads of the bolts, and which will entirely prevent the bolts from 'working' loose or dropping out of their places, from the vibration of vehicles passing over the rails, or from other causes."

Held, that although rails, chairs, fish plates, and screw bolts, had long been in use separately on railways, still the present combination was such as to effect a new purpose, and as such formed the proper subject of a patent.

The defendants continued to use the combination so patented from the year 1870, and they claimed to have used a similar contrivance some years prior to the patent, and no claim was ever made against the defendants in respect of such user and alleged infringement until the year 1874, when *Y.*, to whom *F.* had assigned an interest in the patent, wrote to the proper officer of the defendants, making a formal demand in respect thereof, but no attention was paid to such demand, and, although the defendants continued to use the combination, no proceeding was taken to prevent them so doing until the 8th of March, 1876, when *Y.* filed a bill seeking to restrain the further infringement of the patent.

Held, that the delay in proceeding formed no objection to the party obtaining relief.

A patentee assigned part of his interest thereunder to the plaintiff, who alone filed a bill to restrain the infringement of the patent. At the hearing an objection was taken that the patentee was not a party to the suit; but *F.*, by his counsel, appearing and consenting to be named as a plaintiff and to be bound by the proceedings in the cause, an amendment in that respect was directed by the decree to be made, and relief granted according to the terms of the prayer.

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Yates v. Great Western R. W. Co.

This was a bill by *Henry Yates*, filed on the 8th of March, 1876, seeking to restrain the infringement of a patent of invention, obtained by one *Thomas Fogg*, a share in which patent *Fogg* had assigned and transferred to the plaintiff. The bill charged that the defendants were infringing the patent, which they by their answer denied, and set up that there was not any novelty in the invention, or at all events not such novelty as entitled the alleged inventor to a patent.

The cause came on for the examination of witnesses and hearing before the Chancellor, at Toronto, on the 24th day of January, 1877.

Mr. *H. MacMahon*, Q.C., and Mr. *J. A. Boyd*, Q. C., for the plaintiff.

Mr. *Samuel Barker*, for the defendants, objected that *Fogg*, the patentee, should be a party to the suit. Counsel for the plaintiff, thereupon, said they were authorized to appear for *Fogg*, and consent to be added as a party and bound by all the proceedings. *Fogg* was accordingly directed to be added as a co-plaintiff. The other facts, and the authorities cited, appear in the judgment.

Judgment.

SPRAGGE, V. C.—The bill is to restrain the infringement of a patent bearing date 2nd May, 1864, granted to the plaintiff *Fogg*, as the inventor of "an improved chair for preventing bolts or nuts used in bracing and joining together iron rails from becoming loose or insecure," and the patent describes it as consisting "in the lipped chair in combination with the heads or nuts of bolts."

In the specification and description annexed to the patent the inventor describes the chair and its combination with the nuts of bolts used in fastening iron plates, called fish-plates or straps, at the "joints," as they are called, of rails, by reference to figures and drawings also annexed to the patent, and he further described it thus: "The chair is constructed with a

raised edge or lip, and extending over a part or the whole of its surface. This lip is formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts D after they are placed in position and firmly screwed to the straps and rails, as shewn. It will be seen that the upper portion of the chair at E forms a seat or cheek, for receiving the sides of the nuts, or heads of the bolts, and which will entirely prevent the bolts from 'working' loose or dropping out of their places, from the vibration of vehicles passing over the rails, or from other causes." It appears by the evidence that chairs placed upon rail-way-ties, and upon which the iron rail rested, were in use before the iron plates, called fish-plates, were introduced; that upon these plates being used the chairs were for awhile discarded, but it being found that the rails, in the absence of chairs, cut into the ties, the chairs were again brought into use; and chairs and plates used in combination; the plates being at the end of each rail—the T rail being used and bolted together by a bolt through the rail; the head of the bolt being on one side and a screw with a square-headed nut on the other. The vibration from the running of trains caused the nuts to unwind from the screw, as well as to wear away the thread of the screw itself; and the consequence was, that the plates had not that firm and close adhesion to the rail, and the rails themselves had not so good a joint as was desirable, in order to the smooth working of the road.

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The desideratum then was, to find some mechanical contrivance by which the unwinding of the nut from the screw should be prevented. There was no novelty in the combination of rail chairs and fish-plates, nor in the latter being bolted together and the bolts being fastened by head on one side and nut and screw on the other. The nut becoming loose on the screw, and working off, was the difficulty to be remedied. And the inventor very properly has confined his application for a patent only to his apparatus for remedying that difficulty.

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His contrivance shortly is, to make the chair with an edge or lip, as it is called in the evidence, carried up of sufficient height to meet the square head of the nut, so that the two should be in contact, or at least so nearly so as to prevent the nut turning on the screw. The upper edge of the lip being square and the head of the nut also square, it is obvious that if a side not a corner of the head of the nut be, or be nearly in close contact with the square lip of the chair, the nut can turn but little, and the closer and more accurate the contact the less must be the turning of the nut, and the more perfect the remedy for the evil to be met.

The apparatus is admittedly useful: it is proved to be so by evidence; and its use upon the Grand Trunk Railway, and its further use after being tested, and its having been also used upon the defendants' railway, are confirmatory of its usefulness.

It is certainly exceedingly simple, but its being so is rather a recommendation than an objection.

Judgment.

In *Murray* v. *Clayton* (*a*), the invention patented was a machine for making bricks. Lord Justice *James* said in that case: "The machine, too, when produced, is so simple and so completely adapted to effect its object that one feels disposed to wonder how people could have gone on for thousands of years making bricks, without ever having thought of it; but that is the case with many noted inventions—when the thing is once hit, it seems a marvel that it was not hit before."

The principal defence is, the want of novelty; that *Fogg* was not the inventor; that the apparatus had been in use before *Fogg* obtained his patent. And rail, chair, and fish plate combined, are produced by the defendants from their own yard; and which some of the witnesses say were in use in their yard in Hamilton, at an earlier date than the issue of the patent, and one of those produced resembles the patent apparatus in one side of the

(*a*) L. R. 7 Chy. 570.

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chair having a raised shoulder or lip, somewhat resembling the lip of the chair in the plaintiffs' apparatus, and being like it under the nut. The value of this as a piece of evidence is, however, impaired by the fact of the rail and chair being old, and the bolt and nut being new, so that it is left doubtful whether the nut used with it was of the same dimensions as the one produced; it may have been much smaller, and so less like *Fogg's* invention.

But assuming what is produced to resemble in all respects what was used, it does not displace the novelty of *Fogg's* apparatus. The shoulder or lip in the specimen produced was not a contrivance to keep the nut from turning, but to keep the rail in its place; this is apparent, from there being a space between the upper part of the shoulder, and the nut in the specimen produced of about one-fifth of an inch; if the nut used with it was smaller the space between would, of course, be greater. As it is, the space is small enough to prevent the nut turning round on the screw; the nut used with it may have been so much smaller as not to prevent it. But what appears to me to be convincing is, that what was used in the Hamilton yard was not an apparatus for the same purpose as *Fogg's* patent is, that any space at all is left between the nut and the upper surface of the shoulder, allowing the nut to play and to wear the thread of the screw. Another reason for the same conclusion is, that the shoulder is brought up under only one nut; and another reason is, that Mr. *Reed*, of the Great Western Railway, treated *Fogg's* apparatus as a new thing; spoke of adopting it; discussed its merits with Mr. *Weatherstone*, superintendent of the roadway, who suggested a slight modification in another part of the chair. Its merits were discussed as a machine for "locking the nuts," a great desideratum at the time. The model was at the time in Mr. *Reed's* office, under the name of "*Fogg's* patent," having been sent to Mr. *Reed* shortly before, in the same year, by

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the plaintiff *Yates*, an assignee of a share in the patent. All this is unaccountable, if the defendants had in use themselves at the time an apparatus for the same purpose. If they had such apparatus it would surely have been known to Mr. *Reed*, and it is scarcely possible that it could have been unknown to Mr. *Weatherstone*. There is this also as bearing upon that point, that upon one of the specimens produced by the defendants is a small square iron plate placed above the nut, and close above it a mechanical contrivance for the same purpose.

It is somewhat remarkable, certainly, that the Great Western Railway people, having in use a chair and fish plates attached to a rail of the pattern to which I have referred, and which only required the shoulder or lip to be raised higher, and the nuts to be of such a size as to meet the lip and be locked by it, it never occurred to any of them so to construct them. But it is only another instance of the correctness of the remark of Lord Justice *James* "When the thing is once hit, it seems a marvel that it was not hit before."

Judgment.

The decision in *Schuster* v. *McKellar* (*a*) is applicable to this case. The head note gives succinctly the point and the decision: "A patentee in his specification claimed as his invention, exhausting from mill stone cases the dusty air blown through between the grinding surfaces by a blast of air, being a combination of a blast and an exhaust applied to the working of a mill. The claim was not restricted to any particular mode of creating or applying the blast of air, nor to any particular mode of producing the exhaust; and *both blast and exhaust had previously been used separately in working mills.* Held, that the invention of this combination and application of a blast and an exhaust might be made the subject of a patent." Lord *Campbell* said, "The whole of the plaintiff's process, if the combination be new, is certainly the subject of a patent; * *

(*a*) 7 E. & B. 725.

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for exhausting the air from the cases of mill-stones, combined with the application of a blast to the grinding surfaces, as they introduce very important improvements in manufacturing wheat and other grain into meal and flour." Here there is more than improvement in a manufacture, by the combination, of what has been used before separately. Chairs with a shoulder or lip, and both with nuts had been used before separately, and were so used in the specimen produced from the defendants' yard; but they were not used in combination. In the *Fogg* patent they are used in combination and not to effect an improvement only, but to effect a new purpose. This case is *a fortiori;* and is *a fortiori* to the doctrine laid down by Lord *Eldon*, and quoted by Lord Justice *James*, in *Murray* v. *Clayton* (*a*), that "There may be a valid patent for a new combination of materials previously in use for the same purpose, or even for a new method of applying such materials." The specimen from the defendants' yard is, so far as the evidence shews, the nearest approach to the *Fogg* patent; and that has not the distinguishing feature of the patented apparatus, the juxtaposition of the lip of the chair with the nut. In my opinion the patent is a valid one.

Judgment.

I think there can be no doubt upon the question of infringement. A model of the rail, chair, fish plates and nuts in combination in actual use upon the defendants' railway is produced in Court. It is the same as the patented apparatus, except in this, that it has in addition an edge or shoulder slightly raised on the chair, on the side opposite to the nuts. This may or may not be an improvement, and if it be, it makes no difference.

This combination was first used in 1870, and I think it a proper conclusion from the evidence, that the articles which go to make up the combination were made after the model in Mr. *Reed's* office, or a model from that model, with the modification suggested by Mr.

(*a*) L. R. 7 Chy. at page 584.

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Weatherstone. The evidence proves that Mr. *Reed* not only adopted, but appropriated the *Fogg* apparatus for use on the defendants' railway. His pressing the adoption of it upon the Board in London in spite of opposition; his vexation expressed at finding some of the nuts made too small to square with the lip of the chair. These are evidences of an intentional adoption of the apparatus for the purpose for which it was designed—this, besides his express approval of it in preference to other contrivances to effect the same object, in his conference on the subject with Mr. *Weatherstone.* I do not say that notice to the defendants of the existence of this patent was necessary to the plaintiffs' case; but it appears, as a fact, that the defendant had notice *i. e.*, if notice to Mr. *Reed* was notice to them, as I think it was. The model in Mr. *Reed's* office was labelled "*Fogg's* patent." Mr. *Reed* was informed of it also by Mr. *Yates*, and Mr. *Yates*, in 1874, addressed a formal letter to Mr. *Muir* on the subject. It is not shewn in evidence what officers of the company Mr. *Reed* and Mr. *Muir* were, but no question was raised as to their being the proper persons to be communicated with on the subject.

Judgment.

In my opinion the plaintiff has established his case, and is entitled to relief; to what relief is a material question. Primarily he is entitled to enjoin the defendants from the further use of the article patented; but that would entail very serious consequences; if carried out literally it would involve the removal of every chair on the defendants' line, with a lip of the construction of the *Fogg* patent, or, at least, the change of the nuts now in use to nuts of such a size as not to be locked by the lip of the chair. Even the change from the present to smaller nuts, is a change for which it would be necessary that time should be given; for to enjoin at once the use of the patented apparatus, would be in effect to enjoin the running of the railway, and is, therefore, entirely out of the question.

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I think the plaintiff entitled to a reasonable compensation for the use of the patented article, from the time of the claim by letter made by Mr. *Yates* in 1874. I would name an earlier date, but its use by the defendants was not formally objected to before that time. I put it as "reasonable compensation," for I do not see how it can be a case for accounts of profits made. For the future a time should be fixed after which the use of the apparatus should be enjoined, the plaintiffs being compensated for its use in the meanwhile.

It may be that the parties may make some arrangement for the future use of the invention. If not, I will hear them as to the date from which the injunction is to take effect.

The decree is to be with costs.*

SOLICITORS.—*MacMahon*, *Gibbons*, and *McNab*, for the plaintiffs; *Barker*, for the defendants.

MEIGHEN v. BUELL.

Appeal from Master—Solicitor—Trustee—Costs.

The rule which prevails in England, that a solicitor, being also a trustee or executor and a party to a suit, is not entitled to charge costs except costs out of pocket, applies with equal force in this country; although here by law he is entitled to receive compensation for his services in the capacity of trustee or executor.

Clack v. *Carlon*, 7 Jur. N. S. 441, not followed.

This was an appeal from the report of the Master at Perth on several grounds, all of which with the exception of the seventh were disposed of at the argument. The seventh ground was, that the Master had improperly allowed to the defendant *Hall* his full costs of suit in proceeding under the decree, which directed generally that the parties should receive their costs.

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* The defendants have since filed a petition to the Court of Appeal, and the case will be argued at the June sittings of that Court.

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The objection and authorities cited are clearly stated in the judgment.

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

Mr. *Moss,* contra.

May 9th.

SPRAGGE, C.—I disposed at the time of the several questions raised upon this appeal with the exception of the seventh.

Mr. *Hall,* one of the three executors, is one of a firm of solicitors who are solicitors for the plaintiff in this suit, and the Master has allowed full costs.

It is contended for the solicitors that it was not open to the Master to do otherwise, as costs are given generally by the decree. The same point was raised in *Cradock* v. *Piper* (*a*), and after consideration by Lord *Cottenham* it was decided by him against the present contention: "The first question," his Lordship observed, "raised in this case, is, whether, under an order to tax costs as between solicitor and client, or generally (and that can make no difference) where the solicitor is also a trustee, it is competent to the Taxing Master to discriminate between the costs of the trustee acting as solicitor and the ordinary costs which would be payable if that circumstance did not exist. It is stated that the Taxing Master has, in the present instance, disallowed to the solicitor all costs except the costs out of pocket, upon the ground that he was a trustee. Now it appears that he acted as solicitor in several suits; in one as solicitor for the plaintiffs, the trustees, of whom he himself was one; in others for *cestui que trusts* who were defendants also for himself and his co-trustees who were likewise defendants. The Taxing Master has disallowed the costs claimed in all these different relations. The first question then is, whether, in the exercise of his duty under the order to tax, independently of any other question, it is competent

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(*a*) 1 McN. & G. at 674.

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for the Taxing Master to exercise the jurisdiction he has thus assumed. It certainly struck me at first that this was a large discretion for the Taxing Master to exercise under an order to tax costs, as in substance and effect it was not taxing the costs at all; for disallowing all costs except the costs out of pocket is in substance disallowing all costs, the actual out-payments not being, properly speaking, costs which constitute those professional charges which a solicitor claims against his client. I find, however, that it has been so understood by the present Taxing Master, and a case was referred to, decided by his Honour Vice Chancellor *Knight Bruce*, in which it was held that under a general order to tax it was competent to the Master to exercise such a discretion."

The general question also I find has been expressly decided. There could be no doubt of the general rule that a trustee acting as a solicitor in the matter of the trust is entitled only to costs out of pocket, but the same distinction has been taken in other cases that has been taken in this case, that the trustee is one of a firm of solicitors, the firm acting for the trust. In *Collins* v. *Carey* (*a*) the question raised was, whether the Master ought to have allowed more than costs out of pocket, for the business done by the plaintiff, and counsel for the solicitors distinguished the case from *New* v. *Jones* (*b*), and *Moore* v. *Frowd* (*c*), on the ground that the business was transacted by a firm one of the members of which was not a trustee, and that he ought not to be deprived of his share of the costs on the ground of his partner filling that character. The Master of the Rolls thought there was no distinction, and disallowed the claim.

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The question was raised again with the same result, in *Christophers* v. *White* (*d*), the difference between that case and *Collins v. Carey* being that in the latter the business was not done by the trustee, he being incapacitated by

(*a*) 2 Beav. 128.
(*b*) 1 McN. & G. 668 *n*.
(*c*) 8 M. & C. 45.
(*d*) 10 Beav. 523.

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ill health, but the whole was done by the partner who was not a trustee. Lord *Langdale* said: "Would this Court allow a trustee to say to his partner, 'You shall act as solicitor and earn all the profit you can for the concern?'"

A distinction was taken in *Clack* v. *Carlon* (*a*), and sustained by Lord *Hatherley*, then Vice Chancellor, that where a trustee who was a solicitor had agreed with his partner that the partner should act as solicitor to the trust and receive the profits for his own benefit, the rule does not apply. There does not appear to have been any such arrangement in this case; and if there had been I cannot but think, with the greatest deference for the opinion of the learned Judge who decided the case, that there are serious objections to allowing full costs in such a case. As stated in the report, the question was, whether one *Haynes*, a solicitor, who was the partner of the defendant *Carlon*, "was entitled to certain costs claimed by him as the trustee's costs, charges, and

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expenses of the defendant *Carlon*. The bill was a bill to carry into effect a certain deed, whereof the defendant *Carlon* was trustee, and to determine various difficult questions arising thereunder. The decree contained a direction for an inquiry whether the defendant *Carlon* had incurred any costs, charges, and expenses as trustee. Mr. *Carlon* claimed, under this inquiry, costs out of pocket up to the month of August, 1856, and from that date he claimed to be allowed profit costs paid or incurred to his partner, Mr. *Haynes*, under an arrangement set out in an affidavit of the latter gentleman in these words: 'In the month of August, 1856, it was agreed between the said *Carlon* and myself that I should, in all matters connected with the trust, act as the solicitor of the said *Carlon*, and that I alone should be entitled to receive, for my own benefit, any costs and charges which might be incurred in carrying on the said trust.'"

(*a*) 7 Jur. N. S. 441.

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In disposing of the case the learned Judge remarked: "This case involves a point of considerable practical importance, namely, whether or not the rule of the Court that no trustee can charge, in respect of his bill of costs, any more than costs out of pocket if he choose to act as solicitor to the trust, is to be extended to the case where it is proved that the whole trust business has been carried on by the trustee's partner for his own benefit, and not for that of the partnership business. The rule on which the denial of costs to a solicitor trustee is founded rests mainly, if not entirely, on this ground, that a trustee shall not make a profit of his trust. This rule has, no doubt, been extended to the case of a partner. It has, however, been argued from *dicta* in some of the cases that the rule rests on a broader ground, and that the reason for it is this, that the solicitor being also trustee, there is no proper control over him. But I apprehend that this is not so, for the result of such a train of argument must be to deny the trustee's right to act as solicitor at all; whereas, as we know, the law goes no further than to deny him his costs if he so acts. I consider, therefore, that the true ground of the rule is, the denial to the trustee of any profit out of his trust. It is distinctly sworn in this case that no such profit is received or receivable by Mr. *Carlon*. No doubt there is force in the argument that such an arrangement affords a means of collusion and duplicity; but the same remark applies with no less force to the case of a solicitor trustee who employs another solicitor. It was said that partners might make an arrangement each to take the other's trustee business, and that thus a door for fraud be opened. It does not seem to me that such an arrangement necessarily implies any more fraud than a similar arrangement between two distinct firms, in which case, I think, there is nothing that could be argued necessarily to shew fraud. My opinion in this case, therefore, is, that Mr. *Haynes* is entitled to his costs from the date of the arrangement between him and his partner."

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In *New* v. *Jones* (*a*), in *Moore* v. *Frowd* (*b*), in *Broughton* v. *Broughton* (*c*) the decisions were placed upon the double ground that a trustee shall not be allowed to make a profit of his trust, and that no one who has a duty to perform shall place himself in a situation where his interest may come in conflict with his duty; and both these grounds have been approved by eminent Judges in other cases. The first ground may not apply with so much force here, where trustees are entitled to compensation, but it is all the more necessary on that account that the principle that a trustee shall not place himself in a position where his interest is in conflict with his duty, should be rigorously maintained. I cannot but think that the reasoning in *Clark* v *Carlon* omits one important consideration, that by denying profit costs to a solicitor transacting professionally the business of the trust you remove the temptation to unnecessary litigation.

Judgment.

The seventh objection is allowed.

I disposed of the costs of the appeal at the hearing.

SOLICITORS.—*Bethune*, *Osler*, and *Moss*, agents for *Hall* and *Elliott*, Perth, for plaintiffs; *Blake*, *Kerr*, and *Boyd*, agents for *W. O. Buell*, Perth, for the defendants.

(*a*) 1 McN. & G. 668, n. (*b*) 3 M. & C. 45.
(*c*) 5 D. M. & G. 160.

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BROWER v. CANADIAN PERMANENT BUILDING ASSOCIATION.

Mortgages on separate estates—Right to redeem—Consolidation of debts—Registry Act, 1868, O.

The right of consolidating separate mortgage debts on separate properties, is an equitable one, and under the 68th section of the Registry Act, 31 Victoria, chapter 20, will not be allowed in favour of the holder of the mortgages against a *puisne* incumbrancer of one of the mortgaged properties without notice, although such right would be enforced as against the mortgagor himself. May 31st.

Motion for injunction to restrain the defendants from proceeding to sell under a power of sale contained in two several mortgages.

It appeared that the plaintiffs were second, third, and fourth mortgagees of certain land, A., in Belleville, upon which the defendants had a first mortgage; and that the defendants were also mortgagees of another piece of property, B., mortgaged by the same mortgagor to secure a different debt; and the defendants desired to consolidate their two mortgages as against the plaintiffs. Statement.

The plaintiffs conceded that the defendants had this right under the law applicable to the consolidation of securities; but they contended that our Registry laws had altered the rule and that no rights of that kind could be enforced against them, as it did not appear on the register; and there was no pretence of notice to them of the existence of any such claim as was sought to be enforced.

Mr. *Fitzgerald*, Q. C., in support of the application. The cases in England are against the plaintiffs' contention, but under our Registry Act, 31 Victoria ch. 20, sec. 68, the rule is altered, as thereby it is expressly enacted that no equitable lien, charge, or interest

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affecting land, shall be deemed valid in any Court as against a registered title; and tacking, it is declared, shall not be allowed against the provisions of the Act.

Mr. *George MacKenzie*, contra, referred to *The Dominion Savings Society* v. *Kittridge* (*a*), as establishing the right of the defendants here to insist upon the claim now asserted: as against the mortgagor himself, their right is unquestioned, and the mortgagor could not convey to the plaintiffs any greater right than he himself had.

May 30th.

PROUDFOOT, V. C.—The Act of 1868 (*a*) enacts that registry shall constitute notice of any instrument to all persons claiming any interest in such lands subsequent to the registry. That does not apply to this case, for the plaintiffs claim nothing in the B. property, and are therefore not affected by any instrument recorded upon it.

Judgment.

By section 68, it is enacted that, no equitable lien, charge, or interest affecting land, shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party; and tacking shall not be allowed to prevail against the provisions of the Act.

It was admitted that *consolidation* was not *tacking*, but it was said that the right to consolidate, was an equitable interest affecting land, and if it do not appear on the register it is not valid.

The Dominion Savings Bank v. *Kittridge* (*a*) does not decide the point involved in the present case; for there the plaintiffs had mortgages on different properties made by *Loughead*, and afterwards *Loughead* mortgaged both properties to *Kittridge*, and then sold to *Kittridge* all his interest in one of them. *Kittridge*,

(*a*) 23 Gr. 631. (*b*) 31 Vic. ch. 20, sec. 66.
(*c*) 23 Gr. 631.

under the Registry law, had notice of both mortgages being in the same hand, and of all the circumstances which gave the plaintiffs the right they claimed. Here the plaintiffs had no notice of the B. mortgage to the defendants. 1877. Brower v. Canada Permanent Building Ass'n.

A long series of decisions has determined that the language of the Registry laws was never intended to protect, and does not protect, a person who has notice of a right or of an interest which he is endeavouring to defeat: *McMaster* v. *Phipps* (*a*), *Forrester* v. *Campbell* (*b*), *Wigle* v. *Setterington* (*c*), and registration is *actual* notice: *Bell* v. *Walker* (*d*).

It was argued, however, that the right to consolidate was not a charge or lien, nor an equitable interest, and was therefore not cut off by the Registry law.

The right, I apprehend, to be an equitable one—there is no express charge of both debts upon both properties. The legal estate does not pass with any clog upon the right of redemption beyond the one debt upon each property—and the right must, therefore, arise from some equitable principle. This principle, as expressed in *Willie* v. *Lugg* (*e*), is, "If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate; yet, if the mortgagor would redeem one, he cannot, because if you come for equity, you must do equity. * * * If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this Court interposes." In that case it was the mortgagor who was coming to redeem, but the same principle applies as against a purchaser of the equity of redemption of one Judgment.

(*a*) 5 Gr. 253.
(*b*) 17 Gr. 379.
(*c*) 19 Gr. 512.
(*d*) 20 Gr. 558.
(*e*) 2 Eden 78.

*The head note to this case would seem to be erroneous in representing it as one of tacking; in reality, it being for consolidation.

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of the estates without notice of the other mortgage: *Hyman* v. *Roots* (*a*).

Under the earlier Registry laws, which did not contain any clause similar to the 68th section of the Act of 1868, it had been held that where the equity was incapable of registration, it was not affected by these laws: *McMaster* v. *Phipps* (*b*). But under the late Acts, (section 66 of 1865, the same as section 68 of 1868,) though not capable of registration, it is barred: *Bell* v. *Walker* (*c*), *Gray* v. *Ball* (*d*).

Upon the whole, I think the plaintiffs entitled to an injunction to restrain the defendants' proceedings until the hearing.

SOLICITORS.—*Fitzgerald* and *Arnoldi*, agents for *E. B. Fralick*, for the plaintiffs; *Jones Brothers* and *Mackenzie*, for the defendants.

(*a*) 10 Gr. 340.
(*b*) 5 Gr. 253.
(*c*) 20 Gr. 558.
(*d*) 23 Gr. 396.

RICE v. GEORGE. 1877.

Tenancy in common—Laches—Covenant running with the land—Liquidated damages.

A., one of several tenants in common of a lot of land, conveyed it in fee, as an entirety, to *B.*, who conveyed to *C.*, who conveyed to *D.* On the sales to *B.* and *C.* £100 of the purchase money was allowed to remain unpaid until all matters of title could be settled, it being then known that *A.* had only a tenancy in common in the land, and that proceedings for a partition of that and other lands, held on the same tenancy, were pending. In February, 1855 *C.* paid the £100, on receiving from *A.'s* husband and *E.*, one of the other tenants in common, a covenant under seal to have a partition made without delay, and if possible to have the lot so sold included as part of their share, and to execute such further assurances as might be necessary to make *C.'s* title good, and in default to repay the £100 with compensation for improvements and charge for occupation rent. In a suit in this Court for partition *D.* was made a party, and this lot was charged with various sums in favour of *A.'s* heirs and *E.* and other tenants in common for equality of partition, rents, &c. *D.* had no knowledge of the existence of this covenant until after the Master's report, when he procured an assignment of it, and filed a petition in May, 1875, to be relieved of the charges on his land under the report, and to be indemnified against them by *A.'s* representatives and *E.*

Held, (1) that *D.* was entitled to the relief prayed; (2) that the application was not too late, as *laches* could not be imputed until after knowledge of the facts; (3) that it was immaterial whether the covenant ran with the land or not; (4) that *E.'s* liability was not limited to the £100, but was for a complete indemnification of *C.* and his assigns.

Motion on petition setting forth that one *Elizabeth Rice*, one of the original tenants in common of the property in question in this case, and her husband *Thomas Edwin Rice*, on the 17th June, 1851, conveyed 50 acres of the land to one *Chester Colton*, who conveyed them to *Jonathan Porter* by deed dated 19th September, 1853, and he by deed dated 19th September, 1869, conveyed the same to the petitioner *John Elford*. All these deeds purported to convey the whole title in fee in the land. The purchase from *Porter* was made by *William Elford*, the father of the petitioner, for $2,800,

1877. and by his direction the conveyance was made to the petitioner.

Rice v. George.

That on the occasion of the sale by *Colton* to *Porter*, it appeared that *Colton* had paid £100, the half of his purchase money, to Mr. and Mrs. *Rice*, leaving £100 due, which was not to be paid until all matters of title as to said land should be settled, and that till then the said deed from *Rice* to *Colton* should not be delivered, but was to remain in the hands of *George L. Ward*, of Port Hope.

That *Porter* bought from *Colton* for £300, and paid him £200, and the remaining £100 was to remain unpaid in like manner as was agreed between *Rice* and *Colton*, and to be paid on the title being made good.

That in February, 1855, *Rice* and *James G. Burn*, another of the tenants in common, applied to *Porter* to pay the £100, who said he would do so on being secured in the title being completed. They agreed to

Statement.

do so, and thereupon an indenture was prepared and executed, upon which *Porter* paid over the £100.

This indenture was dated the 21st February, 1855, and was made between *Thomas Edwin Rice* and *James Burn* (*James G. Burn*), of the first part, and *Jonathan Porter* of the second part, and recited that *Rice* and *Burn* were jointly interested with others in the lands in question and others; and that before any partition was made of them, *Rice* and his wife conveyed a portion, the land now in question, to *Colton* for £200, of which he paid £100, leaving £100 unpaid; that *Porter* had agreed with *Colton* to purchase the land in question, and being now called on for the balance of the purchase money had agreed to pay the same on the security of that indenture; and it was witnessed that *Rice* and *Burn*, in consideration of the premises and of £100 then paid by *Porter*, agreed and bound themselves, their heirs, executors and administrators, that they would take all necessary and proper steps, and without any unnecessary delay, to have a partition made of the lands of which

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Rice v. George.

they were tenants in common, and in such partition would, if possible, procure the said 50 acres, the lands in question, to be included as part of their share or shares of the said lands, and would thereupon execute to *Porter*, his heirs and assigns, such further conveyances and assurances as might be necessary for vesting a good and legal title to the said 50 acres in the said *Porter*, his heirs and assigns. And should they be unable to perfect the same they for themselves, their heirs, executors, and administrators, covenanted with *Porter*, his executors, administrators, and assigns, that they would pay to *Porter*, his executors, administrators, or assigns, the sum of £100, paid at the date of that indenture with interest, and the value of any improvements to be made after that date by *Porter*, his heirs or assigns, such value to be ascertained by two persons, one to be chosen by *Rice* and *Burn*, and the other by *Porter*, or their legal representatives, and in such event *Porter*, his heirs or assigns, should be charged with an occupation rent to be ascertained in the same manner. And further, in the event of not being able to make good such title, the said *Rice*, his executors or administrators, would pay *Porter* the sum of £100 so paid by *Colton* with interest, and the value of any improvements made by him or *Porter* up to that date, a fair occupation rent to be charged to *Porter* from the time *Colton* obtained possession to that date, such rent and the value of the improvements to be ascertained as before mentioned.

Statement.

That in order the better to secure *Porter*, his heirs and assigns, in reference to the said sum of £200 with interest, and for the value of the improvements, *Rice* and *Burn* charged all the lands in Darlington as far as they could do so, and declared them to be a security for the fulfilment of that agreement.

The Master's report was dated the 2nd March, 1875, and allotted to the petitioner *John Elford*, as deriving title under some of the original tenants in common, the land in question, subject to the payment of $154.75 on

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account of a mortgage to *Eliza George*, which was in addition to $100 previously paid by the petitioner on that account; and to $219.72, part of the plaintiff's costs charged on the said lands; and to $82.93, part of defendant's costs; and to $1,500 charged in favour of the plaintiff *James G. Burn*; and to $750 to the defendant *J. C. Agar*; and to $187.50 to the plaintiff *J. A. Rice*; and for rents to *J. G. Burn*, $384.07; to *J. A. Rice*, $60.37, and to *J. C. Agar*, $429, in all $3,868.34.

That the petitioner had not taken any active interest in the suit, the same having been left to his father *William Elford*, and they were assured by *J. G. Burn* that it was not necessary for him to contest these charges, as he, *Burn*, was liable for them, and would save the petitioner harmless.

That the petitioner was not aware of the execution of the indenture of 21st February, 1855, till after the making of the report, and not it would seem till some days after the 22nd March, 1875, when *William Elford* was informed of it by *Porter*, and the petitioner had obtained an assignment of it on 5th May, 1875, from *Porter*.

Statement.

The prayer of the petition was, that *James G. Burn* might be declared to be not entitled to receive any of the said sums found due to him by the petitioner, and that he might be required to save the petitioner harmless in respect of all sums found payable by the petitioner to others; and that *James A. Rice* (who it was alleged derived title under his father *Thomas Edwin Rice* and his mother *Elizabeth Rice*, and was bound by their agreement) might also be declared not entitled to any of the sums found due to him, and might indemnify the petitioner to others under the report; and that the moneys found due to *J. G. Burn* and *J. A. Rice* might be charged with all sums which the petitioner was charged with as well as the £100 paid to *Eliza George*.

Mr. *Hector Cameron*, Q. C., and Mr. *Bethune*, Q. C., for the petitioner.

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

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PROUDFOOT, V. C. [after setting forth the facts above stated]—I think all the facts alleged in the petition, and stated above, are established in evidence, and unless there be some insuperable legal difficulty in the way of giving effect to the agreements set out, the petitioner is entitled to relief.

On behalf of *Burn* and *Rice* it is contended that the petitioner is too late in making this application; that it should have been raised before going into the Master's office; that the petitioner is not entitled to the benefit of the covenant with *Porter*; that it does not run with the land, and that the agreement does not make *Burn* responsible beyond £100.

A number of minor objections were also urged with the usual skill and ability of the counsel who argued the case, but if these are disposed of in favour of the petitioner, the others are not of sufficient importance to demand attention.

I do not think that the petitioner has been guilty of any laches; he was not aware of the existence of the bond till after the report was made, and I know of no principle which debars him from relief because he did not insist upon a right of which he was at the time ignorant: *Lindsay Petroleum Co.* v. *Hurd* (*a*). Judgment.

I do not think it material to inquire whether the covenants in the deed of February, 1855, run 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* (*b*). And where 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* (*c*).

(*a*) L. R. 5 Privy C. 221. (*b*) 3 T. R. 678.
(*c*) 7 Sim. 529.

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On the last point, that the damages are liquidated by the parties themselves, and that the covenantors are not liable beyond the £100. The question in such cases is, whether the clause amounts to a stipulation for liberty to do a certain act, or not to do it, on the payment of a certain sum : *Cole* v. *Sim* (*b*).

The subject was much discussed some years ago in this Court in the case of *Stokes* v. *Crysler* (not reported.) In that case the defendant agreed to sell to the plaintiff some land for a sum of money, to be paid in the manner specified in the agreement, and a clause was added " For the faithful performance of the covenants herein contained, each of said parties binds himself to the other in the penalty of $400, which is stipulated and agreed upon as the amount of damages." But specific performance was decreed ; and upon appeal the decree was affirmed.*

Judgment.

The agreement here is to procure the 50 acres to be allotted to the share of the covenantors, and then to execute to *Porter* and his assigns such further conveyances as might be necessary to vest a good and legal title in him and his assigns. The result of the partition has been to vest in the assignee of *Porter* these 50 acres, and the question is, whether the persons who made this agreement are to be at liberty to claim the sums specified in the report in defiance of their covenant to vest a good title in *Porter's* assignee. A simple agreement to convey the land would have bound these parties to discharge incumbrances vested in third parties, *a fortiori* to release any in their favour. The clause for damages never contemplated the case of a title being made to *Porter's* assignee, and subjecting it to a sum in favour of the covenantors, and that in such case the parties might be at liberty to pay $400, and thus entitle them to receive more than that four times told, and to the other tenants in common an equal sum.

(*a*) 5 D. M. & G. 1.

* 27th February, 1858.

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The statement of the case is alone a sufficient answer to the claim. If *Burn* and *Rice* are permitted to receive this money, it would be a violation of every principle of common honesty, and a reproach to the administration of justice.

I think the order should be affirmed, and with costs.

SOLICITORS.—*Cameron* and *Appelbe*, for the petitioner; *Morphy, Morphy*, and *Winchester*, for the plaintiff; *Blake, Kerr*, and *Boyd*, and *Beaty, Hamilton*, and *Cassels*, for other parties.

RE COUMBE, COCKBURN & CAMPBELL.

Common carrier—Lumberman—Lien for freight—Insurance—Promise to pay the debt of another.

A lumberman agreeing to carry lumber for hire at the request of the owner thereof, does not thereby become a common carrier or render himself bound to carry safe at all risks, the acts of God or the Queen's enemies excepted; and *Quære*, whether he would be so liable even if it were shewn that he was in the habit of forwarding timber for any one who might choose to employ him to do so.

Under such circumstances the party carrying the lumber is not bound, in the absence of any agreement on the point, to make good money paid by the owner for the purpose of insuring the property.

In such a case the carrier will be entitled to a lien on the lumber carried by him for his freight and charges, which will be defeated, however, by procuring it to be taken in execution at his own suit.

A lumberman had a lien on lumber for his freight, and *C.* wrote saying "I wish you would advise your agents in Quebec to deliver to *A. J. Coumbe* the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take *Coumbe's* draft on me here at 30 days for river freight, which I will pay."

Held, that the effect of this letter was not such as to render *C.* liable to pay the freight until the lumberman had obtained *Coumbe's* draft for the amount thereof.

By an order of the 4th February, 1875, it was referred to the Master of this Court to inquire into all matters in difference between the said *Coumbe* and *Cockburn*, and

1877. to ascertain and state what was the amount of indebtedness (if any) of *Coumbe* to *Cockburn*, or of *Cockburn* to *Coumbe*.

Re Coumbe, Cockburn & Campbell.

The Master reported that *Coumbe* was indebted to *Cockburn* in the sum of $1950.88.

From this finding of the Master, *Coumbe* appealed.

It appeared that about the beginning of September, 1872, *Cockburn* agreed to take on a raft from Kingston to Quebec a quantity of oak plank and sawn lumber, which *Coumbe* then had on the wharves at Kingston, for $6.50 per thousand feet, board measure; that *Cockburn* did carry 299,067 feet, and had paid a barge for carrying 104,119 feet more, making in all 403,186 feet. *Coumbe* claimed that the lumber he had measured 425,098 feet, and he sought to make *Cockburn* responsible for the difference, or shortage as it is termed, of 21,912 feet.

The quantity put on the raft, was not measured when it was loaded. There was no bill of lading, and no receipt for it. Nor was it measured when landed on the wharves at Kingston.

Mr. *McCarthy*, Q. C., and Mr. *Rye*, for the appeal.
Mr. *Moss* and Mr. *Hoyles*, contra.

Feb. 21.

Judgment.

PROUDFOOT, V. C.—The mode in which *Coumbe* endeavors to establish the quantity, is this. He proves that at different points in the lumber districts he purchased 425,098 feet. That he saw them shipped on boats and barges to be conveyed from the western end of Lake Erie and still further west, to Kingston. There is general evidence given that nothing was lost on the transit. It was piled on the wharves at Kingston, except one load which was delivered at Collins's Bay. What was landed at Kingston was landed about the 20th July, and lay partly on one wharf where there was a watchman day and night, and partly on another wharf where there was none; and some general evidence was given that no loss was likely to occur or did occur there

from the 20th July till the 20th or 27th September, when *Cockburn* began to load it on the raft. It is also proved that in the transit to Quebec some pieces of *Coumbe's* timber were lost, and it is claimed that *Cockburn* should be liable for the whole shortage at Quebec. 1877. Re Coumbe, Cockburn & Campbell.

It appears, however, that as to one load brought from Michigan, it had lain for some months after it was measured to *Coumbe* without any special care being taken of it, although it seems it was near a policeman's beat, and it was not measured when shipped for Kingston. The Master has declined to charge *Cockburn* with the shortage.

I do not think the evidence is sufficient to enable me to say that the Master was wrong. The first thing to prove against a bailee is, the delivery of the subject for which he is to answer. The plain mode of doing this was, to have the timber measured as it was placed on the raft. In the chain of proof, as a substitute for this, there are several links wanting, or so very slight as to render it unsafe to act upon it. It is not proved how much was shipped of the Michigan lumber. Then there was the chance of some being lost on the voyage to Kingston, and while on the wharf at Kingston, a busy lake port, with a good deal of shipping constantly coming and going, and a consequent use of timber in building or repairing ships; and there is evidence of some having been used in that way. I cannot assume against the bailee, under these circumstances, that all the timber purchased by *Coumbe* was delivered to *Cockburn*. Judgment.

But if not liable for the whole, it is said he is answerable for that lost on the transit from Kingston to Quebec, for some lost while loading at Kingston, and for sixteen pieces not loaded at Collins's Bay, and sent forward the next Spring as *Cockburn's* own. As to these sixteen pieces *Cockburn* must account. It is clearly proved they were part of *Coumbe's* timber, that they were not put on the raft, and that *Cockburn* got the benefit of

1877.

Re Coumbe, Cockburn & Campbell.

them. As to those lost while loading, there is evidence that some pieces, which were thrown into the water by *Cockburn's* men preparatory to loading them on the raft, sank. They could have been loaded directly on to the raft from the wharf. For these I think *Cockburn* must account. There was negligence in not taking proper precautions to prevent them from sinking, or in not recovering them afterwards. There will be a reference back to ascertain the number unless the parties can agree upon it. I am unable, on the present evidence, to do more than guess at it. It is said to be from 25 to 50.

As to those lost while on the transit to Quebec, other considerations arise: 1st, whether *Cockburn* is liable at all unless negligence is proved; 2nd, is negligence proved; and last, the number lost. If he is to be liable, without negligence, it must be on the ground that he was a common carrier and bound to insure against everything, except the act of God or the Queen's enemies. Now whatever may be the rule as to ships trading between defined termini, and ready, and bound, to take the goods of all applicants, it would be an abuse of terms to call *Cockburn* a common carrier. It is not shewn, even if that would suffice, that he was in the habit of forwarding the timber of any one who chose to employ him. He was engaged in the purchase and transport of his own timber, and if he on some occasions carried the goods of others for hire with his own, it is quite clear that he was not compellable to do so. He might undertake it or not as he pleased. He did not invite persons to send lumber by him. He did not profess, by advertisement or otherwise, to be ready to do so. I doubt whether a raftsman, or a forwarder of timber in rafts, can in any sense be deemed a common carrier. His engagement and liability, I would think, must, in each case, depend upon the terms of his agreement.

Judgment.

Not being liable in that capacity, has there been shewn any such negligence as would render an ordinary

bailee for hire liable? It is shewn that the floor of the raft was rather more strongly constructed than usual on account of having to carry *Coumbe's* timber; but it was three-fourths of oak, and only one-fourth of pine, not enough pine to render the raft so buoyant as, when loaded with *Coumbe's* timber, to be above, or even on a level with the surface of the water. Indeed one of the drams, that which was wrecked, was from a foot to two and a half feet under water. This want of buoyancy rendered it necessary to take special precautions against the planks being washed off. There is some evidence of wattling, whatever that may be, to the height of nine inches above the floor; but that did not reach the top of the planks, and besides was not of a nature to render a very effectual resistance to the force of the water, when running the rapids. It was getting late in the season, and rough weather was to be expected. An ordinary mode of securing the planks is, to have a binder across each tier, as well as stringers or wattlings. This was not done. One dram was wrecked on Round Island, and some planks lost. It is no doubt true that drams are occasionally wrecked, but in this instance I think the disaster was caused, to a considerable extent, by the want of buoyancy of the dram. It was sunk so low in the water that it would not steer, and the pilot was one of the oldest and most experienced on the river. The evidence of the pilot, *LeBlanc*, seems to me conclusive. He says that, after piling the plank evenly over the dram, there were two feet, three feet and, in some places, three and a half feet of water above the oak logs. His men hesitated to go with it, and but for pride would not have gone. It was dangerous. Then some planks that were taken from the wreck were left on shore, and were carried off by the ice. I think there was such negligence as to make it incumbent on *Cockburn* to account for the plank lost. It was said the raft was partly his own timber, and he took as much care of *Coumbe's* as of his. I do not think he did. His part

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Re Coumbe, Cockburn & Campbell.

Judgment.

1877.

Re Coumbe, Cockburn & Campbell.

of the raft consisted of the logs forming the floor and were strongly fastened together; *Coumbe's* was laid on this, and was not fastened, or not properly fastened.

As to the quantity, it is difficult to ascertain it from the present evidence with anything like accuracy. A great number of witnesses have been examined, and if the lost pieces spoken of by them were all added together, the number must have been considerable. But several probably refer to the same pieces; some certainly do.

LeBlanc speaks of twelve to fifteen going adrift, while going down the Cedars.

Eli says five pieces were lost between Cascades and Quebec, and thirteen found after the wreck and taken away by ice in Spring.

Fournier speaks of seeing four or five sunk which had been in the drams, but I do not understand him to have left them there. It was his business to collect all he could, and send them down to the barge. *Cockburn* should not be charged with these.

Judgment.

LeRoux, who was employed in a boat at the eddy to catch the planks floated from the dram, says, that eight or ten escaped and could not be saved, and three sank which were raised in the Spring of 1874.

Chartrain speaks of the thirteen carried off by the ice of which *Eli* spoke.

Cuillerrier speaks of the same as *LeRoux*.

I should think that not more than forty-one pieces could safely be considered as proved to have been lost between Kingston and Quebec. But if the parties are not satisfied with this, it may go back to the Master.

The appellant also complains that the Master has not allowed, for personal expenses of *Coumbe* in loading barge $37.40, and for cost of unloading barge $120, and for rent of Commissioners' wharf at Quebec $47.25, total $204.65.

The personal expenses were incurred in travelling, I understand, principally from Quebec to Kingston and

back again, in order to procure a barge to carry the lumber left by *Cockburn* at Kingston. There seems to have been no necessity for this. *Swift* could have engaged the barge on being instructed by telegraph, and it was he who actually did engage it. 1877. Re Coumbe, Cockburn & Campbell.

As to the cost of unloading the barge at Quebec, it is claimed on account of the late arrival, which rendered it necessary to land the timber on a wharf instead of transferring it directly to a timber ship. The cost of unloading in the latter case would have been borne by *Coumbe*. The claim for rent may be considered together with this. They depend partly on the contract, whether any time was limited in which *Cockburn* was to deliver the timber, partly on the probability of getting a sale that autumn, and partly on whether more than a reasonable time elapsed in carrying the lumber. I do not think it established, that *Cockburn* agreed to have the lumber in Quebec in three weeks, or any other specified time.

Judgment.

Coumbe swears to three weeks. *Cockburn* denies it, and there is no corroborative evidence unless a letter written by *Coumbe* to *Cockburn* stating that as a term of the agreement, be such a corroboration. I do not think it is. It cannot have any more effect than *Coumbe's* oath, and that is met by *Cockburn's*.

If no time fixed, then the law will imply a reasonable time. Was the time actually spent an unreasonable one? The contract was made on the 2nd September. *Cockburn* expected to be able to send off the raft in ten or twelve days, which would be the 12th or 14th; while it did not leave Kingston till the 1st October, and did not reach Quebec till the 7th November. The impression made upon me by the evidence is, that at Kinsgton and between Kingston and Quebec the time spent was unavoidable, unless perhaps the time lost by the wreck of the dram. It was late in the season, stormy weather, and the evidence shews that delay was actually caused by storms. The time to be considered then, is the thirteen or fif-

1877.

Re Coumbe, Cockburn & Campbell.

teen days before the 27th September, when the raft reached Kingston. I do not think the ten or twelve days were named by *Cockburn* as the time he would positively start but as an expectation, merely, of being able to start then. It was his interest to get his own timber to Quebec as rapidly as possible. *Coumbe* knew he was building a raft not then completed. A load of pine was expected at Collins's Bay to put in the raft, but it is not said there was any delay on that account, and, in the absence of any proof of time wasted there, I do not think the report wrong in refusing to make *Cockburn* responsible for the unloading and for the rent. If I had thought the delay inexcusable, I would still have hesitated to make *Cockburn* liable for these charges, in the absence of proof of a contract for the sale which had failed to be carried out from the non-arrival of the raft. There was very vague evidence of the probability of having got it sold, had it been down earlier.

Judgment.

The Master properly refused to allow the charge for insurance. As *Cockburn* was not a common carrier, *Coumbe* was the person to bear the cost of insurance.

The chief ground of complaint, however, is, that the Master refused to allow damages for delay, consisting of interest on capital, $21,254.40, for 244 days, being $852.75, and for deterioration in value from exposure all winter; and fall in the market $3,454.34.

There having been no time fixed for the delivery, and an unreasonable time not having been taken, determines this objection, and that *Cockburn* is not liable for these damages. I do not, therefore think it necessary to consider whether the damages are so remote as not to be recoverable.

The order also directed the Master to inquire as to any liability of *Campbell* to *Cockburn* in respect of *Coumbe*.

The Master found *Campbell* liable to pay *Cockburn* the whole of the sum of $1950,88, reported due from *Coumbe* to *Cockburn*.

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Re Coumbe, Cockburn & Campbell.

From this finding of the Master, *Campbell* appealed.

The same counsel appeared for the parties respectively.

PROUDFOOT, V. C.—The liability of *Campbell* appears to have been based on the notion that he had an interest in the property, and that *Cockburn* had a lien for freight, and upon a letter written by *Campbell* to *Cockburn*, which otherwise would be without consideration. The letter is dated, Windsor, 2nd November, 1872, and says, "I wish you would advise your agents in Quebec to deliver to *A. J. Coumbe* the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take *Coumbe's* draft on me here at 30 days for river freight, which I will pay."

The interest of *Campbell* in the timber depends upon the evidence of *Swift* and *Bew* and on an affidavit of *Campbell*.

Swift proves that *Campbell* paid him his charges as broker in connection with the lumber, and that sent in the barge was insured; the loss, if any, payable to *Campbell*.

Judgment.

Bew says he knew *Campbell* had advanced money to *Coumbe* and, therefore, was indirectly interested.

Campbell in the affidavit he made, while repudiating the authority of *Bew* to submit to arbitration, offered to pay whatever might be due.

I do not think this establishes any interest in *Campbell* in the lumber. It is quite true that, having made advances to *Coumbe*, it would be his interest to see the lumber forwarded, but that would not be an interest in the lumber itself. His engagement, therefore, would be that of a guarantor and void for want of consideration, so far as interest is concerned.

If *Cockburn* had a lien and had given up the lumber to *Coumbe* upon the faith of the letter, that would be a good consideration. I think *Cockburn* had a lien for the freight, on the same principle that carriers by water,

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not common carriers, have a lien (*a*). But by taking it in execution before delivery to *Coumbe*, he destroyed the lien: *Jacobs* v. *Latour* (*b*). So that when he delivered the lumber he gave up no right, and cannot import that as a consideration into the guarantee.

Besides the letter is not an unconditional promise to pay at all events. It is a promise to pay *Coumbe's* draft on him for the freight at thirty days. *Cockburn* has never got this draft.

On the whole I am unable to concur with the Master on this point.

The appeal is allowed, with costs.

SOLICITORS. — *McCarthy*, *Boys*, and *Pepler*, for *Coumbe*; *Bethune*, *Osler*, and *Moss*, for *Cockburn*.

RE CURRY.

General orders 511, 608—*Counsel fee in Chambers.*

The discretion of a Judge to order an increase of fees, payable to solicitor or counsel, has been taken away by the general orders 511 and 608.

Jan. 10th. This was an application by Mr. *Caswell* for an order upon the taxing officer, directing him to increase the fees to counsel, and also to allow a fee for the attendance of solicitor, and for the preparation of briefs for counsel on the argument of this matter, which is reported *ante* volume xxiii., page 277. In proceeding to tax the costs under the order there reported the officer had allowed a counsel fee of $10 only.

Mr. *Kingstone*, contra.

Judgment. PROUDFOOT, V. C.—Reg. Gen. 511 provides that the fees of solicitors and counsel for proceedings under the Quieting Titles' Act are to be the same, respectively, as for like proceedings in suits.

(*a*) Cross on Lien 300. (*b*) 5 Bing. 130.

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Re Curry.

Reg. Gen. 608 determines the fees, from 29th June, 1873, payable to solicitors and counsel, and no other fees than those set down in the schedule to the order are to be allowed, either upon taxation between solicitor and client, or between party and party.

And the schedule specifies that on argument in Chambers in cases proper for the attendance of counsel, the fee is $2 (to be increased in the discretion of the Master or Referee, not beyond $10), to be marked at the time. Under the tariff previously in force (*a*), such a fee might be increased to any amount at the discretion of the Judge.

This discretion has now been taken away by the Reg. Gen., and I have no power to increase the fee, however much the case might deserve it. And in this case the fees asked for counsel do not seem to me extravagant.

The fees for briefs and attendance of solicitors, if not provided for by the tariff, I cannot interfere with.

Judgment.

SOLICITORS.—*Cameron* and *Caswell*, for the petitioners; *Leith*, *Kingstone*, and *Brough*, for the respondents.

RE O——, A SOLICITOR.

Surrogate Courts—Costs in contentious cases.

Under the Orders promulgated, in August, 1858, by the Judges appointed to frame rules under the Surrogate Court Act, which are still in force, the fees payable to attorneys and counsel in *contentious*, as well as non-contentious matters, are the same, as nearly as the case will allow, as those payable in suits and proceedings in the County Courts.

This was an appeal from the ruling of the Master finding that the appellant was entitled to tax County Court costs, only. The appellant was engaged by the respondent to conduct proceedings on his behalf in a

June 12th.

(*a*) Taylor's Orders, p. 398.

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Re O—— a Solicitor.

contentious matter in the Surrogate Court. The order made in the matter directed the costs to be paid out of the estate. Upon a reference to the Master to tax the appellant's bill of costs, reference was made to the tariff of fees settled by the Judges appointed to frame rules and orders under the provisions of the Surrogate Court Act, and it was pointed out that the tariff was expressed to be applicable to non-contentious matters, only, and it was argued that there appearing to be no fixed tariff for contentious matters the costs ought to be allowed according to the table of fees in the Court of Probate in England.

The Master, however, held that the appellant was entitled to County Court costs only.

After argument of the appeal from this decision before *Proudfoot*, V. C., the attention of the learned Vice Chancellor was called to the fact that on the 31st August, 1858, the Judges, appointed to frame rules and forms, had promulgated certain rules amongst which were the following :—

"The fees to be taken by attorneys and barristers, respectively, practising in the Surrogate Courts in respect to business under the said Act or under any Act of the Parliament of Upper Canada or of this Province giving powers or jurisdiction to the said Courts or the Judges thereof, shall be the same, as nearly as the case will allow, as are now payable in suits and proceedings in the County Court."

"These, it is to be understood, are only temporary provisions until a full body of rules and forms can be settled and printed for distribution."

These rules were not to be found in the printed book of rules and forms issued under the authority of the said Judges. Under these circumstances,

Judgment.

PROUDFOOT, V. C.—Held that no full body of rules had been settled, inasmuch as no provision was subsequently made for the fixing of the scale of costs in

contenticus matters, and that the rule set forth above is still in force. 1877.

Appeal dismissed, without costs.

Re O——, a Solicitor.

Mr. *Moss*, for appellant.

Mr. *Boyd*, Q. C., for respondent.

SOLICITORS.—*Bethune, Osler*, and *Moss*, agents for the solicitor in person; *J. G. Scott*, for the Attorney General.

CUTHBERT v. THE COMMERCIAL TRAVELLERS' ASSOCIATION OF CANADA, WARRING KENNEDY, PRESIDENT, AND CHARLES RILEY, SECRETARY, OF THE SAID ASSOCIATION.

Demurrer—Parties—Incorporated company—Offices of corporation.

A bill was filed by a member of an incorporated association, against the corporation, the president, and the secretary thereof, charging that these officers had colluded and conspired together to refuse and deprive the plaintiff of the rights and privileges of the association, and setting forth certain loss and damage sustained by the plaintiff by reason thereof, and praying amongst other things that the defendants might be ordered to pay and make good such loss and damage, and that the defendants, other than the secretary, might be ordered to pay the costs of the suit.

Held, notwithstanding the provisions of the 63rd General Order of 1868, that the secretary was a proper party to the bill; and a demurrer by him, on the ground that he was not a necessary or proper party, was overruled, with costs.

Cline v. *The Mountainview Cheese Factory*, *ante* vol. XX., p. 227, approved of and followed.

The plaintiff was a member of the Commercial Travellers' Association, incorporated by 37 Vict., ch. 96, C., amended by 39 Vict,. ch. 68, C,. who alleged that he had been improperly deprived of the benefits of membership, and prayed to have his right declared. Statement.

The defendant *Riley* demurred because he was not a proper party to the suit.

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The bill stated the Act of Incorporation and set out several of the by-laws of the Association, which declared the objects of the society to be, among other things, providing a cheap and satisfactory scheme of insurance,—to obtain concessions from Government, municipalities, railways, and other corporate bodies, which, individually, apart from association, commercial travellers could not expect or hope to receive;—to impart regular information to the members relative to the places visited by commercial travellers, to hotels best adapted in price, comforts, and business convenience, and to the various railroads and modes of communication. * * * The annual subscription falls due on the 1st January in each year, and must be paid before 12 o'clock at noon of that day in order to secure insurance and other rights and privileges of the Association. The duties of the secretary shall be to keep an account of the transactions of the Association and the Board, to announce all meetings, to issue members' certificates, to receive money, pay the same to the treasurer, and submit an account thereof to the board of directors at each of their meetings, and, generally, to conform to the wishes of the board of management.

Statement.

The bill further stated that the defendant *Warring Kennedy* was the president, and the defendant *Charles Riley* the secretary of the Association for the year 1877, and had been so for the year 1876.

That the plaintiff was a member, and had been so since the Association was incorporated, and at the time fixed by the by-laws tendered to the defendant *Riley* the amount of his annual subscription for the year 1877, and demanded from him his certificate of membership, but the said *Riley* neglected and refused to receive such sum from, or to issue such certificate to, the plaintiff, and without such certificate the plaintiff could not enjoy the privileges of membership.

The eleventh paragraph of the bill was as follows: "The said Association and the said *Charles Riley* were,

and still are, directed by the said *Warring Kennedy* not to issue a certificate to the plaintiff, and not to grant him any of the rights and privileges of the said Association; and the said *Warring Kennedy* and *Charles Riley* have colluded and conspired together to refuse and deprive the plaintiff of the rights and privileges of the said Association."

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The bill further alleged that the plaintiff then applied to the office of the Association in Hamilton, paid his subscription, and received a certificate of membership.

The thirteenth paragraph of the bill stated that "The plaintiff endeavoured to make use of the said certificate, but the defendants, for the purpose and with the view of depriving the plaintiff of the rights and privileges of membership, notified the various railway companies, hotel-keepers, and others, in the Dominion of Canada, that the plaintiff was not a member of the said Association, nor entitled to the rights and privileges thereof, and they also attempted to and did pass resolutions purporting to cancel the said certificate, but which resolution the plaintiff is unable more fully to set forth, as the same is in the possession of the defendants."

Statement.

That the plaintiff had never been suspended as a member of the said Association or been expelled from it, and was entitled to a certificate of membership and to all the rights and privileges of a member.

That the plaintiff had suffered and sustained, and still continued to suffer and sustain great loss and damage in consequence of the conduct of the said defendants. And the plaintiff submitted that the defendants, the Association, were bound to make good to him the amount of such loss and damage.

The bill prayed that the certificate issued to him might be declared valid, and that the defendants might be ordered to procure to be issued to the plaintiff an accident insurance policy, or that the defendants might be ordered to issue a new certificate of membership to the plaintiff for the year 1877, and that the defendants

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might be restrained from depriving the plaintiff of his privileges as a member, and from doing anything to prevent him from enjoying them, and that the defendants might be ordered to withdraw the notice given to the railway companies, hotel-keepers, and others; and that the defendants might be ordered to pay the loss and damage the plaintiff had sustained, by reason of the matters alleged; and that the defendants, other than *Riley*, might be ordered to pay the costs of suit.

May 29th.

Mr. *Attorney General Mowat*, in support of the demurrer, contended that *Riley* was not a proper or necessary party, and that the General Order 63 of the Court rendered it improper to make officers of a corporation defendants. The bill states that he acts under the direction of the president of the Association; that he has only acted under the directions of the Association, and in his official capacity, and therefore is not personally responsible. The plaintiff cannot contend that *Riley* is a necessary party because he prays for an injunction, as the injunction against the Association would bind this

Argument.

defendant. The bill does not ask costs against him, and although in the prayer damages are asked against him, yet in the body of the bill damages are only asked against the Association. The bill does not sufficiently charge any personal wrong done to plaintiff by *Riley*. He cited *Winch* v. *The Birkenhead, &c., Railway Co.* (*a*), *Gilbert* v. *Lewis* (*b*), *Kerr* v. *Read* (*c*).

Mr. *A. Hoskin*, contra, contended that as the by-laws of the Association, which are set out in the bill, provide that *Riley*, as secretary, was to issue certificates of membership, he was bound to do so to every member; and that, as he had refused to give plaintiff a certificate, he personally interfered with the rights of the plaintiff, and failed in his duty, and was therefore personally re-

(*a*) 5 DeG. & Sm. 562. (*b*) 1 DeG. & Sm. 38.
(*c*) 22 Grant 529.

sponsible to the plaintiff; that if an officer of a corporation, at the instance of the directors, does a wrong, he is not protected because of his official character; that the bill alleged that he and the president were colluding and conspiring together to deprive plaintiff of his rights; that the bill also alleged that plaintiff had obtained a certificate, and that *Riley*, with the other defendants, had prevented plaintiff from making use of it; that it was sufficient to pray for damages against *Riley* without making a claim in the body of the bill. He cited *West Gwillimbury* v. *Simcoe* (*a*), *Cline* v. *Mountainview Cheese Co.* (*b*), *Betts* v. *DeVitre* (*c*).

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PROUDFOOT, V. C. [after stating the facts as above set forth.]—For the demurrer it was argued that our general order 63 has dispensed with the necessity of making officers of corporations parties; that *Riley* is not alleged to have an interest, and it is said he acted under the direction of the president; and that no fraud or improper conduct is charged against *Riley* except in such general terms that no relief can be given upon them; that costs are not asked against him, that, though it is prayed that he with the other defendants may pay the loss and damage sustained by the plaintiff, the allegation in the bill is, not that he is liable, but that the Association are.

June 12th.

Judgment.

The general order 63 has indeed dispensed with the necessity for making officers of corporate bodies parties, where the bill is filed for discovery only, and has given a means of obtaining the discovery in another manner. This order removed the exception to the general rule that a mere witness ought not to be a party.

If, however, acts are charged against *Riley* which entitle the plaintiff to relief against him that rule does not apply.

(*a*) 21 Grant 69. (*b*) 20 Grant 227.
(*c*) 11 Jur. N. S. 9, and L. R. 3 Ch. App. 429.

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Riley's duties are alleged to be, to receive the subscriptions, and to issue certificates of membership: that he has refused to perform these duties: that he has colluded with the president to deprive the plaintiff of the rights and privileges of the Association; that, when plaintiff did obtain a certificate from another office, *Riley* with the other defendants, for the purpose of depriving the plaintiff of his rights as a member, sent notices to the railway companies, hotel-keepers, &c.; and all this while plaintiff had been a member, and had not been suspended or expelled. These charges seem to me to amount to much more than that he was merely acting in pursuance of his duty as secretary, that he was a mere servant and not responsible to the plaintiff. Had the acts complained of been acts in the ordinary routine of the work of the Association, this might have been so; but while the plaintiff remained a member, the Association could not legally refuse him his certificate, and, supposing the secretary to have acted under the orders of the Association, he would have been equally responsible with them for his participation in the improper act.

Judgment.

Then, although costs are not prayed against him, substantial relief is asked in seeking to make him responsible for the loss and damage sustained by the plaintiff. If the facts upon which this liability is based appear in the bill, it is not necessary that it should be expressly charged that he is liable in consequence of them. If the facts support the prayer the charge is unnecessary.

In *Cline* v. *The Mountainview Cheese Factory* (*a*), the subject is discussed at some length, upon facts very similar to those that occur here. There the directors and foreman of the cheese company demurred to being made parties, but as the allegation was, that the *defendants* were infringing the plaintiff's patent, and prayed damages against the *defendants*, the demurrer was overruled.

(*a*) 20 Gr. 227.

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Harvey v. *Beckwith* (*a*) and *Pepper* v. *Green* (*b*) are, in principle, in favour of this bill.

But it is needless for me to cite any other authority than the cheese factory case, as I could not allow the demurrer without deciding at variance with that decision. Were my own view of the law different from that entertained by my brother *Blake*, I would follow his decision. But I concur in the opinion he has given, and think it fully warranted by the cases he quotes in support of it.

The demurrer is overruled, with costs—Leave to answer in a fortnight.

SOLICITORS.—*Cameron, McMichael, and Hoskin*, for the plaintiff; *Mowat, Maclennan, and Downey*, for the defendants.

RE COZIER—PARKER V. GLOVER.

Sale of land subject to mortgage.

B. sold land to *C.* who was to pay a mortgage thereon as part of the purchase money, and the deed described the land as being "subject to a mortgage in favour of *McF.* for $596 with interest as therein mentioned."

Held, that in a suit to administer the estate of *C.* the executors were entitled to credit for all moneys paid by them on account of the mortgage; and that the mortgagee was entitled to prove for the balance of the mortgage debt against the general estate of *C.*

The acceptance of a deed reciting that the property is conveyed subject to a mortgage or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt unless the amount is included in the consideration and retained by the vendee as so much money belonging to the incumbrancer.

James Cozier agreed to purchase from *George A. Burroughs* a piece of land then subject to a mortgage made by *Burroughs* to *John McFarlane*. *Cozier* was

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(*a*) 2 H. & M. 429. (*b*) 2 H. & M. 478.

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to assume *Burroughs's* place in regard to the land. It was sold to *Cozier* for the same price at which *Burroughs* bought, $596. The land was sold to *Cozier* on condition that he would pay the mortgage to *McFarlane.*

Burroughs conveyed the land to *Cozier* by deed dated 7th February, 1874. The deed contained no recitals. The consideration was stated in it to be $100. And, after the description of the property, it contained a clause "subject to a mortgage in favour of *John McFarlane* for $596, with interest as therein mentioned." The covenants for title excepted that mortgage. The deed was signed by the grantor and his wife, not by *Cozier.* A receipt for the $100 was indorsed signed by *Burroughs.* In one part of the evidence given by *Burroughs* he said: "I don't remember of getting any money at the time of sale from *Cozier,* if any sum was paid it was handed at once to Mr. *McFarlane* the mortgagee." On being further examined, he stated, "I sold the land to *Cozier* on condition that he would pay the mortgage to *McFarlane,* and he paid $100 on account thereof at the time."

Statement.

There was no writing between *Burroughs* and *Cozier,* save the deed.

On the 3rd December, 1874, *Cozier* died, leaving a will made the 1st of December, 1874, by which the first directed that his funeral charges and just debts should be paid by his executors. The residue of his estate not required for these purposes and the expenses of administering his estate, he gave, all his household furniture to his wife, and the remainder in equal shares to his wife, his son *William,* and his daughter *Mary;* the children not to receive their shares till *William* attained twenty-one years of age, and in the meantime the whole of the rents and profits of his estate were to be applied to the maintenance of his wife and children.

An order to administer the estate was made upon the application of the mother, and the children who were infants.

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In taking the accounts of the estate the Master at Ottawa had allowed to the executors a sum of $138.58, paid by them to the mortgagee, and had permitted the mortgagee to prove the balance of the mortgage debt against the general estate.

The plaintiffs appealed on both grounds, the allowance of the payment, and the proof.

Mr. *Ewart*, for the appeal.
Mr. *Moss*, contra.

The authorities cited are mentioned in the judgment.

PROUDFOOT, V. C.—As the plaintiffs are by the will entitled to the whole estate, real and personal, of the testator, it is unnecessary to consider which is the primary fund for payment of the mortgage debt.

Indeed I apprehend there is very little doubt that now under our present law, the same as Locke King's Act, in England, the mortgaged property would be the primary fund for payment of the debt, as between the real and personal representatives of the testator, there being no such contrary expression in this will as to take it out of the operation of the Act: *Fisher* on Mortgages (*a*).

Judgment.

But the numerous cases on that subject, and the statute itself, do not determine anything to the prejudice of the mortgagee, who is entitled to enforce his whole debt from the estate of the person liable to pay it.

When a person purchases a mortgaged estate, the mortgage forming part of the purchase money, and left in his hands for the purpose of paying the mortgagee, he becomes liable, independent of contract, to indemnify the vendor against the personal obligation to pay the money due upon the mortgage: *Waring* v. *Ward* (*b*). And in *Tweddell* v. *Tweddell* (*c*) Lord *Thurlow* said that the mortgagor covenanted with the mortgagee,—that the

(*a*) 2nd ed., secs. 1352, 1353.
(*b*) 7 Ves. 332.
(*c*) 2 B. C. C. 152.

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covenant of the purchaser with the vendor, the mortgagor, only made him a surety for the vendor, and not by any means liable to the mortgagee; but that if the vendor should be sued by the mortgagee, then that the purchaser would be liable over.

Again, he says: "The buyer takes it, (the equity of redemption,) subject to the charge; but the debt, as to him, is a real, not a personal debt. His contract with the mortgagor is only that the debt shall not fall upon him; it is a mere contract of indemnity, and he would be bound, without any specific contract, to indemnify him, as long as he can pay the money."

Whether Lord *Thurlow* was right in determining, upon the facts of that case, that the purchaser's covenant only amounted to a covenant of indemnity, or not, is a matter upon which subsequent Judges have entertained much doubt.

In *Woods* v. *Huntingford* (*a*) Lord *Alvanley* says: "I have taken the more time to consider this case, because the inference I draw from these transactions is different from that Lord *Thurlow* drew from the transactions in *Tweddell* v. *Tweddell*. * * That was not the case of a mortgaged estate descending upon the heir; but it was a purchase of an estate subject to a mortgage. There was no communication with the mortgagee; but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee. * * *Tweddell* v. *Tweddell* amounts only to this, that where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that which he must do, if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally."

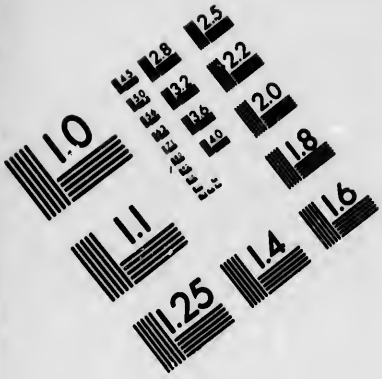
Judgment.

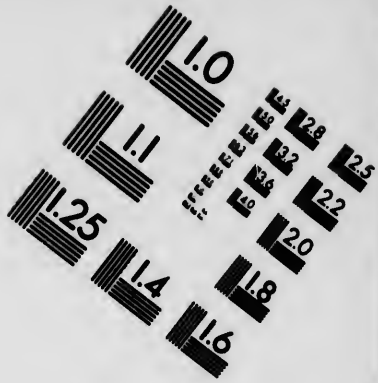
(*a*) 3 Ves. 128.

In *Waring* v. *Ward* (*a*), Lord *Eldon* says: "The case of *Tweddell* v. *Tweddell* certainly went upon this principle, that the debt due to *Delaval* [the mortgagee] was never a debt due directly from that person who personal assets they sought to have applied in payment of it. Whether that was quite accurate depended upon the construction of the articles of agreement and the deed executing them. But taking the articles and the deed together, it may very well be said in support of the decree, that the real intent, notwithstanding the particular expression in those instruments, was, that the purchase between the vendor and the vendee was the mere purchase of the equity of redemption; not meaning by that transaction to disturb the mortgage as a mortgage, to alter the contract itself, even in respect of the sum due. Mr. *Madocks*, who, I recollect, was not satisfied with the decision, laid great stress upon the recital, that the purchaser had contracted for the absolute purchase of the premises. Whether Lord *Thurlow* was right or ill founded in the opinion, that upon the whole, either the agreement at first, or the deed executing it, the contract was for an equity of redemption and nothing more, reasoning upon the facts; yet the case is a clear authority, that, if he decided the fact right, such a contract, for a mere equity of redemption, will not make the mortgage debt, which is to remain an incumbrance upon the estate, the debt of the person buying under these circumstances; for in his hands it is the debt of the estate; a mortgage interest as between his representatives." And in *Oxford* v. *Rodney* (*b*), Sir *Wm. Grant* says that, in *Tweddell* v. *Tweddell*, Lord *Thurlow* "seems to rest entirely upon the ground, that the contract was nothing more than a contract of indemnity against the mortgage; that it was not a contract, giving any direct and immediate right against himself to the mortgagee; but only indemnifying the vendor, in case

Judgment.

(*a*) 7 Ves. 337. (*b*) 14 Ves. 417.





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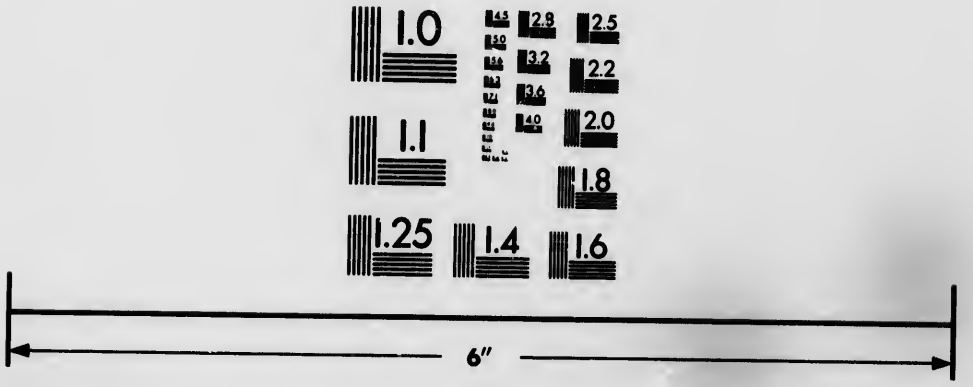

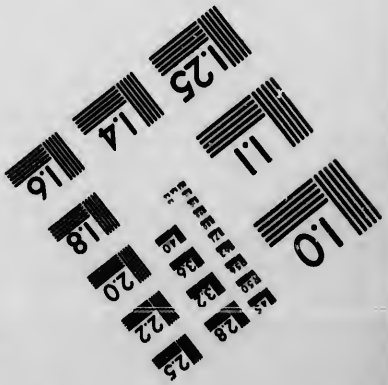

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1877. he should be sued by the mortgagee. The principle is right, if that was the real result of the facts. The agreement is for a given price, £3,500. The purchaser had then to pay what was due to the mortgagee, and the rest to the vendor. It is very doubtful upon that, whether the mortgage was not taken as a part of the price."

Re Coxler—Parker v. Glover.

I have quoted these cases at some length to shew what stress is laid upon the fact, whether the contract between the purchaser and vendee was one only of indemnity or not, and whether the mortgage was taken as part of the price or not. *Tweddell* v. *Tweddell* was decided, and the decision supported, on the supposition that the contract was only one of indemnity, and that the mortgage did not form part of the purchase money. Had these facts been found otherwise, then I apprehend Mr. Madock's argument in *Tweddell* v. *Tweddell* correctly states the law.

Judgment

He says (*a*): "Where a man makes a contract for the purchase of an estate which is in mortgage, he pledges his personal estate for the money due upon the estate. If the covenant is made with the mortgagee, and the mortgagee conveys to the purchaser, it becomes his debt, and he is personally bound to discharge it; and even though the contract be not made with the mortgagee, but with the mortgagor, yet the mortgagee may take the benefit of the contract in this Court, it not being necessary that he should be a party to the contract in order to his being a creditor by it."

With regard to the difference between a covenant for payment of the mortgage debt, and a covenant to indemnify the mortgagor, I take the following observations from the Am. ed. of W. & T. L. C. (4th Am. from 4th Lond. ed. 1877) vol. 2, p. 342: "A covenant by a purchaser of an equity of redemption to save the vendee harmless against the mortgage debt, does not impose a certain

(*a*) 2 B. C. C. 152.

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or fixed liability. Whether the covenant can be enforced, and for how much, depends first on the covenant between the mortgagor and mortgagee, and next on the election of the mortgagee to proceed against the mortgagor personally, instead of having recourse to the lands. The covenantee may hope or anticipate that a judgment will not be recovered against the mortgagor and mean to leave himself free to determine whether he will suffer the mortgagee to foreclose or discharge the debt out of the personal assets. Such an obligation is, therefore, essentially different from the assumption of a sum certain as due on the bond, and to be paid to the mortgagee as a part of the consideration for the sale."

The American editors cite in support of this the case of *Parsons* v. *Freeman* (*a*), in which Lord *Hardwicke* said, that not only might the mortgagee have brought suit on the agreement in the vendor's name for his own use, but the heir was entitled to stand in the vendor's place for the purpose of compelling the appropriation of the assets in the hands of the executor, to the fulfilment of the obligation which had been incurred by the testator. The second resolution in the case is particularly noticeable. "It being agreed to be part of the purchase money, the heir would (*if there was nothing more in the case*) be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate and dies before the purchase is completed." From Mr. *Blunt's* note it would seem that the mortgagee and mortgagor joined in the conveyance to the purchaser, a fact not noticed by the American writer whom I have quoted, and which may perhaps render the *decision* not at variance with *Tweddell* v. *Tweddell*; but the second resolution is an expression of Lord *Hardwicke's* opinion, if there were nothing more in the case than that the mortgage was to be part of the purchase money, that it became the debt of the purchaser and was payable out of his personal estate.

Judgment

(*a*) Amb. 115.

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And Chancellor *Kent* observed that an agreement between the purchaser and mortgagor, treating the mortgage as so much money left in the hands of the purchaser for the use of the mortgagee, may be a sufficient ground for a recovery at law by the mortgagee, on the ground that one may enforce a promise made for his benefit: *Hoff's* Appeal, (*a*).

In *Belvedere* v. *Rochfort* (*b*), a mortgagor sold the land to a purchaser, and in covenanting against incumbrances an exception was made of the mortgage, *the principal of which with the interest is to be paid by the purchaser out of the consideration money.* The Court of Chancery in Ireland held that this was payable out of the personal estate. Lord *Thurlow* was one of the counsel for the respondents on an appeal to the Lords, and one reason in support of the decree is, that "the plain intent was to put the purchaser in place of the vendor, who was to be no longer liable; and that he might not be so, a sufficient part of the purchase money was left in the purchaser's hands, for satisfaction of the mortgage; the pur[illegible] thereby taking upon him the vendor's bond and cov[illegible]t for payment of the mortgage, as fully as if he had himself covenanted to pay it off; and either the vendor or mortgagee might upon that contract have compelled him to pay it." The decree was affirmed, but no reasons are given in *Brown's* Parliamentary Reports.

Judgment.

Lord *Thurlow* afterwards, when Chancellor, in the case of *Billinghurst* v. *Walker* (*c*), says: "All the cases of sale have turned upon this, whether the charge was considered as part of the price. The mere purchase of an estate subject to charges, as an equity of redemption, does not make the personal estate of the purchaser liable to the charge, but if the charge is part of the price, then the personal estate is liable."

In *Hoff's* Appeal (*d*), *Hoff* bought a house from

(*a*) 12 Harris, 200, 205.
(*b*) 5 Bro. P. C. 299.
(*c*) 2 B. C. C. 604.
(*d*) 12 Harris 200.

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Reynolds for $13,900, of which $8,400 was to be paid in discharge of a mortgage to *Harvey*. *Hoff* paid the interest to the mortgagee till his death.

Woodward, J., said: "It is indisputable that what *Hoff* bought was not merely the equity of redemption, but the entire interest of the estate, and that the mortgage formed part of the price, and had been so assumed as such by him. There can be no doubt on this evidence that he was liable to an action for money had and received at the suit of the mortgagee."

The American editors of W. & T. L. C., whom I have already quoted, say, after noticing this and many other cases, vol. ii p. 344, "The weight of authority seems to be, that the acceptance of a deed reciting that the property is conveyed subject to a mortgage or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration, and retained by the vendee as so much money belonging to the incumbrancer."

Judgment.

This seems to be the fair deduction from the English cases, by which I am bound. But see *Bank of Upper Canada* v *Brough* (*a*), per *Esten*, V. C. In all of them I think the dispute was between the parties interested in the real, and those interested in the personal estate of the purchaser. And if in these cases the fact of the mortgage money being part of the consideration rendered it the debt of the purchaser, much more must that apply where there is no dispute between these parties, for the whole real and personal estate goes to the same persons, and by his will the testator has charged his whole estate with his debts. As it seems that this is to be considered a debt, then he has charged it on all his estate, and the plaintiffs must take the estate with the charge.

As there is no dispute between the real and personal

(*a*) 2 E. & A. 95.

1877. representatives, our Act, similar to *Locke King's* Act, does not apply.

Re Cosier—Parker v. Glover.

There still remains the question, whether the mortgagee could prove the mortgage debt against the estate. It is said there is no privity between him and the purchaser. There is no covenant with him for the payment. But I think, upon the evidence, it is shewn that the purchaser paid $100 to the mortgagee on account of the debt. That I apprehend, even at law, would enable the mortgagee to sue for money had and received, where it is shewn that the mortgage money was part of the consideration. Mr. *Addison* (Contracts, 6th ed., 630,) says, that the mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes no liability upon the agent to such third person, unless there is an express or implied assent, on the part of the agent, to pay the money according to the directions he has received. Here the payment of the $100 to the mortgagee on account of the mortgage debt, seems to me such an act on the purchaser's part as to imply an agreement to hold the money for the use of the mortgagee, and that therefore the mortgagee might have sued for it. If he could have sued at law, he can prove in equity.

Judgment.

Mulholland v. *Merriam* (*a*) is an instance of a class of cases in which a person not a party to an instrument made for his benefit may sue upon it. There *John Mulholland* assigned property to *Merriam* upon condition to pay sums of money to several persons, among others to the plaintiff. *Strong*, V. C., was of opinion that the plaintiff might sue, even if *Merriam* were not a trustee (p. 293), as if a personal representative of *John Mulholland* were to sue and recover the money he would be a trustee for the plaintiff, and if so, the plaintiff might himself maintain the suit. There no consideration moved from the plaintiff. But, as a

(*a*) 19 Gr. 288.

general rule, when two persons enter into an agreement for the benefit of a third person, that third person has no right to enforce it against the two, though each might as against the other: *Colycar* v. *Mulgrave* (*a*).

Lilly v. *Hays* (*b*), is an authority quite sufficient to shew that in this case the plaintiff might sue. A debtor of the plaintiff had sent money to the defendant to pay the debt, the defendant received it and said he would pay the plaintiff. The jury found that this was communicated to the plaintiff by the defendant's authority, although the evidence was certainly of the weakest. It was held that the plaintiff might sue for money had and received, and that the defendant could not allege a want of consideration moving from the plaintiff to himself.

In the present case the payment of a part was made on account of the mortgage debt.

Mathers v. *Helliwell* (*c*) does not seem to support this appeal. The late Chancellor *VanKoughnet* refused to make the purchaser pay in this Court, upon an implied covenant, as the jurisdiction of the Court was then confined to cases of actual contract; and that the Court would not exercise the functions of a Court of law, and direct payment of the mortgage money. Under the more enlarged jurisdiction of the Court, this reason is no longer of weight.

Judgment.

It was argued, however, that parol evidence of the agreement between the vendor and purchaser as to the payment of the mortgage debt was inadmissible. The consideration mentioned in the conveyance is $100, but evidence is admissible to shew what the true consideration was. No objection was made before the Master to the admissibility of the evidence; and I think, even had it been made, it should not have prevailed: *Mulholland* v. *Williamson*, (*d*). The evidence establishes that the true consideration was, the payment of the mortgage to

(*a*) 2 Keen 89.
(*b*) 5 A. & E. 548.
(*c*) 10 Gr. 172.
(*d*) In App. 14 Gr. 291.

1877.

Re Cozier—Parker v. Glover.

McFarlane, and it further shews, that the amount of this mortgage was left in *Cozier's* hands to pay it with. And certainly no objection could be made upon the Statute of Frauds, to shewing by parol evidence that a sum of money, or its equivalent, was placed in the hands of *Cozier* to pay to *McFarlane*. See *Gerow* v. *Black* (*a*).

I think the report of the Master was right. The appeal is dismissed, with costs.

SOLICITORS.—*Mowat, Maclennan, and Downey*, agents for *Musgrove, and Pearson*, Ottawa, for appellants; *Bethune, Osler, and Moss*, agents for *Gibb and Hick*, Ottawa, for respondent.

COLONIAL TRUST COMPANY v. CAMERON.

Trustee—Solicitor—Costs.

The rule that a trustee acting as a solicitor of the trust is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds; not when payable by an adverse party. *Meighen v. Buell, ante* page 503, referred to and distinguished.

Statement.

The decree of the 7th November, 1873, ordered the defendant *Cameron* to execute a release of the land in the pleadings mentioned from a mortgage made by the defendant *Angus* to him. The decree then directed that *Cameron* should pay plaintiffs' costs to the hearing. An account was then taken of what was due to the plaintiffs on their security, which was proved to be $5,000 for principal and $560 for interest, and payment was ordered to be made on the 10th July, 1874, by the defendants *Angus* and *Sutton* to the plaintiffs, and upon default a sale was ordered to be had.

(*a*) 9 U. C. R. 219.

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Upon the 1st November, 1875, an order was made in Chambers, on the application of the plaintiffs, stating that since the making of the decree they had been paid a sum of money on account of the sum found due to them, referring it to the Master to take a subsequent account of the amount due to the plaintiffs for principal and subsequent interest; and the defendant *Angus* was to pay the same in three months after the report.

The Master by his report of 13th January, 1877, found due to the plaintiffs as follows:

Principal	$2,306·54
Interest to time of payment...	531·37
Making in all	$2,837·91,

which was ordered to be paid on the 14th April, 1877.

The plaintiffs appealed from this report, because the Master in taking the account refused to charge the defendant or allow to the plaintiffs $292, claimed by the plaintiffs for their costs of this suit, together with so much of the bill of $81.78, referred to in an affidavit of Mr. *Chipman* for miscellaneous charges, as does not relate to services performed by the trustees *Crooks* and *Chipman*. The plaintiffs at the argument asked leave to strike out the sum of $292 mentioned in the notice, and thus leave the appeal to apply to all the costs, and the Court gave leave to amend the notice in that way.

Statement.

It appeared that *Angus* and *Sutton* obtained an advance of $5,000 from the plaintiffs on the 29th September, 1869, upon the security, 1st of a promissory note of *Angus* indorsed by *Sutton*, *Fosby* and *Finlayson*, 2nd of an agreement of *Angus* and *Sutton* to execute to *Adam Crooks*, local director, and *R. J. U. Chipman*, manager, an irrevocable power of attorney to receive from the Government of Canada certain moneys payable to *Angus* and *Sutton*. *Sutton* and *Angus* executed the power of attorney.

On the 27th January, 1870, *Angus* made a mortgage to *Finlayson* to indemnify him in regard to his indorsation of the note.

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On the 2nd April, 1870, that mortgage was assigned by *Angus* and *Finlayson* to the plaintiffs as collateral security for the payment of the note and interest. And on the same day *Sutton* and *Angus* executed a deed to *Chipman* and *Crooks*, reciting that moneys were due to them from the Government of Canada under a contract recently annulled, and assigning to *Crooks* and *Chipman* all the moneys payable by the Government of Canada, upon trust to collect the same and pay costs, &c., of collection, to pay the amount due to the plaintiffs and all costs attending it, to pay the creditors of *Sutton* and *Angus pari passu*, and any surplus to pay to *Sutton* and *Angus*.

The bill was filed, by a firm of solicitors of which Mr. *Crooks* was a member, to set aside the mortgage to *Cameron*, and for the sale of the mortgaged property, taking no notice of the other securities held by the plaintiffs, treating the assigned mortgage as an absolute security.

March 15. Mr. *Cattanach*, for the appeal.

Mr. *Arnoldi*, contra.

The authorities cited appear in the judgment.

Judgment. June 27th. PROUDFOOT V. C. [after stating the facts as above set forth]—The Master, I understand, allowed disbursements, but refused to allow profit costs on the ground that Mr. *Crooks* was both a solicitor and a trustee, and has refused to charge against *Angus* the costs of suit to the hearing, which the plaintiffs have been unable to recover from *Cameron*.

The plaintiffs allege that the suit was brought, so far as it was adapted to set aside the mortgage to *Cameron*, at the instance of and for the benefit of *Angus*. And I think in this contention they are right. In a letter of June (1873) addressed to Mr. *Crooks* by *Angus* he says: "I think you would better take proceedings at once to

set aside the mortgage on my factory which was given to Mr. *Cameron*. * * * I want you to take immediate action in this matter, as I have had a fair offer for my factory." And in a letter of 27th April, 1874, to Mr. *Crooks*, *Angus* says: "Would you please let me know the exact amount of your claim, including interest and costs, &c. I hope you will make the costs as light as possible, as the whole thing has been a very unfortunate affair for me."

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On the 13th December, 1872, Mr. *Chipman* had written to *Angus* informing him of Mr. *Cameron's* refusal to release his mortgage, and says: "It will be necessary for you to come to Toronto, and confer with our solicitors as to what remedy is to be had to compel him. I trust you will do so at the earliest moment possible, and as this is a matter in which you are personally interested, that you will arrange with the solicitors as regards the expense of their action."

I think the proper conclusion to be drawn from this correspondence is, that the suit, so far as requisite to set aside *Cameron's* mortgage at least, was instituted by the direction and under the authority of *Angus*, who was to be liable for the costs of it.

Judgment.

But to justify the Master in taxing these costs against *Angus*, something more was necessary. The plaintiffs were satisfied with a decree that *Cameron* was to pay the costs to the hearing, and no costs were given against *Angus* to that stage of the cause; the account was taken of what he was to pay, and it was only in default of payment that he was to be liable to costs, and those subsequent costs. The bills of costs forming exhibit B are for services in 1869 and 1870 prior to the decree. It is quite possible the plaintiffs may have a remedy by petition to compel *Angus* to pay the costs on the ground that the suit was brought by his instructions; but I do not think that under this decree the Master had any authority to tax the costs complained of, and to add them to *Angus's* debt, and therefore there can be no appeal because he has not done so.

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As to the costs which the Master has taxed, and has only allowed disbursements, it does not appear on the papers before me what they are. But if in taxing the subsequent costs he has only allowed profit costs to the plaintiffs because Mr. *Crooks* was a trustee for them, I apprehend that is not according to the practice of the Court. True enough, where the trustee solicitor is seeking to get costs from the *cestui que trust* then as a general rule he is not entitled to profit costs (*a*); and the same principle applies when he is a member of the firm who make the charge (*b*), *Collins* v. *Carey* (*c*). An exception to this rule is said to exist where the other partners are alone entitled to the costs: *Clack* v. *Carlon* (*d*); but in the recent case of *Meighen* v. *Buell* (*e*) the Chancellor has declined to follow *Clack* v. *Carlon*, and I suppose that involves a refusal to follow *Cradock* v. *Piper* (*f*), in regard to which doubts have been expressed by other Judges. See *Ontario* v. *Winnaker* (*g*).

Judgment.

In *Fisher* on Mortgage (*h*), it is said that when a mortgagee is his own solicitor he will only have costs out of pocket in the matter in which he has so acted. For this position is cited *Sclater* v. *Cottam* (*i*) and *Price* v. *Davies* (*j*). The last case I cannot find reported, but Mr. *Fisher* says it was one of express trust. *Sclater* v. *Cottam* was a case where the costs of a mortgagee solicitor were being taxed in an administration suit. They had been incurred in defending the title of the property. One of the bills had been dismissed with costs. They were taxed, but it does not appear on what scale, and failing to recover them from the plaintiff, it was sought to get them from the estate, when *Kindersley*, V. C., allowed disbursements only.

(*a*) Lewin, 3rd ed., 320.
(*b*) Lewin, 3rd. ed., 549.
(*c*) 2 Beav. 128.
(*d*) 7 Jur. N. S. 441.
(*e*) *Ante* 503.
(*f*) 1 McN. & G. 668.
(*g*) 13 Gr. 441.
(*h*) 2nd. ed. 956, note m.
(*i*) 3 Jur. N. S. 630.
(*j*) V. C. Kindersley, 16 June 1862.

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The reason usually assigned for not giving the solicitor profit costs in such cases is, that he is not to profit by the trust estate. The value of that reason is only apparent when he is seeking to diminish the estate. *Whitney* v. *Smith* (*a*) shows that a solicitor may derive a benefit from the estate bringing him business without accounting for the profits, so long as he does not seek to charge the estate. The facts of *Meighen* v. *Buell* (*b*) do not appear in the report, but I assume that the costs were sought to be recovered from the estate by the solicitor. All the cases cited by the Chancellor in his judgment are of that description: *Collins* v. *Carey* (*c*), *New* v. *Jones* (*d*), *Moore* v. *Frowd* (*e*), *Christophers* v. *White* (*f*), *Broughton* v. *Broughton* (*g*), *Cradock* v. *Piper* (*h*), and *Clack* v. *Carlon* (*i*); and the Chancellor adopts the reasoning of these cases that a solicitor shall not be permitted to profit by his trust. I conceive he was therefore dealing with a case in which the solicitor was seeking to recover his costs from the trust estate.

Judgment.

In *Ontario* v. *Winnaker* (*j*) the plaintiffs were allowed their costs in equity in a suit upon a mortgage, and I suppose one of the plaintiffs to have been a solicitor and trustee. *Mowat*, V. C., says this was done, the defendants not objecting, and he then makes some remarks upon *Cradock* v. *Piper* as not having been approved in *Broughton* v. *Broughton*, and treats the rule as applicable to a suit between the trust and strangers. These remarks, though of value as containing the opinion of a learned Judge, were not required to dispose of any issue in the cause, and must be considered as *obiter dicta* merely.

But *Pince* v. *Beattie* (*k*) is an express authority that

(*a*) L. R. 4 Chy. 513.
(*b*) 24 Gr. 503.
(*c*) 2 Beav. 128.
(*d*) 1 McN. & G. 668 n.
(*e*) 3 M. & C. 45.
(*f*) 10 Beav. 523.
(*g*) 5 D. M. G. 160.
(*h*) 1 McN. & G. 674.
(*i*) 7 Jur. N. S. 441.
(*j*) 13 Gr. 443.
(*k*) 9 Jur. N. S. 111

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the rule depriving a trustee who acts as his own solicitor of profit costs, applies only as between the trustee and his *cestui que trust*. In that case the plaintiff sought, among other things, to set aside a settlement or to rectify it, against Mr. *Beattie*, a solicitor, through whom it had been prepared, who defended as his own solicitor. The bill so far as it sought to set aside or rectify the settlement, was dismissed with costs. After looking into the authorities, *Kindersley*, V.C., said: "That where a suit was instituted to administer a trust, a trustee acting as solicitor had a right only to his costs out of pocket; and in those cases in which a trustee was allowed to employ a collector but chose to collect himself, he could claim nothing for so doing. This practice was obviously for the protection of the trust estate. In the present case, however, the question was not one between trustees and *cestuis que trust*, * * and Mr. *Beattie* was entitled to his full costs of so much of the bill as was dismissed with costs, although he was solicitor on the record."

Judgment

In *Morgan* on Costs (*a*) the same distinction is drawn: that trustees are only disallowed profit costs in suits between them and the estate.

I think, therefore, the Master was right in refusing, on the material before him, to charge the costs to the hearing against *Angus*, and the appeal on that ground is dismissed, with costs. The other appeal because the Master did not tax subsequent full costs to the plaintiff, is allowed, with costs. Or perhaps, as there is one appeal dismissed and one allowed, it may be better to say there shall be no costs to either side.

SOLICITORS.—*Crooks*, *Kingsmill*, and *Cattanach*, for the plaintiffs; *Cameron* and *Appelbe*, for the defendant.

(*a*) 282 (ed. 1865).

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RE ROBERTSON, ROBERTSON v. ROBERTSON.

Practice—Costs—Experts.

The General Orders, 240, 482, and 541, do not authorize the Master in proceedings in his office to employ the services of experts; but where, in an administration suit instituted by the infant children of the deceased, whose estate it appeared at an early stage of the proceedings was insufficient to pay the creditors, the Master had, at the instance of the plaintiffs, and with the consent of the creditors, employed an expert whose services had been of benefit to the estate by having a large claim against it disallowed, the Court *held*, on appeal, that the creditors could not afterwards, on the taxation of costs, object to the allowance of the sums paid to such expert.

Where, in such a suit, the plaintiffs had incurred the expense of several journeys to examine the books of the estate:

Held, that as these journeys had been made and the expenses incurred without the consent of the creditors, the only persons really interested in realizing the estate, the charge could not be allowed to the plaintiffs on taxation.

Although by the tariff of costs the attendance before the Master may be increased to $2 an hour by the local Masters on taxation, still Order 312, giving the taxing officer at Toronto power to revise the taxation, empowers him to reduce such allowance.

The Master disallowed the whole of the charges for the service of warrants on creditors; and as the proceedings had not been sanctioned by the creditors, the Court on appeal sustained this ruling; although, had the proceedings been approved of by the creditors, it would have been reasonable to have allowed so much of the charge as would have been incurred in serving the creditors with notice of the proceedings—notice being all that is required to be served on creditors whose claims are disputed.

The same rule was adopted in respect of a fee paid to a counsel in the United States; notwithstanding that his services had been beneficial to the estate.

The Master had disallowed to the solicitor of the plaintiffs his charge for comparing the deeds of property sold to purchasers under the decree. On appeal, the Court overruled the Master's finding, it being the duty of the vendor's solicitor to see that the engrossed deed agrees with the draft.

Where the Master had exercised his discretion in making an allowance to a solicitor for his services in respect of incumbrances, the Court refused to disturb his ruling

Instalments of purchase money (not the deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him paid into Court:

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Held, that he was not entitled to any remuneration from the estate for such services, it being the duty of the purchasers to pay these moneys into Court

A sum of money paid to the local Master for going out of the province to take evidence was disallowed, as it was not shewn that the creditors had desired it.

Certain disbursements for the proving of which an affidavit had been made, were disallowed on taxation: *held*, that the charge for preparing the affidavit was also properly disallowed.

The decree on further directions gave the plaintiffs their costs as between solicitor and client. The plaintiffs were the infant children of *Donald Robertson*, who died intestate. The administration order was made on the 1st September, 1873, and the decree on further directions on the 5th May, 1875. The bill of costs as originally brought in before the Master at St. Catharines amounted to $4,589·12; he taxed it at $2,467·38; and upon revision a further sum of about $900 was deducted. Thereupon this appeal was brought in respect of some of the items struck off upon such revision. The several grounds of appeal are clearly stated in the judgment.

March 15th. Mr. *Attorney-General Mowat* and Mr. *Ewart*, for the appeal.

Mr. *F. B. Robertson*, for the administratrix.

Mr. *J. A. Miller*, for the creditors, contra.

June 2nd. Judgment. PROUDFOOT, V. C.—The estate has turned out wholly insolvent, and will not produce enough to satisfy the creditors. The solicitors for the plaintiffs were aware of this soon after the claims of the creditors were produced, in October or November, 1873. From that time the plaintiffs must be taken to have been aware that they had no interest in the estate. The next friend of the plaintiffs was, I understand, a creditor.

The first ground of appeal is, because a sum of $40, paid to one *Magrath* was not allowed. *Magrath* was

an accountant employed by the direction of the local Master to investigate the accounts of the estate with reference to a large claim of one *Drew*, and by means of such investigation was enabled to give evidence by which the claim was disallowed, and *Drew* found to be indebted to the estate. Upon the original taxation it was stated that *Magrath* claimed $40 as remuneration for his services, and it was suggested that this sum should be inserted in the bill of costs, allowed to the plaintiffs' solicitor, and be paid by him to *Magrath*. This was agreed to by the solicitors for all parties, including Mr. *Miller* who was present and acted as solicitor for the creditors. 1877. Re Robertson.

With this item may be considered the second ground of appeal; that a sum of $19.45, paid to *Magrath* for his services and expenses in attending at Buffalo, upon the suggestion of the local Master that he should be present at the taking of evidence in regard to *Drew's* claim, was struck off on revision.

The Master disallowed the first, as the local Master had no power to direct the employment of an accountant; and the second, because there was no need, in the interest of the plaintiffs, to contest these claims; and if the solicitor claims them as really acting for the creditors or in their interest, he ought to have been retained by them, of which there was no allegation and no proof. Judgment.

I think that upon both the grounds upon which the Master proceeded he was right. The *Reg. Gen.* 541 only authorizes the Court to employ experts. The *Reg. Gen.* 240 directs the Master to adopt the simplest and speediest method of prosecuting a reference; and the *Reg. Gen.* 482 empowers him to allow claims, &c., and may direct such investigation, and require such evidence in regard thereto as he thinks fit. Neither of these orders enables the Master to create a new species of evidence, or to employ the assistance of skilled persons in unravelling intricate accounts.

But I allowed these two appeals on the argument, upon

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the ground that the creditors had consented to what the local Master had ordered and suggested. The certificate of the local Master shews this to have been the case, and it was not denied that the certificate was accurate. But I rather think this evidence was not before the taxing officer. It is too late for the creditors to object to the allowance, after assenting to the services of *Magrath* being obtained and paid for, and receiving a benefit from them.

Before proceeding to examine in detail the other appeals, it will much shorten the discussion of them to consider the effect that ought to be given to the fact of the insolvency of the estate, and the knowledge of that fact by the plaintiffs' solicitors. The plaintiffs being heirs and next of kin of the intestate and filing their bill in that capacity, there are authorities that would deprive the plaintiffs of costs, if there was nothing coming to them: *Newbegin* v. *Bell* (*a*). That question is not open for consideration now, as the decree has given them their costs. But it has a great deal of importance when considering claims made for costs beyond those incurred in the ordinary prosecution of a suit; and it is a distinction which the taxing Master has a right to make without special reference to him in the decree. Where a fund belongs wholly to other parties, as in this case, a much less liberal allowance is made than where the costs come out of a fund in which the plaintiffs are interested with others, or where the fund belongs wholly to themselves (*b*).

Judgment.

Here the plaintiffs were early aware that they had no interest in the estate; that after paying creditors there would be no surplus. It has been held in creditors' suits, if a plaintiff after information that there are no assets applicable to the payment of his debt, persists in prosecuting the suit, he does so, at his own risk. The same has been held in a legatee's suit, and also, as we

(*a*) 23 Beav. 386. (*b*) Morgan and Davey, Costs 2.
(*c*) Morgan & Davey, 136, 137.

have seen, in a suit by next of kin. (*c*). The plain and obvious course for the plaintiffs to pursue was, to procure the authority of those interested in the suit, the creditors. I have said the plaintiffs are affected by the course pursued, for, though they are infants, they are bound by the acts of their next friend (*a*). The ground upon which the allowance was asked for, that the next friend was also a creditor, should not have any influence. The order was not got by him as a creditor. I do not know whether the fact were disclosed that he was a creditor when the order was made. His position as a creditor was adverse to his character of next friend, and might have been a reason for not making the administration order at his instance, or for removing him afterwards. (*b*).

Charges and allowances, therefore, which might very properly be allowed on a taxation as between solicitor and client, when the costs are to come out of the plaintiffs' fund or one in which they are interested, it might be very improper to allow out of a fund in which they have no interest.

Judgment.

The third appeal is, because the charges for a number of journeys to Buffalo and Toronto were disallowed.

These journeys range between the dates of 8th October, 1873, and 29th January, 1875. Those to Buffalo were partly to examine the books of the estate to ascertain who were creditors, partly to make inquiries, &c. It was said, and I assume it to be the fact, that the books were under attachment at Buffalo, and also that the defendant, the administratrix, gave her son an order to get them, but failed to obtain them. And in doing so, it places the matter in the most favourable light as regards the plaintiffs, and disposes of some of the minor grounds alluded to by the Master. But when these journeys were made, the plaintiffs were aware that they had no interest in the estate, and I think they are only

(*a*) Chambers on Infants, 758. (*b*) Chambers, 762.

1877. charges that could be allowed when authorized and sanctioned by the creditors. There was no pretence of any authority from them. The Master was quite correct in disallowing them. I think he was also right in disallowing the charges for the journeys to Toronto, partly because they were unnecessary, but chiefly on the ground just stated, that the persons interested did not authorize them.

Re Robertson.

This appeal is dismissed.

The fourth appeal is, because the Master has disallowed charges allowed by the local Master for attendances before him. In the tariff of fees (*a*) the fee for attendance before the Master may be increased to $2 an hour, when in his judgment the matters are of such a nature as to have required previous preparation, and to have had it, and the increase is noted in his book. It is said that this leaves it in the discretion of the local Master, and that his exercise of discretion cannot be interfered with; and did the matter rest here it would be difficult to avoid that conclusion. But *Reg. Gen.* 312 gives the taxing officer at Toronto power to *revise* the taxation, a term wide enough to cover any alteration, addition, or reduction he may think proper; and in practice, I understand, the charges for attendance before the local Master have been considered proper subjects for revision: *Keim* v. *Yeagley* (*b*).

Judgment.

This appeal is dismissed.

The fifth appeal is, because a portion, if not the whole, of the charges in connection with service of warrants on creditors should have been allowed. The Master has disallowed these warrants as not according to the practice of the Court. It is admitted that the practice only authorizes notices to creditors whose claims are disputed, but it is said that as much should have been allowed as

(*a*) Taylor's Ord. p. 896. (*b*) 6 Pr. R. 60.

the notices would have cost. This would not have been unreasonable. But the objection to this, which runs through so many of the subjects of appeal, is, that the proceeding, whether by warrant or notice, was not sanctioned by the creditors. The plaintiffs' solicitors could not make themselves solicitors for the creditors without their consent, and however much I may regret to deprive the solicitors of the charges for these services, it is impossible for me to retain them for the creditors. 1877. Re Robertson.

This appeal is dismissed.

The sixth appeal is, because the Master has disallowed a fee of $40, paid to Mr. *Davis*, a counsel at Buffalo, in the matter of a claim made by one *Smith* against the estate. A receipt is produced for the payment as made in May 1874, which was not before the taxing Master I would be glad to allow this if I could find any authority from the creditors for making it, or any recognition of it when made; for it may be said of this, as well as of nearly all the other disallowed items, that it seems to have been incurred for the benefit of the creditors and to have been beneficial to them. But they had solicitors employed for themselves, and to allow this would be making them pay double costs. Judgment.

This appeal is dismissed.

The seventh appeal is, that charges for comparing deeds of property sold to purchasers have been disallowed. The Master has disallowed them because by the conditions of sale the deeds were to be at the expense of the purchasers. This condition is in effect what the law of the Court, in the absence of any agreement on the subject, was before. The purchaser had to be at the expense of preparing the conveyance, and the vendor of getting it executed by all necessary parties: *Weiss* v. *Crafts* (*a*); and in *Smith's* Practice (*b*), as quoted in

(*a*) 6 Pr. R. 151. (*b*) Vol. I. p. 1014.

1877. that case, it is said: "In the absence of a condition to the contrary, the expense attending the perusal and execution of the conveyance is always borne by the vendor." I do not see any notice of these in the reasons given by the Master for the disallowances made by him. The vendor's solicitor was in duty bound to see that the engrossed deed corresponded with the draft. I think the charges in connection with this should be allowed.

Re Robertson.

This appeal is allowed.

The eighth appeal is, because certain charges in connection with the report on incumbrances should have been, but were not, allowed. The Master, I understand, has exercised his discretion as to amount and has allowed a certain sum for the services, and having done so it is not a subject of appeal, there being no question of principle involved.

I dismiss this appeal.

Judgment.

The ninth appeal is, because the Master has disallowed charges for remitting purchase money to Toronto and paying it into the bank. This was not part of the deposit, but purchase money which the purchaser himself was bound to pay into Court. The vendors' solicitors had nothing to do with it in that capacity. I think the Master was right.

This appeal is dismissed.

The tenth appeal is, because a sum paid to the local Master for his expenses in going to Buffalo to take evidence has been struck off. If there were any evidence of this expense having been incurred at the desire or with the consent of the creditors, it should be allowed. But I find no evidence of that kind, and I cannot say the Master was wrong.

I dismiss this appeal.

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The eleventh appeal is, because the expense of an affidavit as to disbursements, prepared for the purpose chiefly of shewing the necessity and propriety of the journeys charged for, was not allowed. It was admitted that this charge must stand or fall with the items for which it was prepared. These having been disallowed it will be also.

I dismiss this appeal.

The twelfth appeal, as to a counsel fee at the hearing on further directions, was dismissed upon the argument.

The result is, that the first, second, and seventh appeals are allowed, and the other nine dismissed. Costs of each appeal will follow its result.

SOLICITORS.—*Mowat, Maclennan*, and *Downey*, agents for *Brown* and *Brown*, St. Catharines, for plaintiffs; *Boswell* and *Robertson*, agents for *Miller* and *Miller*, St. Catharines, for the creditors; *McCarthy, Hoskin, Plumb*, and *Creelman*, agents for *Robertson* and *Robertson*, Hamilton, for the administratrix.

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THE CORPORATION OF WYOMING AND THE PUBLIC SCHOOL BOARD OF WYOMING v. JAMES BELL.

Dedication—36 *Vic. ch.* 22, (Ont.)—*Improvements.*

A reservation for school purposes is of such a character as to be the subject of dedication.

The owners of land in 1856 caused the same to be surveyed and laid off into village lots, and on the plan thereof, which was duly registered, marked a portion as "Reserve for school ground." An auction sale of lots took place during the same month with reference to the lots not fronting on the reserve, when lots to the value of $20,000 were sold; and after the auction lots were sold privately, according to the plan. The school trustees did not take possession of the school reserve. Subsequently conveyances were executed to *S.* of all the undisposed of portion of the town as surveyed. *S.* in January, 1863, caused a new plan to be prepared and registered, in which the school reserve was laid out into village lots, some of which had meanwhile been bought by the defendant from an intermediate owner with notice of the original plan and the reservation for school purposes:

Held, on a bill filed in 1876, that the original plan was binding; that the conveyance to *S.* did not give him the ownership of the soil of the streets or reserves for public purposes; and that the defendant was not entitled under the Statute 36 Vic. ch. 22 (Ont.), to be paid for any improvements he had made upon the lots forming part of the school reserve.

Statement. This was a bill by *The Corporation of Wyoming and The Public School Board of Wyoming* against *James Bell*, setting forth that two persons named *McKay* and *Robertson* were at one time owners of the site of the present village of Wyoming: that in September, 1856, they had a plan made laying out the ground in village lots, with streets and reserves for public purposes, and among them one that was marked on the plan "Reserve for school ground": that an auction sale took place in September, 1856, of village lots according to the plan: that the plan was in the auction room, and had been posted up in different towns, and the advertisement of the sale was pasted on it: that more than one hundred lots were sold pursuant to the plan. The price for which they were sold was about $20,000, and subsequent

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to the auction other lots were sold according to this plan. No evidence was given of any lots sold fronting the School Reserve. One was sold on the corner of a block; the lot was opposite the corner of the School Reserve. Some lots were bought fronting on a reserve for a market square, for which a higher price was given on account of the neighbourhood of the School Reserve. A number of sales and transfers were made of lots according to the plan, before January, 1863. At the time of the making and registry of the plan the land was mortgaged to one *Brown*.

On the 1st of June, 1857, *McKay* conveyed to *Robertson*, who on the 3rd of December, 1857, conveyed to *Spencer*, *Douglas*, and *Richardson*, and by other conveyances the property was, on the 5th of April, 1861, vested in *Spencer*. These conveyances purported to pass all the undisposed of portion of the town of Wyoming as surveyed, and prior to 1863 *Spencer* made some conveyances of lots according to the registered plan.

On the 12th of January, 1863, *Spencer* caused a new plan of the village to be prepared and registered, in which the School Reserve was laid out into village lots. *Bell*, the defendant, bought eight of these lots on the School Reserve from *Richardson*, one of the intermediate owners of the property, and they were conveyed to him by deed of 14th of June, 1869. He denied that he knew anything of there being a School Reserve till after he had bought and paid two instalments of the purchase money.

Argument.

It appeared that *Bell* had cleared up the lots, fenced them, and had made a garden of the property.

The cause came on for the examination of witnesses and hearing at the Sittings at Sarnia, on the 17th of April, 1877.

Mr. *Moncrieff*, for the plaintiffs, contended that what was here shewn to have taken place was a sufficient dedication of the land for the purpose of a public school, and

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that it was not necessary to an effectual dedication that a user for the purpose intended should take place; the question really being, was there the *animus dedicandi*? *Corporation of Guelph* v. *Canada Company* (*a*) shews that what was done sufficiently establishes that. The owner of the legal estate in this case was present and did not object to what the mortgagor did as to the mode of laying out the property, so that if even the rule were that the owner of the equity of redemption could not dedicate, the legal estate was here bound. He referred also to *O'Connor* v. *Dunn* (*b*), *Gummerson* v. *Banting* (*c*), *Attorney General* v. *Brantford* (*d*), *Saugeen* v. *The Church Society* (*e*), *Attorney General* v. *Goderich* (*f*).

Mr. *Boyd*, Q.C., and Mr. *Lister*, for the defendants, submitted that in any view of the case the defendant should be declared entitled to payment for improvements effected by him on the property; that the Statute of Limitations (*g*) formed a complete answer to the plain-

Argument.

tiffs' bill, so far at least as it seeks to set aside the plan registered by *Spencer* as a cloud upon the title of the plaintiffs. Here there was no evidence of any dealing with this property on the faith of these lots being retained as a school site; and even if any one had purchased on the faith of there being a school site the party so purchasing was the proper person to institute proceedings, not the public.

They referred to *Dillon* on Corporations, vol. ii, pp. 598, 601, 605.

Judgment.

June 27.

PROUDFOOT, V. C.—The evidence satisfies me that *Bell* had notice before he bought. *McKay*, who has no interest in the property, and to whom I give credit, says, that in 1862 *Bell* told him he was going to buy the

(*a*) 4 Gr. 362.
(*b*) 37 U. C. R. 430.
(*c*) 18 Gr. 516.
(*d*) 6 Gr. 593.
(*e*) 6 Gr. 546.
(*f*) 5 Gr. 406.
(*g*) 38 Vic. ch. 16.

property back of his shop, referring to the school ground, when *McKay* told him there was no use of his doing that, as it belonged to the town if ever they built a school on it. *Ravin*, another witness, says, *Bell* told him he got the lots cheap on account of their being a school property. *Wood*, another witness, says, that about three years ago *Bell* told him that before he bought he knew it was a school reserve; that *Richardson* and his agent, *Smith*, promised that if he bought he should see no harm by it.

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It is clear that there was an original dedication of the property in question for the purposes of a school reserve, and a reservation for school purposes is of such a character as to be the subject of dedication (*a*).

The plaintiffs contend that the subsequent conveyances by which the title became vested in *Spencer*, being of "all the undisposed of portion of the town of Wyoming as surveyed," only passed to him the unsold and unsurveyed lots, and not this school reserve: that the streets and reserves for public purposes were *disposed of*, by their dedication for these purposes; and that the deeds disclose no intention to alienate or transfer the soil, over which easements had been given to the public. It is not as if the land had been described by its designation as a township lot, which would probably have passed any rights of property that remained in the grantors, but there is an express limitation to the undisposed of portion.

Judgment.

Now, so long as that first plan remained unaltered, neither *McKay* nor *Robertson* could have made any conveyance to interfere with the allowances for roads, streets, or commons on the plan, the statute then in force enacting that all such allowances for roads, streets, and commons, laid down on the plan and upon which lots of lands, fronting or adjoining them, have been or may be

(*a*) Klinkever v. School District, 11 Penn. St. R. 444.

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sold, shall be public highways, streets, and commons (*a*); and I think the conveyances indicate that they meant to convey only what they lawfully might, and that *Spencer* intended to buy only what could be lawfully sold.

By the dedication in the original plan the public had acquired an interest, as much as if a deed or conveyance had been made in trust for them of this school reserve. The statute already cited, section 39, authorizes owners to lay out the sites of villages into lots, streets, and commons, and to deposit a plan, according to which subsequent registries were to be made. The school reserve was neither a street, road, nor common. It was part of the plot of lots. It was within the competence of the owners to dedicate them to the public. *Guelph* v. *Canada Company* (*b*). Was there then a dedication? In the case just quoted, the preparation of a plan by the defendants leaving an open space on which "Market ground" was written, was held to be sufficient evidence of an intention to dedicate. Mr. *Dillon*, in his excellent work on Municipal Corporations, says (*c*): "An intent on the part of the owner to dedicate, is absolutely essential; and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists. Where a plat is made and recorded, the requisite intention is generally indisputable."

Judgment.

This intention was also communicated to the school trustees by *McKay*, and they were told to take possession for the people; and at one time the trustees were negotiating with the owners to exchange for another site.

I conclude that this School Reserve was effectually dedicated to the public: that it must be taken as part of the site of the town that had been disposed of; and therefore did not pass to *Spencer* by the deeds to him.

The defendant contended, however, that the statute requires the *owners* to sign the certificate for registra-

(*a*) C. S. U. C. ch. 93, sec. 35. (*b*) 4 Grant. 632.
(*c*) Section 499.

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tion, and that the property being in mortgage, and the mortgagee not joining, the registration was ineffectual. Mr. *Dillon* says (*a*): the dedication must be by the owner of the land, or of an estate therein. Here the mortgagors had the equity of redemption, which is an estate in the land. But probably they could not have dedicated, to the prejudice of the mortgagee, without his assent. This assent may be either express or implied: (*b*). It is shewn, that *Brown*, the mortgagee, was present on the day of the auction sale. He made no objection to the plan. He never objected to it. He permitted the sales to take place upon the plan. He owned the east half of the township lot in which the town plot was laid out, and *McKay* and *Robertson* left half the width of a street off their land adjoining his for his benefit when he should lay out his land. This is amply sufficient to imply an assent on *Brown's* part, and would have sufficed to estop him had, he ever thought of interfering with it: *Angell* on Highways, section 134.

Judgment.

It was further argued that user by the public was necessary to perfect the dedication. User for a long period has been held evidence of an intention to dedicate: *Dillon*, section 500. And he says also (section 495) that unless private rights have attached a common law dedication of land for a highway, street or other public use, may, according to some authorities, be revoked by the owner at any time before there has been an acceptance by formal act of the proper authorities, or by user, but not afterwards. But he adds (note 2) that completed dedication by map, held not revocable, although not accepted. *Methodist Episcopal Church* v. *Hoboken* (*c*), *Cook* v. *Burlington* (*d*). The passage in Mr. *Dillon's* book, section 495, was the only authority cited, and the passage in the note shews that it does not interfere with such a dedication as there was in this case.

(*a*) Section 498.
(*b*) 2 Sm. L. C. 95.
(*c*) 33 N. J. (Law) 13.
(*d*) 30 Iowa, 94.

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I have consulted also Mr. *Washburn's* Work on Easements, in which the subject of dedication is discussed. I find that on the subject of dedication at common law without any specific grant or formal contract, he does not differ from Mr. *Dillon*, that it must be completed by the acceptance of the public: ch. 1, s. 5, pl. 10. But at pl. 30, he says, "But it is not, after all, the laying down of streets or squares upon the plot of a contemplated city or village, even though the same may be publicly exhibited or declared by the proprietors thereof, that constitutes a dedication of these to the public. There must be a sale of some of these lots, *having reference to such street or squares, and some adoption thereof by the public as such,* in order to create a dedication of these to the public use." Mr. *Washburn's* book, 2nd ed. was published in 1867, and he does not quote the cases cited by Mr. *Dillon*, whose book was published in 1873, and in fact some of these cases had been decided in the intervening period. I must assume that Mr. *Dillon* gives the law as it had been settled when he wrote, and it commends itself to my judgment as more in accordance with our law than that stated by Mr. *Washburn*. The cases on which he relies, I infer from his remarks, p. 31 *et seq.*, were influenced by local laws or decisions requiring the same proceedings for laying out such streets as if there had been no dedication. And the question seems rather to have been, whether the way dedicated had so become a public highway as to impose on the public authorities a duty to amend or repair.

Judgment.

Among the cases cited by Mr. *Dillon* is, *The Trustees of the Methodist Episcopal Church* v. *Hoboken* (c). Most of the cases referred to by Mr. *Washburn* are cited in it, and the rule deduced from them varies from the italicized portion of the passage taken from Mr. *Washburn*, only requiring that the sales should have *reference to a plot in which the same is so laid off*, not

(a) 33 N. J. (Law) 13 (1868).

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necessarily to the streets or squares. And in *Stone* v. *Brooks* (*a*), the Court refer to the New York cases which required an acceptance by the proper authorities of a dedicated street before it became a public street, as decided under statutes containing peculiar provisions, and say that such a requirement destroys the common law doctrine of dedication: citing *Holdane* v. *Trustees of Cold Spring* (*b*); *Clements* v. *The Village of West Troy* (*c*); *Angell* on Highways, section 149.

Our statute, as we have seen, makes the roads and streets laid down in the plan public highways, and requires no acceptance on the part of the public to complete the dedication.

But even according to the rule as stated by Mr. *Washburn*, the dedication here complies with it. As there was a sale of lots having reference to the reserve, and the school trustees were notified of the dedication and assented to it. They did not go into actual possession, as they were not then prepared to build on it; but they did not dissent from the gift, and at a subsequent period endeavoured to effect an exchange.

Judgment.

There is one point, however, I had almost forgotten to notice, on which I find an authority in Mr. *Washburn's* book, and which in this instance I readily adopt. The plan was prepared here, and the dedication made, before there was any village in existence, and seventeen years before its incorporation. Mr. *Washburn* says, ch. 1, sec. 5, p. 19, there may be a dedication to the use of a town before it shall actually have been incorporated, or it may be to the public—a body not capable of taking a grant—the only limit being, that what is dedicated is suited to the wants of the community at large. And this is fully justified by the case cited from 33 New Jersey 13, *Angell* on Highways, Sec. 125; *Dillon*, Sec. 494.

The defendant, however, relied chiefly on the authority given by Consol. Stat. U. C. ch. 93 sec. 37, as amended

(*a*) 35 Cal. 489, 397. (*b*) 23 Barb. 119. (*c*) 10 How Pr. 199.

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by 24, Vict. ch. 49 sec. 1, to the owners to alter their first survey or plan. The owners are by the last statute allowed to cause a new survey or plan altering or wholly or partially cancelling and making void the first survey and plan, and the division of the land into lots, streets, &c.; provided that no street shall be altered or closed up upon which any lot had been sold. The former statute permitted the alteration provided no lots had been sold upon a street or common. It was argued that "common" being omitted in the later Act, the owners might re-survey this school reserve. But it seems quite plain that this is not a common. It was reserved for a specific purpose—a school site—and can in no proper sense be deemed a common, which must "remain free and common to the use of all the public." (*a*) It was a reserve of so much of the original plot and dedicated to this particular object as much as any of the town lots which had been sold. And there is no shadow of reason for construing the Act so as to interfere with lots sold to individuals or otherwise disposed of. But besides the Act only applies to owners; and, as I have said, I do not think this reserve passed by the conveyance to *Spencer*, who caused the re-survey to be made.

Judgment.

The defendant also claimed if the decree went against him that he was entitled to the improvements he had made. The statute (*b*) gives a right to lasting improvements made upon any land by any person under the belief that the land was his own. I do not think he had any such belief. He knew of the dedication for a school site, and was assured that his vendor would indemnify him: *Smith* v. *Gibson* (*c*), *Carrick* v. *Smith* (*d*).

I think the plaintiffs entitled to a decree, with costs. It will declare *Spencer's* plan void so far as it attempted to interfere with this school reserve.

SOLICITORS.—*Geo. Moncrieff*, Petrolia, for the plaintiffs; *James F. Lister*, Sarnia, for the defendant.

(*a*) *Dillon*, sec. 509.
(*b*) 36 Vict. Ch. 22 O.
(*c*) 34 U. C. R. 389, 399.
(*d*) 25 C. P. 248.

CRAIG v. CRAIG.

Easement—Injunction—Private way.

An agreement for an easement is presumed *primâ facie* to be for an easement in perpetuity.

A legal title to a private right of way can be obtained only by prescription or user for the time required by statute to give a title to easements, or by grant; but equity entertains jurisdiction to enforce agreements for easements as it would for the purchase of the fee.

The owners of two adjoining half lots entered into a parol agreement for a lane between the two half lots, the agreement not being limited in terms as to time; each accordingly erected his fence so as to leave about a rod of his land for his part of the lane, and the respective proprietors used the lane in common for fifteen years, and until after the death of one of the original parties to the agreement: the deceased laid out his farm and planted his orchard with reference to the lane:

Held, that the agreement must be presumed to have been for a lane in perpetuity, and was to be enforced accordingly.

This was a suit seeking to restrain the defendant from closing up the portion of a lane situate on his land, and came on for the examination of witnesses and hearing at the sittings of the Court at Walkerton, in the Spring of 1877. Statement.

From the pleadings and evidence it appeared that *Alexander Craig* and *John Craig*, brothers, agreed for the purchase of a lot of land from the locatee of the Crown; each was to have half of the lot, *Alexander* the east half, and *John* the west half. The title was taken in the name of *Alexander*. They went on the lot in 1858. In February, 1868, *Alexander* assigned to *John* the west half, and on 16th June, 1875, *John* obtained a patent for it. The land was wood land when it was purchased. The brothers went into possession and made a clearing; and for mutual convenience a lane was laid out between them, leading to the concession, each to give, and as he supposed giving, a rod of his half to form the lane, though it turned out to be not exactly evenly divided between them, and that a little more came off *John's* half than off the other. *Alexander*

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died on 2nd June, 1875, intestate; the plaintiffs were his widow and heirs-at-law. In November, 1876, *John* proceeded to take in half of the lane into his lot, or rather to place his fence on the dividing line.

The lane had been in existence for fifteen years and upwards; some draining had been done upon it, and some slight other improvements, by the brothers. A road from each half lot led into the lane, and from thence access was had to the concession road; and *Alexander* planted an orchard on his half in front of his house, so that a road could not be now made to the concession without cutting it up. *John* assisted in planting this, and the brothers worked for a number of years as partners on the farm.

John Anderson, who lived for eight years within a mile and a half of the property, swore the lane was always there when he knew the place, and *John* told him, in regard to the lane, that *Alexander* was his share, and he (*John*) was his share, they could not do without it.

Statement.

William Quirk, who lived across the road from the land in question, said the lane had been used for a great many years; it was begun as soon as they cleared the land, and *John* told him one had as good a right as the other to the road between them.

John Stephens said he lived five or six lots from this property. The lane had been there a good few years. Both brothers had spoken of it as a lane. The road from *Alexander's* house went to the lane, and so from *John's*.

John Kidd proved the existence of the lane for a number of years.

Anne Craig, *Alexander's* widow, proved the existence of the lane for fifteen years. The house was put up in reference to the lane. The lane had been used for wagons, cattle, sleighs, &c. *Alexander* and *John* planted an orchard in front of the house between it and the concession road. A road could not be made from the house to the concession without cutting up the orchard.

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Her husband often told her of the agreement as to the lane, each was to give a rod, and to keep up their own fences, and it was not to be shut up unless one sold to the other.

The defendant *John Craig*, in his examination, swore that *Alexander* and he agreed to make a lane for their convenience for the time. There was no agreement that it should always remain open. It was laid out a good many years ago, and remained so till he began to close it up. It was agreed between his brother and him that either might close it up, *i. e.*, each close up his own half. The lane was in 1868 just as in 1876, and the defendant relied on the Statute of Frauds.

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

Mr. *Barrett*, for the defendants.

The cases cited are mentioned in the judgment.

June 27th. Judgment.

PROUDFOOT, V. C. [after stating the facts as above.]— There can be no dedication properly speaking to private uses. A private way cannot be created by dedication. The very evidence which would tend to shew dedication would disprove it as a private way: *Commonwealth* v. *Newberry* (*a*), *M. E. Church* v. *Hoboken* (*b*).

A private way can only be acquired by prescription or long user, for the period required by statute to give a title to easements, or by grant. But although a legal title can only be got in those modes, yet equity entertains jurisdiction to enforce agreements for easements, as it would for the purchase of the fee simple; and also interposes to prevent a person, who has acquiesced in the expenditure of money, or in the doing of some other act, on the supposition that a right to an easement was acknowledged, from making use of his legal title to interfere with the enjoyment of it.

(*a*) 2 Pick. 57. (*b*) 33 New Jersey 13.

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An agreement to grant an easement is good in equity, and will be enforced. *East India Co.* v. *Vincent* (*a*), *Phillips* v. *Treeby* (*b*).

And where money has been expended, with consent of the owner of the soil, in preparing it for the exercise of an easement, and the easement has been used, a perpetual injunction will be granted to restrain his interference with it.

In *The Duke of Devonshire* v. *Eglin* (*c*), the defendant had consented to plaintiff making a watercourse through his land, upon being paid "a proper and reasonable sum." The watercourse was made, but no grant was executed, and no sum arranged. After nine years user the defendant stopped it up, but he was restrained by a perpetual injunction from interfering with it, and a reference was made to the master to fix a proper compensation. See also *Powell* v. *Thomas* (*d*), *Laird* v. *Birkenhead Ry. Co.* (*e*), *Duke of Beaufort* v. *Patrick* (*f*), *Bankhart* v. *Houghton* (*g*), *Somerset Coal Canal Co.* v. *Harcourt* (*h*), *Moreland* v. *Richardson* (*i*).

Judgment.

I think the evidence sufficiently establishes that there was a parol agreement for the lane, not limited as to time: that, in pursuance of that agreement, each of the parties contributed one half of the ground necessary for it: that it has been so used for fifteen years.

The defendant admits that the lane was made by mutual agreement; he indeed says that it was *for the time*, and that there was no agreement that it should always remain open. This limitation, however, requires corroboration (*k*), and there is none. There is then the admission of the defendant that a lane was laid out, each contributing half the land, by agreement. *Anderson* proves that *John* (the defendant) told him *Alexander*

(*a*) 2 Atk. 83.
(*b*) 3 Giff. 632.
(*c*) 14 Beav. 530.
(*d*) 6 Hare 300.
(*e*) John. 500.
(*f*) 17 Beav. 60.
(*g*) 27 Beav. 425.
(*h*) 24 Beav. 571, 2 DeG. &J.
(*i*) 22 Beav. 596.
(*k*) 36 Vic. ch. 10, sec. 6.

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was his share, and he (*John*) was his, and they could not do without it; *John* told *Quirk* that one had as good a right to it as the other. Both brothers spoke of it as a lane. Each kept up the fence on his own side. Upon the rule in specific performance cases, that an agreement to sell land, without specifying the quantity of interest, is an agreement to sell the fee, I apprehend that an agreement for an easement is for an easement in perpetuity. *Hughes* v. *Parker* (*a*).

To carry the agreement into effect each gives up a portion of his land, fences it off, and for fifteen years the lane is used in common. These seem to me such acts as justify the reception of parol evidence of the real agreement, and, having found the terms established with reasonable certainty in the evidence, I think the agreement should be enforced.

There was some evidence of a small expenditure of labour in draining and crosswaying the lane, which, though not to be disregarded entirely, is not of sufficient importance to rest the right upon.

Judgment.

There was, however, another class of acts, performed by the ancestor of the plaintiffs which seems to me of more value, which were assented to and assisted in by the defendant, and which he ought not now to be permitted to ignore. Each of the brothers, relying upon the agreement, made a road from his house, not to the concession road, but to the lane, from which they obtained access to the concession road, and in further reliance on this state of things continuing, *Alexander* with *John's* assistance, planted an orchard between his house and the concession road, so as to interpose an obstacle to direct access to it. And access to it cannot now be had without cutting up the orchard.

Such an alteration of the physical features of the locality is the strongest evidence of the agreement between the parties, and of its being designed to last for

(*a*) 8 M. & W. 244, Fry, Spec. Perf. Sec. 223.

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a much longer period than the *mere convenience* of the parties.

The fact of the lane taking rather more from one lot than from the other, ought not to be a difficulty in the disposition of the case. Under the former statutes of limitations a possession by *Alexander* for twenty years, up to the fence forming his side of the lane, would have given a title, although a part ought to have been thrown into the lane, and *John* could not have compelled him to move his fence. *Denison* v. *Chew* (*a*), *Elliott* v. *Bulmer* (*b*). The recent statute, 38 Vic. c. 16, O., has shortened that period to ten years, to which the same rule will apply. This later statute, however, does not apply to easements, and cannot be invoked in favour of the lane.

Judgment.

I think the plaintiffs entitled to a perpetual injunction to restrain the defendant from interfering with the lane. The plaintiffs will have their costs.

SOLICITORS.—*Blake*, *Kerr*, and *Boyd*, agents for *Shaw* and *Robertson*, Walkerton, for the plaintiffs. *Ferguson*, *Bain*, and *Meyers*, agents for *Barrett* and *Klein*, Walkerton, for the defendant.

(*a*) 5 Q. B., O. S. 16. (*b*) 27 C. P. 217.

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ABBOTT v. CANADA CENTRAL RAILWAY COMPANY.

Pleading—Demurrer—Practice.

A demurrer to part of the prayer of a bill is not on that account erroneous in form.

Where a bill prays alternative relief a demurrer to one of the alternatives is not irregular.

The bill in this case, after setting forth the statutes incorporating the defendants, the railway company, and their powers of borrowing and giving security, stated that on the 12th August, 1871, the company executed to one *Henry Lancelot Redhead*, as mortgagee in trust, a mortgage of the property specified in it, including the railway; that default had been made in payment of the sums secured by it; and prayed for payment of the amount secured, and in default that the title of the company to the property mortgaged, including the railway, might be foreclosed, or, at the option of the plaintiffs, sold and the proceeds applied in or towards payment of the sum secured; and that in the meantime the possession of the railway, &c., should be delivered to the plaintiff *Abbott*; and that the defendants, the directors, should be restrained from interfering with such possession; or that a manager and receiver of the said railway should be appointed by the Court, and such manager and receiver authorized to take possession of all the said railway and property, and to run and operate the said railway. Statement.

The defendants, the railway company, put in an answer and demurrer to the bill. The demurrer was: "As to such part of the plaintiffs' said bill as prays for a foreclosure or sale of the said railway and that possession of the said railway may be delivered to the said plaintiffs, and that a manager may be appointed to take

(*a*) *Ante* vol. xiv., p. 499. (*b*) *Ante* vol. ix., p. 455.

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possession and run and operate the said railway, we demur thereto for the want of equity and, without admitting any of the allegations in the said bill contained, we submit that no case is made on the plaintiffs' own shewing entitling them to any such relief in respect of the said matters as against us; and we demand the judgment of this Honourable Court whether we shall be compelled to make any further or other answer to the said bill."

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

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

The points relied on sufficiently appear in the judgment.

Judgment.

PROUDFOOT, V. C.—The counsel for the bill did not argue the general question raised by the demurrer, as the Court would probably follow the decisions which have determined that there can be no foreclosure or sale of a railway, that possession of it would not be ordered to be given to the plaintiffs, and that the Court will not appoint a manager to run and operate the railway: *Galt* v. *The Erie & Niagara R. W. Co.* (*a*), *Peto* v. *The Welland R. W. Co.* (*b*), *Gardner* v. *The London, Chatham, and Dover R. W. Co.* (*c*).

It was conceded also that there might be a demurrer to part of a bill: *Hitchen* v. *Birks* (*d*), *Burton* v. *Robertson* (*e*).

But it was contended that the demurrer was erroneous in form in not specifying with sufficient precision the part of the bill demurred to; that it does not demur to

(*a*) 14 Gr. 499.
(*b*) 9 Gr. 455.
(*c*) L. R. 2 Chy. 201.
(*d*) L. R. 10 Eq. 471.
(*e*) 1 J. & H. 38.

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any of the facts in the bill, but only to the prayer for relief, or a portion of it; that if the plaintiff is entitled to any relief on the facts stated, there can be no demurrer, because he asks more than he is entitled to; and that the relief is prayed in the alternative, leaving it open to the plaintiff to ask at the hearing what he is by law entitled to.

I think the demurrer is sufficiently specific, and defines very precisely what is objected to. It is to so much of the prayer as seeks a sale or foreclosure, delivery of possession, and the appointment of a manager. I do not know how it could point out more accurately the part of the bill intended to be objected to. No doubt a partial demurrer must define the part of the bill demurred to: (*a*), *Barnes* v. *Taylor* (*b*); and in expressing the parts of the bill demurred to, it will be sufficient to do so by way of exception, as by demurring to all except certain portions, *so long as it distinctly appears to what part the demurrer is applied*: (*c*), *Hicks* v. *Raincock* (*d*), *Robinson* v. *Thompson* (*e*). The rule, thus expressed, appears to be sufficiently complied with.

Judgment.

It does not seem to me to be a valid objection that the demurrer is only to a part of the prayer. The facts stated may be such as to entitle the plaintiffs to some relief, but not to that kind of relief that is objected to. The allegations in the bill could not be demurred to, while the liability sought to be deduced from them, may not be the legal result of the statements. In that case, which is the case here, all that need be done is, to ask the decision of the Court, assuming the statements to be accurate, whether they impose on the defendants the liability prayed to be enforced. But the demurrer does in fact "submit that no case is made on the plaintiffs' own shewing." They have stated no case entitling

(*a*) Red. 214.
(*b*) 4 W. R. 577.
(*c*) Lewis Eq. Draft 254.
(*d*) 1 Cox 40.
(*e*) 2 V. & B. 118.

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them to the peculiar relief sought. That makes the objection apply not only to the prayer, but to all that the plaintiffs shew in support of it, that is, to all the facts on which the prayer is based. There are many cases where the demurrer has been to the prayer: *Rose* v. *Gannel* (*a*). In that case a bill was brought for discovery and perpetuating the testimony of witnesses. The plaintiff struck out the relief, but in praying process prayed that the defendant might abide such order and decree as the Court should think proper to make. Lord *Hardwicke* said that the words order and decree made it a bill for relief. In a note it is said that there was a case before Lord *Talbot* of a bill for discovery with these words in the prayer of process, and upon the defendants demurring, his Lordship said it was praying relief as well as a discovery, and allowed the demurrer. It seems that these words in the prayer of process would not at a later period have made a bill for discovery one of relief, but that does not affect the question that a demurrer may be to the prayer. In *Angell* v. *Westcombe* (*b*) a prayer for general relief was found in a bill for discovery, which made it objectionable on demurrer.

Judgment.

The rule further relied on by the plaintiffs, that if a plaintiff is entitled to any relief the defendant cannot demur is a rule applicable only to general demurrers for want of equity: *Saunders* v. *Richardson* (*c*), *Innes* v. *Mitchell* (*d*), *Hope* v. *Hope* (*e*). It rests on the general principle that a demurrer cannot be good in part and bad in part. And if it does not appear that the plaintiff is not entitled to any relief, then the demurrer is too extensive. None of that reasoning applies to a special demurrer, which limits the objection to stating that the plaintiff is not entitled to some specific relief he seeks: *Story's* Eq. Pl. sects. 42, 443.

(*a*) 3 Atk. 439. (*b*) 6 Sim. 30. (*c*) 2 Drew. 128, 141.
(*d*) 4 Drew. 57, 95. (*e*) 22 Beav. 351, 366.

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Nor do I think that the relief being prayed in the alternative prevents the defendant from demurring to the alternative. *Marsh* v. *Keith* (*a*) was a case where alternative relief was prayed, and the defendant refused to answer some of the interrogatories because in regard to them the bill was demurrable. *Kindersley*, V. C., says, (*b*), "Then the defendant says, I can shew that if a demurrer had been put in to the bill, so far as it prays a declaration and injunction, the demurrer would be allowed. But I think that, upon exceptions, it is not the proper time or mode of going into that question. What is the nature of the bill? It relates to a charge of £21,000 in which the plaintiff is beneficially interested. The plaintiff says he is interested in having it remain a charge, and prays for a declaration accordingly, and an injunction to restrain its being raised. That might have been the whole relief; it would be complete relief in itself. But then if that cannot be obtained the plaintiff asks in the alternative other relief. He says if the charge is to be raised let it be done by another trustee. The first relief asked is entirely separate and alternative; so is the other; no part of either is asked concurrently with the other. Now it is argued that if there are several portions of relief asked, you may shew as ground for refusing discovery as to a particular portion, that that portion is demurrable. Is it, however, the fact, even if that were this case, that you may object to answer a particular question by saying, 'If I had filed a demurrer to a portion of the relief respecting which this particular question is asked, I should shew the bill to be in that respect demurrable'? * * * Besides, as I have said, this is not the case of a bill being demurrable as to a portion of the relief. Here it is the whole of the relief asked in one alternative, as to which it is alleged that the bill is demurrable."

Judgment.

The whole of the reasoning of the learned Vice Chan-

(*a*) 1 Drew. & Sm. 342.

(*b*) P. 349.

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cellor is based on the supposition that the alternative relief may be the subject of demurrer. Indeed, the system of pleading which permits such alternative relief to be asked, involves the necessity of permitting it to be demurred to. If it could not be demurred to or pleaded to as in England, it ought not to be permitted to form part of the bill, and the plaintiff would be driven to seek his alternative relief in a different suit. I refer to cases where alternative relief is permissible, and not to cases liable to the objection of approbating and reprobating the same transaction: *Pince* v. *Beattie* (*a*). In the present case, with any other defendant than a public railway company, there would be no objection to the alternative relief asked. But the demurrer raises the question whether such relief can be had against a company of that kind. The demurrer is allowed with costs, the plaintiffs to have liberty to amend.

Judgment.

SOLICITORS.—*Smith* and *Rae*, for the plaintiffs. *Blake*, *Kerr*, and *Boyd*, for the defendants.

(*a*) 9 Jur. N. S. 1119.

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BUCHANAN v. BROOKE.

Equitable execution—Inquiry as to amount required for support.

A testator bequeathed the income of his estate to his son and his son's wife for the support of themselves and their family "in a fit and suitable manner," and after the death of the son and his wife the *corpus* was to be divided among their children. On a bill filed by an execution creditor of the son seeking equitable execution against his interest, the Court directed a reference to the Master to inquire what would be a sufficient sum for such support of the wife and children, the excess to be applied in payment of the plaintiff's judgment and costs of suit.

This was a bill filed for equitable execution against the defendant's interest in the lands and tenements devised to him and his wife by the last will and testament of his father *Daniel Brooke*, the elder, late of the City of Toronto, deceased.

The plaintiff had recovered a judgment at law against the defendant on the 8th of October, 1856, on which he issued execution against goods and lands, but realized nothing. He allowed his judgment to lie until September, 1876, when he revived the same, and again issued execution, goods and lands, against the defendant, the latter in the meantime having acquired jointly with his wife considerable property under the said will of his father. Statement.

On the peculiar trusts of the will the sheriff was unable to return anything made on these writs, and the plaintiff thereupon filed his bill for equitable execution against the interest of the defendant in the income derived from his father's estate, and for a receiver. The following is the clause of the will under which the defendant was interested:

"Third.—I will, devise, and bequeath unto my son *Daniel Osborne Brooke*, of the City of Toronto, in the Province of Canada, gentleman, and to *Emily Brooke*, his wife, all my estate, real and personal, consisting of houses, lands and tenements, rents, mortgages, and other

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securities for payment of moneys on lands situate in that part of the city of Toronto and county of York lying east of Yonge street in the said city and county, also in the county of Ontario, also in the county of Hastings, also in the county of Northumberland, and also in the town of Cobourg, all in the Province of Canada, to have and to hold unto the said *Daniel Osborne Brooke* and his wife, *Emily Brooke*, and the survivor of them, to, for, with, and upon the uses, trusts, limitations, powers, provisoes, conditions, and limitations hereinafter provided of and concerning the same, that is to say: In the first place, to and for the support and maintenance of the said *Daniel Osborne Brooke* and his wife *Emily Brooke* in a fit and suitable manner according to their rank and station during their joint lives and during the life of the survivor of them; secondly, for the support, education, and maintenance of the children of the said *Daniel Osborne Brooke*, now born or which may be hereafter born, the fruit of their marriage, according to the discretion of the said *Daniel Osborne Brooke* and *Emily Brooke*, and after their death then to all their said children, share and share alike, as may survive them, and to the heirs of the bodies lawfully begotten of such as may not survive them, forever. Provided that said *Daniel Osborne Brooke* and his said wife, or the survivor of them shall not by any instrument or instruments under their hands and seals, or under the hand and seal of such survivor, make any other distribution of the same between the said children and their said heirs, or other disposition thereof than as they are hereafter empowered to do; and thirdly, as to the four equal shares of my said money on deposit in the said Bank of Upper Canada, and the eleven railway shares in the New York Central Railway, in this will hereinbefore provided to be paid to the said *Daniel Osborne Brooke* and his said wife, I declare the same to be held by them upon the same uses, trusts, and conditions as above provided. And I hereby empower the said *Daniel Osborne Brooke* and his said wife jointly, during their lives jointly, but not either of them, and the said *Daniel Osborne Brooke* if he shall survive his said wife, but not the said *Emily Brooke* if she should survive her said husband, any or all of the said lands and tenements, mortgages and other securities to sell, convey, and absolutely dispose of, and for that purpose any deed or

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deeds to execute, sign, seal, and deliver, and any mortgage or mortgages or other securities to accept and take, securing the payment of the purchase money of any part thereof at such time or times as they may think fit, and to stand possessed of the said proceeds of such sale or sales to and upon the same uses, trusts, and conditions as hereinbefore provided with respect to my bequest to the said *Daniel Osborne Brooke* and his said wife. And I hereby further empower my said son, *Daniel Osborne Brooke* and his said wife, during their joint lives, or the survivor of them, by instrument under their hands and seals, irrevocable, to take effect after their deaths, to divide the said real and personal estate or the proceeds thereof, or so much thereof as may then remain unexpended and unappropriated in carrying out the said trusts between their said children and their said heirs, if any, in such manner and in such proportions as to them may seem fit, or to exclude any of them entirely from any benefit therein or any portion thereof if they shall see fit so to do, or in the meantime by any such instrument to convey and make over to any of them by way of advancement any portion of the same, to become theirs absolutely from thenceforth forever. Provided always, that nothing herein mentioned shall be construed to allow the said *Daniel Osborne Brooke* and his said wife, or either of them, to mortgage or create any lien on any part of the said bequest to them, or in any way encumber the same by any debts either already contracted, or to be contracted by them or either of them in any way, whatsoever."

Statement.

The defendant in his answer admitted: that he had no separate interest in the estate devised by his father, such as would entitle the plaintiff to an account of the rents and profits of the same, or that any portion of the same could be applied in payment of the plaintiff's debt: also, that the plaintiff could have obtained complete relief at law, and that he was not entitled to come to a Court of equity, until he had obtained a garnishee order at law, and had been unable to enforce the same by any process there.

The cause was set down for hearing by way of motion for decree, and came on before *Blake*, V. C., on the 16th of March, 1877.

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Mr. *Boyd*, Q. C. and Mr. *Rusk Harris*, for the plaintiff.

Mr. *Fitzgerald*, Q. C., and Mr. *A. Hoskin*, for the defendant.

After hearing the argument of counsel the learned Vice Chancellor reserved judgment until the Court of Appeal should give judgment in the case of *St. Michael's College* v. *Merrick*, as to the question of a Court of equity entertaining a suit founded on a judgment at law, and where the remedies at law had not been exhausted. The Court of Appeal having delivered judgment in that case, affirming the right—

Judgment.

BLAKE, V. C.—The cases of *St. Michael's College* v. *Merrick* (*a*), and *The Victoria Insurance Co.* v. *Bethune* (*b*) in Appeal, shew the plaintiff is not precluded from proceeding in this Court to realize the fruit of his execution, although he may have recovered his judgment at law. I think under the authorities (*Horsley* v. *Cox* (*c*), 2 *Spence's* Eq. Jur, 392 and cases there cited), the interest reserved is one available in favour of the creditors of the defendant. The law does not allow an interest in favour of a debtor to be restricted in the manner attempted by the will in question, and therefore the creditors are as much entitled to make this interest available as if the testator had not endeavoured to prevent its alienation. There is no proviso for cesser or for a going over of the interest which has been held, in some cases, to prevent the interest being available for the creditor.

In *Summers* v. *Morphew* (*d*), *Amphlett*, B., says: "I think that the distinction between legal and equitable debts has been abolished." The objection that previously has been successfully raised in some

(*a*) 1 App. R. 520.
(*b*) 1 App. R. 398.
(*c*) L. R. 4 Ch. 92.
(*d*) L. T. 24 June. 1876, p. 140.

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instances to the realization of claims such as, or analogous to the presen' appears to be removed by the Administration of Justice Act, which allows the plaintiff to prosecute a claim although it may have been previously thereto only or properly cognizable in a Court of law. The plaintiff has not the right to interfere with the discretion of the trustees, nor with the rights of the other beneficiaries under the will, but I think he is entitled to have made available for the payment of his debt so much of the income as shall not be required to carry out the trusts of the will, other than those in favour of the defendant. There must be a reference to the Master to make this inquiry, and payment to the plaintiff of the amount thus found available towards his debt, to which are to be added the costs of this suit.

SOLICITORS.—*Morris, Harris,* and *McBride,* for the plaintiff. *Cameron, McMichael,* and *Hoskin,* for the defendant.

ROE v. BRADEN.

Registered title—Notice—Possession.

In the case of a registered title, actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice; nor will it be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession.

Statement.

The bill in this case was filed by *Jesse Roe* against *Samuel Braden,* setting forth that in 1865 the plaintiff entered into occupation of lot No. 14, in the 5th concession of Howick, as a squatter, and continued in such

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occupation ever since; that at the time of so entering into possession there was on the premises a small house, which had become ruinous; and there were two or three acres cleared, but there was not anyone in possession of the premises, and the plaintiff believed that the premises were wild land belonging to the Crown, and the plaintiff so entered into possession with the intention of performing the settlement duties on the lot, and of purchasing the same from the Crown, by whom the rights of squatters on wild lands were at that time recognized; that he repaired the dwelling-house thereon, and effected clearings on the land, which, by the autumn of 1866, had become considerably improved, when one *Ira Brown* came to the plaintiff, claimed to be the owner of the land, and offered the same to plaintiff, and plaintiff agreed to purchase the same on the terms that *Brown* should give him a deed, free from all incumbrances, for $1,000, payable in ten equal annual instalments with interest,—*Brown* to give plaintiff the deed so soon as he

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could obtain his patent from the Crown; that plaintiff and *Brown* went to a conveyancer for the purpose of having such formal agreement drawn up between them, but were unable at the time to do so, and deferred having such written agreement prepared to a future time; that shortly afterwards plaintiff desiring to have the matter completed went to *Brown* with a written agreement embodying all the terms of their original bargain for the purpose of procuring *Brown's* signature thereto; but he, instead of executing the same, took plaintiff to a lawyer or conveyancer, (whose name plaintiff did not recollect) and who advised *Brown* that he could not safely execute such written agreement, and recommended *Brown* to give plaintiff a lease for a year at a nominal rental, in the meantime obtain his patent and then give plaintiff a deed and take back a mortgage.

The bill further stated that plaintiff was an illiterate man, hardly able to sign his name, and acted without independent advice relying altogether on the statements

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of *Brown* and his legal adviser, and then accepted from *Brown* such lease, relying on his agreement to sell to plaintiff on the terms already stated; that in August 1868, *Brown* obtained his patent from the Crown for the said land, but never offered to convey to plaintiff as agreed upon; but on the contrary, on the 20th of July, 1875, executed a deed purporting to convey the said lot to one *John Hodgson* for $1,600, and on the same day *Hodgson*, for an alleged consideration of $1,900, conveyed to defendant both of which conveyances were duly registered on the 9th of August, 1875; that both *Hodgson* and the defendant had actual notice of the claim and title of the plaintiff to the said lot, and bought the same subject thereto: submitted that the agreement between the plaintiff and *Brown* had been partly performed, and that the plaintiff was entitled to have the same specifically performed and carried into execution. The prayer of the bill was in accordance with these statements.

The defendant answered raising amongst other defences that of a purchase for value without notice; objected that *Brown* and *Hodgson* were necessary parties, and craved the same benefit as if he had demurred for want of equity and want of parties.

The case came on for the examination of witnesses and hearing at Walkerton in the autumn of 1876.

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

Mr. *J. A. Boyd*, Q. C., for the defendant.

The authorities cited are stated in the judgment.

Judgment

SPRAGGE, C.—At the hearing of the case my impression was, that the equity of the plaintiff between himself and *Brown*, assuming it to have been made out in evidence, would not prevail against the registered title of the defendant, but I wished to consider the question

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further. I have since done so and have examined the authorities to which I have been referred by Mr. *Boyd*, and our own registration Acts.

The 67th and 68th sections of the Act of 1868, (the latter following sect. 56 of the Act of 1865), are very explicit. Section 67 runs thus: "Priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration."

Section 68: "No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs, or assigns." All that the defendant had notice of in this case, was, that a man of the plaintiff's name was in occupation of part of the land. He had no notice of the existence of any instrument between the occupant and Mr. *Brown*; and if he had seen the instrument that was executed between them, it would rather have negatived than established title in the plaintiff. The equity, if any, existed independently of that instrument and to such an equity section 68 applies.

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There was nothing to affect a purchaser with notice except such possession as I have described, and that, it has been held, is not actual notice but constructive notice only and not such notice as under the Irish registry law would affect a purchaser with notice. This was held in *Popham* v. *Baldwin* (*a*), approved of in *Clarke* v. *Armstrong* (*b*).

Our Act requires actual notice of an instrument. In *Sherboneau* v. *Jeffs* (*c*) the late Chancellor, commenting upon the language of the Act, observed, "Now the mere fact of possession by a claimant, is not such actual notice in my opinion, as the Legislature meant; and I think we

(*a*) 2 Jones Ir. Ex. 320. (*b*) 10 Ir. Ch. 269.
(*c*) 15 Gr. 576.

must not fritter away their meaning by mere subtleties of construction or doctrine." In this I entirely concur. 1877. Roe v. Braden.

It is not necessary in this case to refer to the 68th section of the Act. It was enacted to meet and annul the doctrine that where an equity existed independently of any instrument capable of registration, the registry laws did not apply. That section has been acted upon in this Court in *Bell* v. *Walker* (*a*) and in *Grey* v. *Ball* (*b*), and is, in my opinion, a most salutary provision. That section as well as section 67, applies in this case.

The bill is dismissed with costs.

SOLICITORS.—*Mowat, Maclennan* and *Downey*, agents for *Cameron* and *McFadden*, Goderich, for the plaintiff. *Blake, Kerr* and *Boyd*, agents for *Shaw* and *Robertson*, Walkerton, for the defendants.

CLOSE V. MARA.

Insolvency—Jurisdiction—Practice.

This Court will not entertain a suit to set aside a composition and discharge in Insolvency for fraud, or upon any other grounds which are open to creditors before the Judge in Insolvency, unless special circumstances intervene in the case.

Where a bill was filed for that purpose, alleging as ground for the relief sought, fraud or evil practice in procuring the consent of the creditors to the discharge of the insolvent, or their execution of the deed of composition or discharge, a demurrer for want of equity was allowed.

The bill in this cause was filed by *Patrick George Close*, *John Sloan*, and *Alexander Jardine*, co-partners in trade, and *John Smith*, suing on behalf of themselves and other creditors of the defendant *Mara*, other than those who were defendants, against *Thomas Albert Mara*, *Frank Smith*, *William Griffith*, *Robert J. Griffith*, Statement.

(*a*) 20 Gr. 558. (*b*) 23 Gr. 390.

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Close v. Mara.

Henry Nerlich, Peter Backer, Charles B. Doherty, Henry W. Bailey, Christopher W. Bunting, Enrico Bendelari, Edward Long, Edward Harding, R. G. Warren, John E. Harding and *Thomas Miller*, setting forth (1.) That the defendant *Mara* had been carrying on business as a grocer in the town of Stratford, and had made an assignment, under the Insolvent Act of 1869, of his estate and effects to the defendant *Thomas Miller*, who was a duly appointed official assignee for the county of Perth, and that at a meeting of creditors held on the 23rd of June, 1873, for the appointment of an assignee to such estate and effects, the said *Thomas Miller* was appointed and acted as such assignee. (2.) That the plaintiffs were creditors of *Mara*, and that the other defendants except *Miller* were also his creditors. (3.) That the liabilities of *Mara* amounted to $10,200, and his assets to the sum of $7,800. (4.) That the defendants *Bailey* and *Bunting* who carried on business in co-partnership as "Bailey & Bunting," were the largest creditors of *Mara*, their claim amounting to $6,400, and that the defendants *Harding* were related by marriage to *Mara*. (5.) That the estate of *Mara* was amply sufficient to pay his creditors a composition of 50 or 60 cents in the dollar on their claims, of which the defendants *Bunting, John E. Harding* and *Mara* were well aware, yet that the said last named defendants combined and confederated together to get control of the said estate, and force the plaintiffs and other creditors in the minority to accept a composition of 30 cents in the dollar of their claims; and that a fraudulent agreement was then made between *Mara* and *Bunting* (who acted for himself and partner) that if he, *Bunting*, could succeed in compelling or inducing the other creditors to accept a composition of 25 or 30 cents in the dollar on their claims, then the said firm of *Bailey* and *Bunting* should be paid by *Mara* a large sum over and above that paid to the other creditors, and over and above such composition of 25 or 30 cents in the dollar, and that the said *John E. Harding* became a party to a like fraudulent arrangement with *Mara*, and agreed to assist him in obtaining the said composition. (6.) That accordingly, and before the meeting of creditors for the appointment of an assignee as above mentioned was held, the said *Bunting* procured powers of attorney to vote at said meeting, and to act generally in relation to the estate of

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the said *Mara*, and execute a deed of composition and discharge, to be made to his solicitor by the defendants *Frank Smith*, trading under the name of "Frank Smith & Co," *William Griffith* and *R. J. Griffith*, trading under the name of "W. & R. Griffith," and *Henry Nerlich*, *Peter Backer* and *Charles Doherty*, trading under the name of "Nerlich, Backer & Co.; and the said *John E. Harding* obtained a similar power of attorney from the defendant *Warren*. (7.) That by means of such power of attorney, and on account of the large amount of the claim of the defendants *Bailey* and *Bunting*, the said *Bunting* and *Harding* succeeded in obtaining control over the proceedings at the said meeting of creditors, and though the plaintiff *John Smith* attended such meeting on behalf of himself and the other plaintiffs, and moved that *Mara* should be examined as to his estate and effects and affairs generally, yet such motion was voted down by the said *Bunting's* solicitor, and the said *Harding* and he (the said plaintiff) was not allowed to examine *Mara* or inquire as to the state of his affairs; and in pursuance of the fraudulent combination and confederacy referred to, *Mara* made an offer at such meeting of 30 cents in the dollar cash of his liabilities, which offer was at once accepted and voted on by the said *Harding* and the solicitor for *Bunting*, in the names of those whose powers of attorney he had, and notwithstanding the objections and protestations to the contrary made by the plaintiff *John Smith*, and notstanding that the said plaintiff made an offer of 50 cents cash, for the estate of the said *Mara*, such offer of 30 cents was voted on and carried by the said *Harding* and solicitor for said *Bunting*, by means of the said powers of attorney, and the said assignee of the estate was directed to deliver up to *Mara* the whole of his estate and effects upon payment to him, the assignee, of such composition of 30 cents in the dollar, and upon depositing with him a deed of composition and discharge in that behalf; and the said meeting separated without any opportunity being allowed to the said plaintiff *John Smith* of examining *Mara* or shewing that his estate was sufficient to pay 55 or 60 cents in the dollar. (8) That in further pursuance of such fraudulent arrangement, *Bunting* caused a deed of composition and discharge to be prepared by his solicitor, whereby the creditors of the said *Mara* purported to release and discharge him

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from their claims upon payment of such composition; and the said defendant *Thomas Miller*, as such assignee, was directed to yield, deliver up and reconvey to *Mara* all his estate and effects, both real and personal, which had been assigned to him by the assignment made by *Mara* as above mentioned. (9.) That *Bunting* then caused the said deed to be executed by his said solicitor under said powers of attorney, with the names and on behalf of said firms of *Bailey & Bunting*, *Frank Smith & Co.*, *W. & R. Griffith*, *Nerlich*, *Backer & Co.*; and the said *John E. Harding* executed said deed on behalf of himself, the defendant *R. G. Warren*, and the firm of *Harding & Harding*, consisting of himself and the defendant *Edward Harding*; and the said deed was also executed by the defendant *Edward Long*. (10.) That the defendant *Enrico Bendelari* at first refused to execute said deed or agree to such composition, but upon the urgent solicitation of the defendant *Bunting*, and upon receiving from the said *Bunting* 50 cents in the dollar cash for his claim, which amount *Bunting* paid him, the said *Bendelari* consented to and executed the said deed; and that no other creditors had consented to or executed said deed. (11.) That notwithstanding

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that the plaintiffs had notified *Bunting* and his solicitor and the said *Harding* and *Mara* that they objected to said deed, and that the estate of *Mara* was amply sufficient to pay 55 or 60 cents in the dollar, the said *Bunting* and *Mara* and *Harding* threatened and intended to do all in their power to obtain from the said assignee a reconveyance of the estate, and for that purpose deposited said deed with the said assignee and demanded from him such reconveyance. The plaintiffs had, however, given *Miller* notice that they objected to said deed, and had notified him not to act thereon, and alleged that the defendant *Miller* intended to act upon the deed and make such reconveyance unless restrained. (12.) That the said deed was executed by the necessary majorities in number and value of the creditors of *Mara* required by the said Insolvent Act. (13.) The plaintiffs charged, and the fact was, that the estate and effects of *Mara* were amply sufficient to pay a composition of 55 cents in the dollar of his liabilities to the knowledge of the said *Bunting* and *John E. Harding*, and that the said deed of composition and discharge was the result of a fraudulent arrangement

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with *Mara*, whereby *Bunting*, in consideration of executing the same and obtaining the execution thereof by the other creditors above mentioned, was to obtain an unjust preference over the plaintiffs and the other creditors, on whose behalf as well as their own the plaintiffs sued. (14.) That owing to the execution and deposit with the assignee of said deed of composition and discharge, the estate of *Mara* had not been sold or disposed of, but remained in the hands of the assignee, and had become deteriorated in value to the great loss of the plaintiffs. (15.) The plaintiffs submitted that the deed of composition and discharge had been obtained by fraud and fraudulent preference, and by the payment or promise of payment to the said *Bunting* of a valuable consideration for his consent, and that the same should be declared to be null and void. The plaintiffs further submitted that the said composition of 30 cents in the dollar was, under the circumstances above mentioned, far less than the said estate could reasonably pay, and was, on that account, unfair and unjust as regarded the plaintiffs and other creditors not consenting thereto, and that the same ought on that account to be declared fraudulent as against the plaintiffs and such other creditors.

The bill prayed that the deed of composition might be declared fraudulent and void; the defendant *Miller* restrained from delivering up or reconveying the estate of *Mara*; that *Miller* might be ordered to wind up the estate, and for other relief.

The defendants *Baily*, *Bunting*, and *Mara*, filed a demurrer for want of equity, which came on to be argued before the Chancellor.

Mr. *Bain* and Mr. *Meyers*, in support of the demurrer.

Mr. *Lash*, contra.

Judgment.

SPRAGGE, C.—It is clear that if the matters alleged in the bill be true, as upon this demurrer I must take them to be, the deed of composition and discharge agreed to by the creditors as alleged in the bill ought not to be

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confirmed, but ought to be set aside. The question is, whether this Court can properly entertain a suit to set aside the deed of composition, or whether it is of the exclusive, or if not of the exclusive still of the proper cognizance of the Judge in insolvency to refuse confirmation, and to set aside the discharge. The question arises under the Insolvency Act of 1869.

Among the grounds upon which the Judge has cognizance of the question are "fraud or fraudulent preference within the meaning of the Act," and "fraud or evil practice in procuring the consent of the creditors to the discharge of the insolvent or their execution of the deed of composition or discharge." These are the grounds upon which the bill seeks to set aside the composition and discharge. There is indeed a further ground rather hinted at than stated. It is alleged that the defendants *Harding* are related by marriage to the insolvent. If it was intended to suggest that the *Hardings* were thereby influenced by friendly feelings toward the insolvent to accept a composition very much less than was warranted by the assets, and that *mala fide;* and if it was intended to make that a ground of objection to the composition deed, under *Ex parte Cowen* (*a*), it should have been so stated in the bill.

Judgment.

The cases of *Martin* v. *Powning* (*b*), *Stone* v. *Thomas* (*c*), and *Philips* v. *Furber* (*d*), establish that where adequate relief can be given in bankruptcy the proper remedy is in bankruptcy, and this Court will not entertain a suit for the same purpose. Not that the jurisdiction of this Court is ousted, but that the Court will in its discretion leave the questions cognizable in bankruptcy to be there adjudicated upon, unless there be some special reason for their being heard and determined in this Court rather than in bankruptcy.

These cases were under the Bankruptcy Act of

(*a*) L. R. 2 Chy. 563.
(*b*) L. R. 4 Chy. 356.
(*c*) 5 Ib. 219.
(*d*) Ib. 746.

1861 (*a*). It is *a fortiori* that this Court should not entertain a suit where as in this case the whole matter is in another forum, which has cognizance of it, and from which this question would have to be withdrawn if a bill in this Court is sustained. 1877. Close v. Mara.

I have felt some doubt whether the powers given by the Insolvent Act of 1869 are sufficiently large to admit of evidence being given by others than the insolvent in relation to the questions raised by the bill in this suit. Sections 109 110, and 111, relate to the examination of the insolvent himself, section 112 is in these words: "Any other person who is believed to possess information respecting the estate or effects of the insolvent may also be from time to time examined before the Judge upon oath as to such estate or effects upon an order from the Judge to that effect," &c. The point upon which I have felt some doubt is, whether evidence in relation to a fraudulent agreement between the insolvent and some creditors, that if those creditors could succeed in inducing other creditors to accept a certain composition, the insolvent would pay them a large sum over and above the general agreed composition, is evidence respecting the estate or effects of the insolvent—whether it would not be evidence of an agreement outside the insolvent's estate and effects. But though I am not entirely free from doubt I think it would be giving too narrow a construction to the words used. The Act gives the Judge cognizance of certain matters and makes a provision respecting evidence to be given before him. If he may administer an oath in relation to matters before him that would be sufficient to empower him to take evidence upon all questions of which he has cognizance under the Act. Unless therefore the language of section 112 is restrictive, which I feel certain it was not intended to be, the Judge has power to take evidence upon all questions in which he has jurisdiction under the Act. Judgment.

(*a*) 24 & 25 Vict. ch. 134.

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I am referred to two decisions in common law, *Thompson* v. *Rutherford* (*a*), and *McLean* v. *McLellan* (*b*). But in both those cases there was this important element, that the creditors who sued for their debts, and against the recovery of which the discharge of the insolvent was set up, had not notice of the fraud until after confirmation and discharge, and after the time for appeal had expired. That is not the case here, but the plaintiffs filed their bill before confirmation. It is true that in the earlier of these cases *Hagarty*, C. J., then a Judge of the Court of Queen's Bench, suggested a doubt whether even if the fraud were known to the creditor he was bound to make his objection in insolvency. In view of the English cases that I have cited, and even without them, I am unable to share that doubt; but, however that may be, this is a different question. It is not whether in an action for the debt the creditor may reply *per fraudem* to a discharge set up by the debtor; but whether this Court will entertain a bill to set aside a composition and discharge in insolvency upon grounds which are open to creditors before the Judge in insolvency, and in the absence of anything special in the case, and upon that the authorities are against the plaintiffs.

Judgment.

My conclusion is, that the demurrer should be allowed with costs.

SOLICITORS.—*Beaty*, *Chadwick*, and *Lash*, for the plaintiffs. *Ferguson*, *Bain*, and *Meyers*, for the defendants.

(*a*) 27 U. C. R. 205. (*b*) 29 U. C. R. 548.

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ADMINISTRATION.

1. Where a testator provides by his will for the payment to executors for their services, any presumption that any undisposed residue of personalty is intended for them beneficially is effectually rebutted: the fact that by law they are entitled to be paid a compensation, without any provision made therefor by the will, is immaterial.

Loveless v. Clarke—Re Foster, 14.

2. S. assigned to the defendant certain promissory notes for his sole and only use, except such as might be used in liquidation of all necessary expenses in connection with his board and funeral expenses, and by his will appointed the defendant his executor. In taking the accounts in an administration suit, one of the local Masters refused to allow the defendant the expenses of taking out probate of the will, of advertising for creditors, of medicine and medical attendance for the testator and of a gravestone, as having been sufficiently compensated for by the notes.

Held, on appeal, that he was entitled to be allowed the amounts in passing his accounts, except the sum paid for the gravestone, which was a charge properly attending the funeral: not as necessary, but as suitable and proper to be allowed as a customary mark of respect.

Smith v. Rose, 438.

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ADVANCEMENT.

1. The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction; or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations.

Birdsell v. Johnson, 202.

2. A testator devised to his grandson *A.*, an infant, 30 acres, part of his farm, the remainder thereof he devised to his eldest son, the father of *A.* By the evidence of the father it was shewn that on *A.* coming of age, by agreement between them, his father conveyed to him 50 acres of equally valuable land in lieu of the portion devised to him, the father at the time saying that he would charge him with the difference in value as an advance; and that it was supposed by the parties that no conveyance from *A.* to his father was necessary, as he being the heir at law of the testator, all that was necessary was to destroy the will, which was done. Up to the time of his death *A.* never made any claim to the 30 acres; on the contrary, it was proved that on several occasions he had admitted the fact of the exchange.

Held, under the circumstances stated, sufficient appeared to shew that the conveyance to *A.* had been by way of an exchange of lands, and not as an advancement by the father to his son. *Ib.*

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On the argument of an appeal in a suit seeking to have the defendant declared a trustee of lands, it appeared that the evidence, if implicitly relied on, tended to make the defendant a mortgagee rather than a trustee. A motion was then made to amend the bill in order to make that case; the Court, however, refused the application as not being an exercise of sound discretion to permit the amendment at that stage of the suit.

McManus v. McManus, 118.

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In an action on a policy to recover the amount of loss sustained by the insured, a plea was put in that the papers as to proof of loss were insufficient; but the Court being of opinion that the defects, if any, were cured by the Act, 38 Vic. ch. 65 (Ont.), gave the plaintiff liberty at the trial to reply the particulars required to bring the case within that Act, if necessary to do so.

Billington v. The Provincial Ins. Co., 299.

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BONUS TO RAILWAY COMPANY.

A proposed by-law for granting to a railway company a bonus of $44,000, was assented to by the ratepayers of the township of Eldon; and to induce the Council afterwards to ratify the by-law, the company entered into a bond, undertaking that if certain other townships should deliver to the company certain debentures expected from them, the company would give to Eldon $6,000 of preferential bonds of the company: the company having a limited statutory authority to issue preferential bonds "for raising money to prosecute the undertaking." One of the townships failed to give the debentures expected from it, and the company, instead of giving its preferential bonds to Eldon, gave to the municipality an ordinary bond for the $6,000.

Held, that the company had no authority to give its preferential bonds for the purpose of carrying out its bargain with the municipal Council. That the default of one of the other townships to give the debentures expected from it, disentitled Eldon to demand preferential bonds from the company, even if the company had had authority to grant them; and that the giving of the bond which the company did give, was no waiver of the objection, as an answer to the municipality's demand of preferential bonds.

The Corporation of the Township of Eldon v. The Toronto and Nipissing Railway Company, 396.

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The Imperial Statute, 1 & 2 Victoria, ch. 110, if in force in this Province, authorizes the issuing of a charging order against stocks standing in the name of a debtor "in his own right or in the name of any person in trust for him," but does not apply where such stocks have been fraudulently assigned in order to avoid execution.

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1. A lumberman agreeing to carry lumber for hire at the request of the owner thereof, does not thereby become a common

carrier or render himself bound to carry safe at all risks, the act of God or the Queen's enemies excepted; and *Quære*, whether he would be so liable even if it were shewn that he was in the habit of forwarding timber for any one who might choose to employ him to do so.

Re Coumbe, Cockburn and Campbell, 519.

2. Under such circumstances the party carrying the lumber is not bound, in the absence of any agreement on the point, to make good money paid by the owner for the purpose of insuring the property. *Ib.*

3. In such a case the carrier will be entitled to a lien on the lumber carried by him for his freight and charges, which will be defeated, however, by procuring it to be taken in execution at his own suit. *Ib.*

COMPENSATION FOR DEFICIENCY OF LAND, &c., SOLD.

Where a purchase was made of 300 acres, "more or less," and upon a survey being made of the lands, they were found to contain only 244 acres:

Held, that this was such a difference as entitled the purchaser to compensation; and the fact that the lands were alleged to be of but comparatively small value, could not affect the right of the purchaser to an allowance for the deficiency.

Wardell v. Trenouth, 465.

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CONTRACT.

W. J. E. contracted with plaintiffs for the manufacture by him into logs of all the pine timber on a certain timber limit owned by the plaintiffs, during a period of six years from 1st October, 1867, for an aggregate sum of money equal to the sum of $1.29 for every standard log delivered and accepted, the plaintiffs advancing to *W. J. E.* "three-fourths thereof as the work progressed, and the balance on delivery of the logs, namely, for each and every log accepted and delivered as above mentioned, and cut on any lots numbered * * * the sum of $1.12½; for similar logs cut on any of the lots numbered * * * the sum of $1; for similar logs cut on any of the lots numbered * * * the sum of $1.50; for similar logs cut on the remaining lots of the said limit the sum of $1.29; and the balance, if any, on the completion of this contract. And should it be found that the aggregate of the said advances will amount to more than $1.29 for each such standard log, then the parties of the second part (the plaintiffs) shall be at liberty to reduce their advances by such excess, so that on completion of the contract they shall not have advanced and paid * * more than the said sum of $1.29 for each such standard saw log." *W. J. E.* entered upon the task of carrying out the contract, and worked for two years thereunder, when he died intestate, and letters of administration were, by his father, obtained to his estate; an arrangement having in the meantime been entered into between the plaintiffs and the father, whereby the plaintiffs were to assume all the debts and liabilities of *W. J. E.* incurred in connection with the contract, and account for the value of the logs got out by the deceased "at the contract price." In a suit brought by the administrator against the present plaintiffs, he claimed and recovered judgment for $1,880.54, being the balance remaining due to the intestate's estate, computing the price of the saw logs at $1.29 each, which the Court of Common Pleas determined was the sum properly chargeable under the agreement. The plaintiffs, insisting that the words "contract price" meant the sums of $1, $1.12½, and $1.50, according to the section from which the logs were obtained, filed a bill in the Court of Chancery, seeking to have their agreement with the administrator varied in this respect, and obtained a decree for that purpose, although the administiator swore that he had never entered into such an agreement. On appeal to this Court, that decree was reversed with costs, and the bill ordered to be dismissed with costs.

Campbell v. Edwards [In Appeal], 152.

See also "Operation of Contract."

CONVEYANCE TO WIFE OF PURCHASER.

The plaintiff and *M.* became sureties for *W.*, who absconded, and the sureties satisfied the claim by giving their note for $215, upon which judgment was subsequently recovered against them; whereupon *M.* absconded from the province. A year previously a conveyance of land had been made to the wife of *M.*, which the plaintiff alleged was so conveyed to her as the appointee of her husband and for the fraudulent purpose of defeating the plaintiff in recovering contribution. The evidence adduced satisfied the court that more than a year before the parties had entered into such suretyship the contract for purchase had been made in the wife's name, who paid the down instalment; and that the subsequent earnings of the sons, and moneys belonging to the wife, had been expended in erecting a house upon the premises and paying the balance of purchase money thereof. A bill seeking to charge the land as the property of the husband was under such circumstances dismissed with costs.

Barton v. Merritt, 139.

CORROBORATIVE EVIDENCE.

What is sufficient corroboration of the evidence of the surviving party to a transaction against the representatives of the other party thereto considered and acted on.

Birdsell v. Johnson, 202.

COSTS.

1. Certain disbursements, for the proving of which an affidavit had been made, were disallowed on taxation: *Held*, that the charge for preparing the affidavit was also properly disallowed.

Re Robertson, 555.

2. Although by the tariff of costs the attendance before the Master may be increased to $2 an hour by the local Masters on taxation, still order 312, giving the taxing officer at Toronto power to revise the taxation, empowers him to reduce such allowance. *Ib.*

3. The Master disallowed the whole of the charges for the service of warrants on creditors; and as the proceedings had not been sanctioned by the creditors, the Court on appeal sustained this ruling; although, had the proceedings been approved of by the creditors, it would have been reasonable to have allowed so much of the charge as would have been incurred in serving the creditors with notice of the proceedings—notice being all that is required to be served on creditors whose claims are disputed. *Ib.*

4. The same rule was adopted in respect of a fee paid to a counsel in the United States; notwithstanding that his services had been beneficial to the estate. *Ib.*

5. The Master had disallowed to the solicitor of the plaintiffs his charge for comparing the deeds of property sold to purchasers under the decree. On appeal, the Court overruled the Master's finding, it being the duty of the vendor's solicitor to see that the engrossed deed agrees with the draft. *Ib.*

6. Where the Master had exercised his discretion in making an allowance to a solicitor for his services in respect of incumbrances, the Court refused to disturb his ruling. *Ib.*

7. Instalments of purchase money (not the deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him paid into Court:

Held, that he was not entitled to any remuneration from the estate for such services, it being the duty of the purchasers to pay these moneys into Court. *Ib.*

8. A sum of money paid to the local Master for going out of the Province to take evidence was disallowed, as it was not shewn that the creditors had desired it. *Ib.*

See also "Executrix Beneficially Interested."
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1. Where a suit in the Surrogate Court is by order removed into Chancery, and the Court directs any of the parties to receive their costs, the costs to which they are entitled are those allowed by the Court of Chancery tariff—not the costs of the Probate Court in England, or of the County Courts here, it appearing that no tariff of costs for contentious cases in the Surrogate Court here had been promulgated.

Re Harris—Harris v. Harris, 459.

But see Re O—, a Solicitor, 529.

2. Under the Orders promulgated in August, 1858, by the Judges appointed to frame rules under the Surrogate Court Act, which are still in force, the fees payable to attorneys and counsel in *contentious*, as well as non-contentious, matters are the same, as nearly as the case will allow, as those payable in suits and proceedings in the County Courts.

Re O., a Solicitor, 529.

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McLean v. Burton, 134.

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The Court will not make a declaratory decree simply, without directing any relief to the plaintiff, where without such declaration the right of the plaintiff is clear. Therefore, where the plaintiff was liable to pay to one *W.* $2,000 one year after the death of plaintiff's mother, who was alive, and the plaintiff had paid a large portion of such legacy to *W.*, who had made an assignment thereof, the Court refused to make any decree declaring the rights of the parties, or restraining an assignment of the legacy: the right to recover the legacy being a mere chose in action, any person accepting an assignment thereof took it subject to all equities, and took it for no more than the amount that was actually due in respect of it.

Cogswell v. Sugden, 474.

DEDICATION.

1. A reservation for school purposes is of such a character as to be the subject of dedication.

The Corporation of Wyoming v. Bell, 564.

2. The owners of land in 1856 caused the same to be surveyed and laid off into village lots, and on the plan thereof, which was duly registered, marked a portion as "Reserve for school ground." An auction sale of lots took place during the same month with reference to the lots not fronting on the reserve, when lots to the value of $20,000 were sold; and after the auction lots were sold privately, according to the plan. The school trustees did not take possession of the school reserve. Subsequently conveyances were executed to S. of all the undisposed of portion of the town as surveyed. S. in January, 1863, caused a new plan to be prepared and registered, in which the school reserve was laid out into village lots, some of which had meanwhile been bought by the defendant from an intermediate owner with notice of the original plan and the reservation for school purposes:

Held, on a bill filed in 1876, that the original plan was binding; that the conveyance to S. did not give him the ownership of the soil of the streets or reserves for public purposes; and that the defendant was not entitled under the Statute 36 Vict. ch. 22, O., to be paid for any improvements he had made upon the lots forming part of the school reserve. *Ib.*

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1. Where in a suit for specific performance the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently

becoming entitled thereto by surviving her husband; the interest during the joint lives of the vendor and his wife to be paid to him, and also the principal so set aside on her decease.

Skinner v. Ainsworth, 148.

2. Where a woman joins with her husband in executing a mortgage to secure money borrowed by the husband—no portion of which is received by her to her own use; and after the husband's death the land is sold at the instance of creditors, the widow is entitled even as against them to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage.

Semble, in the event of no surplus or the balance being insufficient, the widow could only claim as any other creditor of her husband.

Sheppard v. *Sheppard*, *ante* vol. xiv. p. 174, approved and followed.

In re the Estate of the late Donald Robertson, 442.

EASEMENT.

An agreement for an easement is presumed *primâ facie* to be for an easement in perpetuity,

Craig v. Craig, 573.

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EQUITABLE EXECUTION.

A testator bequeated the income of his estate to his son and his son's wife for the support of themselves and their family "in a fit and suitable manner," and after the death of the son and his wife the *corpus* was to be divided among their children. On a bill filed by an execution creditor of the son seeking equitable execution against his interest, the Court directed a reference to the Master to inquire what would be a sufficient sum for such support of the wife and children, the excess to be applied in payment of the plaintiff's judgment and costs of suit.

Buchanan v. Brooke, 585.

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EXECUTORS.

Parties named executors, whose duties in respect to the management of the estate did not commence till after the death of *B.* and *M.* proved the will, and shortly afterwards and before the death of either of these parties, filed a bill to be relieved from the executorship; the Court, under the circumstances, refused to make any order to relieve them, they having deliberately accepted the office.

Hellem v. Severs, 320.

EXECUTRIX BENEFICIALLY INTERESTED.

Where a testator provided that the executrix was to have the sole management during her life, and the executors were to manage afterwards; and the latter filed a bill against the executrix without sufficient cause, they were not allowed their costs; but the matter having been brought to the notice of the Court a decree for an account was made as respected the executrix.

Hellem v. Severs, 320.

EXPERTS.

1. The General Orders 240, 462, and 541, do not authorize the Master in proceedings in his office to employ the services of experts; but where, in an administration suit instituted by the infant children of the deceased, whose estate it appeared at an early stage of the proceedings was insufficient to pay the creditors, the Master had, at the instance of the plaintiffs, and with the consent of the creditors, employed an expert whose services had been of benefit to the estate by having a large claim against it disallowed, the Court held, on appeal, that the creditors could not afterwards, on the taxation of costs, object to the allowance of the sums paid to such expert.

Re Robertson, 555.

2. Where, in such a suit, the plaintiffs had incurred the expense of several journeys to examine the books of the estate:

Held, that as these journeys had been made and the expenses incurred without the consent of the creditors, the only persons really interested in realizing the estate, the charge could not be allowed to the plaintiffs on taxation. *Ib.*

EXTINCTION OF RIGHT.

See "Public Highway."

FALSE REPRESENTATION.

In order to a party recovering damages against one who has been guilty of deceit, it is not necessary to shew that the person practising it has benefited thereby; but no action or suit will lie for false representation, unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it, and he does act upon it, and sustains damage in consequenee.

French v. Skead, 179.

[Affirmed on Appeal, 16th March, 187[illegible].]

FATHER AND SON.

See "Fraudulent Conveyance," 2.
"Parol Agreement."
"Resulting Trust."

FIRE INSURANCE.

1. On the 6th of February, 1875, the plaintiff applied to the agent of the defendants at Dundas, to effect an insurance for two months from that date, for which he paid the premium demanded, and obtained an interim receipt, but before a policy was issued the property was destroyed by fire. It was shewn that it was not usual to issue policies on interim receipts for short risks; but after the fire occurred a policy was issued, on which were indorsed, amongst other conditions, one, that notice of all previous insurances upon the property should be given to the company, and indorsed on the policy, or otherwise acknowledged by them in writing; and another that if the agent of the company made the application for the insured he should be considered the agent of the insured and not of the company, which rule of the company, their manager said, was established in order to prevent collusion between their agents and parties effecting insurances; but no intimation of such a condition appeared on the receipt given to the plaintiff. When the insurance was applied for the plaintiff informed the agent of the existence of a prior insurance on the same property in another company (the same person was, in fact, agent for both companies), and expressed great anxiety to have the same properly acknowledged by the company; but it appeared that the agent had omitted to communicate the fact of such prior insurance to his principals, as he promised the plaintiff to do. It was proved by the manager of the company that it was the duty

of the agent to receive applications for insurance, and that such applications would necessarily give notice of the existence of other insurances. In an action brought to recover the amount of the policy, the company raised several defences of false representations by and fraudulent conduct on the part of the insured, all of which were either abandoned or disproved at the trial; the defence being finally rested on the want of notice of prior insurance, and the questions of agency and over-valuation:

Held, under the circumstances stated, that the plaintiff was entitled to recover the amount of loss sustained by him, together with his costs of suit, the amount of which the company were ordered to pay forthwith.

Billington v. The Provincial Ins. Co., 299.

2. *N.*, in September, 1872, effected an insurance for three years with the defendants, a Mutual Insurance Company, acting through an agent, on two houses, which property *N.* had previously mortgaged to one *G.*, by whom the application stated the policy was to be held as security, and was so entered in the books of the company, and he with *N.* attended at the agent's office, and joined in signing the premium note. The policy was issued on the 14th of September, and the usual consent of the company to such assignment was indorsed thereon, "subject to all the terms and conditions therein referred to," one of which was, that if any assessment to be made on the premium note should remain unpaid, for a period of thirty days after notice thereof to the assured, the company would be at liberty to cancel the policy. On the 31st of May, 1873, *N.* made an assignment in insolvency. On the 11th of August, 1873, an assessment of $10,80 was made on the premium note, of which notice was given to *N.* only; no notice whatever having been sent to or served upon the representatives of G., who had died in the previous month of March. The property insured was destroyed by fire on the 25th of March, 1875, the company having, on the 25th of April previously, assumed to cancel the policy for non-payment of the assessment.

Held, under the circumstances stated, that the company had not any power to cancel the policy; that the same was still a continuing security in favour of the estate of *G.*, whose representative was entitled to recover from the company the amount secured by such policy.

Guggisberg v. The Waterloo Mutual Fire Ins. Co., 35

3. The answer of the company relied upon the premises being vacant without notice to the company; at the hearing it was proved to be incorrect, when an application was made to supplement their answer by relying on a change in the occupation and an increase in the number of tenants; but as it was not shewn that the change

in occupation had increased the risk, or that the loss was occasioned by it, the Court, in the exercise of the discretion given to it under the Administration of Justice Act, refused to allow the amendment. *Ib.*

FOREIGN BANKRUPTCY.

D., who was a naturalized British subject, possessed of a large quantity of lands in Canada, residing in the State of New York, was, with his co-partners, duly declared bankrupt by the Courts of that State, on the 16th of November, 1873, and on the 14th of February following a trustee of their estates was duly appointed, when the bankrupts executed a deed purporting "to convey, transfer, and deliver" to him, without words of inheritance, all their and each of their *estate* and effects for the benefit of creditors. On the 26th of August, 1874, an execution against D.'s lands in Canada was placed in the hands of the proper sheriff, which was kept duly renewed. On the 24th of September, 1874, *D.*, by way of further assurance, and in pursuance of the said Act of Congress, and of the said deed of 14th of February, conveyed all his lands in Canada, specifying the several parcels, to the same trustee in trust for the said creditors:

Held, that the debts due the creditors of *D.* formed a sufficient consideration for the deed of the 14th of February, 1874, which bound the lands in equity; that the defects in that deed, if any, would have been aided by this Court, which, however, were sufficiently remedied by the deed of the 24th of September; and that the retention by the defendants, the execution creditors, of their writ in the hands of the sheriff, formed such a cloud upon the title of the trustee as this Court would decree the removal of.

McDonald v. The Georgian Bay Lumber Co., 356.

[Reversed on Appeal, 15th September, 1877.]

FRAUDULENT CONVEYANCE.

1. Although a debtor may be at liberty, under the Statute of Elizabeth; to prefer a creditor by creating a mortgage in his favour; still, if the preference given is only colourable to secure that creditor, and in reality for the fraudulent purpose of defrauding other creditors, and such purpose is known to the preferred creditor, who lends himself to it, not for the purpose of obtaining security for his debt, but of aiding the fraudulent purpose of his debtor, the element of *bonâ fides* is wanting, which is necessary for the protection of the transaction under the Act.

Knox v. Traver, 477.

2. Land stood in the name of a son who was in embarrassed circumstances, and the same was conveyed by him to his father,

who asserted that he had advanced the money wherewith to pay the consideration, and he created mortgages thereon to secure his own liabilities in favour of *bona fide* creditors, with the sanction of the son. The Court, being satisfied that this was a scheme adopted for the purpose of defeating and delaying the creditors of the son, declared the conveyance to the father fraudulent as against creditors. *Ib.*

See also "Conveyance to Wife of Purchaser."

FUNERAL EXPENSES.

See "Administration," 2.

GENERAL ORDERS, 511 AND 608.

See "Council Fee in Chambers."

GRAVESTONE.

See "Administration," 2.

HUSBAND AND WIFE.

Held, affirming the decree pronounced *ante* vol. xxii., p. 29, that a wife's conveyance of her equitable estate is valid without the husband joining in the deed; and, the husband having the legal estate vested in him, the wife's vendee could compel a conveyance by the husband.

Adams v. Loomis, 242.

ILLEGAL CONTRACT.

See "Bonus to Railway Company."

IMPERIAL STATUTE.

[1 & 2 Vict. ch. 110.]

See "Charging Order."

IMPERFECT ENUMERATION.

See "Will, Construction of," 8.

IMPROVEMENTS.

See "Dedication," 2.

INCORPORATED COMPANY.

A bill was filed by a member of an incorporated association, against the corporation, the president, and the secretary thereof, charging that these officers had colluded and conspired together to refuse and deprive the plaintiff of the rights and privileges of the association, and setting forth certain loss and damage sustained by the plaintiff by reason thereof, and praying amongst other things that the defendants might be ordered to pay and make good such loss and damage, and that the defendants, other than the secretary, might be ordered to pay the costs of the suit.

Held, notwithstanding the provisions of the 63rd General Order of 1868, that the secretary was a proper party to the bill; and a demurrer by him, on the ground that he was not a necessary or proper party, was overruled with costs.

Cline v. *The Mountainview Cheese Factory*, *ante* vol. xx. p. 227, approved of and followed.

Cuthbert v. The Commercial Travellers' Ass'n., &c., 531.

INCONSISTENT BEQUESTS.

See "Will, Construction of," 4.

INDORSER.

See "Insolvent."

INJUNCTION.

See "Mill-owner,"
"Private Way."
"Trespasser."

INOPS CONSILII.

Where a will, though prepared by a solicitor, was so inconsistently worded that but little benefit could be derived from his labours in construing it, the Court thought that as liberal an interpretation should be made of the language in order to ascertain the intentions of the testator as if he had been, in fact, *inops consilii*.

Hellem v. Severs, 320.

INQUIRY AS TO AMOUNT REQUIRED FOR SUPPORT.

See "Equitable Execution."

INSOLVENCY.

1. Two cousins, *H.* and *R.*, entered into partnership in trade, *R.* furnishing all the capital (about $1,400). After eighteen months *R.* retired from the business, assigning as a reason therefor his having become possessed of the family homestead the management of which it was necessary for him to superintend. On *R.'s* retirement he sold his interest to *S.*, a brother of *H.* for about $1,230, paid partly by two promissory notes, one for $80 at a short date, and the other for $1,080 at a year, indorsed by two other brothers, and the residue by $70 in cash, supplied by one of the indorsers—*S.* having been without any means of his own. Shortly afterwards (about three or four months) *S.* withdrew from the business, making way for *J.*, a brother-in-law of *H.* and *S.*, who put $1,000 into the business, but paid nothing to *S.* for the transfer of his interest. The smaller note was duly paid, but the larger note was not met at maturity, and it was alleged that there was an understanding for an extension of the time for payment; *R.* omitted to give the indorsers notice of dishonour, and some months afterwards, claiming that the partnership effects were, under the circumstances and a prior verbal arrangement, answerable for the note, applied to *H. & J.* (the new firm) for payment thereof, which, being unable to meet, they assigned to *R.* certain accounts, and executed in his favour a chattel mortgage on nearly the whole of their assets, as security for its ultimate payment. Within thirty days after the execution of these instruments *H.* and *J.* were placed in insolveney by other creditors.

Held, *per Curiam*, on appeal, [reversing the decree of the Court below] that such assignment and mortgage were void, as an unjust preference made in contemplation of insolvency, within the 89th section of the Insolvent Act of 1869, (32 & 33 Vic. ch. 16): and per PATTERSON, J., [in this affirming the judgment of the Court below,] that under the circumstances stated *R.* might properly be considered a creditor of *H.* and *J.*: but, per DRAPER, C. J., that the facts shewn did not prove that *R.* was such creditor.

Held, per DRAPER, C. J., and PATTERSON, J., that the presumption referred to in the 89th section of the Insolvent Act of 1869 is not a rebuttable one, and, therefore that any act done or security given by a debtor within the thirty days therein mentioned, whereby one creditor obtains an unjust preference over the other creditors, is void: but, per BURTON and MOSS, JJ., although an act so done is presumed to be done in contemplation of insolvency, circumstances may be shewn which would rebut such presumption, and render the act—whether in payment of, or security for the debt—valid; but *per Curiam* mere pressure will not, under any circumstances, validate such transaction.

Per PATTERSON, J.—The rule, that when an Act of Parliament has received a construction either from long practice or by judicial interpretation, and is afterwards re-enacted in the same terms,

the Legislature is deemed to have had that construction in view in the re-enactment, cannot apply to an Act of the Dominion, where different constructions are shewn to have obtained in some of the Provinces of the Dominion.

Davidson v. Ross, 22.

2. The decree reported *ante* volume xxii., page 217, declaring that the assignment by the insolvent to the defendant was, under the circumstances appearing in the case, a preferential assignment, within the meaning of the Insolvent Act, and as such fraudulent and void against the general body of creditors, and that the facts negatived the existence of any pressure having been brought to bear upon the debtor, so as to induce him to make the assignment, affirmed, on rehearing, with costs.

Held, also, that even if pressure had been proved in the case, it could not, under the ruling of *Davidson* v. *Ross*, *ante* page 22, have validated the assignment.

Davidson v. McInnes, 414.

See also "Fire Insurance," 2.
"Interpleader Suit by Assignee," &c.
"Jurisdiction," 1, 2.
"Manufacturer," 1.
"Unjust Preference," 1, 2.

INSOLVENT.

1. A trader being in embarrassed circumstances, sold out his business, and out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, and shortly afterwards went into insolvency. The evidence did not shew that the indorser was aware or was party to the payment in any way, and it was by no act of his that the note was so paid.

Held, under the circumstances, that the assignee in insolvency had no right to call upon the indorser to refund the amount of such note; but,

Where the payment of a note had been procured by the indorser, he was under the 89th section of the Insolvent Act of 1869, [in effect the same as section 133 of the Act of 1875], held liable to make good the amount thereof,

Botham v. Armstrong, 216.

INSOLVENT ACT, 1875.

[Sec. 133.]

See "Insolvent."

INSURANCE.

See "Common Carrier," 2.

INTERPLEADER SUIT BY ASSIGNEE IN INSOLVENCY.

A writ of attachment issued, under which the assignee in insolvency seized goods which were claimed by a person to whom it was alleged the debtor had transferred them. The assignee thereupon filed a bill of interpleader against the claimant and the creditors who had sued out the writ, on which relief was afforded to the assignee, without requiring him to apply to the Judge of the Insolvent Court under sec. 125 of the Act of 1875; and the claimant failing to appear was ordered to be debarred of all interest in the goods in question, and to pay the costs of suit: and the assignee was given a lien on the goods in his hands for his costs.

Wells v. Hews, 131.

JURISDICTION.

1. This Court will not entertain a suit to set aside a composition and discharge in Insolvency for fraud, or upon any other grounds which are open to creditors before the Judge in Insolvency, unless special circumstances intervene in the case.

Close v. Mara, 593.

2. Where a bill was filed for that purpose, alleging as ground for the relief sought, fraud or evil practice in procuring the consent of the creditors to the discharge of the insolvent, or their execution of the deed of composition or discharge, a demurrer for want of equity was allowed. *Ib.*

JURISDICTION OF COURT TO SET ASIDE WILL AFTER PROBATE.

This Court has jurisdiction to set aside a will as having been executed under improper influence, or when the testator was not of sufficient capacity, without waiting for a revocation of probate. *Perrin* v. *Perrin*, *ante* vol. xix., p. 259, approved of and followed.

Wilson v. Wilson, 377.

LACHES.

See "Patent of Invention." 1.
"Vendor and Purchaser." 2.
"Tenancy in Common."

LANDS AFFECTED THOUGH NOT SPECIALLY MENTIONED,

See "Foreign Bankruptcy."

LANDS IMPROPERLY ASSESSED AS NON-RESIDENT.

See "Sale of Land for Taxes." 1.

LENGTHENED POSSESSION.

[Of Original Road Allowance.]

See "Public Highway."

LESSOR AND LESSEE.

Where there is a contract between the owner of lands and another person, whether lessee or not, that if such other person shall do a certain specified act he shall be at liberty to buy the property; in such a case, time is of the essence of the contract, and until the performance of the act which has been so stipulated for the relation of vendor and purchaser does not exist between the parties: Therefore where *The Canada Company* granted the plaintiff a lease of certain lands, whereby, amongst other things, they agreed that if the lessee duly paid certain rents and taxes, and should not cut or sell, or suffer, or permit to be cut or sold any timber or other trees growing on the lands, except for the purposes of clearing and the use of the premises, he should be at liberty to purchase the same at a certain named price, and it was admitted that default had been made as well in regard to the payment of rent and taxes as to the cutting of timber, it was *held* that the right to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon.

Ball v. The Canada Company, 281.

LIABILITY OF PERSON MAKING AN ERRONEOUS REPRESENTATION.

See "False Representation."
"Unpaid Valuator."

LIEN, CANCELLING.

See "Mechanics' Lien Acts."

LIEN FOR DEPOSIT.

The costs of a suit at law to recover back a deposit paid on account of purchase money, do not form any lien upon the land, although the deposit itself does constitute such a lien.

Burns v. Griffin, 451.

LIEN FOR FREIGHT.

See "Common Carrier."

LIEN ON WAREHOUSEMAN'S RECEIPTS.

See "Manufacturer." 1.

LIMITATIONS, STATUTE OF.

See "Mortgage," &c. 2.

LIQUIDATED DAMAGES.

See "Tenancy in Common."

LIS PENDENS.

See "Vendor and Purchaser." 2.

LOCATEE.

See "Crown Lands."

LUMBERMAN.

A lumberman had a lien on lumber for freight, and *C.* wrote saying "I wish you would advise your agents in Quebec to deliver to *J. A. Coumbe* the sawn stuff on your rafts. I am to pay the river freight, and will thank you to take *Coumbe's* draft on me at 30 days for river freight, which I will pay."

Held, that the effect of this letter was not such as to render *C.* liable to pay the freight until the lumberman had obtained *Coumbe's* draft for the amount thereof.

Re Coumbe, Cockburn and Campbell. 519.

MANUFACTURER.

[ADVANCES TO.]

1. In May, 1874, *A.*, a manufacturer, opened an account with a bank, representing himself as being in good circumstances with a capital of $20,000 over all his liabilities, which was believed

by *C.*, the Bank agent, who thought him doing a flourishing business, and *A.* then promised to keep *C.* always well supplied with collaterals for any accommodation afforded him. In December, 1875, *A.* applied to *C.* for assistance, and proposed that he should warehouse his goods as manufactured, and pledge the receipts of the warehouseman to the Bank for advances to be made to him; which proposal was acceded to by *C.* Advances were accordingly made, for which receipts were deposited with *C.* on the 19th of January, 25th of January, 1st of February, and 7th of February. On the 26th of February, *A.*, in compliance with a demand by some of his creditors, executed an assignment in insolvency. On a bill filed to impeach these transactions as an unjust preference, the Court being satisfied that they all took place in good faith, and not in the contemplation of insolvency: *Held*, that the Bank were entitled to hold their lien on such of the receipts as were so deposited more than thirty days before the assignment in insolvency; but in respect of such of them as were deposited within the thirty days the Bank could not claim any lien or priority.

Held, also, that the same rule was applicable to promissory notes deposited with the bank as collateral security.

Suter v. The Merchants' Bank, 365.

2. The promise, however, to keep *C.* well supplied with collaterals was of too vague and general a character to entitle the Bank to retain any lien. But where advances were to be made on goods manufactured remaining unsold (without specifying any quantity), and *C.* was to judge of the amount of the advance to be made:

Held, that this agreement was not so vague or uncertain as to prevent the Bank obtaining security for advances. *Ib.*

See also "Warehouseman's Receipts."

MARRIAGE, REPUTATION OF.

The presumption which arises of a marriage having taken place between the parties by reason of a man and woman having for many years cohabited and lived together as husband and wife is a rebuttable one; and after the death of the man the evidence of the woman alone, on which the Court placed full reliance, was received for that purpose, although she was then interested in negativing the fact of the marriage, because, if married at the time alleged, the will, under which she claimed all the property of the man, would, under the Act, have been revoked.

Preston v. Lyons. 142.

MARRIED WOMAN.

1. Where real estate is acquired by a married woman after the passing of the Married Woman's Property Act of 1872, such property is liable for her contracts to the same extent as if she were a *feme sole;* but the Court will not make any personal order against her, as would be done in the case of man or a *feme sole.*

Kerr v. Stripp, 198.

2. The Married Woman's Property Act, 1872, applies to cases where lands have been acquired by married women after the passing of that Act, although the marriage took place before the Act came into force. [Per PROUDFOOT, V. C.]

Adams v. Loomis, 242.

MASTER'S OFFICE

[ALLOWANCE FOR ATTENDANCE IN.]

See "Costs," 2.

MECHANICS' LIEN ACTS.

[1873 & 1874, O.]

1. The effect of the Mechanics' Lien Act of 1874, where inconsistent with the provisions of the Act of 1873, is to cancel a lien that had been created under the earlier Act, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by the 4th section of that Act; no proceeding to realize the claim having been taken for more than thirty days after the machinery, the foundation of the claim, had been supplied; the provisions of the Act of 1873 being inconsistent with, and repugnant to, the provisions of the later Act, which repeals all Acts inconsistent therewith.

Walker v. Walton, 209.

[Reversed on appeal, the Court holding that the saving clause of the Interpretation Act preserved the rights of the parties. 1 App. Rep. 579.]

2. Where a bill is filed by a sub-contractor against the owner of property, and a contractor with him, to enforce a claim against such contractor, the owner of the property, and all persons claiming to have liens, are necessary parties in the Master's office, whose costs will be ordered to be paid out of the amount found due the contractor, and the balance distributed ratably between the several lien holders, and a personal order made against the contractor for the deficiency, if any.

Hovenden v. Ellison, 448.

3. A suit brought by a lien holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act keeps alive all similar liens then existing. *Ib.*

MENTAL CAPACITY.

See "Undue Influence."
"Will, Setting aside."

MILL OWNER.

This Court refused to recognize the existence of such a rule as that the first action at law for damages to a mill site is brought simply to try the right, not to obtain substantial damages, if any such have been sustained. BLAKE, V. C., *dubitante.*

Wadsworth v. McDougall, 1.

Where the owner of a mill files a bill against another mill owner to restrain the latter from backing water, he must establish affirmatively that certain alterations in the stream effected principally by digging out the bed of the mill-race, and which was done by the plaintiff himself, have not caused the injury complained of: where it is doubtful whether such is not the case, this Court will refuse to interfere by injunction. *Ib.*

MILL SITE.

A purchase was made of a mill site and mill. Subsequently it appeared that the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser on negociating for such purchase:

Held, that this was a subject for compensation.

Wardell v. Trenouth, 465.

MORTGAGE—MORTGAGEE—MORTGAGOR.

1. Unless a mortgagor prove demonstrably, so as to leave no room for doubt, that the mortgage premises remain ample security for the mortgage debt, the Court will restrain him from cutting over the whole land.

McLean v. Burton, 134.

2. Where a judgment creditor filed a bill impeaching a mortgage created by the debtor in favour of his brother, a partner in business, and after evidence the usual decree was made:

Held, that the production of the ordinary affidavit by the holder of the mortgage stating the amount due, was sufficient

primâ facie evidence, as in other cases; and that, if the party entitled to redeem desired to reduce the amount claimed, it rested on him to adduce evidence for that purpose.

Elliott v. Hunter, 430.

3. Where a defendant desires to prevent the plaintiff from recovering interest for a longer period than six years, he must set up the defence of the Statute of Limitations: merely filing the usual disputing note is not sufficient for this purpose.

Wright v. Morgan, 457.

[Reversed on Appeal, 16th June, 1877.]

4. The right of consolidating separate mortgage debts on separate properties, is an equitable one, and under the 68th section of the Registry Act, 31 Vict. ch. 20, will not be allowed in favour of the holder of the mortgages against a *puisne* incumbrancer of one of the mortgaged properties without notice, although such right would be enforced as against the mortgagor himself.

Brower v. The Canadian Permanent Building Ass. 509.

See also "Damages for Cutting Timber."
"Dower," 2.
"Set-off by Assignee of Mortgagor."
"Timber Cut on Mortgage Premises."
"Vendor and Purchaser," 1.

MORTMAIN ACT.

Where land is specifically devised charged with a void bequest the charge sinks for the benefit of the specific devisee: therefore, where a testator devised his real estate, "consisting of * * to *A. F.*, eldest son of * * to exercise ownership over said lots during his natural life: he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to *A. F.*, the aforementioned heir, the shop on the church property, with all its goods and contents * * With respect to lot * * and lot * * they appear very rich in precious stones: they are a mine, and worth a great deal: they must, therefore, be assessed to the said *A. F.* with lot * * along with the shop and its contents. $4000 to be paid to the English Church of Cornwall:" *Held*, that the $4000 was charged on the devise and bequest to *A. F.*; that so far as this was charged on land—freehold or leasehold—the bequest was void; so far as charged on personalty it was valid, and would be apportioned *pro rata* between the realty and personalty; and that *A. F.* was entitled to hold the several properties absolutely, subject only to such proportion of the legacy as was properly applicable to the personalty.

Fulton v. Fulton, 422.

NON-RESIDENT.

See "Sale of Lands for Taxes," 1.

NOTICE.

See "Registered Title."

NOTICE OF ASSESSMENT.

[On Premium Note.]

See "Fire Insurance," 1.

NOTICE TO AGENT OF INSURANCE COMPANY.

See "Fire Insurance," 1.

NOVELTY.

See "Patent of Invention," 1.

NUISANCE.

1. By the statute 32 Vict. ch. 28, O., all the public buildings and works are placed under the control and management of the Commissioner of Public Works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the Legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London Lunatic Asylum was erected under the provisions of an Act of the Legislature, and the drains of it were constructed in such a manner as to discharge into a stream crossing the land of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was to carry the sewage to the river Thames, at an estimated cost of $30,000 :

Held, that the Commissioner of Public Works could not be restrained by injunction from allowing the nuisance to continue. [Spragge, C., dissenting.]

Hiscox v. Lander, 250.

2. Per Spragge, C.—The stream which had thus been polluted had not been acquired by the Commissioner under the Act, and it was not a drain to carry off water from a public work which had been constructed by the Commissioner, and therefore it was not such an act as the Statute authorizes, even if it had been properly done. *Semble.—Ib.*

OFFER TO COMPLETE CONTRACT.

See "Specific Performance," 2.

recovering for any excess of acres, although a conveyance of the land had been executed to the purchaser.

Kitchen v. Boon, 195.

PAROL EVIDENCE TO ESTABLISH A TRUST.

In April, 1853, the plaintiff and her husband joined in a deed conveying two building lots to her father, who paid to or advanced for the husband the full value thereof, intending and promising at the time to settle the same on the plaintiff, who with her husband continued in possession, or in receipt of the rents and profits until May, 1864, when the father sold one of the lots to other members of his family: the plaintiff with her husband remaining in the full enjoyment of the other lot until after the death of the father in September, 1872. Meanwhile, and on the 4th April, 1864, the plaintiff and her husband had joined in another deed to her father, which recited the deed of April, 1853; the promise and proposal of the father to settle the lands on the plaintiff; that it was then considered inexpedient so to settle the same; the desire of the father to make further advances to the husband, and the request by him and the plaintiff that the father would sell the lands, the plaintiff and her husband thereby releasing to him all claims to, or interest in those lands. The plaintiff alleged that shortly after the execution of the deed of April, 1853, the father, in pursuance of his promise, did execute and deliver to her a deed of the lands, which she held for several years, and until she gave it up to a messenger, another son-in-law, sent by her father, the father having stated that it would be safer for the plaintiff that the deed should be in his hands. No steps were ever taken to enforce a re-delivery of such deed or a further conveyance of the lands to the plaintiff until February, 1874, when the present suit was instituted, seeking to obtain a re-conveyance of the lot remaining unsold on payment of what should be found due in respect of advances made for the husband, and an account of the proceeds of the lot disposed of. The only evidence of the existence of such re-conveyance was that of the plaintiff and her husband, and of a person resident in the United States, which latter, from its unsatisfactory character, the Court refused to adopt:

Held, that the recitals contained in the deed of April, 1864, were not sufficient to create the father a trustee; and therefore the right to redeem or trust, if any existed, could only be established by parol: and though the husband was not a competent witness to corroborate his wife's testimony, which, under the Act, required corroboration after the death of the father, his testimony was so at variance with that of his wife and other witnesses that the Court declined to adopt his statements, and the evidence consequently failed to establish such right or trust; this

PARTIES.

PART PERFORMANCE.

PARTITION.

PATENT OF INVENTION.

depth, so as to be in constant contact with the heads or nuts of the bolts D after they are placed in position and firmly screwed to the straps and rails, as shewn. It will be seen that the upper portion of the chair at E forms a seat or cheek, for receiving the sides of the nuts or heads of the bolts, and which will entirely prevent the bolts from 'working' loose or dropping out of their places, from the vibration of vehicles passing over the rails, or from other causes."

Held, that although rails, chairs, fish plates, and screw bolts, had long been in use separately on railways, still the present combination was such as to effect a new purpose, and as such formed the proper subject of a patent.

Yates v. The Great Western R. W. Co., 495.

2. The defendants continued to use the combination so patented from the year 1870, and they claimed to have used a similar contrivance some years prior to the patent, and no claim was ever made against the defendants in respect of such user and alleged infringement until the year 1874, when *Y.*, to whom *F.* had assigned an interest in the patent, wrote to the proper officer of the defendants, making a formal demand in respect thereof, but no attention was paid to such demand, and, although the defendants continued to use the combination, no proceeding was taken to prevent them so doing until the 8th of March, 1876, when *Y.* filed a bill seeking to restrain the further infringement of the patent.

Held, that the delay in proceeding formed no objection to the party obtaining relief. *Ib.*

[Reversed on Appeal, 17th December, 1877, PATTERSON, J.A., dissenting.]

See also "Simplicity of Invention."

PAYING FOR LANDS REQUIRED FOR RAILWAY.

See "Railway Company," 1.

PAYMENT BY ADMINISTRATOR.

See "Administration," 2.

PAYMENT INTO COURT.

The person who was to have the sole control and management of the estate being entitled beneficially to the interest on the investments the Court refused to order a transfer into Court.

Hellem v. Severs, 320.

PLEADING.

Where a bill by a municipality seeking to restrain the defendants from obstructing a highway in one paragraph alleged that the defendants "have fenced or allowed the same to be fenced," and in another paragraph that they were "in the occupation and possession of the said side line * * and have prevented and still prevent the inhabitants * * and the public at large from travelling on and over the said line * * and have refused and still refuse to open the said line or to allow the plaintiffs to do so," and that the defendants claimed they were entitled to the road.

Held, on demurrer for want of equity, that the allegations taken together were sufficient to entitle the plaintiffs to the relief; although had the only allegation been that the defendants had "fenced or allowed the same to be fenced," it would not have entitled the plaintiffs to the injunction prayed for.

The Corporation of the Township of McKillop v. Smith, 278.

See also "Declaratory Decree."
"Parties," 1.
"Practice," 4, 5.
"Specific Performance," 2.
"Surviving Partner," 1, 3.

POSSESSION.

See "Registered Title."

PRACTICE.

1. Where a demurrer was filed which on argument was overruled, and a demurrer then put in *ore tenus* was allowed, the Court allowed the latter without costs, although costs were given to the plaintiff of the demurrer that was overruled, following the decision in *Roche* v. *Jordan*, *ante* volume xx., p. 373.

Adams v. Loomis, 250.

2. Where on a reference to a Master to take an account of a trustee's dealings with an estate, that officer omitted to ascertain the amount of the trustee's charges, costs, &c., a reference back to ascertain it was directed at the hearing on further directions; and the fact of the Master having reported that the trustee had omitted to keep any regular set of books shewing a debtor and creditor account of his dealings with the estate, but not stating that for that reason he had been unable to ascertain the amount, was not considered a sufficient reason for his having omitted to find the amount of such claim.

Life Association of Scotland v. Walker, 293.

3. Where the time for the completion of a contract had not arrived, some of the instalments of purchase being not yet due :

Held, that, under the circumstances, though there could not be a decree for specific performance, the purchaser was entitled to a declaration of right to specific performance and an inquiry as to title ; the over due instalments of purchase money being paid into Court.

Wardell v. Trenc 465.

4. A demurrer to part of the prayer of a bill is not on that account erroneous in form.

Abbott v. The Canada Central R. W. Co., 579.

5. Where a bill prays alternative relief, a demurrer to one of the alternatives is not irregular. *Ib.*

See also "Amendment at Trial."
"Amendment in Appeal."
"Declaratory Decree."
"Fire Insurance," 3.
"Jurisdiction," 1, 2.
"Mortgage," &c., 2.
"Parties," 2.
"Re-Hearing."
"Will, Proof of Execution of."

PREFERENTIAL ASSIGNMENT.

See "Insolvency," 1, 2.

PREFERENTIAL BONDS.

See "Bonus to Railway Company."

PREFERRED CREDITORS.

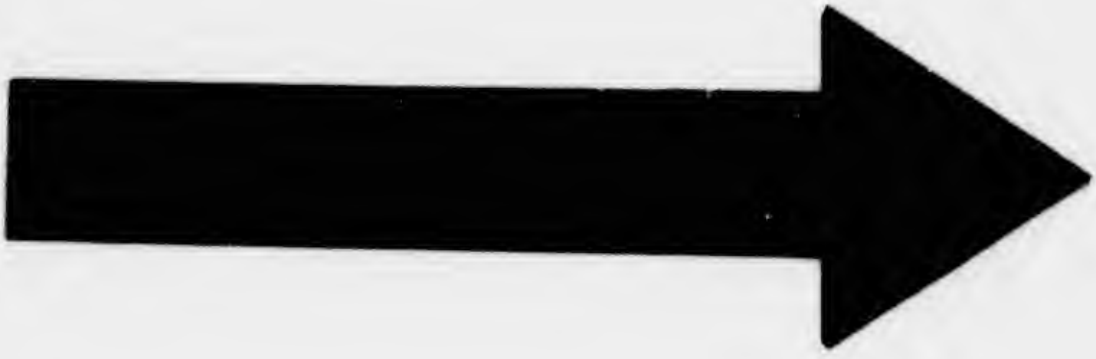
See "Fraudulent Conveyance." 1.
"Insolvent." 1, 2.

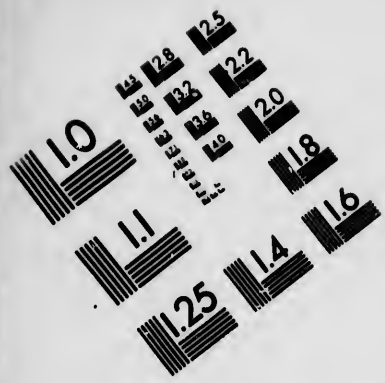
PREMIUM NOTE.

See "Fire Insurance," 2.

PRESENT INTEREST IN BEQUEST.

See "Will, Construction of," 6.





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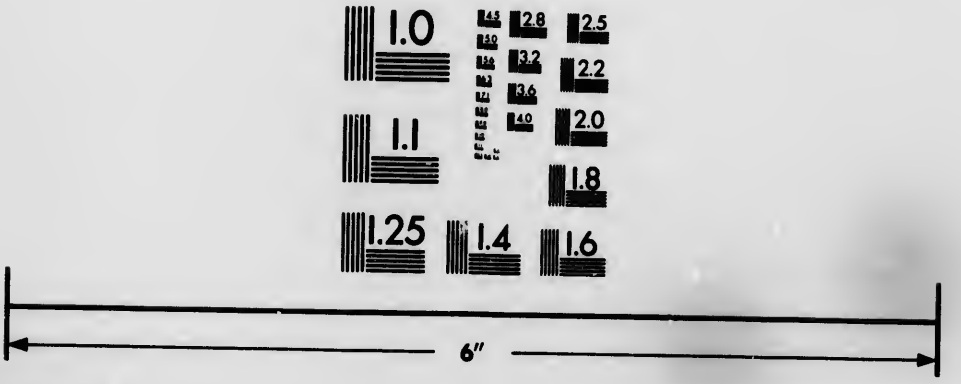

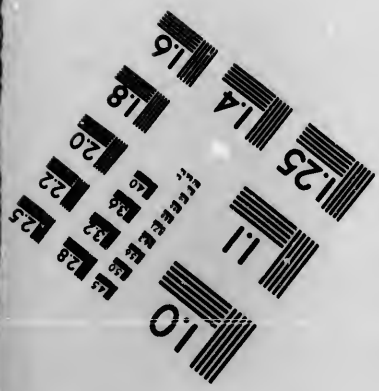

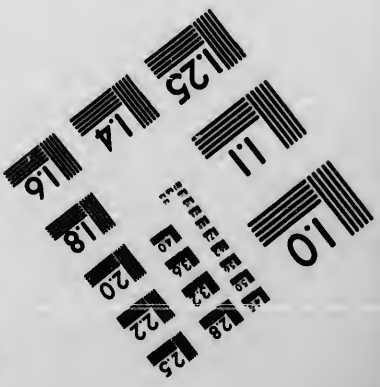

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PRESSURE.

See "Insolvency," 1, 2.

PRIOR INSURANCE.

See "Fire Insurance," 1.

PRIVATE RIGHT OF WAY.

1. A legal title to a private right of way can be obtained only by prescription or user for the time required by statute to give a title to easements, or by grant; but equity entertains jurisdiction to enforce agreements for easements as it would for the purchase of the fee.

Craig v. Craig, 573.

2. The owners of two adjoining half lots entered into a parol agreement for a lane between the two half lots, the agreement not being limited in terms as to time; each accordingly erected his fence so as to leave about a rod of his land for his part of the lane, and the respective proprietors used the land in common for fifteen years, and until after the death of one of the original parties to the agreement: the deceased laid out his farm and planted his orchard with reference to the lane:

Held, that the agreement must be presumed to have been for a lane in perpetuity, and was to be enforced accordingly.—*Ib.*.

PRIVILEGE OF PURCHASE.

See "Lessor and Lessee."

PROBATE.

See "Jurisdiction of Court," &c.
"Will, Proof of Execution of."

PROMISE TO PAY THE DEBT TO ANOTHER.

See "Lumberman."

PUBLIC HIGHWAY.

The public cannot release their rights; and there is no extinctive presumption or prescription: therefore where an original allowance for road had been taken possession of, and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:

Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same.

Nash v. Glover, 219.

PURCHASE BY THE ACRE.

See "Parol Evidence of Consideration."

PURCHASE MONEY.

See "Costs," 7.

RAILWAY COMPANY.

1. Although a tenant for life has authority—under the Railway Acts, C. S. C. ch. 66, and 24 Vic. ch. 17—to contract for the sale and to convey the fee simple of land required for the use of a railway, the company are not warranted in paying him the full amount of compensation agreed on, notwithstanding our Statute omits to provide for the application of the amount, as is done in the Imperial Act, 8 Vict. ch. 18. And where a Railway Company did so pay the amount they were compelled afterwards at the suit of a party interested in the remainder to make good the amount of his interest.

Cameron v. Wigle, 8.

2. Where arbitrators are appointed to award compensation for lands taken for the purposes of a railroad, and assess the damages sustained by the proprietors by reason of the severance of the lands, the arbitrators may properly take into consideration the increased value to the estate by reason of the construction of the railroad, although benefited only in the same way as other farms in the neighbourhood through which the railroad does not pass; as also the increase in value by reason of the probable location of a station at a town in the vicinity of the lands, and which the Company had bound themselves to place there in consideration of a bonus paid by such town.

Re Credit Valley R. W. Co. and Spragge, 231.

3. Although the Statute, C. S. U. C. ch. 66, directs that when the sum awarded for lands taken for a railroad is less than that tendered, the costs should be borne by the owners, the same rule does not apply as to the costs of an appeal to this Court, they being then in the discretion of this Court, who, under the circumstances, dismissed an appeal without costs. *Ib.*

RAILWAY STOCKS.

See "Charging Order."

RESIDUE.

See "Will, Construction of," 9.

RESIDUE OF PERSONALTY.

See "Administration," 1.

RES JUDICATA.

The plaintiffs put in evidence that *C.* had, on a former occasion, filed a bill against them seeking an account of the lumber dealings, and charging that the land agreement had been cancelled; that it was after answer and before decree in that suit that *C.* had mortgaged his interest to *M.* & *W.* (who were not made parties to the suit and had not any notice of it); and that the cause having been set down for examination of witnesses and the plaintiff therein not appearing, the bill was dismissed with costs. The present plaintiffs, however, did not in their bill set up these proceedings. The Court declined to hold the defendants the mortgagees concluded by them as *res judicata*.

Cook v. Mason, 112.

RESULTING TRUST.

Where money is advanced by a father for the purchase of land, the conveyance of which is taken in the name of the son, the presumption is, that the transaction is by way of advancement to the son. In such a case, there is no resulting trust in favour of the father.

Knox v. Traver, 477.

REVOCATION OF WILL.

See "Marriage, Reputation of."

RIGHT TO REDEEM.

See "Mortgage," &c., 4.

RIPARIAN RIGHTS.

See "Mill-owner," 1, 2.
"Trespasser."

ROAD ALLOWANCE.

[LENGTHENED POSSESSION OF ORIGINAL.]

See "Public Highway."

SALE OF LAND FOR TAXES.

1. An erroneous assessment of land as non-resident or unoccupied, is not a ground for impeaching a sale for taxes.

Silverthorne v. Campbell, 17.

2. The plaintiff purchased a lot in 1870, in which year and the preceding the lot had been returned as non-resident and unoccupied, though occupied by a tenant of the then owner. The plaintiff, however, made no inquiry or search as to taxes, but in succeeding years regularly paid them. In fact the taxes for 1869 and 1870 had not been paid, and the land was in due course sold for such arrears:

Held, following the decision in *Bank of Toronto* v. *Fanning*, *ante* volume xviii., page 391, that the sale was binding on the owner; and a bill filed after the expiration of a year from the time of sale to set it aside was dismissed with costs: although the Court considered the case one of great hardship upon the plaintiff. *Ib.*

SALE OF LAND SUBJECT TO MORTGAGE.

1. *B.* sold land to *C.* who was to pay a mortgage thereon as part of the purchase money, and the deed described the land as being "subject to a mortgage in favour of *McF.* for $596 with interest as therein mentioned."

Held, that in a suit to administer the estate of *C.* the executors were entitled to credit for all moneys paid by them on account of the mortgage; and that the mortgagee was entitled to prove for the balance of the mortgage debt against the general estate of *C.*

Re Cozier—Parker v. Glover, 537.

2. The acceptance of a deed reciting that the property is conveyed subject to a mortgage or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt unless the amount is included in the consideration and retained by the vendee as so much money belonging to the incumbrancer. *Ib.*

SEPARATE CONTRACT.
SEPARATE ESTATE.

See "Married Woman," 1.

SEPARATE ESTATES.

See "Mortgage," &c, 4.

SET-OFF BY MORTGAGOR'S ASSIGNEE.

A purchase of lands had been made by plaintiffs and one *C.* jointly, each to pay one-half the purchase money: the plaintiffs paid more than their share and had a lien on *C.'s* interest for the excess; they also had lumber dealings together, the accounts of which were unsettled, and the balance thereon was claimed by each to be in his favour; in accounts of these lumber dealings the plaintiffs had charged *C.* with his share of the purchase money: they afterwards filed a bill claiming that the land account and lumber account were unconnected; that they should be paid their advances for *C.* on the land, and that in default his mortgagees and assignee should be foreclosed.

Held, that as against the lien of the plaintiffs on the land these mortgagees were entitled to set off the amount, if any, due by the plaintiffs on the lumber dealings.

Cook v. Mason, 112.

SEWAGE RATES.

Held, on appeal from the Master, that the sewer rates in the City of Toronto, under by-law 468, do not form a charge upon lands.

Squire v. Oliver, 441.

SIMPLICITY OF INVENTION.

The great simplicity of an invention is not a ground of objection to a patent therefor. It is rather a recommendation in favour of it.

Yates v. Great Western R. W. Co. 495.

SOLICITOR.

See "Trustee," &c., 4, 5.

SPECIFIC PERFORMANCE.

1. An agreement for sale of lands referred to them as certain lots in "Stretton's Survey." No survey had in fact been then made, but a rough sketch of the proposed survey was in existence.

Held, that such sketch could not be considered as the survey referred to in the agreement; and as parol evidence was necessary to shew the particulars as to size and position, without which such sketch was unintelligible, the Court refused to enforce the agreement, but offered to make a decree for performance of the agreement admitted by the answer without costs; or dismiss the bill without costs—the defendant having improperly denied the

SUPERINTENDENT OF ASYLUM.

To a suit to restrain a nuisance caused by a public asylum, the superintendent of the institution is not a necessary party.

Hiscox v. Lander, 250.

SUPPORT.

[INQUIRY AS TO AMOUNT REQUIRED FOR.]

See "Equitable Execution.

SURROGATE COURTS.

See "Costs of Contentious Suits in Surrogate Courts."

TAXES.

See "Sale of Land for Taxes," 1.

TENANCY IN COMMON.

A., one of several tenants in common of a lot of land, conveyed it in fee, as an entirety, to *B.*, who conveyed to *C.*, who conveyed to *D.* On the sales to *B.* and *C.* £100 of the purchase money was allowed to remain unpaid until all matters of title could be settled, it being then known that *A.* had only a tenancy in common in the land, and that proceedings for a partition of that and other lands, held on the same tenancy, were pending. In February, 1855, *C.* paid the £100, on receiving from *A.'s* husband and *E.*, one of the other tenants in common, a covenant under seal to have a partition made without delay, and, if possible, to have the lot so sold included as part of their share, and to execute such further assurances as might be necessary to make *C.'s* title good, and in default to repay the £100 with compensation for improvements and charge for occupation rent. In a suit in this Court for partition *D.* was made a party, and this lot was charged with various sums in favour of *A.'s* heirs and *E.* and other tenants in common for equality of partition, rents, &c. *D.* had no knowledge of the existence of this covenant until after the Master's report, when he procured an assignment of it, and filed a petition in May, 1875, to be relieved of the charges on his land under the report, and to be indemnified against them by *A.'s* representatives and *E.*

Held, on re-hearing by the full Court, (1) that *D.* was entitled to the relief prayed; (2) that the application was not too late, as *laches* could not be imputed until after knowledge of the facts; (3) that it was immaterial whether the covenant ran with the land or not; (4) that *E.'s* liability was not limited to the £100, but was for a complete indemnification of C. and his assigns.

Rice v. George, 513.

TENANT FOR LIFE.

See "Railway Company."

TIMBER CUT ON MORTGAGE PREMISES.

The jurisdiction as to restraining the cutting and removal of timber was not preventive only; the Court would in a proper case interpose where the timber could be followed. The Administration of Justice Act (1873, sec. 32) it would appear, however, has removed any technical difficulty of this sort.

McLean v. Burton, 134.

See also "Damages for Cutting."

TRESPASSER.

In a suit brought to have boundaries declared, the defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of the road along a portion of the shore of Muskoka Bay. It appeared that the road in question was of great public utility and benefit; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; and that the defendants had built their mills—one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay:

Held, that the defendants were to be treated as plaintiffs seeking relief by bill, and (following *Giles* v. *Campbell*, *ante* vol. xix., page 266) that being themselves trespassers, they were not entitled to any relief against the plaintiff.

Cockburn v. Eager, 409.

TRUST, TRUSTEE, AND CESTUI QUE TRUST.

1. A purchase was negotiated by M., the husband and father of the plaintiffs respectively, of a village building lot, and he obtained from the vendor a bond securing a conveyance thereof to his father. *M.* thereupon went into possession, built upon and otherwise improved the property, and died in possession thereof. Amongst his papers there was found, after his death, a receipt from the vendor as follows: "Received from *Mark McManus* payment in full for a building lot of one hundred and four feet square, on which he has a store erected. The deed to be given when demanded;" but no evidence was forthcoming of this document ever having been shewn to the father, who, it was proved, was unable to read or write, in consequence of which he was in the habit of always having his business transacted by *M.* From the evidence of the vendor it was evident that the whole payment

for the lot came from the father. After the death of *M.* his widow and infant daughter filed a bill seeking to declare the father, who had obtained a conveyance, a trustee of the property. The defendant denied the existence of any trust, and the only evidence against such denial was that given by the widow, who swore that the defendant had stated in answer to a question as to what would become of the property, that "it was all right and whatever was *Mark's* should be hers," meaning the infant plaintiff.

Held, that there was not sufficient shewn to take the case out of the Statute of Frauds, and the defence thereof was a bar to any relief being given.

McManus v. McManus, 118.

2. A mortgagee executed a declaration that he held the security in trust to pay the first instalment payable thereon to two creditors named, and out of the balance secured by the said mortgage "remaining after the said first payment of $3,510, to pay over to each one of the parties hereinafter named * * * [naming eight creditors whose claims amounted to the whole of the balance secured by the mortgage], it being expressly understood and declared that each of the said instalments as they shall become due and be paid * * * shall be assigned and distributed ratably amongst each of the said parties, and in the just proportion that each of their debts bears to the aggregate of the sums and the amount of each instalment :"

Held, that neither of the eight named creditors was entitled to share in the first instalment ; and that the amount of each of the other instalments as received was to be ratably divided amongst them.

Wigle v. McLean, 237.

3. The rule of decision in Equity, which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the *cestui que trust* or his assignee can compel a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains, and trouble under the Act of Ontario, 37 Vict. ch. 9.

Life Association of Scotland v. Walker, 293.

4. The rule which prevails in England, that a solicitor, being also a trustee or executor and a party to a suit, is not entitled to charge costs except costs out of pocket, applies with equal force in this country; although here by law he is entitled to receive compensation for his services in the capacity of trustee or executor.

Clack v. *Carlon*, 7 Jur. N. S. 441, not followed.

Meighen v. Buell, 503.

[But see *Colonial Trust Co.* v. *Cameron*, post 548.]

5. The rule that a trustee acting as a solicitor of the trust is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds; not when payable by an adverse party.

Meighen v. *Buell*, *ante* page 503, referred to and distinguished.

Colonial Trust Co. v. Cameron, 548.

See also "Parol Evidence to Establish a Trust."

ULTRA VIRES.

The Ontario Statute (38 Vict. ch. 65) is not *ultra vires*, so far as it affects companies incorporated by Acts of the Legislature of Canada. As to any such company transacting business in Ontario, on any subject within the powers of the Provincial Legislature, that body may impose what conditions it pleases on the operations of the company.

Billington v. The Provincial Ins. Co., 299.

UNDUE INFLUENCE.

W., the holder of a policy of insurance on his life, who had fallen into habits of intemperance, which greatly enfeebled his bodily health, although his mental faculties remained sufficiently unimpaired to enable him to understand business, assigned this policy to *T.*, his brother-in-law, a clergyman, for his own benefit; and on the following day made his will, appointing *T.* his sole executor, and thereby bequeathed his effects, which were of but trifling value, to several of his relatives. No entry of the assignment of the policy was made in the books of the insurance company, and the premium afterwards paid was paid in the name of *W.* *T.*, on applying for payment of the insurance money, represented himself as the assignee and executor of the deceased.

Held, on rehearing, affirming the decision of BLAKE, V. C., as reported *ante* vol. xxii., p. 547, that the circumstances were not such as shifted the onus of proof, and called for evidence on the part of *T.* that the assignment was *bona fide*, and that he had not exercised any influence over the deceased in obtaining the same.

Re White-Kersten v. Tane, 224.

UNJUST PREFERENCE.

1. It is incumbent on a party seeking to impeach as an unjust preference a transaction between a debtor and his creditor occurring more than thirty days before insolvency, to prove that such transaction took place in contemplation of insolvency.

Suter v. The Merchants' Bank, 365.

2. *A.* owned a barley mill which he was endeavouring to sell to one *T.*, whose notes he was to accept in payment, and in December, 1875, he arranged with C. that these notes were to be handed over in security for all his notes then under discount. Subsequently, and on the 7th of February, 1876, the sale to *T.* having fallen through, *A.* executed a memorandum in writing transferring to C. "as collateral security against paper discounted for me, my right, title, and interest, in a barley mill * * * keeping the privilege of disposing of the same and handing to you the promissory notes of the purchaser."

Held, that this was not an unjust preference; that the bank having made advances on the faith of having the proceeds of the sale handed over, it was no extension of their security, on the sale falling through, to obtain an assignment of the mill itself. *Ib.*

See also "Insolvency," 1.

UNPAID VALUATOR.

In order to facilitate an intending borrower obtaining a loan of money, the defendant, who was well known to the plaintiff, the proposed lender, gave a certificate in the following words: "I beg to state that I know the farm belonging to Mr. *James Wheelen*, of Brudenell, situate opposite the church, and in a thriving settlement. I consider it worth at least $1,200; and have reason to believe that it has cost him a much larger sum, and I am sure the investment of $400 will prove a safe one." At this time the property was worth not more than $400 or $500, and on a sale under execution at the suit of the plaintiff, it realized only $130.

Held, *per Curiam*, that in the absence of *mala fides* the defendant, being an unpaid valuator, was not liable to make good the loss sustained by the plaintiff by reason of this erroneous valuation. [SPRAGGE, C., dissenting, who considered that the defendant had been guilty of such gross neglect in reference to the matter as rendered him liable to indemnify the plaintiff.]

French v. Skead, 179.

[Affimed on Appeal, 16th March, 1877.]

VAGUENESS OF AGREEMENT.

See "Manufacturer," 2.

VALUABLE CONSIDERATION.

Held, affirming the decree pronounced *ante* volume xxii., page 99, that the compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife.

Adams v. Loomis, 242.

VALUING LANDS TAKEN FOR RAILWAY.

See "Railway Company," 2.

VARYING CONSIDERATION STATED IN DEED.

See "Parol Evidence of Consideration."

VENDOR AND PURCHASER.

In 1835, *D.*, the owner of land, sold and conveyed the same to *S.* for £310, and a mortgage was executed by the purchaser for the whole of the consideration money. In 1838 *S.* sold and conveyed his equity of redemption to *K.* In 1842 the original vendor filed a bill of foreclosure against *S.*, on which a final decree of foreclosure was obtained in August, 1846; but to this suit *K.*, through some oversight, was not made a party. Sixteen months afterwards *D.* effected a sale of the same property to another purchaser, who, in October, 1854, mortgaged to the defendant *W.*, and he, in September, 1860, obtained a final order of foreclosure, by reason of default in payment, and subsequently conveyed to his co-defendant. During the time *W.* held the land he paid a sum for taxes exceeding the original purchase money; *K.* never having paid anything on account thereof, or of the money or interest secured by the mortgage from *S.* to *D.* (of 1825.) In 1876 *K.* died, and the plaintiff, his heir-at-law and devisee, in June of that year, for the first time discovered the conveyance of 1838 from *S.* to *K.*, and thereupon filed a bill seeking to redeem.

Held, under the circumstances stated, that whether the original transaction between *D.* and *S.* could only be looked at as one between mortgagor and mortgagee, or merely as one between vendor and vendee, the plaintiff was not entitled to relief, and the bill filed by him was, therefore, dismissed with costs; and *Semble*, that *S.* having been an innocent purchaser at a time when registration was not notice, would have afforded a good ground of defence, if it had been taken by the answer.

Kay v. Wilson, 212.

2. Where the purchaser paid a deposit on effecting a purchase, which he afterwards rescinded in consequence of a good title not having been made out, and recovered judgment at law for the amount of the deposit, which he was unable to realize under execution:

Held, notwithstanding the provisions of the Administration of Justice Act, that the purchaser had a right to institute proceedings in this Court to enforce his lien, his object being to obtain a *lis pendens* which he could not obtain at law, in order to prevent the vendor disposing of his lands as he had of his goods.

Burns v. Griffin, 451.

[Affirmed on Appeal, 16th March, 1877.]

VOID BEQUEST.

See "Mortmain Act."

WAREHOUSEMAN'S RECEIPTS.

The Dominion Act 34 Vict. ch. 5, sec. 37, enables a party making advances to a manufacturer to stipulate for obtaining a lien on warehouse receipts to be subsequently granted to the manufacturer.

Suter v. The Merchants' Bank, 365.

See also "Manufacturer," 1.

WIFE.

[Conveyance by.]

See "Husband and Wife."

[Refusing to join in Conveyance.]

See "Dower," 1.

WILL, CONSTRUCTION OF.

1. A testator in a will containing inconsistent provisions devised certain real estate, after the death of his daughter, to his grandsons *J.* and *F.*, "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them, and to their male heirs after their or either of their decease, and to their heirs and assigns for ever," and in case of the death of *F.* without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson *H.*, for his life, and after his death to his heirs and assigns for ever.

Held, that the remainder after the death of the daughter went to *J.* and *F.* as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to *F.'s* part to *H.*

Hellem v. Severs, 320.

2. A will contained the following devise: "My will is, that after the decease of my daughter *Bridget*, and after the decease of all my sons-in-law, *James Esmond*, *John Emery* and *John Severs*, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be divided into equal parts and paid to my grandchildren, equally amongst all my grandchildren; but in case of the death of any of my grandchildren before the death of my daughter *Bridget*, and before the death of all my sons-in-law leaving lawful issue, then the share

that would have belonged to my grandchild if living shall go and belong to the lawful issue of such deceased grandchild."

Held, that the estate was not to be divided till twenty-one years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grandchildren living at his death took an immediately vested interest, subject to be divested *pro tanto* as the number of grandchildren should be increased by future births before the period of distribution. *Ib.*

3. The testator directed that *F.* should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral: *Held*, that the land was charged with the bequest. *Ib.*

4. The testator bequeathed to *M.* the interest due on the amount in the Savings Bank or Building Society after *Bridget's* death, and the interest annually on the mortgages till twenty-one years from the testator's death was given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 was given to him "as compensation for his coming from Hamilton quarterly, to submit the statements and accounts, and receipts and expenditure, and deposit receipts to the solicitor as above mentioned:"

Held, that these were not inconsistent bequests; the one being for the care and management of the estate; the other for a specific item of expense—the coming from Hamilton—and might both well stand together. But as *M.'s* care of the estate was only to arise after *Bridget's* death, and, therefore, might never come into operation, he was not entitled to claim the $100 until he did enter on the management. *Ib.*

5. The testator bequeathed his money in the Bank of Commerce to "*H. F.*, son of *C.* and *A. F.*, when he becomes of age, to receive it in full with interest. Should he not survive them, his next heir shall become inheritor:"

Held, a specific bequest of the money and interest which vested presently.

Fulton v. Fulton, 422.

6. After directing a particular disposition for a period of seven years of the interest of moneys vested, the testator declared that afterwards "the yearly proceeds or interest, as it accrues, to be the property of my beloved niece *A. F.*, who will cause to be paid out of said moneys to the English Church in Cornwall $150: $50 per year for three years. Should she die, then the inheritance shall be in the person of the said *A. F.*, so far as the

proceeds are concerned, while the sum invested remains intact for ever. She can name any of her brothers or sisters who shall enjoy it after her :"

Held, that *A. F.* took presently an absolute interest in the fund. *Ib.*

7. The testator devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower ; the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses.

Held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her, freed from the debts of the testator.

Dungey v. Dungey, 455.

8. *Held*, on rehearing [affirming the decree reported *ante* volume xxii. p. 267] that, although a will speaks from the death of the testator, and so would carry after-acquired lands, yet where a testator devised to his wife all the remainder of his real estate, and then proceeded to enumerate the lands comprised in such remainder, after-acquired lands did not pass as part of the residue.

Crombie v. Cooper, 470.

WILL, PROOF OF EXECUTION OF.

Where probate of a will is produced at the hearing, in pursuance of notice served under the statute 22 Vict. ch. 96, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will, and of its validity and contents ; but if the notice to dispute has been served, and the will does not appear to be duly executed, the Court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of the Statute 4 Wm. IV. ch. 1, as to the execution of wills had been complied with.

Stewart v. Lees, 433.

[Affirmed on re-hearing, Sept. 8, 1877.]

WILL, REVOCATION OF.

[Setting Aside.]

The decree pronounced (*ante* vol. xxii., p. 30) setting aside a will purporting to be executed by the testator, affirmed on rehearing, except as to costs. In this respect the Court varied the decree by refusing the defendants their costs.

Wilson v. Wilson, 377.

See also "Marriage, Reputation of."