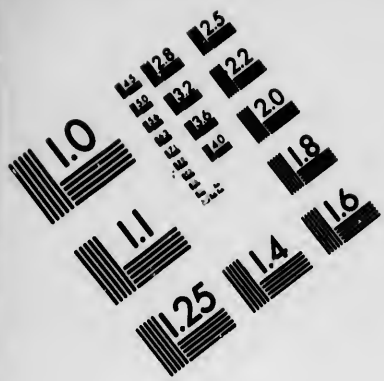

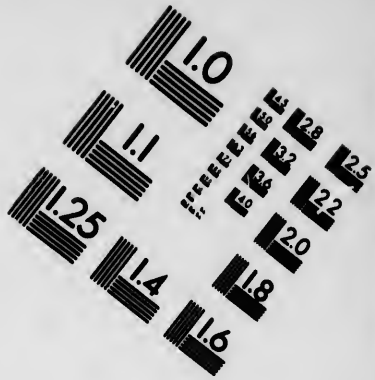

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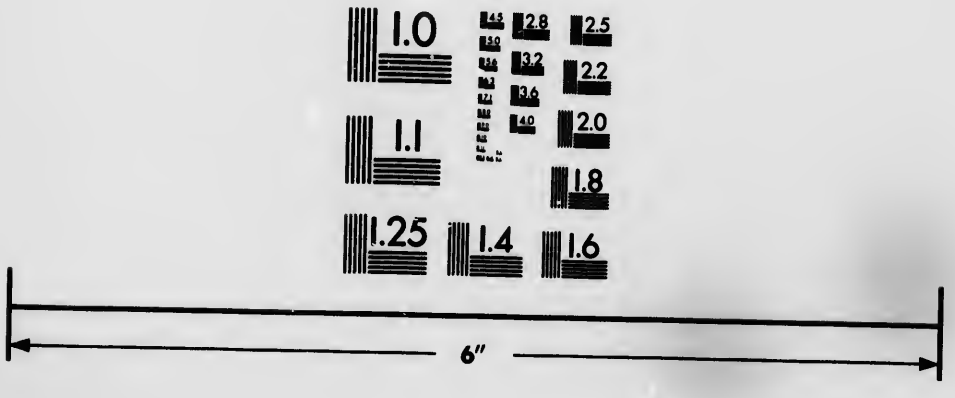

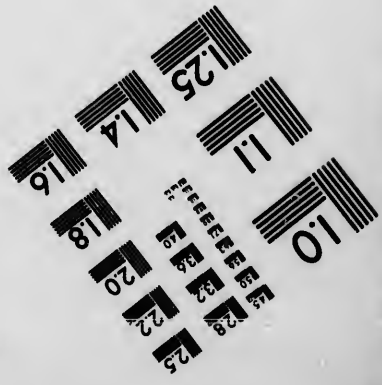

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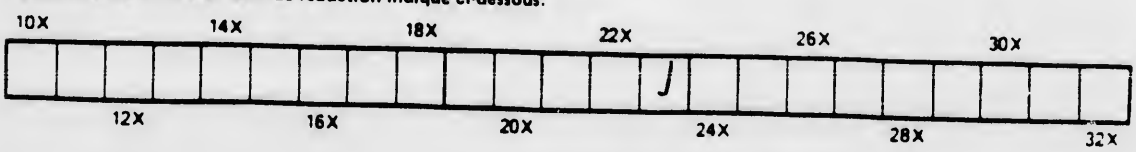


REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1867.

BY

ALEXANDER GRANT, BARRISTER,
REPORTER TO THE COURT.

VOLUME XIV.

TORONTO:
HENRY ROWSELL,
KING STREET.

1868.

HENRY ROWSELL, LAW PRINTER, KING STREET, TORONTO.

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

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

" OLIVER MOWAT, *Vice-Chancellor.*

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

TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the Plaintiff's name

A.

B.

B.

C.

D.

E.

F.

G.

G.

H.

H.

I.

J.

K.

L.

L.

M.

M.

Mc.

Mc.

N.

O.

P.

Q.

R.

S.

S.

T.

T.

V.

W.

W.

Y.

Z.

A TABLE

OF

CASES CITED IN THIS VOLUME.

B.

C.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1867.

RYKERT v. MILLER.

Purchase for value without notice—Professional adviser—Notice—Registered title.

A testator, the registered owner of the property in question, gave an annuity to his wife, and charged it on his real estate. His heirs being also his devisees, did not register the will, and made a partition of the property as heirs. One of the heirs who was an attorney, sold part of his share to *P.*, the latter employing no other attorney in the transaction; *P.'s* interest afterwards passed to the defendant *M.* The widow filed her bill to enforce her annuity against this property, and *M.* set up that *P.* was a purchaser for value without notice.

Held, that *P.'s* vendor was not his attorney so that his knowledge of the charge could be imputed to *P.*; and the Court, not being satisfied with the evidence of express notice, dismissed the bill with costs.

Statement.

This was a bill filed by the widow of *George Rykert*, deceased, to enforce payment of an annuity given to her by her husband's will, and secured upon his real estate.

The defendant, by his answer, set up that one *Parnell*, through whom he claimed title, was a purchaser for value without notice.

1867.

Rykert v. Miller.

The cause came on for the examination of witnesses at the sittings of the Court in Hamilton. The plaintiff was examined as a witness for the defendant. The evidence clearly established that the will had been withheld from the registry in order to enable the sons of the plaintiff more easily to deal with the real estate; but it was attempted to fix *Parnell* with notice by reason of his having purchased from one of the sons, who was an attorney at law, without the intervention of any legal adviser on his part.

Mr. *Moss*, for the plaintiff.

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

VANKOUGHNET, C.—I think the case fails on the threshold. Notice to *Parnell*, of the plaintiff's rights under the will, is not made out to my satisfaction. It is, I think, manifest, that what *Parnell* inquired of *Rykert* was, how he could sell the land free from his mother's dower—a widow's right—of which both he and his wife, and, indeed, people in general were well aware. Mr. *Rykert*, in giving his evidence, was speaking of a conversation with *Parnell*, which had occurred six years previously.

Judgment.

Mr. *Rykert* says that, knowing *Parnell* would not find the will there, he sent him to the Registry Office to search the title—that *Parnell* returned and asked him what right he (*Rykert*) had to sell. Now, this could not be. The registry showed a perfect title in *Rykert*, subject to his mother's claim for dower; and it is this alone, I am certain, that *Parnell* concerned himself about, as he and his wife were both alive to it. *Rykert* says he satisfied him as to such a claim, by telling him his mother was better provided for under his father's will, and that he would save him harmless. He does not, in his examination-in-chief, say that he

informed him that his mother had an annuity under the will, charged upon this particular land, and it would be absurd that he should have done so, for the will was kept off the registry to enable the heirs of the testator to deal with the lands freed from any charges created by the will; and can any one suppose that Mr. *Rykert*, a lawyer, a shrewd man, accustomed to deal in lands, would send the man to the Registry Office to see that there was no will affecting the lands, and, immediately on his return, tell him that there was such a will? It is true that Mr. *Rykert* does, on his cross-examination, say that he told *Parnell* that his mother's annuity was charged on the land; but he does not say so in his examination-in-chief, when, knowing what was necessary to the plaintiff's case, he told us all he knew; and I treat his further statement on cross-examination as a mere slip. I do not think the case in any way affected by what *Parnell* said or did when he had lost, or was about losing, the property. A desperate man will catch at any chance of saving a plank amid the shipwreck. I treat the case as if Mrs. *Rykert* were urging this annuity against *Parnell*, while he still held the property as the free and absolute owner; and I think that she could not have succeeded against him upon the evidence, here now, as to what he knew at the time he acquired the title. I feel every sympathy with the plaintiff in her misfortunes, but I cannot sympathize with her in the loss of the charge which the will created in her favour upon her husband's property. She had every confidence, and doubtless deservedly so, in her sons, the heirs of her husband; and, I have no doubt, they will repay this confidence with filial devotion, and, so far as they can, repay her losses. But, in that confidence, as stated by herself, she permitted and enabled her sons to deal with the estate of the deceased, as their own, freed from any will—and she did this designedly. She says, herself, she trusted everything to them, and agreed to anything they proposed. It would be rather

1867.

Rykert v. Miller.

Judgment.

1867. Rykert v. Miller. hard, after this, that she should be allowed to set up, against purchasers of property claims upon it under the will which for years she had suppressed.

There would be other difficulties in the plaintiff's way, if she were not stopped here. As to Mr. *Rykert* being treated as *Parnell's* solicitor in the sale, it would be preposterous. *Rykert*, though a solicitor, was like any layman, selling his own land, and *Parnell* searched the title for himself—*Rykert* did not even charge him for the conveyancing. The English cases certainly go very far, but not far enough, to reach such a case as the present; and I think we never could apply them, in the length to which they do go, to the transactions in this country, which are of such every-day occurrence, as the sale by an attorney of his own land to a layman. To treat the attorney, in such a case, as acting professionally for the other, and to impute to that other all the knowledge which the attorney had as to the title, and which it would often be to his interest to suppress, would be an artificial equity too monstrous for common sense to recognize. Bill dismissed with costs.

Judgment.

[Affirmed on re-hearing, 13th December, 1867.]

1867.

KELLY v. MACKLEM.

Sale for taxes—Mortgage—Redemption.

The five years for which lands are to be in arrear for taxes, before they are liable to be sold, must be before the delivery of the Treasurer's warrant to the Sheriff.

Land having been sold for taxes, a party interested therein as mortgagee applied to the vendee of the Sheriff to be allowed to purchase, on the ground of his having an interest in the land, and which he was permitted to do, his only interest in the land being as mortgagee.

Held, that the purchaser could not afterwards set up this title in opposition to the mortgagor's claim to redeem.

Although a mortgagee may, as well as a stranger, purchase lands of which he is mortgagee, still, if he purchases as mortgagee, and makes his interest in the land a ground for being allowed to purchase, he cannot afterwards set up the title thus obtained against the mortgagor's right to redeem.

This cause came on for the examination of witnesses and hearing at the sittings of the Court at Sarnia. Statement.

Mr. *Blake*, Q.C., and Mr. *F. T. Jones*, for the plaintiff.

Mr. *Roaf*, Q.C., and Mr. *Grahame*, for the defendants *Macklem* and *Street*.

Mr. *Seager*, for the defendant *Richards*.

SPRAGGE, V. C.—No portion of the taxes was in arrear for five years before the delivery of the Treasurer's warrant to the Sheriff *i. e.* computing the time as, according to my interpretation of the Act in *Ford* v. *Proudfoot* (*a*), it is to be computed. Whether the five years mentioned in the Statute is five years before the delivery of the warrant, or five years before the actual sale, was a point argued. I said I inclined to think it must be five years

(*a*) 9 Grant, 47.

1867.

Kelly v. Macklem.

before the delivery of the warrant; otherwise a direction to sell might be given to the Sheriff before the time had arrived at which the land would be saleable; that there was not so long a default as the Statute contemplated before the lands were saleable, and that it would be an anomaly for the Treasurer to issue his warrant in order to their sale before they were saleable. The warrant presupposes them already saleable. There may indeed be something in the Statute to authorize the issuing of the warrant before the expiration of the five years, and Mr. *Roaf*, refers to certain sections. The sale was under 16 Vic., ch. 182, before the consolidation of the statutes.

Judgment.

Another point is this. It appears by the evidence that the purchase from Mr. *Talfourd* was made with the money of Mrs. *Macklem*; not with the money of her husband, but that her husband was the agent through whom it was made. In making the purchase he made a certain representation; and his wife was bound by any representation that he made. He represented that he had an interest in the land, and used the word "redemption" in speaking of his purchase. In truth he had an interest—he was mortgagee, and assuming that he might as mortgagee purchase the land and stand upon his right as purchaser, and not submit to be redeemed; still can it lie in his mouth having made this representation to repudiate the character in which alone, consistently with the truth, he could have asserted that he was interested in the land. A mortgagee may purchase as any stranger may; and may say that his being a mortgagee shall not place him in a worse position than he would be in, if he were not mortgagee, because he is not a trustee for, and owes no duty to the mortgagor; but if he purchases as mortgagee; makes his interest in the land a ground for being allowed to purchase, can he afterwards set up his right to hold, as if he had purchased as a stranger. It is true, that so far

1867.

Kelly v. Macklem.

as appears, the mortgagor was not prejudiced by what took place. If *Talfourd* submitted to be redeemed upon the faith of *Macklem's* representation, can the mortgagor avail himself of it? He would have lost the land at the expiration of the year after sale, the only difference being that the purchaser, not *Macklem*, would have got it; and it may be said that his availing himself of the representation made to the purchaser is a setting up of the *jus tertii*. Still, giving due weight to all these considerations, I incline to think the sounder view of the question is, that Mrs. *Macklem's* agent purchased as a mortgagee; and that neither she nor he can be heard to say that the purchase was not made in that character.

Judgment.

The defendant, Mrs. *Ma klem*, fills a double character. She claims in her own right as purchaser from *Talfourd;* and she is, with her co-defendant Mr. *Street*, personal representative of the estate of her husband. As representatives of the estate of *Macklem*, it is their interest to be redeemed; and they submit in that character to be redeemed.

Mr. *Roaf* takes this position, that the bill is multifarious in seeking to redeem, and seeking also to set aside the sale; and he contends that only one part of what is sought by the bill should be decreed, viz., that the plaintiff should be allowed to redeem; and, upon redemption, should be put to file another bill to set aside the sale. The objection of multifariousness is not taken by answer; and the Court will not at the hearing give effect to the objection where what is sought can with any reasonable convenience be worked out in the one suit. I am clear that the objection ought not to be allowed to prevail in this suit. If the plaintiff had filed his bill for redemption only, I do not see that the defendants could not set up, that he had no title to redeem, inasmuch as a sale for taxes had divested him

1867.

Kelly v. Macklem.

of his estate. It would be proper for him first, I apprehend, to place himself in a position to redeem by getting the estate revested in him. If Mrs. *Macklem* had been the sole personal representative of her husband's estate, it would certainly not have been proper for the plaintiff to file two bills against her: one to set aside the sale, and a second to redeem; the only difference is, that for the second purpose, another person, the other personal representative, is a necessary party. He has not objected that he had nothing to do with the sale; and the Court would be adopting a stricter rule than is necessary or usual, if it were upon this suggestion made for the first time at the hearing, to put the plaintiff to file another bill. If only one part of the relief prayed were to be granted, it should be to set aside the sale (if it ought to be set aside), not, as suggested, to allow redemption. The latter would be reversing the proper order. If the sale be set aside the right to redeem would be clear; it is not disputed for any other reason than the sale; and it would be idle to put the plaintiff to commence another suit for the purpose.

Judgment.

The defendant *Richards* is also interested in the redemption, and he takes an additional objection to the sale, viz., that it was not duly advertised. The same point was raised in another case before the Chancellor; and the objection was overruled. The case is appealed, and stands for judgment. I may either dispose of this case upon the points to which I have adverted, or await the decision of the Court of Appeal upon the point raised by Mr. *Richards*. If I should be against the plaintiff upon the other points, I may follow the ruling of the Chancellor, and dismiss so much of the bill as seeks to set aside the sale; or await the decision of the Court of Appeal. I incline to think the latter would be the better course.

I have since looked at the statute 16 Vic., ch. 152,

under which the sale took place. The 45th section provides that "whenever a portion of the tax on any land has been due for five years, the Treasurer of the County shall issue a warrant under his hand and seal, directed to the Sheriff of the County, commanding him to levy upon the said land for the amount of arrears due thereon, with his costs, and after the issuing of the warrant, the Treasurer shall receive no payment on account of the sums contained in the warrant." A warrant issued before the expiry of the five years has nothing to authorize it, and, in my opinion, must be a nullity, as to the lands in regard to which the time has not expired. The land owner, too, is prejudiced by this premature warrant, for he is debarred thenceforth from paying his arrears to the Treasurer.

1867.

Kelly v. Macklem.

The plaintiff is entitled to a decree with costs, other than the costs of an ordinary redemption suit.

LAING v. AVERY.

Quieting Titles Act—Statute of Limitations.

The filing of a petition, under the Act for Quieting Titles, is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations.

This was an appeal from the ruling of the Referee of titles, disallowing the claim to dower of the contestant *Deborah Avery*, as widow of *Hiram Matthews*, deceased.

Mr. *R. Grahame*, for the appellant.

Mr. *Strong*, Q.C., and Mr. *S. Wood*, contra.

SPRAGGE, V. C.—The contestant claims as dowress, and the question is whether her dower is barred by the

Judgment.

1867. Laing v. Avery.

Statute of Limitations. It has been held in England, in *Marshall* v. *Smith* (*a*), and in Canada in *German* v. *Grooms*, (*b*) and *McDonell* v. *McIntosh*, (*c*) that dower is an interest in land, within the Statute, and that the Statute begins to run from the death of the husband.

In this case the husband died on the 24th of March, 1847, and the dowress presented her claim in this matter in April, 1867. *Laing* presented his petition under the act in October, 1866, and notice thereof was by the direction of the Referee mailed to the dowress, to her address in the State of Michigan, on the 18th of March, 1867. The dowress relies upon these proceedings taken by the petitioner as saving the running of the Statute, the twenty years having expired between the date of these proceedings and the filing of her claim.

Judgment.

The position of the dowress is, in my opinion, untenable. The language of the 16th section of the act is (*d*) "that no person shall bring an action to recover any land but within twenty years next after the time at which the right to bring such action shall have first accrued to the person bringing the same." It would be going very far to hold that a proceeding adverse to the party claiming land was the bringing of an action to recover it. The case of *Fyson* v. *Pole* (*e*), one of the cases to which I am referred, does at the first glance look something like it; but when examined it does not at all support the position. An attorney had sued at law for his bill, but was stopped by injunction in equity, at the suit of his client: a compromise took place, and an order of Court was founded upon it, which order was, as the attorney alleged, erroneously drawn up, and he filed a bill to rectify the error. At that date six years from the accruing

(*a*) 34 L. J. Chy, 189.
(*b*) 6 U. C. Q. B. 414.
(*c*) 8 U. C. Q. B. 388.
(*d*) 4 Wm. IV. c. 1.
(*e*) 3 Y. & C. 266.

1867.

Laing v. Avery.

of the debt had elapsed, and this appearing upon the face of the bill, the defendant demurred. The demurrer was overruled upon the plain ground that the attorney had been stopped in his action by the injunction; and in such a case the Court would not allow the Statute of Limitations to be set up. Besides, in such a case, the Statute is not allowed as a positive bar, but the time prescribed by the Statute is adopted in equity, by analogy to the Statute; and for that reason the Court will relax the rule in a proper case.

The dowress relies also upon the rule which permits a creditor, after the lapse of the time prescribed by the Statute of Limitations to prove his debt, in a suit commenced by another creditor within the time. *Sterndale* v. *Hankinson* (*a*) is a leading authority upon this point. The principle of the decision was that where a creditor files a bill on behalf of himself and all other creditors, every creditor has, after the filing of the bill, what the Vice-Chancellor called "an inchoate interest in the suit to the extent of its being considered as a demand," *i. e.*, as a suit on his behalf, a suit in which he is a *quasi* plaintiff. That this is the principle is apparent from other cases: *O'Kelly* v. *Bodkin* (*b*), *Busby* v. *Seymour* (*c*). This principle is wholly inapplicable to an adverse proceeding like this; or it may be called an independent proceeding; a proceeding *sui generis;* not to raise the question of the contestant's right to dower, but generally to quiet the petitioner's own title. It appears to me that to hold such a proceeding to be in any sense a bringing of an action by the dowress would be not only unwarranted by authority or reason, but very decidedly against both.

Judgment.

The appeal is dismissed, with costs.

(*a*) 1 Sim. 393. (*b*) 3 Irish Eq. 390.
(*c*) 1 J. & L. 527.

1867.

LAING v. MATTHEWS.

Quieting Titles Act—Sales under execution.

Where a petitioner in proceeding under the Act, makes out his title satisfactorily, he is entitled to a certificate unless the title can be successfully impeached at law or in equity: and if a bill filed by the contestants impeaching the transaction, by which the claimant's title arose, could be successfully resisted by the claimant on any ground, it will form no obstacle to a certificate being granted to the claimant.

Inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a Sheriff under execution. The rule could only be applied in an extreme case.

A Sheriff, in obedience to a writ of *venditioni exponas*, in November, 1849, exposed for sale, by auction, and sold to the attorney of the plaintiff in the writ, for £70, a farm of 150 acres, variously estimated as worth £2 10s. and £5 per acre; but, which was subject to three rights of dower, two of the parties being young women. In April, 1867, the party claiming under the purchaser at Sheriff's sale, filed a petition under the Act to quiet his title. The devisee of the execution debtor opposed the certificate on the grounds of improper conduct in the matter of the sale by the Sheriff, evidenced by the gross inadequacy of consideration. The Referee of titles reported in favour of the claimant; and, on appeal, both parties desiring an adjudication on the facts appearing in the affidavits and proceedings before the Referee, the Court affirmed the finding of the Referee, and dismissed the appeal with costs.

Statement

This was an appeal from the finding of the Referee of titles, over-ruling the objections made to the title of the claimant by the contestant *Henry Matthews*, and arose in prosecuting the same petition as did the preceding case of *Laing* v. *Avery*.

Mr. *R. Grahame* for the appeal.

Mr. *Strong*, Q. C., and Mr. *S. Wood*, contra.

SPRAGGE, V. C.—The petitioner has deduced a legal title to himself; this is not disputed. Both parties indeed

claim through one person, *Hiram Matthews*; the petitioner through a purchaser at Sheriff's sale under writs of *fi. fa.* and *venditioni exponas* against the lands of *Hiram Matthews*; and the contestant, as devisee of the same *Hiram Matthews*: the case of the contestant being that the Sheriff's sale ought not to be supported. The chief ground of objection is, that the sale was at an extreme undervalue. The purchaser was at the time the attorney for the execution creditor. 1867. Laing v. Matthews.

The land consisted of about 150 acres, of which fifty or more were cleared; and there were some buildings, of no great value on the place. The farm was not in good condition, and the fences were bad. The land was subject to the dower of three widows, two of whom were young women. The sale took place in November, 1849, the purchase money was £70. Witnesses estimate the value of the place, the majority of them at $20 an acre, some at half that sum; that is, with a clear title and free from incumbrance. Judgment.

The first point to be considered is, the position of a petitioner, and a contestant in proceeding under the Statute. It seems to me to be, that the petitioner, upon making out his title satisfactorily, is entitled to a certificate, unless his title is shewn to be impeachable at law or in equity. In this case it would be impeachable, if a bill would lie at the suit of the heirs of the execution debtor, and if such suit could not be successfully resisted by the petitioner. But if it could be successfully resisted upon any equitable ground, then the contestant fails to establish any equitable title in himself, or any ground for disturbing the title of the petitioner.

These considerations are material in this view. The petitioner is not the original purchaser, but derives title through mesne conveyances as the report states, the last being from one *Carpenter* to himself. The claim

1867.

Laing v. Matthews.

of the contestant is simply as devisee of *Hiram Matthews*, and he does not allege notice to *Laing* of any equity in himself. The affidavit of *Laing* is of course not framed to meet any equity in *Matthews*, and does not say in terms that he is a purchaser for value without notice; but if his affidavit be true, he is a purchaser for value without notice; and in the absence of any specific allegation of the nature of the contestant's equity, and of notice thereof to the petitioner, an explicit denial of notice could not be looked for. If the contestant had desired to file a bill to set aside the Sheriff's sale he could have done so; and in that way have put the petitioner to a formal denial of notice. When the matter came before me I suggested that course, but both parties preferred that the question should be disposed of without formal pleadings, and upon the materials which were before the Referee. I think the petitioner is entitled to stand upon the same footing as if such bill had been filed; and if upon the evidence before me, such bill ought to be dismissed, the contestant's case fails, and is no obstacle to a certificate being granted to the petitioner.

Judgment.

If I am correct in this view, the petitioner is affected only with notice of what appears in the conveyances constituting his chain of title. The fact, of which he would thereby have notice is indeed the principal ground, though not the only ground, upon which the Sheriff's sale is impeached, viz., the inadequacy of the price.

Upon a sale and purchase of land between private individuals, the inadequacy must be very great indeed to induce the Court on that ground oven to refuse specific performance; so great, as was said by Lord *Eldon* in *Coles* v. *Trecothick* (*a*), as to shock the conscience, and to amount in itself to conclusive and decisive

(*a*) 9 Ves. 245.

1867.

Laing v. Matthews.

evidence of fraud in the transaction; and the inadequacy of price or other inequality must be much greater where what is sought is to set aside a conveyance. In *Gwynne* v. *Heaton* (*a*) Lord *Thurlow* said: "To set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." The books are full of language to the like effect. I will add only the words of Lord *Campbell*, in *Wilde* v. *Gibson* (*b*): "With regard to the first (a suit for specific performance) if there be in any way whatever misrepresentation or concealment, which is material to the purchaser, a Court of Equity will not compel him to complete the purchase; but when the conveyance has been executed, I apprehend, my lords, that a Court of Equity will set aside the conveyance only on the ground of actual fraud." That I take to be the true doctrine, *i.e.*, where parties are dealing together, without more, and apart from any question of fiduciary relation or malversation in office, or other special ground; where inadequacy of price is the objection, it must be so gross as to be evidence of fraud; or, in other words, it is fraud evidenced by gross inadequacy of price. I think in this case the inadequacy of price was very great; but whether, taking into account that the land was subject to the dower of three widows, it was so great, so gross, as to warrant the Court in setting aside a conveyance, it is not necessary to determine. Here was a sale by auction, a sale by a public officer in execution of a public duty, and a sale, too, under a peremptory writ requiring him to sell —a *venditioni exponas*. The Sheriff was bound to make the money by a sale of the lands of the execution debtor; and I think it would never do to say, that he was bound, or that he was at liberty, to wait until an adequate price was offered, or even until a price not greatly inadequate

Judgment.

(*a*) 1 B. C. C. 9. (*b*) 1 H. L. Ca. 605.

1867.

Laing v. Matthews.

was offered. He is bound certainly to use his best endeavours to bring the land to sale to the best advantage, and to get the best price that he can, and he cannot sell at a mere nominal price. All that is necessary in this case to say is, that the Court cannot see that *Burnham*, the purchaser at Sheriff's sale, and the purchasers from him including the petitioner, must have seen from the amount paid, £70, as appearing by the Sheriff's deed, that there was fraud in the Sheriff, or official misconduct, in selling at that price. It is difficult to apply to a sale by a Sheriff the doctrine as to fraud being evidenced by inadequacy of consideration, as in the case of a bargain between individuals. It could, at all events, only be applied in a most extreme case. I am satisfied that it ought not to be applied in this case. This Court has upheld sales for taxes where the inadequacy of price has been greater; and I think properly.

Judg ment.

The appeal is dismissed, with costs.

GREENWOOD v. THE COMMERCIAL BANK OF CANADA.

Principal and agent.

A. had authority to collect rent, and to contract for the sale of property, and to receive the down payments.

Held, that such authority did not entitle him to receive payments on a mortgage given for unpaid purchase money.

Where such an agent had at one time, without authority, received some payments on such mortgage, which the principal did not publicly repudiate, and another montgagor who did not appear to have had notice of these payments, made a payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment.

The *Commercial Bank*, through one *McLeod*, sold a lot of land to the plaintiff. *McLeod* carried on business

1867.

Greenwood v. Commercial Bank.

as a general agent. The down payment on the sale was made to *McLeod*, and the conveyance sent to him, by the Bank, to deliver to the plaintiff on his executing a mortgage for the unpaid purchase money. The mortgage, in March, 1865, was accordingly executed, and was forwarded by *McLeod* to the Bank. The first instalment was due 1st July, 1865. On the 27th of June the plaintiff gave *McLeod* a cheque for $300, payable the 1st of July, and *McLeod* received, but misappropriated the funds. The question in the cause was, whether payment to *McLeod* was authorised.

The facts on which the contention proceeded appear in the judgment.

The cause was heard before Vice-Chancellor *Spragge*, at Cobourg.

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

Mr. *Dennistoun*, for the defendants.

Judgment.

SPRAGGE, V. C.—The question raised is whether *McLeod* was the agent of the *Commercial Bank* to receive the instalment payable by the defendant upon his mortgage to the Bank.

There was clearly no [illegible]al express agency as between the Bank and *McLeod*, this was well understood. Supposing for a moment that *Harper*, the Peterborough agent of the Bank was competent to appoint him such agent, he did not in fact do so; there is no evidence that he did, and *Harper's* letters to *McLeod* negative it.

Then, was his agency to receive this money to be implied from the nature of his agency to do certain acts for the Bank. He was agent for some purposes, *i.e.*, to sell this land, and other lands of the estate of

1867.

Greenwood v. Commercial Bank.

which this was a portion; and received compensation by a commission upon the sales effected by him.

He seems further to have been agent for the Bank in relation to the conveyancing; to deliver the conveyance to the purchaser, and to receive from the purchaser a mortgage for that portion of the purchase money which was not to be paid down; and it may be that he was agent to receive the down payment from the nature of the transaction: the delivery of the conveyance, the receiving of the mortgage, and the payment of the money to be paid in hand would be simultaneous; but if he was agent to receive such money, it was because authority to do so was to be inferred from his other duties of agency, to be performed at the same time: whether he was so or not it is not necessary to determine. His duty was to transmit such mortgage to his principal, and in fact the mortgage in question was so transmitted, and was kept by the Bank at its head office in Kingston.

Judgment.

Now the law upon this point is not at all obscure; it is unfortunute that it is not better understood, or that purchasers who do understand it are not more careful in acting upon it, for, as Lord *St. Leonards* observes, "purchasers frequently run considerable risk in paying the purchase money to the agent or solicitor of the seller upon the delivery of the conveyance" (*a*). It is well settled in England, that an agent or solicitor having the conveyance executed and ready for delivery, and the receipt for purchase money duly signed, is not thereby authorised to receive the purchase money—*Viney* v. *Chaplin* (*b*), *Myles* v. *Thompson* (*c*); and Lord *St. Leonards* lays it down in so many words, that "an agent employed to sell has no authority as such to

(*a*) Sug. V. & P. 667.
(*b*) 4 Jur. N. S., 619.
(*c*) 23 U. C. Q. B. 553.

receive payment of the purchase money" (*a*). Mr. *Dart* says the same thing, and says further, that the purchase money "should in strictness be paid to the vendor personally, or upon his written authority" (*b*). In the case of *Pole* v. *Leask* (*c*), which was a case of agency for a mercantile house, it was held that the onus of proving agency lies on those dealing with a person as agent; and this is one of the cases referred to by Lord *St. Leonards* in support of his proposition, that an agent employed to sell has no authority, as such, to receive payment of purchase money.

Some evidence has been given of other acts done by *McLeod* as agent for the Bank; his receiving rents of other lands of the same estate which remained unsold by the Bank, and other acts of a like character. This may have been given as proof of circumstances from which was to be inferred his agency to receive mortgage money, or as evidence of his being held out to the world as agent to receive all moneys payable to the Bank in respect of these lands. In either view it entirely fails. As to the first, suppose it made out ever so clearly that he was agent of the Bank to receive the rents, or other moneys payable to the Bank in respect of these lands, other than mortgage moneys, there would be no implied authority to receive mortgage moneys; and I think it is not going too far to say that if he were proved to have been agent to receive mortgage money, payable by some other mortgagees, there would be no implied authority to receive the mortgage money in question. As to the other view it is not made by the bill, and I do not think the facts would sustain it if it were.

Judgment.

I take the real facts to have been that in consequence of *McLeod's* connection with the Bank, and his being in

(*a*) V. & P. 48. (*b*) Dart, page 429.
(*c*) 9 Jur. N. S. 829.

1867.

Greenwood v. Commercial Bank.

frequent communication with the agency at Peterborough, he was looked upon by the plaintiff and others, who had purchased or rented lands of the Bank, as a convenient medium of communication in business matters, between them and the Bank in the payment of money as well as otherwise; and his solvency being unquestioned, they thought themselves safe in paying moneys into his hands; but this is quite a different thing from his being agent to receive this mortgage money; the mortgage itself being—and this is a very material circumstance—not in his hands, nor even in the hands of the Peterborough agent, but in the Bank at Kingston. If inquiry had been made at the Bank, or of the Peterborough agent, whether *McLeod* was authorised to receive the mortgage money in question, the answer would certainly have been in the negative.

Judgment.

Reference has been made to some letters written after *McLeod* had received this money from the plaintiff, and had failed to pay it to the Bank. I do not think them very material, they contain no admission of *McLeod's* agency; and it is not shewn, nor even alleged, that the plaintiff was put off his guard, or that his position was thereby altered.

There is an old case, acknowledged as authority at the present day, which is singularly applicable to the case before me. Sir *John Wolsterholm* v. *Davies*. It is reported in 2 Freeman, 289, and 2 Eq. Ca., Abr. 769. It is as follows: the plaintiff having borrowed £100 of the defendant's testator, which was procured by *Williams*, a scrivener in the Old Baily, when the bond was sealed it was delivered to the obligee. The plaintiff paid several years' interest to *Williams*, the scrivener, and also £50, part of the principal money, which the scrivener paid to the obligee; but the last £50 of the principal money being paid to the scrivener, he broke before he paid it to the obligee; and the question was whether the plaintiff was to lose the money or the obligee, and the

Master of the Rolls said it was the constant rule of this Court, that if the party to whom the security was made, trusted his security in the hands of the scrivener, that payment to the scrivener was good payment: but if he took the security into his own keeping, payment to the scrivener would not be good payment, unless it could be proved that the scrivener had authority to receive it; but as long as he paid it over all was well, and any one else might have carried it to the party as well as he: and the plaintiff not proving that the scrivener had any authority from the obligee to receive, he was forced to pay the last £50 again; although the Master of the Rolls declared that he thought it a very hard case. I need hardly say that there was a good deal more from which to imply authority, than in the case before me.

1867.

Greenwood v. Commercial Bank.

There will be the usual decree to redeem, and this is a case in which the mortgagee should have his costs at law as well as in this Court.

Judgment.

The plaintiff being dissatisfied with the decree then pronounced, set the cause down to be re-heard before the full Court.

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

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

VanKoughnet, C., agreed with the views expressed in the judgment of V. C. *Spragge*, and thought the decree should be affirmed with costs.

Mowat, V. C.—It is quite clear that *McLeod's* receiving this money was contrary to his express and repeated instructions from Mr. *Harper*, the agent of the Bank at Peterborough, from or through whom *McLeod* appears to have received whatever authority he had in

1867.

Greenwood v. Commercial Bank.

regard to the property of which the parcel sold to the plaintiff was a portion. It is clear, also, that authority to receive rents, or to contract for the sale of land, or to receive the down payment when he delivered the conveyance to the plaintiff, does not in law imply an authority to receive the sums secured by the mortgage which was executed for the unpaid balance of the purchase money.

But the learned counsel for the plaintiff contended, that the Bank was aware, through their agent at Peterborough, that *McLeod* had received payments on other mortgages; that the Bank recognized these payments, though in the private correspondence with *McLeod* his receiving of them was disapproved of; and that they did not notify the plaintiff that he was not to pay *McLeod*.

Judgment.

McLeod had received no payment on any mortgage for fourteen months before the plaintiff paid him the money in question. His last receipt had been of the small sum of $31.40, from one *McDonald*, on the 28th April, 1865, and Mr. *Harper* then renewed his instruction that all such payments were to be made to the Bank direct. This course does not appear to have been adopted from any want of confidence in *McLeod*, for, up to the time of his absconding, it is admitted that the Bank had every confidence in him; but for the reason that his agency was not thought to be needed in respect of mortgage moneys, which it was found could be more advantageously and conveniently attended to without his intervention. The evidence does not shew that more than five sums had ever been received by *McLeod* on mortgages before the plaintiff made his payment. These were of comparatively small sums, and one of them was received in November, and another in December, 1863; two in November, 1864; and the fifth and last I have already mentioned. There were many mortgages given, and, I presume, many more than five payments made on them to the Bank, during this period. There is no

evidence that the plaintiff was aware that these five payments or any of them had been made to *McLeod*; and considering that they were all made so long before the plaintiff made his payment, I do not see that we can assume that he was aware of them, and that he had been misled by this knowledge (*a*); or that we can hold he was justified in making his payment, without further inquiry, to a person who was not in fact authorised to receive payment, and had not in his possession the mortgage, or any other evidence from which such an authority might have been inferred. I think the decree must be affirmed.

Judgment.

Per Cur—Decree affirmed with costs.

PEGLEY v. WOODS.

Trust estate—Payment for improvements.

Where trustees with power of sale had in good faith, but erroneously, made a conveyance of a portion of the trust estate to one of the *cestuis que trust*, for the collateral advantage, to the whole property to be derived from certain buildings and improvements to be made on the part conveyed thereon, thus committing a technical breach of trust; upon discovering which the grantee joined with the trustees in a conveyance of the whole trust estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the Court might consider him entitled to, and thereupon filed a bill for that purpose. The Court, under the circumstances, directed the grantee to be allowed such sum as it should be made to appear the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever should be the lesser in amount, and referred it to the Master to ascertain the amount; although the rule is that, in such cases, payment for improvements will not be allowed at the instance of the party making them.

Examination and hearing at Chatham.

(*a*) Edmanson v. Thompson, 8 Jur. N. S. 235; Dickinson v. Valpy. 10 B. & C. 128.

1867.

Pegley v. Woods.

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

Mr. *Roaf*, Q.C., for the defendant *Woods*.

Mr. *McCrae* for the infant defendants.

Mr. *Pegley* for the other defendants.

The *York Buildings Company* v. *McKenzie* (*a*), *Ex parte Bennett* (*b*), *Ramsden* v. *Dyson* (*c*), were referred to.

Judgment.

SPRAGGE, V. C.—I think this case ought to be treated as standing upon the same footing as if the bill had been filed by the trustees, or *cestuis que trust*, or both, to set aside the conveyance to the plaintiff of the 13th of August, 1855: and for this reason, that under that conveyance the plaintiff had the legal estate, which legal estate he parted with, upon terms agreed upon between his trustees and himself: the principal of which was that the right to compensation for certain improvements made by him upon the land conveyed to him, should be ascertained through the medium of a suit to be instituted in this Court, either by himself or the trustees. This agreement is dated two days before his conveyance of the legal estate. It is true that the conveyance of the legal estate was by his own desire; being included in a conveyance by the trustees of other trust estate upon a sale which the plaintiff, as one of the *cestuis que trust*, thinks, as the trustees themselves think, was a beneficial one.

It is agreed that the conveyance to the plaintiff was *ultra vires*, was technically a breach of trust; that while they had authority to make sale of portions of the trust

(*a*) 8 Br. P. C. 42. (*b*) 10 Ves. 380.
(*c*) 1 L. Rep. E. & I. App. 129; S. C. 12 Jur. N. S. 506.

1867.

Pegley v. Woods.

estate, it was only for a pecuniary consideration, not for collateral advantages, although those collateral advantages might be a valuable consideration, and sufficient in value, as there is a good deal of evidence to show this to have been.

The state of the parties, then, was this: In October, 1866, an agreement had been made for the sale, to a religious institution called the Ursuline Academy of Chatham, of twelve acres of the trust estate, including the parcel, a little over two acres, which had been conveyed to *Pegley*, the plaintiff. *Pegley* had built a house and made some other improvements upon the parcel conveyed to him, and had also made improvements upon other portions of the trust estate, which building and improvements were the consideration for the conveyance to him. It was considered that the value of the trust estate was considerably enhanced thereby, and that the price obtained from the Ursuline Academy was considerably greater than would have been obtained but for the improvements made by *Pegley* thereupon; and the agreement under which this suit is brought recites that "the trustees are desirous of being relieved from any liability as to so much of the said purchase money as may amount to the value of the said dwelling-house and other buildings so erected on the said two acres, by the said *Pegley;* and which are valued at $3600; and the said *Pegley* has agreed to get the direction of the Court as to such money." The whole purchase money to be paid for the twelve acres was $6500 in cash. I gather from the evidence, that the value of the twelve acres, irrespective of improvements, is somewhere about $150 an acre.

Judgment.

I cannot say that *Pegley* would have joined in the conveyance, thereby divesting himself of his legal estate in the two acres, without the agreement that his right to compensation for improvements should be submitted

1867.

Pegley v. Woods.

to this Court; and it appears to have been for the benefit of the trust estate that the sale and conveyance of the twelve acres should have been made. I think, therefore, that it is only just to *Pegley*, and certainly no wrong to the trust estate, that he, *Pegley*, should be relegated to his position before and at the time when he agreed to convey, and did convey the two acres; in other words, that he should have out of the purchase money paid, or to be paid by the Ursuline Academy, compensation for his improvements on the two acres, if upon a bill filed against him to compel a conveyance, the Court would have held him entitled to such compensation.

A suit against *Pegley* would be to set aside the sale and conveyance to him upon the grounds that I have already indicated. They would amount to this, that both the trustees and *Pegley* misconstrued the trust deed; that under a mistake as to the trustees' powers and rights, they conveyed to him; and under the same mistake he took the conveyance and did what on his part he was bound to do, in effect paid the stipulated consideration. I think there can be no doubt of the moral justice of not depriving him of his legal estate without some compensation, if it can be done without doing wrong to the trust estate. The limits of that compensation I will consider presently.

Judgment.

The authorities are quite in accordance with what I consider the moral justice of the case. There is the old case before the Lords, of *The York Building Society* v. *McKenzie* (*a*). *Exparte Bennett* (*b*), *Neesom* v. *Clarkson* (*c*), and in our own Court, *Fitzgibbon* v. *Duggan* (*d*), and *Bullen* v. *Renwick* (*e*). In all these

(*a*) 8 B. P. C. 42.
(*b*) 15 Ves. 400.
(*c*) 2 Hare, 163.
(*d*) 11 Gr. 188.
(*e*) 8 Gr. 342.

cases compensation for improvements was made a term of the granting of relief. It is indeed only a carrying out of the maxim, that he who comes into equity must do equity.

1867.

Pegley v. Woods.

Mr. *Roaf* refers me to a case before the House of Lords, of *Ramsden* v. *Dyson* (*a*), being on appeal from a decision of Sir *John Stuart*, of *Thornton* v. *Ramsden* (*b*). I have read the case carefully. The bill was filed to obtain a grant of a long lease renewable, of certain lands of which *Thornton* was tenant, as the Court held, with one dissentient, Lord *Kingsdown*, from year to year, and upon which he had expended a large sum of money in building, in the expectation, no doubt, that a lease would be granted to him. The land was part of a very large estate; and the plaintiff in the Court below set up a sort of custom as he alleged, to grant such leases as he came into Court to enforce. Lord *Kingsdown* thought the plaintiff entitled to the relief he sought, upon the principle that, "if a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord; and upon the faith of such promise or expectation lays out money upon the land with the knowledge of the landlord, and without objection by him, a Court of Equity will compel the landlord to give effect to such promise or expectation," and Lord *Kingsdown* thought that the evidence established such a case. The other learned Lords, Lord *Westbury*, Lord *Brougham*, Lord *Cranworth*, and Lord *Wensleydale*, thought the case not established, differing from Lord *Kingsdown* rather as to the effect of the evidence, than as to the law; and, upon the appeal, the bill was dismissed. But the case was essen-

Judgment.

(*a*) 1 L. R. Appeal Cases, 129. (*b*) 12 Jur. N. S. 506.

1867.

Pegley v. Woods.

tially different from the one before me. The bare statement of the case shews this, as does the principle propounded by Lord *Kingsdown*. It was not a case of compensation for improvements, asked by a defendant as a condition for relief against him; but direct relief sought by a plaintiff upon entirely different equitable principles.

I think the plaintiff entitled under the circumstances to compensation, that is to an allowance out of the purchase money; and the fact of their being purchase money from which it may be deducted, divests the case of some dificulties in the practical application of the principle upon which he is entitled to relief. The allowance to which he is entitled must, I think, be limited to this, to the extent to which the dwelling-house and other buildings erected on the two acres,—I take this from the agreement,—enhanced the value of the twelve acres sold to the Ursuline Academy; and to the extent to which the price of the whole was thereby enhanced, if this latter point can be ascertained. Both these elements are proper to be considered, for to that extent only has the trust estate been benefitted, and the amount of allowance must be limited to which ever of these two may be the lower. It may be that the latter is incapable of ascertainment; in that case the former only will be the limit. The master is to fix the amount to be allowed, and to limit the amount upon the principles which I have indicated as the proper ones. I took occasion before leaving Chatham, where the case was heard, to see the buildings put up on the two acres, though only cursorily; what I did see led me to doubt whether the valuation $3600 was not a high one, that is, if made upon correct principles. In this, however, I may be wrong; the Master will settle the proper amount.

Judgment.

As to the costs it is settled by the agreement of the

parties that the plaintiff is to pay them; they will be taxed in the usual way, and only costs properly incurred will be allowed; the taxation will be in accordance with the agreement, of all costs, charges, and expenses, properly incurred. 1867. [Pegley v. Woods.

VanWagner v. Findlay.

Vendor's lien—Insolvency—Sale by Sheriff.

Land subject to a vendor's lien for unpaid purchase money, was sold under execution at Sheriff's sale to a purchaser without notice. The execution debtor subsequently re-purchased the land from the Sheriff's vendee in the name of a third party, who conveyed to a brother of the debtor, in trust for the latter, who having become insolvent, made an assignment under the Insolvency Act of 1864.

Held, that the vendor's lien attached on the lands in the hand of the assignee; but,

Semble, that the Sheriff's vendee would have held free from the lien; though, if the execution creditor had himself become the purchaser at Sheriff's sale he could have so held the land, free from such lien, though ignorant of the latter: *Quære*,

Statement.

On the 13th of February, 1855, the plaintiff was the owner in fee of a lot of land, which he sold and conveyed on that day to one *Andrew Randall* for $800, $200 cash down, and the balance to be paid within four years, in instalments of $200 and interest. To secure these payments *Randall* gave his promissory notes, which were overdue, and wholly unpaid when the bill was filed. In January, 1857, a judgment was recovered in the Queen's Bench against *Randall* for £225 4s. 1d., and in August of the following year the land in question was sold under a *fi. fa.* to one *Richard Miller*, without any notice to him of a vendor's lien.

Randall, soon after this, furnished money to *Huidson* to buy the land from *Miller* for him. *Huidson* took the conveyance in his own name, and afterwards, at

1867.
VanWagner. v. Findlay.

Randall's request, conveyed it in March, 1865, to *Robert T. Randall*, a brother of *Andrew Randall*.

In July, 1865, *Andrew Randall* made an assignment under the "Insolvent Act," and subsequently his official assignee, the defendant *Findlay*, filed a bill against *Robert T. Randall* on behalf of the estate, and obtained a decree declaring the land to belong to the estate, and directing a conveyance to him from *Robert T. Randall*. This conveyance was made, and the plaintiff filed this bill to have his vendor's lien enforced against the land.

The case came on to be heard by way of motion for decree.

Mr. *Edgar*, for the plaintiff, cited the following authorities to shew that the vendor's lien will prevail against the claim of an assignee under the Insolvent Act:—*Mitford* v. *Mitford* (*a*), *Grant* v. *Mills* (*b*), *Chapman* v. *Tanner* (*c*); and that insolvent not a necessary party—*Torrance* v. *Winterbtotom* (*d*).

Argument.

The sale under *fi. fa.* even to a purchaser without notice does not defeat the lien; in *Whitworth* v. *Gaugain* (*e*), it was held that the tenant by elegit could only hold the land subject to prior equitable mortgages. A sale under execution can have no tortious operation, *Kinderley* v. *Jervis* (*f*), and *Wickham* v. *New Brunswick Railway Co.* (*g*), *Strong* v. *Lewis* (*h*), *Langton Horton* (*i*).

Even if the lien did not attach in the hands of the purchaser under the *fi. fa.*, still as soon as the land

(*a*) 9 Ves. 100.
(*b*) 2 Ves. & B. 306.
(*c*) 1 Vern. 267.
(*d*) 2 Grant, 487.
(*e*) 3 Hare, 416.
(*f*) 22 Beav. 21.
(*g*) 12 Jur. N. S. 34.
(*h*) 1 Grant, 443.
(*i*) 1 Hare, 549.

1867.

VanWagner v. Findlay.

became re-vested in the original purchaser *Andrew Randall*, by the purchase with his funds, and especially when it is now portion of his insolvent estate, the lien or trust for the plaintiff would re-attach—*Kennedy* v. *Daly* (*a*).

Mr. *Lemon*, for the defendants, contended that the vendor's lien being once lost or waived could not be revived. The purchaser at Sheriff's sale having been a *bonâ fide* purchaser, without notice of any claim of the plaintiff, would clearly have been entitled to hold free from the charge of the plaintiff, and he, holding absolutely, could convey a like estate to his vendee, even though such vendee was cognizant of the original existence of the lien.

Judgment.

VanKoughnet, C.—One *Andrew Randall*, purchased from the plaintiff the premises in quesion for $800, payable in four equal annual instalments. The first instalment was paid, but the balance was not, and remains still due, and formed a lien on the premises. A creditor of *Randall* obtained judgment against him; and on an execution tion against lands caused the premises to be sold by the Sheriff to a purchaser, without notice. Subsequently, *Randall* purchased back from the Sheriff's vendee the premises. Both *Randall* and the Sheriff's vendee had obtained deeds at their several dates, conveying the legal fee in the land. *Randall* became bankrupt, and his estate in the premises has passed to the assignee, against whom this bill is filed by the plaintiff to enforce his lien for the purchase money left unpaid by *Randall*. He insists that the purchaser at Sheriff's sale, though he had no notice of this lien, is in no better position than the judgment creditor, who clearly would be entitled only to the beneficial interest of his debtor in the land. I do not agree in this contention. In England

(*a*) 1 Sch. 1 Lef. 379.

1867.

VanWagner v. Findlay.

the judgment creditor goes into possession of the land under the writ of elegit; and has, by his judgment or his debt, acquired no specific lien upon it, as a mortgagee would. He had not advanced his money, or allowed the debt to him to be contracted on the security of the land; and he can only claim out of it, what the debtor really has in it. In this country the land is sold, and the purchaser of it being a stranger, does not stand in the position of the judgment creditor. Whether if the creditor becomes the purchaser he can stand in a better position than his debtor, as owner of the land, did; or whether, if having received the whole proceeds of the land sold, free from the lien, or to the amount of his claim, he can be made to account for those proceeds to the extent of the lien, or proportionately, are not questions arising here. If a stranger purchases, through the Sheriff, without notice of any prior equity affecting the legal title sold, why should he not hold the latter free from such equity, as any innocent purchaser from the judgment debtor himself would? It is decided law, that he may gain priority under the Registry Acts. It is not necessary for me to pronounce any judgment on this very important question—important, I mean, to purchasers at Sheriff's sales—(and it seems strange that it should yet await decision)—for I think that the plaintiff is entitled to enforce his lien against *Randall* (and so of course against his assignee in bankruptcy who takes subject to the equities against him), or rather against the premises, when they have come back to *Randall*. He, as vendee, was trustee for the vendor, of the land, for payment of the residue of the purchase money. He parts with, or allows to be taken from him the land, while he holds it on this trust; and it coming back to him, will, in his hands, be charged with the same trust. Lord *St. Leonards*, in the 14th edition of Vendors and Purchasers p. 753, lays down this proposition broadly, and cites in support of it

Judgment.

Kennedy v. *Daly* (*a*). The decree will therefore be the usual one to enforce payment of the plaintiff's lien for the unpaid purchase money, to be ascertained by the Master, and for his costs out of the land.

1867.

Van Wagner v. Findlay.

GILMORE v. GILMORE.

Widow's share—Account.

A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to his widow. The widow and son, and an infirm daughter lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill by the widow against her son's representatives for an account of her share of the produce was dismissed with costs.

This cause came on to be heard before the Chancellor in Toronto.

The facts giving rise to the case are fully stated in the head-note and judgment.

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

Mr. *Gwynne*, Q.C., for the infant defendants.

Mr. *Blake*, Q.C., and Mr. *O'Brien*, for the other defendants.

VANKOUGHNET, C.—When the testator, the late husband of the plaintiff, died in 1852, his son *James*, the devisee of the property referred to here, was a

Judgment.

(*a*) 1 Sch. & Lef. 379.

1867.

Gilmore v. Gilmore.

minor, being of about the age of 20 years. From this time to the marriage of *James* the younger, in February, 1855, the mother and son lived together in the old homestead, the son doing the work of the farm and she the work of the house, with the assistance at times of a servant girl or woman. The will directed that the son should work the farm and pay one-third of the produce to the mother. It is contended that, for this period, the mother's services to her son were at least equal to her board and lodging and any clothes which he might have supplied to her, and that, therefore, she should have an account and payment of the one-third annual produce of the farm during those years. From the time of the marriage of *James* till his death, in 1863, his mother continued to live with him. In December, 1855, the family moved to a new house erected by *James* on the farm, and in it were appropriated two rooms for the use of the mother. It is not pretended that, after the marriage of *James*, the mother did any household work, beyond attending to her own rooms, and, when she required it, she was waited on by a member or domestic of *James's* family. Her daughter *Martha* lived with her in *James's* house, from the time of the old man's death till her own death in 1860. She was older than *James*, infirm and sickly, and unable to attend even to her own wants. *James* furnished them both with all necessary support. The farm was an ordinary one of 100 acres, described as very good land, bearing good crops. The mother under the will would be entitled to one-third of the net produce—some witnesses say that the whole annual net produce would not exceed £50 per annum. The farm is valued now at from £75 to £100 per annum. Is it too much to say that mother and son tacitly, if not expressly agreed that, the accommodation and support thus furnished by *James* to herself and daughter were to be taken in lieu of the one-third produce, which, upon the evidence, could not have exceeded £33 a-year or thereabouts? Did they

Judgment.

1867.

Gilmore v. Gilmore.

ever, while living together, think of accounting to one another? During *James's* life the mother makes no complaint—asks for nothing—and not till after she had left the house, which had been his, and had gone to reside with a daughter in another part of the country, do we hear of this claim. Was it unreasonable that a mother so supported by her only son should abandon to him her one-third of the farm produce, and waive any account of it? While *James* lay on his death-bed, the mother, anxious that after his death there should be no difficulty with his executors as to the provision for her under her husband's will, asks him for an agreement in writing, declaring that her future claims might be recognised. Nothing was said — nothing asked for, as to the past. *James* is dead, and it is now sought to make his estate account, for the many years that are past, for this one-third annual produce. I think it would be unreasonable and unjust to decree such an account, and I refuse it.

Judgment.

Bill dismissed with costs.

MURTHA v. MCKENNA.

Fraudulent conveyance—Delaying creditor.

A debtor sold his property, reserving by parol certain future rents to pay a creditor, and which were sufficient for the purpose; the object was to delay the creditor, and to compel him to wait for payment until these rents should accrue, and all parties combined for that object. The sale was held wholly void against the creditor—a transaction to delay a creditor being within the statute 13th Elizabeth, as much as a transaction to defeat him altogether.

Bill filed to set aside a conveyance of real estate as fraudulent, and came on to be heard before the Chancellor.

1867.

Murtha v. McKenna.

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

Mr. *Hector Cameron*, for defendants.

VANKOUGHNET, C.—I think that the transaction was necessarily calculated to delay and hinder plaintiff in the payment of his debt. The parties agreed together that *Murtha*, who was a creditor, with his claim then in suit, should be paid as they pleased, and they were pleased to say he must take it out of a small balance of rents and profits, although the written agreement does not provide even for this. That the parties intended this delay and hindrance is evident, and it was necessarily the effect of their act. Now this is what the Statute of Elizabeth expressly provides against. However valid the consideration may otherwise have been, the parties combined to hinder and delay *Murtha* in the recovery of payment, and I must therefore as against him decree the transaction void. The property having been sold, the plaintiff's claim is on the fund in the hands of the Trust and Loan Company, who can be made parties in the Master's office to account for it —they to have their costs. Defendants other than *Murtha* and daughter to pay all costs. Plaintiff to have them of course out of the fund as usual. Costs of evidence at former hearing to be taxed.

Judgment.

Reference to Lindsay.

1867.

McLennan v. McDonald.

Solicitor—Sale to.

In August, 1860, the plaintiff, being pressed for money, applied to the defendant to purchase from him a mortgage belonging to the plaintiff, and the defendant agreed to purchase on such terms as would give the defendant fifteen per cent. per annum. In October of the same year, the transaction was completed. In 1865, the plaintiff filed his bill, alleging that the defendant was his solicitor, and had taken advantage of his necessities, and praying that he might be relieved. The defendant did act as attorney for the plaintiff in 1854, but he did not appear to have acted for him from that time until February, 1860, when the plaintiff put two claims into the defendant's office for collection. One of which proceeded no further than issuing a writ. The money in the other had been collected and paid over to the plaintiff in June, 1860; the defendant knew nothing of either suit, and was never afterwards employed professionally by the plaintiff. The Court having reference to all the circumstances and the delay in instituting proceedings, dismissed the bill with costs.

Statement.

In the month of July, 1860, the plaintiff sold to one *McKenzie* a house and lot at the Lancaster station of the Grand Trunk Railway, upon which a payment was made in cash, and the balance was to be secured by mortgage on the property, payable in four equal annual instalments. Before the conveyances were executed the plaintiff applied to the defendant *McDonald* for the sale to the latter of the intended mortgage for ready money. The defendant *McDonald* agreed to cash the mortgage at the discount of fifteen per cent. per annuam. The mortgage for the sum of £310 was taken from *McKenzie* direct to the defendant *McLennan*, as trustee for the other defendant. The defendant *McLennan* was at that time the managing clerk of the defendant *McDonald*, and it appeared from the evidence that the mortgage was taken in the name of the former for the purpose of enabling him to release the mortgage in the event of its being paid in the absence of the

1867. McLennan v. McDonald.

defendant *McDonald*. This mortgage was paid at maturity, and the plaintiff's bill was filed for an account of the moneys received thereon by the defendants.

The transaction was impeached by the plaintiff on the ground of the alleged existence of the relationship of solicitor and client between the parties, and of the great intimacy and friendship subsisting between the parties at that time. The bill further alleged, that when the plaintiff applied to the defendant *McDonald* for money, the former was in great pecuniary embarrassment, and charged that both the defendants in their professional character had taken an improper advantage of the plaintiff's necessities, and that the plaintiff had only received £137 on account of the transaction in question.

Statement.

In the month of October, in the same year, the defendant *McDonald* prepared a statement of the amount the plaintiff was to receive after deducting the discount, and of the sums which the defendant *McDonald* had paid to and for the plaintiff on account of the transaction. This instrument which was signed by the plaintiff, was also impeached by the bill, the plaintiff contending that under the circumstances he should not be bound by it. The cause came on for the examination at the sittings at Cornwall.

The bill was dismissed against the defendant *McLennan* at the close of the plaintiff's case.

It appeared from the evidence for the defence that the defendant *McDonald* had paid the amounts mentioned in the statement signed by the plaintiff, but it was contended on behalf of the plaintiff that the discount was exorbitant, and that the transaction was a great hardship upon the plaintiff. The evidence for the defence also shewed that the house which formed part of the

1867.

McLennan v. McDonald.

mortgage security was defective in its construction, and that the security was a hazardous one.

Some time prior to the purchase of this mortgage by the defendant *McDonald* two County Court suits had been brought for the plaintiff in the defendant's office, and at an earlier period a Mr. *Walker*, who was then in the defendant's office, acted as the Cornwall agent of the plaintiff's Toronto solicitors in a Chancery suit in which the plaintiff was interested. Those proceedings were relied on by the plaintiff to establish the relationship of solicitor and client.

Mr. *James McLennan* and Mr. *James Bethune* for the plaintiff.

Mr. *D. B. McLennan* for the defendant.

Judgment.

VANKOUGHNET, C.—[Without calling on the defendant.]—I have never seen a case in which it was attempted to show professional influence upon so slight evidence as that given here. The most that appears is that in the years between 1851 and 1854, instructions were furnished to and through the office of the defendant *McDonald*, to the solicitor of the plaintiff at Toronto, in a Chancery suit instituted against him. Admit that this did establish the relation of solicitor and client at the time, it terminated in 1854. From that time till the month of February, 1860, the defendant does not appear to have acted in any way as solicitor for the plaintiff; and all that occurred in that month was that two claims were put by the plaintiff into the office of defendant for collection; and it is sworn that of these two suits the defendant knew nothing, till a dispute and a Chancery suit between him and plaintiff in 1865. One of these suits went no farther than the issuing of a writ, when the plaintiff stayed proceedings; the other was finally settled on

1867.

McLennan v. McDonald.

the 8th of June, 1860, by the payment over to the plaintiff of the moneys received in it. From that time, down to the present, it does not appear that the defendant ever acted professionally for the plaintiff, or ever gave him any opinion or advice; and the plaintiff appears to have employed in his matters other attorneys. In August, 1860, the plaintiff was pressed on an execution for the payment of a debt. The defendant had nothing to do with this suit, either for or against the plaintiff. The defendant being, or being reported to be, a moneyed man, the plaintiff applies to him, not for advice, but to become a purchaser of a mortgage. After some two or three weeks' delay, and with reluctance, the defendant, at the plaintiff's solicitation, becomes the purchaser, and the terms, equal to a discount of fifteen per cent., are agreed upon. The plaintiff consents to sell on those terms. He was not obliged to sell to the defendant. There were other men, I suppose, who had money in the community. The plaintiff was not under any pressure by the defendant; he was not in any way in his power; the defendant was not acting professionally for him, and does not appear to have been his professional adviser in any matter since 1854; and even, at that period, a Mr. *Walker*, who was well known to have been the manager of the defendant's business, alone appears to have received and communicated to the solicitors in Toronto, the instructions required or sought for in the Chancery suit. The very fact that the plaintiff and defendant were as intimate and friendly, as they are represented to have been at the time, would show that the plaintiff was not in the defendant's power—that the defendant was not pressing him, or exercising any control over him. The plaintiff was a shrewd business man—a Sheriff's officer, and, independently of his duties as such, engaged in many business transactions. He, under those circumstances, applies to the defendant for money, and consents at length to the terms on which the defendant alone would advance it. He was under no

Judgment.

1867.

McLennan v. McDonald.

obligation to defendant to take his money, but being an independent agent, he does take it, knowing what he had to pay; and in October, 1860, he signed a paper setting forth the terms of the sale, the payments mado on his behalf, and the balance coming to him, which he accepts. Throughout all this transaction, the defendant did not in any way act as the plaintiff's solicitor—the plaintiff was not even charged with the conveyancing. The plaintiff had not applied to the defendant as a professional man—he applied to him as a money-lender, and because he was his friend. But the plaintiff was in no way imposed upon—he agreed at the time to the discount required by the defendant—he acknowledged it as correct two months afterwards—and more than six years after this occurs, he files his bill, charging the defendant with having taken advantage of the professional relation which subsisted between them. No such professional relation, I think, is established; if it had been, the plaintiff knew at the time, as well as now, the wrong, if any, done him. He sleeps upon this for six years, and, until after a quarrel between him and the defendant, in relation to other matters; and then he files his bill. I think laches alone a sufficient answer here, (though the lapse of such a time will not in all cases be a bar), even if the professional relation at the time had been made out, for it certainly did not afterwards continue—and the plaintiff was free more than six years ago to file his bill; but, not subsisting, there is no pretence for the interference of this Court. If there was any error in the statement—which does not appear—the plaintiff might have sued in an inferior Court at law for the difference coming to him, and not have invoked, for such a purpose, the powerful and expensive machinery of this Court.

Judgment.

Bill dismissed with costs.

1867.

FINLAY v. FELLOWS.

Will—Construction of—Precatory devise.

A testator, by his will, devised thus: "All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number.

Held, that the words used were directory, not precatory only; that the power reposed in the widow was not properly exercised, as she was bound to divide the property among all the children, although she might, in her discretion, give personalty to one and realty to another.

The bill in this cause was filed to obtain from the Court the proper construction of the following words in the will of the testator: "All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children as she shall think best."

The cause came on to be heard before the Chancellor at the sittings at Cornwall.

Mr. *Bethune*, for the plaintiff.

Mr. *Fitzgerald* and Mr. *Mathewson*, for the defendant.

Judgment. VANKOUGHNET, C.—Under the clause of the will above quoted, I am at present of opinion, though with some doubt from the varying decisions upon such questions, that the devisee, the wife, had not an exclusive power of appointment, but was bound to divide the property among all the children in such proportions and manner as she thought best. The property was impressed with a trust, under the word "request," to be executed by her in the way mentioned. She has, however, devised the whole property, as I understand, to the plaintiff, there being other children, parties to

1867.

Finlay v. Fellows.

the bill, which they have allowed to be taken *pro confesso*. The devise is of "all the residue of my property, real and personal." This she might will to the children as she thought best. She might give personalty to one and realty to another; but she has not done this—she has given all to one. I think, therefore, that the power was not well executed, and fails, and that the property must be divided among the children living at her death or their representatives—the costs of all parties to be paid out of the estate, as the other children have apparently conceded, what has been assumed in this case, the right of the plaintiff to the whole. Master to ascertain parties entitled.

PHILIPS v. PRESTON.

Vendor and purchaser—Right of Purchase—Order for Possession.

The defendant, who was entitled to purchase certain land, had been guilty of default in paying the purchase money; had failed to erect a new saw mill on the land, as stipulated for; had allowed the saw mills already thereon to fall into disrepair; and had been cutting and removing the timber,—so that the saw mills were in such a condition that they would become utterly lost to the plaintiffs if the defendant was allowed to retain possession; and that the saw mills and timber constituted the almost entire value of the mortgage security:

Held, that the plaintiffs were entitled to an order for possession in case the defendant did not pay the over-due instalments in a month, without prejudice to the plaintiff's right to enforce the agreement for sale.

Statement

The plaintiffs were assignees of a mortgage bearing date the 21st December, 1859, and executed by the defendant, for $18,678, with interest at seven per cent. The bill stated, in effect, that the defendant had paid nothing on this mortgage since the 3rd April, 1863; that the whole of the principal money and an arrear of interest remained unpaid; that on the 10th January,

1867. Phillips v. Preston.

1867, an agreement was entered into between the plaintiffs and defendant, that the defendant should forthwith execute to the plaintiffs a release of the equity of redemption, but should have the option of re-purchasing for the amount of the mortgage debt, by paying $1,000 on the 1st May, 1867, and $1,000 every quarter thereafter, until the debt, with interest at six per cent., should be fully paid; provided that he should immediately execute the release, and should, by the 1st January, 1867, erect on the premises and have in operation a new saw mill worth at least $1,500; and it was further agreed that the defendant might remain in possession until he was in default in making any of the payments; and that the agreement should not be considered to have been made by way of mortgage security, but as a re-sale; and that under no circumstances should a foreclosure suit be necessary.

Judgment.

The bill further alleged as follows: (Paragraph 6) "In pursuance of the said agreement, a release of the defendant's equity of redemption was prepared and submitted to him for execution, but the defendant has, on one pretext or another, from time to time, postponed and evaded the execution of the said release, and has also in all other respects failed to comply with the said agreement. (8). The defendant was anxious to have possession of the said lands and the right of re-purchasing them for the purpose of enabling him to work a saw mill which was on the said premises, and for the purpose also of cutting and removing saw logs and pine timber on the said premises, to be manufactured and converted into lumber. (9). The value of the said lands consists principally in the pine and timber trees on the said lands, and without such trees and timber the said lands are a totally inadequate security for the said mortgage debt. (10). The defendant has also neglected to repair and keep in order the mill and other premises comprised in the said mortgage security,

1867.

Phillips v. Preston.

and which with the said timber constitute the almost entire value of the said mortgage security, and the said saw mills and premises are now in such a condition that they will become utterly lost to the plaintiffs if the defendant is allowed to retain possession thereof. (11). The defendant has also cut down a large quantity of timber from the said premises, and has removed the same and other timber previously cut by him on the said premises to the said mill, and has been and is manufacturing the same into lumber, which he is constantly selling and removing from off the said premises in large quantities, and unless he is restrained by the order and injunction of this honourable Court, the whole of the said lumber will shortly be removed. (12). The said agreement was entered into by the plaintiffs on the faith of the representations of the defendant, that he would make the improvements and payments stipulated for by the times therein mentioned, and in the belief that if he did not do so, they would have the benefit of the improvements and of the lumber to be manufactured, and that the same could not be removed by the defendant at the time fixed for payment; and in fact the said representations formed the principal inducement and consideration for the plaintiffs entering into the said agreement. (13). But for the said agreement the plaintiffs would have ejected the defendant from the said lands and premises, and would have the use of the same during this present season, and the plaintiffs have delayed in taking action upon the said agreement upon the promise from time to time of the defendant to carry out his said agreement."

Judgment.

The plaintiffs prayed as follows:—

"(1). That the said agreement of the 10th day of January, 1867, may be specifically performed. (2). That the defendant may be in the meantime re-

1867.

Phillips v. Preston.

strained by the order and injunction of this honourable Court from further cutting down or removing any timber on, off, or from the said premises. (3). And that the defendant may be further restrained from removing or selling or otherwise disposing of any of the manufactured lumber or timber aforesaid. (4). That the defendant may be ordered to deliver up possession of the said premises forthwith. (5). Or that, in default of payment of the mortgage debt and interest, and the costs of this suit, his equity of redemption in the said lands and premises may be foreclosed, or that the said lands and premises may be sold, and that the defendant may be ordered to pay any deficiency after such sale. (6). That the defendant may be also restrained, by the order and injunction of this honourable Court, from cutting down or removing any timber or other trees growing or being on the said lands. (7). That the defendant may in any event be ordered to pay the costs of this suit. (8). That all proper accounts may be taken, inquiries made, and directions given. And for further relief.

Judgment.

The cause was set down to be heard *pro confesso*.

Mr. *Cattanach* for the plaintiff.

Mr. *Hodgins* for the defendant.

MOWAT, V.C.—On the argument of this case, it was assumed, on both sides, that the agreement set out was a valid agreement, and was enforceable in this Court. The bill prays that it may be specifically performed, and I think I must treat the plaintiffs as submitting to give effect to the defendant's option to purchase, notwithstanding the lapse of time, as the bill does not charge that the right to repurchase has been lost through the defendant's default or misconduct,

or that for any reason the plaintiffs do not consider it binding. 1867.

Phillips v. Preston.

As incident to a decree for specific performance, there is authority for the plaintiffs' prayer for possession in case the defendant does not forthwith pay into Court the over-due instalments of the purchase money (*a*); considering that the defendant not only has been in default in making his payments, but has failed to build the new saw mill; has allowed the saw mills already on the premises to fall into disrepair; and has been cutting and removing the timber;—so that "the saw mills and premises are now in such a condition that they will become utterly lost to the plaintiffs if the defendant is allowed to retain possession; and that these with the timber constitute the almost entire value of the mortgage security."

Judgment.

On the other hand, I think the defendant must be held, by remaining in possession and cutting the timber, to have elected to avail himself of his option to purchase.

The defendant should pay the over-due instalments into Court in one month, or in default deliver up possession to the plaintiffs. Injunction meantime to restrain the defendant from cutting the timber, and from removing or disposing of any which has been cut since the 1st May last, and from removing or disposing of the lumber manufactured from timber cut since that date. (The bill seems impliedly to admit that the defendant was to be at liberty to cut if he made no default in his payments, and I

(*a*) See the cases collected, Sugden V. and P., 13th edition, ch. 5, sec. 4, pl. 13, P. 229–230. Dart on V. and P., ch. 18, sec. 10, P. 704, 3rd edition.

1867.

Phillips v. Preston.

therefore confine the injunction to what has been cut since the defendant's default). The delivery of possession does not necessarily carry with it the rescission of the contract; and the plaintiff may have either an order to rescind, on default, or an order for sale the defendant making good any deficiency. The rescission or sale will be after the usual time allowed a purchaser in such case to pay.

Had the defendant insisted at the bar on treating the plaintiffs as mortgagees, and on the decree being for foreclosure on default, I would have great difficulty in making any other decree, as the notice endorsed on the bill was a notice to that effect under the 4th General Order, of 10th January, 1863.

Wood v. Brett.

Trustees—Assignment of decree.

Trustees made payments to one class of creditors over whom another class of creditors were entitled to priority, without first paying, or retaining sufficient to pay, the prior class; and a suit for the administration of the trust estate having been instituted, the creditors, who had received such payments, were ordered to repay what they had erroneously received, and the unpaid creditors were held entitled to a lien on the trust funds in Court in priority to the claims of the trustees, and all subsequent creditors, for debt and costs.

Where a decree by mistake gave a trustee priority, in respect of a debt due to him by the estate, over claims of certain parties who were entitled to priority over the trustees: *Held*, on an application to correct the error, that an assignment for value, executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all the equities to which the trustee himself was subject.

Statement.

The defendant, *Robert H. Brett*, on the 30th September, 1857, made an assignment to the defendants

1867.

Wood v. Brett.

James B. Davis, *Wm. D. Taylor*, and *Wm. Anderson*, for the benefit of his creditors, who were thereby divided into seven classes, those in the first class being directed to be paid first, and so on. The plaintiffs were creditors of the fifth class, and appeared to have been the only creditors of that class. Their bill was for the execution of the trusts of the assignment.

On the 10th of May, 1862, a decree was made, directing the usual inquiries, and reserving further directions and costs. On the 10th of April, 1863, the Master made his report, finding that, amongst other things, property, notes, bills of exchange, and evidences of debt, from which £4,290 17s. 11d. was realised, had been delivered to the plaintiffs, and that there was still due to them £1730 10s. 10d. (including interest). The cause was not brought on for further directions and costs until the 24th of November following. By the decree then made, the Court, amongst other things, found a sum of £309 14s. 1d. to be due from the estate to the trustee *James B. Davis*, and ordered the plaintiffs to pay to the third class creditors the amount the plaintiffs had received from the trustees, or so much thereof as should be sufficient to satisfy the debts of the third class creditors; and in default of their doing so, the trustees, other than *Wm. D. Taylor*, were ordered to pay the same; and in case they did so out of their own money, they were to be allowed the same in their accounts with the estate; and the amount they should so pay, together with the amount due *Davis*, were decreed to be a first charge upon the assets of the estate. The outstanding real and personal estate was directed to be realised, and the proceeds applied as follows, viz.: 1st. To pay what was coming to the trustees; 2nd. The costs of all parties as between solicitor and client; and 3rd. The creditors in the order of their priorities. It was not shewn that any creditor was entitled to rank in the fourth class.

Statement.

1867.

Wood v. Brett.

On the 30th of April, 1864, the Master made a separate report, in which he found, amongst other things, that the debts due to the third class creditors amounted, with interest, to £491 7s. 4d. One of these creditors, *Jane Giles*, who had obtained the carriage of the decree, alleged that she had unsuccessfully endeavoured to enforce payment by the plaintiffs, and she therefore applied by motion for a decretal order declaring that, under the circumstances, the third class creditors were entitled to be paid in priority to all claims of the plaintiffs, or of the defendants *Brett*, *Davis*, and *Anderson*, or the assigns of any of them, for debt, interest, or costs, and were entitled to be paid out of the moneys then in Court, or thereafter to come into Court, to the credit of the cause.

Mr. *Hodgins*, in support of the application.

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

Mr. *J. B. Davis*, for the defendants *Brett* and the trustees.

Mr. *Blain*, for the defendant *Martha Davis*.

Judgment.

MOWAT, V. C.—Apart from certain objections of form, the creditors appear clearly entitled to what they ask, and proper provisions, if applied for, would, I apprehend, have been introduced into the decree as of course. The trustees were treated by the Court as having improperly paid the plaintiffs, who were fifth class creditors, while the third class creditors remained unpaid; and it follows, that the trustees should make good to the third class creditors out of their own moneys the amount so paid, though entitled to recover it back from the plaintiffs, and should receive nothing themselves as against this class of creditors until this obligation is performed. If neither the plaintiffs nor the trustees can be made to

1867.

Wood v. Brett.

pay the creditors, there is no reason why the loss should fall on the third class creditors, whom the wrongful payment to the plaintiffs disappointed, rather than on the other persons interested in the fund, and over whom such third class creditors are entitled, by the terms of the assignment, to priority.

It was said that the costs payable to the trustees cannot be postponed to, or set off against, the debt they owe. But the reverse is clearly the rule (*a*).

It was also said, that the amount due the trustee *James B. Davis* had been assigned by him to *Martha Davis;* that he was a trustee for her of the original debt found by the Master also due him, the money he advanced, it was said, being hers and not his; and that, at all events, after an assignment no order can be made affecting the debt as against the assignee. The first point was decided against the assignee by the Judgment. Chancellor, when he made the order (13th February, 1867) on her petition, substituting her for the trustee *James B. Davis*, in respect of the debt so assigned; and, having now heard the evidence read and discussed, I may say that I entirely concur in that decision. As to the second point, it is clear that the trustee could not by an assignment exclude an equity like that now set up on behalf of the creditors.

It was further said, on behalf of the trustees, that if the fund in Court (now amounting to $1599 27, besides bank interest) is applied to the payment of the third class creditors, there will not be sufficient left to pay the trustees' costs; that an assignment of these costs has been made; and that there being no assets left to pay them, they must be paid by the plaintiffs

(*a*) Harmer v. Harris, 1 Russ. 155; Wilson v. Switzer, 1 Ch. Chamb. 75; Nicholson v. Norton, 7 B. 67; Cooper v. Pitcher, 4 H. 485.

1867.

Wood v. Brett.

personally. The assignment of the costs makes no difference; and the present applicant appears to have no concern with the question, whether the plaintiffs should pay these costs or not. But in an administration suit, it is only where the plaintiff is informed that there are no assets, and perseveres notwithstanding with a suit, that it has been held that in default of assets he must pay the costs to which he puts trustees or executors (*a*). Here it is not pretended that the plaintiffs were told there were no assets, or not enough to pay anything to the fifth class creditors, the class to which the plaintiffs belong. No such statement is made in any of the answers, and no such result appears to have been anticipated by any of the parties until after the decree on further directions, and after the sale of the trust estates under that decree. There were some assets, and the amount in Court has been realized from them. If taken to pay the third class creditors, the plaintiffs are bound to make the amount good, and the trustees' costs may then be paid out of the amount; but there is no ground for requiring the plaintiffs to repay, not only what they received that should have gone to the third class creditors, but the costs of the suit besides. The payment to the plaintiffs appears to have been made voluntarily, and no question seems to have been raised by the trustees as to its propriety, until on further directions they themselves were held liable for the amount.

Judgment.

On the other hand, the learned counsel for the plaintiffs claimed, that the costs of the plaintiffs should be paid in priority to any amount payable to the trustees; but on this point the decree appears to me to have been drawn correctly.

So far as to the merits. But it was objected

(*a*) Vide King v. Bryant, 4 Beav. 460; Ottley v. Gilby, 8 Ib. 602; Fuller v. Green, 24 Ib. 217.

1867.

Wood v. Brett.

that what is asked is in effect an amendment of the decree, and it was contended that the decree can only be amended on a re-hearing. I do not concur in that contention, as the points are not pretended to have been the subject of adjudication when the cause was heard on further directions; and the 20th General Order, of 20th December, 1865, provides for amendments in such case being made without a re-hearing. I do not see, however, how I can make the required order on motion. What is wanted is certainly an amendment of the decree; and this requires a petition. To save expense, I have expressed my opinion on all the questions argued; but a petition will be necessary before any order is drawn up, and the motion now made must be refused, without costs.

Judgment.

It was alleged on the part of the trustees, that the report was wrong in stating that the notes and bills which the plaintiffs had received were delivered to them by the trustees—that the fact was, they were delivered to the plaintiffs by the debtor *Brett*, before the assignment; that this appears from the evidence in the Master's office; that the trustees did not appeal from the report, because they did not perceive the importance of the mistake till the decree on further directions was made; that they were so far satisfied with that decree, on the whole, that they did not feel it necessary as long as the decree stood, to attempt to procure the correction of the error; but that, if the decree is amended as contended for on the present application, the plaintiffs, it was argued, should have an opportunity now of shewing the error. If the facts are as alleged, this contention is not unreasonable, considering the fiduciary character of the parties, and the protection to which they are entitled against undeserved loss. I have not seen the evidence in the Master's office, nor was any affidavit filed on the present motion to the effect of what was alleged; and the matter, besides, must be dealt with on a separate application in Chambers.

1867.

Wood v. Brett.

The notice of motion also asked, that a certain composition received by the trustees in respect of two notes of *Bostwick & McDonald*, should be paid into Court, the same having been received contrary to the decree on further directions. I do not see how this construction can be placed on that decree; but as the trustees are ordered to pay the third class creditors in case the latter do not obtain payment otherwise, these creditors appear to have no interest in procuring the payment of this additional sum into Court; and as the amount so received by the trustees is less than is due them, and as they have priority over all others for what is due to them, it is plain that no useful object is to be gained by the payment desired. This part of the motion was not much pressed.

Judgment.

I must not part with this case without observing that the trustees ought not to have more than one set of costs out of the fund, there having been no sufficient reason for severing in their defence; and that, so far as I can perceive, the costs of *Martha Davis*, the assignee of one of the trustees, ought not in any event to be charged upon the estate in addition to the costs of the trustees.

A petition was afterwards presented by the same creditor to amend the decree, under the general order of the 20th day of December, 1865, (No. 20); and on this petition coming on to be heard before Vice-Chancellor *Mowat*, it was for the first time alleged by the other parties that the changes required would interfere with what Vice-Chancellor *Spragge*, who made the decree on further directions, had adjudicated. Thereupon the Vice-Chancellor gave leave to re-hear the cause, and reserved the costs of the petition to be disposed of on such re-hearing.

The cause was re-heard accordingly before the Chancellor and the Vice-Chancellors. 1867. Wood v. Brett.

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

Mr. *Hodgins*, for *Jane Giles*.

Mr. *J. B. Davis*, for *Brett* and the trustees other than *Taylor*.

Mr. *Rusk Harris*, for the defendant *Taylor*.

The judgment of the Court was delivered by

MOWAT, V. C.—It is now ascertained that the alteration desired by the applicant *Jane Giles*, is not inconsistent with anything which my brother *Spragge* meant to decide when he made the decree on further directions. We all agree that the alteration desired is proper, and that the directions asked for must have been inserted in that decree as a matter of course, if any of the parties had suggested their introduction. Judgment.

The order on re-hearing will therefore declare, that the third class creditors are entitled to be paid in priority to all claims of the plaintiffs, or of the defendants *Brett* and *Davis*, or the assigns of any of them, for debt, interest or costs, and are entitled to be paid out of the moneys now in Court, or that may hereafter come into Court, to the credit of this cause; and will order and decree the same accordingly. Cheques to be drawn, &c. In case the said sums are paid out of moneys in Court, the plaintiffs are to pay into Court the sums which by the decree they were ordered to pay to the third class creditors. The Secretary can take any accounts that this order may require.

As the re-hearing was rendered necessary by the mistaken allegation that my brother *Spragge* had adjudicated

1867.

Wood v. Brett.

on some of the matters affected by this change in the decree, the creditor *Jane Giles*, who re-hears, should have her costs of the re-hearing, out of the estate; but as all parties are to blame for the error in the decree, there will be no costs, to any party, of the petition to amend the decree, and no costs of the re-hearing to any party other than the applicant.

WILSON v. COSSEY.

Practice—Motion for Decree.

On a motion for decree, the plaintiff was assumed, for the purposes of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term.

A bill of redemption alleged that an absolute conveyance which the plaintiff had executed, was intended as a security for a debt then due by the plaintiff; the defendants admitted that the conveyance was intended as a security, but alleged that it was to secure future advances, as well as the existing debt, and interest at twelve per cent. The plaintiff moved for a decree on the answer:

Held, that the defendant was entitled to a declaration that the security was to cover the future advances, and twelve per cent interest, as well as the existing debt; but the Court gave leave to the plaintiff to abandon his motion, and to file a replication and proceed to a hearing in term, if he chose.

The defendants, by their answer, specified a certain sum as the amount of the debt due at the time the conveyance was executed, and certain other amounts, as admitted by the plaintiff to be due at subsequent periods:

Held, that, on a motion for decree, these allegations were not binding on the plaintiff, and that they must be established before the Master.

Statement.

This was a suit for redemption. The plaintiff, on the 29th May, 1860, conveyed his interest in certain land to the defendant *William Cossey*. This conveyance was absolute in form, but was intended as a security only. On the 10th February, 1862, *Cossey*

conveyed to the defendant *John Hays*. On the 31st May, 1865, *Hays* mortgaged to the defendant *John Land*. The defendants alleged that these conveyances were with the knowledge and concurrence of the plaintiff, and that they never claimed to hold the premises except as security for what the plaintiff was liable to pay, but they claimed that the security was more extensive in its object than the plaintiff alleged,—the plaintiff asserting that the security was for $158 48; the defendants, that the amount was $200, as well as future advances and interest at twelve per cent.

William Cossey died after answering, and the suit was revived against his administratrix. The cause came on by way of motion for decree, on the admissions contained in the answer.

Mr. *Stephens*, for the plaintiff, contended that he was entitled to a general reference to the Master, to find what was due from the plaintiff on the security of the premises.

Mr. *Gwynne*, Q.C., for the defendants *Hays* and *Land*, contended that the plaintiff was bound by all the statements of the answer, and that the decree should be framed accordingly.

Mr. *Moss*, for *Ann Cossey*, the administratrix.

Judgment.

MOWAT, V.C.—On this motion I must take the answers to be true on all points on which, by the practice of the Court, the defendants could have given evidence if the plaintiff had replied to the answers, and gone to a hearing in term.

I must therefore dismiss the Bill with costs, as against *Ann Cossey*, administratrix of *William Cossey*, as it appears that the deceased neither had nor claimed

1867.

Wilson v. Cossey.

any interest in the property at the time the suit against him was instituted, and his answer denied all charges of wrong-doing in the matter.

As respects the other defendants, I must declare that the transfer of the 29th May, 1860, was made by way of security for the debt then due by the plaintiff to *William Cossey*, with interest at twelve per cent, and for any other sums *William Cossey* should from time to time thereafter advance to the plaintiff, with interest thereon at the same rate; these being the terms of the bargain according to the allegation in the answer of the defendants *Hays* and *Land*. The answer specifies the amount of the debt at this time, and at certain subsequent periods respectively, and sets forth admissions and promises by the plaintiff respecting it; but these allegations I do not consider to be binding on the plaintiff, as evidence to establish them would not be receivable at the hearing, and would have to be reserved for the Master's office. An account will be directed as to what is due from the plaintiff, and the plaintiff must pay the same, with the costs of suit, within six months, and on payment he will be entitled to a conveyance. Whatever sum is due to *Land* by *Hays* beyond the amount due from the plaintiff, *Hays* must pay.

Judgment.

If the plaintiff prefers to file replication, and go to a hearing in term, rather than take a decree with the declaration I have mentioned, the motion must be dismissed with costs.

1867.

RICH v. BRANTFORD.

Injunction—Delay in moving.

Where the plaintiff's title was disputed, and the injury of which he complained had been going on for three years, and was not any greater at the time the plaintiff moved for an interlocutory injunction than it had been for three years before, the Court refused the motion.

This was a motion for an injunction to restrain the defendants from using the surplus water in the Brantford Canal, at times when there was not sufficient water therein to afford the plaintiff the supply to which he claimed to be entitled under a lease from the Grand River Navigation Company.

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

Mr. *E. B. Wood*, Mr. *Moss*, and Mr. *W. H. Burns*, contra.

MOWAT, V. C.—The plaintiff's affidavits seem to shew a sufficient *primâ facie* case on the merits for the injunction he seeks, but the defendants by their affidavits controvert some of the principal facts on which the plaintiff's right depends, and bring forward some new matters which the defendants respectively rely upon in answer to the application. This being so, the delay of the plaintiff in enforcing his claim disentitles him, under the circumstances in evidence, to an interlocutory injunction: he must wait now till the hearing of the cause. Judgment.

The plaintiff claims under a lease from the Grand River Navigation Company, subsequent in point of date to the leases under which the principal defendants *Watts* and *David Spence* claim; but the plaintiff alleges that his rights have priority, because there was a contract for his lease before the respective times when the rights of the other lessees accrued. This priority is

1867.

Rich v. Brantford.

essential to the plaintiff's case, but is not admitted by the defendants; and there is no evidence whatever of the alleged prior contract, except the naked statement of the plaintiff himself that there was such a contract, and he was not a party to the lease, and does not pretend to any personal knowledge on the subject. It is quite possible that the case may be as the plaintiff states, for the term runs, according to the lease, from an antecedent day, viz., the 1st July, 1850, which is prior to the date of any other lease; but the plaintiff's lease contains no recital or statement to explain this circumstance. On the other hand, *James Wilkes*, the son of the lessee named in the lease now held by *Watts*, the lessee himself being dead, says that his father applied for his lease in 1844; that the application was granted; and that his father built a mill on the demised premises in 1847—three years before the alleged date of the contract under which the plaintiff claims; that the deponent is positive his father's was the first lease granted; and that the deponent was a director of the Navigation Company from 1841 to 1852. The Solicitor for the defendant *Watts* swears that he applied to the superintendent for leave to examine the books of the company in order to ascertain the date of *Wilkes's* application for a lease; and that leave was refused. No answer is made to these statements, on the part of the plaintiff; and though they are less clear and satisfactory than, if the facts are as contended for by the defendants, they might have been, yet I think they are sufficient to make extremely doubtful which party has the priority.

Judgment.

Assuming, therefore, that I was prepared to decide in favour of the plaintiff all the other points raised, the doubt on the question of priority would make an interference by interlocutory injunction, at this late date, contrary to the rule of the Court. The affidavits filed by the plaintiff shew, that the injury he complains of began in 1864, and that for three years his

1867.

Rich v. Brantford.

mills have, from time to time, been forced to lie idle for want of water, in consequence of the defendants' drawing off, and diverting to their own use, the water which was theretofore available for the plaintiff's mill, and to which he claims to be entitled.

There is always some risk in granting an interlocutory injunction on conflicting *ex parte* affidavits, instead of at the hearing of the cause when the witnesses are examined and cross-examined by counsel in the presence of the Court; and where the plaintiff's case is not free from doubt, and an interlocutory injunction would seriously injure the defendant, such an injunction is seldom granted unless the injury complained of is recent, and the party complaining has had no opportunity before he moves of having the question determined by a hearing in equity or trial at law. Here it is admitted by the plaintiff's affidavits that an injunction would, at certain seasons, stop the mills of the defendants. The plaintiff says, that during the greater part of the present summer his time has been occupied in endeavouring to obtain relief without a suit; he makes no explanation of his delay previous to last summer; and if since last summer, he has chosen to negotiate instead of suing, this does not entitle him now to an injunction against the defendants on less satisfactory evidence than would have been before the Court if he had instituted a suit, and brought on his case for examination of witnesses and hearing at Brantford this autumn, instead of moving for an injunction on *ex parte* affidavits.

Judgment.

In a word, the case for an injunction does not appear more pressing to-day, than it has been for the last three years; and to stop the defendants' mills before the hearing, on doubtful evidence of title, after so long an acquiescence in the injury complained of, would be a less safe course than to decline interfering until the case is brought to a hearing; and would therefore be improper.

1867. Rich v. Brantford.

Various other objections were taken to the plaintiff's right to relief on which I express no opinion, and some of them I have not considered.

I refuse the motion, reserving the costs of all parties.

McIntyre v. The Attorney-General.

Letters Patent—Repeal of.

Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff though it may to some extent involve proof of a negative.

Where it appeared that the Commissioner of Crown Lands, in deciding between rival claimants to a lot of land, to which neither claimant had any right, was under a false impression as to a matter of fact, and the fact had not been untruly stated by the party in whose favor the Commissioner decided, and was not shewn to be material,—the Court *held* that the error did not constitute a sufficient ground for setting aside the patent at the suit of the disappointed claimant.

This cause came on for hearing at the sittings at Guelph.

Mr. *Moss*, for the plaintiff.

Mr. *Crooks*, Q. C., for the Attorney-General.

Mr. *J. C. Hamilton*, for the defendants *Walker* and *Jackson*.

Lawrence v. *Pomeroy* (*a*), *Mahon* v. *McLean* (*b*), *McDiarmid* v. *McDiarmid* (*c*), *Barnes* v. *Boomer* (*d*), *Boulton* v. *Jeffrey* (*e*), *Stevenson* v. *Coote* (*f*), *Proctor* v. *Grant* (*g*), were referred to.

(*a*) 9 Gr. 474.
(*b*) 13 Gr. 361.
(*c*) 9 Gr. 144.
(*d*) 10 Gr. 532.
(*e*) 1 U. C. E. & App. 111.
(*f*) 10 Gr. 410.
(*g*) 9 Gr. 26, 224.

1867.

McIntyre v. Attorney-General.

MOWAT, V. C.—This is a bill to repeal a patent granted by the Crown to the defendant *George Jackson*, for lot No. 4, in the 15th concession of the township of Carrick, 122 acres.

This lot and another were purchased on the 1st of February, 1855, by one *Donald Campbell*, on condition of actual settlement. Any right under this purchase became forfeited by non-payment of the money; and in 1862 the plaintiff and the defendant *Joseph Walker* were opposing claimants before the Government for the lot, the plaintiff—as the actual occupant, and as having made improvements on the lot, and the defendant *Walker*—as the assignee of the original purchaser. The matter appears to have been referred to Mr. *McNabb*, the local agent, for his report; before whom was produced an affidavit by one *Archibald McVicar*, stating that *Walker* had purchased from the plaintiff lot No. 9, in the 1st concession, south of the Durham road, in the Township of Brant, for $200 and sixty acres or one-half of the lot in question; that they subsequently came to a new agreement, by which the plaintiff gave up these sixty acres, and took in lieu *Walker's* notes for $300, which had subsequently been paid. Mr. *McNabb*, on the 24th of January, 1863, reported the facts accordingly; and on the 14th of June, 1864, the Commissioner came to the following conclusion: "The title by the papers is now in *Walker*, no assignment from him having been produced. Unless *McIntyre* pay *Walker* the $300, and interest, mentioned in *McVicar's* affidavit, within two months, let patent issue to *Walker* on paying balance of purchase money." On this decision being communicated to *McIntyre*, he applied to the Commissioner to reconsider the case, and he filed a number of affidavits on the subject of the alleged agreement. I do not find any further affidavits on the part of *Walker*, but letters only, commenting on these affidavits. On the 27th of January, 1866, the Commissioner, having

Judgment.

1867.

McIntyre v. Attorney-General.

given further consideration to the matter, adhered to his former decision. On the 9th of July, 1866, *Walker* assigned the lot to the defendant *George Jackson*. The defendants state that this assignment, though in form absolute, was intended as a security for a debt due *Jackson* by *Walker*. The patent was thereupon issued to *Jackson*.

The bill attacked the patent on several grounds, some of which have been distinctly disproved, and their importance therefore has not to be considered. Thus, the bill alleges that the Commissioner was in error in supposing that *Walker* had bought the lot from *Campbell*, the original purchaser, the fact being, according to the bill, that he had bought the timber only; and in supposing that *Walker* had paid *Campbell* the consideration agreed upon (£30); but it was distinctly proved by *Campbell* himself at the hearing before me, that *Walker* had bought the lot, and not the timber only, and had paid the consideration agreed upon. These charges were therefore not pressed on behalf of the plaintiff in the argument.

Judgment.

The bill further alleged, that one *Joseph Hartley* and others, by whom the plaintiff could have given material evidence, had refused to make affidavits on his behalf; and that the plaintiff was thus deprived of their testimony before the Commissioner; but *Hartley* was the only witness examined before me who had not made an affidavit, and he gave no evidence that was material to the plaintiff, and swore that the reason of his refusal to make an affidavit was, that he did not know what the plaintiff's solicitor supposed he knew, and wished to put into the affidavit. The evidence generally was quite as strong in favor of the plaintiff upon the affidavits he laid before the Commissioner, as upon the hearing before me.

But the most important error which the plaintiff

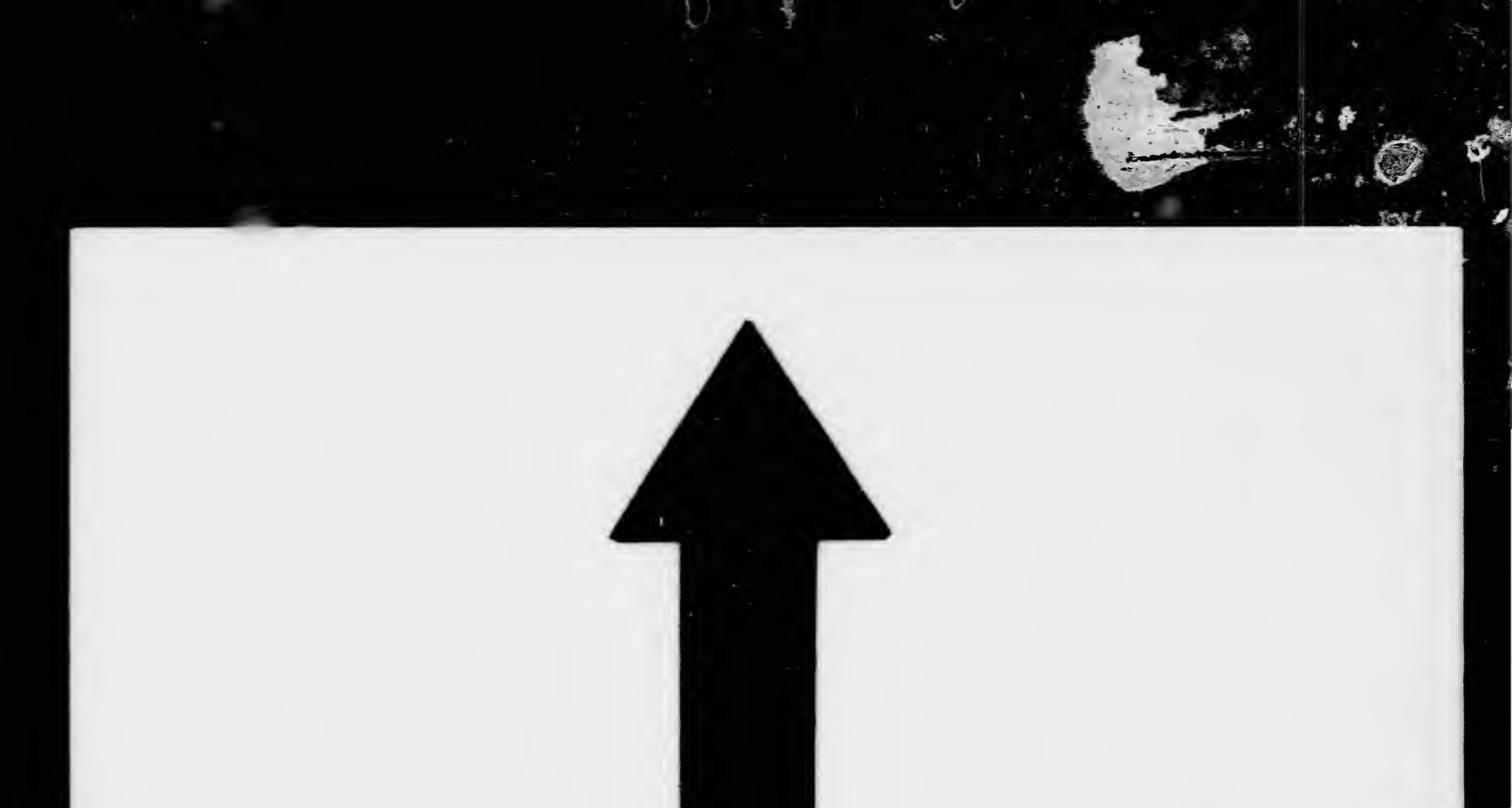
alleges by his bill, is in regard to the $300, and the purpose for which it was paid to him. The plaintiff says, that the Commissioner was in error in supposing that *Walker* had purchased sixty acres of the lot in question from the plaintiff; or that the plaintiff had agreed to give possession thereof to *Walker* that the $300 had been paid to the plaintiff for the lot; and the plaintiff's statement is that he sold *Walker's* part of his Brant lot for $200, and the remainder for $300; that he did not agree to take sixty acres of the lot in question for this sum; that there was no reference to the lot in question in the sale of the Brant lot; and that the notes were given for the purchase money of the Brant lot.

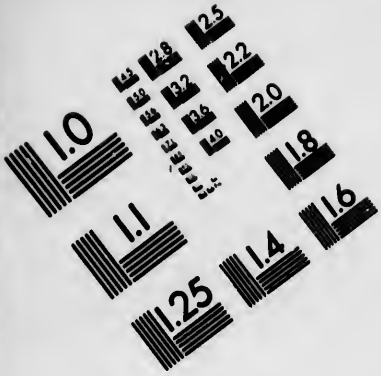
1867.

McIntyre v. Attorney-General.

The onus of establishing the errors alleged is on the plaintiff: how far, if established, they afford a sufficient ground for setting aside the patent will be a subsequent consideration. When the matter was before the Commissioner, the burthen of establishing the alleged agreement was on *Walker*; but, *Walker* having satisfied the Commissioner of the fact, and his assignee having obtained the patent, *omnia præsumuntur rite esse acta*; and I have no jurisdiction to interfere on any such ground as a difference of opinion from the Commissioner as to the sufficiency of the evidence of the agreement, or as to the comparative weight of the evidence brought against it and in its favor respectively. Patents are not to be lightly disturbed: they lie at the foundation of every man's title to his property. It is with the patent that investigations of title by purchasers commence; and a degree of uncertainty most prejudicial to the general interests would arise from holding Crown grants repealable on slight grounds; though, where improvidence, error, or fraud is really made out, justice requires that the jurisdiction which the Legislature has given in such cases to this Court should be exercised with firmness.

Judgment.





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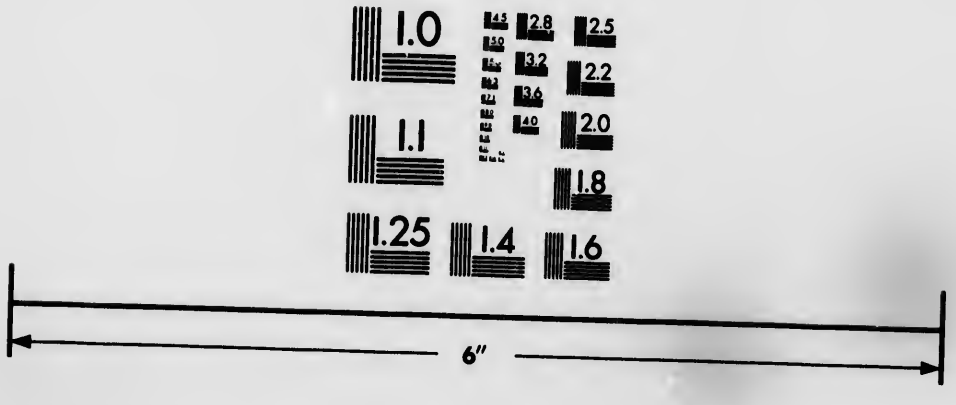

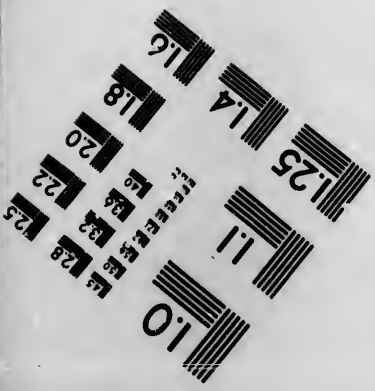

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1867.

McIntyre v. Attorney-General.

What in the present case the plaintiff must be considered as having undertaken is the (no doubt) difficult task of proving positively that there was no such agreement as *Walker* alleged; and the plaintiff must, I presume, make this out by some such evidence as would support an indictment for perjury. Now, what is the agreement that *Walker* set up before the Commissioner? That, in the agreement for the sale of the Brant lot to *Walker*, the plaintiff consented in the first instance to accept sixty acres of the lot now in question as part of the consideration; that this agreement was subsequently changed, and the plaintiff took in lieu of the sixty acres *Walker's* notes for $300. This is the way the transactions as to the sixty acres are put in the only affidavit which *Walker* filed on the subject. The officers of the department treated and spoke of these transactions as, first a sale by *Walker* to the plaintiff, and then a repurchase by *Walker* from the plaintiff; and these expressions may in a sense be correct, but the defendants do not appear from the papers to be responsible for them; and I cannot assume that in the minds of these officers, and of the Commissioner, the expressions used meant more than was stated in the affidavit. Now, what is the evidence before me disproving the statements of *McVicar's* affidavit on this point? There is literally none whatever. The only pretence of such evidence is by a witness, *Stewart*, who was present when the notes were given, and who states that nothing was then said about the lot in question. But the bargain was not made then, but had been made previously; and there was no absolute occasion to refer to it again at this time; and for a Court to hold that the statement of a single witness that nothing was said respecting the lot at this particular time, is sufficient for the present purpose to disprove the existence of the prior arrangements alleged by *Walker*—would be out of the question, even if there were not the defendants' sworn answer positively stating these arrangements, and *McVicar's* again positively deposing to them before me.

Judgment.

1867.

McIntyre v. Attorney-General.

At the time of the Commissioner's second adjudication he was under the impression, that the bargain for accepting the notes for $300 was made while the plaintiff was in possession of the lot now in question under the agreement respecting it with *Walker;* that it was part of the agreement that he should give up the possession to *Walker*; and that there was no evidence filed by *McIntyre* to contradict these conclusions: the Commissioner states these points in setting forth the grounds for adhering to his former ruling. Mr. *McNabb*, in his letter to the department, had made similar statements as to the possession; and Mr. *Tarbutt*, the officer of the department who has charge of matters of this kind, had, in the memorandum of facts submitted to the Commissioner before he first adjudicated on the case, stated them in the same way as Mr. *McNabb*. Nor on the evidence before me, is it by any means clear that in this they were wrong, though for the purposes of this suit I must hold that they were wrong; for Mr. *McNabb*, in his letter, expressly referred to *McVicar's* affidavit as the ground Mr. *McNabb* had for his statement; and he is not alleged to have had any means of knowing the facts except from the papers which were before the Commissioner and are now produced. Mr. *Tarbutt* appears, in his memorandum, to have merely followed Mr. *McNabb's* letter on this point; and, curiously enough, *McVicar's* affidavit states the reverse of what was thus supposed. It contains but one short reference to the possession, viz., that "*after* receiving the notes," the plaintiff immediately "went into Carrick and squatted on the said lot No. 4." No affidavit filed by the defendant had stated the matter differently; and on the other hand, the plaintiff's affidavits stated distinctly that he had not taken possession of lot No. 4, until after receiving the notes. He himself swore he never even saw the lot until afterwards; and there is nothing against this in any of the other affidavits. So, in the answer to the plaintiff's bill, *Walker* does not say that

Judgment.

1867.

McIntyre v. Attorney-General.

the plaintiff took possession of the lot in question under the authority of the alleged agreement relating to it. On the contrary, he swears that the plaintiff entered on the lot without his license, and contrary to his repeatedly expressed desire, and that the plaintiff's occupation of the lot was and is as a trespasser only. The want of evidence on the part of the plaintiff to this effect before me is, therefore, immaterial; and I must hold that to this extent the Commissioner, when reviewing his decision in 1866, fell into an error, though the error was not occasioned by the affidavits which *Walker* had laid before him. Now, an error for which a successful claimant is not responsible, must appear to have been material, before a patent could be set aside on account of it at the suit, not of the *Attorney General*, but of a rival claimant for a patent. Can I regard this error as material? An error as to whether there was any agreement respecting the lot in question would no doubt have been material, because the condition imposed on the plaintiff was expressly founded on the supposed existence of such an agreement; but an error as to the period of making the agreement stands in a different position. If, assuming an agreement for substituting the notes to have been made a few weeks *after* possession of the lot in question, it would be just that the plaintiff should pay *Walker* $300 and interest before being allowed to purchase,—can I say such a condition would have been unjust or inequitable if made a few weeks *before* the plaintiff had possession? No evidence from the department or otherwise was offered to shew that the fact would have been deemed material there; and on general grounds it would manifestly be impossible for me so to hold. Whether the condition imposed was a reasonable one, I have no jurisdiction to decide. The Commissioner, acting for the Crown, had authority to impose any condition he chose, and the Court has no authority to review his discretion in this respect. The utmost I can be asked to be satisfied

Judgment.

1867.

McIntyre v. Attorney-General.

of, is, that, assuming the condition he imposed on the plaintiff to have been just and equitable if the plaintiff had been in possession a few weeks before receiving the notes, it was not unjust or inequitable because he had not then taken possession.

I think, therefore, that the plaintiff has failed to disprove the statements of *McVicar's* affidavit; and, consequently, to shew that the Commissioner was in error so far as he relied upon those statements; and I think the error, which the plaintiff must be held to have shewn in the view which on the Commissioner's reconsideration of the case he did fall into as to the time of giving the notes, the same not appearing to have been occasioned by the defendant or to be material,—is not a sufficient ground for setting aside the patent at the plaintiff's suit.

Judgment.

I must, therefore, dismiss the bill. The plaintiff is a poor and illiterate man, with a large family, and during the first five or six years of his occupancy he made improvements on the place, with the defendant *Walker's* knowledge, to an amount variously estimated in the affidavits at from $300 to $500, and which the plaintiff loses. On the other hand, the defendant is a man of means, has been accustomed to land transactions, and had bought the whole lot of 122 acres for £30 but a few months before the verbal understanding, which he alleges to have taken place and afterwards been abandoned without being acted upon, that the plaintiff should accept half of the lot in lieu of £75; and the inability of the plaintiff to pay that sum and interest to *Walker*, in obedience to the requirement of the Commissioner, has transferred the plaintiff's improvements to the defendants. I presume that under these circumstances the defendants will not press for costs against the plaintiff.

1867.

McGonigal v. Storey.

Undue influence—Guardian and ward.

An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by the promise so given to her uncle, conveyed the lot selected by him, which was much more valuable than the other. The money (if any) paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and the institution of the suit impeaching the transaction.

Statement.

This cause came on for the examination of witnesses at Guelph. It appeared that the plaintiff had been placed by her father under the care of his brother, the defendant *Storey*, at the age of eleven months, with whom she continued to reside until her marriage, with the exception of occasional periods of absence on visits to other relatives, or when, after she had grown up, she went out to work at service: that her father had died in June, 1843, intestate, leaving her his only child; and having, during his life time, entered into a contract with the Canada Company, for the purchase from them of lots 19 and 20, in the 11th concession of the township of Downie, on which he had paid a portion of the consideration money; the balance was paid by the uncle, and the deed from the Company obtained in the name of the plaintiff; which, however, the defendant retained in his own custody without having acquainted her thereof until the execution of the impeached deed after her marriage. A doubt existed as to what money was made use of to pay the Canada Company, the plaintiff alleging that it was obtained from the sale of certain personal assets left by her father; the defendant asserting that he advanced the funds for the purpose.

1867.

McGonigal v. Storey.

The plaintiff came of age in August, 1856, and was married to the defendant *McGonigal* in 1860. While the plaintiff was resident in the house of the defendant he had represented to her that he had advanced £100 to pay the Canada Company, and urged her to convey to him one of the lots in consideration of such advance, which she accordingly promised to do, relying upon the assurances of her uncle that the advance of money had been so made by him, and that the land was not worth more than the sum so advanced. Shortly after the marriage of the plaintiff, and in September, 1860, the uncle obtained from the plaintiff a conveyance of the more valuable of the two lots (stated to be worth £500) for the alleged consideration of £100.

The bill charged that the deed had been obtained by undue influence, arising from the position in which the defendant stood towards the plaintiff; prayed that the conveyance might be set aside, and for further relief.

The other facts bearing on the questions involved are set out in the judgment.

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

Mr. *Crooks*, Q.C., for the defendant *Storey*.

The bill was *pro confesso* against the defendant *McGonigal*.

Judgment.

VANKOUGHNET, C.—The bill in this case asks that a conveyance by Mrs. *McGonigal* the plaintiff to the defendant *Storey* may be set aside. This conveyance was obtained under the following circumstances:

One *Adam Storey*, a brother of the defendant, and father of the plaintiff, in July, 1842, purchased from the Canada Company two lots of land for the price of

1867.

McGonigal v. Storey.

£112 10s. of which he paid at the time the sum of £52 10s. Shortly after this, and in the year 1845, *Adam Storey* died, leaving the plaintiff his only child and heiress-at-law and then about eight years of age. From the death of her father up to the time of her marriage she continued to reside with the defendant, her uncle, as one of his family, asssisting, it may be assumed, in the daily work of a farmer's house, and as she grew up towards womanhood, occasionally going out to service. Her father at the time of his death was possessed of some chattel property, and had about £50 out at interest. The chattels were converted into money by his brother the defendant, and the money out at interest was got in by him, altogether amounting to about £100. *Storey* does not appear to have owed any debts at the time of his death, except the balance of the purchase money on the two lots of land. The defendant *Storey* paid this balance to the Canada Company,

Judgment.

and procured from them a deed to the plaintiff. Unless for taxes he does not appear to have paid anything else for his deceased brother, and the amount paid for taxes is not shewn. He makes no claim for anything expended in the support of the plaintiff, and, I suppose, could not well do so, as she lived as much with her grandfather and grandmother for some years after her father's death as with the defendant *Storey;* and I suppose that her service as she advanced in years fully recompensed the defendant for any outlay on her. The defendant does claim, what seems a very preposterous and apparently improvised charge, for attendance on his brother in his last illness; at least we hear nothing of any such claim till the institution of this suit.

This being the position of matters, the defendant having assumed the position of executor, and having had in his hands money sufficient to pay the balance of the purchase money of the lands, he stated to the plaintiff, and he alleges now, that he paid this balance out of his own

funds; and he admits in his examination on his answer that before she came of age he obtained from her a promise that in consideration of such payment by him she would convey to him one of the lots.

He had previously visited these lots, and this he could only have done for the purpose of ascertaining their position and value. It is proved that the lot which he selected, and of which he procured from her the conveyance now impeached, is worth some $400 more than the other lot which he permitted her to retain.

The plaintiff, apparently against the wish of her uncle, had contracted to marry the other defendant, now her husband. A day or two before her marriage, and in her uncle's house and at her instance, as he alleges and his nephew swears, a settlement of accounts was come to between them, when a Mr. *Bateson*, a neighbour attended, or professed to attend on behalf of the plaintiff. He was examined and states that all he had to do was to see that the sums which the defendant *Storey* alleged were paid by him on behalf of the lands were correctly totted up. *Storey* stated the amounts—and a certificate was signed by *Bateson* and another neighbour, who attended on behalf of *Storey*, stating what this amount was. It was mentioned to the plaintiff, and it is sworn that she expressed herself satisfied with it. No information was furnished to her by the uncle as to the assets left by her father; nothing in fact was said about them. No information was given to her as to the relative value of the two lots of land, or as to the value of either of them. An inmate in her uncle's house under his protection—in fact he standing towards her in the position of a parent—she agrees to give him a deed of the lot in question. The following day she left her uncle's house; and, on that or the next day, married a man who appears to have been then, and ever since, a shiftless,

Judgment.

1867.

McGonigal v. Storey.

thriftless fellow—given to drink. For some time after their marriage he worked about in a neighbouring village as a labourer, and while so employed, and within three months after the marriage, the uncle procured him and his wife to execute the deed in pursuance of the previous promise by her.

It is impossible that a deed so obtained can stand. On every principle which animates the Court in dealing with such transactions between parties standing in the position towards one another that the plaintiff and her uncle did, the deed must be set aside. The deed was made after plaintiff's marriage, it is true, but a marriage which did not bring her much, if any, protection at that time from an influence which necessarily had been so long exerted over her. It was executed in pursuance of a promise extorted from her in her early youth, and repeated again while in her uncle's household: a promise which she seems to have considered binding upon her, though made in ignorance of everything that it was the duty of the uncle to tell her. She never even had possession of the deed to herself. She does not appear to have seen it till the occasion of her executing the impeached conveyance, when her uncle, who had always retained it, handed it to her. It is said that she had the protection which the statute law gives to a married woman, in her examination, apart from her husband, before two magistrates. But this examination, slight as is the protection which it affords, is intended to enable her to escape from coercion on the part of her husband. No such coercion is complained of here. The influence complained of is that of her uncle. But even were this examination intended to meet such a case, it could never be accepted as evidencing a voluntary disposition of property made in ignorance of facts which it was the duty, as here, of the grantee to communicate.

Judgment.

1867.

McGonigal v. Storey.

It is said that five or six years have elapsed since the plaintiff became acquainted with the position and value of the two lots of land, and that she is therefore too late in making her complaint. I do not think this delay merely would bar her; but it does not appear that she knew till very recently of her uncle's dealings with her father's estate; and as it was his duty to have informed her of these, so soon as she was able to understand them, and he did not do so, we will not assume, in his favour, that she heard of them otherwise.

The deed must be set aside with costs; the plaintiff paying to the defendant anything he may have advanced for the purchase of the land beyond the moneys of his brother's estate with which he is chargeable; and, as to this, inquiry, if either party desire it, with the usual consequent directions.

McDonald v. McMillan.

Principal and Agent—Trustee.

At a sale of lands under a writ of execution, the nephew of the execution creditor, a person without means, attended at the sale, and bid off the property; and, on a subsequent day, produced to the Sheriff the receipt of the plaintiff in the writ for the amount bid at the sale, and paid the Sheriff his fees, who thereupon conveyed the lands sold to the nephew, who was allowed by his uncle to retain the title in himself. The uncle subsequently agreed for the sale and conveyance of this land to a purchaser who made default in completing the bargain, and the nephew wrote to his uncle pointing out the proper proceedings to be adopted to compel the purchaser to complete the contract. The uncle died without any further proceedings in respect of such contract, having, by will, devised the property. The nephew, after the death of the uncle, set up a claim to be entitled to the property absolutely. On a bill filed by the devisee against the nephew, the Court declared the defendant to be a trustee, and ordered him to convey to the plaintiff.

Statement.

In the month of June, 1857, the late *Duncan McDonald*, of whom the plaintiff was the devisee, recovered

1867.

McDonald v. McMillan.

judgment at law against *Ronald McDonald* and *Angus McDonald*, and had a writ of *fieri facias* against their lands placed in the hands of the Sheriff of the United Counties of Stormont, Dundas, and Glengary: and the Sheriff afterwards, under a writ of *venditioni exponas*, sold the north-half of lot number thirty-two, in the seventh concession of the township of Lancaster. The defendant, who was a nephew of *Duncan McDonald*, and who was a law student, acted as the agent of *Duncan McDonald*, in various matters of business, and among other things the defendant, as his uncle's agent, instructed the Sheriff to advertise and sell the land. The defendant, who was a young man without means, attended the Sheriff's sale, and purchased the land in his own name; and a few days afterwards sent the Sheriff the money to pay his fees. The defendant applied to the Sheriff for a deed in his own name, and, upon his furnishing a receipt from his uncle for the purchase money, the Sheriff executed a deed to the defendant bearing date the 19th of February, 1859.

Statement.

This suit was instituted for the purpose of having the defendant declared a trustee of the land in question for the plaintiff, and for a conveyance.

It appeared that the defendant always recognised *Duncan McDonald*, as the real owner of the land, but that the latter allowed the defendant to retain the title in his own name, for the purpose of giving him a standing.

In November, 1859, *Duncan McDonald* entered into a contract with one *Donald Roy McDonell*, for the sale of this land and accepted in part payment, an assignment of a mortgage of one *Campbell*. This assignment was in the handwriting of the defendant, and he was a witness to its execution.

Donald Roy McDonell, having made default in the

payment of the balance of his purchase money, the defendant wrote a letter to *Duncan McDonald*, advising him as to the course he ought to pursue to compel *Donald Roy McDonell* to complete his purchase. 1867. McDonald v. McMillan.

It was contended by counsel for the defendant that all the circumstances shewed that *Duncan McDonald* intended to make the land in question a gift to the defendant.

It was urged on behalf of the plaintiff that the defendant's letter to *Duncan McDonald* and his other acts acknowledging *Duncan McDonald* as owner, precluded him from claming any beneficial interest in the land.

The case came on for the examination of witnesses and hearing at the sittings of the Court at Cornwall.

Mr. *J. S. McDonald*, Q. C., and Mr. *D. B. McLennan*, for the plaintiff.

Mr. *James McLennan*, and Mr. *James Bethune*, for the defendant.

VANKOUGHNET, C.—I think, for the reasons assigned by the plaintiff, that the bill in this case must be sustained. Judgment.

With regard to the argument that the testator here stood in *loco parentis* to the defendant, and that it must be considered, therefore, that the allowing the defendant to take the deed in his own name, though the property was purchased with the testator's money, is to be treated as an advance, it is to be observed that this inference or presumption of law, like any other such, may be rebutted by evidence; and I think the evidence here does displace this position assumed by the defendant. In the very inception of the purchase, in the

1867. letter of the 18th December, 1858, the defendant assumes the position of agent for the testator. He says he was residing at Williamstown at the time, at school, maintained by the testator. If so, then he must have come in here (*i. e.*, Cornwall) for the testator, to make the purchase at Sheriff's sale for him. The sale does not then come off; but takes place subsequently on the 8th of January, 1859, when the defendant purchased for £251—which is discharged by payment of the Sheriff's fees, transmitted from Williamstown by the defendant, who was then living with the testator, and amounting to $50, and which, of course, must have been the money of the testator; and by a receipt signed by the testator for the difference, £238 and some shillings, sent by or for the testator, to the Sheriff, in discharge of so much of the judgment. Now, had anything occured between the 18th of December, when the defendant wrote the letter of that date, and the 9th of January, 1859, to raise any inference that, on that latter day, the parties stood towards one another in any other or different relation than in that of the 18th? Passing from this commencement in the transaction to the last act of the defendant in relation to it, in the lifetime of the testator, on the 20th of September, 1865, we find the defendant, by a letter to the testator, treating the latter, as owner of the property, and advising him to take proceedings, in Chancery, to have the matter of the sale of the property by him to *Donald Roy McDonell* brought to an issue. It is not pretended by the defendant that this letter relates to anything else than the sale, hereafter referred to. Now, as the legal estate was, under the Sheriff's deed, in the defendant, if the beneficial interest were also in him, as since, *and for the first time since* the death of the testator, he alleges it to have been, why have written the testator this letter? Why have troubled him in the last few weeks of his existence with the prospect of a Chancery suit? In the inception and at the close of the communications between these two

McDonald v. McMillan.

Judgment.

parties, the defendant treats the testator as owner of the property and himself as merely agent, and so trustee. Did anything occur intermediately to alter this relation? Two acts of great significance, accompanied by expressions, in connection with them, of importance, were done by the defendant in that intermediate period, which showed that he treated the testator as owner of the property. One was, his concurrence in the sale by the testator to *Donald Roy McDonell*, evidenced by his having drawn an assignment to the testator from *Donald Roy McDonell* of a mortgage to the latter by one *Campbell*, and which, it is proved, was to be transferred to the testator, as part of the consideration for the sale by him of the lot. Not only did the defendant prepare this assignment, but he swore to the execution of it as a subscribing witness, in order to procure its registration. The other act was the preparing a conveyance for the testator to execute, and, which he did execute, by which, certainly, the testator assumed to convey this property as his own to one *George McDonell*, who had agreed to take it in security from the testator. On that occasion the defendant assured *George McDonell* that his uncle's title was all right—that though the deed stood in his (defendant's) name, he was to make a deed back to his uncle; and he thus induced *McDonell* to take the title from the testator. Now, if, as was argued, might have been the case, the defendant had merely lent this land to his uncle, the testator, there would have been nothing surprising in it, or inconsistent with his being the beneficial owner of the property. He was under great obligations to his uncle, who had provided for him in his youth, and had secured him a place in the legal profession as a barrister. But the defendant did not pretend he was lending the land to his uncle. He did not offer to join, nor did he join, in a deed of it for the purpose of making a loan: but, on the contrary, he declared the land to be his uncle's, and allowed *McDonell* to take the deed from the uncle as owner. He could

1867.

McDonald v. McMillan.

Judgment.

1867.

McDonald v. McMillan.

not of course have set up his own title against *McDonell* after this: and *McDonell*, acting in good faith, on his security being discharged subsequently, conveyed this land to the plaintiff, as the devisee of the uncle. Now, all this is consistent with the position which the defendant at the first and at the last assumed to the testator; and it is inconsistent with any other position. His last transaction with the testator was the drawing of his will, by which the testator left him certain property—but not this.

It is said, however, that the testator more than once declared that the property was the defendant's, or referred parties who had business, or offers to make, in regard to the lot, to the defendant. Now, besides the danger of relying upon mere expressions dropped in casual conversation, and particularly by a man noted for peculiar phraseology, as the testator was, there was really nothing surprising in the testator, though the owner of the property, referring applicants to the defendant. The latter from boyhood had attended to business for him; while a student-at-law, he managed, as far as a student could, his uncle's legal business: he was entrusted with his moneys; and, at least in one other case, it is proved, beyond doubt, that he purchased at Sheriff's sale for his uncle, but in his own name, a valuable property. Moreover, the testator had a dispute with the family of *Donald Roy McDonell* as to the amount of purchase money due. They claimed a deduction which he would not make; and, a man of well-known cunning, to get rid of their applications or importunities, he referred them to defendant, who not only held the legal title, but was his man of business. The most I think the language of the testator (independently of these references to defendant), as given by the witnesses, amounts to, is this: that he intended the land for the defendant, or that he had given it, or would give it to him. It would not be safe, in oppo-

Judgment.

sition to the defendant's own letters and acts, to put any other construction upon it. If, as I find it to be, the defendant purchased as the testator's agent, and with the testator's money, and so became his trustee, it would require something more than the mere declarations of the testator, or even a verbal gift of the lands to him, to deprive or relieve the defendant of his fiduciary character. 1867. McDonald v. McMillan.

In addition to all this, it is clear that the defendant never interfered with the possession of the land—never exercised control over it—never claimed the purchase moneys received by the testator—never asserted any right to the balance. On the contrary, he was, after these moneys had been secured or received, the admitted debtor of the testator, apologizing to him for not paying him, and borrowing money from him.

I must decree, as I now do, that the defendant held the deed as trustee for the testator in his lifetime, and holds it as trustee for the plaintiff the devisee, and that he must execute the necessary conveyance to place the title in her, and pay the costs of this suit. The Master will settle the conveyance, as usual, in case the parties differ. Judgment.

1867.

MULHOLLAND v. DOWNES.

Injunction, committal for breach of—Settlement of suit—Condition.

After an injunction restraining the felling of timber had been issued and on the same day the writ was served, the plaintiff entered into a written agreement with the principal defendant in the cause, by which the latter agreed to give up possession of the premises in question on a particular day, and to refrain from cutting or removing any timber cut in the meantime; and the plaintiff thereby agreed "that I, the said T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," &c. The defendant, having, notwithstanding continued to cut down and remove the timber, a motion was made to commit him for breach of injunction, when it was *held* that the suit was still pending, the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit.

Mr. *Hodgins*, for the plaintiff, moved on notice to commit the defendant *Sheldric* for breach of injunction under the circumstances stated in the head-note and judgment.

Mr. *J. Curran*, contra.

Judgment. SPRAGGE, V. C.—An injunction was granted on the 8th of May, 1866, restraining the defendants *Sheldric* and *Buckbee* from cutting timber and other trees, on a certain property of the plaintiff. This injunction was served on the 11th of the same month, and it is clear, from the affidavits, that unless the effect of this injunction has been in some way intercepted, there has been a breach of it by *Sheldric*.

The present is an application to commit *Sheldric* for an alleged breach. He contends that this suit was compromised, and put an end to, by an agreement entered into between the plaintiff and himself, on the

11th of May, the same day that the injunction was served. 1867.

Mulholland v. Downes.

The agreement is in writing, and is put in. It consists of a lease of thirty acres of the lot of land mentioned in the injunction, from the plaintiff to *Sheldric*, up to the 1st of October, then next. It contains provisions as to cordwood then already cut upon the land, and *Sheldric* thereby agrees and binds himself not to cut or remove any timber of any description except for his own firewood, and that to be taken from the lying timber. The agreement does not authorize *Sheldric*, to do anything which was by the injunction forbidden to be done. The agreement, however, contains this stipulation, upon which *Sheldric* relies:

"It is further agreed that I, the said *Thomas Mulholland*, do hereby, upon the above conditions being complied with, withdraw all suits now pending against the said *Shadrac Sheldric*, and the above named *Price Buckbee*, and also do hereby exonerate the said parties from all costs now incurred in a suit now pending in Chancery against the said parties." Judgment.

The language employed is obviously inaccurate. Literally taken, the plaintiff professes *then* to withdraw all pending suits, but it is upon certain conditions being complied with, which necessarily points to the future. The two taken, each by itself literally, do not consist: taken together what is their meaning?—Is it that the plaintiff agrees that he will, upon the conditions being complied with, withdraw the pending suits, or that he agrees then to withdraw them upon the engagement of *Sheldric* to comply with the conditions? Upon either construction some words must be understood. In *Roberts* v. *Brett*, which was a case before the English Court of

(a) 18 C. B. 561—6 C. B. N. S. 611.

1867.

Mulholland v. Downes.

Common Pleas, and before the Exchequer Chamber in Appeal (*a*), the principles upon which written instruments are construed was a good deal discussed. In the case before me the question is, whether or not the performance by *Sheldric* of the conditions referred to in the stipulation that I have quoted, was or was not a condition precedent to the withdrawal by the plaintiff of the pending suits. A similar question arose in *Roberts* v. *Brett*. In the Common Pleas, Sir *John Jervis* thus stated the rule upon this point: "Where on the whole it is apparent that the intention is, that that which is to be done first is not to depend upon the performance of the thing that is to be done afterwards, the parties are relying on their remedy, and not on the performance of the condition; but where you plainly see that it is their intention to rely on the condition and not on the remedy, the performance of the thing is a condition precedent." The word "upon" is sometimes used in the sense of "after." Two instances of its use in that sense are given by Mr. *Dwarris* in his Treatise on Statutes, page 692, and their construction; one is "Roman Catholics may hold office upon taking certain oaths," the other is "on admission" in the case of copyholds. I do not see in what other sense it can be used in the agreement in question: that would plainly be its sense but for the words "do hereby;" and I think it is used in that sense, notwithstanding those words. But taking the word "upon" in its ordinary meaning in such a connection, and applying the rule of construction enunciated by Sir *John Jervis* to the whole passage, is it not obvious—I confess it appears so to me—that it was the intention of the plaintiff to rely on the condition and not on the remedy? The words "upon the above condition being complied with," appear to me to manifest such an intention, with almost absolute certainty. In *Roberts* v. *Brett* the use of the word "forthwith" created some doubt, as the words "do hereby" in this case make the construction less plain; but the construction of the agreement is to

Judgment.

1867.

Mulholland v. Downes.

be gathered from the whole of it. We are to see what, in the words of Mr. *Justice Coleridge* in the same case, is the essence of the contract, and that I am satisfied in this case was, that the plaintiff should withdraw the then pending suits *upon*, that is, *after Sheldric* had performed the conditions on his part to be performed; in other words, that the performance by him of those conditions, was a condition precedent to the withdrawal of the suits by the plaintiff.

I have been anxiously careful to arrive at a correct construction of the agreement before pronouncing an order for the commitment of a party. Having come to the conclusion that this suit is still pending, and the injunction in force, I have only to add that this seems a proper case for the commitment of the offending party. His breach of the injunction has been flagrant and defiant. It will lie upon him hereafter to make application for his discharge. The order is granted with costs.

BRANDON v. ELLIOTT.

Practice—Injunction by defendant.

If an injunction may be granted to a defendant before the hearing (as to which, query?), the answer must pray therefor specifically.

Statement.

The defendant moved for an injunction to restrain the plaintiff from proceeding with his execution at law. On behalf of the plaintiff it was objected, that a defendant cannot move for an injunction before decree; that if he can in any case make such a motion before decree, he must shew that an injunction was prayed for by the answer. The answer prayed, that the defendant might be discharged from the judgment, and that satisfaction might be entered on the roll, but did not pray an

1867.

Brandon v. Elliott.

injunction against proceeding meanwhile, it not having been anticipated, when the answer was filed, that the plaintiff would proceed at law on his judgment. It was admitted that such a prayer as the answer in this case contained, if contained in a bill, would not enable a plaintiff to move for an injunction.

Mr. *Spencer*, for the defendant.

Mr. *J. Bain*, contra.

MOWAT, V. C.—[After stating the facts as above set forth]—I think that, if the General Orders entitle a defendant to move for an injunction before decree—as to which I say nothing,—it must be prayed for in the answer in the same manner as in a bill; and this motion must, therefore, be refused with costs, except of the affidavits filed by the plaintiff, and the second appearance in Court.

ANDERSON v. PAINE.

Charitable uses—Voluntary bond—Injunction.

A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's lands.

A judgment having been recovered against the obligor's executors on a voluntary bond in favor of a charity, and execution having been issued thereon against his lands, the Court, at the suit of the heirs, restrained further proceedings on such execution.

Statement.

This was a bill by one of the heirs-at-law and next of kin of *Jacob Beam*, on behalf of himself and the other heirs and next of kin, to prevent a judgment, recovered by the defendant *Cyrus F. Paine*, treasurer of the defendants "The New York Baptist Union for Ministerial

1867.

Anderson v. Paine.

Education" (a corporation) against the executors of the deceased, from being recovered out of his real assets.

The deceased, on the 18th November, 1854, executed a voluntary bond in the following words: "Know all men by these presents, that I, *Jacob Beam*, of Beamsville, C.W., am holden and firmly bound to *Cyrus F. Paine*, treasurer of the board of trustees of the New York Baptist Union for Ministerial Education, located at Rochester in the State of New York, in the sum of $2000, to be paid to the said *Cyrus F. Paine*, his successors in office, or any duly authorized agent of the said board of trustees: payment hereof to be made within six months after my decease; for which payment, well and truly to be made, I bind myself, my heirs, executors, or administrators, firmly by these presents, signed with my hand, and sealed with my seal, and dated November 8, 1854." The testator died in June, 1858, leaving a will, dated 2nd June, 1857, which is set forth in the judgment of the Chancellor in the case of *Anderson* v. *Kilborn*, reported ante volume xiii., page 219. This will contained a bequest of $1000 to "The Rochester Theological Baptist Institution," if they should produce to the executors the testator's promise for the same, to be paid in one year after his decease. The executors proved the will. On the 19th February, 1863, the plaintiff filed a bill against the executors, and certain charitable corporations named in the will, and the Attorney-General. "The Rochester Theological Baptist Institution" allowed the bill to be taken *pro confesso* against them, and the Court declared the bequest in their favor void so far as it affected the realty. The decree was made on the 8th January, 1867; but, in the meantime, viz., on the 18th November, 1865, a judgment had been recovered by Mr. *Paine* against the executors on the bond. On the 24th of the same month an execution was issued against the testator's lands on this judgment; and the writ was renewed on the 20th November, 1866.

Statement.

der

1867.

Anderson v. Paine.

this writ the Sheriff seized lands of the deceased, and advertised the same for sale. The defendant's proceedings having in this way come to the knowledge of the plaintiff, he filed the present bill, and obtained an interlocutory injunction on the 6th May, 1867, to restrain further proceedings.

The cause came on for hearing upon bill and answer, there being no dispute between the parties as to facts. The bill alleged that in giving a legacy of $1000 to "The Rochester Theological Baptist Institution," the testator meant the defendants, "The New York Baptist Union for Ministerial Education," and that he had named $1000 in forgetfulness that his "promise" was for $2000; and the bill stated that the plaintiff was not aware of the mistake in the defendant's corporate name until after the decree in his other suit.

Statement.

The bond was not enrolled or registered; and the question in the suit was, as to the right of the donees to enforce it as against the donor's real estate.

Mr. *Miles O'Reilly*, Q. C., for the plaintiff, cited *Fisher* v. *Brierly* (*a*), *Jeffries* v. *Alexander* (*b*), *Strickland* v. *Aldridge* (*c*).

Mr. *Roaf*, Q. C., for the defendants, cited *Paine* v. *Kilbourne* (*d*).

Judgment.

MOWAT, V.C.—There is no doubt of the validity at law (*e*) of the instrument under which the claim of the defen-

(*a*) 10 H. L. 159.
(*b*) 8 H. L. 594.
(*c*) 9 Ves. 519.
(*d*) 16 U. C. C. P. 64.
(*e*) Jeffries v. Alexander, 8 H. L. 594; Paine v. Kilbourne, 16 U. C. C. P. 64.

dants arises; there is no doubt, either, of its validity in equity, so far as the bond affected any pure personalty which the donor left at the time of his death; and it is settled by a late case in the House of Lords (*a*), that such an instrument may be valid at law, and valid to this extent in equity, and yet not entitle the donee to enforce it against the donor's real assets. The question in the suit is, whether this is the effect of the instrument for which the judgment has been recovered. The plaintiff contends that it is.

1867.

Anderson v. Paine.

The contention is founded on the English Statute relating to charitable uses (*b*), which is in force in this country. This Statute recites, that "gifts or alienations of lands, tenements or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs: for remedy whereof" it is enacted, "that no manors, lands, * * shall be given * * for any estate or interest whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift * * be made by deed, indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of (the) donor, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof," &c. The 3rd section enacts, "That all gifts * * of any lands, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect

Judgment.

(*a*) Jeffries v. Alexander, 8 H. L. 594. (*b*) 9 Geo. II., ch. 36.

1867. Anderson v. Paine.

any lands, * * to or in trust for any charitable uses whatsoever, which shall * * be made in any other manner than by this Act is directed, shall be absolutely and to all intents and purposes null and void."

The Act does not limit the power of persons to dispose of personalty, not savoring of the realty, by will or otherwise, in favor of charities, to any amount whatever, provided it is not required to be laid out in the purchase of land or real securities. The operation of the Act is confined to land. The donor is not to give land, or any charge or incumbrance on land, unless he gives it during his life, to take effect immediately, and not to the mere disherison of heirs the donor retaining the enjoyment of it himself as long as he lives; and to prevent death-bed gifts, which fear may extort, the gift must have a certain amount of publicity, and be made a specified time before the death of the donor. Alienations of land to charitable uses were deemed by Parliament, "prejudicial to and against the common utility," "a public mischief," and which should therefore be restrained and limited, though not entirely prohibited. Accordingly, the restraints and limits set forth were imposed.

Judgment.

In construing this Statute, it has been settled by repeated decisions, that a gift of lands cannot by any contrivance or form of words be by will charged upon, or made payable out of, land; and that, if there is a deficiency of pure personalty to pay all a testator's legacies, the Court will not even marshal the assets in favor of a charity, it being held that this would be an indirect violation of the Statute.

The instrument here was, indisputably, as mere a gift as a bequest would have been, and was not to take effect until after the donor's death. It did not in the smallest degree interfere with his using and enjoying and dealing with any of his property during his life:

and after his death all claim under the bond, apart from the objection arising on the Statute, was subject to the donor's debts; for a voluntary bond was expressly held by the Lords Commissioners in *Fairband* v. *Bowers* (*a*) to be in the nature of a legacy; and the learned Lords in *Jeffries* v. *Alexander* (*b*) expressly recognised the propriety of that decision, and the accuracy of the language of the Lords Commissioners.

1867.

Anderson v. Paine.

Now, I find myself unable to perceive any substantial difference, for the purposes of the Statute, between a bequest and a gift by a writing of this kind. If by no possible form of words in a will, real assets can be made liable for such a gift, I do not see how a donor can be free to accomplish the forbidden purpose by adopting the form of a bond for the money, payable after his death. A testator gives a sum of money to a charity, and says nothing as to its being paid out of real assets, or how else; the general rule of law is, that all bequests are to be paid out of personalty, and out of chattels real as well as other personalty; and if the testator's estate consists partly or wholly of real assets, what then? Is the rule referred to allowed to operate for the benefit of the charity? The Courts have held not; that such a course is in effect forbidden by the Statute. So, a man, instead of making a gift by will, or besides making it by will, executes a bond like that here; judgment and execution are obtained on this bond after his death; the general rule of law is, that real assets as well as personal are liable to execution; is this rule to operate for the benefit of the charity? It seems to me that precisely the same reason must be held to forbid this also; that to allow it would be in effect allowing the purpose of the Statute, as interpreted by the cases, to be defeated. In order to exclude from the real assets the gift by will, it is not necessary that the testator

Judgment.

(*a*) Prec. Ch. 17.

(*b*) 8 H. L. 594.

1867.

Anderson v. Paine.

should appear to have had in his mind that way of paying; it is entirely immaterial whether he had or not, —whether he is proved, when he made his will, to have had to his own knowledge abundance of pure personalty to pay all his debts and legacies, or to have had all his means in mortgages and other real securities: the Statute is held to forbid the application of real assets to pay such a legacy, whether the testator did or did not contemplate a state of his property at the time of his death, which should leave no other assets to pay his legacies. Must not the same rule be acted upon, if the gift is, in form, by a bond payable after death?

Judgment.

Again, if this instrument contained an express covenant that the money should be paid out of the donor's real estate, nobody doubts that this covenant would be void. Would it not be absurd to hold that precisely the same result as such an illegal covenant would provide for, may be obtained by omitting to make the provision? That the law will do what the party dare not covenant for? If so, the means of defeating the Statute, which hitherto has been found almost impossible, will henceforward be extremely easy; a very simple means, which the parties here have contrived, or stumbled upon, will have proved to be more effectual than any which the learning and ingenuity of English lawyers for the last hundred years and more have been able to discover.

The case of *Jeffries* v. *Alexander* (*a*) was referred to, on the part of the plaintiff, as supporting his contention. But it was also cited on the part of the defendants as shewing, that the donees have a right to enforce payment out of lands, in the absence of any evidence that the purpose of giving the bond was to

(*a*) 8 H. L. 594.

give the donees that right. Now, is it not to be presumed that the purpose, or one of the purposes, for which a bond was given, instead of a mere bequest, was to enable the real estate to be reached if necessary? Is this not a much more likely purpose than the suggestion, that the donor by giving the bond merely wished to deprive himself of the power of revoking the gift? By the writing he expressly binds his heirs, and not his executors only, to the due fulfilment of the promise. Does not this binding of his heirs of itself afford sufficient evidence, that the source from which the money would come was a matter present to the donor's mind, and an object he had in view in giving the bond?

I do not, however, read the observations of the law Lords in the way contended for on the part of the defendants. Their Lordships were of opinion that the donor, in the case before them, had the state of his assets in view, and gave the covenant which was in question for the express purpose of enabling his gift to be paid out of the real assets, most of his means being of that description. This express purpose was therefore remarked upon, and relied on, in the judgments of their Lordships; but after a careful perusal of their judgments, I am unable to say that they pronounced the proof of intention in this respect essential to the invalidity of the covenant; or that they were prepared so to hold. There was much difference of opinion among the learned Judges who at its various stages were called on to consider that case. But all of them who held the covenant to be good against the real assets, were of opinion that if the covenant was valid at law for any purpose, it was effectual in equity as well as at law for all purposes. The reverse, however, having been ultimately decided, I am not embarrassed with that view in deciding the case before me; and, perhaps, but for their opinion on this point, less difficulty would have been felt by the learned Judges in

Judgment.

1867.

Anderson v. Paine.

adopting the view, afterwards affirmed by the House of Lords, as to restricting the payment to the donor's pure personalty.

Lord Chief Justice *Cockburn* was one of the Judges whose opinions were called for by the House, and he expressly declared that he considered the intention of the donor as to paying out of his real assets to be immaterial. The covenant, like that in the present case, was general, and the Lord Chief Justice observed (*a*): "It is not necessary to repeat the words of the Statute or the construction that has been put upon them, and by which they are applicable to mortgages as well as real estate; and then the question is, substantially, whether a covenant that the executors of the covenantor shall, for the benefit of certain charitable uses, apply £60,000 to be raised out of his chattels real, is a good covenant. It would be admitted that in this form it would not; but it is said that if by a covenant he creates a debt, and thereby enables the covenantee to sue the executors, and obtain indirectly what it would have been unlawful to obtain directly, the covenant is good, and the object may be accomplished. It appears to me that this is quite opposed to the whole spirit of the English law, and to the general current of authorities; and I think it is quite unimportant whether this was a devise on the part of Mr. *Brame* (the donor) or not; he may have been utterly ignorant that there existed such a Statute as the 9 Geo. II., and may have had no intention to break it, or evade it. I form my opinion quite independently of the motive of Mr. *Brame*, or his intention, but upon this plain ground, that if it is not lawful to grant or transfer, or to charge or encumber, a certain description of property for a particular purpose, it cannot be charged or encumbered by creating a fictitious debt, on which an execution may issue to produce exactly the same result."

Judgment.

(*a*) Page 643.

1867.

Anderson v. Paine.

It was not necessary to adopt this view in pronouncing judgment against the charity, as there was evidence of the intention, motive, or device which the Lord Chief Justice held to be unessential; but much of the reasoning of the three learned Lords who advised the order which was made by the House, is quite independent of the supposed motive or device of the donor.

Thus, Lord *Campbell* observed (*a*): "I agree in all that has been said about Courts of Justice not being able to prevent the mere evasion of a Statute; but if what is called an evasion, is a clear violation of the Statute, Courts of Justice are bound to see that the expressed intentions of the Legislature shall not be defeated. Is it not the expressed intention of the Legislature by this Statute, that without conforming to the requisitions specified in the first section, a man shall not in his lifetime, by any gift or settlement, appropriate his chattels real to be applied at his death to charitable uses, he remaining in the possession of the chattels real, and having complete control over them till he dies? Is not the Statute violated by a person doing what certainly and inevitably leads to such appropriation at his death, after such possession and control during his life? * * Supposing that, at the time of his death he had no property whatever except mortgages, and that, instead of executing a deed, he had, by his will, left the £60,000 to charitable uses, without expressly charging the legacy on the mortgages, would not this have been an infraction of the Statute, as much as if he had charged the legacy on the mortgages, or had bequeathed the mortgages to be sold, and the proceeds to be applied to the endowment of the charities? Surely that may not lawfully be done indirectly which the law forbids to be done directly."

Judgment.

Lord *St. Leonards*, in summing up his argument, made

(*a*) At page 646.

1867.

Anderson v. Paine.

the following observations (*a*), and it will be perceived their force does not at all depend on the proof of any device to evade or purpose to violate the Statute. "It comes then, my Lords, at last to this. Looking at the gift by this deed, considering it as a valid deed, and as binding on such parts of the personal estate as in the case of a legacy to a charitable use would be answerable to pay that legacy; how does the matter now stand? As an intended charge, or as an indirect charge, upon these identical chattels real in violation of the Statute, I think the attempt is perfectly fruitless. But if we look at the matter as it stands, in point of administration of assets, nothing can be more simple; the law of the Court of Equity is so perfectly clear upon that subject. We all know that if a legacy is given to a charitable use generally, when the Court comes to deal with the assets, it has become the settled rule of the Court, after some difference of opinion, and is now a rule which no one can disturb, that in the administration of assets you cannot, in the case of a legacy to a charity, have a marshalling of the assets as you would have in the case of other legacies, so as to let the charitable legacy be thrown wholly, or as far as it could be thrown, upon the pure personalty. I ask your Lordships to consider, does or does not the gift by this deed, as the rule of equity stands, putting it on the highest ground on which you can place it, amount simply to a legacy, a legacy secured or directed by a deed, but still a legacy in the creation of it, a legacy in the gift of it, a legacy in the administration of assets for the payment of it, a legacy in all characters and qualities that it can possibly have? Well then, what follows? Why, that every gift to a charitable use out of personal estate binds the whole personal estate. You take it as it is given, and it is payable out of the entire personal estate. Then, you have

Judgment.

(*a*) At p. 664.

1867.

Anderson v. Paine.

to consider whether you can apply the whole of the personal estate *pro rata* to the payment of that particular legacy. The Statute forbids it. Well, if the Statute forbids it, what have you to do? Marshalling the assets for this purpose is entirely out of the question, because that is a settled rule which nobody can alter. Then, if there can be no marshalling of assets for this purpose, can it be paid out of the chattels real? In this instance there is no other source. Clearly and unquestionably, it cannot. To pay out of the chattels real would, in my opinion, be a direct violation of the Statute of Mortmain."

Lord *Kingsdown* was still more explicit in the same direction, and, indeed, states expressly and unequivocally that the intention is immaterial:—"If it is in effect a gift, it can make no difference whether the gift is made by deed or by will. If it would be a violation of the Statute 9 George II. chapter 36, to permit it to take effect against real estate in the one case, it must equally be so in the other. * * The gift is not more a violation of the Statute because it is made by a testamentary paper than if it be made by deed affecting the same assets; if the legacy is an appropriation of the assets of the testator, so is a gift which affects only the assets (*a*). * * To me therefore, it appears that, upon the plain language of the Statute, interpreted, as it must be, by settled rules of construction, the deed in question is, in effect, an attempted appropriation of the assets of the testator after his death to charitable purposes; and that to the extent of real estate and of chattels real, the law will not permit such appropriation; and that the gift must fail. In my view, it is not merely a contrivance to evade the Statute and defeat the policy of the law, but the mode of doing it, the act as well as the the intention, is in the teeth of the Statute (*b*). * * If, therefore,

Judgment.

(*a*) At page 677.

(*b*) At page 678.

1867.

Anderson v. Paine.

the deed now under consideration had been far less directly within the terms of the Statute than it seems to me to be, I should think that the Court ought on this ground to refuse it effect. * * The learned Judges, in referring to *Collinson* v. *Pater* (*a*), observe that in all the cases the devise or conveyance in question operated directly upon something which was a chattel real, or charge upon real estate. But in that very case the gift was not of the judgment debt specifically to the charity; it was a general bequest to executors, with a direction to get in debts, realise the assets, and invest the residue for charitable purposes. The common case of a pecuniary legacy, given without the least reference to the state of the assets, fails to the extent in which the assets consist of chattels real, not because the devise to the charity operates directly on the chattels real, but because in the ordinary legal administration of assets chattels real would be applied to the payment of the legacy."

Judgment.

This case thus, as a decision, establishes two things—first, that a covenant may be so far valid that an action can be maintained on it, and execution be levied on the donor's personalty, and yet may not be enforceable against his real assets; and second, that a covenant for the benefit of a charity is not enforcible against real assets where the donor's object is to make the gift payable out of these, and the covenant was given with that view. But the case does not determine what the effect of the judgment would be in the absence f proof of such purpose cr device; it does not pronounce such proof to be essential, or non-essential, to the restriction of the judgment to pure personalty; but I think it follows from the first point so decided, and from principle, that proof of such a device is not essential; and I find support for this view in the judgment of Lord *Kingsdowne*, which is to the very

(*a*) 2 Russ & M. 344.

point, and in much of the reasoning of the other two law Lords who decided the case. 1867.

Anderson v. Paine.

My opinion in reference to the case before me is, that the donor intended to make his gift payable, if necessary, out of his real estate; but that it cannot be enforced against his real estate, whether he had such an intention or not; that to allow it to be so enforced would be against the true meaning of the Statute as interpreted by past decisions. The decree will be accordingly, and the defendants will be restrained from enforcing any execution against the testator's lands. Declare all parties entitled to their costs out of the testator's estate.

BOULTON v. THE CHURCH SOCIETY OF THE DIOCESE OF TORONTO.

Aff. on Appeal 15 Gr. 450

Pleading—Parties.

A bill was held to lie by a Corporator of the Church Society of the Diocese of Toronto, on behalf of himself and all other members of the Society, to correct and prevent alleged breaches of trust by the Corporation.

To such a bill the Attorney-General is not a necessary party.

Statement.

The original bill in this cause was filed by the present plaintiff *William Henry Boulton*, and *William Armstrong*, against *The Church Society* and *The Attorney General*. A demurrer was filed to this bill on the ground that the bill was defective in point of form, as the bill should have been on behalf of the plaintiffs and all other members of the Society. This demurrer was allowed by Vice-Chancellor *Mowat*, as reported ante volume xiii, page 552.

The bill was subsequently amended by striking out the name of *William Armstrong* as a co-plaintiff, and

1867.

Boulton v. The Church Society.

of the *Attorney-General* as a defendant, and introducing the formal words held on the demurrer to be necessary.

To the bill thus amended the defendants demurred on two grounds: first, that the suit should be by the *Attorney-General*; and, second, that if a suit by the plaintiff on behalf of himself and the other corporators is proper, the *Attorney-General* should be a defendant.

The demurrer came on to be argued before Vice-Chancellor *Mowat*.

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

Mr. *Strong*, Q. C., contra.

Skinners' Co. v. *The Irish Society* (*a*), *The Attorney-General* v. *Vivian* (*b*), *The Attorney-General* v. *Fea* (*c*), *Wellbeloved* v. *Jones* (*d*), *The Attorney-General* v. *Gaunt* (*e*), *Nash* v. *Morley* (*f*), *Lewin* on Trusts, pages 20, 396, 665 and note,—668, 673, and cases there cited, were referred to by counsel.

Judgment.

MOWAT, V. C.—On the first point argued I expressed my opinion in giving judgment on the former demurrer (*g*); but the question was again argued at considerable length, and I have given my best consideration to what was advanced by the learned counsel for the defendants in support of his contention, without perceiving any reason for changing my opinion.

The learned counsel contended that *Paterson* v. *Bowes*, and the other authorities to which I referred in my judgment on the former demurrer, have no application

(*a*) 12 Cl. & F. 425; S. C. 7 Beav. 593.
(*b*) 1 Russ. 226.
(*c*) 4 Mad, 274.
(*d*) 1 S. & S. 140.
(*e*) 8 Sw. 148.
(*f*) 5 Beav. 177.
(*g*) 13 Gr. 552.

1867.

Boulton v. The Church Society.

to the case of a charity, and that the rule of this Court requires every suit of that kind to be brought in the name of the Attorney-General, whatever may be the rule in regard to suits respecting the property of municipal and other corporations. But the books do not bear out this view, for they are full of cases in which trustees, and parties interested, have been permitted to sue in their own names in respect to charitable funds and property. I refer, amongst other cases, to *Nash* v. *Morley* (*a*), *Wellbeloved* v. *Jones* (*b*), *Powerscourt* v. *Powerscourt* (*c*), *Davis* v. *Jenkins* (*d*), *Milligan* v. *Mitchell* (*e*), *Horde* v. *Earl of Suffolk* (*f*), *Giblet* v. *Hobson* (*ff*), *Broom* v. *Summers* (*g*), *Perry* v. *Shipway* (*h*), *Jauncey* v. *Attorney-General* (*i*), *Shakespeare* v. *Thomson* (*j*) *Hipwell* v. *Ward* (*k*), and *The Charitable Corporation* v. *Sutton* (*l*).

Judgment.

The case of the *Skinners' Company* v. *The Irish Society* (*m*) was a good deal relied upon on the part of the defendants; but it really affords no support to the demurrer. The plaintiffs' bill in that case was founded on the allegation, that the Irish Society were trustees for the plaintiffs and certain other companies; and it was held that they were not trustees for these companies; that they were trustees for certain public purposes independent of the companies, and had a discretion in applying the funds in question to these purposes; and that it was a matter of discretion whether to give anything, or how much, to the companies: it was on these grounds that the suit failed. But in that very case it

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(*a*) 5 Beav. 177.
(*b*) 1 S. & S. 40.
(*c*) 1 Moll. 616.
(*d*) 3 V. & B. 151.
(*e*) 1 M. & K. 446; S.C. 3 M. & C. 72.
(*f*) 2 M. & C. 59.
(*ff*) 3 M. & K. 517.
(*g*) 11 Sim. 353.
(*h*) 1 Giff. 1; S. C. 4 DeG. & J. 353.
(*i*) 3 Giff. 308.
(*j*) 3 Giff. 547.
(*k*) 1 DeG. F. & J. 399.
(*l*) 2 Atk. 401.
(*m*) 12 C. & F. 425.

See also cases cited post, and G. O. 3rd June, 1853, No. 6. Rule 7.

1867.

Boulton v. The Church Society.

was held, that, though the property was held by the Society for public purposes, and the Crown might therefore call the Society to account, yet the City of London might do so also. Thus, the Lord Chancellor, after shewing that the Irish Society were public officers, observed: "If they are public officers, and have in any respect neglected their duty, they are liable to account; but they are not liable to account to the companies. They may be liable to account to the Crown; they may be liable to account for misconduct to the Corporation of the City of London; they are elected by the City of London; they are half of them removed every year. The City of London can exercise a control over them if they misconduct themselves; they can be restrained and kept in order by the authority of the City of London, or by the authority of the Crown if they are public officers; but they are in no respect, as it appears to me, amenable to the private companies for the manner in which they perform their duties."

Judgment.

It was further urged, that where a matter affects the whole public, or a considerable portion of the public, no individual can sue without shewing some interest peculiar to himself; and that the plaintiff here has no interest except in common with every member of the Church of England. But I think that the circumstances of the plaintiff's being a corporate member of the Society, and being a contributor to its general funds, do give him a peculiar interest, if such is necessary, in their proper application, and in freeing these funds from liability to make good to the Clergy Trust Fund any losses arising from neglect of duty by the Corporation. I cannot, on any satisfactory ground, distinguish the sort of interest which the plaintiff has in these funds, from the interest a corporator has in funds, a share of which is to be returned in some form to his pocket. Money is only desired by most men for the purposes to which it can be applied; and some of the uses which all good men desire money for,

1867.

Boulton v. The Church Society.

are just of the description to which the funds of this Society are devoted (*a*).

Again, every corporator is also a trustee of these funds, and is responsible for any misapplication of them to which he is a party. This personal responsibility was not disputed on the argument. Now, it is the settled rule of the Court, that a trustee may always, for his own protection and that of his *cestuis que trust*, come into this Court against his co-trustees to recover and secure the trust fund, and without making any of the *cestuis que trust* parties (*b*).

It was argued, that the plaintiff here, according to the statements of his bill, is not responsible for the breaches of trust which he alleges to have taken place, as he says that he resisted them. But mere resistance to a breach of trust has never been held to exonerate a trustee from liability. He must, as a general rule, take active steps to prevent the wrong (*c*), even though, in a matter of sufficient importance, this should involve the necessity of bringing a suit. This is part of the duty which he assumes when he accepts the trust.

Judgment.

The trust funds are very large; the Commutation Fund is stated in the bill to have amounted to £224,900 16s. 8d.; and to this sum is said to have been added a grant of £7500 from a Society in England for the Propagation of the Gospel: the two sums constituting the "Clergy Trust Fund." The amount of the general funds of the Corporation is not stated; they are alleged to consist of

(*a*) See Statute 7 Vic., ch. 68.

(*b*) Horsley v. Fawcett, 11 Beav. 565; Baynard v. Wooley, 20 Beav. 583; May v. Selby, 1 Y. & C. CC. 235; Peak v. Ledger, 4 DeG. & S. 137; Franco v. Franco, 3 Ves. 75.

(*c*) Styles v. Guy, 1 McN. & G. 422; Walker v. Symonds, 3 Sw. 41; Booth v. Booth, 1 Beav. 125; In re Chertsey Market, 6 Pr. 279; Lawson v. Copeland, 2 B. C.C. 156.

1867.

Boulton v. The Church Society.

contributions and collections made for the charitable purposes of the Society.

By one of the by-laws set out in the bill, the Corporation is declared to consist of the members appointed by the charter [meaning, I presume, the Act of Incorporation], and of so many of the associated members of the Society as shall be elected by ballot members of the Corporation; and it is provided, that the whole number of members of the Corporation, in addition to those who are made members by statute, shall at no time exceed 300, or be less than 100. By another by-law, it is provided that the Clergy Trust Fund is to be managed by a committee of the Society, consisting of the Bishop of the Diocese, and eighteen members to be elected as the by-law sets forth. The commuting clergymen are stated in the bill to have made over their commutation money to the Society, as trustees, to invest and manage the same, and to receive the income and profits thereof, and to apply such income in and towards the payment of certain annual stipends to the said respective clergymen, for life; and subject to such payments, upon such trusts for the support and maintenance of the clergy of the said Church, in such manner, as from time to time should be declared by any by-law or by-laws of the Corporation. The bill charges that the grant of £7500 was made and accepted on the like trusts.

Judgment.

Now, in entrusting these large sums to the Society, I cannot assume that the parties relied for their security on the wealth of the Society as a corporate body; but I must believe, that their reliance was on the vigilance, prudence, and individual responsibility of all the members of the Corporation; and if, through negligence or other causes, a majority of the members are allowing breaches of trust to be committed, would it now be just to say that the minority may, by mere passive resistance to what is

1867.

Boulton v. The Church Society

wrong, shift to those who confided in them the burden of instituting the proceedings necessary for remedying the evil? I cannot assume, from the statements of the bill, that all the commuting clergymen are even aware of the breaches of trust alleged, if these breaches of trust have taken place. If a trustee, in a case like this, were desirous of relieving himself as far as possible without a suit from responsibility for wrongful acts of his co-trustees, he would probably be advised to give notice to them all, as well as to the Attorney-General, of what was wrong, and to preserve legal evidence of having done so; and I am not prepared to say that even this would secure him against liability. But the difficulty of preserving such evidence, where the parties are numerous, is manifest; and it would be most unjust to a trustee, and contrary to the spirit in which equity deals with trustees, to make his safety, if endangered, to depend on his being able to preserve evidence, and produce it at any future period, that he had done all which his position required of him. A suit to prevent or correct the wrong is a more safe protection; and is so much more for the advantage of *cestuis que trust* than the other course, that it seems impossible for a Court to forbid or discourage a trustee, or a person in a like situation, from resorting to such a suit. In the language of the Master of the Rolls, in *Nash* v. *Morley* (*a*) (which was a suit by one of several trustees of a charitable gift, against his co-trustee who had refused to act, and the testator's next of kin who disputed the validity of the gift): "I own I cannot come to the conclusion that a trustee in the situation of the plaintiff has not a right to maintain such a bill as this."

Judgment.

Referring to the circumstances of that case, the Master of the Rolls continued: "He (the plaintiff)

(*a*) 5 Beav. 177, 184.

1867.

Boulton v. The Church Society.

alleges, that he is desirious of carrying this trust into execution, and that he is prevented from doing so by the refusal of his co-trustee. In such a state of circumstances, though I conceive that it would have been better for him to have applied to the Attorney-General, and to have informed him of the difficulty in which he was placed, in order that the trust might be carried into execution at the instance of the officer of the Crown, still I cannot say that he was bound to depend upon the Attorney-General in that respect, or that he has not a right to come here. Although there is no suggestion that the Attorney-General did in this case refuse his sanction, yet he might have done so, and I can hardly hold that this suit was improperly instituted without placing trustees like these, more in the discretion and power of the Attorney-General than they ought to be. I cannot therefore say that this suit was improperly instituted."

Judgment.

The present bill alleges that the plaintiff did apply to the Attorney-General, and that the Attorney-General refused his sanction to an information. This refusal may have been for the best possible reasons; but on this demurrer I have to assume all the allegations of the plaintiff's bill to be true.

I do not say that the plaintiff, in case of his establishing all his allegations to the letter, would be entitled to all the relief prayed by his bill; but if he would be entitled to any relief whatever, the first ground of demurrer must be overruled (*a*).

I proceed now to consider the second ground of demurrer, viz., that the Attorney-General, if not himself the informant, must be a defendant to the plaintiff's bill. He was a party, either as informant or as defendant, in many of the charity cases to which I have

(*a*) Hartley v. Russell, 2 S. & S. 253.

referred; but the question now is, whether in the present case it is so necessary that he should be a defendant that the bill is demurrable for the defect. The Attorney-General was not a party in *Paterson* v. *Bowes* (*a*), or in the cases which have followed that case.

1867.
Boulton v. The Church Society.

It was not contended, I think, that he is the proper party to represent, in this suit, the interests of the commuting clergymen. They have individually a purchased right to their annuities; and if their interests require to be represented, some of themselves should be made parties for this purpose. The Attorney-General, if a necessary party at all, is so as representing the interests concerned in the funds of the Society subject to the rights of the commuting clergymen.

It is to be observed, that what the bill charges against the defendants is neglect of duty, not fraud or bad faith; that the plaintiff does not ask for a change of trustees; or for an administration of any of the trust funds by the Court; or for the investment of them by the Court; and that no question as to the validity or construction of any gift to the Society is involved in the suit. As I understand the bill, the plaintiff professes by it to desire the prevention of future breaches of trust, and the correction of those which, he alleges, have already taken place; and he wishes to accomplish these objects without unnecessarily interfering with the management of the funds by the Society; though I am inclined to make the same remark in regard to the prayer of the bill as was made by Lord *Langdale* in overruling the demurrer in *Horsley* v. *Fawcett* (*b*).

Judgment.

If to such a bill it is not necessary, as was assumed, and I think correctly assumed, by both sides on the argument, that any of the commuting clergymen should

(*a*) 4 Gr. 170.

(*b*) 11 Beav. 569.

1867.

Boulton v. The Church Society.

be defendants, I think that neither is it necessary for the Attorney-General to be a party in respect of the interests which he would represent.

Further, I take the rule in charity cases to be, that the Attorney-General is not, ordinarily, a necessary party where the gift, which is the subject of the suit, was made to a corporate body, or to other trustees named and determined by the donor himself (*a*); and, accordingly, such suits often proceed in the absence of the Attorney-General (*b*), though in any such case the Court, at the hearing, in the exercise of its discretion, may order the Attorney-General to be made a party (*c*).

I think both grounds of demurrer must be overruled, with costs.

STEWART v. HUNTER.

Administration suit—Sale of real estate—Parties.

On an application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; and the order asked for was granted, with a direction that an office copy of the decree should be served on each of the parties interested in the real estate under the will.

Statement. Hearing on further directions.

(*a*) Vide Morril v. Lawson, 4 Vin. 500, pl. 11; Wellbeloved v. Jones, 1 S. & S. 40; Attorney-General v. Heelis, 2 S. & S. 675.

(*b*) See Waldo v. Caloy, 16 Ves. 206; Thomson v. Shakspear, 1 DeG. F. & J. 399; Corne v. Long, 2 DeG. F. & J. 75, S. C. Johns, 612; Moss v. Cooper, 1 J. & H. 352; Ward v. Hipwell, 3 Giff, 547; Graham v. Paternoster, 8 Jur. N. S. 127; Totham v. Drummond, 10 Jur. N.S. 1087; Pollock v. Day, 14 Ir. Chan. 297; Chitty v. Parker, 4 B. C. C. 37.

(*c*) Alexander v. Brame, 19 Beav. 444.

1867.

Stewart v. Hunter.

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

Mr. *R. M. Wells*, for the defendants.

MOWAT, V.C.—The usual order for the administration of the estate of *James Stewart*, deceased, was made on the 13th April, 1866. The Master has made his report; and on the cause coming before me on the 22nd October, 1867, for further directions, the parties concurred in asking for an administration and sale of the real estate, as demanded by the state of the testator's affairs and the directions of his will—which, by the 13th order of the 20th December, 1865, can only be granted on notice to one or more of the persons interested in the real estate, The executors seem sufficiently interested to render unnecessary notice to others, part of the estate being devised to them as trustees for certain purposes mentioned in the will. An office copy of the decree on further directions will be served on each of the other parties interested under the will in the real estate: by rule 6, order vi. sec. 2. Further directions and costs will be reserved.

Judgment.

RACHEL MCDONALD V. ARCHIBALD MCDONALD.

Registry law, construction of.

The 66th section of the Registry Act (1865), which enacts that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act,"—is not retrospective.

The bill in this cause was filed on the 5th of March, 1867, to enforce a vendor's lien for unpaid purchase money on the east half of lot No. 17, in the 8th concession of Lancaster.

1867.

McDonald v. McDonald.

Neil McDonald was on the 11th July, 1855, seised in fee simple of this lot, and his title was a registered one. On that day, in consideration of £350, he conveyed this land to his son *Norman McDonald* in fee simple, and this conveyance was registered on the same day. The purchase money was not paid, but notes were given for it, some of which were afterwards paid. On the 16th of April, 1857, *Norman McDonald*, in consideration of £350, conveyed the north half of the land to the defendant in fee simple, and this conveyance was duly registered about the same time. On the 7th of November, 1859, in considerationof £150, he conveyed the other half of the land to the defendant in the same manner, and this conveyance, like the other, was duly registered; part of the purchase money was paid, and notes were given for the residue. *Neil McDonald* died in 1862, having first made a will whereby he devised as follows:—"The east half of this lot having been sold by me to my son *Norman* for £350, for which he gave me his notes, of which four for £50 each remain unpaid, and as the said *Norman* has sold the land, leaving the payment of the amount of the purchase money yet due, unprovided for, it is my intention to pursue my claim in the Court of Chancery, with a view of fastening and charging the said unpaid notes on the land, and should the suit not terminate in my lifetime, or if it should, and that money shall be secured by arrangement or decree of the Court of Chancery, I do hereby bequeath unto the said *Rachel McDonald* [the plaintiff] the advantages and benefits which I might derive from such decree or charge, as if I were living." No appointment of executors was made by the will, nor were letters of administration ever taken out.

Judgment.

The cause came on for the examination of witnesses and hearing, at Cornwall on the 17th of September, 1867.

Mr. *J. S. Macdonald*, Q. C., and Mr. *D. B. McLennan*, for the plaintiff.

1867.

McDonald v. McDonald.

Mr. *J. Bethune*, for the defendant, contended after the evidence was given, that the plaintiff not being the personal representative, could not sue; that no lien ever existed; but if it did exist, it was gone under the 66th section of the new Registry Act, which was retrospective; that the word "deemed" in the Act had reference to the time when the matter was under the consideration of the Court, and not to the time of the making of the contract; and as time was given after the passing of the Act, from the 18th of September to the 1st of January then next, it must be taken to have been given to enable parties to get decrees before the Act came into operation.

Judgment.

MOWAT, V. C.—On the 11th of July, 1855, *Neil McDonald*, since deceased, sold and conveyed certain lands to his son *Norman McDonald* in fee, receiving from him promissory notes for the unpaid balance of the purchase money. These notes have been partly paid since; and for what remains due upon them, I held at the hearing that the vendor had a lien on the property. The vendee, *Norman McDonald*, subsequently sold and conveyed the property to the defendant with notice of the vendor's claim, and the defendant's deeds were duly registered. All this took place before the passing of the "Registration of Titles (U. C.) Act" (*a*); and it was contended at the hearing that the lien of the vendor was put an end to by the sixty-sixth section of the Act, which provides, that "No equitable lien, charge, or interest affecting lands shall be deemed valid in any Court of this Province, after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns." It is not necessary to consider whether a vendor's lien, which does not arise from any instrument executed by the vendee, is by this enactment avoided as against a registered conveyance by

(*a*) 29 Victoria, chapter 24.

1867.

McDonald v. McDonald.

the vendee. The enactment does not in terms restrict its operation in defeating equitable interests, which fall within its meaning, to conveyances for value. Is it so restricted in legal construction? and if so, are cases in which the subsequent purchaser had notice of the equitable interest, also excluded? These questions may have hereafter to be carefully considered and to be decided. But assuming the case of a vendor's lien to fall within the provision, is the enactment retrospective, as the defendant contends?

Judgment.

It is difficult to believe, and I do not believe, that the Legislature meant to legislate away existing "liens, charges, and interests." The language used is certainly large enough to comprise equitable interests existing before the passing of the Act, as well as those arising subsequently; but a like circumstance has been held in many cases to be by no means a decisive test of a meaning of a Statute, words quite as broad as those in question having been construed as not retrospective. Thus, in *Gilmore* v. *Spooter* (*a*) the language of the Statute was, "that from and after the 24th of June, 1677, no action shall be brought," &c., and it was held that an action brought after that date in respect of a cause of action accruing before the Statute, was not affected by the Act. The principle is that *nova constitutio futuris formam imponere debet, non præteritis*, and the maxim is applied with rigour where vested rights are concerned, though not to some other cases. *Pollock*, C. B., pointed out in *Wright* v. *Hale* (*b*), "that there is considerable difference between new enactments which affect vested rights, and those which merely affect the procedure in Courts of Justice, or what evidence must be produced to prove particular facts." If, occasionally, the rule has been lost sight of in dealing with

(*a*) 2 Show. 17. (*b*) 6 H. & N. 230.

1867.

McDonald v. McDonald.

vested rights, the circumstance has been referred to in subsequent cases with disapprobation (*a*). And it has been said that "The principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of Statutes, unless in cases where there is something on the face of the enactment, putting it beyond doubt that the Legislature meant it to operate retrospectively" (*b*). "It would be a flagrant violation of natural justice to make the enactment applicable to existing contracts" (*c*). "Unless the words imperatively require it, we ought not to make their prohibition retrospective, for it is contrary to the first principles of justice to punish those who have offended against no law; and surely, to take away existing rights without compensation, is in the nature of punishment" (*d*). "The rule, which is in effect that enactments in a Statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded on good sense and strict justice" (*e*). "It seems a strong thing to hold that the Legislature could have meant that a party, who, under a contract made prior to the Act, had as perfect a title to recover a sum of money, as he had to any of his personal property, should be totally deprived of it without compensation" (*f*). "It would require words of no ordinary strength in the Statute to induce us to say that it takes away such a vested right" (*g*). The principal cases on the point are cited in *Bank of Montreal* v. *Scott* (*h*), and a more full collection of them will be found in *Broom's* Legal Maxims (*i*). I have examined most of the cases; and, reading the enactment in question in the light of these cases, and of the various clauses of the Statute to

Judgment.

(*a*) See Moon v. Durden, 2 Ex. 784.
(*b*) 2 Ex. per. Rolfe, B. 33.
(*c*) Ib. 38.
(*d*) Per Parke, B. Io. 41.
(*e*) Ib. 42, 43.
(*f*) Ib. 42, 43.
(*g*) Jackson v. Woolley, 8 E. & B. 787.
(*h*) 17 U. C. C. P. 358.
(*i*) Page 34, *et seq.*, 4th ed.
(*j*) Jackson v. Woolley, 8 E. & B.

1867.

McDonald v. McDonald.

which my attention was called, I am of opinion that the sixty-sixth section has not a retrospective operation.

The plaintiff is the sole legatee of *Neil McDonald* the vendor, and the bill alleges that he left no debts; the will names no executor, and the plaintiff is entitled to administration *cum testamento annexo*, and it is necessary that she should take out administration before the decree is drawn up. The case must therefore stand over for this purpose, with liberty to amend by introducing the proper statements with reference to the administration. I think it was understood on the argument that the decree should then be drawn up without a further hearing, in case I should come to a conclusion against the defendant on the Statute. The plaintiff is entitled to the costs of the suit.

McMaster v. Morrison.

Will, construction of—Statute of limitations—Possession of part.

A will gave land to the testator's heir-at-law for life with power to appoint the same to one or more of his sons; and declared that the devisee (his heir) was not to alien or mortgage the lot; and that it was not to be attachable by his creditors:

Quære, whether this power was a naked power, or created a trust in favor of the devisee's sons.

To prove title by length of possession, the plaintiff showed that a person under whom he claimed, had, at an early date, cleared part of the lot in question; but there being no evidence that he did so under any claim of right, it was held that such clearing was not constructively a possession of the rest of the lot.

Statement. Examination and hearing at Cornwall, September, 1867.

Mr. *J. Bethune*, for the plaintiff.

Mr. *J. S. Macdonald*, Attorney General, and Mr. *D. B. McLennan*, for the defendant. 1867.

McMaster v. Morrison.

Allison v. *Rednor* (*a*), *Asher*, v. *Whitlock* (*b*), *Young* v. *Elliot* (*c*), *Finlay* v. *Williamson* (*d*), were referred to.

MOWAT, V. C.—The case made by the plaintiff's bill is, that *Donald McMaster* was the registered owner in fee simple of lot No. 23, in the 2nd concession of Finch; that he died on the first of September, 1845, leaving a will by which he devised the lot to *John McMaster*, his only son and heir-at-law, for life, with power to him to appoint the lot, by a writing under his hand, to any one or more of his sons in fee; that this will was not registered; that on the first of January, 1856, *John McMaster* sold the easterly sixty acres of the lot, and executed a conveyance thereof, to the defendant; that this conveyance was duly registered on the same day; that the defendant, before and at the time of his purchase, had notice of the will, and, therefore, in equity, took subject to it; that afterwards *John McMaster*, by writing, under his hand, dated the 28th of January, 1864, appointed the lot to the plaintiff and his heirs; that he died on the 12th of December, 1864; and that by reason of the title being registered, the plaintiff cannot bring an action at law, and is entitled to relief in this Court. The prayer is for a conveyance and general relief. Judgment.

The effect of the will was not discussed at the hearing, it being assumed on both sides, that an appointment under the will would give the estate to the appointee, notwithstanding a prior sale and conveyance by the appointor; yet it seemed to be conceded, that the power was a naked power, creating no trust in favor of

(*a*) 14 U. C. Q. B., 459.
(*b*) 1. Law Rep. Q. B. 1.
(*c*) 25 Ib. 380.
(*d*) 15 U. C. C. P. 538.

1867.

McMaster v. Morrison.

the sons. If that is its real character, it appears to follow that the conveyance to the defendant extinguished the power, and that his subsequent appointment in favor of the plaintiff was void (*a*). But I am not sure that the will did not create a trust, though neither am I prepared to say that it did (*b*); and the point, if the case turned upon it, would require consideration.

The defendant had full notice of the will before he made his purchase, but was advised by a lawyer (since deceased) that he would, notwithstanding, be safe in purchasing. *John McMaster*, after the sale was completed, delivered the will to the defendant's brother, *Allan Morrison*, who had negotiated the purchase for the defendant; and *Allan* soon afterwards burnt the will, with the concurrence of *John McMaster*, and in the presence of the defendant. This was done under an idea that the will did not affect the defendant's title, though it might throw on it a cloud which it was desirable to prevent; but the destruction of the will is not to be justified by any such explanation. Fortunately, the terms of the instrument were known to others, and there is no dispute about them. The gentleman who drew the will was called by the plaintiff, and gave fuller evidence than the other witnesses as to the contents of the will. He said that the will not only gave the lot to the devisee for life, with power to appoint the lot, as the bill alleges, but also provided that the devisee was not to sell or mortgage the lot, and that it was

Judgment.

(*a*) Vide West v. Berney, 1 Russ. & M. 434; Hole v. Estcot, 4 M. & C. 187; Sug. on Powers, 8th ed., ch. 3, sec. 5; pl. 14, *et seq.* p 88, &c.

(*b*). Burrough v. Philcox, 5 M. & C. 72; Sug. on Powers, 8th ed. ch 11; sec. 6, Pl. 3 *et seq.* p. 588, &c; Chance on Powers, ch. 3, sec. 5, p. 90, &c., and chapter 23, sec. 4, p. 552, &c; 1 Jarman on Wills, 3rd ed., ch. 17, sec 5, p. 514; Notes to Edwards v. Slater, Tudor's Real Property Cases, 2nd ed., 813 *et seq.*

not to be attachable by his creditors. Now these restrictions were void, so far as they related to any estate which the devisee took in the lot (*a*); but, considering them in connection with the fact that the devisee, to whom the "power" was given, was the testator's heir, and did not need any such power to enable him to give the lot to one or more of his sons, room is afforded for argument, that the will sufficiently shows the testator's intention to create a trust in favor of the sons—which, had their father died without an appointment, the Court would have executed in favor of all the sons equally (*b*).

1867.

McMaster v. Morrison.

But from the turn the case has taken, it is unnecessary to decide upon the effect of the will. It appears that when this suit was commenced, the defendant became alarmed at the prospect of losing his farm; and, having heard that *Donald McMaster* the testator, under whom both the plaintiff and defendant claimed the property, had not had a good title to it, and that another *John McMaster*, a resident of Nova Scotia, was the heir-at-law of the patentee and the true owner of the lot, the defendant's brother proceeded to Nova Scotia to endeavor to obtain this person's title; and he succeeded in obtaining it. The conveyance thereupon executed to *Allan Morrison*, bears date the 30th of September, 1865; and on the 4th of January following, *Allan* conveyed to the defendant the sixty acres previously bought by the defendant from the plaintiff's father. The defendant set up this new title by a supplemental answer.

Judgment.

In order to meet the unexpected difficulty thus thrown in the plaintiff's way, his counsel at the hearing refrained

(*a*) Atwater v. Atwater, 18 B. 300; Ware v. Cann, 10 B. & C, 433; Bradley v. Peixoto, 3 Ves. 324; S. C. Tudor's Real Property, 2nd ed. 858.

(*b*) Harding v. Glynn, 1 Atk. 469; Brown v. Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561.

1867.

McMaster v. Morrison.

from putting in evidence the registered title of the testator, and endeavored to establish a title by length of possession. But if the title is by possession, and not by registered instruments, the case is entirely different from that set up by the bill, and the whole equity on which the bill proceeds is gone.

With reference to the defendant's new title, objections were made to the admissibility of some of the defendant's evidence as to the heirship of the *John McMaster* under whom the new title is derived; but, having considered these objections (*a*), I am of opinion that the heirship is sufficiently proved.

Judgment.

The lot was wild and uncultivated until after the patentee's death (which took place in April or May, 1824); and as the patentee's heir knew nothing of the lot being in the possession of anybody, the plaintiff must prove a possession of forty years to get rid of the heir's title (*b*). Upon this point the plaintiff has but one witness, and the defendants have several against him. The recollection of them all is loose and unsatisfactory as to the exact period at which the testator's possession began, though I think the learned counsel for the plaintiff was right in his contention, that his witness *William Wiseman* is more likely to be accurate than most of the other witnesses. But even *Wiseman* cannot be said to have fixed with certainty an earlier date than 1828, for the commencement of the testator's clearing on the lot. He said, on cross-examination, that the testator came to the country in 1820 or 1821. In his examination-in-chief he had stated that the testator, after coming to the country, lived first in an old house belonging to one *John McMullen*, and that he lived there one or two

(*a*) See Taylor on Evidence, 4th ed., sec. 575 and sec. 579.
(*b*) 27 and 28 Vict. ch. 29; Doe Pettit v. Ryerson, 9 U.C.Q.B. 27.

years, the witness would not be positive which. This brings us to 1823. He then went to another lot, number twenty-two, in the first concession, and was there, according to the same witness, four or five years before the testator began to clear on the lot in question. This would bring us to 1828, as the earliest date I could be sure, from the testimony of the plaintiff's own witness, and without considering the defendant's evidence, that even a beginning was made towards clearing the lot. That date is less than forty years ago; and it is therefore unnecessary to consider up to what period the plaintiff is entitled to reckon the possession in his favor.

Further, this clearing was not on the easterly sixty acres of the lot—which portion alone is in question in this suit; and it was at a considerably later date, by the testimony of all the witnesses, that there was any clearing or other possession of these sixty acres. The plaintiff has not shewn that at the early period referred to, the testator either had or pretended to have any title to the lot, or that he exercised any acts of ownership on any portion of it except what he cleared, or that he was more than a mere trespasser in respect of even that portion. Under these circumstances he cannot, according to the authorities, be held to have been, constructively, in possession of any part of the lot of which he was not in actual possession (*a*). Judgment.

The evidence thus entirely failed to establish a title by length of possession, even if the plaintiff could avail himself of such a title in this suit.

The unexpected absence of a witness prevented the plaintiff from proving at the hearing the execution of

(*a*) Hunter v. Farr, 23 U. C. Q. B. 327; Dundas v. Johnston, 24 Ib. 547; Young v. Elliott, 25 Ib. 30; Turley v. Williamson, 15 U. C. C. P. 538.

1867.

McMaster v. Morrison.

the deed of appointment, and from giving strict evidence of the death of the plaintiff's father. These points were not in issue between the parties, but they were not admitted by the defendants; and the case was proceeded with and argued on both sides, subject to the future production of the intended testimony. I was to give some direction on the subject should my opinion on the other points be in the plaintiff's favor; but as my opinion is against him, this has become unnecessary.

My decree must be that the bill be dismissed; and I think that there should be no costs to either party up to the filing of the supplemental answer, and that the defendant is entitled to the subsequent costs of the suit.

STEPHENSON v. NICOLLS.

Practice—Master's office.

Where a plaintiff had been guilty of delay in bringing a decree into the Master's office; and, after taking out warrants to consider, procured two postponements, and did not attend the third appointment, the Master, on a subsequent day, transferred the carriage of the decree to the defendant, and granted him a warrant to hear and determine: *Held*, not irregular.

A notice to re-hear a cause, by the party who has the carriage of the decree, does not, in the absence of special circumstances, entitle him to stop the prosecution of the decree in the Master's office.

Statement.

Motion by the plaintiff to set aside an order of the Master, giving to the defendant *Levi W. Nicholls* the carriage of the decree.

In this case the decree referred it to the Master at Belleville to take certain accounts. The plaintiff, after long delay, brought the decree into the Master's office, and got a warrant to consider it. On the return he had the consideration repeatedly adjourned, and upon the

last adjournment he did not appear, and the other defendants then applied *ex parte* to the Master for an order, giving him the conduct of the reference, and the Master made the order accordingly. The Master also issued a warrant to hear and determine, under which evidence was taken, and the plaintiff cross-examined the witness at great length, without prejudice to his right to object to the order for irregularity.

1867.

Stephenson v. Nicolls.

Mr. *Moss* moved in Court, to have the order set aside for irregularity; and he contended that it should have been made on notice to the plaintiff, and that the plaintiff was prejudiced by the shortness of the time. It appeared, however, that the witness had been cross-examined for several hours, and that the plaintiff was aware of the intention to examine him. It also appeared that the witness had come from Illinois to give evidence, and that he was on the way before the Master had made his order.

Statement.

Mr. *McGregor* supported the order, and contended that it was regular; that the Master had a discretion, under our rules, to which he referred, to make such an order; and that he had exercised a proper discretion in making it. It also appeared that the plaintiff was offered an adjournment for the purpose of further cross-examining the witness, or giving counter evidence, which his solicitor had declined.

MOWAT, V. C.—No papers appear to have been left for my perusal with reference to this motion; but the facts were admitted at the bar, and, as I recollect them, were these: The decree of the Chancellor was, it seems, partly against the plaintiff and partly in his favor: and the plaintiff delayed for some months to carry it into the Master's office. The defendant *Levi W. Nicolls* then gave notice of motion that he should have the carriage of the decree. The plaintiff immediately there-

1867.

Stephenson v. Nicolls.

upon carried in the decree, and took out and served a warrant to consider. In consequence of these proceedings, the only order made on the motion was, that the plaintiff should pay the costs of the application. At the return of the warrant, the plaintiff procured a postponement of the consideration of the decree until a future day, and on the adjourned day he applied for and obtained a second postponement. On this third appointment the plaintiff did not attend; and the Master considered these proceedings so objectionable that, shortly afterwards, viz., on the 4th of November, he granted to the defendant *ex parte* an order transferring to him the carriage of the decree; and the Master at the same time, at the instance of the defendant, issued his warrant to hear and determine, returnable on the 9th of November. The order and warrant were served on the 6th. The plaintiff on the return of the warrant took the objection, that an *ex parte* order, transferring to another party the carriage of the decree, was irregular. The Master overruled the objection, and an important witness, who had come from some place in the United States where he resides, was examined on the part of the defendant, and cross-examined without prejudice to the objection. Afterwards, viz., on the 14th November, the plaintiff gave notice of the present application to set aside all these proceedings for irregularity.

Judgment.

The General Order which gives the Master the power of transferring the carriage of the decree from one party to another (*a*), does not say that notice of the application is necessary; but the practice in England, while a corresponding order (*b*) was in force there, was to give such notice (*c*) as had been necessary when the

(*a*) G. O. No. 42, sec. 10, (3rd June, 1853).
(*b*) 56 G. O. of April 3, 1828.
(*c*) 1 Smith's Practice, 312, 2nd Edit.

application had to be made to the Court (*a*); and any order a Master made on such an application was appealable (*b*).

1867.

Stephenson v. Nicolls.

But the practice in the Master's office here varies considerably from the practice in England, a much larger discretion being given in this country to Masters than the English practice allowed (*c*). By the General Order of this Court: "In regulating the manner of proceeding before him, the Master is to devise and adopt the simplest and most speedy and least expensive method of prosecuting the reference and every part thereof; and, with that view, to dispense with any proceedings ordinarily taken in the Master's office, which he may conceive to be unnecessary; to shorten the periods for taking any proceedings; or to substitute a different course of proceeding for that ordinarily taken" (*d*). The Master is at liberty, upon the bringing in of a decree or order of reference, without a warrant to consider and therefore *ex parte* "to regulate in all respects the manner of proceeding with such reference," and therein (amongst other things, of greater and less importance, respectively) "to fix a time at which to proceed to the hearing and determining of such reference." If these things can justly be done *ex parte* on the application of the party having the carriage of the decree, it cannot be contrary to natural justice, that some of the same things should be done *ex parte* at the instance of any other party. If, for example, at the instance of the plaintiff, the Master might, if he had seen fit, have appointed *ex parte* the day for hearing, and issued his warrant accordingly, it would be on technical grounds

Judgment.

(*a*) Sims v. Ridge 3 Mer. 458; Edwards v. Acland, 5 Madd, 31.
(*b*) Wyatt v. Sadler, 5 Sim, 450; Alvanley v. Kinnaird, 8 Jur. (O. S.) 114.
(*c*) Vide G. O. No. 42, sec. 13, (June 3, 1853).
(*d*) sec. 2.

1867.

Stephenson v. Nicolls.

alone, if on any grounds, that it could be held that the Master may not appoint the day and issue his warrant, *ex parte*, at the instance of a defendant; and these proceedings may be regular, and I think are regular, even if an *ex parte* order for transferring the general carriage should be irregular.

But what is it to have the carriage of the decree? The rule which regulates the question, as to who should have the carriage, is a technical one; and "in the majority of cases, the solicitors alone are interested, and it in nowise tends to the benefit of the parties" (*a*). This will appear from the summary of the privileges which the carriage of the decree gives, as set forth in the last edition of Smith's Practice (*b*). The party having the conduct of the decree, or rather his solicitor, "is entitled to prosecute all those proceedings which relate to the general inquiries, and the other parties only prosecute those which relate exclusively to themselves, or such as it would be inconsistent for the plaintiff to do. Thus, the plaintiff bespeaks and procures to be inserted all advertisements, whether for creditors, or for next of kin, or for the sale of the property; and where there is a sale of property, he prepares the abstract and answers the requisitions; and if the purchaser requires a reference of title, he attends upon it at Judge's Chambers. He furnishes, where directed, for the purposes of answering the general inquiries and taking the general accounts, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements which are in his possession, relating to proceedings of a general character, and not belonging to particular parties to prosecute."

Judgment.

The question, as to which party, or which solicitor,

(*a*) Knott v. Cottle, 27 B. 34.
(*b*) 1 Smith's Practice, 7th Edit. 929.

1867.

Stephenson v. Nicolls.

shall have the right of taking these proceedings, is manifestly of much less importance than some of the other matters specified in the General Order, and which the Master has express authority to determine *ex parte*, if he sees fit; and I think it impossible to hold, in view of the very wide language of the Order, that the Master was, in point of practice, irregular in dispensing with a warrant to shew cause why the defendant should not have the carriage of the decree, after the repeated and unavailing postponement, at the plaintiff's instance, of the consideration of the decree, and after the plaintiff's neglect to attend the third appointment. In such a case, if the party who loses the carriage of the decree is dissatisfied, it is in his power to apply at once to the Master for a warrant to re-consider the question; and if the Master should refuse to grant such a warrant, or should on the return of the warrant decline to restore the carriage of the decree, an appeal is open to the party complaining. Or, the plaintiff might have taken a warrant to shew cause why the hearing should not be postponed to a later day; or he might, on the day appointed for the hearing, have applied for a postponement, on his objection to the regularity of the defendant's proceedings being overruled; and I presume the Master's ruling in either case would be subject to appeal, though the Court would not be disposed to interfere unnecessarily with his discretion (*a*).

Judgment.

As to the merits: The justification which is offered of the plaintiff's conduct in prosecuting the reference is, that he wished to avoid the examination of the defendant *Douglas Nicolls* as a witness; that the other defendant was authorised by the decree to examine *Douglas* as a witness; and that the plaintiff is dissatisfied with the

(*a*) Earl Nelson v. Lord Bridport, 6 Beav. 295, at 299; Alvanley v. Kinnaird, 8 Jur. O. S. 115; Dixon v. Pyner, 7 H. 331, at 333.

1867.

Stephenson v. Nicolls.

decree in this and other respects, and has set down the cause to be re-heard. But it is quite clear that these circumstances would not constitute a sufficient ground for a stay of the proceedings by the Court (*a*); and what the Court would not do, the plaintiff has no right to avail himself of the carriage of the decree to accomplish without the intervention of the Court.

Motion refused.

SEVERN v. SEVERN.

Alimony—Misconduct of wife subsequent to decree.

After a decree for alimony had been made, and alimony paid for several years under it, the Court entertained a petition by the husband to be relieved from the decree, on the ground of adultery subsequently committed by the wife.

On the hearing of a petition by a husband to be relieved from a decree of alimony, an act of adultery was sworn to by two credible witnesses: and the general conduct of the wife raising no presumption in her favor, an order was made as prayed.

Statement.

In this case a decree for alimony had been made in favor of the plaintiff, and the sum allowed by the Master therein was subsequently ordered to be increased to £200 a year, as reported, ante Vol. III., page 321, and Vol. VII., page 109.

This amount had been paid regularly by the defendant since that time. The defendant having received information of several acts of adultery, and general immoral conduct on the part of the plaintiff, presented a petition praying on those grounds to be relieved from payment

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(*a*) 1 Smith's Practice, p. 691 *et seq.*; 2 Dan. Practice, 4th edit. 1351 *et seq.*

of the alimony under the decree and order, and that the care and custody of his three daughters might be restored to him. 1867. Severn v. Severn.

Those portions of the evidence, which was taken before the Court at great length, bearing upon the questions involved, are stated in the judgment.

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

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

VANKOUGHNET, C.—This unhappy case comes before me on a petition to deprive the wife of alimony, which she has been enjoying under the decree of the Court, on the ground of adultery committed since that decree was made; or to reduce the alimony, because of the impropriety of her conduct rendering it unfit that her daughters, three in number, should any longer reside with her; and this, on the assumption that the amount of the alimony was fixed with a regard to their being supported out of it by the mother. Judgment.

I have already intimated that this latter alternative of the prayer of the petition cannot be sustained. I do not find anything to warrant me in assuming, that the support by the mother of the children, in any way regulated the amount of alimony as fixed by the Court; and the language of the judgment delivered, when that subject was before it, would negative any such conclusion. At all events, I could only entertain a proposition to reduce it, upon a case shewing that the sum awarded was out of due proportion to the husband's present means; and of that there is here neither statement nor evidence. With the children I have no power to deal; they are all over the age of fourteen years, and are thus relieved from tutelage. Their future, under Providence, depends mainly upon themselves and, in the

1867.
Severn v. Severn.

unfortunate and cruel position in which they are placed, by the misconduct and errors of both their parents, I can do no more than extend to them my sympathy, and express the hope that, warned by those errors, they may be able to chasten and regulate their tempers and passions, and thus guard themselves against misfortune, vice, and ruin.

After careful consideration of the evidence, and much anxious thought, I feel myself bound to find that the principal allegation in the petition, the adultery of the wife, is proved; and that that adultery consisted in the act deposed to by *Atkinson* and *Sampler* as having taken place on a night in the month of August last, somewhere between the 16th and 23rd of that month. The testimony of both men is positive as to a man and a woman having been seen by them on that night in an open piece of ground in the rear of Mrs. *Severn's* house, in the act of carnal connection. The testimony of *Atkinson* is positive that the woman was the respondent, and *Sampler* swears that he knows Mrs. *Severn*, and that to the best of his opinion it was she; he says, "I saw her face so as to identify her." *Atkinson* says, "I repeat, without hesitation, that it was Mrs. *Severn* I saw in connexion with the man. I know her as well almost as I know my own mother." He also swears that he has known her for many years. I think the testimony of both these witnesses entitled to every credit. The note I made at the close of their evidence is in these words: "I think the testimony of *Sampler* and *Atkinson* reliable so far, though the former became confused under cross-examination." The attempt to impeach *Atkinson's* character for veracity, I think, failed; and *Sampler's* is unimpeached. So also, every effort to find an interested motive which could induce either to swear away this woman's character and means of livelihood has failed. I can conceive of no inducement to them to do so, on the information and explanations which we have.

Judgment.

1867.

Severn v. Severn.

I was very much impressed with the straight-forward manner in which *Atkinson* gave his evidence; and I do not think that the variances between it and the statements in his affidavit are of such a character as to throw any doubt upon the former. We all know that an affidavit prepared for a man to swear to, will not always disclose the whole facts, and will oftentimes, and without design, incorrectly describe, without the deponent detecting it, some of the occurrences narrated. The doubt over which I have lingered in this case, desiring to give the unfortunate woman all the advantage which I could reasonably attach to it, was, whether or not *Atkinson* and *Sampler* might not be mistaken as to her person, and whether they did really identify her on the night in question. A statement of the appearance of the sky, during the week when this event occurred, obtained from the Toronto Observatory, has been put in by consent. From it, it appears, that on the 17th of August, at 10 p.m., the sky was nearly clear. On the 18th, at the same hour, it was a light haze. On the 19th, at the same hour, it was nearly clear; and on the 20th, at the same hour, it was very dark. Both the witnesses say that it was about 10 o'clock, of a night about the middle of the week in August, extending from the 16th to the 23rd day of that month, that the occurrence took place; and that the night was neither very clear nor very dark, and that there was no moon. According to their description this could not have been on the 20th, which was very dark, and the three preceding nights were clear, or nearly so. That a familiar face could not be recognised on any such a night is more than I can venture to take upon myself to say, in opposition to the positive testimony of a witness who was telling, and was desirous only to tell the truth, as I believe. The question of identity was pressed by Mr. *Blake* with great earnestness and ability, and it has had with me its due weight. It may be that the witnesses are mistaken; but this chance must not, in the interests of justice, frighten us away

Judgment.

1867.

Severn v. Severn.

from a finding upon evidence; else, no guilt could be punished. It may be that the defendant is a victim to false testimony, as perchance others have been; but I cannot find any reasonable doubt by which to withhold credence to it. Had the respondent been a woman of reputed spotless character; had she been careful to preserve a good name, whatever sin she might have committed in secret; had her deportment been that of a modest, sober, well-behaved woman, one might have had great hesitation in believing that she would have left her own house, repaired to an open field, and there exposed her person, even at night, and at a late hour, when she might not have feared intrusion by a passer by. But, unfortunately for the respondent, she was given to drunkenness, the parent of too many crimes. A woman who yields to this debasing vice; who exposes it to her neighbours; who is found drunk on the street; cannot set up her outward habits of life as a shield against a charge of even the disgraceful conduct imputed here. A woman who gives way to the influence of liquor, rapidly sinks in her own estimation as well as in that of others, and will, I fear, seldom stop short of any crime. She becomes degraded and abandoned, and that feeling of shame which exists, even where a virtuous intent is wanting, soon departs from her. I know nothing more calculated to render domestic life unhappy, and to break up a household, than an indulgence in drink by the wife and mother. Not that I mean to intimate that even this, to a husband, harrowing affliction, justified the brutal treatment, which the evidence in previous stages of this cause shews the petitioner to have inflicted on his wife. One thing has seemed strange to me, if the respondent were entirely innocent of the offence to which *Atkinson* and *Sampler* depose, and that is, that when she heard she was accused of it, as she did shortly after it happened, she did not by herself or others, call upon either *Atkinson* or *Sampler*

Judgment.

1867.

Severn v. Severn.

for an explanation; did not require them to state time and place; did not indignantly deny it. It does not appear that when *Sampler*, in her presence, was asked by Mr. *Christopher* if he was charging this offence against her, that she asked him any question, or made any remark. Mrs. *Severn* is spoken of as a woman accustomed to make very free use of her tongue. If she was a chaste woman, independently of the pecuniary interest she had in repelling such a charge, one would have expected an indignant denial from her, and an effort at once to prove and establish to her neighbors, among whom the story was current, that on the night in question she was elsewhere than at the place indicated. It is true her solicitor wrote to the petitioner to institute proceedings to prove these accusations; but that is not the kind of protest, or rather the only protest which one would have expected. I am not called on in this case to act upon the statement of *Susan Sheppard*, although, I must say, the manner in which she gave her evidence, impressed me favourably: still, it is unsupported, and is on several considerations improbable. On the other hand I was surprised that neither the daughter, who was in the house at the time, nor Mrs. *Casey*, who was also then there a visitor, and present, nor any of the boarders in the house (for the respondent kept a boarding-house at the time), were called upon to account for the respondent on that day, or contradict in any particular *Susan Sheppard's* account of her mistress's conduct. The respondent gives her age as at forty-one years. My painful duty is at an end in ordering, as I now do, that for the future the respondent be deprived of alimony, and the petitioner exonerated from paying it under the existing decree of the Court, for cause of adultery, committed by the respondent.*

Judgment.

*This judgment was mislaid for a length of time after it was pronounced.

1867.

JACKSON v. BOWMAN.

Insolvent—Marriage settlement.

A person in insolvent circumstances conveyed by way of settlement to his intended wife, a lot of land, on which the settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in Insolvency the Court declared that for so much of the building as was completed after marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage or pay to the assignees the amount of such expenditure: and it subsequently appearing that the husband had created a mortgage prior to the settlement; the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priorty to the claims of the creditors.

Examination of witnesses and hearing at Guelph.

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

Mr. *McLennan* for Mrs. *Bowman*.

The bill was *pro confesso* against the defendant *Israel D. Bowman*.

Judgment. SPRAGGE, V.C.—The material facts of this case lie in a narrow compass.

The defendant *Israel D. Bowman*, and one *Hines* were partners in the business of shopkeepers in the town of Berlin, for some years before the 27th February, 1865. On the 10th of that month they gave their creditors the usual notice of insolvency, under the Act of 1864; and, on the 27th, assignees were appointed. It is in evidence that the affairs of the firm were in fact insolvent for at least a year before the declared insolvency.

The plaintiffs are the assignees in insolvency.

1867.

Jackson v. Bowman.

On the 25th of February, 1864, *Bowman* conveyed to *Angelina L. Lyson*, his then intended wife, in consideration, as is expressed, of the intended marriage, lot 160, in block B, in the Town of Berlin. The marriage took place on the 30th or 31st of August in the same year; the parties going to a distance—to Preston for the purpose; the wife returning to the house of her mother, and the marriage not being announced until some time afterwards. The Insolvency Act, passed the 30th of June, 1864, came into operation the first of September, one or two days, as the case may be, after the marriage. It is suggested, and with much reason, that *Bowman* hastened the marriage in order to its being before the Insolvency Act should come into operation.

Judgment.

Before the marriage *Bowman* commenced the building of a house upon the land that he had conveyed to his intended wife; the house was completed in December of the same year at a cost of about $2,400, the cost of the building being defrayed almost entirely by the delivery of goods out of the shop of the firm, upon the orders of *Bowman*, and in that way somewhere about one-third of the entire stock in trade was consumed; a large proportion of this was after the marriage.

I think *Bowman* must be taken to have been cognizant of the actully unsound condition of his affairs at the time of the conveyance to his intended wife. It is just possible that he was not, but he took that part in the management of the business of the firm, which would inform him upon that point: and I have no reason to doubt that he was. If he was, the conclusion is, that the conveyance and the building on the land conveyed, were devices to defraud creditors. As to the wife, I think knowledge of the embarrassed condition of *Bowman's* affairs is not brought home to her, such knowledge is not proved against her until after the completion of the

1867. Jackson v. Bowman.

house. I may suspect that she had such knowledge; and I am not free from suspicion on the subject, but I do not find the fact proved against her.

I must take the marriage to be a valuable consideration for the conveyance. It is contended that the building of the house was a voluntary gift. So much as was built before and so much as was built after the marriage admit of different considerations.

As to that part of it which was built before;—suppose it had been completed before the marriage, I do not see how I could in that case separate the house from the land. I must have held both settled upon the wife before marriage, the conveyance of the land, though before the building of the house, being effectual for that purpose, and if so, an incomplete house must follow the same rule.

Judgment.

As to the expenditures upon the building after the marriage, they were voluntary and amounted to a post nuptial gift by an insolvent. If they had not been erections or additions to that which was already the property of the wife, I should have no difficulty. The difficulty is created by their not being practically separable from that which is the property of the wife, and there being no fraud in the wife in allowing them to be added to her estate. To give the creditors as against the wife the benefit of their voluntary settlement I must charge the estate of the wife with its value giving her perhaps the option of having such a charge; or of compelling the creditors to pay to her the value of the whole, less the value of what was done after marriage.

There are difficulties: and the point is, as far as I know, a new one; but the Court should not be staggered by any difficulties that are not insuperable. I have to choose between allowing a wife to retain as against

creditors a voluntary gift from an insolvent husband, and charging the wife's estate with its value. I cannot but see that doing the latter is onerating her estate with a charge not contracted for by her, and may operate as a hardship upon her. But it would open the door to great fraud, to hold that because a wife has land by a conveyance before marriage which is not impeachable, she must therefore be entitled to hold as against creditors, whatever an insolvent husband might place upon it. To test such a position it is not improper to suppose an extreme case, but one nevertheless, which might easily happen. The land conveyed before marriage might be a village lot of small value, worth perhaps £25; and an insolvent husband might shortly after marriage, or years after marriage, when he found his affairs going wrong, place buildings upon the land worth a thousand or several thousand pounds, sufficient it might be, to support himself and his family in comfort, while his creditors got nothing; or, as put by Mr. *Blake*, the property might be leasehold, subject to a rental of full value so that the estate of the wife would in fact be worth nothing, and buildings of great value might be placed upon the land by the husband at the expense, in fact, of his creditors.

1867.

Jackson v. Bowman.

Judgment.

The strength of the wife's position is just in this that land is esteemed to be a thing of peculiar value, not adequately compensated for by damages, and that the creditors cannot, consistently, with land having that character, insist upon the wife taking the value of the land, instead of the land itself or making the gift of the husband made at their expense a charge upon it. If the thing settled upon the wife were not land, but something of ordinary market value the difficulty would not exist. The question is whether the Court could properly make this principle as to the character of land give way in order to do justice to creditors of the husband. I have no hesitation in saying, that if the

1867.

Jackson v. Bowman.

Court can do so, it ought to do so. The Court has in such case to deal with two conflicting principles, one of which must be made to give way to the other. The one is the right of the wife to have and to hold her land: the other is the right of the creditors of the husband to have his voluntary settlement upon the wife avoided for their benefit. To avoid such a settlement would be doing some violence to the abstract right of the wife in regard to her land; but on the other hand, to deny the right of the creditors, and to hold the wife's land inviolate, would be to defeat the Statute of Elizabeth and to sacrifice the rights of creditors to a rule which is often, and in this country especially, a technical one. My conclusion is, that the Court ought to give effect to the right of the creditors, when it can see its way to do so without doing practical injustice to the wife; that it ought not to allow the theoretical rights of the wife to stand in the way of practical justice to her husband's creditors. I am far from saying that the case is without its difficulties, but the mischief to be considered is a serious one. To allow a husband, in failing circumstances to enrich his wife, and indirectly himself, by such means as he might do if the right of the creditors is denied in this case, would be a grievous wrong to creditors. I place my judgment, be it right or wrong, shortly upon this: The expenditure, in building after marriage upon the wife's land, is a voluntary settlement upon her, and if made by a husband in insolvent circumstances is void as against creditors: the getting at it is the difficulty. The right to have it is with the creditors, and as I must deny their right or overcome the difficulty, I hold the difficulty should be overcome when these two things concur; when it is essential to the giving effect to the rights of creditors, and when it can be done without practical injustice to the wife. To carry this out I propose to direct an inquiry of the value of the improvements made upon the wife's estate after marriage, and an inquiry of the

Judgment.

1867.

Jackson v. Bowman.

value of her estate independently of such improvements, and to declare her entitled to elect to have the former a charge upon the parcel of land upon which it is erected, such charge to be payable in six months after report, otherwise a sale; or at her option that the plaintiffs shall purchase her estate at its value, independently of the improvements made after marriage, the creditors to have three months to make such payment, the election of the wife to be made before and to be stated in the Master's report. I propose to make the decree in this shape as trenching as little as possible on the rights of the wife. If any other mode can be suggested which will do so in a less degree I will readily adopt it, provided, of course, that it does not seriously interfere with the rights of the creditors.

In regard to the contention of the wife, that the husband had agreed before marriage to build and complete the house; assuming that such agreement is to be inferred from the fact of the house having been commenced and progress in building having been made before the marriage, the right of the wife contended for is negatived by the case of *Warden* v. *Jones* (*a*); and the language of the Statute of Frauds upon which that case proceeds, is clearly against it. Judgment.

As to costs, the plaintiffs should have their costs against the husband, whose conduct has occasioned the difficulty and the suit. I think costs should not be given either to or against the wife.

In proceeding to draw up the decree, it appeared that prior to the settlement by the defendant he had created a mortgage upon the settled estate which was registered before the settlement, and therefore entitled to priority

(*a*) 2 DeG. & J. 76.

1867.

Jackson v. Bowman.

over it; and a motion was made before his Lordship the Chancellor, to vary the minutes as drawn up, by directing payment of this incumbrance out of the portion of the property properly applicable to the payment of debts.

The same counsel appeared for the parties respectively.

VanKoughnet C.—The principal facts in this case appear in the judgment of my brother *Spragge*. A fact not stated before him is brought under my consideration, and it is this; that intermediately between the execution by the insolvent of the conveyance to the wife and his marriage with her, he had executed a mortgage to a third party which, being registered before the conveyance to the wife, takes priority of it. The question arising on this fact is, whether or not the wife is entitled to have the value of those improvements, made upon the land after marriage, and which, but for this mortgage, would, under the judgment of my brother *Spragge*, go to the creditors of the insolvent husband, applied to the reduction of the mortgage, in order that the land conveyed to her may, to that extent, be freed from the charge created by the mortgage. The mortgage covers these improvements, and is admitted to be a valid legal charge upon the whole property as against both the wife and the creditors of the husband. As against the creditors, the mortgagee claims a right to realize his debt out of the improvements in question; but, for the mortgage, it is true these improvements would go to the creditors; but so, also, would the wife have had her estate free had not the husband fraudulently, as against her, covered it with this mortgage. It seems to me that on reason and principle the wife has the right, so far as the improvements covered by the mortgage and held not to belong to her extend, to have her estate relieved from the mortgage charge; and I decree accordingly.

Judgment.

1867.

BUCHANAN v. CAMPBELL.

Voluntary deed—Cloud on title.

As against a purchaser for value a voluntary deed, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted either by or against him, this Court will not interfere to remove the registraton of the void deed as a cloud on the title.

This was a bill praying to have a deed executed by the defendant *Alexander Campbell*, to his son, the other defendant, the registration of which took place on the 9th of February, 1858, declared fraudulent and void, on the ground that the same was voluntary and as such void as against the plaintiff who was a *bona fide* purchaser for value.

The defendants answered the bill admitting that the deed was executed without consideration beyond natural love and affection; and alleging that the father was in perfectly solvent circumstances, when he executed the conveyance, which he did at the instance of his wife, who had brought to him a considerable sum of money.

The deed to the plaintiff was executed 7th December 1861, at which time the grantor was indebted to the plaintiff and others in a considerable sum of money.

The cause came on for the examination of witnesses and hearing at the sittings in Hamilton, in the autumn of 1867.

Mr. *Proudfoot*, for the plaintiff.

Mr. *Burton*, Q. C., and Mr. *Sadlier*, for the defendants.

VANKOUGHNET, C.—This bill is filed to set aside and remove from registration a deed, made without Judgment.

1867.

Buchanan v. Campbell.

valuable consideration; followed by a deed to the plaintiff for valuable consideration. I was under the impression at the hearing (though I made a query in my note-book at the time) that this Court had, at the instance of a purchaser and grantee for value, removed from off the Registry, and declared void a deed to a voluntary grantee, as forming a cloud upon the title of the purchaser for value. I have only seen, however, one case in which this was done, *Ross* v. *Harvey* (*a*); and the circumstances there differed from the ordinary naked case stated here. It was there alleged and confessed, that the voluntary deed had been prepared and executed for the purpose of practising a fraud upon the plaintiff, to whom it was also intended at the time to convey the land, and that this voluntary deed had been kept secret, and was afterwards set up, and used to embarrass the plaintiff. The Court thought that a conveyance made in pursuance of such a deliberate scheme ought to be removed out of the way.

Judgment.

In this case it is not alleged that the voluntary conveyance purported to be for value and, I understand, in fact, it does not so purport.

It is proved that the plaintiff was aware of its existence, when he took the deed to himself for value. It is not alleged that this voluntary deed was made in fraud. Is there any authority, then, for making such a decree as plaintiff asks? In *De Houghton* v. *Money* (*b*), Lord *Romilly* asks if any one had ever heard of such a decree? In *Oxley* v. *Lee* (*c*), Lord *Hardwicke* says he does not remember any case in which this Court had decreed a voluntary conveyance to be set aside at the instance of a purchaser for value, unless there were

(*a*) 3 Grant, 639.
(*b*) 1 Law Rep. Equity, 164.
(*c*) 1 Atk. 625.

1867.

Buchanan v. Campbell.

circumstances of fraud attendant. It is of the doctrine of this Court not to set aside an instrument void upon the face of it, or the invalidity of which can be readily ascertained: and it was held in *Hurd* v. *Billington* (*d*), that the registration of such an instrument made no difference in the application of the rule. Here any one looking at the deed attacked, would see that it was voluntary on the face of it; and the registration of course shews the same thing.

The bill must be dismissed with costs.

Malcolm v. Malcolm.

Practice—Several grounds of demurrer.

A demurrer was filed for want of parties and for want of equity; and on the argument it was admitted that the bill was defective as to parties. The Court refused to allow the other question to be argued until the bill was made perfect as to parties, and gave the plaintiff liberty to amend on payment of costs.

Statement.

The bill in this case was filed by the plaintiff *Eliakim Malcolm* on behalf of himself "and of a majority of the rate-payers" of school section No. 18, in the Township of Burford, in the County of Brant; and school section No. 3, in the Township of Oakland, in the said County, seeking to restrain the defendants *Augustus Malcolm* and others, the school trustees of these school sections, from proceeding with the erection of a new school house, on the site of the old one, on the ground alleged in the bill.

To this bill the defendants filed a demurrer in the following terms, "That the said bill does not disclose a

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(*d*) 6 Grant 149.

1867.

Malcolm v. Malcolm.

case whereon any relief prayed may be had against these defendants, *and** that there are not proper parties to the said bill, for that all the assessed freeholders and householders of union school section, No. 18, in the Township of Burford, in the County of Brant, and No. 3, in the Township of Oakland, in the said County of Brant, ought to be, but are not by name or representation, made parties to the said bill," that is, that the bill should have been on behalf of all the rate-payers ; and that it was not sufficient to say it was on behalf of a majority of them.

Mr. *E. B. Wood*, for the plaintiff, admitted that the bill was defective as to parties, but insisted that as there was a demurrer also for want of equity, which the defendants failed to sustain; there should be no costs to either party. Referring to *Paine* v. *Chapman* (*a*).

Mr. *S. Blake*, for the defendants, on the other hand, contended that the demurrer was not for want of equity, but, was solely for want of parties, and that the word "and" before the clause "that there are not proper parties to the said bill," was an error of the clerk in copying, and the clause should read: "in that there are not proper parties to the said bill;" but that in any case the demurrer, for want of equity, could not be argued as that for want of parties, had been allowed. He referred to *Westbrooke* v. *The Attorney-General* (*b*).

Judgment.

VanKoughnet, C.—After stating that he thought the demurrer must be treated as being one for want of of parties, and also one for want of equity; that in fact there were two demurrers, proceeded to say, when a demurrer is filed for want of parties, and also for want of equity, I think that the plaintiff should put his bill right as

* Note.—The word "*in*" was intended instead of the word "*and*," but owing to a clerical error the word *and* was inserted

(*a*) 6 Gr. 338. (*b*) 11 Gr. 264.

1867.

Malcolm v. Malcolm.

to parties before he can insist on having argued the demurrer for want of equity. To argue the demurrer for want of equity, in the absence of the proper parties to the suit, seems contrary to all principle. The Court might as well proceed to a hearing of the cause in the face of such an objection, when it is plain at the outset. In many or most cases, such a course would be futile, as the absent parties could in no way be bound. Here the plaintiff admits that his bill is defective in parties, and that he knew it was so, when he set down the demurrer; but he insists, nevertheless, in having the question of the whole equity argued. I think I must stop him here, and give him leave to amend his bill on payment of costs. Sometimes the argument has taken place, subject to this objection of parties, and the Court has in such cases apportioned the costs; but, here, the objection is too obvious to require delay for consideration.

VanWormer v. Harding.

Specific performance—Costs.

The vendor of real estate having died before the conveyance of property agreed to be sold, leaving infant heirs, the purchaser, instead of proceeding to enforce the contract in this Court, instituted proceedings at law to recover back the purchase money paid, partly to the vendor and partly to his administrators, whereupon a bill was filed by the representatives of the vendor, seeking to restrain the action at law and for specific performance. The Court made the decree as asked, and ordered the defendant to pay costs up to the hearing.

Bill for specific performance.

Statement.

It appeared that one *S. H. Parke* since deceased, had sold certain property to the defendant, *George Harding*. *Parke* died, leaving the plaintiffs, his widow and children, and letters of administration were granted to certain of the plaintiffs. During the life of *Parke*, *Harding*

1867. paid part of the purchase money, the remainder not being due, and since his death had paid the balance.

VanWormer v. Harding.

Several of the defendants being infants, no conveyance had consequently been made, although the adult plaintiffs had offered to convey and to covenant that the infants would convey when of age. *Harding*, however, brought an action to recover back the purchase money paid, and then the present bill was filed for an injunction, restraining the proceedings at law.

Under these circumstances the plaintiffs brought on the case to be heard by way of motion for decree.

It was admitted on the part of the defendant, that a good title had been shewn since bill and answer were filed; but he claimed that if he had to accept the title, the costs of this suit, and at law, should be paid by the plaintiff.

The question discussed was as to who should bear the costs.

Mr. *S. Blake*, for the plaintiffs, referred to *Weihe* v. *Ferrie* (*a*); *Winters* v. *Sutton* (*b*).

Mr. *Hamilton* cited *Morgan* and *Davey* on costs, pp 181, 2, 3.

Judgment. VANKOUGHNET, C.—I think that *Harding* should pay the costs of so much of the suit as has been occasioned by the necessity for an injunction. Indeed I think he should pay costs down to and inclusive of the hearing. The suit was rendered necessary by his having brought the action at law. He assumed a hostile attitude, which the plaintiffs had to come here to repress. He might have remained quiet till the infants came of

(*a*) 10 Gr. 98. (*b*) 12 Gr. 113.

age, or sought for a title through this Court. He did neither, but treated the equity as at an end, and this decree is necessary to give effect to it against his action in the matter. 1867. Van Wormer v. Harding.

PATTERSON v. THE ROYAL INSURANCE COMPANY.

Insurance—Provisional receipt.

A. applied to an agent of the Royal Insurance Company to effect an insurance and paid the premium. The agent gave the usual receipt, following a form supplied by the Company, and which declared that a policy would be issued by the Company in sixty days if approved of by the Manager at Toronto: that otherwise the receipt would be cancelled and the amount of unearned premium refunded, and that the receipt would be void should camphene oil be used on the premises.

The agent did not report the transaction to the Company, and after the expiration of sixty days a fire occurred.

Held, 1st. That this receipt contained a valid contract for interim insurance.

Held, 2dly. That the Company and not the insured, should sustain any damage occasioned by the agent's neglect, and that the Company was liable for the loss by the fire.

Examination and hearing at Cobourg.

Mr. *Blake*, Q.C., and Mr. J. D. *Armour*, for the plaintiff.

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

VANKOUGHNET, C.—The receipt issued in this case is headed "Agent's Provisional Receipt." It is in the form furnished in blank to the agents of the Company for use. It is filled up by the agent, and acknowledges the receipt of $40, "being the premium of insurance on property for twelve months, and for which a policy will be issued by the Royal Insurance Company within sixty Judgment.

1867.

Patterson v. Royal Ins. Co.

days if approved by the manager in Toronto, otherwise, this receipt will be cancelled, and the amount of unearned premium refunded," and at the bottom appears: "N.B.—This receipt will be void should camphene oil be used on the premises." I take this receipt to contain a contract for an interim insurance—that is, till the transaction evidenced by it is rejected by the manager. The provision for the return of unearned premium shows that the insurance was to take effect at once, and the condition for making the receipt void in case camphene be used, must imply an immediate insurance continuing on the receipt till it is superceded by rejection, when it is to be cancelled; or, by a policy. The evidence of the manager shows that the agents were authorized to issue these receipts, and that the company had always treated them as creating insurances till they were disapproved by the manager. I should, I think, hold that by means of this receipt, and the payment of the money which it acknowledges, an insurance was effected binding on the company, and that it continued to be binding up to and at the time of the fire; no rejection of it having taken place in the meantime. The company, it is true had no opportunity to reject, because their agent had never informed the manager of the risk; but they, not the plaintiff must suffer by his neglect or fraud. The plaintiff was not bound to see that *McLeod*, the agent, did his duty to the company. He had a right to presume that this was done, and he heard nothing to the contrary. We know that very often policies do not issue, parties insured resting upon their receipt as evidence of the fact; and, though the plaintiff might have demanded a policy and required and enforced one after sixty days, yet I cannot hold that he lost or abandoned his insurance by neglect to do this. It is proved that the manager issued settled forms of policy, which, with the seal of the company, were transmitted to him from England in blank, to be filled up and issued by him. I think it must by intended as

Judgment.

1867.

Patterson v. Royal Ins. Co.

against the company that it was one of these policies they contracted to issue by the receipt, unless the insurance was rejected, or was altered and a special form of policy stipulated for. The plaintiff could not insist on any better terms than those usual forms of policy would have given him; and to one of those I think him entitled, unless his action in regard to the Western Insurance Company shuts him out from his claim on the Royal Insurance Company.

Looking at the fact that *McLeod* was agent for both companies—that the plaintiff did not contract with the Western Insurance Company, or authorize *McLeod* to do so for him; that *McLeod* concocted the papers in the plaintiff's name with that company, and prepared the affidavit which the plaintiff made to sustain it at a time anterior, so far as I can see, to any knowledge by the plaintiff of the attempt of *McLeod* to transfer the risk to the Western; that *McLeod's* act was a fraud, by which he hoped to get rid of the earlier fraud practised on the Royal by embezzling the money paid to him by the plaintiff and concealing the transaction from the company: the necessity in his mind, therefore, for immediate action. I think I am not drawing an unreasonable conclusion, looking besides at the plaintiff's conduct afterwards; that he, the plaintiff, really did not understand when subscribing the affidavit prepared by *McLeod* that he was making a claim on the Western or any claim other than upon his original insurance which had been effected with the Royal eight months previously, I think the evidence shows that on the morning of the 21st July, *McLeod*, hearing that the inspector of the Western Insurance Company was coming down, hurried out to the plaintiff with the receipt issued in the name of the Western Insurance Company, and instructed him that when the agent went out to the plaintiff he was to show him the latter receipt and say that his claim rested on it; the plaintiff seems then at

Judgment.

1867.

Patterson v. Royal Ins. Co.

once to have felt that there was something wrong, and without waiting to see the Inspector or attempting to impose upon him or aid *McLeod* in his fraud, comes on at once on the same day to his legal adviser, tells him the whole truth, has it explained to the agents of both companies, for whom *McLeod* had been acting, and makes his claim upon the Royal, admitting that he has no claim upon the Western; I cannot, under these circumstances, I think, hold that the plaintiff abandoned his right to look to the Royal, or made an insurance in the Western in substitution or otherwise—but that what was done in his respect, was done by *McLeod*, and the plaintiff made an innocent instrument for him in the matter.

Decree for the plaintiff for amount of insurance and interest according to the terms of the policy, as if it had issued, and costs.

SECORD v. TERRYBERRY.

Appeal from Master—Costs.

Where it was considered that the finding of the Master was, under the circumstances, a fit subject for discussion; the Court, although it dismissed an appeal, from the finding of the Master, did so without costs.

Statement.

This was a suit for the administration of the estate of *William Terryberry*, deceased. The defendant *Terryberry*, was appointed one of his executors, and certain lands owned by the testator were devised to the plaintiff, then an infant of tender years.

In taking the accounts under the decree, the Master allowed to the executor certain moneys paid by him to settle a suit brought against the estate of the testator, against which allowance the plaintiff appealed on the

ground that the executor being interested in the matter in his own right, the compromise was, in fact, for his own benefit. 1867.

Secord v. Terryberry.

Mr. *Spohn*, for the plaintiff.

Mr. *Freeman*, Q. C., contra.

VanKoughnet C.—On looking over the evidence and the Master's Report, I have come to the conclusion that he was right in allowing to *Jacob Terryberry* the sum paid by him on behalf of the plaintiff, then an infant, in compromising the action at law. The result of further litigation was more than doubtful, and the defendant dealt for himself as well as the infant in the compromise arrived at. To act for an infant under such circumstances is attended with great risk, for the Court may not eventually sanction it. Here, however, it seems to me to have been a prudent thing to do. The Master appears to have believed the testimony of the tenant, *Samuel Russ*, as to the arrangement between him and the testator; and I cannot say he was wrong in so doing. This being so, the executors cannot be chargeable for any default in not leasing the premises. No estate was conveyed to them by the will; they were given a power of leasing, with which the testator interfered before his death, by the arrangement made with *Russ*.

Judgment.

I have had some doubt in the matter, but upon the whole, I think the Master right. It was a fit subject for discussion, however, and I give no costs to either party on dismissing the appeal.

1867.

SHEPPARD v. SHEPPARD.

Mortgages—Dower—Equity of redemption.

Where a woman joins in a mortgage to bar her dower for the purpose of securing a debt of her husband, and after his death the property is sold for more than is sufficient to satisfy the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband.

This was an appeal from the Master's report, made in a suit to administer the estate of *Thomas Sheppard*, deceased. In proceeding before the Master it appeared that the intestate had executed two mortgages on his real estate, in which the widow had joined for the purpose of barring her dower; that this property had been sold under the decree, and having realized a sum more than sufficient to pay off the mortgage debts and interest, the widow in the proceedings before the Master, claimed for her dower the surplus, and being dissatisfied with the sum allowed her by the Master, she brought the present appeal from his finding. On behalf of the creditors who had proved claims before the Master, it was urged that all the widow had a right to claim was such a sum as, according to the tables of mortality, would be the present value of the interest of one-third the excess—between $400 and $500—this, according to the computation of an actuary, was found to be about $150.

Mr. *Hodgins*, for the appeal.

Mr. *W. H. Burns*, contra.

Judgment. VANKOUGHNET, C.—In this case the widow claims that the whole residue of the purchase money of the premises sold under the decree of this Court, and with her consent, freed from her dower, should be set apart to meet the sum which was to be appropriated to her

use out of this purchase money, in lieu of her dower in the land.

1867.

Sheppard v. Sheppard.

The widow had joined with her husband in two mortgages upon the property; the deeds containing the usual release of dower, absolute in form, and having, for the purpose of barring dower, the same effect in this country as a fine levied by her for the same purpose, had in England before the Statutes there and here which now enable a wife to take dower in equitable estates. Prior to these Statutes, it had been settled law for a century, that a widow was not entitled to dower in an equity of redemption upon a mortgage in fee, and that she could not redeem such a mortgage, although she could redeem a mortgaged term, as she was dowable of the reversion. Now that she is dowable of an equity of redemption, there can be no doubt that she may redeem a mortgage in fee, though she has joined in that mortgage for the purpose of barring her dower. The bar of dower, however, in such a case can only be conditional on no redemption taking place, for, as I have already said, the wife being dowable of the equity of redemption has, as she here has, a right to redeem the estate, that she may have in it her full dower. It follows, as a corrollary, I think, that the widow may call upon the personal estate left by her deceased husband, to remove the charges which he created, and procured her consent to, for his own purposes.

Judgment.

The question arises in this case, where there is no personal estate, whether the real estate, left by the intestate is applicable to the same purpose. The only real estate here is the equity of redemption in the mortgaged premises. These mortgaged premises have been sold for about $1,700. After paying off the mortgage money and the costs there is left about $450—less than one-third of the money realized—to meet claims upon the intestate's estate. Several creditors have

1867.

Sheppard v. Sheppard.

proved debts against this residue, and to an amount in excess of it. It is not denied that the widow is entitled to have one-third of this residue set apart to meet her claim to dower. The claim is, however, that the whole of it should be set apart, as it is less than one-third of the value of the lands sold; and that her claim is prior to that of any of her husband's creditors, except the mortgage creditors. On the other hand, it is said that the wife having barred her dower in the estate, and its value, to at least the amount secured by mortgage, can only have dower in the equity of redemption—that is in the residue of the estate after paying off the mortgages.

Judgment.

In England the widow's right to dower was always regarded with great favor, even at the expense of the heir. We have here no legislative or judicial policy opposed to this. On the contrary, the statutory right to dower in equitable estates may be considered as upholding if not extending it. In Mr. *Park's* valuable treatise on dower at page 351—1st edition—it is said "a dowress, like an heir or devisee, has of course a right to have the personal estate of her husband, as far as it will go, applied in discharge of mortgage and other debts contracted by the husband which are charges upon the land which she holds in dower—and even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land assigned to her in dower." The authorities to which he refers seem to me to warrant this statement of the law. Thus, it has been decided, that if a husband's lands at the time of marriage be subject to the King's debt, the lands in the heirs hands shall discharge the debt, if sufficient, or *pro tanto*, before the lands assigned to the widow in dowry shall be touched. In this country lands are assets for the satisfaction of debts, and are subject

to the like remedies for payment of the same, as personal estates.

1867.

Sheppard v. Sheppard.

Now, the creditors here, who claim against the widow, are simple contract creditors, and can only claim to have the value of the land, or as here, in reality, only the equity of redemption applied to pay their claims, because such equity of redemption is by Statute assets for the payment of debts. Now, if the widow is entitled to have the personal estate applied to paying off the incumbrances upon the land out of which she seeks dower, and in preference to the claims of other creditors, and, if land be assets equally with personalty for the payment of debts, why may she not also ask that such land be applied to the discharge of the incumbrances, equally with, or in the absence of personalty? It seems to me that she has this right, and that the claims of the simple contract creditors must be postponed to it; and, as the residue, after paying off the incumbrances and the costs of the suit, is less than one-third of the whole value of the estate, let it be set apart as the widow's dower and invested as such for her life, to be applied at the termination thereof to the payment of the creditors of the intestate.

Judgment.

COCHRANE v. JOHNSON.

Quieting Titles' Act—Purchase for value without notice.

In proceeding under this Act to quiet a title, if it appears that the opposing claim is such that had a bill been filed by the party entitled, to enforce it, the applicant would have had a good defence as a *bona fide* purchaser for value, without notice, the applicant will be entitled to obtain the usual certificate of title.

This was an appeal from the report of Mr. *Turner*, one of the Referees of titles, finding that the applicant, *Cochrane*, was entitled to a certificate of title.

1867.

Cochrane v. Johnson.

Cochrane, it appeared, had advanced a sum of £500, and accepted a mortgage on the premises in question, as security for the advance and had subsequently obtained a final decree of foreclosesure in a suit brought upon the mortgage.

After the final order of forecloseure had been obtained, the contestant *Johnson* asserted his title to the property as heir of his mother on the ground that one of the deeds, under which *Cochrane* claimed, had been obtained by undue influence, but of which he, *Cochrane*, had not any notice; and it was shewn that before advancing his money he had made inquiry as to the title deeds of the party interested in the estate. Thereupon *Cochrane* filed a petition under the Act for Quieting Titles, and the Referee having found that he had not had any notice of such undue influence before advancing his money and registering his mortgage reported in favor of his title.

Mr. *Roaf*, Q. C., for *Johnson*, who appeals.

Mr. *Strong*, Q. C. and Mr. *M. VanKoughnet*, contra.

Judgment.

VANKOUGHNET, C.—I think the ruling of the Referee in this case right, and that the appeal should be dismissed with costs. No notice to *Cochrane* of any thing wrong in the transaction between the late Mrs. *Johnson* and *Pinnock* is shewn. The most that can be charged against him is that the absence of the deed from her son to herself, under or through which Mr. and Mrs. *Pinnock* claimed, was calculated to excite suspicion, or called for inquiry. Mr. *Hurd*, who acted for the petitioner, thought inquiry for this missing deed necessary; and one *Greene* was sent by *Cochrane* to Mrs. *Johnson* to ask her for all deeds in her possession relating to lot 11. She produced but one: the deed to her husband, under which all parties claim, saying, according to *Greene's* evidence that she had no other deed. This

1867.

Cochrane v. Johnson.

Greene communicated to the petitioner; and, upon receipt of that information, Mr. *Hurd* passed the title: the money was advanced, and the mortgage in question executed. It is urged that there was something very suspicious in the instructions given by *Cochrane* to *Greene*, and in the manner in which *Greene* approached Mrs. *Johnson* on the subject of the deeds; especially so, on the evidence of *Thomas Johnson*. But, in answer to this accusation, it may be said what possible object could *Cochrane* have had in advancing his money upon a shaky or suspected title? In October, 1858, when this advance was made, money, as we all know, was in great demand, and very high rates of interest paid for it, and the petitioner could have had no difficulty in procuring a safe investment. Again, his solicitor, after a very careful examination and inquiry, and after learning the result of *Greene's* interview with Mrs. *Johnson*, passed the title. It is not pretended that there was any understanding between the petitioner and *Pinnock*, that the former should take a deed for the purpose of defeating any equity Mrs. *Johnson* had, or to assist *Pinnock* in any way in strengthening his title against her, or that *Cochrane* ever heard or knew that Mrs. *Johnson* was dissatisfied with, or intended to repudiate the deed made by her to Mrs. *Pinnock*. It is not even shewn that *Cochrane* was aware that *Pinnock* had left in Mrs. *Johnson's* custody the missing deed; and when *Cochrane* ascertained through *Greene*, that it was not in Mrs. *Johnson's* custody, and that *Pinnock* had it not, it was treated by Mr. *Hurd*, his solicitor, as a missing deed, evidence of which was to be found in the Registry Office. *Pinnock* was in possession of the land, acting as owner. The only thing, then, that at all raises a suspicion that *Cochrane* doubted the validity of the title, is that *Greene* was not instructed to ask for this particular deed. He swore he asked for all deeds relating to lot No. 11, and that Mrs. *Johnson*, after search in a box, produced the deed to her husband, saying that that was the only deed she

Judgment.

1867.

Cochrane v. Johnson.

had relating to the lot, and that she had no other deed relating to it in her own possession or that of any one else. She did not then say anything about the deed to herself from her son, or the deed to *Pinnock*. She did not object to, or repudiate, the latter. *Pinnock*, according to the evidence of *Thomas Johnson*, was present at the time. *Thomas Johnson* says he looked for and handed to *Greene* the deed which the latter obtained, and this, by his mother's instructions. This may be true. His account of the interview varies somewhat from *Greene's*; but I think I must give full credence to the statements in the letter written at the time to the petitioner by *Greene*, who is and was perfectly disinterested in the matter between these parties, and in no way connected with the family. His statement made at the time, and he swore that as made then it contained the truth, is more reliable than the memory of a witness nine years after the transaction occurred. I think then, that the

Judgment.

petitioner finding a registered title in favor of Mrs. *Pinnock*; and finding her and her husband in possession under it; and unable to obtain from them or from Mrs. *Johnson* the deed so appearing on registry; and not having heard anything calculated to arouse suupicion as to the title of *Pinnock* and wife cannot be disturbed in his registered title; against which, as I understand, the doctrine of this Court, not merely suspicion but even constructive notice or any notice less than actual notice shall not avail. (*a*)

(*a*) Cobbett v. Brock, 20 Beav. 524; Hewett v. Loosemore, 9 Hare, 455; Atterbury v. Wallis, 8 Deg, M. & G. 454.

1868.

CHAMBERLAIN v. TORRANCE.

Ancient deed—New trial before a jury.

Although the rule is, that an ancient deed produced from the proper custody proves itself, this does not preclude a party interested from proving that the deed was a forgery; or that on any other ground this deed is not a valid and binding instrument.

Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due execution, the other party may give evidence of the character of such deceased witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him.

A trial was ordered before a jury to try the question as to the genuineness of a deed more than thirty years old, produced by one of the parties, when evidence was adduced which was a surprise upon the defendants. The Court, at their instance, ordered a new trial or re-hearing of the cause upon payment of costs of the hearing already had, including the costs occasioned by a jury being summoned and empanelled, as also the costs of the motion; and defendants undertaking to pay the costs of the second jury, should they demand one, whatever might be the result of the cause.

Motion to set aside a verdict rendered by a jury empanelled to try the question of the genuineness of a deed of one *Keeler*, under which the defendants claimed.

Mr. *Rae*, for the motion.

Mr. *Moss*, contra.

VANKOUGHNET C.—This is a motion for a new trial, or a rehearing before the Court and a jury of a question which has been already submitted to a jury before me. Judgment.

The question was one arising upon a claim made under the Quieting of Titles' Act, and is, whether or not a certain deed alleged to have been made by one *Peter Keeler*, and under which the defendants claim, was or not a forgery. This deed was at the hearing produced from the proper custody and is nearly forty

1868.

Chamberlain v. Torrance.

years old. It had been signed by the grantor, if at all, by his mark. The jury found it a forgery, and on the evidence given I concurred in their verdict.

A new trial is asked for on affidavits, and for misdirection in two particulars.

1st. That I admitted evidence to prejudice the character of one *Edgar*, the subscribing witness to the deed, who is now dead.

2d. That I admitted evidence to disprove a deed more than thirty years old; whereas, it is contended, a deed of that age cannot be impeached, but is by an absolute, irresistible presumption of law, to be treated as valid—even though it could be positively proved that it had never been executed, as it purports to be—but had been forged.

Judgment.

As to the second ground of misdirection, I think I was right in admitting evidence as to the genuineness of the deed. It seems to me that it would be monstrous to hold that a man might forge the name of another to a deed in his own favor, keep it for thirty years among his muniments of title—among genuine deeds it may be—then produce it, and say it must prevail without any question. It is true that a party setting up a deed thirty years old, is released from the necessity of producing evidence in support of it, for the law supposes or presumes that the witnesses and parties to it after that length of time are not likely to be living or capable of being accounted for, and because of the great difficulty, if not impossibility, of proving handwriting at such a distance of time. But if there be anything suspicious in the appearance of the instrument, or suspicions in regard to it be otherwise created, while the party may yet ask the jury to presume the due execution, he does so, I take it at the risk of the jury not being satisfied there-

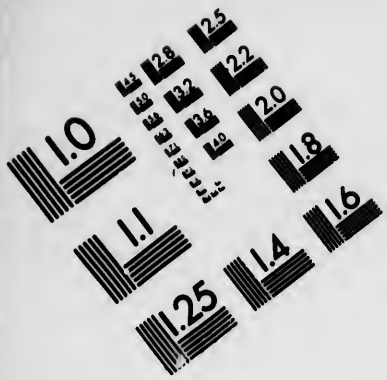
1868.

Chamberlain v. Torrance.

with. In *Roe dem Brune* v. *Rawlings* (*a*), Lord *Ellenborough* says, (referring to 12 V. Ab. 84, Tit. Evidence,) that the reason given for receiving in evidence without proof of execution ancient deeds found among deeds and evidences of land is, "that it is hard to prove ancient things and the finding them *in such a place* is a presumption they were fairly and honestly obtained and reserved for use, and are free *from suspicion of dishonesty*." Now, in this case, the deed produced and impeached professes to have the mark of the grantor in evidence of his signature. That grantor swears he never executed it, and that it is a forgery. Can any greater suspicion than this attach to the deed? Is it not at least as suspicious a circumstance, as if there were interlineations or obliterations in the deed? And yet, in the latter case, text writers and Judges say that it is not, at least, safe to trust to the age of the deed, without some evidence to account for these appearances in it. When any cause, however trifling, may cast suspicion on the deed, so as to rebut or weaken the presumption of its due execution, is it to be said that direct evidence of forgery or non-execution cannot be received to destroy such presumption? It is said that no case is to be found in which such evidence has been received. If this be so, it must be because no one ever thought of questioning the propriety of such evidence. After this case had been argued and my opinion expressed as written above, a similar question was raised before me in appeal from the Referee's Report on Title, *in re* lot 13, in 1st concession Brooke: and I had the benefit, then, of the very full argument of Mr. *Crooks* in support of the objection to the reception of such evidence. Mr. *Crooks* admitted that he could find no authority in support of it except the statement in Mr. *Taylor's* book of evidence that the presumption of the due execution of a deed thirty years old is one of those conclusive presumptions

Judgment.

(*a*) 7 East 291.



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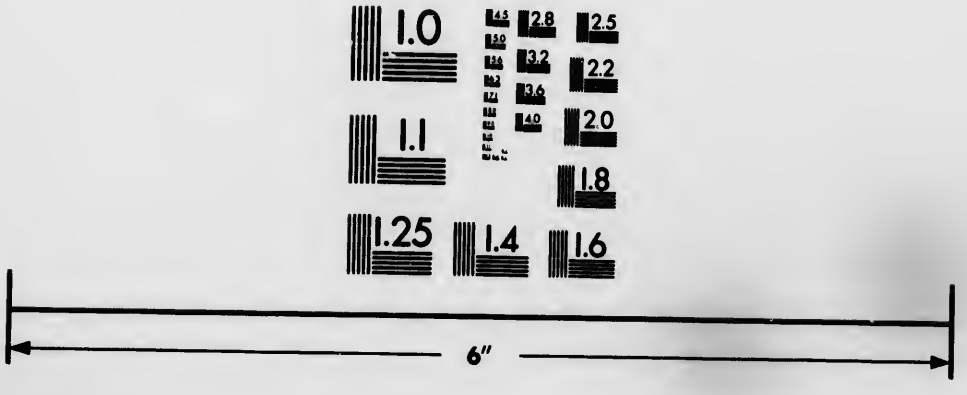

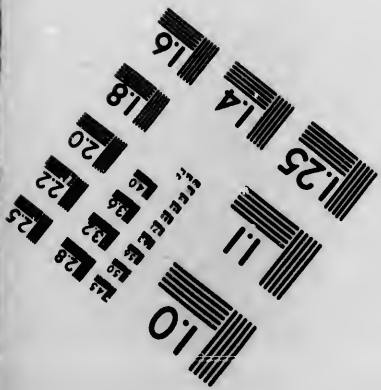

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1868.

Chamberlain v. Torrance.

tions of law not to be shaken by any testimony to the contrary. I do not understand Mr. *Taylor* to mean this, or any thing more than, that the presumption of the death or inability of the witnesses to swear to the execution of a deed thirty years old shall not be questioned, and that the party producing the deed shall not be deprived of this presumption by its being shewn that the witnesses are still alive, or can speak as to the fact of execution, even though they be in Court ready to be called. This is a presumption of law, so far conclusive; but, it is confounding two things together to say that while this presumption stands absolutely, in the place of evidence *by the witnesses*, that the deed was executed, yet that the execution itself might not or could not be impeached, as it could be were the witnesses themselves called to prove a deed not yet thirty years old. The presumption stands merely in the place of the evidence the witnesses would be supposed to give of the execution; but, I take it, it goes no further; and if Mr. *Taylor* means to say it does, I do not agree with him. I find, however, that notwithstanding that this presumption in favor of the execution of deeds thirty years old, is classed by Mr. *Taylor* among "conclusive presumptions," yet, among those same presumptions, he ranks that which exists in favor of a bond having been made upon good consideration, *so long as the instrument remains unimpeached.* See sec. 68; and, in sec. 70, speaking of deeds thirty years old, he says, that the deed "must come from such custody as to afford reasonable presumption in favor of its genuineness, and *that it is otherwise free from just grounds* of suspicion." These, as I have said, may appear on the deed itself, or otherwise. It is to be observed in this case, that possession never accompanied the deed, as the lot was wild land.

Judgment.

I have disposed, first, of this objection, because the first ground of alleged misdirection depended upon its success or failure. I think it also cannot prevail.

1868.

Chamberlain v. Torrance.

It is of the highest importance that juries should know, if possible, the character, and very often the pursuits of those who give evidence; otherwise, the man of indifferent character and questionable pursuits may have just the same weight with them as the best and most righteous man in the land. Here, the alleged grantor swore he never executed the deed; and yet the name of one *Edgar*, since dead, appeared as a subscribing witness to that pretended execution. An affidavit made by *Edgar* of the due execution of the deed was produced before the jury for a collateral purpose. The jury, however, could not fail to see and be more or less impressed with the oath of due execution of the deed, though it was not legal evidence of the fact. Against this oath, was the legal evidence of the grantor. Was it or not important that the jury should know something of the past character and mode of dealing of this witness *Edgar?* The moment, doubt even was thrown on the execution of the deed, it was open to those asserting it, to sustain it by giving evidence of the good character of the witness and his disinterestedness in the matter. Was it not equally open to the other side to shew that his character was not good, and that he had had an interest in the matter? Here, *Edgar* was shewn to have been a dealer in U. E. Rights; to have been in the habit of buying them up for, among others, one *Lashier*, under whom defendants claim; that he had arranged with *Lashier* to procure a deed from *Peter Keeler*, the son, of an U. E. to the lot in question; that he located for *Keeler* the lot and obtained the patent to him for it; that for his trouble he was to receive half of the lot from *Keeler*; that he never did receive it; that he produced and delivered to *Lashier* the deed in question for the whole lot, and, as *Keeler* swears, without his signature to it; without his knowledge, and without his having ever received anything for it. The forgery having been sworn to by *Keeler*, the inducement to *Edgar* was manifest, viz., to disregard his bargain with *Keeler*, and sell the lot, the

Judgment.

1868.

Chamberlain v. Torrance.

whole lot to *Lashier*, in *Keeler's* name and receive the whole consideration money, instead of half of it. To know something of the character and habits of a man accused and suspected of so acting, and whose name appeared as duly attesting this deed, was, I thought, of some importance, and I think so still, and I therefore admitted, and I think rightly, the evidence complained of.

See *Provis* v. *Reed* (*a*), *Aveson* v. *Kinnaird* (*b*); *Doe Walker* v. *Stephenson* (*c*); *Starkie* on Evidence: (4 ed. pp. 252, 512).

As regards the case made by affidavit, I have had some difficulty. I cannot say that the statement by *Keeler* that he never made his mark, but always wrote his name, supported as it was by the testimony of his brothers and others, had not some weight with the jury. It was one of the reasons given why *Keeler* could not have executed the deed in question; yet it now appears that to the petition presented by him to the Quarter Sessions, claiming land as the son of U. E. Loyalist, his name was attached with his mark; that upon this petition certified in Quarter Sessions and transmitted to the Government, the land in question was located and patented. The defendants might have ascertained this before, and they may have known it, as they do not swear they did not. They could have had no object, however, in withholding it, for it would have been material to them to have shewn that in this very transaction *Keeler* had established his claim to the land by a petition bearing not his own signature, but his mark. It is not denied now that the petition was so signed. The evidence of it sought to be given now, is not of a doubtful character. It is not evidence that could be made or manufactured to strengthen a defective

Judgment.

(*a*) 5 Bing. 435. (*b*) 6 East. 188. (*c*) 3 Esp. 284.

case, after the weakness had been shewn. The fact existed before the hearing, as it does since; and it has not been, and cannot be in the power of the defendants in any way to affect it, or get up evidence in support of it. Were this an action of ejectment merely, I would not grant a new trial, as the defendants could have ascertained the existence of this evidence before the hearing, as well as after it. But inasmuch as the final decision of this case must settle the question of title forever under the References of Titles' Act; as there is a real, *bona fide* dispute between the parties; and it is not pretended that *Lashier*, under whom defendants claim, knew of the alleged forgery, or had any reason to suspect it; and as the plaintiffs relied strongly before the jury upon the circumstance that the deed bore not the signature by name, but only by mark of *Keeler*; and that he swore he never had signed any paper with his mark, but with his full name, though it did not appear that he had ever signed his name to any paper except the deed to the plaintiff; and as I cannot tell how largely this consideration may have influenced the jury, I think it right before concluding the matter to give the defendants the benefit of another trial or hearing, but on the following terms, viz.: That they pay the costs of the last hearing and examination, including the costs occasioned by a jury, and the costs of this motion, and also the costs of and attending upon the summoning, and the empanelling of another jury, if they desire one, whatever may be the result of the further hearing; and that the venue be changed, if the plaintiff desire it, to Belleville or Kingston, near to which the witnesses reside The evidence already taken to be used by either party, unless either party desires the witness recalled.

Judgment.

I have delayed giving judgment in this case, because it was said in argument that in the inquiry before the Referee it had been distinctly asserted by affidavit, or otherwise, that *Keeler* never used a mark to designate

1868. Chamberlain v. Torrance.

his signature. I have since called for evidence of this, but none has been furnished. Had it been, the defendants would have been guilty of wilful neglect in not having been prepared at the hearing to meet this assertion of *Keeler's*.

See also *Andrew* v. *Motley* (*a*); *Malcolmson* v. *O'Dea* (*b*); *Regina* v. *Wytton* (*c*); *Ex parte Reay* (*d*); *Rogers* v. *Shortis* (*e*); *Best* on Evidence, pp. 243, 329; *Best* on Presumptions, sec. 71, p. 81.

HEWARD v. WOLFENDEN.

Equity of redemption—Sale under execution—Costs.

Where several lots of land are mortgaged, the equity of redemption in one or some of them only, cannot be sold under common law process—and *Semble*, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity.

Where an appeal from the Master was dismissed, on a ground appearing for the first time on the appeal and had not been taken in the Master's Office, the Court refused to give costs to the successful parties.

Appeal from the report of the Master.

Statement.

It appeared that on the 3rd of October, 1859, the mortgagor (since deceased) created a mortgage in favour of the plaintiffs upon two lots of land, A. & B., one being his own property, the other being that of his wife. In May, 1861, the mortgagor created a mortgage in favour of the Bank of Montreal, on lot A. and another lot (C.,) both his own property. On the 16th of July, 1861, one *McKay* placed an execution against the

(*a*) 12 C. B. N. S. 526-34. (*b*) 10 H. L. Ca. 614.
(*c*) 2 Ell. & Ell. 557. (*d*) 1 Jur. N. S. 222.
(*e*) 10 Gr. 250.

1868.

Heward v. Wolfenden.

lands of the mortgagor in the hands of the Sheriff of Ontario, in which county all the lands lie, and this writ was renewed in July, 1862, and under it the interest of the mortgagor in lots A. and C. was advertised for sale on the 30th of July of that year. On the 22nd January, 1863, *McKay*, assigned his judgment to the Bank of Montreal. In January, 1863, the Sheriff under a writ of *ven. ex.*, at the suit of *McKay*, sold the mortgagor's interest in lot C. to the Bank of Montreal (for $328 less than the amount of the judgment,) to whom the Sheriff conveyed in February, 1864, and under that deed the Bank entered into possession.

Subsequently and on 12th November, 1864, the plaintiffs filed this bill on their mortgage of October, 1859. No further action was taken by the Bank in order to sell lot A., and on the 17th of October, 1866, after decree made in this cause, the Bank removed an engine from the mill on lot C., and sold it; and on the 30th of October, 1866, sold the fee in the property to a purchaser. Statement.

In the Master's Office the Bank proved as incumbrancers for the amount of their mortgage and the balance of the judgment.

The Master by his report found that the legal estate in lot C. had not vested in the purchaser from the Bank, and found a sum due the Bank in respect of their mortgage and judgment.

The appeal was by an execution creditor subsequent to the Bank of Montreal, who under the circumstances contended that the mortgage debt of the Bank had become extinguished; that is, that in bidding for lot C. they must be taken to have paid only the value of the land over and above their mortgage money and interest; that if the purchase had been by a stranger he would have bought subject to the mortgage for the whole

1868.

Heward v. Wolfenden.

amount, and the equity of redemption might be much more valuable than the amount due on the mortgage; that the Statute in such case extinguished the whole debt, not a part only.

Mr. *Gwynne*, Q.C., for the appeal.

Mr. *Blake*, Q.C., for the Bank of Montreal.

Mr. *Cattanach*, for the plaintiffs.

VANKOUGHNET, C.—The sale in question here was of the equity of redemption in one of several lots mortgaged to secure the same debt, under a writ of *fi. fa.* against lands. This sale was attempted under the provisions of the Act 12 Victoria, chapter 73, (Consolidated Statutes of Upper Canada—chapter 22, sections 257,8,9,) which first permitted the sales of such interests in lands under execution. It has been found necessary to give this Act a very limited effect in consequence of the difficulties of dealing by common law process with such an estate, involving, as it so often does, so many and varied interests, with which a Court of Equity can alone deal fairly and completely.

Judgment.

In my construction of the Statute, the Sheriff must sell the equity of redemption in all the mortgaged lands, or not sell at all; and of course there could be no such Sheriff's sale when the lands lie in different counties, and the Act then would not apply. Section 257 provides that the Sheriff may sell all the interest of the mortgagor in the mortgaged lands; this seems to contemplate a sale of his interest in the whole of the mortgaged lands. But supposing that this fact, if it stood alone, would warrant a sale of the whole interest in a portion of the mortgaged lands, the two following sections, I think, show that such a sale was not intended by the Legislature. Section

258 gives to the purchaser at Sheriff's sale the same rights that the mortgagor had before such sale; and on payment of the charge, the same rights that the mortgagor would have had on such payment. Now, the mortgagor's right, unaffected by a sale of his interest, is to have all the lands conveyed to him absolutely, by the mortgagee, on payment of the charge upon them. Suppose, then, the mortgage embraces several lots of land, and the Sheriff sells as here, the equity of redemption in one of them, is the purchaser of that interest only, to be entitled to call upon the mortgagee, upon payment to him of the charge upon the whole lands, for a conveyance of all those lands, freed from the equity of redemption therein of the mortgagor, though the purchaser only bought, and the Sheriff only sold, the equity of redemption in one of the lots? That one lot may have been worth more or less than the whole debt. In either case there would be the, at all events apparent, absurdity, and the difficulty, that, while the Sheriff was only selling the mortgagor's estate in one lot, the purchaser would thereby actually acquire the estate of the mortgagor in all the other lots mortgaged; for if such a sale passed anything, the purchaser must, under the Statute, have this right. The sale of the mortgagor's interest in an acre of one thousand acres mortgaged, must then give the purchaser this right, however small the sum be paid; and thus deprive the mortgagor of the power of redeeming the 999 acres, however much more valuable than the debt they may be. The Legislature did not, I think, intend this, and the language employed by them justifies me in avoiding such a result. Section 259 leads also to the same conclusion, and it gives the mortgagor a charge upon the mortgaged lands, against the purchaser of the equity of redemption, until the mortgage debt be paid. The lands spoken of here are the mortgaged lands, as in section 257, and I do not think that while the Legislature meant that the purchaser was to acquire the whole of the mortgaged

Judgment.

1868.

Heward v. Wolfenden.

lands that the Sheriff might sell, they also meant that he might obtain the whole by the actual sale of only a part, however small, as in effect he must do, if the appellant's argument here be right; for if the sale passed anything it passed the mortgagor's right in the whole of the mortgaged lands. I think, therefore, the Sheriff's sale inoperative, and I disallow the appeal, but without costs, as both parties have treated the sale as good to some extent, and the question is now and arises for the first time on this appeal, and not in the Master's Office.

Low v. Morrison.

Quieting Titles' Act—Statute of Limitations—Costs.

The Act 25th Victoria, chapter 20, abolishes all exceptions and distinctions in favor of absentees: therefore twenty years adverse user or occupation of land will bar the right of the party having the legal paper title, whether resident within or without the jurisdiction during such period of twenty years.

When a Referee finds in favor of a title, acquired by adverse possession for twenty years, against the legal paper title, his certificate must shew of what portion of the lot the claimant has been in possession: as by the occupation of one or more acres, of a wild lot of land, a party will not acquire title to the whole lot, but only to so much as he is in actual possession of.

Where a party having acquired title to land by an adverse possession for twenty years, institutes proceedings under the Act to quiet his title, he must establish his right at his own expense: costs do not follow as a matter of course in proceedings under this act; and, *Semble*, that although such adverse title is established, the applicant may be made to pay the costs of an unsuccessful contestant.

Statement.

This was an appeal from the certificate of Mr. *Turner*, one of the Referees under the Act for Quieting Titles, certifying—on the facts stated in the judgment—in favor of the title of the petitioner, on the ground that

he had been in adverse possession of the premises in question for a period of more than twenty years. 1868.

Low v. Morrison.

Mr. *Strong*, Q. C., and Mr. *D. A. Sampson*, for the appeal.

Mr. *Blake*, Q. C., and Mr. *C. S. Patterson*, contra.

VanKoughnet, C.—The petitioner here describes himself as the owner in fee simple absolute of the premises in question. This is erroneous. He has the legal estate in trust, with a power of sale. He should have been described as trustee for sale of the fee simple, and in this respect the petition must be amended.

The petitioner's title as against the contestant rests on an adverse possession of twenty years. The right of the contestant rests upon the patent from the Crown, which secures to the children of *Maria Robertson* and her late husband, Colonel *George Robertson*, estates for life in the land; and it is these estates, the contestant claims under a deed thereof to him. The petitioner says that this estate is shut out by the Statute of Limitations—by a prescriptive right of twenty years' use or possession. The contestant replies that the tenants for life have never been in Upper Canada, and that twenty years' adverse possession does not bar their right. The petitioner rejoins that chapter 20 of 25 Victoria, has done away with this disability or exception in favor of absent owners, and that as to all proceedings instituted since the 1st of July, 1863, they stand upon the same footing with resident proprietors. I have reluctantly come to the conclusion that this is so. This Statute declares, "that it is desirable to abolish the distinction between plaintiffs or persons resident within or without the jurisdiction of the Courts in Upper Canada in the limitation of actions and suits," and then provides that an absentee shall have no longer period

Judgment.

1868.
Low v. Morrison.

of time to bring any suit, action, or proceeding, than if he were resident in Upper Canada when the cause of such action first accrued, and that all and every exception or distinction in any law or Statute relating to the limitation of actions now in force in Upper Canada in favor of such absentees by whatever terms or words such absence is stated or described in such law or Statute is repealed and abolished.

The 1st section of the Consolidated Statutes, chapter 88, says: "No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or bring such action shall have first accrued," &c., Section 45 says:—"If at the time at which the right of any person to bring an action to recover any land shall have first accrued as hereinbefore mentioned, such person shall have been absent from Upper Canada, then such person may, notwithstanding the period of twenty years shall have expired bring an action at any time within ten years after such person shall have ceased to be under any such disability." But (says section 46) "No action shall be brought by any person, notwithstanding any such disability, but within forty years next after the time at which the right to bring such action shall have first accrued."

Judgment.

I think I must read this longer period of time, this exception, this distinction in favour of absentees, as abolished by the Statute of 25 Victoria. I was much struck with Mr. *Strong's* contention in his very able argument of this case, that here only the remedy and not the right was barred; and that if the party could assert his right by entry without action, he might yet do so, unaffected by the Statute 25 Victoria. I leaned much to that view till I came to consider the 16th section of the Consolidated Statutes, which enacts that at "the determination of the period limited by this Act, to any person for bringing

any action or suit, the right and title of such person to the land, for the recovery whereof such action might have been brought within such period, shall be extinguished." 1868. Low v. Morrison.

Reading the 25th Victoria, as abolishing the extended period for bringing an action formerly given to absentees, and as limiting it to twenty years, I must apply the 16th section of the Consolidated Statutes, and hold that after the lapse of twenty years, the right and title of the absentees are extinguished. This law, if harsh, and all *ex poste facto* laws are more or less unjust, the Legislature is responsible for. They, however, gave absentees a year within which to avail themselves of an existing disability—whether or not this was sufficient to save existing rights is not for me to say—I must adjudicate that the right and title of the absentee are gone equally with those of the resident, where there has been a possession for twenty years, adverse to the right or title. I am not, however, satisfied here with the evidence of possession. A jury might or might not find it sufficient, and their verdict either way would not be disturbed perhaps. But, where a party seeks under the summary provisions of the Act here invoked, to establish a title by possession merely, against a clear paper title, and thus to usurp the place of the rightful owner and supplant him, he must do so by clear evidence, admitting of no reasonable doubt. Now, here, though it appears that *Webster* was assisting in the erection of a mill on these premises, more than twenty years ago, it does not appear that he did anything more than that for years after. It does not appear that the mill was erected by or for himself, or when it was first worked by him. Some people, named *Nulty*, appear to have had as much to do with it as he. Moreover, the erection of a mill on the corner of a wild lot of land would not be a possession of the whole lot. Many a man as a squatter or under a pretence of right has availed himself of the advantages which a stream of water affords for driving

Judgment.

1868.
Low v. Morrison.

machinery. and erected a mill there and worked it. But it does not follow from this, that he is thereby in possession of the adjacent 200 or 400 acres, so as to give a title to them, adverse to the true title. On which side of the mill, for instance, is the vacant wild land to be considered as in his possession? Is he to be treated as occupying 200 acres in front or in rear, or both, giving him 400 acres in all?* The evidence of possession here, is not, I think, of a character sufficiently satisfactory to shut out and extinguish the right and title to the land under the patent. It must go back to the Referee under this head of objection.

Judgment.

I have been treating this question of possession as if the tenants for life had, as contended for by Mr. *Strong*, the legal estate in the land. The same principle, however, would apply equally to their estate, if an equitable one only, with the additional provision of the 32nd section of the Consolidated Act; and I think, looking at the provisions of the patent, that the estate is only equitable. I think that the grant is to Mrs. *Robertson*, her heirs and assigns, in fee subject to a trust in favour of her children for their lives. In the premises the grant is to her, her heirs, and assigns. This, I apprehend. could not be cut down by the habendum to an estate merely for life, even if it were clear that that was the intention or purpose of the habendum, and I don't think it was. The words are to "hold to her (in trust for the children lawfully begotten of her body by the said *George Robertson*), her heirs, and assigns." The words "in trust," &c., are here interpolated in parenthesis between her own name and the designation "her heirs." I think, that to give sense and meaning to this part of the deed, we must read these words so introduced, as if they followed the word "heirs"; and it is easy to see they were placed where they are, because a vacant space in the printed form of

* See as to this McMaster v. Morrison, *ante* p. 138.

1868.

Low v. Morrison.

deed presented a convenient place for the purpose—not of course, that this accident alone could control the language of the deed. It is clear from the subsequent parts of the deed, that the grant to her, so far as the language of the deed imports, is in fee. The deed imposes upon "her heirs and assigns" an obligation, with forfeiture as the penalty of neglect, to erect, within three years, a house on the land, and to reside or have resident some one thereon for the space of three years next after such erection. I cannot say that in 1836, when this patent issued, such a provision and condition were idle forms. I think that to comply with them it was necessary she should take presently an estate in the land, which she could not have, if the trust or use was immediately executed in the tenants for life, so as to vest the legal estate for that freehold term in them (*a*).

Judgment.

Mr. *Strong* also contended that the deed here, being voluntary, there was a resulting trust in favor of the Crown after the declared trust had been exhausted by the deaths of all the tenants for life, and he pressed this position with so much force, that I think it right before it is finally disposed of, that notice thereof should be given to the Attorney General, and he be allowed to intervene if he choose, to maintain it. I do not feel that I ought in a proceeding of this kind, the result of which may be final, to dispose of the matter in his absence, although my present opinion is that there is no such resulting trust. In the first place, we know that free grants in this country were common for the benefit of widows and children of those who had rendered the Crown service, as well as for the servitors themselves. In the next place it would seem from the terms of the grant, that the Crown intended the whole fee to pass, subject to the trust for the children. The duty imposed

(*a*) 2 Williams Saunders, Rep. p. 11, N. 6; Barker v. Greenwood, 4 M. & W. 421.

1868.
Low v. Morrison.

upon the grantee, her heirs and assigns, to build, relieves it somewhat from the character of a mere voluntary grant. The grantee, her heirs and assigns, are to do something in return, and that for the benefit of the country, by becoming settlers or procuring others to be. The duty thus imposed might not come to be discharged, might exist and be capable of performance, within the prescribed time after the deaths of all the tenants for life. Then there is a provision that any alienee of the land by deed of sale, conveyance or feoffment or exchange, or by gift, devise or marriage, or any heir thereto, shall within twelve months take the oaths prescribed by law, &c. The whole scope of the deed I think, shows that the Crown parted with all interest in the land. The mere fact of a conveyance being voluntary, does not of itself create a resulting use, otherwise nothing could ever pass by a voluntary conveyance operating under the Statute of Uses, although a gift was the express object of the conveyance; unless indeed, on the consideration of blood or marriage. When a conveyance is executed to certain persons as trustees in fee for the performance merely of some specific trust which does not require or exhaust the whole estate, and no intention is manifested to part with the residue, as a general rule, that residue will result to the grantor. I have not thought it necessary to consider whether there is any difference, ordinarily, in this respect between a grant by the Crown or a subject, as the circumstances under which Crown grants were made here in former times, and the object and purposes of the Crown in making them, and the particular terms of this grant itself, seem to me to negative the existence of any resulting trust.

Judgment.

As to the costs of the contestant in such cases as the present, I think that, where a party petitioner claims title by adverse possession against the clear paper title of the contestant, he should establish such title at his

own cost. He seeks for his own benefit, in his own case, to have his own title affirmed and declared valid. He invites the opposition of all who can reasonably contest it. The rightful owner of the title, which the petitioner or claimant seeks to shut out and extinguish by wrongful possession, may fairly call upon him to establish this. The rightful owner is not to hunt up evidence for the purpose. He cannot tell upon what evidence his adversary may rely to make out such a case, and I do not think he should be made to pay that adversary's costs, even though the latter establish his case. Costs ought not to follow as a matter of course in proceedings under this Act. I reserve the costs of the contestant on this appeal until after the Referee shall have made his final report.

In re NELSON—MCLENNAN v. WISHART.

Will—Construction of—Residuary estate.

The testator left two unsigned and undated scraps of paper, on one of which he had written, "I leave the whof of my property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, $2000;" and on the second scrap of paper he had written: "I give Peter Crann $500 for himself," which were admitted to probate as the last will of the deceased.

Held, That there was an intestacy as to the residue of the personalty over and above the $2,500 mentioned in these bequests.

Statement.

This was a suit to administer the estate of *Alexander Nelson*, deceased, by the administrator, with the will annexed. The Master found the legatee, *William Brown*, entitled under the terms of the will to the residue of *Nelson's* personal estate. From this finding of the Master, the next of kin appealed on the ground that as to the residue over and above the two legacies mentioned in the head-note and judgment, the testator had died intestate.

1868.

In re Nelson

Mr. *Moss* for the appeal.

Mr. *George Murray* for the heirs-at-law in the same interest.

Mr. *McLennan* and Mr. *E. Henderson* for the administrator and the legatee, *Brown*.

Southcot v. *Watson* (*a*), *Cradock* v. *Owen* (*b*), *West* v. *Lawday* (*c*), *Ellis* v. *Selby* (*d*), were referred to.

VANKOUGHNET, C.—The Surrogate Court has granted probate of two scraps of paper as containing the will of the testator. As arranged in the order which that Court has given to them, the will of the testator reads thus: "I leave the whof of my property to *William Brown*, Townhead, Arbuthnot by Fordoun, Scotland.

$2000.

Judgment.

WILLIAM BROWN,

Townhead, Arbuthnot by Fordoun, Scotland.

[This is written on the first scrap of paper.]

"I give *Peter Crann* $500 for himself."

[This appears on the second scrap.]

It is doubtful, I think, whether the testator did anything more than make these two memoranda with the intention of embodying them in a will thereafter to be made.

Probate, however, has been issued upon them; and the question before me now, is, not whether these two

(*a*) 3 Atk. 226.
(*b*) 2 Sm. & Giff. 241.
(*c*) 11 H. L. C. 375.
(*d*) 7 Sim. 352.

papers contain the last will of the testator; but, assuming them as his will, what construction is to be given to the language appearing in the first memorandum or piece of paper? I have looked at the original papers. Either the testator was not accustomed to write, and ignorant of its artificial requirements; or he was ill and feeble when this paper was written by him. The first scrap of paper is:

1868.

In re Nelson.

"I leave the whof of my property" next follows in the subsequent line:

"To William Brown, Townhead, Arbuthnot by Fordoun, Scotland."

"$2000."

"WILLIAM BROWN,

Townhead, Arbuthnot, by Fordoun, Scotland."

Judgment.

There is no marked comma or stop at or after the word "property"; and, but for the introduction at the end of this devise or bequest, of the figures "$2000," its natural and plain reading would give to the legatee named the whole of the testator's property. The addition, to the sentence, of these figures creates the difficulty. That the testator either at the time, or subsequently, did not intend *Brown* to have the whole of his property, is manifest from the bequest to *Crann*, subsequently made according to the order of the bequests as recognised in the Surrogate Court.

I can only look at the papers constituting the will, and the evidence as to the circumstances, and the nature of the testator's property, to gather its meaning. Can I reject the figures $2000? The testator must have meant something by them. They have no meaning, no use; are insensible, unless read as designating the amount

1868.

In re Nelson.

of the bequest to *Brown*. But can this be reconciled with the introduction to the will which says, "I leave the whof of my property", and without stoppage by note or comma, "to *William Brown*." After some doubt, I have come to the conclusion, that to make all parts of this will speak, I must limit the bequest to *Brown* to the $2000; that I must read the first line in the written will, "I leave the whof of my property", as a mere declaration by the testator; and as constituting a sentence by itself; amounting to a declaration by the testator, that he was going to dispose of the whole of his property, an intention which he never executed.

The absence of a comma or a note indicating a stoppage at this sentence is of no moment when one looks at the handwriting. An ignorant man or a sick man would be very apt not to know or think of its importance. It is clear that the testator before he died did not intend *Brown* to have the whole of his property, for he leaves $500 of it to *Crann*. It is also clear upon the admissions made that he possessed property greatly exceeding $2500. If the first memorandum contained,

Judgment.

at any time, his whole will, then the bequest to *Crann* should have been treated as a codicil; but the Surrogate Court does not appear so to have treated it. In the face of what seems to me a limitation by the use of the figures $2000, I do not feel that I can decree *Brown* to be the legatee of the whole estate, subject to the bequest to *Crann*; but that I must declare, that after providing for these two legacies, the testator's estate is undisposed of by him.

The old rule, though I think not very applicable here, might be invoked, that the last words in the will should govern; that is, that the figures $2000 should cut down the larger bequest preceding them. The word "whof" in the first sentence or line, has been treated by both parties as meaning "whole." I suppose it was so intended.

1868.

MURPHY v. MORRISON.

Appeal from County Court—Practice—Costs.

In appeals against the orders of the County Court, this Court will assume those orders to be correct until the contrary is shewn; and care must be taken to point out the defects on the pleadings and proceedings brought into this Court.

The defendant in a suit on the equity side of the County Court had, before being served with an injunction restraining the removal of a building, removed the same by direction of the City Inspector as being a nuisance, having been erected partly on the public street; notwithstanding this, an order was made by the Judge of the County Court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this Court: in making an order allowing the appeal and directing the discharge of the defendant, the Court did so without giving him the costs of the application.

This was a motion by way of appeal from the County Court of the County of York. It appeared that the defendant had obtained from the plaintiff a lease of a piece of land in the City of Toronto, on which the defendant had erected a frame dwelling. It also appeared that the greater part of this house was situated on the public street, and under these circumstances the defendant, in obedience to the order of the City Inspector, had commenced to remove the house; the plaintiff, thereupon, filed a claim on the equity side of the County Court, and obtained an injunction to restrain the removal.

The Judge ordered the committal of the defendant for breach of the injunction, who thereupon appealed to this Court.

Mr. *Blevins*, for the appeal.

Mr. *Cattanach*, contra.

VANKOUGHNET C.—This is an appeal from two orders of the junior Judge of the County Court of the County of York. Judgment.

1868.

Murphy v. Morrison.

The first order discharged with costs, an appeal bond, and set aside for irregularity, a claim filed by the respondent on the equity side of the Court.

The second order directed the defendant to be committed for breach of an injunction issued on that claim, and that the bond given as security for costs on an appeal to this Court from the first mentioned order, should be taken off the files. Mr. *Blevins*, for the appellant, contended that it did not appear that this bond had reference to the first order, or that there was not a further or proper bond given. On looking at the papers which have been brought up with the certificate of the learned Judge, I find among them this bond; that it relates to an order made by him on the 23rd September; that the order first above mentioned is of that date; that the order was made on a notice of motion to set aside for irregularity, the proceedings of the plaintiff in the Court below; that no other order of that date appears, and that no other bond is shewn to have been given. Under these circumstances, I think, I must assume that this bond is the one set aside by the second order complained of, and that if that order be right, then there is no bond for securing the costs on the appeal on the first order, and that, consequently, I cannot hear such appeal. In face of these facts, I cannot assume that there was such other security given as to warrant the appeal against this order, merely because the Judge below, has certified all the proceedings as ripe for an appeal. He would have done so in any case in respect of the appeal against the second order. I have not seen this latter order, but I learned its purport from both parties.

Judgment.

As to that part of it which orders the appeal bond to be taken off the files, I do not see how I can interfere, as neither party has taken the trouble to inform me on what grounds the bond was objected to before the learned Judge, or disallowed by him. On glancing at the bond

1868.

Murphy v. Morrison.

I can see one irregularity, and that is, that the bond does not describe the obligee as plaintiff, or in any other way than by his name simply. The jurat to the affidavit of execution may not be in accordance with the forms prescribed in the Court below. However this may be, it is the duty of parties complaining of an order made in the Court below, to make out that that order is wrong. If necessary, the Judge should certify on what grounds he set aside a proceeding as irregular or insufficient; but he does not appear to have been asked for this. So much of the order as directed the appellant to be committed for breach of the injunction issued below, must be reversed. The only affidavit in support of the motion was that of the plaintiff below, who swears merely as to his belief, without stating the grounds of it, or making out that positive case which the Court should see before doing so serious a thing as sending a man to prison for breach of an order or writ of injunction. In opposition to this affidavit, the defendant and one *Burrowes*, swear positively that before the service of the writ of injunction, the building in question had been torn down, and all the materials removed from the premises, and that this had been done in obedience to an order of the City Inspector, inasmuch as the appellant had erected the building on the street, with the exception of about two feet which formed part of the premises leased by him from the respondent. The defendant, the appellant here, committed therefore no breach of the injunction, for the acts complained of were, on the evidence, all done before the injunction issued or was served. Had application been made to dissolve the injunction on the facts disclosed, it should have been granted. The plaintiff does not pretend that the defendant was to build this house and leave it on the premises for him. It was not a fixture, and therefore defendant could, at any time during his tenancy remove it; moreover, the mere fact of his having leased over a portion of the street from the plaintiff, as part of his premises

Judgment.

1868.

Murphy v. Morrison.

would not oblige him to keep there a building which was a nuisance, and to submit to an indictment for so doing. Had it been the plaintiff's house it would have been different; but the house, being the defendant's, he not only had the right, but he was bound to remove it from off the street. Notwithstanding all this, if the defendant had committed all the acts complained of after notice of the injunction, he would have been properly committed, as it was his duty to obey the writ, so long as it stood. I allow, therefore, this part of the appeal, dismissing the rest. The case will go back with the proceedings in the Court below, and an order from this Court in accordance with this judgment. I make no order as to costs. More care must be taken in bringing appeals here. This Court will assume orders in the Court below to be right, till the contrary appears; and something more must be done to shew defects, than hurling at the Court a bundle of papers confusedly put together.

DAVIES v. DAVIDSON.

Sheriff's poundage—Account—Costs.

Where a Sheriff had moneys in his hands which were properly applicable to paying off certain executions in his office, but the debtor having otherwise arranged with the plaintiffs in the writs, obtained from them orders on the Sheriff for payment of the amounts coming to them respectively, but these the Sheriff refused to pay, unless the debtor would consent to pay the full amount of his poundage, as if a sale had taken place, which under the circumstances he was not entitled to claim; and defended an action brought to recover the amount, in which the Sheriff succeeded in defeating the plaintiff. This Court, on a bill filed against the Sheriff, granted a decree for an account and ordered him to pay the costs up to the hearing.

Examination of witnesses and hearing at Guelph.

Mr. *Miller* (of Galt), for the plaintiff.

Mr. *J. Bain*, for the defendant.

1868.

Davies v. Davidson.

VANKOUGHNET, C.—I have delayed disposing of this case until I could ascertain, which I have only recently done, on what ground the application at law to tax the fees claimed by the Sheriff, the defendant, was refused, and why it is that relief could not be had summarily there. I learn that laches and the compromise effected by the plaintiff with his execution creditors were the obstacles in his way. This is unfortunate, for the plaintiff must have relief somewhere, and the Common Law Courts ought to be able to furnish the more convenient and inexpensive procedure for the purpose. Section 39 of chapter 28 of the Act of 1864 contemplates, if it does not expressly provide, remedies to defendants as well as plaintiffs against excessive claims for fees by Sheriffs. The difficulty, however, in this case is, supposing those fees taxed, what remedy would the plaintiff have for the balance of moneys in the Sheriff's hands, collected by him for the execution creditors, and by them subsequently ordered to be paid by him to the execution debtor, the plaintiff here, who had otherwise settled with his creditors. In seems that the Sheriff having several executions against the plaintiff, seized his goods, but arranged with him not to sell or remove them, and to allow him, the debtor, to go on making sales of his stock of merchandise from time to time, he paying over the proceeds to the Sheriff: and agreeing in consideration thereof, that the Sheriff should have the same poundage as if he had sold the goods at once under the writ. This arrangement proceeded for some time; and under it, and sales made by the Sheriff himself, certain moneys came to his hands on account of the executions in favor of three creditors. Subsequently the plaintiff settled with these creditors, and they severally gave him orders on the Sheriff for the amounts applicable on their executions. These amounts the Sheriff was, before this responsible to the execution creditors for, and in an

Judgment.

1808.

Wallis v. Davidson.

action for money had and received, could have been compelled by them to pay over the sums applicable on their several executions. Whether there was money enough in his hands to pay off these three executions, does not appear in the evidence; but it was assumed before me that there was, or that each execution creditor was entitled to a portion of the moneys. Had the first execution creditor alone been entitled, it might make a difference in the adjudication of this case. The Sheriff refused to accept these orders or account to the plaintiff; his reason being, as I understand, that the plaintiff had refused to pay him the stipulated poundage. He opposed the plaintiff's application to have his fees taxed in a Court of Law, where the question as to his right to poundage, and as to the proper fees chargeable by him could have been readily and inexpensively determined. He resisted an action at law, brought by the plaintiff in the County Court in which his claim to fees could also have been settled; and he removed it by *certiorari* into a superior Court. The plaintiff, I apprehend, could not sue at law, in his own name, for the moneys in the Sheriff 's hands, as a right of action to them had vested in the execution creditors, and this they could not, at law, assign. The plaintiff could have sued in the names of the execution creditors, I suppose; but this would have necessitated three actions at law. Without encouraging recourse to this jurisdiction, when, in a plain, simple case of assignor and assignee, the latter may recover at law in the name of the former; yet, looking at the difficulty which the defendant has thrown in the plaintiff's way at law; that the plaintiff is the assignee of three choses, or rights of action; and that the defendant has, as a condition of accounting, insisted upon a right to poundage, which the law disables him from claiming, or levying, I have with considerable reluctance, determined on giving the plaintiff a decree for an account.

Judgment.

As to the case made by the Sheriff for poundage,

1868.

Davies v. Davidson.

I think that a promise to pay it, when the law says it shall not be collected or paid, cannot be enforced. If the money were actually paid for a benefit conferred, I do not say that it could be recovered back: *Stotesbury* v. *Smith* (*a*), *Bacon's* Ab: Tit: "Extortion". The Sheriff may, under section 271 of the Common Law Procedure Act (Con. Stat. U. C. p. 244,) be allowed a reasonable charge for any service rendered by him; and the amount claimed here by him for poundage may, under the circumstances, be a reasonable charge—but *qua* poundage, except on the money actually levied, (which in this case should include the money paid over by defendant to him under the agreement mentioned), it cannot be recognized.

The officer of the Court will have to tax the bills with such aid from the taxing Master of the Common Law Court as he can get. I think the defendant must pay the costs up to the hearing, and he must also pay the sum found against him by the Master. No costs to either party subsequent to hearing.

Judgment.

GRANGER v. LATHAM.

Vendor and purchaser—Shewing a good title.

A vendor does not shew a good title by producing and furnishing to the purchaser an abstract shewing on the face of it a good title; he does so only when he verifies such abstract.

This was an appeal from the Master, finding that the vendor had shewn a good title at the time the plaintiff (the vendor), had delivered answers to the requisitions of the purchaser.

(*a*) 2 Burr. 924.

1868.

Granger v. Latham.

Mr. *Morphy*, for the appeal.

Mr. *Strong*, Q. C., contra.

VanKoughnet C.—In *Parr* v. *Lovegrove* (*a*), cited on the argument, Vice Chancellor *Kindersley* considered at some length, what was meant by the words "shewing a good title," and "making a good title." The two terms are distinct in expression and meaning. He expressed the opinion that a good title was shewn when it appeared clear on the abstract, and the vendor was ready and had the means in his possession of proving it. Now, here, the Master reports, "that a good title was shewn at the date of the delivery of the answers of the plaintiff to the requisitions of the purchaser, that is to say, on the 19th of February last," and he also reports "that full evidence to verify the title and the abstract of title, and the answers to the said requisitions was not adduced before me until the settling of my present report."

Judgment.

So far as I can ascertain from the statements of counsel, and the papers and proceedings in the matter, the vendor was neither able nor willing to verify his abstract up to this latter period; and that, though the purchaser demanded the evidence, he had not till then shewn it. Under these circumstances, the Master should have certified that a good title was first shewn at the settling of this latter report on the 22nd of November last.

(*a*) 6 Jur. N. S. 600.

1868.

WADDELL v. MCCOLL.

Appeal from the Master's report—Dating report—Increased rate of interest—Rents and profits.

Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent.; and if the principal were not then paid, twelve per cent. should be thereafter charged.

Held, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named.

After default in payment of a mortgage, a tenant who had been put in possession by the mortgagor, promised to pay the mortgagee rent but failed to do so,

Held, that the mortgagee was not chargeable with such rent.

A local Master in making his report is not at liberty to date it until the costs taxed by himself have been finally revised, and settled by the Master in Ordinary under the General Orders.

Statement.

This was a bill to foreclose a mortgage executed by the defendant in favor of the plaintiff, and the usual reference had been made to the Master at Cobourg. The mortgage stipulated that up to a day named, the interest to be paid upon the advance should be eight per cent., and if default were then made, that thenceforward twelve per cent. should be allowed. In taking the account the Master allowed twelve per cent. after the day fixed for payment.

It appeared that a tenant in possession, placed there by the mortgagor, had promised to pay his rent to the mortgagee, but had failed to do so. Notwithstanding, the defendant claimed to charge the plaintiff with rents and profits accrued in the meantime; but this the Master refused to do.

It also appeared that in preparing his report the Master had, after he had taxed the costs, dated his report as of that day and transmitted the bill of costs to Toronto for revision by the Master in Ordinary, and

1868.

Waddell v. McColl.

after receiving the same back from Toronto, filled in the amount of the costs in the report, as also the total sum to be paid by the defendant; there being thus a period of about seven days, between the day the report was settled and dated, and the time the same was completed by filling in the amounts.

From this report the defendant appealed on the following amongst the grounds.

1st. That the Master was wrong in allowing twelve per cent, the increased rate being in the nature of a penalty, not an agreement to pay interest.

2nd. That the Master should have charged the plaintiff with rents and profits in respect of the rent which the tenant had agreed to pay him, but which plaintiff had neglected to enforce payment of; and

Statement.

3rd. That the Master had no power to ante-date his report; that the same should not have been dated until fully completed by inserting the amount of costs and the total amount to be paid: that by reason of such ante-dating, the defendant had not had the full month allowed by the order under which the account was taken, within which to pay the amount found due the plaintiff.

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

Mr. *Spencer*, contra.

Teeter v. *St. John* (*a*); *Thompson* v. *Hudson* (*b*); *Halifax* v. *Higgins*, (*c*); *Montgomery* v. *Boucher* (*d*), were referred to.

(*a*) 10 Gr. 85.
(*b*) 2 L. R. Eq. 612.
(*c*) 2 Ver. 134.
(*d*) 4 U. C. C. P. 45.

At the close of the case,

1868.

Waddell v. McColl.

VanKoughnet, C., as to the second objection, stated that he thought the Master right in not charging these rents to the plaintiff. The plaintiff never was in possession. The tenant was the defendant's tenant and might or might not pay the plaintiff the rent. The tenant had agreed to pay the plaintiff, but only in case he did so could the plaintiff be charged. The plaintiff had not the power of compelling payment as the defendant had.

As to the last stated objection, the Master should have dated his report of the day he signed it; and he could not sign it until the costs were finally revised and settled. It was as important to fixing the whole amount to be paid by defendant that the amount of costs should be ascertained, as that an item of interest should be. Here, however, the report must be ante-dated, by so many days as the Master delayed signing, at plaintiff's request.

Judgment.

The defendant had a month after the whole amount was ascertained within which to pay. He would be deprived of this time if the report was to bear an antecedent date.

As to the first objection, after taking time to look into the authorities.

VanKoughnet, C.—I am of opinion that the Master was right in calculating interest at the rate of twelve per cent. from the time of default as stipulated for in the mortgage. This stipulation cannot be treated as a penalty for enforcing payment of a smaller rate of interest or of a particular sum at a fixed day. What the mortgagee offers and what the mortgagor agrees to, is this: that the mortgagee will let the mortgagor have the money at eight per cent. up to a named day, to be

1868. Waddell v. McColl.

then repaid, and if the mortgagor retains it for a longer period he shall pay twelve per cent. on it for such period. This is the contract of the parties and there is nothing illegal in it,—nothing against which this Court can or should relieve. It does not fall within the class of cases referred to in *Thompson* v. *Hudson*.

The order to be now drawn up will also correct the date of the Master's report; the Court having power to do so by order, without referring it back to the Master.

BRADY v. KEENAN.

Trust—Laches.

The plaintiff, a squatter on Crown Lands, made an assignment thereof to the defendant to enable him to obtain the patent for the plaintiff There was no writing shewing the trust, and the defendant procured the patent to be issued in his own name, and thereupon the defendant induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in respect of their business capacity and otherwise; and the defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure and influence.

The Court *held*, that the plaintiff was entitled to redeem, on payment of the amount of the defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transaction; the excuse assigned for the delay being his poverty: it appearing that the parties could be restored to their original positions without loss to the defendants.

Examination and hearing at the sittings of the Court at Lindsay.

Mr. *Hector Cameron*, for the plaintiff.

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

Mr. *Cattanach*, for the Attorney General.

1868.

Brady v. Keenan.

VanKoughnet C.—I think the evidence shews that the plaintiff knew the defendant *Keenan*, had sold his interest in the land to the other defendant after the patent had issued, and that the defendant had dealt with *Keenan*, in fact, as owner of the land; and therefore the bill should not have challenged the transaction of purchase from the Crown Lands Department. I think this portion of the bill not sustained and that it must be dismissed.

As to the transaction of February, 1859, I think, it cannot be sustained, though the plaintiff may, by his laches have disentitled himself to relief now. *Keenan*, as agent for plaintiff, as trustee for him, in fact, procured the patent from the Crown. In possession of this, he, a shrewd, business man, procures from the defendant, an ignorant man, an immigrant squatter on the lot, a release of all his interest in the land, for a consideration not more than one-half of the value of the land, at the lowest calculation; but not one-third of the value which we may suppose *Keenan* thought it to be, and which he sold it for, and which the plaintiff might have obtained had he sold it at the time. It may be the opinion now of parties that the land is not worth more than $750 or $800; but that does not seem to have been the opinion of the defendant and of *Ducie*, who had long lived in the neighborhood at the time of the sale to him by *Keenan* and who was most interested in ascertaining the quality and the value of the land. It is of no consequence in the consideration of this question that the land is less valuable now than the parties thought it to be when they were dealing with it; for if they thought, or the defendant thought, it worth $1200 then, this creates as strong evidence against him as if the land was really worth that sum.

Judgment.

Look, then, at the position of the parties. The plaintiff, in doubt whether he could ever obtain the land from

1868.

Brady v. Keenan.

the Crown, assigns to the defendant his squatter right to it, to enable the defendant to procure it for him. The difficulty which the plaintiff had feared, and which he had made defendant aware of, was, that the land stood in the Crown Lands Books in the name of one *Clark*, who had emigrated to this country with the plaintiff's father and his family. The defendant, to surmount this difficulty procures an ignorant man of the same name, *James Clark*, to personate the original squatter, who had long before disappeared, and to execute to him an assignment of his interest. He passes this off on the Crown Lands Department as the assignment of the original locatee, and by means of it, and of the assignment from the plaintiff, obtains to himself the patent. Armed with this patent thus procured, he says to his ignorant customer and debtor: "I paid so much to obtain this patent, and you owe me so much; I will discharge the debt and give you a lease of the land on your releasing to me all your interest in it"; and, the plaintiff, ignorant, in his power, and not having anything in writing by which to shew that the defendant acted as his agent in obtaining the patent, and was now the trustee of the legal estate for him, submits, or consents, and executes the release required. It does not appear that defendant informed him on what very advantageous terms, as they appear in the letter to him of his agent at Toronto, he had procured the patent; nor that instead of paying cash he had paid in scrip at a large discount. I think that standing in the relation the defendant did to the plaintiff, and considering the inequality in their positions in life, and in their ability to transact business, and particularly in land matters, the defendant is bound to shew, and he has not done so, that he gave to the plaintiff full information; and that, possessed of this the plaintiff, notwithstanding and without pressure or influence, made the losing bargain now impeached.

Judgment.

It is objected, however, that the plaintiff having been

aware of this imposition from the first, and having been released as a debtor, and thus relieved from all obligation to, or dependance upon the defendant, has slept so long upon his rights—nearly seven years having elapsed before he filed his bill—that this Court will not now look at them or enforce them.

1868.

Brady v. Keenan.

On the other side it is said, and it is proved, that very shortly after the sale, a year or so, perhaps, the plaintiff complained that he had been imposed upon; gave notice of his intention to impeach the transaction, and about the year 1863, employed counsel and a solicitor for the purpose, and paid a fee to the latter, who soon after died without having instituted proceedings by suit, as has since been done. *Brooksbank* v. *Smith* (*a*), states correctly enough the principle on which a Court of Equity acts, in applying the different Statutes of Limitations; but it is not so easy to ascertain from decided cases what length of time will constitute such laches as to induce a Court of Equity to withhold its aid. In regard to titles to land, no time short of twenty years is an absolute bar to relief, though a party may by agreement or conduct which amounts to an abandonment of his right, in a much shorter period than twenty years, forfeit all claim upon the interposition of the Court. I think it would be very desirable that when the right to relief, even in respect of lands, is put upon the ground of personal fraud, a short period, say that of six years from the time of the discovery of the fraud, should be an absolute bar to the suit; but I do not find any such limitation established. The same reasons which led to the fixing of six years by the Statute of *James*, operate as powerfully in a case of personal fraud practised in regard to land, as to any other subject of property. So much in such a case generally depends upon the memory

Judgment.

(*a*) 2 Y. & C. 58.

1868.

Brady v. Keenan.

of the witnesses, as to the acts, conduct, and sayings of the one party or the other; memory is so fallible, so fluctuating; impressions formed at the time are so apt to fade away; statements recalled to the attention or memory of a mere listener of six years ago, are so apt to be confounded with his own imperfect recollections of what did occur at the time, and are so often adopted by him as his own recollections from mere reliance upon the word of others, that no Judge called upon to decide upon such testimony but must feel that he is travelling to a conclusion over very dangerous and uncertain ground. Besides all this, witnesses die; evidence is lost; and then, perhaps from designed delay, a case is launched which would never have been seen had the living witnesses, or the evidence otherwise, continued in existence. Yet, I cannot find that any authority warrants me in refusing the plaintiff relief here, because of laches. It is true, his bill was not filed for nearly seven

Judgment.

years after the transaction impugned; but I cannot say that he abandoned, or intended to abandon his right of suit during that time. Poverty is the excuse for not having proceeded earlier; and though this will not remove any of the fixed rules of the Court, yet, in matters discretionary and depending for solution upon the conduct of a party, it must have its influence. Fortunately here, both parties can be restored to their original positions without much loss to either, unless it be to the plaintiff for having been kept so long out of the possession of the land.

The decree I make is, that upon the plaintiff paying to the defendant within six months what shall be found due to him for principal and interest in respect to the moneys paid by him for the procuring of the patent of the land, and the amount of the plaintiff's indebtedness to him at the time of the plaintiff's release to him of his interest in the land, (the agreement in respect thereof then made between the parties to be binding upon

them) less rents and profits received, the defendant reconvey to the plaintiff the land free from all incumbrances; which, if there be any, defendant is to pay off and remove; and that defendant do pay the costs of this suit. 1868. Brady v. Keenan.

Plaintiff to confirm the existing lease.

WYCOTT v. HARTMAN.

Deed of gift—Parent and child.

In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence shewing imposition or undue influence, to support the deed, by the evidence which might be necessary in the case of a gift from a child to a parent.

Statement.

The bill in this case was filed by *Eve Wycott*, by her next friend, against *Nicholas Hartman*, *Henry Simmons*, and the husband of the plaintiff, setting forth that one *Isaac Fraser* being seised of the east half of lot No. 26, in the first concession of Ernestown, conveyed the same in fee to *Margaret Hartman*, the mother of the plaintiff, upon the trust, however, that she would convey the same in such a manner as that the plaintiff should have one-half and her sister *Rosina Gaylord* the other half, and that subsequently, and in February, 1843, the mother had conveyed the said half-lot to the plaintiff and her sister, for the expressed consideration of natural love and affection; reserving, however, a life-estate to herself in the premises: that on, or immediately after, the day of such conveyances, the defendant *Nicholas Hartman* being aware of the trust, and desiring to deprive the plaintiff of her estate in the said premises, procured from his mother by the exercise of threats and undue influence, and without any consideration, a deed of twenty acres, being part of the said premises so conveyed to the plaintiff, and procured the deed to him

1868.

Wycott v. Hartman.

to be registered before the conveyance to the plaintiff: that *Rosina Gaylord* had duly conveyed her share to the defendant *Simmons*. Subsequently, and in June, 1850, the defendant *Hartman*, with full knowledge of the conveyance to the plaintiff, procured his mother to execute a conveyance of the whole of the said premises to him for the pretended consideration of $2000: the real consideration being a mortgage for the expressed consideration of £500, but the proviso of redemption stipulated that the mother should have possession of certain parts of the property, and other privileges connected therewith, and that she should be supported by her said son.

Statement.

The bill further alleged that the plaintiff had instituted proceedings in ejectment against the defendant *Hartman*, to recover possession of the premises, but in that she was defeated, and prayed that the deeds to *Hartman* might be set aside and declared void as against the plaintiff, and for other relief.

The defendant *Hartman* answered the bill denying all fraudulent practices therein alleged against him, and all knowledge of any trust existing in favour of the plaintiff, and claimed that the deed to her was void, under the Statute 27th of Elizabeth, as a fraud on him: and set up laches on the part of the plaintiff in asserting her title.

The cause came on for the examination of witnesses and hearing at the sittings of the Court in Kingston. The effect of the testimony then adduced appears sufficiently in the judgment.

Mr. *Crooks*, Q.C., and Mr. *R. Walkem*, for the plaintiff.

Sir *H. Smith*, Q. C., and Mr. *Machar* for the defendant *Hartman*.

1868.

Wycott v. Hartman.

Davies v. *Davies* (*a*), *Clark* v. *Malpas* (*b*), *Sharp* v. *Leach* (*c*), *Anderson* v. *Elworth* (*d*), *Longmate* v. *Ledger* (*e*), *Harvey* v. *Mount* (*f*), *Cooke* v. *Lamotte* (*g*), *Baker* v. *Mount* (*h*). *Berdoe* v. *Dawson* (*i*), *Donaldson* v. *Donaldson* (*j*), *Fraser* v. *Rodney* (*k*), *Mason* v. *Seney* (*l*), *Fallon* v. *Keenan* (*m*), *Elgie* v. *Campbell* (*n*), *Harris* v. *Guise* (*o*), *Harrison* v. *Guest* (*p*), *Denison* v. *Denison* (*q*), *Hunter* v. *Atkins* (*r*), *Whalley* v. *Whalley* (*s*), were, amongst other cases, referred to.

VanKoughnet, C.—I do not think that any trust is established. It is admitted that Col. *Fraser* and Col. *Clark* were both highly respectable men. *Fraser* was the adviser of the *Hartman* family. Three years, before Mrs. *Hartman* made the deeds to her daughters, *Fraser* had made to her a deed of the land, and, not upon any trust, but absolutely. When, then, did the trust arise? When and how was it created? It would not be safe to establish it upon such evidence as was given by such a witness as *Gaylord*. That it was the intention of all parties that the daughters should have this land was very likely—is highly probable—but it will not do to construe this into a trust, undertaken by Mrs. *Hartman*. The only remaining question then is, was the deed to the defendant *Nicholas* obtained by undue influence. No doubt such a transaction as this should be carefully and jealously inquired into by the Court. The evidence, however of influence, rests upon

Judgment.

(*a*) 9 Jur. N. S. 1002.
(*b*) 31 Reav. 80.
(*c*) 31 Beav. 491.
(*d*) 3 Giff. 154.
(*e*) 2 Giff. 157.
(*f*) 8 Beav. 439.
(*g*) 15 Beav. 234.
(*h*) 10 Jur. N. S. 634; On Appeal, 691.
(*i*) 11 Jur. N. S. 254.
(*j*) 12 Gr. 481.
(*k*) 11 Gr. 426.
(*l*) 11 Gr. 447.
(*m*) 12 Gr. 388.
(*n*) 12 Gr. 132.
(*o*) 8 H. L. Ca. 841.
(*p*) 6 D. M. G. 424.
(*q*) 13 Gr. 114.
(*r*) 3 M. & K. 113.
(*s*) 3 Bligh. 41.

1868.
Wycott v. Hartman.

the affection which the grantor bore to her son, and the confidence she reposed in his judgment and opinion. In this there was nothing unnatural or surprising, nor is there anything unnatural or surprising in her giving property to a favorite child.

It is said that the mother was afraid of her son; but of this there is really no evidence but that of *Gaylord*, who speaks of the son having sworn at his mother and raised his arm in a threatening and angry manner to her. I am not disposed to rely implicitly upon the evidence of *Gaylord*; and I had some opportunity of observing the defendant's action in Court, when communicating with his own counsel and when giving his evidence. I noticed that he was a man of excitable, I should say irascible temperament, and that, in speaking, he constantly raised his arm as if to give force to what he said. This probably explains the threatening attitude of which *Gaylord* spoke. Then, the consideration for the deed was a very natural and reasonable one, namely, the support of the mother for life.

Judgment.

Mrs. *Hartman* is described as having been a woman of independent will; and that she insisted on living alone until she was upwards of eighty years of age. It is proved by a highly respectable witness that she spent half-a-day on the subject of this deed alone, with Col. *Clark*, at the house of the latter, who was resorted to by his neighbors for advice and conveyancing, and who, I should judge, would be much more competent to advise Mrs. *Hartman* in such a matter than any mere solicitor who might have felt no more interest in her affairs than telling her what the law required or provided for her safety, and obtaining his fees.

I think as strong evidence as can generally be given in such a case is furnished, of Mrs. *Hartman*

1868.

Wycott v. Hartman.

having acted of her own free will and upon proper advice in the making of this deed. She executed it in the presence of Mr. *Fraser*, her friend and her daughter's friend, and he filled in the date of the deed. The witness to its execution was one *George Patterson*, who ten years previously had witnessed the deed from *Fraser* to her. *Fraser* and *Clark* lived for years after this. It is not pretended that *Fraser* ever found fault with this deed; and this goes far to show that he did not consider that Mrs. *Hartman* in making it was violating any trust. Years after his death and that of Col. *Clark*, and of the witness *Patterson*, the plaintiff impeaches this deed; when, had she done so earlier, these three persons, could probably have told us all the circumstances connected with it. I do not think I can declare this deed void without, at the same time, declaring that a parent cannot make a deed of sale or gift to a favorite child; and I am not aware of any rule that requires a child to support such a gift, in the absence of evidence shewing imposition or undue influence.

Judgment.

Fielder v. O'Hara.

Administration—Interest.

The widow of the intestate married again, and allowed her husband to use the moneys of the estate in her hands:

Held, on appeal from the report of the Master that she was liable to to pay interest at 6 per cent., and no more.

This was an administration suit in which the usual reference to the Master at Brantford had been made to take accounts, and in taking the accounts the Master charged the defendants with ten per cent. on the moneys of the estate in the hands of the administratrix, and which she had suffered her husband to use without paying any interest. From this allowance the defendants appealed.

1868.

Fielder v. O'Hara.

Mr. *Spencer*, for the appeal.

Mr. *E. B. Wood*, contra.

VanKoughnet, C.—As to the third objection, the charge for interest, I think the Master was wrong in charging ten per cent. If the administratrix had let out the money of the children at six per cent, I think she could not under the circumstances be charged with more. It is not shewn that she, a widow, or at the time a married woman, knew of any investments which could have been safely made at a higher rate. She was not in trade; not accustomed to invest moneys; she was the widow of a farmer. All were in humble circumstances; but she should not have let out the money without interest, nor should her husband have taken it from her on such terms. Let simple interest at six per cent., the rate fixed by law as the normal rate be charged, and the report altered accordingly. No costs.

Judgment.

Kennedy v. Lawlor.

Crown Lands, (sale of)—Pleadings—Costs.

Where the Crown Lands Department has had before it the evidence and claims of counter claimants and a patent is directed to issue to one of them, this Court has no power to review the decision of the Commissioner; although it might, under the circumstances, have taken a different view of the case in the first instance from that taken by the Commissioner.

Pleadings should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. In future, where pleadings are filed containing useless or improper statements, or admissions so restricted as to render proof necessary, the costs of such pleading will not be allowed to the party filing it; but, on the contrary, he will be ordered to bear the costs occasioned thereby.

The bill in this cause was filed by *James Kennedy*,

1868.

Kennedy v. Lawlor.

against *William Lawlor* and *Kenneth Chisholm*, setting forth that in 1851, one *John Sinclair* had purchased from the Crown one hundred acres of land, in the township of Sydenham, in the County of Grey, and subsequently sold his right thereto to one *John Love*, who sold and assigned to the plaintiff, for which plaintiff paid *Love* $1000 chiefly in cash; that plaintiff entered into the possession of the land and made improvements to the value of $500; and on or about the 17th of February 1862, sold and assigned the land to the defendant *Lawlor*, for $800, and for securing the payment of part thereof, *Lawlor* assigned to the plaintiff a claim for $500, and interest, which *Lawlor* alleged he had against one *John Scott*; but, if this sum should not be recovered from *Scott*, *Lawlor* should pay the same: and subsequently the same not having been recovered from *Scott*, *Lawlor* paid plaintiff $300 and assigned by way of security for the remaining sum of $500, his interest in said land; that in the Autumn of 1863, the Crown Lands Department published a notice that all lands in arrears in the County of Grey, would be sold by public auction, in the month of January following; but improved lands were nevertheless to be withdrawn from sale, on an affidavit being furnished of the fact of such improvements having been made. That an affidavit was accordingly forwarded by *Lawlor* to the proper authorities, shewing the improvements on this land; notwithstanding which, the land was sold at such public sale to one *Thomas Scott*, for one dollar per acre, although at the time the same had been cleared and cultivated to the extent of about seventy acres; that plaintiff subsequently forwarded affidavits to the Crown Lands Department shewing his interest in the land, but notwithstanding a patent for the land was issued to the defendant *Chisholm* to whom *Scott* had assigned his interest.

Statement.

The bill charged that there was an understanding between the defendants, that the defendant *Chisholm*

1868.

Kennedy v. Lawlor.

should hold the land in trust for *Lawlor*. The bill prayed a declaration that the patent had issued in error and improvidence, and was therefore void, or that *Chisholm* might be declared a trustee for *Lawlor*, and in default of payment of the amount due to plaintiff the land might be sold and the proceeds applied in payment of plaintiff's claim.

The defendant *Chisholm* answered the bill. *Lawlor* allowed the bill to be taken *pro confesso* against him. The nature of the defence set up by *Chisholm* appears in the judgment. The cause came on for examination of witnesses and hearing, at the sittings of the Court at Owen Sound, in the Autumn of 1867.

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

Mr. *Moss*, for the defendant *Chisholm*.

Judgment.

VanKoughnet, C.—I must assume that the Commissioner of Crown Lands acted with full knowledge of all the facts disclosed in the papers deposited in the proper department. Those papers were before him; and I must assume also that he gave them due consideration, and that having done so, he directed the sale which had been made to *Scott* to be carried out. Both parties contend and admit that it was this sale by public auction which the Commissioner acted upon. If this be so, then the Commissioner must have come to the conclusion that the plaintiff by his neglect in substantiating his claim to the land had forfeited all right to it, and that the arrangements which *Chisholm* had entered into on the faith of the sale to *Scott*, entitled him to insist on its being carried out. There can be no doubt that the Commissioner of Crown Lands had the right to take this course, and to insist that the policy of the Government should be enforced, and its regulations observed; and that plaintiff's neglect to avail himself in due time of the

1868.

Kennedy v. Lawlor.

opportunity given him to furnish proof, deprived him of any claim upon the grace of the Government. It may be that Mr. *Tarbutt*, of the Crown Lands Department, was hasty in rejecting the affidavit forwarded by *Lawlor* to Mr. *Jackson*, the Crown Lands Agent, just before the sale. Although *Lawlor* swore to only three months occupation by himself, he did not swear that the forty acres of clearance had been made by himself, and it seems quite consistent with his statement, that they might have been made by his predecessor in occupation. It is true, however, that *Lawlor's* affidavit did not disclose the whole truth. It was known to the Department that the land had been originally sold. *Lawlor* traced no title from this purchaser, nor from any previous squatter, and it was of course most improbable if not impossible, that he himself had in three months procured forty acres of land to be improved fit for cultivation. He, however, and all others claiming any interest in the land, were allowed some three months further time to furnish proof in support of their rights, and the plaintiff was doubtless aware of this, for he called upon Mr. *Jackson*, the Crown Lands Agent, during that period, and must have learned from him this arrangement, if he did not learn it at the time of the public sale, where he was present, it appears; and on the very last day of the time allowed, as he was evidently aware, he bestirs himself to secure the land, not however, till a year after the sale, and after the receipt by him of a letter from the department, telling him that he was now too late, did he attempt to furnish the proper evidence; and his excuse for not so doing, is stated by him, in a letter to the department, to have been that he heard the patent had issued to *Chisholm* and that there was no use in further troubling himself about it. *Chisholm* had in the meantime paid *Scott* $150 for his claim, and had released *Lawlor* from his indebtedness to him in consequence of the arrangement effected with *Scott* through *Lawlor's* aid. The Commissioner, I assume, knew all these facts,

Judgment.

1868.

Kennedy v. Lawlor.

and considered and adjudicated upon them, and I do not feel that I have any power to review his decision and say that he acted improvidently, or in error, or mistake. I might not have taken the same view as he did: I might have been more indulgent; but he had the right to adjudicate as he did, and I cannot interfere. He had knowledge of the arrangement between *Lawlor* and *Kennedy*, and he saw the assignment from the former to the latter, which, though absolute in terms, is yet accompanied with such language, as would, I apprehend, induce this Court to treat it as a security, particularly as *Lawlor*, notwithstanding it, appears to have retained a possession recognized by *Kennedy*. Of a mortgage interest merely, the Commissioner would not take notice, but I think, he ignored entirely, the relations between *Lawlor* and *Kennedy*, and after the lapse of time that had occurred, considered, and acted upon the sale to *Scott* as absolute. This being so I do not see how I can treat *Chisholm* as a trustee for *Kennedy*. The patent does not appear to have been issued to him on the strength of any title in *Lawlor*, for the Commissioner was aware that *Lawlor* had previously released all his right to *Kennedy*, and he could not therefore treat *Lawlor* as having anything in him to assign to *Chisholm*, particularly as he would not notice any equity in the former to redeem. If then the sale to *Scott* was carried out to *Chisholm* as the assignee of *Scott* merely, what equity can the plaintiff have against him, *Chisholm*. I see none and I must dismiss the bill with costs. I do so with the regret which every one feels, that any man should, by his mere negligence, lose a valuable right.

Judgment.

In taxing the costs the Master will however, only allow ten folios in all for the answers to the original and reamended bill. Nothing to be allowed for the answer to the amended bill as it admits nothing and denies nothing that had not been denied by the answer to the original bill, and the only excuse for allowing even one folio

1868.

Kennedy v. Lawlor.

for the answer to the reamended bill is the partial admission by the defendant of an offer of compromise alleged by the plaintiff; but this admission is so partial and of so little value to the plaintiff, that it does not warrant a distinct answer and I only allow one folio for it, as if it had been contained in but one answer to the whole bill. The pleadings of the defendant are most discreditable, and a great abuse of the practice of the Court. What he does not intend to admit he need not deny; and it is no admission, in compliance with the spirit and meaning of the Orders of the Court, to say, by way of admission, that you believe there was some such transaction as the plaintiff speaks of, but you do not know its terms and leave him to the proof of it. The order providing for or requiring admissions, was intended to relieve the plaintiff by means of such admissions from the expense of proof; but it was not intended to afford the defendants the opportunity of extending the proceedings and incumbering the record with admissions so restricted as to render proof necessary. There must be an end to this style of pleading, and I wish it to be understood, that for every pleading so drawn and which comes before me hereafter, that is, any pleading in which such useless and unnecessary statements appear, I will direct that nothing whatever be allowed in respect of the pleading and that the erring party be ordered to pay all extra costs occasioned by briefing it, &c. Pleadings should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. When the costs of any such pleading is disallowed on any of these grounds, the Solicitor cannot claim them from his client. If he does, it is open to the client to complain to the Court.

Judgment.

1868.

PAUL v. FERGUSON.

Redemption—Account.

The equity of redemption in mortgaged lands was offered for sale under execution at law, and the mortgagee bid off the property at $200; but the sale proved to be inoperative.

Held, that the mortgagee could not add the amount so paid to the amount of his mortgage debt.

Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable.

Appeal from the report of the Master at St. Thomas. The decree was for redemption, and the Master, in taking the accounts, had allowed to the defendant $200 paid by him at a sale by the Sheriff of the equity of redemption under a writ of *fi. fa.* against the mortgagor; the sale proving ineffectual to convey the plaintiff's interest, the incumbrance held by the plaintiff having been created by a deed absolute in form with a separate defeazance.

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

Mr. *Ferguson*, contra.

Judgment. VANKOUGHNET, C.—In this case the equity of redemption was exposed to sale under an execution at law, issued by a judgment creditor of the mortgagor. The defendant here, the mortgagee, bought, or endeavoured to buy this interest, and paid to the Sheriff £50 for it. The sale was abortive, as the equity of redemption, from the mode in which it was created and evidenced, was not saleable at law. The mortgagee now seeks to have this £50 charged on the land, and added to his mortgage debt, inasmuch as the debt of the mortgagor to the execution creditor was by that amount paid or reduced.

1868.

Paul v. Ferguson.

I do not see how the mortgagee can fasten this sum upon the land. He did not pay it at the request of the mortgagor. He paid it to the creditor of the mortgagor or to the Sheriff for him, or a proceeding *in invitum*. What right had the mortgagee to pay money for the mortagor without his request? or, if he did pay it at his request, how could he charge it on the land without an agreement with the mortgagor therefor? When the right of redemption was first enforced in Chancery, the Court, it is said, would not allow it, unless the mortgagor paid the mortgagee all he owed him, though the entire debt had not been in anyway charged upon the land. This, I suppose, was a loose application of the doctrine, that inasmuch as the Court was not bound to decree relief, he who seeketh equity must do equity—a doctrine which Mr. *Ferguson* invokes now. Courts of Equity were not in those days guided, as now, by fixed principles and rules, and the maxim referred to, crude as it is in expression, is narrowed in its application by certain principles on which the Court in more modern times has acted. An agreement to add to a charge on land, must not only now be express, but must be evidenced by writing. The rights of mortgagor and mortgagee are co-relative, and I am not aware, that in a suit for redemption, a mortgagee can claim to fasten upon the land charges which, in a suit by him for foreclusure, he could not enforce. These rights are well defined and governed by strict rules applicable to the circumstances of each case, and a Court of Equity would now-a-days no more think of refusing to give effect to them, upon any loose notion of what one man or another might consider just or equitable, than a Court of Law would, refuse to enforce payment of a promissory note to which there was no legal defence. The right to foreclosure, and the co-relative right to redemption are incidents to a mortgage, which arise in its creation (*a*). The exercise of the

Judgment.

(*a*) See Colyer v. Finch, 19 Beav. 500 and 5 H. & L. Cases, 905.

1868.

Paul v. Ferguson.

jurisdiction of the Court upon these ordinary rights, is something very different from the extraordinary aid which is sometimes sought from the Court by a plaintiff who has his rights at law. Mr. *Ferguson* alluded to certain cases, among others, bills to set aside tax sales, or to set aside deeds which though equally void at law as here, yet were considered by a plaintiff as standing in his way, making his title suspected, and embarrassing it; there, the plaintiff asks for his own advantage and convenience, that the Court shall exert its powers to remove such difficulties. In *Fraser* v. *Rodney* (*a*), we stated that we did not feel called upon to put the machinery of the Court in motion in such cases, to aid a harsh legal right; and when the Court in its discretion, does interfere, it does so only on such terms as it deems equitable, as, in the cases of tax sales referred to, by ordering payment to the purchasers, of the taxes which have gone in relief of the owner of the land. So also, in the case referred to, of a mortgagor coming to the Court to have a mortgage void for usury delivered up. The Court says, "if you wish this deed removed out of your way, we will only help you on your paying the money really advanced to you, and legal interest. You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but, if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will only aid you on terms."

Judgment.

This £50 allowed by the Master must be stricken out of the amount found chargeable on the land.

(*a*) 12 Gr. 54.

HINCKS v. MCKAY.

1868.

Specific performance—Water power.

A vendor agreed that the purchaser should have sufficient water to drive a saw mill and other machinery: in a suit by the vendor against the purchaser the Court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land: the decree to provide for this, with liberty to the parties to apply from time to time.

This was a suit by the owner of real estate for specific performance of the following agreement:—

"I, William Ross, of the city of Toronto, merchant, agree to sell William McKay, of the village of Renfrew, in the County of Renfrew, agent, the saw mill situate in the said village of Renfrew, and along with the saw mill the following described piece of land: a part of lot number thirteen, in the first concession of the township of Horton, containing on or about one acre of land, be the same more or less. Beginning at the north-west corner of said mill, thence northward on a line with the mill cill, eighty feet, thence turning southward at right angles with the mill cill on first line to the bouundary line between lots numbers twelve and thirteen in the first concession of the said township of Horton, thence along the said line to a point produced by starting at the south-west corner of the said saw mill, thence southward eighty feet, on a line with the mill cill, thence turning at right angles with the mill cill southward, to the boundary line between lots numbers twelve and thirteen in the said township of Horton, for the sum of five hundred pounds of the lawful money of Canada, payable in the following manner:—one hundred pounds on the first of April next, and the balance in five yearly instalments with interest at the rate of six per cent. per annum, payable along with each instalment on the first day of April in each and every year until the whole is paid up. Now the express condition of this sale is that the said

Statement.

1868.

Hincks v. McKay.

William McKay shall not build any mill or machinery to be driven by water power, for any business or trade except for manufacturing lumber in any of its departments for the period of sixteen years, unless on the following conditions, viz: to pay water rent in proportion to the quantity of water used by said mill or mills at the same ratio as on the flume on the other side of the river; but the said *William McKay* shall be allowed a sufficient quantity of water to drive said saw mill, along with any other machinery that may be used for manufacturing lumber in any of its departments.

And be allowed the free use of the dams and booms by the said *William Ross;* the present boom attached by a ring in the rock on the south side of the dam shall be looked upon as the boundary on said dam, and the said *William McKay* will have the piece between the boundary line described before, and the road and bridge at a price per acre same as average of lots sold on the north side of the river Bonnechere.

Statement.

The said *William Ross* to make a title clear from all incumbrances, by deed, and take a mortgage for the credit instalments on the payment of one hundred pounds."

It appeared that the plaintiff had obtained the title of *Ross*, and now sought to enforce this contract.

The defendant by his answer admitted the contract, but alleged that: "neither the said *William Ross* nor the said plaintiff, as his assign, hath kept the said agreement, but have broken the same in the following particulars, that is to say: the said *William Ross* and the plaintiff did not supply me with a sufficient quantity of water to drive the said saw mill for manufacturing timber, but on the contrary allowed the dam in the said agreement mentioned, to get and continue out of repair, and the water thereby to escape, whereby I was hindered and prevented ever since the making of the said agree-

1868.

Hincks v. McKay.

ment from using my said mill so fully and profitably as I otherwise would, and in particular in the fall of the year one thousand eight hundred and sixty-three, I had in my pond in the Bonnechere river, about six hundred saw logs of different kinds for the purpose of being sawed into lumber at the said mill, and which I might, and would have so sawed, if I had been supplied with a sufficient quantity of water, but for the want of such sufficient supply, I was hindered and prevented from getting the same so sawed, and the following Spring the said logs broke loose and were carried away by the freshet and became totally lost, whereby I sustained heavy loss and damage; and further that the said *William Ross* and the plaintiff, since the making of the said agreement did not allow me the free use of the dam and the booms in the said agreement mentioned, but on the contrary altered both the said dam and the said booms in various ways so as injuriously to affect me in my business of working the said saw mill, whereby I have also sustained further heavy loss and damage, and I claim that I am entitled to be allowed the amount of all such losses and damages upon any account that may be taken between us.

Statement.

"I submit that the plaintiff is not entitled to specific performance of the said agreement on my part until he shall restore the said dam and boom to a condition at least as favorable for me as they were in at the making of the said agreement, and shall supply me with a sufficient supply of water to drive my said saw mill for manufacturing timber according to said agreement.

"I say that I always have been and still am ready and willing, and hereby offer to pay any amount that shall be found due to the plaintiff on the said agreement upon any account that may be taken between us under the directions of this honorable Court, upon the plaintiff performing his part of the said agreement.

1868.

Hincks v. McKay.

"I deny that I ever intended, or threatened to remove the machinery or any part thereof from the said saw mill; but on the contrary, I say that I have made large and valuable additions and improvements thereto."

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

Mr. *James Beaty* and Mr. *J. C. Hamilton*, for the plaintiff.

Mr. *Fitzgerald* and Mr. *Lees* for the defendant.

VANKOUGHNET, C.—I think the defence fails, and that the defendant does not make out any case for compensation under his answer. The dam, it is proved, has been better ever since he purchased, than it was at the time, with the exception of the year 1862, when, through the defendant's own act or negligence, it was broken down. Plaintiff paid him for repairing it in 1863, though he might justly have been charged with the expense of this. In the fall of 1863 the Sheriff stopped his operations, and he has done nothing since. The booms disappeared in 1864–5, through the act, apparently, of defendant himself; but, at all events, he does not seem to have required the use of them, for he had no logs. I see no failure on the plaintiff's part, and there must be a decree for specific performance with costs. The defendant asks for a declaration in the decree that plaintiff is bound to keep up the dam and booms. On the other hand, the plaintiff says that only covenants for this purpose should be inserted in the conveyance. It is a difficult contract to execute, and yet both parties want it executed specifically—defendant's only objection being that he was entitled to compensation for breach of contract by the plaintiff, which, as I have already found, is not made out. I think that

Judgment.

1868.

Hincks v. McKay.

the water and the use of the dam and booms must be considered as sold with the property, and that the proper interpretation of the contract, under the circumstances proved, is, that the plaintiff is bound to keep up the booms and dam to the same extent, and in the same position, and of equal capacity and service as they were in at the time of the sale, and that the defendant is entitled to a sufficient quantity of water by means of such dam to drive the said mill, along with any other machinery that may be used for manufacturing lumber in any of its branches, and that the decree should declare and provide for this, and reserve liberty to the parties to apply from time to time.

WALKER v. BROWN.

Specific Performance—Laches.

The intestate contracted with the defendant *George Brown*, for the purchase of a village lot in Bothwell, and paid part of the purchase money. The vendor afterwards agreed to erect certain buildings on the premises, for which the purchaser was to pay by instalments, and the vendor was to hold possession and receive the rents meanwhile on account. The purchaser having made default, died intestate leaving no other means. The heirs lay by for a number of years and until oil was discovered near Bothwell, and property had in consequence risen in value, and they then filed their bill to enforce the purchase, but the Court dismissed the bill with costs on the ground of laches.

Statement.

This was a suit on behalf of the heirs of *Thomas Walker*, deceased, they being joined as defendants for the specific performance of certain contracts entered into by the deceased with the defendant *George Brown*, respecting a village lot in Bothwell. The purchaser died in the Summer of 185[illegible] The plaintiff *Jane Walker* took out administration to [illegible] estate shortly before the filing of the bill (17th May, 1866.)

1868.

Walker v. Brown.

The defendant *Brown* by his answer alleged "that the said *Thomas Walker* never paid up his purchase money or the further amount due by him under the building agreements between us, and the rents of the said premises were quite inadequate to pay the same, and the said *Thomas Walker* became largely in arrear in respect thereof, and the value of the said premises was not equal to the amount thereof, and the value thereof had greatly depreciated; and under these circumstances the said *Thomas Walker* wholly abandoned and gave up the said contract and all his interest in the said premises, and ceased to interfere or deal with the same in anywise, and I treated the said contract as rescinded and forfeited and abandoned; and therefore considered myself, and the said *Thomas Walker* considered me, as the absolute owner of the said premises, and the said contract ceased, as I submit, to be binding.

Statement.

"Some time after the death of the said *Thomas Walker* certain of the above named defendants as representing his heirs-at-law, called on my agent for information as to the said contract, when I gave full information upon the subject, and my agent shewed them the account of the said lot, and informed them that though I did not recognise any right on their part to the said lot, yet I was willing to permit them to perform the said contract if they desired it, but the said parties absolutely declined to have anything to do with the said lot, or to perform the said contract, and if the same were not theretofore, yet it thereupon became abandoned, forfeited, and rescinded.

"I believe and charge, that all the heirs-at-law of the said late *Thomas Walker* were aware of the said application to me, and that the same was made with their assent and on their behalf, and that they all concurred in the course of action pursued by the said parties.

1868.

Walker v. Brown.

"By the said action I was actually confirmed in my belief that I was the absolute owner of the said lot, and that the said contract was at an end.

"At the time I sold the said lot to the defendant *Griffith*, the same was under lease to him, upon a lease some time theretofore made by me to him; and of the term thereby created, a considerable part was yet unexpired, the said term having run out only in this present year 1866, and the said lot was subject to the said lease when I sold the same to the said defendant *Griffith*.

"The value of the said premises was, and is very speculative and fluctuating; being dependent in great measure on the discovery of veins of oil or petroleum in the adjacent lands, and on the activity of speculation in oil lands, and on other circumstances; and at the time I sold the said premises to the said defendant *Griffith*, the price I obtained therefor was their full value, and I thought the same an excellent bargain for me. Statement.

"In making the said sale, I acted *bona fide* and in the belief that the said sale was advantageous.

"Under no circumstances could I have realized the rents which the said defendant *Griffith* obtained from the said premises during the continuance of the said term, as they belonged to the said defendant *Griffith* under the said lease.

"The said defendant *Griffith* was at the date of the purchase, aware of the said contract between myself and the said *Walker*.

"Although the value of the said premises rose shortly after the sale thereof to the said defendant *Griffith*, yet the same has since fallen greatly.

1868.

Walker v. Brown.

"The said *Thomas Walker* was, and his heirs-at-law also have been, guilty of such laches, delay, and acquiescence, as to disentitle them to the assistance of this honourable Court.

"This suit, as I believe, is purely speculative, and was instituted only in consequence of the said increased speculative value, but for which no claim would ever have been made in respect of the said premises by any party.

"I believe that the said plaintiff has been put forward to institute this suit in the interest of some of the said defendants, who so dealt with me as aforesaid, and that she has not instituted the same in her own behalf."

Statement.

After the sale to the defendant *Griffith* mentioned in the answer, the property fell in value, and subsequently to the filing of the bill, the buildings were destroyed by fire, and the property was not worth the amount paid in respect of *Griffith's* purchase money. The bill was taken *pro confesso* against *Griffith*.

John Walker, one of the heirs who had released his interest and was the principal witness for the plaintiffs, stated in his evidence, amongst other things, as follows: "I heard of Mr. *Brown* sending to my brother Thomas, to execute the mortgage on the house. My brother said he would not give him a mortgage. The reason was because Mr. *Brown* had not sent him the deed recorded when he promised. My brother Thomas told me so. My brother told me that Mr. *Brown* wanted a mortgage."

The cause was heard before Vice-Chancellor *Mowat*, at the sittings of the Court at Chatham, in the Spring of 1867; who, at the close of the argument, dismissed the bill with costs.

The cause was thereupon brought on to be re-heard before the Chancellor and Vice-Chancellors. 1868.

Walker v. Brown.

Mr. *J. A. Boyd*, for the plaintiff.

Mr. *Blake*, for the defendant *Brown*.

The judgment of the Court was delivered by

VANKOUGHNET, C.—In this case heard before my brother *Mowat*, at Chatham, he dismissed the bill at the close of the plaintiff's case, and, we think, rightly.

In November 1855, the defendant *Brown* sold to one *Thomas Walker*, since deceased, and under whom the plaintiff and defendants *Walker* claim as heirs-at-law, a lot of land in the village of Bothwell, for £100, of which $325 was paid in cash at the time. The balance $75 being in arrear, and the vendee *Walker* being desirous to procure the erection on the lot of suitable buildings for a tavern, applied to the vendor *Brown*, one of the defendants, to assist him in this object: and thereupon and on the second December 1856, a fresh bargain was made between the parties, whereby the defendant *Brown* agreed to complete the buildings which *Walker* had begun, and *Walker* was to pay *Brown* therefor $1,162.84; $300 down, and the balance in yearly instalments of $250 each, with interest on the principal sum remaining unpaid at the time of paying the instalment; and, to secure the balance, *Walker* was to give a bond and mortgage on the premises, and authority to let the house and receive the rents towards paying the debt and interest, until the remainder should be fully paid; and *Brown* was then to restore possession to *Walker*. Judgment.

Subsequently the defendant agreed to erect also for the vendee *Walker*, a barn on the premises.

1868.

Walker v. Brown.

These buildings were erected according to the agreement between the parties, and were let from time to time, to tenants who paid their rents to the defendant *Brown*.

According to the terms of payment arranged, the last instalment in respect of the tavern building became payable, at latest, on the 2nd December, 1860. Of the first instalment of $300 which should have been paid at once, but $96 was paid at the time, and oats on account of it to the value of about $104, were delivered to and credited by the defendant *Brown* afterwards. Nothing further was ever paid by the deceased *Walker* or his representatives on account of the contract. The last occasion on which the vendee appears to have interfered in the property was in the spring of 1859, when, in concert with the defendant's agent, a lease of the premises to one *Wilson Milligan* was arranged. *Walker* died in September, 1859. In the Fall of the same year after his death, his brother, *John Walker* called to see the defendant *Brown* at his office in Bothwell, and inquired of him into the position of the property and purchase. The defendant told him how matters stood, stating that there was about $1100 due on the property, and asked him what he intended doing, and advised him to take out letters of administration to his brother's estate. This account of what so passed in conversation rests on the evidence of *John Walker* himself, who a few days before the hearing of the cause, released all his interest in the subject matter of it, to enable him to be a witness. Nothing appears to have been done by the heirs of the vendee, in the shape of communication with the defendant or otherwise in reference to the contract, till about the time of the filing of this bill, on the 17th day of May last.

Judgment.

My learned brother thought the laches of the parties

so great, that the Court ought not now to assist them; and, in this, we agree with him.

The plaintiff's contention is, that the possession of the defendant, by reason of his having, since the erection of the buildings, received the rents and profits of them, must be treated as the possession of the vendee, and that, so, time did not run, and the defence of laches does not apply. We do not accede to this argument. The defendant *Brown* by the contract was to receive the rents and profits in security or part payment of the money for which he had contracted; and any possession arising therefrom was his possession, as in the case of a mortgagee receiving rents, and not the possession of the other party. The receipt by the vendor of intermediate rents and profits in no way lessened the obligation of the vendee and those representing him, after his death, to pay the purchase money according to contract. The defendant did not stipulate merely for payment by the rents to be received. He might not have received any; a tenant might not have been found. He was not to wait an indefinite time for his money, until rent enough might have been obtained to pay it. There was a fixed time for payment of the purchase money; the rents, he insisted upon receiving as some security for the performance by the vendee of his contract; and, yet, we are told by this Mr. *John Walker*, the witness for the plaintiff, that the heirs did nothing towards paying up the purchase money, because they thought it better to let the matter lie—to let the defendant *Brown* go on receiving the rents—and, at some future day, to claim the property. This is not conduct which in the eye of this Court entitles a party to specific performance.

Judgment.

Men are not allowed thus to sleep upon their bargains, and at any future time, when it may be to their own advantage to do so, rouse themselves, and complain to the Court, that the opposite parties refuse to carry them

1868.

Walker v. Brown.

out. The conduct of the parties here was one of deliberate and continued inaction; and we should probably never have had their suit before us, had not the property, at one time, risen much in value, and been re-sold by *Brown* in 1865, to a stranger, the defendant *Griffith*, who however had at the time notice of the previous sale to *Thomas Walker*.

It is insisted also that the vendor should have given a notice, to terminate the contract. A contract may be put an end to by a notice giving a reasonable period for the purpose, when time is not originally of the essence of the contract. But laches—delay to assert rights under a contract of sale, may, as here, shut the door to an applicant, though the contract has never been formally put an end to by any act of either party. Here it does not appear that the vendor knew who, with the exception of *John Walker*, were the heirs of the deceased, or where any of them resided. It would have been rather difficult to have given notice under such circumstances; and the vendor might, after the lapse of so much time before he resold, have reasonably concluded that the heirs had abandoned the contract. It was their part to have brought themselves to his notice; not his duty to hunt them up.

Judgment.

It is also contended here, though it was not before my brother *Mowat*, that the defendant the vendor, kept the contract alive by the entries in his books from time to time, of the rents received from the property under the same head of account as that opened with *Walker* on the original sale. These entries were never communicated to the opposite party, never known to them, and, upon the faith of them they never acted, nor were disarmed from acting. For the first time, on the hearing of the cause, they became aware of them; and, even though the defendant may have made the entries with the intention of treating the contract as open, and

enforcing it at his option he being in no default, yet the plaintiff and the other heirs, who did not know of this, and therefore did not act on it, and who were in default all the time, cannot avail themselves of that intention and that option, and insist upon the vendor exercising the one or the other on their behalf or at their instance. Moreover, we know that in books recording land sales, the account is often kept as with the lot of land, though it may have passed into other hands; and it would be rather hard to hold a vendor bound to an intention or a bargain by such entries in his own private book and made for his own purposes only. If it were a question here, what rents the defendant had received, his books, as in the case of a payment or any other fact acknowledged in them, would be good evidence against him; but we do not think that these entries by him of the rents received any more maintain the contract alive as against him, or establish that he kept it alive for the benefit of both parties, than proof of the receipt by him of the rent would do.

1868.

Walker v. Brown.

We affirm the decree with costs.

TOMPKINS v. HOLMES.

Practice—Married woman, examination of

Where it would be attended with inconvenience to have a married woman examined by the Court or Judge, touching her consent to abandon her interest in the fund in litigation; the examination may be taken by the Master.

Statement.

On this case coming on to be heard, it appeared that the wife of the defendant *Holmes*, was entitled to one-seventh of the estate in the hands of her husband as executor, but as the husband had become insolvent, such claim

1868.

Tompkins v. Holmes.

was of little interest and the wife through her counsel consented to abandon it.

Mr. *E. B. Wood*, for the plaintiff.

Mr. *Freeman*, Q. C., for *Holmes* and wife.

VanKoughnet, C.—As to a wife's equity to a settlement, she may consent to waive it: See 2 Spence 486-7. *Whittle* v. *Henning* (*a*)

In this case it is said *Holmes* is bankrupt, and that it is a merely nominal interest, the wife has; however, if this money came into Court, it would be secured for her, and I must be satisfied that she freely and voluntarily abandons it. Her consent to this may be taken apart from her husband, by the Master and he must certify to the Court. It is more usual for the Court or Judge to examine the married woman; but, in this case, that would be inconvenient.

Judgment.

Bessey v. Bostwick.

Lost will—Costs.

When in consequence of the state in which a testator left his papers a reasonable doubt was created as to his having left a will, the costs of the parties necessary to discuss the question of "Will or no Will?" were ordered to be borne by his estate.

In drawing up the decree upon the judgment reported ante, vol. xiii., page 279, a question arose as to how the costs of the defendants *Bostwick* and the *Attorney General* should be provided for; and the question was spoken

(*a*) 2 Ph. 731.

to upon the minutes before his Lordship the Chancellor. 1868.

Bessey v. Bostwick.

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

Mr. *Crooks*, Q.C., for *The Attorney General.*

Mr. *McMichael*, for the defendant *Bostwick.*

VanKoughnet, C.—As to the costs occasioned by *Bostwick* being a party to the suit, it seems to have been contemplated—indeed to have been provided by the order under which this bill was filed, that *Bostwick* should be a defendant, for the purpose of contesting the will, inasmuch as he disputed it, and put himself forward as one of the next of kin.

He has failed in his opposition; but, considering the doubt that naturally and reasonably existed as to the will, in its absence, being supported by extraneous evidence, of which *Bostwick* could know nothing, I cannot properly order him to pay the costs of the contention. On the contrary, I think that as he was made a party to contest the existence of this will, and has assisted in bringing the whole matter to light, he should have the costs of this part of the contention. I do not think I should order him to pay the costs of the inquiry as to his kinship to the testator. The plaintiff had no interest in this. If he failed in establishing the will, it was of no consequence to him what became of the property, for he certainly was not of kin to the testator. The order had already provided that *Bostwick* should be a defendant to contest the will, and it was not necessary therefore that for this purpose, he should establish his kinship; he was already permitted to oppose the will. The plaintiff should not have embarked in this part of the controversy after the order previously made. The question only became of importance as between *Bostwick*

Judgment.

1868.

Bessey v. Bostwick.

and the *Attorney General*, in the event of the Court finding there was no will. As to the *Attorney General*, he, I understand was put to no costs on this head; and therefore no order as to him in regard to it is necessary; but, the *Attorney General* claims his costs of the defence to the plaintiff's bill.

The order directing the bill to be filed required that the *Attorney General* should be made a party. This, I apprehend, was in consequence of the doubts existing as to a lost will of the testator being established, and the allegation of the plaintiff that the testator was illegitimate, and had, therefore, no next of kin. In that case, the personalty would go to the Crown, if there had turned out to be no will; and it seems to me that it was in consequence of this allegation of the plaintiff, that the Court directed the will to be proved as against the Crown, while it gave *Bostwick* the right to come in and dispute it if he liked; he assuming to represent the next of kin. Upon the principle on which I have given to *Bostwick* the costs of the contest as to "Will or no Will?" I think the *Attorney General* should have his costs. The rule, in this respect, is laid down by Sir *James Wilde* to be, that, if the testator's papers be left in such a state of confusion as to raise a reasonable doubt as to whether or not he died testate—or if by reason of any conduct of his or of those claiming his estate under the will such reasonable doubt has been created, the estate should bear the costs of the inquiry. Here, there is the absence of any will; thus raising the presumption that the deceased died intestate. That presumption is rebutted by evidence, of which neither *Bostwick* nor the *Attorney General* could know anything; and their assistance has been of value to the Court in bringing to light all the facts which should influence the Court in its decision.

Judgment.

1868.

McMICHAEL v. THOMAS.

Præcipe decree—Practice—Mortgage.

When proceedings are taken against an absent defendant by advertisement, a decree cannot be obtained on *præcipe*.

This was a mortgage case, and the defendant was served by advertisement, so that he was not personally served with the bill. The notice subjoined to the advertisement, not embracing the notice indorsed on the office-copy of bill in mortgage cases, as required by Orders of 10th of January, so that defendant had no notice of the plaintiff's claim.

Mr. *A. Hoskin*, for plaintiff, applied for the usual decree upon *præcipe*, but the matter being spoken to,

MOWAT, V. C., said, that the Order referred to did not embrace cases where the defendant had been served by advertisement; that he had no notice of the amount claimed by plaintiff, and the foundation of the *præcipe* decree was the defendant's having had served upon him an office-copy of the bill indorsed with the notice prescribed by the above order; that such cases came under the former practice of the Court, and must be set down to be heard *pro confesso* before the Court. Judgment.

This case was afterwards set down, when Vice-Chancellor *Mowat* made the usual decree.

1868.

READ v. SMITH.

Mortgages—Opening foreclosure—Costs.

L. and *S* were joint owners of certain lands, and *L.* had created a mortgage on a part of his undivided interest, in favour of *R.* With a view of effecting a partition, *L.* conveyed his interest to his co-tenant *S.* who thereupon re-conveyed to *L.* a certain defined portion; and in order to protect *S.* against the mortgage outstanding in *R's* hands, *L.* executed back to *S.* an indemnity mortgage: *L.* did not pay off *R.'s* mortgage; and *R.* having obtained a final decree of foreclosure sold his interest in the property to *S.* *L.* after the partition, had sold a portion of the estate to the plaintiffs who in respect of their interest had been made parties to the foreclosure suit by *R.* Subsequently, in an action of ejectment *L.* set up title under the indemnity mortgage from *L.*

Held that he had thus let in the plaintiffs to redeem who were entitled to do so upon paying what *S.* had paid or was liable to pay to *R.*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those, *S.* was ordered to pay the costs.

Examination and hearing at Belleville.

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

Mr. *Strong*, Q. C., and Mr. *Wallbridge*, Q. C., for the defendant.

Judgment. VANKOUGHNET, C.—I was not prepared to dispose of this case at the close of the argument, as my mind was not at the time free from doubt. A subsequent consideration of the facts has however removed any difficulty I felt. The defendant *Levisconte* being the owner of an undivided interest in the lands involved in this litigation, subject to a mortgage thereon to one *Peter Ruttan;* and the defendant *Albert Lewis Smith* being the owner of another undivided interest, it was agreed between them to partition the lands, so that each might hold his share in severalty. To effect this *Levisconte* conveyed his interest in the lands to *Smith*, who then became the legal owner of the entirety, and he

1868.

Read v. Smith.

subsequently conveyed to *Levisconte* a defined portion of the land, as had been arranged between them. This partition was, of course, subject to the paramount outstanding mortgage to *Ruttan*, which, as has since been ascertained, covered only about three-seventieths of the entirety. *Levisconte*, being bound to pay off this mortgage, which of course operated upon the share of the land set apart and retained by *Smith*, executed back to *Smith*, as part of the arrangement between them, and as an indemnity against the mortgage to *Ruttan*, a mortgage upon the lands which *Smith* had conveyed to him in severalty. This mortgage, after reciting the agreement for partition—the partition—the existence of the *Ruttan* mortgage—and that *Levisconte* had agreed to procure its discharge within a certain time (now long elapsed) contained a proviso for its becoming void "if the said *Levisconte* do and shall within two years from the date thereof, (the 17th November, 1856,) pay off discharge and have discharged from the books in the Registry office the said *Ruttan* mortgage so far as the same may be binding on the said lot (meaning the land which had been divided between the parties), so that the said *Albert Lewis Smith*, his heirs, &c., shall, and may have and hold the tenements, parcel of the said lot conveyed by the said *Levisconte* to him, freed and absolutely exonerated from any lien, charge, or mortgage, &c." Then follows a covenant by *Levisconte* to pay the mortgage, so that *Smith* may hold the land conveyed by *Levisconte* to him, freed and discharged from the said mortgage. *Levisconte* did not procure the discharge of this mortgage; and subsequently *Ruttan* filed a bill to foreclose the equity of redemption; and on the 31st March 1866, obtained the final order for foreclosure. Immediately afterwards he sold his interest in the land to the defendant *Smith*, for £1000, being several hundred dollars less than the amount which was due to him on his mortgage at the time of the final order. In the meantime, *Levisconte* had sold parcels of

Judgment.

1868.

Read v. Smith

the land conveyed to him by *Smith*, to divers individuals, among others, to the plaintiffs who file this bill, asking and claiming to be allowed to pay off *Smith*, and to have the property freed from *Ruttan's* title now held by him. These same plaintiffs were parties to the foreclosure suit, when they, or any of them, might have redeemed *Ruttan*. They hold covenants from *Levisconte* to save them harmless against the *Ruttan* mortgage. *Ruttan's* rights under his mortgage were of course in no way affected by the partition between *Smith* and *Levisconte:* which was indeed made expressly subject to it. *Ruttan*, it is therefore contended, could, and doubtless he could, while he held the title have called for a new partition; and this same right it is said has passed to his assignee *Smith*. Admit that this would be so, and that *Smith* had the same right to acquire *Ruttan's* title, and use it, as any stranger could or would if that were all that was in the case; yet *Smith* stands in this different position from a stranger and has acted upon it: he has the mortgage for indemnity, which, although he asserts it to be worthless, he does not offer to give up, but, on the contrary, he has acted upon it. Now either the purchase by *Smith* from *Ruttan* must be treated as in discharge of the mortgage for indemnity, or as not a sufficient compensation. *Smith* cannot claim to hold the land purchased from *Ruttan*, as his own and insist upon the indemnity mortgage also, without giving the right to redeem; and, yet, this is what he has done and what he does. If a jury were to estimate the damages which *Smith* had sustained by breach of the covenant to indemnify, they must take into consideration that although *Smith* had to pay off or buy from *Ruttan*, yet that he got something for his money; and they could never accord him the full amount of the mortgage money due to *Ruttan*, as the loss he sustained. *Smith* contends that the indemnity mortgage is discharged by the foreclosure on *Ruttan's* mortgage. This is not so; *Ruttan* had at most but an interest in a certain undivided share

Judgment.

1868.

Read v. Smith.

of the property covered by the mortgage, in the proportion which his three-seventieths of the whole lot would bear to it—and this is evidenced by the fact—that in order to recover the entirety in the land conveyed to *Levisconte*, and by him mortgaged to *Smith*, the latter has used the indemnity mortgage in an action of ejectment, and by means of it has recovered judgment. Now if *Smith* had sued *Levisconte* at law for breach of covenant, it seems to me clear that the latter could have filed his bill to redeem; and he could only redeem by paying off *Smith* the amount in which he had been damnified by *Ruttan's* mortgage; and these could be the only terms imposed, under the relation in which the parties had stood to one another. Well, *Smith* does not sue upon the covenant, but he uses the mortgage as a subsisting security, and sues upon it in ejectment, or uses it in an ejectment action as part of his title; indeed his only title to the entirety of the land covered by it. Can he have the undivided share of the land conveyed by the Ruttan mortgage, and the residue also under the mortgage to himself? Is *Levisconte* to lose the whole of his land because the defendant *Smith*, has acquired an undivided interest in it from *Ruttan?* Having used the indemnity mortgage as he has done, claiming under it, and seeking, by means of it, the whole of *Levisconte's* land, and not contenting himself with such interest as he acquired in it under *Ruttan*, I think he has let the plaintiffs, assignees of *Levisconte*, in to redeem, and that they are entitled to do this, and to have the mortgage to *Ruttan* released or discharged on payment to the defendant *Smith*, of the amount paid by him to *Ruttan*, or which he is liable to pay; and all expenses to which he may have been put or which have been reasonably incurred, so that he may be fully indemnified from *Levisconte's* default; and all costs subsequent to the hearing: the costs up to and inclusive of the hearing, beyond those of an ordinary redemption suit, are to be paid by defendant *Smith;* but the costs which may

Judgment.

1868.

Read v. Smith.

have been occasioned by plaintiff's allegation of a bargain between *Smith* and *Ruttan*, prior to the order for foreclosure, which was not sustained, the plaintiff must pay. If *Smith* had abandoned the indemnity mortgage, and had insisted only on the additional title and interest acquired under *Ruttan*, I think that, under the circumstances of the previous arrangement between the parties, the Court would have disturbed the existing partition, only so far as would have been necessary, to give *Smith* his additional share in the land.

An injunction to restrain a change of possession under the writ of *habere facias possessionem* in the ejectment suit, is asked for. I grant this, but only on the terms of the plaintiff paying into Court the sum of £1,000 agreed to be paid by *Smith* to *Ruttan*, and interest thereon from the time of such agreement, and £25 additional to cover any incidental expenses.

MATHERS v. SHORT.

Vendor's lien—Practice—Examination of defendant.

One of two partners on retiring from the partnership, conveyed to the remaining partner all his interest in the partnership lands, mill, and stock-in-trade, who gave the retiring partner his promissory note for £500, payable on the 1st September, 1867, agreeing at the same time, that in case of his effecting a sale of the premises before that time, to pay the note though not due. There was no evidence of any express agreement for lien on the property assigned.

Held, that the circumstances were such as to negative the retention of any vendor's lien by the retiring partner.

Where a defendant has been examined on his answer; the answer and examination may be read in connection and used as an affidavit in support of a motion for decree.

Statement.

This was a motion for decree, declaring the plaintiff entitled to a lien as vendor for £500, upon the lands

and premises in question, under the circumstances set forth in the head-note and judgment. 1868.

Mathers v. Short.

Mr. *Gwynne*, Q. C., for plaintiff.

Mr. *McLennan*, contra.

On the motion, counsel for plaintiff read the answer of the defendant as an affidavit and was about to proceed to read the statements of the defendant made upon his examination on his answer: when counsel for the defendant objected to this being done; contending that the admissions, if any, elicited from the defendant on such examination could only be used, as any other admission, at the hearing of the cause; but could not be used as an affidavit, on a motion for decree: the orders of Court authorize reading the answer as an affidavit, but nothing is said as to using the examination of the defendant, which cannot be used in connection with the answer and therefore cannot be read on a motion for decree—but

Statement.

VANKOUGHNET C.—My brother *Spragge* has, I think, ruled otherwise, in *Proctor* v. *Grant* (*a*), and he there treats the examination of the defendant, on his answer, as in substitution for the discovery formerly obtained by written interrogatory. I had in another case without having been referred to *Proctor* v *Grant*, a strong doubt of this, as a defendant was now allowed, by our practice, to shape his answer and defence as he pleased without the compulsory dictation of written interrogatories, and I did not see how the plaintiff could add to this answer by the statements of the defendant extracted from him on his examination; but that any statements so obtained should be treated as evidence as any other admissions by a defendant would be. The view taken by my learned brother, furnishes however a more con-

(*a*) 9 Gr. 31.

1868.

Mathers v. Short.

venient practice as under it, this examination can be read on a motion for decree; and the defendant cannot complain that his own statements are read against him. I therefore allow it to be read.

On the motion *Wilson* v. *Daniels* (*a*), *Seney* v. *Porter* (*b*), *Sudgen's* Vendors and Purchasers, 14 ed. p. 676, were referred to by counsel.

After taking time to look into the authorities,

VanKoughnet C.—I do not see how I can give the plaintiff any relief on this bill. The right to it is based on an alleged lien reserved to plaintiff at the time of the sale. No agreement for a lien is proved; on the contrary, it is denied in the defendant's answer, which is read as an affidavit. No express agreement being proved, the facts, even as alleged in the bill, negative the presumption of a lien, or the intention to retain or preserve one. The parties were in partnership together; the plaintiff retires from it, and the 7th clause of the bill states, that "for the purpose of effecting the intention of the parties, and of conveying the interest of the plaintiff in the said business, *lands and mills* to the defendant, and to enable the defendant to carry on the business on his own behalf and in his own name, it was agreed that the plaintiff should transfer to the defendant all his share and interest in the said lands, mill, and stock-in-trade, &c., and that the defendant should pay to the plaintiff the sum of £100 in cash, and £500 the share of the plaintiff in the said lands and mill, and that he should pay the same to the plaintiff on or before the 1st of September, 1867; and that upon a sale of the lands and mill before the 1st September, 1867, the

Judgment.

(*a*) 9 Gr. 491. (*b*) 12 Gr. 546.

defendant should forthwith thereafter, pay to the plaintiff the said sum of £500, together with a portion of any sum which should be realized in excess of the said sum of £2,000." I may observe, that it is not made out that the £100 was paid for the plaintiff's interest in the business, as distinct from the £500 alleged to be for his interest in the land. The receipt given by plaintiff rather negatives this: *Wilson* v. *Daniels* (*a*). The 8th clause states the deed of dissolution, by which the plaintiff assigns to defendant all his interest in the said business and the debts belonging thereto: and another deed by which the plaintiff transferred to the defendant all his interest in the said lands and mill. The lands and mill formed the premises on which the plaintiff had conducted, and the defendant was to conduct, the business. It was apparently the arrangement of both parties that this property should be sold; and the memorandum at the foot of the defendant's note for £500 shews this, as the defendant thereby agreed that in case he sold the mill property before the 1st September, 1867, he would pay the plaintiff the amount of the note, though not then due.

1868.

Mathers v. Short.

Judgment.

All this, taken in connection with the defendant's affidavit or answer, and, indeed, without it, shews that the defendant was to dispose of the land absolutely, and that no consent of the plaintiff thereto was required. How could he sell the land absolutely if it was to be incumbered? How was he, out of the proceeds of sale to pay the note to the plaintiff, if the land was to be sold subject to the payment of that note? How was the payment to be accelerated and the division of the surplus, should the price obtained exceed £2,000, to be effected if the £500, the amount of the note, was to remain an incumbrance on the property? Suppose the defendant had sold the property next day, and the purchaser had paid into the hands of the defendant the whole

(*a*) 9 Gr. 491.

1868.

Mathers v. Short.

price, say £2,500 in cash, which the plaintiff authorized it seems to me, the defendant to receive, would the purchaser, knowing just what we know of the circumstances of the dissolution, have purchased subject to plaintiff's alleged lien, and been compelled to pay it in addition to his purchase money? It seems to me clearly not. The lien existed at the time the plaintiff sold his interest in the lands, or not at all. The circumstances, in my judgment, negative the existence of any such lien at that time; and, in the absence of any subsequent arrangement between the parties to warrant it, I cannot create it now. It may be a very hard case; but the plaintiff is in the position of many another man who has an unsecured debt, and I can neither secure it for him, nor accelerate the payment of it in order that he may, by process at law, fasten it upon the property.

I must refuse the plaintiff's motion with costs.

BROOKE v. THE CITY OF TORONTO.

Esplanade Acts—Arbitration.

Arbitrators appointed to determine the amount to be paid between the city and a water lot owner, in respect of the construction of the esplanade, in setting a value on the water lot, did so as at the time of the grant; and awarded interest in respect of the sum found payable by the owner to the city. The award was set aside on both grounds, as the arbtraitors should have valued the lot as at the time it was taken possession of by the city, and the Statutes give them no power to award interest, which is chargeable only from the time of the registration of the Surveyor's certificate or the making of the award.

In proceeding under the Acts, whether there should not be separate findings or awards in respect of the filling-in of the esplanade and the grading, levelling, &c., of the strip to the north of the latter.

Statement.

This was a bill to restrain the defendants from proceeding to enforce an award made between them and

the plaintiff in respect of the construction of the Toronto Esplanade, and also to set aside such award.

1868.

Brooke v. The City of Toronto.

The cause came on to be heard by way of motion for decree.

Mr. *McLennan*, for the plaintiff.

Mr. *C. W. Cooper*, for the defendants.

VanKoughnet, C.—The award in this case seems to me to be bad, on two grounds, at all events.

Firstly, because the arbitrators did not estimate the value of the plaintiff's land as it stood at the time when the defendants commenced to convert it into the esplanade; and secondly, because of the charge of interest.

Judgment.

As to the first ground there does not seem to be any express provision in the Acts of 1853 and 1857 for estimating the value of the land taken for the esplanade, beyond that contained in the 4th section of the latter Act, which contemplates such estimate being made and allowed. The Acts do not provide any fixed value for the portion to be abstracted from each water lot for the esplanade; and the value must therefore be dependent upon the position, situation and character of such portion at the time it is taken. One lot will, or may in these respects, differ much from another. A lot covered with water, (other things being equal), cannot be as valuable as a lot filled in and raised above the water; as was the plaintiff's lot here, in consequence of the labor and material supplied by him. The arbitrators thought they were bound to estimate the value of the plaintiff's lot as it was when granted to him. In this they were wrong. They should have valued it as it stood when taken by the city.

1868.

Brooke v. The City of Toronto.

As to the second ground: it is clear from the 3rd section of the Act of 1853, that interest was only chargeable from the time of the registration of the Surveyor's certificate or of the award. The arbitrators had no power to award interest. It was not intended that they should have it.

On these grounds I order the award to be set aside, and an injunction to restrain the defendants from acting on it; and as they have insisted on maintaining it, they must pay the costs.

Judgment.

This is not, as was argued, a case in which a disputed question of law, viz: the construction of the Statute, under which the parties were acting, was referred to arbitration by consent. The resort to arbitration here, was a statutory right, to be pursued in a certain way; and the arbitrators were bound to exercise their powers legally, as a Court of fixed jurisdiction; they intended to do this, but have committed a mistake which it is in the power of this Court to remedy. The Statute of 1857 contemplates an appeal to the Courts, if the right of appeal was otherwise doubtful. Here, a fresh arbitration can be had, and therefore the difficulty which presented itself in the *Attorney General* v. *Jackson* (*a*), referred to by me on the argument, does not arise.

It is quite probable that the plaintiff is right in the position that there ought to be separate awards or findings in respect of the filling-in of the esplanade, as one subject; and the grading, levelling, &c., of the strip of land to the north of it as the other; but it would seem that both parties in this case submitted to the one finding or did not object to it. It is not necessary however, to express any opinion on this objection.

(*a*) 5 Hare, 355.

1868.

CLOUSTEN v. McLEAN.

Practice—Abatement—Parties.

During the progress of an administration suit, and after the Master had made his report charging the executors jointly with receipt of assets of the estate, one of them died, and the plaintiff by way of revivor, made his personal representative a party. A motion to discharge the order of revivor on the ground that no abatement had taken place, was refused with costs.

Motion to discharge an order of revivor under the circumstances stated in the head-note and judgment.

Mr. *A. G. McLean*, for the application.

Mr. *A. Hoskin*, contra.

VANKOUGHNET, C.—The bill in this case was filed against two of the executors of the late *J. D. Cameron*, for an account and administration of his estate. After the Master had made his report charging both defendants jointly with assets of that estate in their hands, and after that report had been sent back to him for review, one of the executors died. His executrix was made a party to the suit as representing his personalty by order of revivor. This order was taken out and served during the long vacation, and the fourteen days elapsed in vacation, if time ran during that period on such an order, without any notice having been given in the mean time of an intention to move against it. The petition to set aside the order, which has now been presented to me, was served within the first fourteen days after the vacation, and if the effect of the General Orders is that the time to move against an order of revivor does run in vacation, I would now give the petitioner leave to proceed on the petition, as she could have done nothing during vacation to get rid of the order; the Court being closed; and, considering the communications that passed between the parties, she

Judgment.

1868. Clouston v. McLean.

has come with sufficient promptness after vacation to entitle her to be let in to move. It is not necessary, however, to decide the question of practice raised, or to grant an extension of time, as I am of opinion that no case is made for setting aside the order. The ground of objection to it is that there being a surviving executor of *Cameron's* estate, left as a defendant to the suit for administration, it is improper to unite with him, as a defendant, the executrix of the deceased defendant, inasmuch as the right of representation survives to, and is cast upon, the surviving executor, who is alone now the proper party defendant to the suit.

Judgment.

Two things are here confounded. It is true that the surviving executor alone can claim to represent the estate of the testator *Cameron;* that the duties of administering it are his alone; and that the representative of the deceased executor can in no way interfere therein; and that at law the surviving executor can alone sue and be sued. But, in this Court, a party, who has no right whatever to administer, may be liable to account for assets which he or his testator has possessed himself of; and at all events, when, as here, a suit has proceeded against both executors, so far that in the life-time of both they are charged with assets found in their hands, and they have both accounted, or endeavored to account for the assets come to them, and one of them then dies, this Court should and must, I think, complete its work of having the accounts of these two executors with the estate fully adjusted, which yet remains to be done; and this cannot take place in the absence of the personal representative of the deceased executor, who will be bound by the proceedings had against her testator in his life time. When two executors as here, are found jointly liable for certain assets, each is severally liable; and those interested in the estate are not obliged to content themselves with the responsibility of the surviving executor alone; nor, at this stage of the cause, to abandon

1868.

Clousten v. McLean.

the prosecution of the accounts against the deceased executor trusting to the surviving executor, taking proceedings hereafter to make his co-executor's estate liable for assets already charged against him in this suit. The plaintiff is entitled to have an account of the personal estate entire; and the full accounts of the estate, here, cannot be ascertained and adjusted without following the assets into the hands of both executors, and prosecuting the inquiries necessary therefor; and this cannot be done in the absence of the personal representative of the deceased executor, who is therefore, I think, properly made a party to this suit by revivor. Sir *Knight Bruce*, does in *Masters* v. *Barnes*,(a) refer to a case in which he says it was held that when one of two executors to a suit died, you could not file a bill of supplement and revivor against the personal representative of that deceased executor to make him a party to the suit, and he remarks that that was a strong decision. If made, it is I think, over-ruled by Lord *Brougham* in *Holland* v. *Prior* (b); and if it was not, I should not hold it applicable, if it be law (and I do not think it is), to a case in the position of this one, where the order to revive was obtained. I do not see how the accounts could be further taken or any subsequent proceedings had here without the personal representative of the deceased accounting executor being before the Court. What proceedings the parties may be entitled ultimately to take, to obtain payment of any thing found due by the deceased executor, if his personal representative does not admit assets, is for them to consider.

Judgment.

I must reject the petition with costs.

(a) 2 Y. & C. C. C. 618.

(b) 1 M. & K. 237.

1868.

RICKER v. RICKER.

Administration—Mortgage—Parties.

A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favor of an infant, and bequeathing legacies to other persons. The Mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt.

Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised.

Statement.

The bill in this cause was filed by *Christopher Ricker* against *Joseph Lehman Ricker*, an infant under the age of twenty-one years, setting forth that on the 15th May, 1860, the late *Joseph Lehman* executed a mortgage to the plaintiff, securing $1200 and interest at ten per cent., on certain lands of the deceased; that the mortgagor died 6th June, 1860, having first made and published his will on the 22nd May, previously, whereby, after directing the payment of debts and funeral expenses, he bequeathed to the defendant, the second son of the defendant's half-brother *David Ricker*, $600; to the said *David Ricker*, $200; to *Frederick Ricker*, $200; to *Amy Deegle*, the testator's sister, $200; and certain articles of furniture to *Sarah Ricker*, wife of *David Ricker*: the residue of his goods and chattels he directed to be divided equally amongst these parties and the plaintiff. The real estate owned by the testator, being the premises embraced in the mortgage of May, 1860, he devised to the plaintiff, charged with payment of the $600 and interest thereon, to the defendant; and appointed the plaintiff and one *James H. Cooper*, executors; the latter renounced probate, and plaintiff having proved the will, probate thereof was granted to him. The bill further alleged that the defendant was entitled to the equity of redemption in the mortgaged premises, and prayed payment of the amount secured by the mortgage, and in default foreclosure.

1868.

Ricker v. Ricker.

The plaintiff did not repudiate the devise to himself; as executor he has proved the will. He, under the will, is owner of the equity of redemption; and yet he treats the defendant as such. The defendant's interest in or right of redemption depends on the question, whether or not the plaintiff's debt ranks on the estate before this legacy, or whether it is gone? and this has not been argued. Counsel must speak to it, and a statement of facts, if one can be agreed on, submitted.

The cause was again brought on, when counsel for the plaintiff consented to a decree, directing a sale of the lands devised.

Judgment.

VANKOUGHNET, C.—The devisee and plaintiff here consenting to a sale of the property, seems to remove all difficulty. While I am of opinion that the mortgagee is not entitled to be paid out of the personalty in preference to the legatees as stated by me on the former argument; still, I think, he is entitled to be paid his mortgage debt out of the property devised to him before the charges on it by the will are raised. The testator, I think, did not mean, and cannot be held to have meant, that these charges which he could only fasten as of right on the equity of redemption were to be paid in preference to the debt to which, in his life time, he had subjected the property.

Let an account be taken of rents and profits received by plaintiff, and also of personalty received by him, and a general administration of the testator's estate if desired; and let the property be sold to pay the amount which may be found coming to the plaintiff; the residue to be applied to pay the charges created by the will, paying into Court the share of the infant. Costs of all parties to be paid out of proceeds of sale, if sufficient, after paying the plaintiff. Other parties interested to be added in the Master's Office.

1868.

Ricker v. Ricker.

The defendant put in the usual infant's answer, submitting his rights to the protection of the Court.

The cause came on by way of motion for decree.

Mr. *C. G. Crickmore*, for the plaintiff, asked for a decree according to the terms of the prayer.

Mr. *Proudfoot*, contra,—The statements of the bill clearly shew that the plaintiff is himself entitled to the equity of redemption. If not content to accept the devise subject to the legacy in favor of the defendant, the only course for him to adopt is to ask a sale.

VanKoughnet, C.—I think that the plaintiff is not entitled to have the sums appropriated as legacies applied to the payment of his mortgage debt. If he insists that he is, then he must bring the legatees before the Court. *Middleton* v. *Middleton* (*a*), is in some sense in his favor.

Judgment.

I understand it to be admitted that there was not personalty sufficient to pay these legacies. If so, then there would be nothing, wherewith the plaintiff could be paid, as all the real estate is devised to himself. On the real estate the legacy to the infant defendant is made a charge. In regard to it two questions of fact and one of law arise:

1st. Is there personalty sufficient to pay the legacy to the defendant after paying the other legacies, or to pay any portion of it?

2nd. What have been the annual rents; or what would have been a fair occupation rent for the premises hitherto? and then,

3rd. Does the plaintiff take the realty subject to the payment of the legacy to the defendant, or is he entitled to have his mortgage debt first paid out of the rents or otherwise?

(*a*) 15 Beav. 450.

1868.

McDougall v. McDougall.

Partition—Mortgage of undivided share.

Although partition may be directed of an estate subject to a mortgage thereon, still, if one of several co-tenants creates an incumbrance on his undivided share, and institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the Court so as to bind the legal estate: and the party creating the charge must bear any additional expense occasioned thereby.

This was a partition suit. It appeared that the plaintiff, as one of the co-tenants, had created a mortgage on his portion of the estate in favor of a person not a party to the cause.

The defendants allowed the bill to be taken *pro confesso*.

Mr. *Fitzgerald*, for the plaintiff, cited *Fitzpatrick* v. *Wilson* (*a*).

VanKoughnet C.—If a mortgage be created by the owner of the entire estate, partition can be had subject to that mortgage; but, if the owner of an undivided interest mortgage his legal estate in it, his mortgagee must, I think, be before the Court. He must join in the conveyances; any extra expense occasioned by this should be borne by the mortgagor (*b*). The mortgagor has chosen to put the legal estate out of him. Surely when he seeks partition he must bring that legal estate before the Court for the benefit and protection of his co-tenants whom he seeks to bind. As, however, they have not raised this objection, the mortgagee may be made a party in the Master's Office, with the right to move, within fourteen days, after decree served on him to set it aside; costs otherwise, as usual. As the personalty Judgment.

(*a*) 12 Gr. 441.

(*b*) Cornish v. Gest, 2 Cox 27.

1868.

McDougall v. McDougall.

was conveyed at the same time, and as part of one transaction, I think the decree may provide for the division or sale of it, as the Master finds advisable; and may also direct the Master to ascertain what sums were paid by the parties respectively for the redemption of the mortgage, and what proportion each should have paid; and order payment of any difference or balance one to the other. No costs, except such as may be incurred by enforcing such payment. I do not think any case made out for inquiry or order as to the proportions paid or payable by each for maintenance, which is not alleged to be a charge on the lands.

MONTGOMERY v. DOUGLAS.

Will, construction of—Election—Dispensing with personal representative.

A testator devised his farm to a grandson, and directed the same to be rented during his minority; and that the testator's widow should be comfortably supported from the proceeds of the farm during life. The testator also directed his goods and chattels to be sold, and the proceeds placed at interest to support his widow and defray all necessary expenses. The widow after his death asserted a life interest in the property and rented it.

Held that the widow had elected to take under the will, and that she was not entitled to any benefit in the personalty other than the interest to accrue on the money produced by sale thereof; the *corpus* of the personalty being distributable amongst the next of kin.

Where the interest (if any) of a deceased party is very small, the Court will not require a personal representative to be appointed.

Statement.

This was an administration suit.

The testator's will was in the following terms:—

"I, *William Montgomery*, of the township of Downie, in the county of Perth, do hereby make my last will and testament, being in sound mind. I give and bequeath to my grandchild *William Montgomery*, son of *John*

1868.

Montgomery v. Douglas.

Montgomery, my farm consisting of fifty acres, east part of Lot No. 7, 8th Concession of the Township of Downie, in the County of Perth. I desire that my widow shall be comfortably maintained from the proceeds of said farm during her life time. I desire my goods and all my chattels to be sold, and the money therefor placed in the Bank on interest, to support my wife:—to defray all necessary expenses.

I will that my farm be rented until my grandchild comes of age: the interest to go in supporting my wife.

I desire three (3) executors to be appointed, to consist of *William Douglas, Thomas Bradshaw, and Moore Vernon.*"

The bill was filed by one of the next of kin, and sought to make the executors personally liable for rents, received by the widow, and certain articles left by the testator under the circumstances stated in the judgment.

The cause came on for examination of witnesses and hearing at Stratford.

Mr. *Harding*, for the plaintiff.

Mr. *R. Smith*, for the defendants.

Judgment.

VANKOUGHNET C.—I am of opinion that the executors did not take any estate in the land. There is no devise to them of it, nor are they directed to rent it, or receive the rents or sell it, or deal with the produce or proceeds of it in any way.

The widow appears to have assumed under the will to deal with it, asserting a life-interest in it, and renting it. I must, I think, assume that she claimed so to act under the will, as otherwise she would be a mere trespasser, without any pretence of right; and that she thus made

1868.

Montgomery v. Douglas.

her election to take under the will; which, it seems to me, excludes her from all benefit or share in the personalty, except in the accruing interest arising from the moneys produced on the sale of it; or, if that with the rent of the farm be insufficient for the purpose, then with so much out of the principal as might be necessary for her support. I think it must be taken that this was all the benefit he intended her to have from it, and that he left the *corpus* for distribution among his next of kin. If she were to take her one-third, the investment ordered by the testator could not take place as he intended; and if she was entitled, under the terms of the will, to have the capital applied to her support, she was only entitled to so much of it as was necessary for that purpose; and no more than she received seems to have been necessary therefor. She died within a year of the testator's death, before the rent reserved on the lease made by her fell due, and before any interest was payable upon the proceeds of the sale. This interest would at most have been $20 or

Judgment.

$30, and it seeems that she received and used some few articles of property left by the testator. She made no will. Under these circumstances it is not necessary that a personal representative for her should be before the Court, as the interest, if any, is too small to call for representation.

1868.

McRory v. Henderson.

Vendor and purchaser—Solicitor selling—Latent defect.

An attorney, in selling property of which he was the apparent, but not real owner, acted for the purchaser, who had confidence in him and employed no other solicitor in the matter; the attorney did not disclose to the purchaser the true state of the title, but alleged it to be good, though without any fraudulent intention. The true owner having, after the conveyance was executed, recovered the property from the purchaser:

Held, that the purchaser was entitled to have his payments and expenditure on the property made good to him by his vendor, and that the latter was not protected by having given only limited covenants for title.

Examination and hearing at Kingston, in the Autumn of 1867.

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

Mr. *Crooks*, Q. C., and Mr. *R. Walkem*, for the defendants.

Mowat, V. C.—In 1854, the plaintiff *John McRory*, and *Wesley McRory* since deceased, purchased from the defendants 350 acres of land in the township of Kingston; and the plaintiff has filed this bill to be relieved from the purchase, on the ground that the defendants had no title to the property. The conveyance, which describes the purchasers as yeomen, contains limited covenants only, but the plaintiff claims to be entitled, under the circumstances, to relief beyond the covenants. The plaintiff has been evicted under a paramount title. The bill is filed in his own right, and as representative of *Wesley McRory* the co-purchaser. Judgment.

As between parties between whom there is no inequality or confidence, the general rule is, that, after conveyance and payment of purchase money, a purchaser is not entitled to relief in respect of a defect of title not covered

1868.

McRory v. Henderson.

by his covenants (*a*). But this rule is subject to some exceptions. Thus, if a vendor is aware of a defect in his title, and misrepresents or conceals the fact, and the purchaser has not the means, or not sufficient means (*b*), of becoming acquainted with it, the vendor cannot shelter himself under the limited covenants in his deed.

The facts of this case fully appear in the reports of the case of *Graves v. Smith* (*c*); and for the purposes of the present suit a short summary will be sufficient.

On the 10th February, 1797, the lands in question, with other lands, were granted by the Crown to Captain *Adam Graves*. He died intestate some time before 1809; leaving one *George Graves* his eldest son and heir at law. *George Graves* also died intestate, leaving *George Oliver Graves* his eldest son and heir, who went to England many years ago, and did not return to this country until shortly after the plaintiff's purchase. During his absence, viz. in 1846, the mother of *George Oliver Graves* authorized the defendants to institute proceedings in ejectment, in his name, for the recovery of part of the property. The action was tried in September, 1849, and failed for want of proof that the plaintiff had been heard of for seven years. A second action was afterwards commenced in which both *George* and his brother *James* were named as plaintiffs. This action was not tried, as, after it was commenced, the parties in possession surrendered the property.

Judgment.

(*a*) Maynard v. Mosely, 3 Sw. 654; Anon, 2 Freem. 106; Jackson v. Rowe, 2 S. and S. 475; Neesom v. Clarkson, 2 Hare, at 173; West v. Reid, 2 Hare, at 260; Armstone v. Pott, 4 Cru. Dig 90; 3 Ves. 235; Jones v. Smith, 1 Ph. at 255; Dart, 3rd ed. p. 504, and cases there collected.

(*b*) Per Lord Justice Turner in Conybeare v. the New Brunswick Railway Co. 1 DeG. F. & J. 595.

(*c*) 6 Grant 306; and S. C. on appeal, 2 E. & A. 9.

1867.

McRory v. Henderson.

On the 18th October, 1801, the patentee had conveyed this property to the Rev. *John Doty*. On the 10th June, 1815, *John Doty* conveyed to *Samuel Doty*. On the 3rd October, 1835, *Samuel Doty* conveyed to *Samuel S. Bridge*. The defendants knew nothing of these deeds until after they had got instructions and authority to institute proceedings to recover the property for *George Oliver Graves*. On the 3rd July, 1849, in consideration of £25, the heir of *Samuel S. Bridge* conveyed the property to the defendant Sir *Henry Smith*. This conveyance does not mention any trust, but the Court of Chancery and the Court of Appeal have held, that the purchase inured for the benefit of *George Oliver Graves*. Shortly after this conveyance an arrangement was come to between *James Graves*, acting as his brother's heir, and the defendants—in pursuance of which part of the property recovered was conveyed to *James Graves*, and the property now in question to Mr. *Henderson*. The *McRorys*, in 1854, applied to the defendants to buy this property, and the terms were agreed upon. The papers—the deed, mortgage and memorials—were prepared by the defendants, and the registration of both the deed and the mortgage was effected through them. The following is the account of the transaction given by Mr. *Henderson* in his deposition at the hearing before me: "The negociation for the sale was conducted through Sir *Henry Smith*. The *McRorys* employed no solicitor that I know of. There was no investigation of the title on their behalf." Mr. *Henderson's* deposition in the suit of *Graves v. Smith* was also put in evidence, and contains the following statements: "I think I told them (the *McRorys*) that they were safe in buying, as they were getting *Bridge's* title. I mentioned to them, however, that *James Graves* was heir-at-law. I think I mentioned to them that *Bridge's* title had been got in. I also told them that if they were in possession and an action of ejectment were brought against them by *James Graves*,

Judgment.

1868.

McRory v. Henderson.

the outstanding title of *Bridge* would defeat *Graves*, and that they were perfectly safe, as having both titles. This conversation with them was after the execution of the deed to them. The *McRorys* were strangers to the proceedings at law. I do not think I mentioned to them that the action of ejectment had been brought. They bought in good faith. They did not employ any Solicitor, and did not search into the title. They relied upon my statements."

Now, the title thus claimed to the property was defective in two respects. (1) The title derived from *Bridge* was held in trust for the heir-at-law, and the defendants had no right without his authority to dispose of it; and (2) *James Graves*, under whom Mr. *Henderson* also claimed title, was not the heir-at-law of his father *George Graves*. The defendants say that they were not aware Sir *Henry Smith* would, under the circumstances, be considered a trustee for the heir *George Oliver Graves*; and that they believed *James* was the heir; that, though in error on both points, they had not intentionally deceived the plaintiff. It was extremely clear that Sir *Henry Smith* was a trustee; but the defendants may well have honestly taken a different view of his position, as a different view of it was, certainly, taken by one member of the Court of Appeal, of the highest distinction as a Common Law Judge (the late Sir *John Beverly Robinson*), whose memory is revered alike by the bench, the profession, and the public; and the defendants may, not unreasonably for all I know, have considered it just that the heir (if *James* proved not to be the heir) should confirm *James's* transactions in reference to the property. As to their assertion to the purchasers that *James* was the heir, the defendants knew that that was not certain; for the only reason they appear to have had for supposing *George Oliver* to be dead was, that he had not been heard from since 1843; and the defendants do not

Judgment.

appear to have had any evidence whatever of his having left no will, or no lawful issue.

It was argued, that as, between adverse litigants, the law presumes death after an absence of seven years without a person's being heard of, so the defendants might justly make the same presumption in dealing with property; but the reason of the seven years' presumption in the former case, as Lord *St. Leonards* points out (*a*), is, "that, if the presumption be erroneously made, the party really entitled may recover back the estate, yet for that very reason," the learned author proceeds to observe, "no such presumption could be made between vendor and purchaser." I refer also on this point to the authorities collected in Mr. *Dart's* Book (*b*). Certainly no one, well advised, would be satisfied to purchase a property for full value, knowing that the title depended on a former owner's death intestate and without issue, and knowing that the only evidence of this was, that he had not written to his friends here for eleven years. It does not even appear that any inquiry had been made for *George* at the place where he then resided; and within some four years before the sale to the *McRory's*, he had been named as a plaintiff in the action of ejectment then brought.

Judgment.

I must therefore hold, that the defendants claimed to have had a good title to this property, when in truth they had not; that they did not communicate to the *McRorys* any of the circumstances which were known to themselves, and on which they have since been decreed to have been trustees of the legal estate for the heir-at-law of Captain *Graves* the patentee; that they positively asserted—what they did not know, and had no sufficient reason for believing, and what has turned out to have

(*a*) Sug. on Vendors, 14 ed. ch. 11, sec .2, pl. 20, p. 418.
(*b*) 3rd ed. p. 228 to 231.

1868.

McRory v. Henderson.

been incorrect—that *James Graves* was the heir to the property; that the *McRorys* relied on the defendants' statements; that they took no advice on the title, placing confidence in the defendants; and that this reliance and confidence were well known to the defendants, and not repudiated by them, but, on the contrary, invited and acted upon.

Judgment.

Now, it is the clear duty of a vendor to communicate to a purchaser all facts material to be known and considered in reference to the title to the property. If an abstract is demanded "the Solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of the title, he ought to abstract every subsequent deed; and if he were to suppress any by which the purchaser should be damnified, he would be answerable for the loss" (*a*). In *Drummond* v. *Tracy* (*b*) an equitable charge had not been mentioned in the abstract, or communicated to the purchaser; and the excuse was, that the holder of the charge was content to be paid out of the purchase money, and that its omission in such a case was warranted by a passage in Mr. *Dart's* book on Vendors; but Vice-Chancellor Sir *W. Page Wood* said: "With respect to the suppression of *Minet's* incumbrance, I should be very sorry to think that Mr. *Dart*, or any other eminent text-writer, had said any thing to encourage the keeping back of documents of this kind. The passage referred to must probably mean, that where an equitable charge has been discharged, it may be advisable not to put it on the face of the abstract; but that such charges ought in some way to be communicated to a purchaser, I have no doubt whatever." (*c*)

(*a*) Sug. V. & P. 14th ed. ch. 11, sec. 1, pl. 5, p. 407.
(*b*) Johns. 608. (*c*) At page 612.

1868.

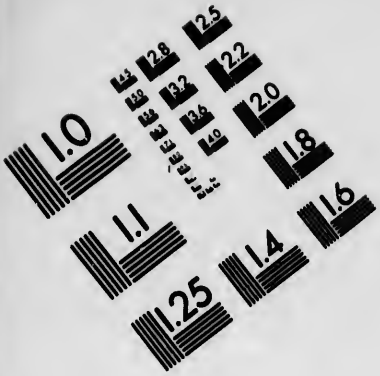
McRory v. Henderson.

That the defendants should have communicated the facts which were afterwards held to make them mere trustees of the property for *George Oliver Graves*, even though they considered that that was not the effect of them, is therefore, quite certain. It was admitted in the suit of *Graves* v. *Smith*, and is now again admitted, that the defendant Sir *Henry Smith's* purchase from *Doty* was made while he was carrying on a suit for *George*, and in his name, by his mother's authority; that it was while investigating the title, during the pendency of that suit, Sir *Henry* became aware of the deed from the patentee to *Doty*; that in his negociation with *Bridge*, he told *Bridge* that he, Sir *Henry*, was acting for the heir of Captain *Graves* in bringing actions for the property, and that if *Bridge* conveyed to him, he, Sir *Henry*, would convey to the heir; that, accordingly, Sir *Henry* bought *Bridge's* claim for the nominal sum of £25 (the deed to *Doty* having been lost—it was discovered three or four years afterwards); and that he bought with the intention, at the time, of conveying to the heir (*a*). Now, I do not say that the defendants could not, in the face of these facts, have supposed that there was no trust which the heir could enforce; but I cannot hesitate to hold, that the circumstances were sufficient to raise a reasonable question, which the purchaser had a clear right to have an opportunity of taking advice upon.

Judgment.

Neither Lord *St. Leonards* nor the Vice-Chancellor had in view, in the observations I have quoted, the rights of a purchaser after a conveyance is executed; and it was contended, on the part of the defendants, that, after conveyance, proof of fraudulent intention is indispensable to relief. General expressions to that effect are certainly to be found in the English

(*a*) Vide 2 Er. & App. at p. 13.



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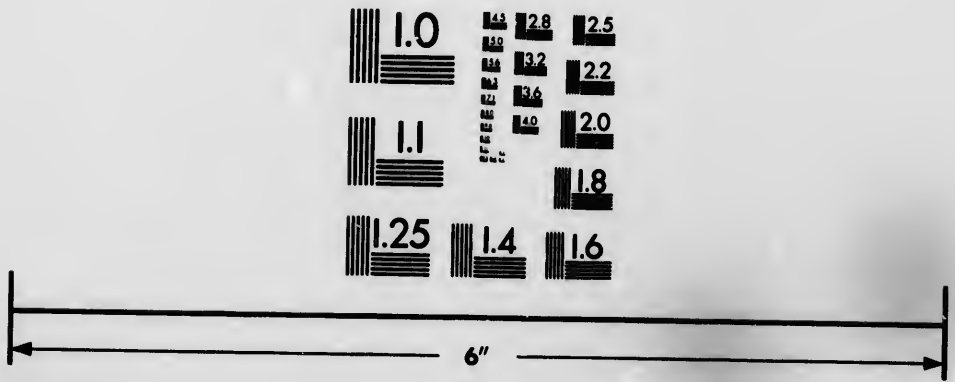

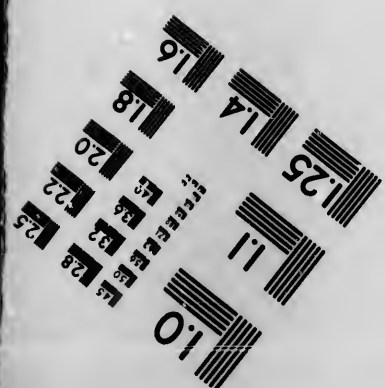

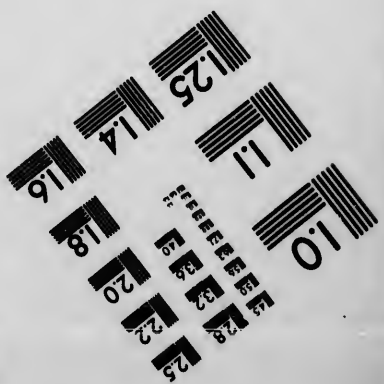

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1868.

McRory v. Henderson.

books (*a*); and if the parties to the transaction here were on anything like an equal footing; if for, example, the purchasers had been, like the defendants, professional men, knowing as much of land transactions and law as the defendants themselves, and had demanded no evidence of title, but carelessly assumed, from the general rumor which is said to have prevailed at the time, that *James Graves* was the heir, and that Mr. *Henderson* could give a good title; or, if the purchasers had employed another Solicitor, and this Solicitor had so far failed in his duty as to act in that way, it might have been necessary for me, if my decision had to proceed on English authorities alone, to consider how far the doctrine, as to relief after conveyance, applied to this case, having reference to *Edwards* v. *McLeay* (*a*), *Conybeare* v. *The N. B. Railway Co.* (*b*), and other authorities (*c*). But I am relieved from the necessity of that investigation by the decision of the Chancellor of this Province in *Brunskill* v. *Widmer* (*d*), given, as was stated at the bar, after a full discussion of all the cases. There, assuming that the vendor had not disclosed to the vendee that he (the vendor), at the time he acquired his title, was a Director of the Bank from which he

Judgment.

(*a*) Sug. V. & P., 14th ed ch. 5, sec. 3, pl. 41, p. 216, & sec. 5, pl. 6, p. 244; ch. 8, sec. 4, pl. 4, 5, pp. 328, 329; referring to Legg v. Croker, 1 B. & B. 507; Small v. Atwood, Yo. 407; 6 C. & F. 332; Sug. H. L. 596; Gibson v. D'Este, 1 H. L. 605; Sug. H. L. 614; Jennings v. Broughton, 17 B. 234; 5 D. G. M. & G. 126 and other cases. Vide also McCulloch v. Gregory, 1 K. & J. at 291; Conybeare v. N. B. Railway Co., 9 H. L. 711.

(*b*) Geo. Coop, 318; 2 Sw. 288. (*c*) 1 DeG. F. & J. 128.

(*d*) Vide Hitchcock v. Giddings, Pri. 135; Harrison v. Coppard, 2 Cox 318; Bingham v. Bingham, 1 Ves. Senr. 126; Belts Sup. 79; Colyer v. Clay, 7 B. 188; Rawlins v. Wickham, 3 DeG. & J. 304; Collins v. Wright, 8 E. & B. 647; Behn v. Burness, 3 Best & Sm. 751; Chandelour v. Lopus, 1 Smith's Leading Cases 160, and authorities there collected; Smith on Contracts 137, *et seq.* and cases there cited.

(*e*) 9 Gr. 430.

purchased, the Chancellor held, that his vendee was entitled to a rescission of the transaction after conveyance, though any actual fraud, or positive misrepresentation, was not pretended. That case seems a direct authority for the plaintiff.

The known ignorance of the purchasers as to the necessity of having the title looked into on their behalf, viewed in connection with the professional character of the vendors, seems to afford another ground for relief, as bringing the case within the principle of *Baker* v. *Monk* (*a*), *Longmate* v. *Ledger* (*b*), *Clark* v. *Malpas* (*c*), *Curzon* v. *Bellworthy* (*d*), and that class of cases.

The acknowledged confidence which the purchasers were placing in the defendants, as to the title and the conveyances, supplies still another ground on which the the plaintiff's case may be sustained. In *Huguenin* v. *Baseley* (*e*) Lord *Eldon* said: "The language of a Court of Justice has in all times been, that if a man does not choose to act upon the confidence appearing in the course of the transaction to be reposed in him, he ought to reject it as soon as proposed." The same learned Judge, in another case (*f*), spoke of "that great rule of the Court that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use is made of that confidence; a rule applying to trustees, attorneys, or any one else." So the Lord Chancellor of Ireland, in *Pike* v. *Vigers* (*g*), after quoting the language of *Lord Thurlow* in *Fox* v. *Mackreth* (*h*), adopted it, saying: "I am disposed to take the liability to have the contract

Judgment.

(*a*) 33 B. 419, 11 Jur. N.S. 692, L.J.
(*b*) 2 Giff. 63.
(*c*) 31 Beav. 81.
(*d*) 3 H. L. 752.
(*e*) 14 Ves. at p. 294.
(*f*) Gibson v. Jeys, 6 Ves. at p. 278.
(*g*) 2 Dr. & Wal. at 264; 8 C. & F. 562, S. C.
(*h*) 2 B. C. C. 640.

1868.

McRory v. Henderson.

set aside to the full extent laid down by *Lord Thurlow*; if he is a trustee; if he is a confidential friend; if he is a stranger assuming the character of a friend, and saying, 'I will deal fairly with you.' "(*a*)

The conversation which Mr. *Henderson* relates took place, if his recollection is correct, after the execution of the instruments; but if before this conversation, the purchasers were, to the defendants' knowledge, relying implicitly on the defendants' claim that they had a good title to the property, and on their fairness and professional ability in the preparation of the instruments for carrying out the transaction, the time of this particular conversation, is quite immaterial; and that the purchasers were so relying, and to the defendants' knowledge,—the facts of the case demonstrate, and the defendants fully admit. I can hardly imagine a case of more implicit confidence, between a vendor and purchaser, than the conduct the *McRorys* displayed towards the defendants; and if their confidence was not implicit, their conduct shews that degree of ignorance of the world and of business, which, in a dealing with persons like the defendants, affords a distinct ground for relief against an improvident transaction (*b*). To either class of cases, it is clear that the doctrine of not relieving after conveyance, in respect of any defect which the covenants would not cover, does not apply (*c*).

Judgment.

To hold Solicitors responsible in such a case for the title they claim to have and to sell, seems to me both to be demanded by authority, and to be a just and

(*a*) See also Dent v. Bennett, 4 M. & C. at 276, 277; Billage v. Southee 9 Hare, at p. 540; Denton v. Donner, 23 Bea. at p. 288, 289; Goddard v. Carlisle, 9 Pri. at p. 180; Hobday v. Peters, 28 B. 349; Sibbald v. Hill, 2 Dow at 266.

(*b*) Baker v. Monk, 33 B. 419; and other cases cited *supra*.

(*c*) Sug. V. & P. 14th ed. ch. 5, sec. 5, pl. 13, p. 245; pl. 15, 17, p. 246, &c.

wholesome rule. When their title is what they profess, there is no inconvenience to anybody in the doctrine. When they are not sure of their title, and do not for that or any other reason wish to accept any responsibility beyond the limited covenants they intend to give, all they have to do is, to insist on the purchasers employing an independent solicitor to look into the title for them. But a solicitor, in selling property, cannot accept the confidence of the purchaser, and take advantage of it to facilitate the transaction between them, without performing the duties which that confidence creates.

1868.

McRory v. Henderson.

I think the known confidence which the purchasers were reposing in the defendants is a sufficient ground for relief, even if there did not exist between them the relation of solicitor and client ; but I am not prepared to say that that relation did not exist between them. In *Hewitt* v. *Loosemore* (*a*) the Vice Chancellor *Sir George Turner* laid down this doctrine: "I think that where a mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction of the mortgage. The mortgagee in such cases trusts the mortgagor to discharge those duties which his own solicitor would discharge, if he thought proper to employ one ; and it can make no difference that the mortgagor is not paid by the mortgagee--the very nature of the transaction being, that all the expenses are borne by the mortgagor." (It is not quite certain in the present case whether the *McRorys* paid the defendants any of the expenses or not; Mr. Henderson thinks, but is not sure, that they were not paid, and the plaintiff has given no evidence of having paid them.) The doctrine of *Hewitt* v. *Loosemore* was affirmed by

Judgment.

(*a*) 9 Hare, at p. 455.

1868.

McRory v. Henderson.

the Lords Justices in *Atterbury* v. *Wallis* (*a*), and seems quite as applicable to the case of a purchase, from a solicitor, as of a mortgage. It may not be just to apply it to all cases between the client and third persons; as, for example, to charge the party with constructive notice of a fraud by the solicitor; for to "say that when (a solicitor) is *ipse doli fabricator*, and knew the iniquity which he contemplated, his knowledge of that should be the knowledge of the [party with whom he was dealing]—would really be almost exposing the doctrine of notice to ridicule." (*b*) But this reason does not apply to a litigation by the party against the solicitor who was dealing with him; and if the rule mentioned in *Hewitt* v. *Loosemore* is sometimes, though not in all cases, carried out so as even to charge the party as between him and third persons with constructive notice, *a fortiori*, it would seem, it must be held good in a complaint by the party against the solicitor himself in respect of the transaction in which the relation existed. The rule cannot bind the one party in some cases, and leave the solicitor free in all; and any modification of the doctrine which the method of doing business in this country may render just so far as relates to constructive notice (*c*), seems forbidden by like justice in such a case as the present. The defendants appear, however, to have acted for the *McRorys*, not only in the matter in question, but also in a transaction which the *McRorys* had at the same time with another person.

Judgment.

On the whole case, as it now appears, while I entirely acquit the solicitors of selling this property knowing that *George Oliver Graves* was living, and that their title to it was therefore good for nothing, I am bound to hold, on doctrines well settled and very important,

(*a*) 8 DeG. McN. & G. 454

(*b*) Perry v. Hall, 2 DeG. F. & J. at p. 53.

(*c*) Henderson v. Graves 2 Er. & App. at pp. 17, 18, 24.

1868.

McRory v. Henderson.

that the defendants are not protected against the plaintiff's claim to relief by having given him covenants for title limited to their own acts. It was insisted on the argument, that the bill did not put the case on the grounds on which (in part) the plaintiff's counsel argued it, and on which (in part) my opinion in favor of the plaintiff rests. To meet this objection the plaintiff's counsel applied for leave to amend the bill, in case I should think the objection good. I do not think the form of the bill can have misled or prejudiced the defendants; but I think they should have an opportunity of shewing, if they can, by affidavit, that it has done so; and, on being satisfied of the fact, I shall give such directions for amending the bill and putting in an answer thereto, and for a further hearing of the cause, and as to costs, as justice shall require (*a*). To afford time for such an application, the decree is not to be drawn up for three weeks.

Judgment.

Otherwise, the decree will direct, the rescission of the transaction, and the release of the mortgage for the unpaid balance of the purchase money; an account of the money paid to the defendants in respect of the purchase money, with interest thereon; and an account of the expenditure of the purchasers in improvements and repairs, with interest. Against these sums, will be set, the sum which the purchasers received from the Grand Trunk Railway Co. for part of the premises, taken by that company; and the rents and profits; or an occupation rent, if the *McRorys* have been in personal occupation. Other just allowances to be made on both sides. The defendants to pay the balance to the plaintiff, and to be declared entitled, on such payment, to the benefit of the provisions, in favor of the *McRorys*, contained in the decree in *Graves* v. *Smith* (which, it seems, has never been prosecuted). The plaintiff to have the costs of this suit.

(*a*) Vide Consol. Stat. U. C., Secs. 216, 217, 221, 222; 2 Lush's Pr. 3d ed. p. 550.

1868.

McDonald v. Wright.

Registered judgments—Trust deed for benefit of creditors.

A bill was filed to enforce a registered judgment while the law for the registration of judgments was in force. After the registration of the judgment, the debtor executed a mortgage on his land, and then assigned his estate for the benefit of his creditors. The bill was against the debtor only, and the mortgagee and assignees for creditors were not made defendants until after decree, nor until after the time limited for bringing suits by the act abolishing registration of judgments.

Held, that the registration of the judgment did not affect the mortgagee or the creditors entitled under the deed of trust; and that the mortgagee was entitled to priority over the plaintiff.

Land was conveyed in trust to pay (first) mortgages, and (secondly) registered judgments. A creditor whose judgment was registered before the date of a mortgage given by the debtor to another creditor, assented to the deed, and his assignee afterwards filed a bill stating such assignment and praying for the administration of the estate.

Held, that the judgment creditor had submitted to be paid according to the order provided by the deed.

Statement. This was a suit for the administration of the estate of *George Wright*, which had been assigned by him to the defendants *Crooks* and *Magrath*, for the benefit of creditors. In taking the accounts the Master had allowed the claim of the plaintiff as assignee of the judgment, in priority to the claim of a mortgagee—*Wilcox*, whose incumbrance was registered subsequently to the date of the registration of the judgment.

From this judgment *Wilcox* appealed.

Mr. *McLennan*, for the appeal.

Mr. *Barrett*, contra.

McFadden v. *Jenkyns* (*a*); *Collinson* v. *Patrick* (*b*);

(*a*) 1 Hare, 458. (*b*) 2 Keen, 123.

Tierney v. *Wood* (*a*); *Tate* v. *Leithead* (*b*); *Blakely* v. *Brady* (*c*), were referred to.

1868.

McDonald v. Wright

VanKoughnet, C.—The original bill in this case was filed against *George Wright* alone, to enforce the lien of certain registered judgments recovered against him. At the time of the filing of the bill, the property in question here, covered by the mortgage which *Wilcox* the appellant, claims should have priority over the judgments, was not vested in *Wright*; but was, subject to the mortgage and the judgments so registered, held by Mr. *Crooks* and *Magrath*, as assignees of *Wright*, in trust for the benefit of creditors under a deed which gave specific mortgages priority over judgments, so far as the settlor *Wright* could by himself and those who became parties by assent or otherwise to the deed, create such a priority. *Wright* had at the time of the filing of this bill no estate in these mortgaged lands, beyond any interest he might have in the surplus of the estate generally, after the execution of the trusts. Subject to this interest, which it is admitted is "nil," and subject to the mortgage and the registered judgments, the legal and equitable estate in the land in question was in *Crooks* and *Magrath* and the *cestius que trustent*; the creditors of *Wright*.

Judgment.

The original bill, as I understand it, contained the usual prayer for payment of the registered judgments by *Wright*, or in default that his lands affected by them might be sold. As against any interest *Wright* might have in such lands, such a prayer might be effectual, but it could not affect the interest acquired by others, who were not parties to the suit. After the passing of the Act doing away with registration of judgments, and after the 1st of May, 1861, limited by that Act, *Crooks* and

(*a*) 19 Beav. 330.

(*b*) Kay, 658.

(*c*) 2 Dr. & Wal. 311.

1868.

McDonald v. Wright.

Magrath were, for the first time, made parties to the bill, by amendment; the suit then, for the first time, became a suit against them; and it was then too late to enforce the judgments as registered liens against their estate in the land. The mortgagee of the land was not made a party to the suit till after decree. Under the decisions in this Court disapproving of the case of the *Bank of Montreal* v. *Woodstock*, the original bill had no effect in initiating the suit against *Crooks* and *Magrath*, and the result is, that they hold the lands free from any lien created by the judgments, and subject to the mortgage alone. The judgments are, therefore, no charge, and the mortgage must be first paid.

Judgment.

Independently of this position, I do not see how the plaintiff can, under the amended bill, claim to have priority over the mortgage. He adopts the trust deed and asserts that *Browne*, his assignor, while he held the judgments assented to it; and, no doubt, according to the evidence, he did so assent; and he, the plaintiff, sets out the clause of the deed which directs "the produce of the rents and sales of the real estate properties incumbered by specific mortgages to be applied to the payment and discharge of the said mortgages respectively, and the application of the surplus if any of the proceeds of any such mortgaged premises respectively over and above its specific incumbrance to the payment and discharge of registered judgments in the order of their priority;" and he prays that the said trusts may be performed, and that he may be paid the several amounts due on the said judgments, and that in default of such payment an account may be taken of the lands and tenements of *Wright* affected by said judgments, and that the same may be sold towards satisfaction thereof, after payment of any specific mortgages (if any) on the said lands, according to the terms of the said trust deed. The mortgage in question was a specific mortgage, and, after the statements and prayer of the bill, I do not see how the plaintiff can

claim that it should be postponed to the registered judgment, supposing registration to have been otherwise of any force.

1868.

McDonald v. Wright.

The decree merely declares the registered judgments liens on the lands of *Wright* in the County of Peel. If he has any lands there, not embraced in the trust deed, the plaintiff can have the benefit of this declaration. The decree then goes on and directs the trusts of the deed to be carried out, and one of these trusts is to give the mortgage priority, and to this priority it is entitled, I think, on both the grounds noticed.

I therefore allow the appeal, although the first ground is not taken in the notice, and was only mentioned by Mr. *McLennan* in reply. It should have been brought to the notice of the Master, who might have allowed it, and saved all the expense of further contention in his office; and for this reason I give no costs.

Judgment.

SWITZER V. INGHAM.

Practice—Setting aside decree—Execution for unpaid purchase money.

On a bill to enforce a vendor's lien, the decree, which through oversight, directed that in default of payment of the amount to be found due by the Master, that an execution against the goods, &c., of the original purchaser should issue, without first selling the land, was set aside at the instance of the purchaser after the execution had been issued and placed in the hands of the Sheriff; the defendant, though served with the bill having taken no proceedings in the case.

The bill in this case was filed to establish a vendor's lien for a balance of unpaid purchase money, and prayed a sale in the event of the amount claimed not being paid. It was taken *pro confesso* against *Ingham*, the original purchaser: the defendant *Morrow*, a sub-purchaser answered.

1868. Switzer v. Ingham.

The cause came on to be heard by way of motion for decree.

Mr. *Snelling* for the plaintiff.

Mr. *Brough*, Q. C., for the defendant *Morrow*.

The following authorities were referred to on the argument *Holmes* v. *Powell* (*a*), *Peto* v. *Hammond* (*b*), *Collins* v. *Collins* (*c*), *Jones* v. *Smith* (*d*), *Sugden's* Vendors and Purchasers, 13th ed., 552, 556, 561; *Dart's* Vendors and Purchasers, 479, 485, 496.

The plaintiff was declared entitled to a lien for the balance of purchase money, and on the application of counsel for the defendant *Morrow*, and by the consent of the plaintiff, the Court ordered that in default of payment by the defendants that an execution should issue against the goods and chattels of *Ingham*; and upon a return of "no goods" or in the event of the whole amount found due to the plaintiff not being realized, it was ordered that a sufficient portion of the lands should be sold to raise the deficiency.

Argument.

Default was made, and execution issued against the goods of *Ingham*, who thereupon filed a petition to set aside the order *pro confesso*, decree, final order, and all subsequent proceedings, and to be let in to answer.

Mr. *McCarthy*, for the petitioner.

Mr. *Snelling*, for the plaintiff.

Mr. *Strong*, Q. C., for the defendant *Morrow*.

(*a*) 8 De. G. M. & G., 572.
(*b*) 30 Beav. 495.
(*c*) 31 Beav. 346.
(*d*) 1 Hare 43.

1868.

Switzer v. Ingham.

The plaintiff contended that the proposed answer should have been served with the petition, that the Court might be enabled to judge if the application for leave to answer was reasonable; that the order for personal payment against *Ingham*, was obtained on the application of the counsel for the defendant *Morrow*; and that the plaintiff should not be prejudiced by reason of his having consented; that the proper mode of proceeding was by a rehearing, and that the Court on petition would not open a decree *pro confesso*, except in the cases mentioned in the General Orders, and this was not one of such cases.

The following cases were referred to: *Barker* v. *Smark* (*a*), *McEwan* v. *Smith* (*b*), *Booth* v. *Creswicke* (*c*), *Knight* v. *Young* (*d*), *Attorney General* v. *Brooke* (*e*).

Judgment.

VanKoughnet, C.—Upon this form of pleading I do not think that any such decree as has been drawn up here could have been made, at all events in the absence of the defendant *Ingham*. When I made the order I did I must have assumed that it was with the consent of all parties. It is so entered in my book, and it is clear that I intended that the decree should state that it was by consent. This does not appear in the decree as passed and entered, and it is not therefore in accordance with my judgment, and must be set aside. Had the minutes of decree gone on to recite the consent, the attention of the parties and of the Judge on a reference to him, would have been called to the fact that there was no consent by *Ingham*. I have no recollection of what passed at the time the case was spoken to; and the parties and the Secretary may have been misled, and I therefore do not set aside the decree with costs. The bill does not ask

(*a*) 3 Beav. 46, (*b*) 2 H. L. C. 330.
(*c*) Cra. & P. 361. (*d*) 2 Ves & B. 186,
(*e*) 18 Ves. 319.

1868.

Switzer v. Ingham.

for any order that *Ingham* should pay personally, but merely that in default of payment the lands may be sold. This was all the relief the plaintiff could claim; what further relief the Court might have granted as between *Ingham* and *Morrow* is a question which could not be decided in the absence of *Ingham* or without notice to him. The plaintiff and *Morrow* could not arrange this by themselves. Then, in the absence of *Ingham*, the sum claimed by the bill is assumed to be due to the plaintiff, and, in case of *Morrow*, *Ingham* is ordered to pay it. This is all wrong. All proceedings subsequent to the setting down of the cause must be set aside with costs, and the defendant *Ingham*, may be let in to answer on payment of the costs down to and inclusive of the setting down of the cause.

Judgment.

1868.

IN APPEAL.

[*Before the Hon. the Chief Justice of Upper Canada, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Adam Wilson, the Hon. Mr. Justice John Wilson, and the Hon. Vice-Chancellor Mowat.*]

MULHOLLAND v. WILLIAMSON.

Fraudulent conveyances—Marriage settlement.

A deed purporting to be a bargain and sale in consideration of £1000, and bearing date the day before the marriage of the grantor to the grantee, was impeached by a subsequent creditor of the grantor. There was no evidence of any prior negociation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her or any one acting for her, until long after the marriage. The Court of Appeal however, being satisfied that the deed was executed as a marriage settlement, and not considering there was any proof of a fraudulent intent upheld the deed and varied the decree made in the Court below accordingly with costs.—[VANKOUGHNET, C., J. WILSON, J., and MOWAT, V. C., dissenting.]

Statement.

The facts of this case appear in the report *ante* volume xii, page 91.

From the decree then pronounced the defendants appealed.

1868.

Mulholland v. Williamson.

Mr. *Gwynne*, Q. C., and Mr. *Blake*, Q. C., for the appellants.

Mr. *Strong*, Q. C., and Mr. *Hodgins*, for the respondent.

DRAPER, C. J.—The execution of the deed of the 29th November, 1854, is established, as well as that no money consideration passed, and unless it can be supported by proof of some other valuable consideration it is a merely voluntary deed, and as such open to be impeached as a fraud against creditors.

The plaintiff is no party to this deed. He attacks it as a creditor of *David Williamson*, alleging that it is fraudulent against him. He does not ask relief except on his own account.

Judgment.

If there was a valuable consideration in fact for this deed, it is, I apprehend, competent to the grantee to prove it, not for the purpose of contradicting the statement of consideration set out, for the plaintiff has made *that* his case, but for the purpose of shewing that the deed was not made with the intention of defrauding him, and that it should be upheld against his objection, *Gale* v. *Williamson* (*a*). There are cases which establish the rule, that you may go out of a deed to prove a consideration that stands well with that stated on the face of the deed, but you cannot be allowed to prove a consideration inconsistent with it. This seems to apply as between parties to the deed. There are, however, cases where the parties were strangers to the deed, which establish a contrary doctrine. In *Peacock* v. *Monk* (*b*), Lord *Hardwicke* uses this language: "where any consideration is mentioned, as of love and affection only, if it is not said also 'and for other considerations' you cannot

(*a*) 8 M. & W. 405. (*b*) 1 Ves. Senr. 127.

enter into proof of any other, for when the deed says it is in consideration of such a particular thing, that imports the whole consideration and is negative to any other." The rule, however, is laid down as above stated in *Clifford* v. *Turrill* (*a*), by Lord *Lyndhurst* on an appeal from the judgment of Knight *Bruce*, V. C., and Lord *Hardwicke's* opinion is questioned, or rather the accuracy of *Vesey's* report of it.

The result would seem to be that in fact the consideration stated in the deed was not paid, but that the grantor in consideration of an intended marriage with the grantee (which was shortly after solemnized) conveyed the property to her, very probably intending only to give her a settlement or security for £1000. The non-payment of any money consideration *primâ facie* establishes a case of fraud, but the grantee may nevertheless support the deed by proving a different, but still a valuable consideration. If the mention of this consideration was omitted, whether through ignorance, or from a mistaken idea that it would be more binding if a money consideration were stated, or from any other motive, the grantee may shew it. The language of *Alderson*, Baron, in the case already cited, has a strong application: "This is not a case in which the parties to a deed are contesting some right arising out of the deed; the question is whether there was in the transaction in question an intent to defeat or delay creditors." The same inquiry arises here, and the same reasoning applies to make it reasonable to permit proof that this deed was made, not voluntarily with an intent to defraud creditors, but as a settlement on an intended marriage. If this question had been tried on an issue by a jury, they would have been called upon to say whether the consideration of marriage being different from that stated in the deed was or was not the true consideration for the convey-

Judgment.

(*a*) 9 Jur. 633.

1868.

Mulholland v. Williamson.

ance. I strongly lean to the belief that, looking at all the facts, they would not have hesitated at coming to the conclusion that marriage was the real consideration. I doubt very much whether any Court would have set that finding aside.

An objection is however taken to the sufficiency of the proof that this deed was made or intended to be made in consideration of the marriage which so shortly afterwards took place. The evidence certainly is not by any means conclusive, as it appears before us. That the grantee *Eliza Jane Irvine* (then *Williamson*) had agreed at the time, to marry the grantor, is an inference irresistibly arising from the evidence. That the grantor intended to make a settlement on his wife and thought he had done so, is shewn by the evidence of the Rev. *Robert Irvine*, who celebrated the marriage ceremony between these parties. And after the marriage the deed

Judgment.

came to the hands of the wife (the defendant *Eliza Jane*), for she is proved to have taken advice with regard to its registration, as well as to have executed the memorial. If the evidence of *John Williamson*, *David's* father, is correctly represented as having been that he was aware of the registration of the deed, and mentioned it to his son in the course of conversation, "who seemed satisfied," but "said he thought it could not be so," it would tend to shew that he was not the immediate moving party in procuring the registration, and by that act seeking to defeat the assignment he had made for the benefit of his creditors. If, as suggested, the word "surprised" should be substituted for "satisfied," it would not weaken this inference.

His Honor Vice-Chancellor *Spragge* has well pointed out that the late Vice-Chancellor (*Esten*) who heard the *vivâ voce* examination of the witnesses, decided in favour of the validity of this deed. I am free to admit that this conclusion, by a very cautious and conscientious Judge,

1868.

Mulholland v. Williamson.

on the question of fact, weighs with me as strongly as, I may say even more strongly than, the verdict of a jury to the same effect might do if the question were on granting a new trial. I also think the observations of Sir *J. Stuart*, Vice-Chancellor in *Frazer* v. *Thompson* (*a*), entitled to great weight. "It is the policy of the law to give paramount force to the consideration of marriage, unless the marriage itself be a mere fraudulent contrivance for defeating creditors; the doctrine both at law and in equity has been to support a settlement of the husband's property when it appears to have been made previously to, and in consideration of, an honest marriage, and this notwithstanding the embarrassed circumstances of the husband at the date of the settlement, and even where the wife has contracted the marriage and obtained the settlement, with a full knowledge of the husband's embarrassments."

Judgment.

And this remark brings on naturally a consideration of how *David Williamson* stood in reference to property and to indebtedness at the date of this conveyance. The inquiry may be thus stated. If even the deed be deemed voluntary, and as such by a mere inference of law fraudulent against creditors, has the plaintiff made out a case to shew an intention in fact to defeat creditors, and to entitle himself to the relief which he seeks?

I think there is no evidence whatever, that an intention in fact existed, on the part of *David Williamson*, to defraud his creditors by the deed in question. The evidence that he was indebted at all at that date, is vague and indefinite. It was proved by one witness, that about thirteen years before the examination (which was in October, 1863), he and *David Williamson* became executors to the witness's father's will, and that the

(*a*) 5 Jur. N. S. 671.

1868.

Mulholland v. Williamson.

latter received moneys belonging to the estate. He proceeds, "I cannot say when it was: before he was married: I think a year before, or three or four years: he received about $2000: it is still owing by the estate of *David Williamson*;" and he added, that *David Williamson* had paid debts of the estate to a small amount. There is no other proof of a debt at the date of the conveyance: November, 1854. On the other hand there is clear proof, that at this date, *David Williamson* was solvent, and that even when he made the assignment, his father thought that if the estate had been properly managed, there would have been a surplus. There is, moreover, no proof to make his intended wife a party to any contemplated fraud.

Judgment.

Admitting then, for argument's sake, that the deed was voluntary, the evidence neither establishes an apprehension on the part of *David Williamson*, that his property would fall into the hands of his creditors, nor a desire to prevent it. In *Scarf* v. *Soulby* (*a*), Lord *Cottenham*, after referring to Lord *Kenyon's* opinion in *Stephens* v. *Olive* (*b*), that the mere fact of a debt being due was insufficient to invalidate a settlement, adds: "property at the time of a settlement not included in it, and ample for the payment of debts, would negative the fraudulent intent;" and while asserting, on the authority of Sir *Thomas Plumer* and Lord *Langdale*, that it was not necessary to shew insolvency at the time of the settlement; he concludes that the mere existence of debt at that time, was not sufficient to establish the fraudulent intent. I refer to this case, however, principally, because his lordship states towards the end of his judgment, that he has gone through preceding cases, "because it is supposed in a great authority of Lord *Hardwicke*, an accidental expression is made use of in order to found a theory which is totally insupportable,

(*a*) 1 McN. & G. 364, 13 Jur. 1109. (*b*) 2 Br. C. C. 91.

and indeed it would lead to the most absurd conclusion, that *for the purpose of invalidating a voluntary settlement, it is sufficient to shew the mere fact, that a debt existed at the time of the settlement.*"

1868.
Mulholland v. Williamson.

The case of *Jenkyn* v. *Vaughan* (*a*), however, shews that where a settlor at the time of the settlement appeared to have owed large debts, some of which were still due, and was in insolvent circumstances at the time of his death, subsequent creditors could maintain a bill to have it declared void. But there Vice Chancellor *Kindersley* only directed an inquiry as to the solvency of the settlor at his death, though, as he also observed, he might have to dismiss the bill when the result came before him. The same learned judge, in *Thompson* v. *Webster* (*b*), as to the general principle, says, he is to see "whether the instrument was made for the intent or purpose of delaying, hindering, or defrauding creditors and others of their just and lawful actions, suits and debts." After pointing out that the *onus* lies upon the party alleging such fraudulent intent to prove it he adds, "He may shift that *onus* by shewing a *primâ facie* case, but the question is whether I can come to the conclusion that there was such intention as that which is alleged;" and in *Corlett* v. *Radcliffe* (*c*), Lord *Chelmsford* says (p. 135): "Each case must depend upon its own circumstances, and in all the question is one of fact whether the transaction was *bona fide* or was a contrivance to defraud creditors. It may, however, be stated generally that a deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts."

Judgment.

In any of these views I think the plaintiff, not a creditor when the deed in question was made, fails in

(*a*) 2 Jur. N. S. 909. (*b*) 5 Jur. N. S. 668.
(*c*) 14 Moo. P. C.

1868.

Mulholland v. Williamson.

proving his case, and I think, therefore, we should sustain the original decree of *Esten*, Vice Chancellor.

VANKOUGHNET, C., and MOWAT, V. C., retained the opinion expressed by them in the Court below; and J. WILSON, J., intimated his concurrence therein.

Per Curiam.—Appeal allowed, and decree in Court below varied accordingly.—[VANKOUGHNET, C., J. WILSON, J., and MOWAT, V. C., dissenting.]

[*Before the Hon. the Chief Justice of Ontario, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Vice-Chancellor Spragge, the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Morrison, the Hon. Mr. Justice Adam Wilson, the Hon. Mr. Justice John Wilson, and the Hon. Vice-Chancellor Mowat.*]

MACBETH v. SMART.

Public company—Set-off.

The Act respecting railways declared a shareholder liable to judgment creditors of the company for "an amount equal to the amount unpaid on the stock held by him."

Held, (reversing a decree of the late V. C. Esten), that a shareholder in an action against him by a judgment creditor of the Company could not set off, in equity, a debt due to him by the Company before the judgment was recovered—[VANKOUGHNET, C., and SPRAGGE and MOWAT, V.CC., dissenting.]

Statement.

Mr. *Smart* having obtained judgment against the *Niagara and Detroit Rivers Railway Company*, and having issued execution and procured a return of "*nulla bona*," proceeded against the plaintiff, a share-holder in the Company, by force of the 80th section of chapter

66 of Consolidated Statutes of Canada, for the recovery of an amount equal to what remained unpaid on his stock. The plaintiff had previously, and while he was indebted to the Company in £875 on his stock, and also as was alleged, liable to the Company as surety in a bond for Mr. *Morton* for a very large amount, accepted certain bills drawn upon him by Mr. *Smart* as Secretary of the Company, and also paid moneys for the Company. He attempted a set-off at law, but failed; and he instituted this suit in order to obtain in effect the same benefit.

1868.

Macbeth v. Smart.

The bill in the Court below was filed by Mr. *Macbeth*, against Mr. *Smart* and the *Niagara and Detroit Rivers Railway Company*. The cause having been put at issue, evidence was taken therein, and came on to be heard before the late Vice-Chancellor *Esten*.

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

Mr. *Roaf*, Q. C., and Mr. *O'Reilly*, Q.C., for the defendant.

ESTEN, V. C.—The defendant objects—First, that his judgment is paramount to any equities subsisting between the plaintiff and the Company; second, that those equities should be applied to the Company's demand against the plaintiff on the bond; and third, that payments made by the plaintiff were in fact made under the bond, and created no debt from the Company to him. Judgment.

The defendant did not enter into evidence at all, and the plaintiff adduced very little.

The indebtedness of the Company to the plaintiff to the extent of about $3000 was established by the verdict;

1868.

Macbeth v. Smart.

and it was not, I believe, disputed that the plaintiff had entered into such a bond as was alleged in the answer; and the only question was, whether the payments had been made in satisfaction of this bond?—which, of course, must be the subject of inquiry, and it was contended by the plaintiff's counsel that inquiry should be confined to that point. The questions, therefore, which I have to decide, seem to be three; first, whether any and what equities subsisted between the Company and the plaintiff? second, whether or no the defendant's judgment is paramount to those equities? third, whether it would not be just to refer those equities to the bond debt, so as to leave the debt on the stock clear for the satisfaction of the defendant's demand?

Judgment.

That certain equities subsisted between the plaintiff and the Company at the time the defendant obtained his judgment, is, I think, established by the third proposition of the Master of the Rolls in the case of *Cavendish* v. *Greaves* (*a*), and in the case of *Jones* v. *Mossop*. (*b*) In *Cavendish* v. *Greaves*, the case was suggested of a customer of a Bank being indebted to the Bankers on bond, which is transferred to a third person, without notice of the transfer to the obligor, who continues to deal with the Bankers, and who become indebted to him in a balance of account. This balance, it was said, the customer would have a right as against the assignee of the bond, to set off against the bond debt. It is observable, that in the case supposed, the balance occurred after the transfer of the bond, and even if it had existed at that time, would *per se* have constituted no equity; for the right of set-off says Mr. *Baron Parke*, in *Whitehead* v. *Walker* (*c*), is no equity; but the proposition shews, that where one person, being indebted to another person, suffers him to become indebted to him,

(*a*) 24 Beav. 163. (*b*) 3 Hare, 568.
(*c*) 10 M. & W. 696.

1868.

Macbeth v. Smart.

it must be intended that he does so on the faith that one debt shall be set against the other, and that the other party assents to that agreement, so that an implied agreement springs up between them to that effect.

The case of *Jones* v. *Mossop*, shews that an equitable right of set-off exists in favor of a surety who is indebted to his principal. In that case, at the date of the vesting order, no debt was due to the surety, because he had not paid the notes; and if a debt had existed at that time, it would have constituted *per se* no equity, but a mere right of set-off when an action should be commenced; and the Statutes of Insolvency afforded no aid, as they did not provide, like the Bankrupt Acts, for mutual credits. But from the relation of surety sprang the right to pay the debt for which he was liabl , but in respect of which he was entitled to be indemnified out of the debt which he owed. In other words, he had a lien on his own debt for indemnity against a debt which was not his own.

Judgment.

So, similar equitable rights of set-off exist in favor of partners (*a*), and between vendor and purchaser (*b*).

In the present case the plaintiff being indebted to the Company, assumed a liability for them as surety, and paid moneys on their account, upon the faith and understanding, as must be intended, that the debt which he owed would furnish an indemnity against the debt which he incurred, to which the Company must be deemed to have assented, and that there arose an implied agreement between them to that effect, which, under ordinary circumstances, would bind any assignee of the debt, being a chose in action.

(*a*) Smith v. Parkes, 16 Beav. 115; *Ex parte* Ashworth, 7 L. T. N. S. 64.

(*b*) Hawford v. Morley, mentioned in Jones v. Mossop.

1868.

Macbeth v. Smart.

It is said that no debt existed on the stock until a call was made; but it was certainly a debt payable on demand; and so the Legislature have treated it, by allowing the creditor of the Company to recover it; and I see no reason why that circumstance should prevent the ordinary intendment from arising; nor do I see why the existence of another debt on the bond should prevent that effect.

The right, I apprehend, accrued to the plaintiff with respect to all the debts, for their application, so far as might be necessary, to his indemnity; which could be attended with no injustice, as they would be applied to that purpose only so far as might be necessary. Besides which, the bond debt was contingent and uncertain as *Morton* might pay the whole of it.

Judgment.

I think, therefore, that at the time the defendant commenced his action, certain equities existed between the plaintiff and the Company, partly given by law, and partly arising from an implied agreement for an off-set of the respective debts; and that this right was different from the ordinary right of set-off arising simply from the existence of mutual demands, and was a right which attached upon the debt, and would bind it in the hands of an ordinary assignee.

The question then is, whether Mr. *Smart* is an ordinary assignee in this respect, or whether his right is paramount to the equities subsisting between the Company and the plaintiff?

The judgment at law, raises, I think, no obstacle in the way of the plaintiff. His equitable rights as I have described them, were not properly suggested. The equitable plea was a simple plea of set-off of cross demands placed on equitable grounds, merely because it was inadmissible on legal grounds. It is clear, too, that the

equitable rights of the parties could not be adjusted in the absence of the Company. It is I believe settled that when a party improperly raises his equitable defence at law he is not precluded from seeking relief in equity on the same grounds. 1868. Macbeth v. Smart.

The most weighty circumstance in the case is the expression which occurs in the judgment of the Court, that Mr. *Smart* was not an assignee, who could be considered as claiming subject to the equities between the parties: it was not necessary, however, to the decision of the case to determine the position of Mr. *Smart* in this respect: and therefore we must regard this suggestion only as an expression of opinion entitled to the greatest weight.

I regard this case in the same light as if it had been expressly agreed between the plaintiff and the Company, that he should pay the acceptances and other debts out of the amount due on the stock; these moneys have been actually paid, and the case is therefore within the principle of *Woodruff* v. *Peterborough* (*a*). And if the moneys had not been actually paid, but only agreed to be paid, I should still think that in equity the amount would not be deemed to be "unpaid on the stock" within the meaning of the Act of Parliament. The payments appear to have been a proper application of the capital of the Company, and the contrary is not suggested on the pleadings or argument. The arrangement does not seem to give an undue preference to the plaintiff, who pays for his stock at once, and long before the other shareholders. Mr. *Macbeth* became a surety for the Company, and paid moneys for them, owing them debts at the time, and the law gave him a lien on the debts that he owed as surety, and an agreement arose by implication that the debts which accrued to him Judgment.

(*a*) 22 Q. B. U. C., 247.

1868.

Macbeth v. Smart.

should be satisfied out of the same debts and therefore, when Mr. *Smart* commenced his action the amount for which he proceeded was not in equity "unpaid on the stock" within the meaning of the Act of Parliament. The question which remains, is, whether it is not proper to confine the plaintiff's lien to debts which the defendant, whose claim is confined to the amount unpaid on the stock, cannot attach? and I should think it extremely just that such an arrangement should be made, and that the plaintiff who, seeking equitable relief should himself act upon equitable principles, having two funds to which he may resort, should have recourse to the fund to which the defendant has no claim, as notwithstanding all that has occurred at law, he could, without doubt, in an action on the bond, make an off-set of the moneys he has paid; and I should be extremely anxious to make so equitable an arrangement; but the difficulty which I feel is, that *non constat* that the debt on the bond will ever be exacted from the plaintiff. *Morton* is primarily bound to pay it, and may, and probably will, eventually pay it; and if the creditor, knowing such to be the case, should refrain from pressing the sureties, and should be willing to allow time to the principal debtor, I do not see that the Court has any right to interfere with this arrangement. The supposed liability of the plaintiff arising from the advance to *Morton* in pursuance of the resolution, must be deemed, I think, to have been absorbed by the bond, which constituted therefore the only liability: it was a matter within the province of the directors to manage, and on the bond they obtained the liability not only of the plaintiff and *Morton*, but also of Mr. *McDonald*, and the arrangement in the absence of evidence to the contrary must be deemed to be for the benefit of the Company.

Judgment.

Mr. *O'Reilly* disputed the fact that the plaintiff became a surety for the Company through his acceptance of the bills, but no doubt, I think, can be entertained that such was his position.

1868.

Macb ... v. Smart.

It was contended that the payments made by the plaintiff were under and towards satisfaction of the bond. As I have already observed, very little evidence was adduced, but I do not understand that the facts were disputed, and it was contended that inquiry should be confined to this point. I am disposed to refer it to the Master, to inquire what debts the plaintiff owed to the Company at the time that he accepted the bills and paid the moneys on their account, as stated in the pleadings. And also whether the payments made by the plaintiff were under and towards satisfaction of the bond as alleged, or created a debt from the Company. Reserving further directions and costs.

From this decree the defendant appealed on the following, amongst other grounds:—

Statement.

(1.) That at the time the appellant's action in the pleadings mentioned was brought the respondent was indebted to the Railway Company, in respect of his stock, in a sum greater in amount than the appellant's debt, sought to be recovered in the action; and any liability which the Company had then incurred to the respondent, entitled the respondent to a mere right of set-off, and had not then in any way absorbed the debt due to the Company by the respondent, in respect of his stock, but was co-existent with such last mentioned debt; and the appellant was not bound by any equity or right of set-off existing between the Company and the respondent; but on the contrary, had a statutory right of action altogether paramount to any such right or equity. (2). That if the respondent had any legal or equitable right of set-off the same ought to be applied in the first instance against his liabilities to the Company under the bond, and in respect of the breaches of trust in the pleadings mentioned; and (3), that the respondent, by reason of no calls for stock having ever been made by the Company, never was under such liability to the Company, in respect

1868.

Macbeth v. Smart.

thereof, as would, either at law or in equity, constitute a proper subject of set-off.

In support of the decree, the respondent alleged the following, amongst other grounds:—

(1.) That at the time the appellant's action was brought, the respondent was not in equity or at law indebted to the Railway Company in a sum greater than the amount for which the action was brought, or in any sum; (2), that the liability of the Company to the respondent, and their mutual relations gave the respondent a right of set-off, and more than a right of set-off, and gave him the right to allege, and justified the Court in concluding that his liability for balance due on his stock in the Company had been in equity, if not at law, paid and satisfied; (3), that the alleged breaches of trust in the answer mentioned, if there ever were any such, were settled and waived upon the execution of the alleged bond, in the answer mentioned, nor can the appellant set up the same; and the alleged liability of the respondent, under the said alleged bond, if there ever were any such liability, was that of a surety only, and was contingent and undefined, and did not, nor did the alleged liability of the respondent, under the alleged breaches of trust, constitute a claim or debt, in respect of which it would be just or proper to apply the payments made and obligations undertaken by the respondent for the Company. And because the amounts set off by the respondent against the stock in the said Company were not payable or paid, under the said alleged bond; (4), that the statutory right of the appellant is not paramount, but is subject to all the rights and equities of the respondent as against the Company; (5), that in equity, if not in law, the amount of the respondent's stock was paid and satisfied to the Company, at the time the appellant brought his action; (6), that the decree is under the circumstances correct; and the accounts given

Statement.

and the inquiries directed thereby, are such as upon the further directions by the decree reserved, will enable the Court to pronounce a final decree in accordance with the justice of the case; and that the appeal was premature, since the decree was not final, and the result of the accounts and inquiries might upon the said further directions, produce the dismissal of the bill.

1868.

Macbeth v. Smart

The appeal was twice argued in consequence of a difference of opinion among the Judges who heard the first argument.

Mr. *Strong*, Q. C., and Mr. *Roaf*, Q. C., for the appellant.

Mr. *Crooks*, Q. C., and Mr. *Blake*, Q. C., for the respondent.

Statement.

Evans v. *Bremridge* (*a*); *Lady Londonderry* v. *Baker* (*b*); *Terrell* v. *Higgs* (*c*); *Moore* v. *McKinnon* (*d*); *Moore* v. *The Metropolitan Sewage Manure Company* (*e*); *Jones* v. *Mossop* (*f*); *Cherry* v. *Boultbee* (*g*); *Whitehead* v. *Walker* (*h*); *Cavendish* v. *Geaves* (*i*); *Davis* v. *Snell* (*j*); *Ex parte Stevens* (*k*); *Smee* v. *Baines* (*l*); *Jeffs* v. *Wood* (*m*); *Downam* v. *Matthews* (*n*); *In re The German Mining Company* (*o*); *Cochrane* v. *Green* (*p*); *Fisher* v. *Baldwin* (*q*); *Morley* v. *Inglis* (*r*); *Courtenay* v. *Williams* (*s*); *Coates* v. *Coates* (*t*), were amongst the cases referred to by Counsel.

(*a*) 8 DeG. W. N. & G. 100.
(*b*) 7 Jur. N. S. 811.
(*c*) 1 DeG. & J. 488.
(*d*) 21 U. C. Q. B. 140.
(*e*) 3 Ex. 333.
(*f*) 3 Hare 568.
(*g*) 4 M. & C. 442.
(*h*) 10 M. & W. 696.
(*i*) 24 Beav. 163.
(*j*) 3 J. T. N. S. 45.
(*k*) 11 Ves. 24.
(*l*) 7 Jur. N. S. 902.
(*m*) 2 P. W. 128.
(*n*) Pr. Ch. 580.
(*o*) 17 Jur. 745.
(*p*) 7 Jur. N. S. 548.
(*q*) 11 Hare 352.
(*r*) 4 Bing. N. C. 58.
(*s*) 3 Hare 539.
(*t*) 9 L. T. N. S. 795.

1868.

Macbeth v. Smart.

DRAPER, C. J.—*Smart*, the appellant is a judgment creditor of the respondents the Railway Company. He issued a *fi. fa.* against them, which was returned wholly unsatisfied, and in 1862, he brought an action at law against the other respondent *Macbeth*, who owned forty shares of the stock of the Railway Company and was their President. *Macbeth* pleaded in that action on equitable grounds, that before the plaintiff obtained this judgment, the Railway Company were indebted to him (*Macbeth*) in an amount equal to the sum due on the forty shares, for money paid on account of the Company, by reason whereof his stock had been paid for, and that he had a right to set-off that amount against the now appellant's claim. The Court of Common Pleas, in November 1862, gave judgment on a demurrer to this plea in favour of the appellant, which judgment was not appealed from, but *Macbeth* immediately filed a bill to restrain its being enforced, and has obtained a decree to that effect. In the course of this suit it was assumed and apparently admitted that in 1850, *Smart* had, as Secretary of the Railway Company and with the authority of the Directors, drawn four bills of exchange on *Macbeth*, as the President of the Company, amounting together to $1600; that *Macbeth* had so accepted them as to incur individual responsibility and was compelled to pay them from his private means, and that he had for the accommodation of the Railway Company in 1860 and 1861, accepted and paid other bills drawn upon him by *Smart*, as Secretary, amounting together to $878. It was also set up that in 1858, the Railway Company had at their credit in a Bank, at Quebec, $120,000 which had been paid as a deposit of ten per cent. on shares in the stock of the Railway Company, in the name of *James Morton*, who about the 20th November in that year, had entered into a contract for the construction of that road. On the 20th of the same month the Directors of the Company authorized *Macbeth* as their President, together with their Solicitor, to make an advance to *Morton*, in

Judgment.

1868.

Macbeth v. Smart.

anticipation of work to be done, upon *Morton's* giving security for the money, &c., and *Macbeth* paid the money over to him, and *Morton* made his bond in a penalty of £50,000, with two sureties, one of whom was *Macbeth* himself as the required security to the Railway Company. In December 1859, the Company released *Morton* from his contract; but he did not repay the money nor had he performed any work in pursuance of the contract, and the making of the Railway has never been proceeded with. It was also set up by the answer, that all the items making up the sum of $878 were moneys which were payable under the condition of the bond, and that as to the sum of $1600, this was specially provided for by a resolution of the Company on the 18th of August 1859, requiring *Morton*, in accordance with the condition of the bond, to furnish a sufficient sum to satisfy this demand, and that on *Morton's* default, *Macbeth* as his surety became personally liable to the Company, and made the payment, not as an advance or loan to them, but in his own discharge as one of the obligors. Very little evidence was given in the Court below, as the parties agreed that if *Macbeth's* claim for relief as surety or otherwise was sustained; declaration should be made and accounts and inquiries be directed. The decree was that *Macbeth* was entitled to set off and apply the indebtedness in the pleadings mentioned of the Company to him, as against and in discharge of his liability in respect of his Stock in the said Company, subject to the accounts and inquiries therein directed; and that *Smart's* action at law was subject to this equity, which was not affected by the alleged liability of *Macbeth* to the Company in respect of the surety bond for *Morton*, unless it should appear that any payments made by *Macbeth* for the Company, were under and in satisfaction of the bond. The decree directed accounts to be taken, reserving the consideration of further directions and costs, and continued the injunction.

Judgment.

1868.

Macbeth v. Smart.

The important question presented by this appeal is, whether the right of set off which *Macbeth* claims against the Company, admitting it to the fullest extent, gives him an equity as against *Smart*, whose claim against the Company is established by a judgment at law, and as against *Macbeth*, is founded on a statutory right of action? The other questions raised on *Smart's* behalf are secondary to this.

This statutory right of action is founded on the 80th sec. Consol. Stat. Canada, chap. 66, which enacts that each shareholder shall be individually liable to the creditors of the Company, to an amount equal to the amount unpaid on the Stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the Company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders.

Judgment.

Nothing can be clearer than this language both as regards the liability of the shareholder and the remedy of the creditor of the Company; the former is subject to an individual liability for an amount equal to the amount unpaid upon his shares, *until* the whole amount of his stock *has been paid up;* the latter has the right to recover from the shareholder the amount due upon the execution against the Company, provided always that so much is unpaid upon the shares. The creditor's right is made to depend upon the fact that the shareholder has not as yet paid up his stock in full; this right differs from that given to the Company, who can only require payment in the manner and after the delays imposed by the Statute—the creditor can call for immediate payment; the Company must call *pari passu* on all the shareholders, the creditor can sue one, and if he can get satisfaction from him, has no concern with

1868.

Macbeth v. Smart.

contribution from the others. The 61st section of the Statute enabled shareholders *to pay* in advance the amount of, or any part of the money due upon their respective shares beyond the sums for which the Company had made calls. And the Company was authorized to pay interest on such advances, provided the interest was not taken out of the capital. This provision taken in connection with those which affect and limit the power given to make calls, must be considered in construing the 80th section, and the shareholders liability for the amount *unpaid* on the stock held by him. The *payment* must have been made, or the creditors claim is untouched, a loan to the Company, requires a subsequent agreement between them and the shareholder who makes such loan or an appropriation of it in order to convert it into a payment; so long as the right exists in the latter to claim his loan back, so long as in respect thereof he is a creditor of the Company; the amount of the loan is no payment on the shares.

Judgment.

Now, the bill goes no further than to claim that the sums named in the second and third paragraphs were equitable *debts* due to him by the Company to which the fourth paragraph adds, that the Company were justly indebted to him in further sums which he could have set off against them at law. It is also asserted that he made this expenditure on behalf of the Company with a view to the fact that he was a debtor to the Company, and on the faith that he was entitled to apply this indebtedness of the Company to him *towards* the payment of his stock when the same should be called in. He relies on two leading assumptions to sustain his view: first, that the unpaid amount on his shares was a security on which he could rely for indemnity for his advances and payments: second, that *Smart* could have no further or other rights in respect of his (*Macbeth's*) stock, than the Company could have, and that it is inequitable in *Smart* to try to deprive him of the benefit of these claims as a payment of the amount upon his shares.

1868.

Macbeth v. Smart.

It appears to me the Statute stands inexorably in the way of both these assumptions.

The argument is based on the admission that the stock is not actually paid up; that as to all his claims he retained a right to enforce them against the Company, and it was in his option whether they should be applied *pro tanto* to pay calls of the Company made on them in the prescribed manner. So far as I see, if he had sued the Company they would have had no right of set-off, legal or equitable, unless they had made a call or calls, far less to insist that these claims were payments made by *Macbeth* on his stock.

Judgment.

I presume it will not be questioned that if the Legislature had added to the 80th section an express declaration that no mere right of set-off as between the shareholder and the Company, should avail the former as against a creditor suing, as *Smart* has done, that the present contention on *Macbeth's* behalf would have found no entrance. But it is argued, that the case is to be regarded as if it had been expressly agreed between *Macbeth* and the Company that he should pay the moneys which he did pay, out of the amount due upon the stock, and that having paid the moneys he paid up the shares; if this pretension had not been countenanced by the judgment of that very estimable and learned Judge, the late Vice Chancellor *Esten*, I should have been disposed to treat it as a *petitio principii;* but I feel that the weight to which his opinion is justly entitled prevents my passing it over so lightly. I shall not contest, that in spite of the Statutes such an agreement followed by the advances or payments made, might, if properly pleaded, have defeated *Smart's* action at law. At law, however, *Macbeth* somewhat inconsistently with that pretension, pleaded that the Company were indebted to him for moneys paid, &c., in an amount equal to the sums due on his shares, *by reason whereof* (not by force of

any previous agreement) the stock was paid for, and that he had a right to set-off that amount against the sum due on the stock he had subscribed for. How any sum could be due upon stock which was paid for is not very intelligible, but such was the plea, the purport of which apparently was to claim a right to set off a debt due to him by the Company against a debt due to them on his shares. This claim was certainly inconsistent with the assertion made in this suit that he paid the money on an agreement with the Company (sanctioned by section 61), in advance of any call upon his shares; and in the 5th paragraph of his bill he asserts no such agreement, nor even any subsequent assent on the part of the Company though if given after *Smart's* right of action against *Macbeth* accrued, it would have been quite ineffectual. Independently therefore of other considerations, I can not, on this ground, adopt an argument based upon an assumption or deduction of fact which is contravened by the party on whose behalf it is made. No doubt *Macbeth* had the right of paying up his stock in advance, but he preferred holding a position in which, as a creditor of the Corporation, he could sue them for his advances. I see no equity in allowing him to insist now, that these advances were payments on his shares.

1868.

Macbeth v. Smart.

Judgment.

Nor can I give more effect to the assertion that he could and did treat the unpaid amount of his shares as a security for moneys he was advancing to the Company. However reasonable such an assertion, or however just that he should have a claim to insist upon it under ordinary circumstances, still he must be taken to have known the 80th section of the Act, and that by force of it every creditor of the Company who was not a shareholder, had a right to rely on all unpaid stock as his security. Admitting, for argument sake, the equity alleged to arise from *Macbeth's* position and dealings with the Company to the fullest extent, I cannot understand that it is to prevail over a legal right conferred by

1868.

Macbeth v. Smart.

an express Statute, but in effect the decree has this consequence.

2nd. I feel constrained to hold that *Smart* has other and further rights against *Macbeth* in respect of the unpaid stock than the Company had. The corporation could not be its own creditor and therefore could neither claim nor exercise the rights given by the 80th section, to creditors whose execution against the Company was returned unsatisfied. And *Smart* does not derive the power or right to have recourse for the payment of his debt to the shareholders, by or through the Company, for the Statute does not give it to the Company, but to their creditors. It is not therefore to my apprehension, a sound view to treat him on the footing of an assignee of the Company, deriving his rights only from them. The Statute gives a remedy at law, an express right of action, without any limitation, but the amount unpaid by the stockholder, and I cannot discover a shadow of reservation in the language of the Legislature, under cover of which either a set-off at law on the equity claimed for *Macbeth* can be interposed in favor of the shareholder, who under the Statute has become liable to a creditor of the Company, although such shareholder be also a creditor. Although not in point, the case of *Rheam* and *Smith* (*a*), may be referred to for the sake of Lord *Cottingham's* general observations, which bear some analogy to the question in discussion.

Judgment.

In considering this contention on *Macbeth's* part, it is right to look to the consequences to which, if sustained, it might lead. The language of Lord *Chelmsford*, Chancellor, in *Grissell's* Case (*b*), appears to me strictly applicable: "If a debt due from the Company to one of its members should happen to be exactly equal to the call made upon him, he would in this way," *i.e.*, by setting off

(*b*) 2 Phil. 726.

(*a*) L. R. 1 Ch. App. 528.

his debt against such call, "be paid twenty shillings in the pound, while the other creditors might, perhaps, receive a small dividend, and perhaps none at all." And again: "With respect to a member of a Company with limited liability, if a set-off were allowed against a call it would have the effect of withdrawing altogether from the creditors, part of the funds applicable to the payment of their debts."

1868. Macbeth v. Smart.

In the case in judgment, the Company is duly incorporated and *Macbeth's* liability is limited to the amount of the shares he held. He claims a set-off, not against a call made by the Company, but against all the amount of his stock not actually paid when *Smart's* right to resort to him accrued under the 80th section, insisting that his payments for the Company exceed the sum remaining unpaid upon his shares. If this be true, and he has a right to this set-off *Smart's* claim is defeated, though for all that appears, he brought his action at law, in ignorance of this state of facts. So much of the fund on which he had the apparent right to rely, without this diminution is withdrawn, and out of this part of the fund *Macbeth* gets twenty shillings in the pound on his debt, and *Smart* gets nothing, and for anything he can tell, he may be met in the same way by every other solvent shareholder from whom he may seek payment under the 80th section. I cannot interpret the language used in this section as containing a latent reservation in favor of a shareholder, enabling him, for his own benefit to convert a debt due to him by the Company into a payment made upon his shares in anticipation of any call, especially when such conversion is deferred until the corporation has virtually abandoned its powers and functions, and is wholly without means to discharge its liabilities. The fact that such a claim is advanced by the President of the Company, does not in my judgment add to its weight.

Judgment.

The observations of Lord *Chelmsford* therefore

1868.

Macbeth v Smart.

pointedly apply, notwithstanding the difference in the circumstances of the two cases: a similar result will be arrived at to the injury of the outside creditor, if the shareholder creditor is allowed the set-off claimed. In the argument against *Grissell's* claim, counsel put the extreme case that each shareholder might be the creditor of the Company to an amount exactly equal to the amount not paid up on his shares, when if a set-off were allowed, they would get their debts in full, and the outside creditors would get nothing. As regards this part of the question, I see no distinction between the case of a limited Company being wound up under the English Acts, and a Railway Company incorporated by our Legislature, which Company is confessedly insolvent, and which, as I understand, though it has become considerably indebted, has not even commenced to construct the railway.

Judoment.

This decision rests upon principles quite clear from the doctrine of *Jones* v. *Mossop*, or of the numerous cases cited from which analogies have, both ingeniously and ably, been drawn to sustain the decree. None of these cases are touched by it, nor are they even noticed by Lord *Chelmsford*, nor by the eminent counsel who argued for *Grissell*, as bearing upon it. At the utmost those cases furnish no more than analogies, while *Grissell's* case appears to me to assert a principle, and to be founded upon reasons strongly in point here. I readily concede that the Lord Chancellor argued upon the effect of the particular enactment of the English Statute affecting the question before him, and necessarily for the rights claimed and in dispute were founded on those provisions, but his reasoning upon the unjust consequences which would attend granting the application made on behalf of *Grissell*, is not confined to the enactments. Here, too, we must refer to our Statute to ascertain the rights and liabilities it creates, and having settled their nature and extent, we may, I think, well

1868.

Macbeth v. Smart.

apply the same reasoning, if the same unjust consequences would arise from sustaining this decree, which would have followed the reversing of the Vice-Chancellor's decision in that case. It is not a mere analogy, more or less remote applied, for the purpose of limiting the meaning of plain words; it is the demonstration of an actual injustice, which would attend the adoption of such a construction.

It rests upon this, that when the amount of unpaid stock constitutes the sole remaining fund for payment of the debts of the Company, shareholders, although they are creditors, must pay in whatever calls are made, to the extent of their unpaid stock, before they are entitled to a dividend, in common with other creditors; as a consequence it denies the right of set-off which *Macbeth* asserts.

Judgment.

If, as may be contended, perhaps justly, our Statute presses with undue hardship upon the individual shareholder, who may have to pay up his stock in full to satisfy the claim of one creditor while other shareholders are not pressed, and who is left to obtain reimbursement as he best may, the answer is, the Statute inflicts the hardship by giving to the creditor such a remedy against each shareholder. This argument meets its answer in the case of *Rheam* v. *Smith*. The corporation might have enforced calls to the amount of all their debts, and then *Macbeth* and *Smart* would have both been paid out of a proper fund, to which *Macbeth* as a shareholder would have contributed in the same degree as other solvent shareholders, in which case the rights and liabilities created by the 80th section, would not have arisen; but the abandonment of their functions or power by the Directors, or the election by *Macbeth* rather to advance his moneys as a creditor of the Company, than to pay up his stock in anticipation, can create no equity in his favor to defeat the remedy given by the 80th section to

1868.
Macbeth v. Smart.

an outside creditor. If the whole stock subscribed had been paid up and proved insufficient to satisfy their creditors, I cannot see the equity of paying the shareholders in preference to the creditors, and between that course, and allowing the set-off claimed by *Macbeth*, or that he should, in order to defeat *Smart*, be permitted to convert that which made the Company his debtors into a payment of his stock, I perceive no substantial difference.

In the very recent case of *Oakes* v. *Turquand et al.* (*a*), it was argued by Counsel that the creditors of a Company could not be in a better position than the Company itself; that if the Company, because of fraudulent misrepresentations which induced a party to take shares, could not enforce him to pay them, he could not be made a contributory on the winding up, to the satisfaction of the Company's creditors; but the Lord Chancellor interposed by observing, "The case here comes to this: the creditor finds the shareholders in the position in which the Statute makes him a contributory. The creditor has then a right to come against him. At that time he has not avoided his liability; can he afterwards do so at his pleasure?" His Lordship in the same case further says: "he, the creditor, must be taken to have known what his rights were under the Act, and that he had the security of all the persons whose names were to be found on the register, and who had agreed to become shareholders. The liability of shareholders is not under a contract with the creditors, but it is a Statutable liability under which the creditors have a right which attaches upon the shareholders to compel them to contribute to the extent of their shares towards the payment of the debts of the Company."

Judgment.

If a fraudulent representation on the faith of which he subscribed, will not shield the shareholder from the

(*a*) L. R. 2 Eng. & Ir. App. H. of L. 325.

1868.

Macbeth v. Smart.

creditor's claim, I do not see upon what principle an advance of money by a shareholder, for which he became a creditor of the Company, and as such, could maintain an action to recover back his advances, can be set up as an answer to the appellant who seeks to recover from such shareholder to the extent of his "Statutable liability."

If the English Act gives the remedy against every person whose name is on the register, and who has (though through a fraud practised on him) agreed to become a shareholder, why should not our Statute be held to bind every shareholder to the amount unpaid upon his stock? In the first case the equity against the Company to make void the subscription, by reason of fraud, is held to be no answer to the Statute; why in our case, should an equity to set off the debt due by the Company against the amount unpaid on the stock (for no part of which any call has been made) be held sufficient to defeat the claim given by the Statute against such unpaid amount to a creditor of the Company? Any distinction between the two cases must surely be in favour of the shareholder, who has subscribed under the influence of fraudulent misrepresentation or concealment on the part of the Company.

Judgment

After hearing the judgment of the learned Chancellor, I desire to add, that neither overlooking nor questioning the doctrine of equity relied upon by him, I venture to suggest that it does not apply strictly to the facts of the present case, which is not between *Macbeth* and the Company, and in which, as I have endeavoured to shew, *Smart* is not to be considered as an assignee of the Company's rights. *Macbeth* has deliberately retained the position of an unpaid creditor of the Company, whose demand could not be denied, unless and until calls upon his shares had been regularly made and had become payable when the Company would have a cross

1868.

Macbeth v. Smart.

demand. He might, as I have already observed, under the Statute have paid his shares in advance of any calls; he might have arranged with the Company to re-pay him the amount they owed him by giving him credit as having paid the amount on his shares. He has simply done nothing to discharge the Company as his debtors; what he does seek now in effect comes back to what has been already stated; he desires to get twenty shillings in the pound for his debt out of the only fund which can be deemed assets of the Company, namely, the amount unpaid upon shares held by solvent shareholders; though this will probably leave nothing for outside creditors, and will inflict on the appellant the further loss of the costs of proceedings at law and equity between him and the respondent.

Judgment.

The term set-off, involves the existence of two parties, each of which has a right to claim a sum of money from the other. I apprehend that whether this right be founded upon legal or equitable grounds can make no difference, the right must be absolute, a present debt on both sides, not a mere liability with regard to which something has to be done or some period to elapse before it ripens into an absolute debt. Now *Macbeth* was subject to a liability as a stockholder, to pay calls when they should be made, but till they were made and the time for their payment had arrived, he was not the debtor of the Company. If he being the creditor of the Company had sued them, they could not have set off their power to make him their debtor, as an existing debt against his existing debt. But it is argued this is an equitable set-off, that *Macbeth* has entered into a contract with the Company to take shares, that he has thereby incurred a liability to pay calls when made, and that he had a right to treat that liability as a security and on the faith of it to advance money to the Company which when calls were made, he could convert into payments of those calls. Now it appears to me that the

1868.

Macbeth v. Smart.

Company could not by making calls become his creditors, before the time at which they were payable, and I am unable to see the equity by which he can maintain the attitude of a debtor of the Company, owing them nothing, though he may become indebted to them as a shareholder who has not paid calls, and as against this creditor of the Company, insist that he is a debtor for calls and has a counterclaim to the full amount thereof. Granting that, if calls had been made and were due before *Smart* acquired his right to look to *Macbeth* for payment, the latter would have had the equitable right to set off his demand against the Company, it does not appear to me to help the latter, because the Company might have become, or may yet become his creditors; he claims the right to assume that they are so in order to defeat a creditor of the Company whose claim on him arises upon the express language of a Statute.

Judgment.

In my humble judgment the true character of *Smart's* position is not properly appreciated. He is the judgment creditor of the Company, his right to recover against them is not to be controverted in this Court. But for the Statute his rights on this judgment would be limited to their estate and property. The Statute gives him a new right founded, it is true, upon his judgment, but not a right derived from or through the Company his debtors. No act or consent of theirs is necessary to give effect to this new right which depends on three things; first that he is a judgment creditor of the Company unsatisfied; second, that they have no assets which he can reach by execution; third, that *Macbeth* is a shareholder in the Company and has not paid up his stock in full. That is all that the Statute requires. I am not prepared to admit a fourth condition, namely: that *Macbeth* had an equitable right of set off against the Company, to the extent of his unpaid stock. And I have not been able to convince myself that on the facts which appear, there is a right of set-off proved.

1868.

Macbeth v. Smart.

The question may I think be thus fairly stated. Whether a judgment creditor of the Railway Company, who has the right to recover from any shareholder of that Company to the extent of his unpaid stock, satisfaction for the judgment debt, is subject to be defeated by the liability which the Company would be under to a set-off for moneys due by them to such shareholder, provided they had made calls on their shareholders to pay up. The case of *Watson* v. *The Midland Wales Railway Company* (*a*), (to which the learned Chief Justice of the Common Pleas kindly referred me) throws great light on this point, and the case of *Rawson* v. *Samuel* (*b*) referred to in the judgment of *Willes*, J., in the former case, strengthens my conclusion in answering the inquiry in the negative.

Judgment.

After all, the contention on the part of *Macbeth* may be resolved into this. That *Smart* is to be treated as the assignee of a claim which the Railway Company have against him (*Macbeth*) in the nature of a debt, whether assignable or not at law, not perhaps making any real difference, and it is claimed that *Smart* as such assignee, is subject to any equity which *Macbeth* could claim against the Company in reduction or satisfaction of their demand. I cannot grant the *major premiss*. I think *Smart's* position is not either legally or equitably that of an assignee. He is a judgment creditor of an incorporated Company which has no assets to be reached by an execution. In his favour a Statute has enacted, that he may recover from any stockholder of the Company the amount which is *unpaid* on his shares. Such unpaid amount is the fund to which the creditor of the Company has a right to look for payment, irrespective of its being a debt presently due from the shareholder to the Company, which until duly called in according to the provisions of the Act of incorporation it would not

(*a*) Law Rep., 2 Com. Pl. 593. (*b*) Craig and Ph. 161.

1868.

Macbeth v. Smart.

be. It never was intended that the creditors should have to take the accounts of dealings between the Company and its shareholders. He has only to establish that some part of the stock is unpaid.

I may also refer to *Rigby* v. *The Dublin Trunk Connecting Railway Co.* (*a*) for the sake of an observation of *Montague Smith*, J. It was an application by a judgment creditor of the Company, for a *sci. fa.* against a shareholder, against whom an order for execution to issue, had been obtained by another creditor of the same Company. He says, "if the money of the share-"holder remaining unpaid on his shares had been "actually attached, or if it had been paid or tendered "to the creditor, there would be good ground for opposing this rule;" and in remarking on the same point, the Lord Chief Justice observes, "the shareholder has not "paid the money, and if this rule be refused the order may never be carried out." So here, nothing (so far as appears) has been done which would convert this right of set-off into a payment of the stock, or deprive the judgment creditor of the power of calling for payment if the Company had the means of paying him.

Judgment.

VANKOUGHNET, C.—[Whose opinion was delivered orally, said]—Shortly after this case was argued, and more than two years ago, I prepared, a written judgment which, for some cause or other, was not allowed to be read during my absence in England; and changes since, in the *personnel* of the Court, rendered a second argument necessary. That judgment has been mislaid after having passed through several hands; and having been once rejected, I am not inclined to write another. I think it unnecessary to discuss the vexed question of equitable set-off, so much debated in this case, for, in my opinion, on a very plain principle every day recognised in Courts of Equity, the plaintiff is

(*a*) L. R. 2 C. P. 587.

1868.

Macbeth v. Smart.

entitled to succeed. That principle is, the right to retain in his own pocket, for payment of his own debt, money already there, and which another creditor, in no better position than himself, seeks to extract from it. I need only refer to one case, in my memory at the moment, *Cherry* v. *Boultbee* (*a*) as illustrative of the doctrine which, without authority, however is so plainly dictated by common sense that it could scarcely escape adoption. It is every day's practice to allow executors to retain out of the testator's assets, debts due to themselves in preference to other creditors. What better right than *Macbeth* has *Smart* to be paid with *Macbeth's* money? The Statute puts all creditors on an equal footing; and in the eye of a Court of Equity it can make no difference whether their position is or is not ascertained or confirmed by a judgment. The creditor is required to obtain a judgment, and exhaust against the Company the process of execution at law, before he

Judgment.

can call on an individual shareholder to pay. Then what do we see here? *Smart* the plaintiff at law tells us that he has exhausted this legal process; that the Company is bankrupt; and that therefore the individual shareholders are responsible; and he calls on *Macbeth* to pay. Is not the position of *Macbeth* impregnable, when he says to *Smart*, "you shew a state of things in which I, equally with yourself, am entitled to be paid by the individual shareholders. I am a creditor —I cannot issue execution against myself, and I need not obtain a return of *nulla bona* to an execution against the Company to test their solvency, because, you have done this—but, I have in my pocket money, which, as a shareholder, I am liable to pay to the Company, and, out of which, I will now, under the state of circumstances you shew, retain to pay myself." Surely on every principle of justice and equity he has a right to say this. If the forms of proceedings in the Common

(*a*) 4 M. & Cr. at p. 447.

Law Courts stand in the way, no such difficulties exist here. And is a man to be mocked at and robbed merely because he cannot issue an execution against himself? I am afraid this view of the respondent's rights has not engaged the attention of those members of the Bench who, not familiar with the doctrines of Courts of Equity, propose now to overrule the opinions of four Judges of that Court.

In the case of *Grissell, In re Overend and Gurney* (*a*), Lord *Chelmsford* carefully points to the distinction between claims against a Company and the claims against individual shareholders in it; and I confess I do not see how there ever was felt any doubt or difficulty in that case. I think the case of the respondent also supportable upon the other grounds stated in the opinions delivered by the late Vice-Chancellor *Esten* and the present Vice-Chancellors.

Judgment.

SPRAGGE, V. C.—Read a judgment, dissenting from the views of the majority of the Court, which has since been mislaid or lost. If found at a future time it will be printed.

HAGARTY, J.—I feel great difficulty in accepting the proposition that the judgment creditor's position under the Statute is that of an assignee of the Company's claims against *Macbeth* for his unpaid stock. As such assignee he would derive his rights by a voluntary dealing with the Company, a consenting to step into their place and assume with their rights, their responsibilities. If the Legislature designed to give him nothing beyond an assignee's position, the Statute has given him very little substantial aid in enforcing his claim.

Without the Act he could, I presume, have filed a

(*a*) L. Rep. Chy. App. Vol. I., p. 535.

1868.

Macbeth v. Smart.

bill against the Company to compel them to call in sufficient of the unpaid stock to meet his judgment.

In taking this course, as well as in enforcing his rights as an ordinary assignee, he would have, as a matter of course, to encounter all equities existing between the Company and the shareholder.

After all the consideration that I can give the case, I have adopted the opinion that the Statute gives the judgment creditor a higher position than that of an assignee bound by all existing equities between the parties. The charter of this Company regulates the manner and time of calling in stock; not more than ten per cent. can be made payable within any sixty days. An assignee of the Company would be bound, of course, by such a provision. The judgment creditor under the Statute is not, I think, so limited.

Judgment.

I do not think that I am necessarily driven to a precise definition of the judgment creditor's rights on the facts of this case, as I feel compelled to dissent from the conclusions adopted by the Court below, in the words of the judgment that "the plaintiff (*Macbeth*) being indebted to the Company, assumed a liability for them as surety, and paid moneys on their account upon the faith and understanding, as must be intended, that the debt which he owed would furnish an indemnity against the debt which he contracted, to which the Company must be deemed to have assented, and that there arose an implied agreement between them to that effect, which under ordinary circumstances would bind any assignee of the debt, being a chose in action."

This is the language of the lamented Vice Chancellor *Esten*, and I have hesitated long before differing from his experienced judgment.

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22 Vic. ch. 90, s. 8.

1868.

Macbeth v. Smart.

I am not prepared to admit that *Macbeth* was indebted to the Company on any stock held by him on which no call had been made. Had he brought an action against the Company on his claim for the moneys paid to their use, they could not have offset a claim on his stock not called in. Had he filed a bill to compel them to make a general call on all shareholders (himself included) to pay his claims, they could not resist it.

Can he be said in any way to be indebted to the Company on stock on which no call has been made? Does he become their debtor except on a call lawfully made?

Judgment.

Parke, Baron, in *South Staffordshire Railway Co.* v. *Burnside* (*a*), speaking of the holding of shares says, "Is it then a debt payable on a contingency under the 56th section (of Bankrupt Act)? The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time not exceeding a certain sum, and regulated by the wants of the Company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted. * * This is a contingency which never could be the subject of valuation, depending not merely on the wants of the Company, but the ownership of the shares at the time of the call, by the bankrupt. * * That it was not a debt in *presenti* payable in *futuro* we consider to be quite clear. The Statute which enables the Company to recover calls, no doubt merely enforces an obligation on the shareholders, created by contract. If this defendant contracted with the Company to take twenty shares, upon each of which the capital to be contributed was £20, he may be said to

(*a*) 5 Exch. 138.

1868.

Macbeth v. Smart.

have agreed with them to pay £20 per share by such instalments as, according to the Statute, they were entitled to require. But under this section (Bankrupt Act) a debt under such a contract could not be proved. It was uncertain how much of the £20 per share the exigencies of the Company would call for, nor could it be told what the terms of payment would be, and consequently what the amount to be rebated."

I adopt this clear definition of *Macbeth's* position in relation to the Company as to his unpaid stock on which no call had been made. He owed the Company no debt and might never become indebted to them. He had agreed to be a subscriber of a certain amount in a chartered partnership, and as the necessities of the common object of the adventure might so require, he agreed that his subscription should be forthcoming on call, under certain prescribed formalities as to amount and time.

Judgment.

I am, therefore, unable to agree in the statement in the judgment below, that "he became a surety for the Company and paid moneys for them, owing them debts at the time, and that the law gave him a lien on the debts that he owed, as surety."

I do not question or discuss the law of equitable set off as enunciated in the Court below. If my impression of *Macbeth's* true position with the Company be correct the main foundation of an equitable set-off wholly fails.

It may be quite true that where "one person being indebted to another person, suffers him to become indebted to him, it must be intended that he does so in the faith that one debt shall be set against the other, and that the other party assents to the arrangement, so that an implied agreement springs up between them to that effect."

1868.

Macbeth v. Smart.

Were it necessary to scrutinize the facts stated on *Macbeth's* part, to raise the presumption of any such implied agreement, it might be remarked that the bill alleges that so far from *Macbeth* apparently having become surety for, or paid money for, the Company on the faith of his unpaid stock, he accepted the Secretary's drafts on him as President, and in the language of the bill "was adjudged at law to be personally liable in respect of the said bills." I should gather from this, that his becoming the Company's creditor was an involuntary proceeding on his part, not in any way entered into by him on the faith of a possible set-off contemplated by either party.

No case in equity, directly in point, has been cited.

The remarks of our Courts of Law on actions on this clause in the Statute, so far as they extend, are unfavourable to any right of set-off against the judgment creditor's claims; and in the case at law between these parties the Court of Common Pleas expressly decide against the alleged right.

Judgment.

The English case, *Garnet* and *Moseley Gold Mine Co.* v. *Sutton* (*a*), upholds the right of set-off at the suit of the liquidators on the winding-up of a Joint Stock Company (limited) suing a shareholder for a call on his stock. But the Statute governing the case provided, "that in fixing the amount payable by any contributory, he shall be debited with the amount of all debts due from him to the Company, including the amount of the call, and shall be credited with all sums due to him from the Company on any independent contract or dealing between him and the Company, and the balance after making such debit and credit shall be deemed to be the sum due."

(*a*) 7 L. T. N. S. 506 Q. B.

1868.

Macbeth v. Smart.

The Statute was held clearly to allow the set-off, one of the Judges pointing out that the effect might be that the defendant, by his plea of set-off, might get paid all his claims against the Company in full to the prejudice of other creditors. I also refer to *Rudolph* v. *Inns of Court Hotel Co.* (*a*), and *Re British Provident Assurance Co. Re Orpen* (*b*).

I observe a recognition of the principle to govern the rights of creditors in the Imperial Statute respecting Limited Liability Companies (*c*); sec. 38, sub-sec. 7. "No sum due to any member of a Company in his character of member, by way of dividend, profit, or otherwise, shall be deemed to be a debt of the Company payable to such member in a case of competition between himself and any other creditor not being a member of the Company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves." This Act is subsequent to the Statute allowing the set-off which governed the *Garnet* and *Moseley Mining* case already cited.

Judgment.

The late case of *Grissell in re Overend, Gurney & Co.* (*d*), seems very much in point. The Lord Chancellor says, "The Act creates a scheme for the payment of the debts of a Company in lieu of the old course of issuing executions against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor, to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the Company to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. * * If a debt due from the

(*a*) 8 L. T. N. S. 551. (*b*) Ib. 597.
(*c*) 25 & 26 Vic. ch. 89. (*d*) L. R. Chy. App. Vol. 1, p. 528.

1868.

Macbeth v. Smart.

Company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid twenty shillings in the pound upon his debt, while the other creditors might, perhaps, receive a smaller dividend, or even nothing at all. The case of a member of a limited Company is different from that of a member of a company of unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited Company against a call, although the creditors have not been paid, evidently because he is liable to contribute to any amount until all the liabilities of the Company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not. *But with respect to a member of a Company with limited liability if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts.*"

Judgment.

These observations seem to me to apply with much increased force to such a case as this, where instead of a call by an official liquidator under a Winding-up Act, it is a claim by an outside creditor against the fund provided by Statute for his protection.

The still later case in the House of Lords *In re Overend, Gurney & Co.* (*a*), especially the judgment of Lord Cranworth seems to me quite conclusive as to the relative position of creditor, shareholder, and the Company, and as to the former not being affected by existing equities between the two latter.

It seems to me with great submission that the fallacy of the opposite view lies in overlooking the great principle which, I think, underlies all dealings between a

(*a*) L. R. 2 App. Series, 366.

1868.

Macbeth v. Smart.

Company, limited or unlimited, and the outside world viz., that the judgment creditor has a claim on all the assets, in this case, on the unpaid stock, paramount to any right of set-off or counter claim by any member, against the Company. He does not claim through or under the Company.

As the Chancellor says, in *Wickham* v. *New Brunswick and Canada Railway Co.* (*a*), "The judgment creditors take what belonged to the Company, but do not take under them, and a sale by the Sheriff under an execution is a sale by the law and not by the Company."

Judgment.

MOWAT, V. C.—There are three principal questions to be considered in this case: (1) Whether there was a right of set-off or retainer by the defendant as between him and the Company? (2) If so, would an assignee of the Company be subject to this right of set-off? and (3) Does an execution creditor, under the Act in question, occupy the same position in this respect as an assignee? I think that, upon authority and reason, all these questions must be answered in equity in the affirmative.

As to the first of them, I take it to be clear, at law and in equity, that a Company has a right to set-off unpaid calls against a debt due to a shareholder (*b*); and I think that in equity, if not at law, the converse must hold, the right being reciprocal.

Besides this general ground for an affirmative answer to the first question, the case of *Jones* v. *Mossop* (*c*) illustrates how much further a Court of Equity goes in allowing set-off in favor of a surety than can be done at law. In respect of the notes, the defendant's advances were in effect as surety for the Company.

(*a*) L. R. 1 Pri. Co. App. at p. 80.

(*b*) Moore v. The Metropolitan Sewerage Company, 3 Exch. 333; Moore v. McKinnon, 21 U. C. Q. B. 141.

(*c*) 3 H. 563.

1868.

Macbeth v. Smart.

Again, the Company is a partnership; and I apprehend that no counsel would think it worth while to argue in a Court of Equity, in a suit by partners to enforce the covenant of a co-partner for an advance of capital, that the defendant was not entitled to set-off, against the advance he had agreed to make, any payments he voluntarily made for the Company as *Macbeth* made those in question here. In principle, the case as between a partnership and its members is the same whether the partnership is incorporated or unincorporated.

There is no reason why the Court of Chancery should have had any reluctance about taking this view, but entirely the reverse. The doctrine of set-off has always been regarded with great favour. It was recognised and enforced in Equity before Parliament introduced the doctrine into the system administered in Courts of Common Law. It is recognised in Equity still in many cases not within the Statutes relating to set-off (*a*). It forms part of the express enactments of the English Bankruptcy laws (*b*); and from a very early period was applied in Bankruptcy to many cases considered to be within the spirit, though not within the letter, of the statutory enactments on the subject. The doctrine has been embodied in the lately passed Insolvency Act of this Province (*c*); and its equity and justice have from the earliest times been frequently asserted by Equity Judges, as well as by distinguished Judges of the Common Law (*d*). The principle was recognised, also, to the fullest extent in the Roman law, and has been adopted into all the systems of jurisprudence which

Judgment.

(*a*) See the cases collected in Berry v. Columbian Insurance Company, 12 Gr. 421 *et seq.*

(*b*) Vide 6 Geo. IV. c. 15 sec. 60; 12 & 13 Vic. ch. 6 106 sec. 171; and prior Statutes.

(*c*) 27 and 28 Vic. ch. 17, sec. 5, sub-sec. 2.

(*d*) Collins v. Collins, 2 Burr. 820.

1868.

Macbeth v. Smart.

derive their origin from that great source (*a*). I think that nothing but the plainest and most unmistakeable legislative enactment would justify a Court of Equity in holding, that, as between an incorporated Company and its shareholders, this old and just and beneficial policy should be disregarded; and it is not pretended that there is any such enactment.

I proceed, therefore, to the second question. Assuming that the Company was liable to this retainer or set-off, is an assignee of the Company so liable? No doubt he is. It is a familiar rule, that an assignee of a chose in action takes it subject to all equities which attached to it in the hands of the assignor; and that a set-off is an equity in this sense, so clearly appears from *Norrich* v. *Marshall* (*b*), *Priddy* v. *Jones* (*c*), *Morris* v. *Livie* (*d*), *Hopkins* v. *Gowan* (*e*), *Smith* v. *Parkes* (*f*), *Cavendish* v. *Greaves* (*g*), *Re The National Alliance Insurance Company*, *Ashworth's* case (*h*), and other cases, that it is not necessary to do more than refer to them.

Judgment.

At law, there can, I presume, be no set-off in such a case, because, except in the instance of bills and notes, the suit cannot ordinarily be in the name of the assignee; and in the excepted case of bills and notes, the objection to a set-off, even where the transfer was after they became due (*i*), arises from the language of the Statutes, under which alone Courts of Law have jurisdiction to allow set-off, but does not seem to apply in Equity even to bills and notes (*j*), and certainly does not

(*a*) See 2 Story's Equity Jur., Sec. 1438 *et seq.*
(*b*) 5 Madd. 475.
(*c*) 3 Mer. 86.
(*d*) 1 Y. & C. C. C. 380.
(*e*) 1 Moll. 561.
(*f*) 10 Beav. 115.
(*g*) 24 Beav. 163.
(*h*) 7 Law T. N. S. 64.
(*i*) Burrough v. Moss, 10 B. & C. 501; Whitehead v. Walker, 10 M. & W. 696; Oulds v. Harrison, 10 Exch. 572; Isberg v. Rawdon, 8 Exch. 852.
(*j*) Cavendish v. Greaves, 24 Beav. 177.

1868.

Macbeth v. Smart.

apply to any other choses in action—the jurisdiction of Equity not being founded on the Statutes of set-off, or dependent on the language employed in them (*a*).

The stock was not payable to the Company until calls should be made; but I know of no principle, recognised in Equity, on which we can hold that that circumstance makes any difference in favor of an assignee. One of the very cases put by Mr. Justice *Story* in his elementary work on Equity Jurisprudence (*b*), to illustrate the doctrine of equitable set-off, is that of mutual bonds payable at different periods; and Lord *Hardwicke*, in dealing for the first time with a case in Bankruptcy which was not within the letter of the Act then in force, thus observed (*c*): "Where A is debtor to the bankrupt by a bond payable at a future day, and is a creditor on his contract for a less sum, would it be just and equitable that he should be obliged to prove his debt under the commission, and receive perhaps a shilling only in the £; and yet, when his bond becomes due, which in some instances might be in three months only, pay the whole debt, principal and interest, to the assignee under the commission? This may indeed in strictness be said not to be a mutual debt, but is it not a mutual credit? The bankrupt gives a credit to the petitioner in consideration of the debt he owes the petitioner on simple contract; and therefore I think this case is within the equity of the 5th of Geo. II." I refer also to *Ex parte Dowman* (*d*) and *Clayton* v. *Gosling* (*e*). Judgment.

In reference to the principle on which one of the former English Winding-up Acts (*f*) expressly gave a share-

(*a*) Exp. Stephens, 11 Ves. 27; Exp. Blogden, 19 Ves. 467; Whitaker v. Rush, 1 Amb 107; Freeman v Lomas 9 H. 113, &c.
(*b*) sec. 1435.
(*c*) Exp. Prescot 1 Atk. 230.
(*d*) 2 G. & J. 241.
(*e*) 5 B. & C. 360.
(*f*) 21 & 22 Vic. ch. 60, sec. 17.

1868.

Macbeth. v. Smart.

holder the right, even under a winding-up order, of setting-off, against his unpaid stock, a debt due to him by the Company, it was said by Mr. Justice *Wightman*, while that enactment was in force, that "there is no difference in principle between this case and a proceeding under the Bankrupt Act, where the assignees have to take the cross accounts between the bankrupt and persons indebted to him, and ascertain the balance due to the bankrupt; and if they proceed against the debtors of the bankrupt without doing so, the debtors may set-off the debt due to them from the bankrupt" (*a*).

In *Morris* v. *Livie* (*b*) a testator gave a residuary legacy to one of his executors, who assigned it for value, and subsequently committed breaches of trust as executor. It was held, that the parties disappointed by the breaches of trust were entitled to have them made good *pro tanto* out of the legacy, notwithstanding the assignment. The learned Vice-Chancellor, Sir *J. L. Knight Bruce*, observed: "It may, I conceive, be properly said, that (the executor's) legacy was given under a condition, raised and implied by law, that, undertaking, he should duly fulfil, the duties and obligations imposed on him by the instrument giving it. * * The condition, if existing, accompanied his legacy until its discharge, and applied to it as much after as before its assignment."

Judgment.

In *Smith* v. *Parkes* (*c*) the obligors of a bond, which was given to a partner by his co-partners on the dissolution of the firm and was subsequently assigned, were held by the Master of the Rolls to be entitled to set-off as against the assignee, not only debts actually due from the obligee at the time of the assign-

(*a*) The Garnet and Moseley Gold Mining Company v. Sutton, 7 Law T. N. S. 506.

(*b*) 1 Y. & C.C.C. 380.

(*c*) 16 Beav. 119.

ment, but also those which had not then arisen, but which were "flowing out of, and inseparably connected with, the previous dealings and transactions with the firm. Of this latter nature are the costs of the arbitration under the deed itself." (*a*)

1868.
Macbeth v. Smart.

Jeffreys v. *Agra & Masterman's Bank* (*b*) is to the same effect. There one *Speltz* held certain "marginal receipts," representing certain sums for which the *Agra & Masterman's Bank* were at a future time to become liable. Before this time arrived, *Speltz* made over these documents to the *Royal Bank of Liverpool*; and it was expressly held, that the *Agra & Masterman's Bank* had a right to set off, against the sums for which they became liable, any sums due and payable to them by *Speltz*, at the time when the marginal receipts became payable, upon liabilities contracted, not merely before the assignment, but before notice of it. The Vice-Chancellor said: "I take it, as between *Speltz* and the Bankers (meaning the *Agra & Masterman's Bank*), that at all times when the bills became due, they would have been entitled to set-off any moneys actually due from him to the Bank, whatever the account should be. As to mere liabilities, it is equally clear that they could not set them off. How, then, is the case affected by the notice they received of the assignment of this debt on the part of *Speltz?* I apprehend that they cannot be in any worse position as to liabilities actually accrued before they had notice of the assignment, not matured when they had notice of the assignment, but matured when the debt became payable. They would have a right to say:—'We held all these various securities, we knew all our rights of set-off, we knew that when these became due there would be other debts due at the same time, and that we should set the one off against the other,

Judgment.

(*a*) Vide also Irby v Irby (No. 3) 25 Beav. 632.
(*b*) Law Rep. 2 Eq. 674.

1868. Macbeth v. Smart

and our right cannot be interfered with by any dealing of yours with strangers until we have notice of such dealing.'" The decree was accordingly.

In *Smith Fleming & Co's.* case (*a*) the right of restraining the parting with undue acceptances, against which a set-off was claimed, was denied; but, as was argued by counsel there, acceptances are negotiable instruments, given for the purpose of being negotiated (*b*), and which an acceptor has no equity to have kept in hand. The general expressions in the judgment of the Court must be construed with reference to the subject matter of the litigation.

In *Watson* v. *Mid Wales Railway Company* (*c*) the Court of Common Pleas in England came to the conclusion, that rent accruing due from the assignor of a chose in action after an assignment and notice thereof, though under a lease executed previously, could not be set off, unless, in the language of one of the learned Judges, "there is to be implied, or fairly to be presumed, from the transaction, an agreement, or an understanding amounting to a contract, that the one shall go in liquidation of the other;" and in that case there was "nothing to support the inference that the one (debt) was contracted with any reference to the other." If the Court of Common Pleas rightly stated the doctrine of equity, still their view creates no difficulty, for there is considerable evidence,—quite as much as has been thought sufficient for the purpose in other cases (*d*),—that *Macbeth* made his advances on an understanding that he should have the right of applying them in payment of his stock.

Judgment.

(*a*) Law Rep. 1 Ch. Ap. 538.

(*b*) See Re Agra & Masterman's Bank, Exp. Asiatic Banking Corporation, Law Rep. 2 Ch., App. 391, 397.

(*c*) Law Rep., 2 Com. Pl. 593.

(*d*) See the cases collected in Berry v. Columbian Assurance Company, 12 Gr 42.

1868.

Macbeth v. Smart.

In the face of the authorities which I have quoted, illustrative of the equitable doctrine of set-off in case of an assignment, it seems impossible to say that the absence of calls affects the question here, if *Smart* is to be regarded as an assignee *pro tanto* of the unpaid stock.

Then comes the third question: Has an execution creditor of the Company any greater rights than an assignee?

It is on the 80th section of the Act in question (*a*) that the argument for the affirmative is rested; and I shall refer to its language presently. The spirit and policy of the other enactments of the Statute are certainly against the claim. Thus I take it to be clear, that until the moment of *Smart's* execution being returned unsatisfied, the Statute gave him no more interest in the stock of the Company than any creditor had who had brought no suit; and gave him no right whatever to interfere with the disposition of such stock. Until then, *Macbeth* might have sold and transferred his stock, and thus freed himself from further liability; or, he might have paid up to the Company the unpaid amount (*b*), though there had been no calls (*c*); and I presume that, up to the same time, the Company might have agreed, as in *Woodruff* v. *The Corporation of Peterborough* (*d*), to payment being made in any other way, for the uses of the Company, without calls. Nor can I imagine that, up to the same time, the Company were not free to allow as payment the sums already advanced by *Macbeth* to or for the Company. These transactions, and others which might be suggested, would have put an end to the liability of the shareholder either to the Company or to any creditor whose execution should the next day be returned unsatisfied. The policy of the Legislature did not require such transactions to

Judgment.

(*a*) 22 Vic. ch. 66. (*b*) Sec. 61.
(*c*) Tyre v. Wilkes, 13 U. C. Q. B. 486. (*d*) 22 U. C. Q. B. 274.

1868.

Macbeth v. Smart.

be forbidden; and if, in the view of the Legislature, they were just and equitable, it is hard to believe that to allow a set-off can have been regarded by Parliament as unjust or inequitable.

There is certainly no natural equity against a shareholder's liability being put an end to by a set-off, any more than against its being put an end to by express payment or any other means (*a*). It is obvious that the Company gets as much benefit from an advance of money, not at the time made expressly in satisfaction of unpaid stock, as if it was expressly paid on the stock. Again, the solvency of a Company depends, not only on the amount of its assets, but on the amount of its liabilities also; and if a set-off diminishes by so much the Company's assets, it diminishes by the same sum its liabilities—the balance is in either case the same. In the present case, it made no difference to any creditor, except *Smart* and *Macbeth* themselves, whether *Macbeth's* unpaid stock went to pay *Smart* or went to pay *Macbeth*; and a creditor who is not a shareholder has no equity to support his debt, more than a creditor has whose misfortune it is to be a shareholder. If the question were, whether a creditor who is also a shareholder and has unpaid stock, should share the assets of the Company, including all unpaid stock, *pari passu* with all the creditors, or be entitled, to the extent of his own unpaid stock, to priority over them all,—the equity might not be the same. But even in that case, a shareholder under the English Winding-up Acts was at first expressly allowed to set-off any sum the Company owed him (*b*), though a different policy was subsequently adopted (*c*).

Judgment.

It is to be observed, that the Act gives no right

(*a*) Palmer v. Costerton, 4 Q. B. 524.

(*b*) Imp. 7 & 8 V. c. 110, sec. 8 & 9; 11 & 12 V. c. 45, sec. 61 & 86; 19 & 20 V. c. 47, sec. 90; 21 & 22 V. c. 60, sec. 17.

(*c*) See 25 & 26 V. c. 89, sec. 38, sub-sec. 7, sec. 107 and sec. 133.

1868.

Macbeth v. Smart.

to creditors to inspect the Company's books, and provides no means, as many English Statutes do (*a*), whereby a creditor may at any time ascertain who the shareholders are, or what is due upon their stock.

It was admitted, on the first argument, though disputed on the second, and I apprehend it is clear, that a shareholder, by suing the Company and getting judgment for a debt due him, may, on his execution being returned unsatisfied, set-off in equity the amount of his execution against his own unpaid stock. But equity can not require a shareholder who is a creditor, to sue himself, in order that he may be within the words of the Statute.

So, it has been expressly held in equity, that a plaintiff who issues an attachment out of the Lord Mayor's Court, cannot by that means intercept a set-off by the defendant's debtor (*b*). I understand the same has been held at law, under the clauses of the Common Law Procedure Act for the attachment of debts due a defendant; and the reason I take to be, not that the Judges have, under that Act, an arbitrary discretion to say what shall, or shall not, be liable under the attaching process, but, to use the language of *Willes J.* in *Hirsh* v. *Coates* (*c*), because the "Statute must be construed like any other Statute, giving its words their plain, ordinary and proper sense. So construing it, I think it can only operate to give the judgment creditor the same degree of charge upon the debts which are the subject of the order, as an assignment in bankruptcy would give—such as the judgment debtor was entitled to at law and in equity."

Judgment.

Again, a purchaser of goods or lands under execution

(*a*) 7 Geo. 4 c. 46 sec. 4 *et seq.*; 7 & 8 V. c. 110 secs. 10 to 18; ib. c. 113 sec. 16 *et seq.*; 8 & 9 V. c. 16 sec. 9, 10, & 36, &c., &c.

(*b*) Webster v. Webster, 33 B. 393. (*c*) 13 C. B. 757.

1868.

Macbeth v. Smart.

takes only the debtor's interest; and, except in the case of a fraudulent conveyance by the debtor to defeat creditors, a purchaser can claim no greater interest than the debtor himself could have claimed if there had been no execution. As the Lord Chancellor observed in *Wickham* v. *The New Brunswick and Canada Railway Company* (*a*): "There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seised; and that consequently such property must be sold by the Sheriff, with all the charges and incumbrances, legal and equitable, to which it is subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take." Notwithstanding this clear statement of the rule, the case was cited for the appellant here, because the judgment was in favour of the execution creditors; but that proceeded on the construction of the debentures which were in question, in connection with an agreement and an Act of Parliament, both of which are set forth in the report. A single sentence from the judgment of the Lord Chancellor will be sufficient to shew this: "This case, therefore, depends entirely upon the question what, as between *The New Brunswick and Canada Railway Company* and the debenture holders, was the interest which the Company had in the lands taken in execution by the judgment creditors?"

Judgment.

In *Beavan* v. *The Earl of Oxford* (*b*), it was held by Lord *Cranworth* and the Lords Justices, that a registered judgment creditor had no right to set aside

(*a*) Law Reports, 1 Pri Col. 75.

(*b*) 6 D. M. & G. 507. Vide also Benham v. Keane, 1 J. & H. 697; Kinderley v. Jervis, 22 Beav. 1.

a voluntary deed, though a purchaser has such a right, —thus maintaining that a registered judgment creditor occupies a position, not superior, but inferior, to that of an assignee for value. This view was afterwards upheld by the House of Lords in *Eyre* v. *McDowell* (*a*).

1868.

Macbeth v. Smart.

All analogy is thus against placing *Smart* in a higher position than the Company's assignee would occupy, and against excluding *Macbeth* from any equity he would have had against the Company by reason of anything that occurred before *Smart's* right accrued. What, then, is the statutory language on which the contention of the respondents is founded? The Act declares a shareholder liable to creditors for "an amount equal to the amount unpaid on the stock held by him:" and it is argued, that this form of expression excludes the right of set-off, inasmuch as a set-off is not payment. But no authority was cited in support of this way of construing the Statute; and, on the other hand, in *Maillard* v. *The Duke of Argyle* (*b*) the Court of Common Pleas in England distinctly held, that the word "payment," as applicable to the transaction there in question, did not mean payment in satisfaction, but might be treated as used in its popular sense. Mr. Justice *Maule* said: "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises." To the same effect is the language of Lord *Campbell* in *Turney* v. *Dodwell* (*c*). The appellant's contention is wholly founded on the word "unpaid," and his construction of it thus appears to be, not only without authority, but against express authority; for, I apprehend, that, in an enactment making a shareholder liable to creditors of a Company for "an amount equal to the amount unpaid on the stock held by him," it would not occur to any one on 'the exchange'

Judgment.

(*a*) 9 H. L. 619.

(*b*) 6 M. & G. 40.

(*c*) 3 El. & Bl. 141.

1868.

Macbeth v. Smart.

that the shareholder was to be liable to the creditors, in respect of his stock, for more than he was liable for to the Company, whether the deduction was by set-off or in any other way.

Courts of Law long ago refused to hold that the technical word "debts" in the Statutes of set-off, was confined to demands for which an action of debt would lie (*a*). The somewhat strict construction which corresponding language received in The *South Staffordshire Railway Company* v. *Burnside* (*b*), was founded on reasoning which, I think, is inapplicable to the present case.

Grissell's case (*c*) was cited for the appellant, set-off having been denied to the creditor there, but the question in that case, as the Lord Chancellor in giving judgment explained, "depended entirely on the construction of the Companies' Act 1862." Again, his Lordship observed:

Judgment.

"The primary intention of the Legislature * * is expressed in the 133rd section of the Act, being that 'the property of the Company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto shall, unless it be otherwise provided by the regulations of the Company, be distributed amongst the members according to their rights and interest in the Company.' * * * The Act creates a scheme for the payment of the debts of a Company, in lieu of the old course of issuing an execution against individual members. * * To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to the 133rd section as to the satisfaction of the liabilities of the Company *pari passu*." Thus the decree in *Grissell's* case proceeded wholly on statutory provisions which have not yet, either in terms or in spirit, been adopted in this country.

(*a*) Morley v. Inglis, 4 Bing. N. C. 58. (*b*) 8 Exch. 138.
(*c*) Law Rep. 1 Chan. 528.

1868.

Macbeth v. Smart.

I think it plain that all that the Statute here in question really designed was, to enable an unsatisfied execution creditor of the Company to reach, by the machinery which the Statute provided, whatever the Company itself could have recovered against the shareholder; and that it was quite impossible for the late Vice-Chancellor, sitting in equity, to place on the word 'unpaid' the narrow construction contended for by the appellant, in the face of the many considerations there were in support of an opposite view of the intention of the Legislature.

It was contended on the first argument, but not on the second, that *Macbeth's* advances, if capable of being set off against the stock, ought, notwithstanding, on the equitable doctrine of marshalling, to be set off against *Macbeth's* liability on the joint bond given by himself and two others, to secure a debt or liability by *Morton*, one of the two, to the Company. The bond has not been produced, but it is stated in the answer, and was assumed at the Bar, to be a joint bond. It is clear that a joint demand and a separate demand cannot be set off against each other; and it has also been held, that a claim against a surety cannot be set off against a debt due to him (*a*). Judgment.

It is not suggested in the reasons of appeal, that what took place in the action at Law is any bar to a suit in Equity. Something was said on the point by the learned counsel for the appellant, but it seems clear that there is no ground for such a contention (*b*).

The conclusion to which I have come on the whole case is, therefore, the same as that of all the other Equity

(*a*) Morley v. Inglis, 4 Bing. N. C. 58.

(*b*) Mangles v. Dixon, 3 H. L. 702; Evan v. Bremridge, 8 D. M & G. 100; Lady Londonderry v. Baker, 7 Jur. N. S. 811; Terrill v. Higgs, 1 DeG. & J. 388; Holland v. Clark, 1 Y. & C. C. C. 151.

1868. Judges who have considered it. I think the decree of the late Vice-Chancellor was right, and should be affirmed.

Macbeth v. Smart.

Per curiam.—Appeal allowed, and the bill in the Court below dismissed with costs.—[VANKOUGHNET, C., and SPRAGGE and MOWAT, V.CC., dissenting.]

NOTE.—MORRISON, J., was not present at the argument of this case. His name was erroneously inserted as being one of the Judges before whom the appeal was argued.

[*Before the Hon. the Chief Justice, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Hagarty, the Hon. Mr. Justice Morrison, the Hon. Mr. Justice A. Wilson, and the Hon. Vice-Chancellor Mowat.*]

MUTCHMORE v. DAVIS.

Crown patents, repeal of—Pleading—Demurrer.

A bill by a private individual impeaching a patent for fraud or error must shew that the plaintiff's interest arose before the impeached patent was issued.

This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract of purchase.

Where a bill was not maintainable in respect of its principal object, and its statements were confused and verbose, the Court of Appeal declined to consider a minor relief to which the plaintiff claimed to be entitled, and allowed a demurrer to the bill, leaving the plaintiff to file a new trial for the latter relief, if he should be so advised.

Statement. The bill impeached a patent granted by the Crown to *George Sylvester Tiffany*, in 1838, so far as it affected a lot of land purchased by the plaintiff from the Crown Lands Agent in 1845, and another parcel purchased by

1868.

Mutchmore v. Davis.

the plaintiff from a patentee of a subsequent date to *Tiffany's* patent. The land in question was what is called "Indian Land." The land granted to *Tiffany* consisted of 845 acres, which are described in the patent, with this addition "together with all the lands west of this description which are or may be overflowed by the waters of [a certain creek therein described] above the mill-dam now erected on the said creek and lot of land." The substance of the bill (the great and unnecessary length of which was remarked upon by the Court of Appeal) appeared to be as follows:—The bill alleged that these general words, according to their legal import, comprised far more land than the Crown was aware of when the patent was granted; that amongst the lands which it wrongly embraced was a parcel of land subsequently patented to another person and which had theretofore become vested in the plaintiff, and another parcel which, on the 22nd March, 1845, the Crown agreed to sell to the plaintiff, and in respect of which he held the receipt of the Crown Lands Agent for part of the purchase money. The bill further alleged that the patent for the lands west of the 845 acres particularly described therein had been obtained by false representations; that the Crown was at the time without any knowledge of the true situation, extent, value, or description of the overflowable lands west of the described parcel above the mill-dam; that it was falsely represented to Her Majesty, her officers, and agents, verbally and by written communications, and by production of an erroneous map, that, according to the situation and nature of the land, the overflowable land was but a small, compact, and not valuable parcel of drowned land, and did not comprise the lands now claimed by the plaintiff; that the dam which is mentioned in the letters patent had been removed before the issuing of the patent, and was not then in existence; that after the issuing of the patent, Her Majesty had the land which was overflowable by the dam, including the parcels now claimed by

Statement.

1868.

Mutchmore v. Davis.

the defendants, surveyed and offered for sale; that the same were sold to the plaintiff and others; that *Tiffany* his heirs and assigns had full knowledge and notice of this, and did not object to the same or attempt to enforce their pretended right thereto under the patent to *Tiffany;* that the patent, with respect to the overflowable land, was as far as possible, and with the acquiescence of *Tiffany* his heirs and assigns, repudiated by Her Majesty. The bill also alleged that the lands claimed by the plaintiff were Indian lands, and that not only was the Crown deceived into introducing into the patent a description which includes them, but that the grant of such lands, if intended, would have been void under the Statutes in force at the time in relation to Indian lands.

Statement.

It was further alleged that the mill-dam was not rebuilt for many years after the issuing of the patent to *Tiffany* nor until after the sales under which the plaintiff claimed; that during all this time the stream flowed in its natural course and purity through such lands, leaving the same for cultivation and very valuable for farming purposes; that on the faith of his purchase the plaintiff went into and was admitted by the Crown into the actual possession and occupation of the parcel he purchased from the Crown, and, in ignorance that it was comprised in the grant to *Tiffany*, made large and costly improvements thereon, and at great expense cleared, fenced and rendered fit for cultivation thirty acres, and built a dwelling house, barns, stables, and other buildings of great value on the land.

The bill further alleged that the defendants were the assignors of *Tiffany* and claimed to be entitled under his patent to all the land the defendants can overflow, by rebuilding the dam and enlarging it to the utmost, but not for the purpose of acquiring the fee simple of the lands they can thereby overflow. The bill shewed that this overflowing injured the land, destroyed the

timber and improvements, and injuriously affected the health of the inhabitants: and after setting out the threats and intentions of the defendants, the bill prayed amongst other things relief against the patent: that the plaintiff might be decreed entitled to pay to the proper officers of the Crown or department of the Government, the balance of his purchase money and to receive a patent for the land he had bought; for an injunction against the threatened nuisance, and other relief. 1868. Mutchmore v. Davis.

To this bill the defendants, other than the *Attorney General* filed a general demurrer for want of equity.

The *Attorney General* demurred to so much of the bill as sought that the plaintiff might be decreed to pay the residue of his purchase money to the proper officers of the Crown, or the proper department of the Government, and to thereupon receive a patent from the Crown of the land referred to; and for cause of demurrer shewed that the Court had no jurisdiction to grant a decree as against the Crown, any relief to the plaintiff in respect of these matters. To the rest of the bill the *Attorney General* answered, alleging that he was a stranger to the matters alleged and claimed, such rights and interest therein on behalf of Her Majesty as the Court should be of opinion that Her Majesty was entitled to; and he submitted such rights and interest to the care and protection of the Court. Statement.

The demurrer of the other defendants came on to be argued before Vice-Chancellor *Spragge*, who, at the close of the argument (after briefly stating the facts of the case) made the following observations:—

SPRAGGE, V. C.—The bill admits in so many words that at the date of the patent, very large portions of the lands purchased by the plaintiff in 1845, were, and still

1868.

Mutchmore v. Davis

are, lands west of the lands described in *Tiffany's* patent, capable of being overflowed by the waters of the said creek above the said mill-dam, and it alleged that, while such portion of the patent as grants the lands west of the description is valid and conclusive at Common Law, yet that it is invalid and will be relieved against in Equity, upon the ground stated in the bill, such grounds being in substance that the patent was, as to such lands, issued improvidently, and under mistake, and induced by certain misrepresentations which are set out in the bill ; (whether sufficiently alleged is another question). The bill alleges that the Crown is hindered and prevented by the patent to *Tiffany*, from receiving from the plaintiff the residue of his purchase money, and that the plaintiff had made frequent applications for such purpose, but always without effect. The bill makes no case in respect of any equity vesting in himself in respect of the land he purchased or in his assignors in respect of the land purchased by him, at the date of the patent to *Tiffany*. The bill does not state the date of the patent to his assignor. It is no part of the plaintiff's case that the patent to *Tiffany*, at all affected him (and it could not be so for he was a stranger) at the time. His case must be that as to the land in question he purchased from the Crown a right to impeach the Crown patent, so far as it granted those lands. I do not mean by this that the Crown, by its agent, knowingly sold to the plaintiff land covered by the patent to *Tiffany*. It will be presumed, for the honor of the Crown, that the sales to the plaintiff and to his assignee, were in ignorance of the fact that the lands so sold were covered by *Tiffany's* patent, nor do I mean that the plaintiff or his assignor purchased with such knowledge. The plaintiff, indeed, desires such knowledge, though in such terms as to imply that he had notice of the patent itself.

Statement.

If there had been notice of the patent to *Tiffany*, conveying the land in question, this case would be

1868.

Mutchmore v. Davis.

clearly within the case of *Prosser* v. *Edwards*, and I incline to think that notice is not necessary in order to bring a case within its principle. I will quote some passages from the judgment of Lord *Abinger*.—"In a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person: and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such claim would be a questio.. deserving of great consideration; my present impression is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud, and I should say that some authority is necessary to shew that a man can assign to another a right to file a bill for a fraud committed upon himself."

Statement.

The above remarks were made at the close of the argument, and, upon mature deliberation, his Lordship remained of the same opinion, and in giving judgment expressed himself thus:

SPRAGGE, V. C.—Where an equitable interest is assigned, it appears to me that in order to give the assignee a *locus standi* in a Court of Equity, the party assigning the right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. In the present case it is impossible that the assignee can obtain any benefit from his security except through the medium of the Court. He purchases nothing but a hostile right to bring parties into a Court of Equity, as defendants to a bill for the purpose of obtaining the fruits of his purchase, and more to the same purpose. In *Prosser* v. *Edwards*, as in this

1868.

Mutchmore v. Davis.

case the purchase was, not only of that which had been previously conveyed to another, but of something besides, and at the argument Lord *Abinger* felt pressed by that consideration, but eventually allowed the demurrer, notwithstanding. The principle, being one of public policy, would apply, I apprehend, where the second sale or assignment is by the Crown, through its agent, as well as where it is strictly by one subject to another. I see no good reason why it should not.

But there is this further reason, why, as it appears to me, the plaintiff cannot have a *locus standi* in this Court. It is to be assumed, as I have said, that the sale of lands, covered by the previous patent to *Tiffany*, was in ignorance of the fact of their being covered by that patent, for I must assume that the Crown would not, and that its agent would not knowingly do that which was against public policy. The Crown, supposing the allegations of this bill to be true, might by *scire facias*, or by information, it may be assumed, have impeached *Tiffany's* patent, in so far as it granted the lands in question. If it knowingly sold these lands to another, it sold a mere right to file a bill in Equity, which I must take it to be out of the question. It follows that the sales of these lands to the plaintiff and his assignor respectively, were sales made improvidently and under mistake, and can confer upon the plaintiff no right to come into this Court.

Statement.

In coming to this conclusion, I do not go counter to what was decided in *Martin* v. *Kennedy*, and in other cases which have followed it, that the party aggrieved might file a bill without making the *Attorney General* a party; for in none of those cases did the Crown, after granting to one, assume to sell to another, and in all of them, as I believe, the claims of the plaintiff existed before the issue of the patent. In such a case as the one before me, the *Attorney General* is, in my opinion, the only proper person to come into this Court to com-

plain that the Crown has been imposed upon or mistaken. Being of opinion that the plaintiff has no *locus standi* in this Court, I do not go into the question raised by the demurrer. The demurrer is allowed with costs. 1868. Mutchmore v. Davis.

The demurrer of the *Attorney General* afterwards came on before Vice-Chancellor *Mowat, pro forma*, when it being stated that this demurrer depended on that of the other defendants, it was allowed without argument.

The plaintiff appealed from the orders allowing the demurrers.

The reasons of the respondent, Her Majesty's *Attorney General*, which are referred to in the Chancellor's judgment were as follows :—

1. Her Majesty's *Attorney General* says that the order on his demurrer and answer made in the Court below should not be reversed or set aside, because, as he contends, the said Court has no jurisdiction as against the Crown to grant the relief asked for by the appellant and that his demurrer on that ground was properly allowed. Statement.

2. Because under the circumstances stated in the appellant's bill of complaint he is not entitled to the relief asked by him, or to any relief, particularly after the lapse of time since the various interests in question arose.

It is not thought necessary to set out the reasons of the appellant or of the other respondents.

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

Mr. *Crooks*, Q. C., for *The Attorney General.*

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

1868.

Mutchmore v. Davis.

VanKoughnet, C.—Upon the main question in this case, I am of opinion that the plaintiff cannot call upon the Court of Chancery to declare void the patent granted to *Tiffany*. When that patent issued in September, 1838, the plaintiff and those under whom he claims had no interest whatever in the land. The Crown, representing the Indians, as alleged by the bill, dealt with *Tiffany* alone. Years afterwards, and in 1845, the plaintiff made a contract with the authorized agent of the Indian Department for the purchase of a portion of the land which he alleges is covered by the patent to *Tiffany*. No patent or deed for this portion has ever yet issued to him: it never may, for he may never complete his purchase. He also tells us, in paragraph five of this bill, that he is the purchaser, derivatively from the patentee of the Crown, of another portion of the land also covered by *Tiffany's* patent. When this patent, under which he claims, issued, does not appear, except that it was subsequent to the issue of the patent to *Tiffany*. Unless indirectly or constructively by means of this subsequent sale and patent, the grant to *Tiffany* has never been impeached by the Crown. Paragraph seventeen of the bill does say that Her Majesty disregarded the patent to *Tiffany*, and notwithstanding it dealt with and sold the disputed portion of the land covered by it, as still being the land of the Crown. The bill, however, informs us that this patent nevertheless does cover and convey the lands in question and will prevail at law, and that the plaintiff cannot contend against it there, and hence he claims to have it set aside in equity. The only meaning or effect of the seventeenth paragraph would, under this state of facts, be that the Crown, bound by its own patent so long as it stands, has attempted to dispose of lands covered by it: and that, without ever having taken any steps to impugn the patent or have it declared void. Were an individual so to deal, he would, I apprehend, be treated as having conveyed a mere right of action to set aside a deed, which, valid at law, could be only successfully

Judgment.

impeached in equity, on some doctrine peculiar to that jurisdiction. Admitting that the rule of public policy, against champerty and maintenance, does not bind the Crown, and that it may grant a chose or right of action where a subject could not, I think we should be clear that such an unusual thing as a grant of this nature was made by the Crown, before we gave effect to it. There is no pretence here that such a right has been conveyed, unless by the issue of a patent, or by a sale inconsistent with the prior patent. That any such grant of a right of action can be inferred from this Act of the Crown is asking us to assume too much. The Crown frequently makes inconsistent grants, and the Legislature has provided for such cases by giving the Crown authority to make compensation, as in this case, to the plaintiff. The very most, I think, we can take the plaintiff's statement as amounting to is this, that the Crown treating its own patent to *Tiffany* as void, when, according to the bill, it is valid and binding, and can only be set aside in equity, chose to sell and grant portions of the land covered by it, leaving these vendees and grantees to enjoy their purchases and grants as best they could. But this is very different from the assumption that the Crown, at the same time, and by the same means of a simple sale or grant imparted or conveyed a right to impeach its own former patent, on the allegation of fraud, which the Crown itself had never made, or set up, or used as a means or cause for getting rid of that patent. The plaintiff, nor any one else, having any right to complain of the alleged wrong practised upon the Crown, in the procuring the grant to *Tiffany*; and the Crown itself not choosing to complain of it, and at all events not having in my judgment authorized any one else to make that complaint, either on behalf of the Crown, or as assignee of the complaint, how is the plaintiff to get on should the Crown appear, as it does here, by the *Attorney General* and say "I am ignorant of any of the frauds alleged to have been practised upon me, and I object to

1868.

Mutchmore v. Davis.

Judgment.

1868.

Mutchmore v. Davis.

your invoking the jurisdiction of the Court upon any such grounds against the original patent." And I think this is a fair way of testing the right of a private individual to make such a complaint. When there are two parties claimants of the land at the time the patent issues, and the Crown overlooking facts, or deceived by false testimony as to the right of the one, issues a patent to the other, this Court has held that the party thus aggrieved may without the intervention of the *Attorney General*, pray the jurisdiction of the Court to have the matter investigated, and the patent avoided, and the whole question of the disputed right or claim referred back to the Crown. But, I am not aware of any decision going beyond this, and giving to an individual a right to insist here on the avoidance of a patent which, when it issued in no way affected him or any one else, than the Crown and the patentee, and I so expressed myself in judgment in *Stevens* v. *Cook* (*a*), saying at the same time that when the Crown with full knowledge of the rights of adverse claimants and of all the circumstances, issued a patent to one of them, the other could not insist here that the Crown had come to a wrong decision and that its patent must be avoided, whatever right he may have against the patentee under any agreement that had subsisted between them. Were the Court, at the instance of a second patentee, except as relator upon the complaint of the *Attorney General*, or at the very least as assignee of the right of the Crown to complain of such prior patent, to declare the latter void, the result would be that though the Crown might all the while desire the first patent to stand, even after the discovery by it of the alleged fraud, it would be powerless to uphold it, because in a contest between two private individuals the patent might be declared void; in which case the second patent would take effect. I do not think that such mischief as might arise from this

Judgment.

(*a*) Vide Ham v. Lasher.

1868.

Mutchmore v. Davis.

cause was ever contemplated or intended by the Legislature; or that we should assume that the Crown by such an indirect, I would almost say, underhand means, as that of a second grant meant to convey to the grantees under it, a right to do that which the Crown itself had refrained from doing, namely, to impeach its own prior grant (*a*). The bill is entirely silent as to the Crown desiring that the second grant in this case should have any such effect, or that the Crown ever desired or desires now that the first grant should be declared void. I quite agree with my brother *Spragge* that such a presumption as we are asked to make here would not be consistent with the honour of the Crown.

The plaintiff, however, contends that the grant to *Tiffany* in question here is a free grant, and that it is therefore void as having been made subsequent to the Statute of Upper Canada relating to the management of the public lands, passed in 1838, and which prohibits such grants. It might be sufficient as to this to say that if the objection be a good one it is as available at law as here; and that there is no instance to be found, of which at least I am aware, where a bill has been filed to set aside a Crown patent as a cloud upon the title. This relief is granted against individuals who by improper dealings with property have caused or may cause confusion or doubt as to a title; but I never heard of the jurisdiction being exercised because of such alleged dealings by the Crown. There is, however, no foundation for the objection disclosed by the bill. According to its statements, the lands in question were unsurrendered Crown Lands held by Her Majesty in trust for the Six Nations Indians. The Statutes relating to the public lands were never made or held to apply to such Indian lands until the Land Act of 1853, which gave the Government power by order in Council, from time to time, to apply such

Judgment.

(*a*) 6 Mod. 229.

1868.

Mutchmore v. Davis.

provisions of that Act as it thought proper to "Indian lands under the management of the Chief Superintendent of Indian affairs." Until 1861, this last named officer, acting directly for the Imperial, and not for the Local or Provincial Government, controlled the management of the Indian lands, which, up to the last named period, had never been interfered with by the Commissioner of Crown lands unless in concert with the Chief Superintendent. These lands were dealt with by the Crown in the way it considered most for the benefit of the Indians, for and towards whom it assumed the duty of trustee and guardian. For aught that appears it may have been a wise and a most reasonable discharge of this duty: it may have been at the instance, or with the consent of, the Chiefs of the Six Nations Indians, that this grant was made to *Tiffany* in consideration of his erecting mills, the want of which may have been a serious inconvenience to the Indians; or the erection of which may have added largely to the value of their adjacent lands.

Judgment.

The only other alleged ground of equity in the bill is a very minor one, viz: that the defendants threaten and intend to overflow much more land than their patent reasonably covers by raising and thus spreading the waters of the stream. This was not insisted on or urged in the Court below; and no relief was asked there in respect of it. The parties discussed there only the questions which I have been hitherto considering, inviting upon them alone, the judgment of the Court. The reasons of appeal do not complain or set forth specifically that in respect of this alleged threat of nuisance, judgment should have been given in the Court below for the plaintiff. As an independent head of equity it would doubtless, if properly put, form a ground of relief by the preventive process of the Court; but it is so mixed up with the main contention of the plaintiff, so injected into a mass of confused and verbose statements, which

no Court ought to have been called upon to read, and which any Judge might properly, I think, have refused to try to understand—statements, setting at defiance all the rules of pleading, which require brief, concise and intelligible language, and arrangement of language, and was so entirely overlooked by the plaintiffs themselves in the Court below, that I am not disposed on this bill and on this appeal from the only question argued below, to give any relief in respect of it. If necessary, there may be reserved to the plaintiff the right to advance it by another bill, differently shaped and presenting it to the Court in an intelligible form. I think the demurrer of the *Attorney General* sufficiently specific to enable the Court to see at once, and with as little difficulty as the involved statements of the bill permit, what he objects to; and I am sure that his quotation of those statements would in no way have lightened this part of the labor of the Court.

1868.

Mutchmore v. Davis.

Judgment.

A. WILSON, J.—The plaintiff alleges that until after the grant to *Tiffany* and before the purchase by the plaintiff, the Township of Oneida was Indian land, and was then surrendered by the Six Nations Indians to the Crown for sale and settlement.

That *George S. Tiffany* got his patent on the 3rd of September, 1838, for $845\frac{66}{100}$ acres of land, "together with all the lands west of this description which are or may be overflowed by the waters of Anderson's Creek, above the mill dam now erected on the said creek and tract of land," that this grant was obtained by various misrepresentations, and by means of a false map or plan shewing that only a small parcel of land would be overflowed; that the mill dam was not standing when *Tiffany* got his patent, and it was permitted to remain down till after the purchase by the plaintiff; that the Township of Oneida, after *Tiffany's* grant, was surrendered to the Crown and surveyed, and the lands since bought by

1868.

Mutchmore v. Davis.

plaintiff were laid out and surveyed for sale and sold; that the plaintiff's lands were, by reason of the dam being down, capable of being cultivated—and plaintiff went into possession and made large improvements on the land.

In 1857 the saw-mill was burned, and it is not intended to erect it.

The defendants have, at different times, lately erected the mill-dam, but it has always been carried away.

The plaintiff contends that many hundreds of acres beyond what would be overflowed by the dam in the patent to *Tiffany* mentioned, the defendants can cause to be overflowed by wantonly enlarging the dam to the utmost extent, although not necessary for working the mill, but for the mere purpose of acquiring the fee simple of the lands so overflowed, and defacing what should be the true boundaries of his grant.

Judgment.

And that they threaten to erect the dam for such purpose, which will irreparably ruin the plaintiff's lands and improvements.

That the defendants, in execution of these threats, erected in the summer of 1865, a dam of the kind mentioned, and for the purpose mentioned, and injured the plaintiff's lands as before stated, and by the stagnant water created sickness and diseases dangerous to human life. This dam has since been carried away, but the defendants threaten to rebuild it.

The plaintiff is thus ejected from his land.

In *Brewster* v. *Wild* (*a*), it is said, If a patent be to the prejudice of another, he may have a *sci. fa.* on the

(*a*) 6 Mod. 229.

enrolment thereof in Chancery, to have it repealed as well as the Queen may (*a*)

1868.

Mutchmore v. Davis.

It is said to lie by the first patentee to repeal the subsequent patent (*b*).

It is said *scire facias* will not lie at the suit of the last patentee to repeal the first patent though the last patentee have the right with him (*c*). *Scire facias* is in the nature of a bill in Chancery (*d*). But *scire facias* may nevertheless be demurred to for want of certainty. *Nunn* v. *Claxton* (*e*), *Ness* v. *Fenwick* (*f*), *Rex* v. Sir *Oliver Butler* (*g*), *Ness* v. *Bertram* (*h*). The Crown ought to permit subjects aggrieved to sue in the name of the Queen (*i*).

A bill in equity lies to set aside letters patent obtained by fraud, *Attorney General* v. *Vernon* (*j*.) This case was of a grant of land, and the fraud alleged was like this bill in many respects; but it was at the suit of the *Attorney General*, whereas this bill is against the *Attorney General*.

Judgment.

A subsequent grantee of the property, and not merely buying the right to sue can file a bill to set aside a previous conveyance by the same grantor, though the grantor do not concur in the suit. *Dickinson* v. *Burrell* (*k*), this seems like a right which the plaintiff has to be secured in the possession of his land bought from the Crown against the wanton acts of the defendants, who by colour of exercising rights under

(*a*) Bac. Abr. *sci. fa.* ch. 3.
(*b*) Bac. Abr. *sci. fa.* ch. 3.
(*c*) Com. Dig. patent, F. 4, 5; Dyer. 276*a*, 276*b*; 2 Rol. 191, ch. 52.
(*d*) Latch. 112; Bac. Abr. *sci. fa.* D.
(*e*) 3 Exch. 712.
(*f*) 2 Exch. 598.
(*g*) 3 Lev. 221; 2 Ventr. 344.
(*h*) 4 Exch. 195.
(*i*) 10 Mod. 354; 1 P. Wm. 217; Vin. Abr. Prerog. M. b. 9, pl. 10, U. C. pl. 8, and authorities cited.
(*j*) Vern. 277–370.
(*k*) 1 L. R. Equity, 337.

1868.

Mutchmore v. Davis.

such vague words as "together with," &c., are wantonly overflowing and ruining his lands so bought for the mere purpose of enlarging the limits of their supposed grant, by attempting to overflow as much as the waters can by any kind of erection, be made to overflow. And who never, apparently, had more than the right to overflow according to the mill dam as it was in 1838, but who are claiming and exercising much beyond what was then claimed.

If this bill be true, and it apparently is so, it does not seem a proceeding which it is for the honor of the Crown that any merely technical difficulty should be permitted to remain in the way of the plaintiff as a bar, or even an impediment, to his obtaining his full rights.

The Crown, or rather its officers, cannot capriciously refuse to do right to any subject: *Ryves* v. *The Duke of Wellington* (*a*).

Judgment.

"We are not to presume that any promise made by the King even to the meanest and most criminal of his subjects will not be sacredly observed." Per Lord *Denman*, C. J., in *The King* v. *Garsiah* (*b*), If the free grant be unauthorised and be prejudicial in fact to the Crown purchaser, it must be capable of being impeached in some form or other.

The plaintiff must have the right even in the present suit, to determine what his own rights are by determining the limits to which the defendants may lawfully overflow, that which they claim to be their own land, although their patent be not disputed, and to confine them within these limits when established, and to restrain them from overflowing, unless for the purposes in the patent expressed.

MOWAT, V. C.—The bill in this case is certainly expressed with considerable verboseness, its sentences are

(*a*) 9 Beav. 579. (*b*) 3 A. & E. 275.

1868.

Mutchmore v. Davis.

long and involved, its statements are not artistically arranged, and an unusual degree of attention is consequently required to master its full scope; but I have never known a general demurrer to be allowed on these grounds. The General Order (*a*) requires a plaintiff's case to be stated "in clear and concise language." I think that, on most points, the language of this bill is clear, and the case it makes free from ambiguity; it does not state the case concisely, and this should be considered in disposing of the costs; but to hold that a general demurrer lies where a bill is not concisely expressed, would be laying down a rule which would be very hard of application. Conciseness is a thing of degree, and it is very seldom that a bill is expressed with all the conciseness that is practicable. Indeed, no bill on the files of the Court would stand such a test, if strictly applied; and where is the line to be drawn? What degree of diffuseness is to expose the pleader to a demurrer? If any practicable rule could be laid down, I would be very glad to adopt it by a General Order; but I know no way of expressing such a rule. Amongst pleaders, and amongst all men who write or speak, there is the greatest difference in the degree of terseness on the one hand, or copiousness on the other, with which they express what they wish to state; and I am afraid that, in regard to conciseness in bills, it will be vain to attempt more than take the want of it into account, as hitherto, in disposing of the question of costs,—as to which the Court exercises a large discretion. I have, therefore, considered it my duty to consider the case presented by the bill, on its merits.

Judgment.

It is the rule of the Court of Chancery, that if any relief whatever can be given on a bill, a general demurrer must be overruled (*b*). It is quite immaterial, there-

(*a*) No. 9, sec. 3 (3 June, 1853).

(*b*) Hartley v. Russell, 2 S. & S. 253.

1868.

Mutchmore v. Davis.

fore, in disposing of this case, to consider whether some of the grounds for relief which the bill sets up can, or cannot, be maintained by a private individual, or whether all the relief prayed can be granted; but, after giving the case my best consideration, it seems to me clear, that the plaintiff is entitled to some relief, though various questions have to be decided before determining the full extent of the relief which, if the bill is true, the plaintiff has a right to demand.

Judgment.

The bill relates to land in the Township of Oneida, in the County of Haldimand. On the 3rd September, 1838, letters patent of that date issued, purporting to grant to *George Sylvester Tiffany* and his heirs, a certain tract or parcel of land, comprising $345\frac{66}{100}$ acres therein described (and as to which no question arises), "together with all the lands west of this description which are or may be overflowed by the waters of" a certain creek, formerly known as Anderson's Creek, above the mill dam then erected upon the said creek and parcel of land. The bill alleges (sec. 9), that the defendants claim under this patent, not only the land which would be overflowed by means of the dam referred to in the patent, but all other lands "which they can further cause to be overflowed * * * by wantonly enlarging to the utmost the said mill dam, as well as by constructing such further and other dams and contrivances to raise the waters of such creek as they may see fit, * * and although such overflowing may be caused, not for any purpose of using or working * * any * * mill or machinery, but for the mere purpose of acquiring the fee simple of the lands so overflowable, and defining the boundaries thereof;" * * that (sec 11) the dam referred to in the patent had been removed before the issuing of the patent, and was not replaced for many years; that lately the defendants, who claim under *Tiffany*, have more than once "rebuilt said dam, sometimes to the same extent, and sometimes to a greater

1868.

Mutchmore v. Davis.

extent and size;" but that the new dams have at short intervals been removed; that there has been no mill or machinery on the premises since 1851; and that none is intended to be put up; but that during last summer the defendants constructed a new dam upon the site of the old one, though "much higher and more extensive, * * and thereby, after many years' abandonment and disuse * * of their alleged right, * * caused the waters of the said creek to again overflow all and much more than had been previously overflowed of the plaintiff's land, * * comprising very valuable timbered and wooded and arable meadow and pasture, portions of the plaintiff's said lands; * * all of which were, during all that time, thereby greatly injured, as well as the atmosphere of that part of the country made thereby, during all that time, sickly and dangerous to human life by reason of the noxious vapors and malarias which were thereby caused to arise and extend to the plaintiff's said lands, from the waters of the said creek so caused to overflow as aforesaid, and to become stagnant and emit such noxious vapors and malarias;" that the defendants threaten to renew the works (sec. 11) and thereby "raise the waters * * to the utmost possible extent, and thereby cause and force such waters to overflow almost all" the plaintiff's lands, "and greatly and unreasonably beyond what any purpose of (the grant), even if valid, would require, and will thereby irreparably ruin and destroy large quantities of valuable timber and trees now growing upon the said lands, * * as well as a large amount of the fences and costly improvements and buildings now thereupon, and produce great and lasting injury to the soil thereof, not for any purpose to which the said pretended Crown grant thereof to said *Tiffany*, his heirs and assigns, even if it were valid, would extend, but for the mere purpose of acquiring the fee simple of all the lands so overflowable as aforesaid;" and that, unless restrained by injunction, the defendants "will re-erect, make and continue the same" nuisances as

Judgment.

1868.

Mutchmore v. Davis.

formerly, "and worse nuisances, affecting the plaintiff and his property."

Now, having reference to these statements,—which are not concisely expressed, but are sufficiently clear and distinct,—and remembering the rule that a mere occupier can maintain a bill to restrain a nuisance (*a*), I do not see how it can be doubted that a general demurrer to the bill does not lie. If the claims of the parties had arisen from grants by a subject, or from transactions with a subject, of precisely the same character otherwise as those alleged, it was not disputed, and is, I apprehend, indisputable, that a bill by the plaintiff would lie to restrain the nuisance; and I cannot imagine a ground on which this right is to be withheld because the dealings of the parties were with the Crown. If there are supposed to be technical difficulties in the way of repealing the patent to *Tiffany* at the suit of the plaintiff, I perceive no such difficulty in the way of the limited relief asked on the foundation of nuisance. This part of the bill is not remarked upon in the judgment in the Court below, and my brother *Spragge* informs me it was not presented to his attention at the bar; but it was discussed on the appeal, and, so far as I recollect, or as my notes indicate, without objection on the part of the respondents.

Judgment.

I do not say that an injunction is the only relief to which the plaintiff shews an equity; and I do not think that the other relief prayed, so far as it concerns the defendants other than the Crown, is such as can only be granted at the suit of the *Attorney General*. I say nothing at present as to relief against the Crown; but as regards any relief against a fellow subject, where it does not militate against the interest of the Crown, I do not perceive how a Court of Equity can refuse relief on the mere ground

(*a*) See Kerr on Injunctions, 336, and 351, and cases cited.

1868.

Mutchmore v. Davis.

that the validity of a patent comes in question. On the contrary, if the case is one in which, had both parties derived, or claimed to derive, title through a third person, the plaintiff would be entitled to a decree,—I think he must be entitled to it though both claim immediately under the Crown.

Part of the property which the plaintiff claims, he holds under a patent subsequent to *Tiffany's*, and part under a contract of purchase with the Crown. As to the former—the right of a subsequent grantee of a private individual to set aside a prior grant voidable in equity, though good at law, is clear (*a*). This right is, in such a case, "incidental to the conveyance of the property, and passes with it" (*b*). *Prosser* v. *Edmonds*, decided by Lord *Abinger* in 1835 (*c*), has been referred to as opposed to this view. I am not aware that the doctrine of that case has ever hitherto been thought applicable to an assignment by the Crown. Assignments by the Crown of a chose in action are valid even at law, and the assignee can sue at law in his own name (*d*). But viewing the case as between subjects, *Prosser* v. *Edmonds* is not an authority against the bill, for, as the Master of the Rolls pointed out in *Dickenson* v. *Burrell*, "The distinction is this: if *James Dickenson* [the party under whose deed the plaintiff claimed] had sold or conveyed the right to sue to set aside the [prior instrument] without conveying the property or his interest in the property, * * that would not have enabled the grantee *A. B.* to maintain this bill; but if *A. B.* had bought the whole of the interest of *James Dickenson* in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it, in my opinion, a right

Judgment.

(*a*) Dickinson v. Burrell, Law Rep. 1 Eq. 337.
(*b*) *Ib.* 342.
(*c*) 1 Y. & C. Ex. 481.
(*d*) Miles v. Williams, 1 Wils. 252; Earl of Stafford v. Buckley, 2 Ves. Senr. at p. 181; Lambert v. Taylor, 4 B. & C. 138.

1868.

Mutchmore v. Davis.

which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it" (*a*). A jurisdiction having been conferred on the Court of Chancery to set aside, at the instance of parties interested, "patents issued through fraud, or in error or improvidence" (*b*), it seems to follow inevitably that the right to sue, which the plaintiff claims in respect of the land he holds under patent, is incidental to the property thereby conveyed, and that we cannot decline giving effect to it.

But, in point of form, the bill is objectionable as to this part of the case, not because it is not concisely expressed, but because it is wanting in some allegations that are material. It is in fact too concise on this point, for it alleges that "the plaintiff is, by title derived through a purchaser for value and patentee thereof from the Crown, by a patent deed of conveyance issued subsequently to the issuing of the said patent to the said *George Sylvester Tiffany*, the owner of" &c.; and there is no allegation as to how he derived title from the purchaser and patentee referred to, whether by descent, conveyance, &c. The cases collected in *Lewis* on Equity Drafting (*c*) shew how this part of the plaintiff's case should have been stated.

Judgment.

The plaintiff's claim to relief against *Tiffany's* patent, in respect of the land which the plaintiff has occupied and improved on the faith of a contract of purchase, and for which he has not yet obtained a patent,—stands on a different footing. The rule of the Court is, that a purchaser is not entitled to relief against a prior grantee of

(*a*) *Ib.* See also per *Esten*, V. C., in Martin v. Kennedy, 4 Grant, 92, 93; Baby *q. t.* v. Watson, 11 U. C. Q. B. 531; Mason v. Jones, 11 Gr. 460.

(*b*) Consol. Stat. ch. 22, sec. 25; 23 Vic. ch. 2, sec. 25, U. C. Consol. 12, sec. 26, sub-sec. 9.

(*c*) Page 26, *et seq.*

1868.

Mutchmore v. Davis.

his vendor, until such purchaser has completed his purchase, and taken a conveyance. But it having been decided in *Martin* v. *Kennedy* (*a*) and other cases, and being now the law of the Court, that the right to impeach a patent as plaintiff may exist without such an equity as would have given a right to impeach a grant by a private person, I think the suggested restriction of this right to cases in which the interest of the plaintiff arose before the issuing of the impeached patent, is arbitrary, and not to be adopted. Such a restriction receives no support from the language of the Statutes which conferred on the Court jurisdiction to interfere with patents. Nor is any such support claimed for it. No such limitation was suggested in the leading case of *Martin* v. *Kennedy* where, however, it was contended, that the suit must be by the *Attorney General*. That contention was negatived by the Court in the following language: "The arguments against this view appear to be, that the analogy on which it rests does not seem to support it in its full extent, inasmuch as authority exists to shew that a *scire facias* to repeal a patent may issue at the Common Law in the name and at the instance of a subject; and, no doubt, if this Act permits a proceeding in the name and at the suit of a subject, it must be by bill; that for the purpose of permitting an information at the suit or in the name of the Crown, the Act does not seem to have been required, the Crown, it seems, not being confined to a *scire facias* to repeal a patent, but, as it is entitled by its prerogative to sue in whatever Court it pleases, and may require a discovery in order to enforce its rights, might without this Act, in any of the cases specified in it, have proceeded itself, or have permitted a subject to proceed in its name, by information in this Court (*b*); that the words of the 29th clause, in describing the form

Judgment.

(*a*) 4 Grant, 96. See Tasker v. Small, 3 M. & C. 70.

(*b*) Vide Attorney-General v. Vernon, 1 Vern. 277, 370.

1868.

Mutchmore v. Davis.

of proceeding, are 'action, bill, or plaint,' excluding 'information,' perhaps because not required; while it cannot be supposed, that, if this clause was introduced into the Act merely to enable the Crown to proceed, or permit a proceeding, in its own name in this Court, any other form of proceeding than an information would have been contemplated, an information being altogether as short and convenient as a bill, and much more suitable to the dignity of the Crown; and that the relief is to be administered 'upon hearing the parties interested,' a form of expression which would indeed, if necessary, include the Crown, but is not likely to have been employed on the hypothesis suggested. For these reasons, I consider that in a case within the Act, a bill in Equity may be exhibited at the suit of the party aggrieved." This view has been acquiesced in by the Crown and otherwise ever since; many bills have been brought by individuals impeaching patents on similar grounds during the fifteen years which have elapsed since that decision was pronounced; and it seems impossible to doubt, and I believe nobody does doubt, that suits by private individuals were contemplated by the Legislature, and are within the words and the meaning of the Act.

Judgment.

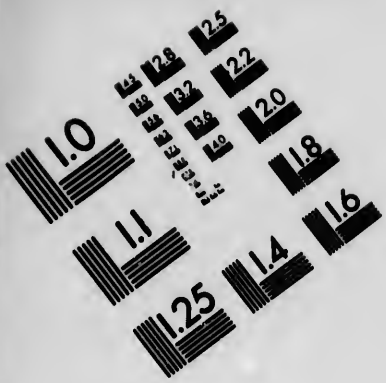
Now, in regard to the interest which is to entitle a private individual to bring such a suit, to draw a line between interests accruing before, and interests accruing after, the issuing of the impeached patent, and to disregard all equities which a case of the latter kind may present, seems to me to be entirely unwarranted, and to be against all analogy and sound reason. No equity could be stronger than that which this plaintiff sets up. His story is, that, at the time of his purchase from the Crown, the Crown was, with the knowledge of the holder of the prior and impeached patent, dealing with the property as ungranted land; that the plaintiff entered in good faith into the contract to purchase; that

1868.

Mutchmore v. Davis.

on the faith of the purchase being valid, he paid to the Crown an instalment of the purchase money; that the Crown accepted his money; that the usual receipt was given to him by the Crown Lands' Agent; that he holds this receipt still; that he went into possession of the land he thus bought, and made valuable improvements upon it, before having any notice of the adverse claim which he seeks now to impeach. Some of the grounds on which he impeaches this adverse claim are, that the grant to *Tiffany*, as respects the land intended to be included in the general description of lands "which are or may be overflowed by the waters of the said creek," was a free grant; that this general description was not supposed by the Crown to comprise the land now claimed by the plaintiff; that the Crown did not intend to grant this land to *Tiffany*; that the patent, so far as relates to the land covered by this general description, was obtained by falsely representing the situation and nature of the land around to be such that the overflowable land was a small piece of drowned land not extending to the lands now claimed by the plaintiff; that, so far as relates to these lands, Her Majesty, as far as possible, repudiated the patent to *Tiffany*, and did so with the acquiescence of *Tiffany*, his heirs and assigns; that *Tiffany*, his heirs and assigns, had full notice and knowledge that Her Majesty was, through her agents and officers, offering for sale and making sales of these lands to the plaintiff and others, and did not object thereto, or in any way attempt to enforce their pretended rights in respect thereof. No equity could be higher than that which these allegations make out in favor of the plaintiff, or could afford stronger reason for allowing a party to make good his own title by getting out of the way a prior patent which, according to the bill, was at once a fraud on the Crown, and a fraud on all who, in ignorance of the claim made under it, should afterwards purchase the land which its description was wrongfully contrived to cover. These

Judgment.



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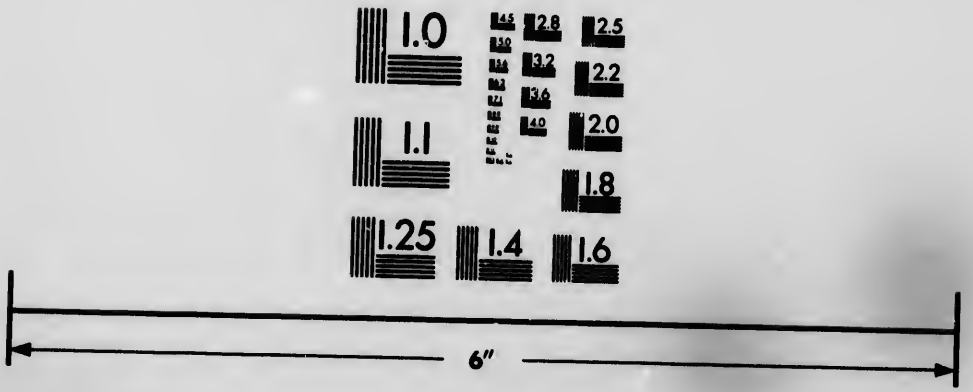

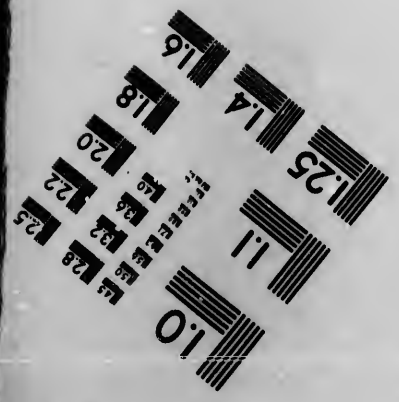

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1868.

Mutchmore v. Davis.

statements of the bill may be all false, but on this demurrer they must be taken to be all true, and we must adjudge accordingly.

The learned counsel for the defendants contended that the statements having reference to this part of the case were too vague to sustain the bill; but, rejecting all which are open to criticism on this ground, I think enough remains for the plaintiff's purpose.

The bill sets up some other objections to *Tiffany's* patent, which, in the view I take of the case, it has not been necessary for me to consider, and some of which appear to be such as a private individual ought not to be permitted to raise.

Judgment.

It is not to be supposed that the Crown desires to uphold a fraudulently obtained patent against a *bona fide* purchaser without notice of such patent, whose money the Crown has accepted, and who has expended his means in improvements on the faith of his purchase. The case, according to the bill, is not one of inconsistent patents issued through mistake by the officers of the Crown, without any fraud on the part of anybody. One can understand why, on the whole, in such a case of mere mistake, especially if the first patentee or his representatives had improved the property, and the second purchaser or patentee and his representatives had not done so, the Crown might justly prefer to leave the erroneous patent in force, giving compensation to the second grantee. But a case of a fraudulently obtained patent, in circumstances like those alleged by the plaintiff here, is in an entirely different position; and if, even here, the Crown, for some reason which the allegations of the bill do not suggest, wishes to leave the impeached patent untouched, the Crown will say so in its answer; and such effect as that desire is entitled to will be given to it at the hearing of the cause; but for the Court to

refuse, at the outset, in all cases indiscriminately, to give relief to a subsequent and *bona fide* purchaser, because in some cases such relief may be inequitable, and against the policy of the day,—instead of leaving such special cases to be dealt with specially,—is surely as little to be defended by reason, as by the language of the Statute.

1868.

Mutchmore v. Davis.

In England the Crown gives, almost as of course, to any *bona fide* applicant who considers himself aggrieved, leave to use the name of the *Attorney General* in an information to try the question. Indeed, so nearly a matter of course had this become, that the contention was raised, though unsuccessfully, that leave could not constitutionally be refused in any case. The signature of the *Attorney General* to the information being obtained, the aggrieved party is left to employ his own solicitor and counsel to conduct the suit, and he carries it on at his own risk and expense. The Crown requires him, also, to name a relator, who is responsible to the opposite party for the costs of the defence, in case he should shew himself entitled to them; and the *Attorney General*, after signing the information and giving his official sanction to the suit, may appear as counsel for the defendant. But in this country, there has often been great difficulty in the way of an applicant for leave to file an information, and the leave has sometimes been withheld when in England it probably would have been granted. A Government in sanctioning an information seems to prejudge the case—to assume the story of the applicant to be true on all points, though it may be controverted on some points that are material, and which the machinery of a Court is necessary to determine satisfactorily; and the opposite party thinks it hard that the whole weight of the authority of the Crown should be given, in advance, in favor of the complaints that are made against him. To permit parties to litigate questions between them in their own

Judgment.

1868.

Mutchmore v. Davis.

names, relieves the *Attorney General* from a responsibility that it is sometimes inconvenient to assume; and the just rights of parties ought, in a free country, to depend, as little as possible, on the mere will of any public officer. I think, therefore, that we ought not to create disqualifications in the way of litigants which the books do not compel us to lay down. So far as to the demurrer of the defendants other than the *Attorney General.*

The demurrer of the *Attorney General* was not argued in the Court below, it having been stated at the bar that it raised the same questions as the demurrer of the other defendants. But this, I perceive, was a mistake. The demurrer of the *Attorney General* is to part only of the bill, viz., to so much of it as prays relief against the Crown. Now the demurrer of the other defendants was allowed on the ground that the

Judgment.

plaintiff had no right to sue. By demurring to part only of the relief prayed, the *Attorney General* admitted that the plaintiff had a right to sue, and to some relief and could not set up an objection of this kind. This was expressly held in *Gilbert* v. *Lewis* (*a*). As to the objection, that the Court has no jurisdiction to direct the plaintiff "to pay the residue of his purchase money," and "to thereupon receive a patent or deed of conveyance from the Crown of the lands" comprised in his contract,—which is the part of the prayer to which the *Attorney General's* demurrer is confined,—I believe no such relief has hitherto been granted in any case; but the Statute establishing this Court gave the Court express jurisdiction "to decree the issue of Letters Patent from the Crown to rightful claimants" (*b*); and I do not know in what cases this jurisdiction is to be exercised,

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(*a*) 1 DeG. J. & Smith, at 49.

(*b*) Consol Stat. U. C. ch. 12. sec. 26. No. 8. Page, 51. Vide Latour v. The Attorney General, 11 Jur. N. S. 7; 23 & 24 Vic. ch. 34 (Impl).

if it cannot be invoked by a purchaser in whose way, and that of the Crown, fraud in obtaining a prior patent has placed a difficulty, which the intervention of this Court is needed to remove. 1868. Mutchmore v. Davis.

I think both demurrers should have been overruled; but, in consequence of the inartificial structure and great prolixity of the bill, without costs.

Per Curiam.—Appeal dismissed with costs.

[A. WILSON, J., and MOWAT, V.C., dissenting.]

IN CHANCERY.

SCOTT v. HUNTER.

Fraudulent conveyance—Evidence—Costs.

A bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved failed to establish more than a case of suspicions against the *bona fides* of the transaction; and the same relief having been sought in a bill by other creditors who were also the personal representatives of the debtor and which relief was refused, the Court in dismissing the present bill did so with costs, notwithstanding the reasons for doubting the *bona fides* of the transaction.

Statement. The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband: *Held*, that, notwithstanding such interest, on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed.

Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property.

The facts giving rise to this suit appear sufficiently in the judgment and the report of the case of *Ferguson* v. *Kilty*, *ante* volume x. page 102. The cause was brought on for the examination of witnesses and hearing at the sittings at Brantford.

Mr. *W. H. C. Kerr*, for the plaintiff.

Mr. *E. B. Wood*, for the defendant *Towner*.

Mr. *V. Mackenzie*, for the representatives of *Wilkins*.

1868.

Scott v. Hunter.

SPRAGGE V. C.—This is a bill filed by a creditor on behalf of himself and all other creditors of *John Francis Bradley*, deceased, to set aside certain conveyances as void, under the Statute 13th Elizabeth. The conveyances impeached are a conveyance from *Bradley* to defendant *Kilty*, and two conveyances from *Kilty* of different parcels of the land conveyed to him by *Bradley*—one to *Towner*, the other to *Wilkins*. The same conveyances were impeached in a suit instituted by *Ferguson* and *McDonald*, creditors and administrators, with the will annexed of the estate of *Bradley* against *Kilty*, *Towner* and *Wilkins*. That suit was before the Chancellor upon demurrer in 1863, and before me upon hearing in the same year. I granted such relief as I conceived the plaintiffs in that suit proved themselves to be entitled to, but less than was sought in that, and is sought in this suit. For the circumstances it is sufficient to refer to the report of the former case (*a*). The plaintiffs in this case have given further evidence to prove, what I thought the plaintiffs in the former case failed to prove, notice to the purchasers *Towner* and *Wilkins*.

Judgment.

The most material witness upon that point is Mrs. *Mary Wright*, the widow of *Bradley*. She was not called in the former suit, and in this suit it is objected that she is not a competent witness. She also speaks as to the circumstances of her late husband at the date of his conveyance to *Kilty*, and of the purpose with which that conveyance was made. It will be convenient to consider in the first place the question of her competency.

The objection is that she is entitled to an annuity under her husband's will and is or may be entitled to dower in the land in question. In the will there is a bequest of an annuity of £50, to be reduced to £12 10s.

(*a*) 10 Gr. 102.

1868.

Scott v. Hunter.

in the event of her marrying again, and it is not made a charge upon the real estate. She joined for the purpose of barring her dower in the conveyance to *Kilty*. The learned counsel who took the objection referred me to two cases: *Bank of Upper Canada* v. *Thomas*, in appeal (*a*), and *Miller* v. *Wiley* (*b*). In the former case, which was, like this, a suit by creditors to set aside a conveyance as void under the Statute, and in which conveyance the widow had, as in this case, joined to bar her dower, the creditors complained that the decree did not go far enough, that while setting aside the conveyance it should have gone on to give them the benefit of the dower. The Court negatived this, and the decision goes no further. The Court did not decide to whom the dower belonged, simply and expressly because it was a point which the Court was not called upon to decide. *Miller* v. *Wiley* decides only this: that when husband and wife join in a conveyance of land, wherein the estate of the husband had been divested by Sheriff's sale and conveyance, the wife joining with her husband only in order to bar her dower—her dower was not thereby barred. The latter case has no application; and, in the former, the point upon which alone an argument against the competency of the witness could be founded was not decided. It is not necessary to decide whether or not the dower did revest in the wife; for if it did revest, it could only give the dowress an interest in the event of the suit; and interest merely does not disqualify. She is not a "person in whose immediate or individual behalf" the suit is brought or defended, either in whole or in part. Its constitution shews this, as clearly as any further explanation can do.

Judgment.

The evidence of Mrs. *Wright* clearly proves notice to *Towner*. It is in substance this; that *Towner* went to her, stating that there was a verbal agreement between

(*a*) 2d Er. & App. 502. (*b*) 3 VanK. 369.

him and *Kilty* for the purchase of the place; that he had been told by different persons that *Kilty* had no right to sell, and that he came to her to know the particulars; and she says that she explained to him that a large claim was coming against her husband upon his mill property, and other claims besides, and that the conveyance to *Kilty* was in order to enable her husband to sell the property without its being sacrificed; that the arrangement was that *Kilty* should only hold the property for a certain time. She adds upon cross-examination, that she does not think that her husband's property would have been sufficient at the time of his death for the payment of all his debts if sold by the Sheriff; that she does not think that *Kilty* had authority to sell the property; he was to receive the rents: and she adds that it was not intended to defraud creditors, but to give her husband time to pay his debts.

1868.

Scott v. Hunter.

There is other evidence confirmatory of this evidence of notice to *Towner*, which was however, by itself attended with this difficulty, that the witnesses were unable to state with sufficient certainty, that their conversations with him were before his purchase; that difficulty is in a great measure removed by *Towner's* statement to the widow before his purchase that he had at that time been told by different persons that *Kilty* had no right to sell. It is a fair inference that among these different persons were those, or some of those, who have given evidence of his conversations with them upon that subject. The unusual provision in the mortgage given by *Towner* to *Kilty* that he, *Towner*, should not be liable for unpaid purchase money is suggestive, at least, of the probability that he had reason to doubt the right of *Kilty* to convey to him. I think it is established by the evidence that the conveyance to *Kilty* was upon a secret trust; as put by the bill, that it was upon the understanding that notwithstanding the conveyance and mortgage, the land should remain the property of

Judgment.

1868. Scott v. Hunter.

Bradley ; and that the object was to delay creditors. All this is confessed by *Kilty* against whom this bill as well as the former one is taken *pro confesso*, and the fact is proved by evidence against the other defendants, and notice thereof is proved against *Towner*.

It is also proved that *Bradley* was pressed with debts at or about the time of his conveyance to *Kilty*.

With regard to the *locus standi* of the plaintiff, I do not find among the papers any *fi. fa.* at his suit against the lands of *Bradley*, nor any evidence of such writ being issued and placed in the hands of the Sheriff; but as no objection was taken on that score, I infer that the defendants had ascertained that such writ was issued and lodged with the Sheriff. Evidence of the fact may be supplied by affidavit. Exception was taken to the evidence in proof of the recovery of the plaintiff's judgment, which was in a Division Court. The procedure book was produced by the Clerk of the Division Court, and he gave evidence in regard to it and to the transcript of judgment under which I infer a *fi. fa.* may have issued. The transcript of judgment appears by the evidence to have been put in, but is not among the papers. The plaintiff had leave at the hearing to produce a record of the judgment. The Clerk stated in evidence, that when a judgment is given in a Division Court it is entered in open Court, on the summons, by the Clerk. A paper purporting to be a summons at the suit of this plaintiff against *Bradley*, dated 13th November, 1857, has since been put in and on it is indorsed, "judgment for plaintiff, to be paid forthwith, for £17 10s." This is not signed nor in any way authenticated that I can see. Whether this constitutes a record of a judgment in a Division Court, I confess myself unable to say. The plaintiff has not referred me to any Statute or other authority upon the point. I understood it to be his object to shew himself a creditor at the date of the summons. I have thought

Judgment.

it better, however, not to delay giving judgment in the case on account of the absence of this formal proof, which may be supplied by affidavit, and may be spoken to upon the minutes if necessary.

1868.

Scott v. Hunter.

Evidence has been given on behalf of the defendant *Clarke*, who claims under *Towner*, of considerable improvements made by *Towner* and himself upon the premises purchased by *Towner*, and it is contended that payment for these improvements ought to be made a term of the plaintiff's obtaining a decree. Upon the termination of the former suit, the purchasers had some reason to suppose that the relief as to them would be limited to what was then decreed; and *Towner* probably felt safe in thereafter dealing with the property as his own; this was a mistake, as the plaintiffs in the former suit were obliged to stand as plaintiffs only in one character, that of personal representatives of *Bradley*, and a decree in such a suit could be no bar to a suit by *Bradley's* creditors; nor is it indeed contended that it is so. Still it is a misapprehension into which the purchasers might very well fall; and if I could see my way to allowing to the defendant, *Clarke*, the value of the improvements made since the former decree, limiting the same to the amount, by which the value thereof would be enhanced upon a sale, I should be disposed to do so. But my difficulty is, that the Statute makes void conveyances made under such circumstances; in the words of the Statute they shall be deemed and taken to be as against creditors "utterly void, frustrate and of none effect," and I do not see how I can, when the evidence does, in my judgment, establish them to be of a character which brings them within the mischief of the Statute, refuse to give effect to the Statute except upon a condition. If counsel for *Clarke* think they can find any authority for what they ask, I shall be very willing to hear them. I have abstained from saying anything as to that part of the case which particularly

Judgment.

1868. affects those claiming under *Wilkins*, as I am informed, through the plaintiff's solicitor, that an arrangement is in progress between himself and those parties, which, if carried out, will be mutually satisfactory; and I have been requested, therefore, not to give judgment on that part of the case. The arrangement must, of course, be such as will not prejudice the representatives of *Towner* in the way of costs or otherwise, and the plaintiff must also consider what may be the effect of his having filed his bill on behalf of himself and all other creditors of *Bradley*.

Scott v. Hunter.

I am informed some little time after disposing of the case as against the representatives of *Towner*, that the treaty for compromise between the plaintiff and the representatives of *Wilkins* has fallen through; and I am requested to dispose of the case as between those parties.

Judgment.

The question is, whether *Wilkins* before his purchase had notice that the conveyance to *Kilty* was not *bona fide*, but upon a secret trust in order to hinder creditors. In *Ferguson* v. *Kilty*, it was stated in evidence that *Wilkins* was one of the principal creditors of the estate of *Bradley*. In that case no evidence was given of notice to *Wilkins*. In this case the only evidence of notice to him, is that of Mrs. *Wright*, formerly the widow of *Bradley*, and it consists of this short passage: "I saw *Wilkins* in the fall after my husband's death: he said he had some thoughts of administering: he said that he knew that *Kilty* held the property; and thought he could arrange with him for a trifle: he said he would go and see *Kilty*, and come and see me again, which he never did. I do not think the mortgage was mentioned," *i. e.* the mortgage from *Kilty* to *Bradley*.

Bradley died—he was killed in his saw-mill—in the

1868.

Scott v. Hunter.

summer of 1858. This conversation was in the autumn of the same year. The conveyance from *Kilty* to *Wilkins* is dated 22nd February, 1861, and a paper is produced dated 5th March in the same year, which refers to a note held by *Wilkins* against one *Brown* for $1000, and which it states was agreed to be given by *Wilkins* to *Kilty* in part payment of purchase money; the paper refers to certain threatened judgments, and a Chancery suit, and it is thereby in substance agreed that if *Kilty* should protect *Wilkins* against them, then the note should be given to him, but if the judgments or Chancery suits should be sustained against the property, then the note to remain the property of *Wilkins*. This last paper taken by itself would rather indicate some new alarm in regard to the title after he had obtained his conveyance. But one cannot read what passed between *Wilkins* and the widow without suspicion that he knew of the arrangement between *Bradley* and *Kilty*, and the real nature of the transaction. But knowing, as we do now, the real nature of that transaction, we are apt to interpret his words in a sense, which would apply to their real nature as now known; when the question really is whether they by themselves import such knowledge? I do not know that they do, necessarily. *Wilkins*, a principal creditor, thought of administering—the widow was named as executrix, but declined to take out probate—he might be guided in his determination to administer or not, by the result of his interview with *Kilty*. If he could for a trifle get the lands in question out of his hands, it might so add to the value of the estate, that it might be worth his while to administer, otherwise not; he said he knew that *Kilty* held the lands, not that he knew *how* he held them. He did not return to Mrs. *Bradley*, he did not administer, and some sixteen or eighteen months afterwards he made his purchase; and the conversation between him and the widow is narrated by her about eight years and a half after it occurred. It does not appear that she explained to *Wilkins*, as

Judgment.

1868.

Scott v. Hunter.

she did to *Towner* what the real nature of the arrangement with *Kilty* was; we have only the few words, which she relates from memory, after so long an interval. I have no reason to doubt that Mrs *Wright* meant to state truly and correctly what passed, but, assuming that she understood *Wilkins* correctly, it is scarcely possible that at this distance of time, we can have anything more than the impression produced in her mind at the time, reproduced in her own words, and it is to be remembered that *she* knew all about the transaction with *Kilty* and may have assumed that *Wilkins* knew it also, and so the impression produced on her mind at the time may have been owing in some degree to that assumption. I do not think it would be safe to hold it proved upon this piece of evidence, that *Wilkins* knew the real nature of the transaction between *Bradley* and *Kilty*. There may be reason for suspecting that he did; but suspicion is not sufficient ground for a decree: and it is perhaps almost too much to say that this evidence affords sufficient grounds for suspicion after the explicit denial of notice contained in *Wilkins's* answer in the suit of *Ferguson* v. *Kilty*.

Judgment.

I think that the representatives of *Wilkins* should have their costs. In cases of suspicion they are sometimes refused on that ground, as in *Hall* v. *The Saloon Omnibus Company*, (*a*). But this is the second suit in which it has been sought to prove notice against him. He has died since the first, and his representatives are placed at the disadvantage, that must always attend a case where questions of notice, or of conduct, have to be met by representatives of an estate, instead of by the person principally concerned; and this has been through the fault of the plaintiff in this suit, for the dates that I have given shew very great delay on his part.

(*a*) 4 Drew. 499.

There can be no relief as to the estate of *Wilkins* beyond that given in *Ferguson* v. *Kilty*. 1868.

Scott v. Hunter.

It would be convenient that the two suits should be consolidated.

TRUST AND LOAN COMPANY v. MONK

25 *Vic. ch.* 72—*Execution of conveyances under, by plaintiff's commissioners—Powers of attorney.*

A purchaser of lands in Canada from the Trust and Loan Company, cannot insist upon a conveyance under the corporate seal of the Company, for, it being an English Company, it would be highly inconvenient if all conveyances had to be sent to England for execution, and the Statute 25 Victoria, chapter 72, effectually provides against the doubts and difficulties in a title, to which the execution of conveyances under powers of attorney ordinarily give rise.

But the Company is bound to place the purchaser in the same position, as nearly as may be, as if the conveyance were directly by the Company, and therefore it should provide and annex to the conveyance executed by the commissioners referred to in the above Act, a certified copy of the commission or power of attorney authorizing them to act for the Company.

An execution by one of two or more commissioners, whose appointment is authenticated as provided by the above Act, is not a compliance with its provisions, and a purchaser is not bound to accept a conveyance so executed.

Statement.

The plaintiffs were an English Company empowered by the Statute 7 Victoria, chapter 63, to acquire lands, &c., in Canada, and the Directors thereof were empowered and authorized to sell, lease, and deal with such lands, &c., as the Company might acquire, in the same manner as if said lands, &c., were owned, not by a body corporate, but by any subject being *sui juris* or of full age. By the same Act, and its charter

1868.

Trust and Loan Co. v. Monk.

of incorporation, the affairs of the Company in Canada were to be conducted by Commissioners or other officers appointed by the Directors.

The Directors appointed two Commissioners to conduct the affairs of the Company in Canada, and to execute deeds and other documents relating to the mortgage or sale of lands, and to perform other acts on behalf of the Company, and the commission or power of attorney conferring such appointment was duly registered as required by the Statute 25 Victoria, chapter 72, which enacts, that upon compliance with certain specified requisitions, the production of an office-copy of the commission or power of attorney appointing the Commissioners, "shall be sufficient evidence of the power and authority of the person or persons therein named to act for the Company, in the manner, and for the purposes, set forth in the commission or power of attorney," until publication in the official *Gazette* of an instrument revoking it.

The lands in this cause were sold under a decree for sale and at the sale the defendant *Pinhey* became the purchaser. In settling the conveyance to him in the Master's office the Master decided that the purchaser was bound to accept a conveyance executed by one only of the two Commissioners appointed as above. From this decision the purchaser appealed.

Mr. *J. A. Boyd*, for the appeal.

Mr. *Moss*, contra.

Judgment.

SPRAGGE, V. C.—This is an appeal by the purchaser of certain lands, who is entitled to a conveyance from the plaintiffs, from a direction of the Master at Kingston in regard to the execution of the conveyance. The

1868.

Trust and Loan Co. v. Monk.

Master held that an execution by one of the two Commissioners appointed by the plaintiffs under the Statute 25 Victoria, chapter 72, was such an execution as the purchaser was bound to accept. The purchaser, on the other hand contended before the Master, and renews the same contention before me, that he is in strictness entitled to a conveyance under the plaintiffs' corporate seal; but at the same time expressing himself content both before the Master and on appeal with an execution of the conveyance, under the Statute by both the Commissioners.

Judgment.

Upon the question whether a purchaser is not bound to accept a conveyance under the Statute, I agree with Mr. *Moss*. The instruments to be executed by, or on behalf of the plaintiffs, are thus enumerated in the Statute assignment, deed, release or acquittance of mortgage, lease or other conveyance, or memorials thereof. The plaintiffs are an English Company; and it would obviously be, to say the least of it, in the highest degree inconvenient to send these various documents to England in order to their execution under the corporate seal of the Company, and I think that the Court will not require this to be done, unless it be shewn that an execution in the mode pointed out by the Statute would entail upon the purchaser doubts and difficulties, in regard to his title, to which it would be unreasonable to subject him—such doubts and difficulties as have induced the Courts both of Law and Equity, to lay down as a general rule, that a purchaser is not bound to accept a conveyance from his vendor, executed by his vendor's attorney. They are of this nature. The power of attorney may have been revoked by the act of the vendor or by his death, or, it may be by his insanity; in which case there would be no execution at all: and when the power of attorney is in force there is still, what the cases call, the multiplying of proofs, a trouble and risk to which a purchaser

1868.

Trust and Loan Co. v. Monk.

should not be subjected, unless for very substantial reasons. But these doubts and difficulties appear to be effectually provided against by the Statute. The commissions or other instruments, under which the affairs of the Company are conducted in Canada, and documents are executed, are required to be registered in *extenso*, and filed in the office of the Provincial Secretary, and published in the official *Gazette;* and the production of an office-copy of such Commission, certified by the Provincial Secretary, is made receivable in all Courts of Law and Equity, in proof of the authority of the commissioners, until publication in the *Gazette* of the registration of some deed or instrument revoking such commission. The danger of a secret, or unknown revocation which exists in the case of an ordinary execution by attorney is obviated; and a ready mode of proof is provided.

Judgment.

For these reasons I think a purchaser bound to accept a conveyance under the Statute. At the same time I think the Company bound to place the purchaser in the same position, as near as may be, as if the conveyance were directly by the Company; and not to leave the purchaser to provide, at his own expense, proof of the authenticity of the commission, under which his conveyance is executed, and for this purpose that a certified copy of the commission furnished by the Company should be annexed to the conveyance. This would entail scarcely any trouble, and, I suppose, but little expense upon the Company: but at any rate it is upon the Company, and not upon the purchaser, that such trouble and expense should fall.

Upon the other point I agree with Mr. *Boyd*. It is not necessary that I should hold that a conveyance executed by one, of two or more Commissioners, would be invalid. It is a sufficient objection by the purchaser if it admits of reasonable doubt: for a purchaser ought

not to be exposed to the chance of having his conveyance held invalid by other Judges, of this or other Courts, or be put to take a conveyance which renders his title less marketable. When the question is one of title, the purchaser is not bound to take one that is doubtful, and a purchaser is always bound to make to a willing purchaser, a title as good, and as free from doubt, as he can. And in a case like this, where what is required by the purchaser involves neither additional trouble nor expense to the vendors, it behoves the vendors to shew, that what this purchaser requires is clearly unnecessary. It is upon this principle that I shall proceed in examining the Statute.

1868.

Trust and Loan Co. v. Monk.

The second section relates to the registration of the instruments executed under the Statute. Taking that section by itself it would appear then, that the Statute contemplated the execution of instruments by all the Commissioners. It speaks of the production to the Registrar of instruments or memorials thereof "which shall purport to be executed by the persons whose names are stated in the notice required to be published in the *Gazette*, as having power and authority to act for the Company." Now this is material in two aspects, one is a help to the interpretation of the Statute; the other in relation to the registration of the conveyance. When an instrument and memorial are produced to the Registrar purporting to be executed as in this section described certain proofs are dispensed with, but when the execution does not purport to be in the manner so described, a Registrar might with some reason (it is not necessary to say more) refuse to register, without the proofs which, upon instruments purporting to be executed by all the Commissioners are dispensed with by the Statute. He might say honestly, and not unreasonably, that it is only when the execution is by all, that he has authority to dispense with the ordinary proofs, and I am not prepared to say that he would be wrong.

Judgment.

1868.

Trust and Loan Co. v. Monk.

The form of conveyance given in Schedule A. does however imply that a conveyance need not be by all the Commissioners, for it gives in the usual shape, blanks for two names, describing them as "two of the persons named in a certain power of attorney" &c., which the Statute elsewhere calls their commission. This supposes a commission to more than two, and a conveyance executed by two.

The first section implies that the commission may be to one only; in providing that an office-copy certified, shall be evidence "of the power and authority of the person or persons therein named." But the most that can be said is that this is implied, and it may be open to this construction that the words person or persons mean all and every person or persons; that is, that the office-copy shall be evidence of the authority of all and every person or persons named therein; and such construction would be favored by the circumstance, that almost all the other clauses of the Act, assume a plurality of Commissioners.

Judgment.

But assuming that one Commissioner might be appointed, and that if appointed he could validly convey under the Act; it does not follow that when two or more are appointed, a conveyance by one would be valid. It is at all events a point not free from doubt.

Upon these points it is not necessary that I should express, and I do not express any opinion beyond this, that they are not free from reasonable doubt; and therefore that what the purchaser required to free his title from doubt, to make it more marketable, and to save trouble and expense in the way of proof, and to facilitate registration should not have been refused to him.

Whether this refusal arose from a desire to save trouble in this particular case, which would have been

very small, not to be weighed against the trouble, doubts and expense which might have been entailed upon the purchaser; or whether it arose from a desire to have a judicial determination upon the point raised; whichever the motive or reason, it is a case in which the costs of the appeal should fall upon the Company.

1868.

Trust and Loan Co. v. Monk.

It subsequently appearing that, at the time of the execution of the deed in question, one of the Commissioners of the Company was dead, and his successor had not been appointed, the matter was spoken to by counsel as to the question of costs.

Judgment.

SPRAGGE, V. C.—In the argument before me of the appeal in this case from the Master's ruling that a party taking a conveyance from the plaintiffs was entitled only to an execution of the same by one Commissioner of the Company, the counsel who argued the appeal were under a misapprehension as to a material fact. They assumed that the Company had two Commissioners in Canada, and I, proceeding upon that assumption held the Company bound, for reasons which appear in my judgment, to have conveyances executed by both; that purchasers who desired it were entitled to have an execution by both, and I gave the costs of the appeal against the Company, on the ground that they had refused what was reasonable and was in their power to do, and that whether their refusal arose from a desire to avoid trouble, or to have a judicial decision upon the point raised; the costs of the appeal should fall upon the Company.

It now appears that one of the two Commissioners was dead, so that there was no refusal by the Company in

1868.

Trust and Loan Co. v. Monk.

the sense in which it was presented to me; and counsel for the Company, while acquiescing in the view that I took, as to costs, as well as to the rights of the purchaser upon the case presented to me, asks that under the real facts of the case now disclosed, the Company should not be ordered to pay costs.

I think this is reasonable; the reasons which influenced me to give costs, do not exist; the question argued was different from the question which would arise upon the real facts; and upon the real facts I think it is not a case for giving costs against the Company.

The parties do not propose to re-argue the point appealed; as the Company expect the Legislature to give express validity to conveyances executed by one Commissioner.

Judgment.

1868.

WHITESIDE v. MILLER.

Will, construction of—Cestui que trust entitled to personal possession.

The rule is that when property is devised to a trustee in trust to pay the rents and profits to the *cestui que trust*, the *cestui que trust* is entitled to the possession.

This rule applies though there are charges on the property; proper terms being in that case imposed by the Court as the condition of giving possession:

But, the Court will not give possession to the *cestui que trust* where it sees that doing so would do violence to the intention of the testator.

Where a will, which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues and profits thereof after deducting all necessary expenses thereout to be paid by his executors * * to his widow by half yearly payments during the residue of her natural life, but devised the dwelling house on the farm to herself directly and not to the trustees; gave them power to lease and keep under lease the farm with the exception of the dwelling house; directed them to sell the stock, crops and farming implements, and to permit the widow to take firewood from the bush part of the farm for the use of the dwelling house; it was held, that the widow was not entitled to the personal possession the farm.

Statement.

This bill was against the executors of *Daniel Whiteside* the elder, whose will was set forth therein. The material portions of the will were as follows:—

"I will and bequeath to my beloved wife *Agnes* or *Nancy Whiteside*, all the rents, issues and profits of my homestead farm being composed of the northern or rear half of lot number twenty-one (21) in the seventh concession of the said Township of Pickering, saving and excepting the portions of said lot previously disposed of. The same after deducting all necessary expenses thereout to be paid by my executors to be hereinafter named, to my said wife by half-yearly payments, during the residue of her natural life. And I will and bequeath to my said wife *Agnes* or *Nancy Whiteside*, the brick dwelling house wherein I now reside, situated on the said lot number twenty-one, in the seventh

1868.

Whiteside v. Miller.

concession of the Township of Pickering, together with whatever portion of the land adjacent thereto, and also whatever appurtenances and privileges belonging to the same my executors may think requisite for the comfort and convenience of my said wife, to have and to hold the same together with a full and free right of way to and from the same, to my said wife, for, and during the residue of her natural life. And I will and direct that my executors, as soon as convenient after my decease, sell and dispose of all my stock, crops, and implements of husbandry, either by credit sale or otherwise, as to them may seem advisable, and after paying thereout all my just debts, funeral expenses, and any other payments I may hereinafter direct to be paid thereout, pay over the residue thereof to my said wife *Agnes* or *Nancy Whiteside*, to and for her sole use and benefit. And I also will and bequeath to my said wife *Aynes* or *Nancy Whiteside*, all other property that I may die possessed of both real and personal, not herein otherwise disposed of after payment of all my liabilities and bequests thereout as aforesaid to and for her sole use and benefit; and I will and direct that my executors permit my said wife to take whatever firewood she may require for the use of her dwelling house thereon, during the residue of her natural life from the bush portion of said lot.

Statement.

And I give and devise after the decease of my said wife *Agnes* or *Nancy Whiteside* to my son *James Whiteside*, all that I own of the northern or rear half of lot number twenty-one, in the seventh concession of the Township of Pickering; the rents and profits whereof I have hereinbefore bequeathed to my wife during her natural life, to have and to hold the same, after my said wife's death, to my said son *James Whiteside*, his heirs, and assigns for ever and subject to, burthened with, and upon the express condition of my said son *James Whiteside*, his heirs, executors or administrators, paying or causing to be paid to my son *Daniel Whiteside*, his heirs,

executors, administrators or assigns, the sum of two thousand dollars. 1868.

Whiteside v. Miller.

And I nominate and appoint my trusty friends *John Crawford*, senior, of lot number fourteen in the fourth concession of the Township of Scarborough, yeoman, *Thomas C. Hubbard*, of the said Township of Pickering, yeoman, and my son-in-law *John Miller*, yeoman, executors of this my last will and testament, hereby giving them full power and authority, to execute all leases and to keep my said farm under lease (except as aforesaid) during the residue of the life of my said wife."

The bill further alleged that the testator died 16th April, 1864: that his widow took possession of the farm and appropriated the rents to her own use until she assigned to the plaintiff in December, 1864: that the widow had thenceforward resided with the plaintiff until lately; and that since she went away the executors had commenced an action of ejectment against the plaintiff to obtain possession. The prayer was for an injunction and general relief.

The defendants alleged that the widow contended that the deed of assignment was not binding on her and that the action had been brought at her request and for her benefit.

At the hearing before the Chancellor, the bill was dismissed without any evidence having been gone into, his Lordship observing as follows:—

VANKOUGHNET, C.—The question remaining is what equity to relief does the plaintiff's bill disclose. If the legal estate for life is in the widow then the defence is at law and the plaintiff has no right here: if it is in the trustees, as they have the power of leasing and are charged with the paying over of the rents, how can I Judgment.

1868.

Whiteside v. Miller.

restrain them from taking possession, in order that they may execute the trust. It is urged that the trustees have exercised an option: nevertheless, if a dispute arose, the trustees could turn the assignees out even if they had exercised the option.

The cause was subsequently reheard before the three Judges.

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

Mr. *Moss*, for the defendant.

Judgment.

SPRAGGE V. C.—The decree is simply for the dismissal of the plaintiff's bill. In order to its affirmance, we must come to the conclusion that there is no equity in the plaintiff, as assignee of the widow, to prevent the trustees under the will from taking actual possession of the farm in question; assuming the assignment to be unimpeachable, because this was the position taken by the Chancellor at the hearing, and it was by reason of such position being taken that, on the one hand, no evidence impeaching the assignment was given; and on the other that leave was not given, as his lordship intimated would have been proper but for the view that he took of the case, to make the widow a party to the cause. The naked question therefore is whether under the provisons of the testator's will, the widow or her assignee, or the trustees are in equity entitled to the possession. There can I think be no question that the legal estate is in the trustees.

It is agreed, and I have no doubt the law is so, that in the simple case of a trust to pay rents and profits to one named in a will, the *cestui que trust* is in equity entitled to possession; and cases, to which I will refer presently, establish that where there are charges upon the lands devised, the Court will upon proper terms, give the

possession to the *cestui que trust*; and therefore I do not consider it an obstacle in the plaintiff's way, that the will in this case provides that the payment by the trustees to the widow is to be "after deducting all necessary expenses thereout." 1868. Whiteside v. Miller.

Tidd v. *Lister* (*a*), is the leading case upon the point which we have to consider. I think this principle may be deduced from all the cases, (which are not very numerous,) that the Court will not give the possession to the *cestui que trust* where it sees that doing so, would do violence to the intentions of the testator. The only thing that I have seen that looks at all the other way is a passage in the judgment of Sir *John Leach*, in the case I have referred to. The passage is this: "There may be very special cases in which this Court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the Court taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator." Sir *John Leach* held the case before him not to be a case of special circumstances; adding: "It is not the personal occupation, but the management of the property that is sought by this bill." In that case as in this, the personal occupation of the dwelling-house was given for life, and the whole real and personal estate was given to trustees to pay debts, to keep buildings insured, to pay certain annuities and to pay the premiums upon two insurances for life; and the personal estate was found sufficient for all, except the last: the whole difficulty was in regard to the premiums of insurance, and as to them the husband of the tenant for life, was Judgment.

(*a*) 5 Madd. 429.

1868.

Whiteside v. Miller.

willing to invest in the cause a sum sufficient to answer the annual payments. But the learned Vice-Chancellor refused to interfere with the possession and management of the estate by the trustees, and his language shews how entirely he respected the intentions of the testator. "It is perfectly plain" he says, "from the continuing nature of this trust, that the testator intended that the actual possession of the trust property should remain with the trustees; and it did appear to me a singular proposition, that if a testator who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias, which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder." In another passage he says: "The testator has thought fit to place his property in their (the trustees) hands, and out of the management of the *cestui que trust* for life; and I have no authority to revoke his will." I have quoted largely from the judgment of Sir *John Leach*, because almost every word of it is apposite to this case, and expresses much better than I can do, the principles which govern it.

Judgment.

In the subsequent case of *Denton* v. *Denton* (*a*), the Court held the *cestui que trust* for life, entitled to the possession although charged with the payment of certain annuities. But the case differed in some material points from *Tidd* v. *Lister*. The trust was to pay the rents or to permit the same to be received by the *cestui que trust*, for life, a circumstance relied upon as well in

(*a*) 7 Beav. 388.

that case as in the case of *Horner* v. *Wheelwright* (*a*), before Sir *John Stuart*; and it differed also in the gift over being to the child and children of the tenant for life. Moreover the will gave the annuitants powers of entry and distress. Lord *Longdale* put the tenant for life upon terms, but held him entitled to the possession.

Later in the same year, was decided the case of *Baylies* v. *Baylies* (*b*). There was more to be done by the trustees than in this case before payment of the rents and profits to the *cestui que trust* for life—renewal fines were to be provided for, and the premises were to be kept in repair. Sir *J. L. Knight Bruce* said. "Upon a just interpretation of the will, I think that, giving security for the due performance of the objects of the will and for dealing with the property in a reasonable and right manner she ought not to be disturbed in the possession." The case was unlike *Tidd* v. *Lister* and unlike this case, in this, that the gift over was to the appointees of the tenant for life. The case seems to go further than any other in holding the *cestui que trust* for life entitled to possession; but the learned Vice Chancellor thought that he was doing no violence to the intentions of the testator, upon as he said "a just interpretation of the will."

Judgment.

Pugh v. *Vaughan* (*c*), before Lord *Langdale*, is another case upon the same point. Like the other cases to which I have referred, it shews that the Court will always consult the intentions of the testator.

Younghusband v. *Gisborne* (*d*), cited for the plaintiff is not in point. It was not the case of a trust for the payment over of rents and profits to the *cestui que trust* for

(*a*) 2 Jur. N. S. 367.
(*b*) 1 Coll. 537.
(*c*) 12 Beav. 517.
(*d*) 1 Coll. 400.

1868.

Whiteside v. Miller.

life, and of a question thereupon arising whether the tenant for life was not entitled to possession; but it was a case of a devise to trustees of certain lands, out of which to raise an annuity, a sum certain; and the will contained certain provisions, intended to preserve the benefit of the trust to the annuitant, notwithstanding bankruptcy or insolvency. That this was the question is plain from the language of the Vice Chancellor: "In the present case I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually." The bill was by assignees in insolvency, against the trustees; and what was sought was, payment of the annuity, not the possession of the land. I should observe that in *Denton* v. *Denton*, and *Baylies* v. *Baylies*, due weight was given to the circumstance of the equitable tenant for life having been already in possession and in receipt of the rents and profits. But I see nothing in the cases to lead to the conclusion that the Court would have continued such possession and receipt against the trustees, if the same were not in accordance with the intentions of the testators. In both cases the Court avowedly acted upon the principle, that in giving such possession and receipt, it was in accordance with the testator's intentions.

Judgment.

In the case before us I think it is manifest from several provisions in the will that the testator intended that his widow should not have possession of the farm. He devises to her the dwelling-house upon the farm; the devise is not in trust for her, but direct to herself. The will gives the trustees power to lease and keep under lease the homestead farm (the land in question) with the exception of the dwelling-house. The will contains a direction to the executors to sell the stock, crops, and implements of husbandry. It contains a direction that the executors shall permit the widow to take firewood off

the land in question for the use of the dwelling-house; and there are besides the weighty reasons given by *Sir John Leach* in *Tidd* v. *Lister*, and I may add that it is true of this case as of *Tidd* v. *Lister* that "it is not the personal occupation, but the management of the property that is sought by this bill," that is, so far as the widow is concerned, and the plaintiff, her assignee, can be in no better position than she would be, if herself plaintiff. I am persuaded that we should do violence to the intentions of the testator, if we held as between the trustees and the widow, that the widow is entitled to the possession. 1868. Whiteside v. Miller.

Upon these grounds I agree in the conclusion at which the Chancellor arrived at the hearing. I think the decree should be affirmed, with costs.

MOWAT, V. C.—The testator died on the 16th April, 1864. Both parties construe his will as giving to the defendants, the executors, *the legal* estate in the homestead, which is the property in question; but the defendants permitted the widow, and the plaintiff as her assignee, to occupy the premises, undisturbed, from the death of the testator until February, 1867, when the defendants brought an action of ejectment against the plaintiff. Assuming that the defendants had the legal estate, I do not think that under the terms of the will, the *cestui que vie* could have claimed the possession, on her husband's death, as a matter of right; but I doubt if the defendants can justify disturbing her after a possession of two years without shewing some reason for doing so; and if they had nothing to shew except what the plaintiff has set forth in this bill, I doubt if this could be regarded as sufficient. Judgment.

In *Horner* v. *Wheelwright* (*a*), the Vice-Chancellor considered the circumstance of the trustees having

(*a*) 2 Jur. N. N. 367.

1868.

Whiteside v. Miller.

allowed the *cestui que trust* to occupy part of the premises as material on the question, not only whether she should be allowed to continue such possession, but whether she should not have the possession of the whole property.

If the doubt I have expressed were well founded, the grounds for their conduct which the defendants state, should have to be entered upon, viz.: that the widow alleges the assignment to the plaintiff to have been obtained from her wrongfully, and not to be binding on her; and that it is on this account the ejectment has been brought; but the inquiry as to the validity of the deed to the plaintiff can not be proceeded with in the absence of the widow; and in that view, the plaintiff might at the hearing have obtained liberty to amend his bill, and the cause might have been ordered to stand over to have the widow made a party on payment of costs,

Judgment.

the objection as to the widow not being a party, having been taken by the answer. But as my brother *Spragge* agrees with the Chancellor, that the defendants have a right in their own discretion, to take possession, without specifying any reason for doing so beyond what the plaintiff's own statements supply, the decree of the Chancellor will be affirmed.

GORDON v. JOHNSTON.

Injunction—Mortgagor.

A mortgage having been created on land on which was erected a steam saw mill, the mortgagor was restrained from removing the machinery out of the mill; although it was alleged that the property would still remain a sufficient security, as the effect of such removal would have been to change the nature and character of the mortgaged premeses.

In this case it appeared that a mortgage had been

created by the defendant in favor of the plaintiff on certain lands on which was erected a steam saw-mill; subsequently the mill had been destroyed by fire, and the defendant intending to remove the machinery of the mill, had taken away one of the boilers and was, it was alleged, about to remove the second together with the other machinery belonging to the mill. Thereupon

1868.
Jordan v. Johnson.

Mr. *James Patterson*, for the plaintiff, moved on notice for an injunction to restrain the removal of the machinery from the mortgaged premises.

Mr. *A. C. Chadwick*, contra.

SPRAGGE, V. C.—I do not call upon the plaintiff to reply. The case of *King* v. *Smith* (*a*), does not apply. In the case before me, the question is not merely of dealing with the mortgaged premises in the way in which they are ordinarily dealt with by the owner, the result of which dealing is to impair the security; but the defendant is changing the nature and character of the mortgaged premises. He mortgaged a steam saw-mill with the land on which it stood. He cannot take away the mill or machinery and say the mortgagee is still left with sufficient security. That, at least, was my opinion in *Russ* v. *Mills* (*b*), and I have seen no reason to alter it. I do not agree with the defendant's counsel that the intention to remove the machinery is not sufficiently made out. The defendant has actually removed one of the boilers and has threatened to remove the rest of the machinery:—that surely is sufficient. The injunction will go.

Judgment.

(*a*) 2 Hare, 239.

(*b*) 7 Grant, 145.

1868.

EADIE v. MCEWEN—RE EADIE.

Practice—Amending decree—Costs.

Where a decree which had been taken out by the plaintiffs in an administration suit, erroneously made provision for payment of certain annuities and legacies in priority to the provision made by the will for the widow of the testator, the Court upon the petition of the widow directed the decree to be amended, but refused costs to either party.

In this matter the common order for the administration of the testator's real and personal estate was obtained on the 18th day of December, 1866, referring it to the Master at Brantford, to take the accounts and make the inquiries directed.

Statement.

The testator devised his real estate being lot No. 6 in the first range west of the Mount Pleasant road in the Township of Brantford in the County of Brant, to his son *Robert*, subject to the payment of the testator's just debts, and also to the payment of certain annuities bequeathed by the testator to his widow and daughters, and to a legacy bequeathed to his son *James;* and the testator directed the devisee of the real estate to pay the debts, annuities and legacy at the times mentioned in the will for the payment thereof. Besides the annuities bequeathed to the widow and daughters, certain specific bequests of personalty were made to them.

The Master having taken the accounts and made the inquiries directed, made his report dated the 6th day of June, 1867, setting forth the substance of the testator's will and stating that the said *Robert Eadie* the devisee of the said real estate, being also a creditor of the said estate to a large amount, and having assigned his claim against the same to one *A. W. Ellis*, for a valuable consideration rather than accept the devise subject to the incumbrances created by the will, which

involved the payment of all debts had, disclaimed and renounced, before him (the said Master) all right and title to the real estate so devised to him, and that he had therefore ceased to have any claim thereon under such devise, preferring payment by the estate of his debt so assigned to the said *A. W. Ellis*. It further appeared by the Master's report that the annuity bequeathed to the testator's widow was in lieu of her dower in the real estate and that she had elected to take under the will.

1868. Eadie v. McEwan.

The matter came on for hearing on further directions before his Lordship the Chancellor, the 18th day of June, 1867.

Mr. *E. B. Wood*, for the plaintiffs.

Mr. *H. McK. Wilson*, for the executors and other defendants.

Mr. *V. McKenzie*, for the widow; 2 Spence 339 *et seq.* *Williams* on Executors, Vol. 2, pages 1224, 1232, 1526, 1542 *et seq.*, and 1548, were referred to on the argument.

At the close of the argument all parties being represented, it was consented that no account should be taken of the specific bequests of personalty to the widow and daughters of the testator, the same being of very little more value than the costs of taking an account of them would have amounted to.

VanKoughnet, C.—The residuary personal estate would seem then to be the primary fund for the payment of debts, costs, &c. It is to be got in and the debts as also the costs paid out of the proceeds. Plaintiffs costs as between solicitor and client to be paid: costs of legatees as between solicitor and client to be paid. As to the widow's costs they are merely the costs of attending here to-day—she may be allowed this—Declare that the

Judgment.

1868.

Eadie v. McEwen.

farm lot number six devised to the son is to bear the annuities and legacies charged on it, and so much of the debts as the residuary personalty will not pay.

The decree taken out declared that the devisee in the testator's will having disclaimed and renounced before the Master at Brantford, the devise to him of the said farm, had no interest therein under the testator's will and decreed the same accordingly. It further declared that *Isabella Eadie*, the widow of the testator, having elected to accept the provision made in her behalf by the will, in lieu of dower in the said farm, was not entitled to, and had no claim for dower therein. After some further directions it was "ordered that the proceeds of the personal estate and the purchase money arising from the sale of the said farm when paid into Court be applied, first, in the payment of the costs of the plaintiffs and defendants, to be taxed by the said Master as between solicitor and client, and of the sum of $10 to the said *Isabella Eadie*, widow of the said testator, as and for her costs of attending the hearing of this cause on further directions: secondly, in payment of the debts of the said testator reported due by the said Master, and thirdly, in payment of the annuities and legacies found payable by the said Master *pro rata* and *pari passu*."

Judgment.

The decree on further directions was taken out without notice of settling or passing having been served.

Application was afterwards (on the 11th November, 1867,) made by petition, on behalf of the widow, under the General Orders of 1865, setting forth, amongst other things, that the testator's farm would not sell for nearly sufficient to pay the costs, debts, annuities and legacies in full, and that the widow accepted the provision made by the will in her behalf in lieu of

dower, and praying that the decree on further directions might be varied or amended by directing that the said farm should be sold and the proceeds applied, 1st, in payment of costs and of the balance of testator's debts (if any), and then in payment of the widow's annuity and then in payment of the other annuities and legacies *pro rata* and *pari passu*.

1868.

Eadie v. McEwen.

Mr. *A. S. Hardy*, for the widow.

Mr. *Hodgins*, for the plaintiffs.

Mr. *H. McK. Wilson*, for the defendants.

Williams on Executors, 1228, was referred ot.

SPRAGGE, V. C.—This petition is presented under the General Order of 1865, by *Isabella Eadie*, widow of the testator, against one of the directions contained in the decree on further directions. The direction complained of is that which relates to the appropriation of the proceeds of the sale of real estate, which is, that after payment of creditors and of costs it should be applied "in payment of the annuities and legacies found payable by the said Master *pro rata* and *pari passu*." The decree on further directions declares the provision made for the widow by the will to be in lieu of dower—part of that provision consists of an annuity of $100 a year, and the widow contends that she is entitled to that annuity in full, and that it ought not to abate in case of a deficiency in common with other annuities and the legacies.

Judgment.

As between the widow and the other annuitants and legatees the widow seems to be entitled to priority. The provision for her, being for a valuable consideration, *i. e.* her dower; and the others being volunteers. This is clear

1868.

Eadie v. McEwen.

from several cases, *Burridge* v. *Bradyl* (*a*), *Blower* v. *Morret* (*b*), and *Davenhill* v. *Fletcher* (*c*). I understand that the widow is content to rank after the creditors. If she were not, an inquiry, if desired by the creditors, would be proper whether the provision made for the widow by the will does not exceed the value of her dower. But as between the widow and those who are mere beneficiaries under the will the authorities seem to be in favor of her retaining her provision in full without reference to its value as compared with the value of her dower.

As to the costs of this application each party asks for them. I cannot give them to the widow for the point now raised by her ought to have been raised when the matter was before the Chancellor on further directions, and upon referring to his Lordship's book, I find a note of a number of questions raised, but none upon this point; and counsel are not able to inform me that this point was raised. Her right however seems so clear that the plaintiffs in drawing up the decree ought to have suggested it to the Registrar, or to have asked for an appointment to settle the minutes in order that the widow might have an opportunity of preferring her claim to priority. The order was taken out by the plaintiffs without notice being given to other parties. Mr. *Wilson* who appeared for the defendants does not, as I understand, ask for costs.

Judgment.

The application is to rectify a mistake and I think is not a case for costs.

(*a*) 1 P. W. 127. (*b*) 2 Ves. Sr. 420. (*c*) Ambler 244.

1868.

WOODSIDE V. THE TORONTO STREET RAILWAY COMPANY.

Pleading—Parties—Objection by answer.

A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the Company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person.

Held, that the Company must be presumed to know who this person was that there was no presumption that the plaintiff knew him; and that the person not being named in the answer the objection could not be insisted on at the hearing.

This was a bill by the holder of debentures issued by the defendants *The Toronto Street Railway Company*, under their act of incorporation (24th Victoria, chapter 50) to enforce payment of the debentures. The Company by their answer objected "that the party to whom such bonds were issued is a necessary party to the suit." Statement.

At the hearing of the cause this objection was taken on behalf of the Company and allowed by the Chancellor and the cause was ordered to stand over with liberty to the plaintiff to amend by making parties or a party hereto the persons or person who had the legal interest in the debentures.

The plaintiff re-heard the cause on this point.

Mr. *Hodgins*, for the plaintiff.

Mr. *Strong*, Q. C., and Mr. *McMichael*, for the defendants.

The judgment of the Court was delivered by

VANKOUGHNET, C.—Though it was not contended for before me, yet we think that the defendants should have gone further in their objection for want of parties, and

1868.

Woodside v. Toronto St. R. W. Co.

pointed out to whom they had first issued the debentures, as that ought to be, (in the absence of allegation or explanation to the contrary), within their knowledge. The practice in these cases requires that the defendant, objecting to the absence of a particular party should either name him, or point to him in such a way as to let the plaintiff know what the objection is which he requires to have cured; as, for instance, that the legal, personal or real representative of A. or B. is a necessary party. This ordinarily would be sufficient; but we think that the reason, on which the practice rests, requires that when the defendant must be assumed to know who the absent party is, and the plaintiff is not shewn to have the same knowledge, or means of knowledge, that the defendant must name him or excuse himself from not so doing. *Pratt* v. *Keith* (*a*), *Daniels's* Ch. Prac. 275.

Judgment.

Ordered varied and deposit to be returned.

THE TRUST AND LOAN COMPANY v. CUTHBERT.

Mortgages—Paying off prior incumbrances.

A mortgagee paying off a prior execution has a lien therefor against subsequent executions.

Re-hearing before the Chancellor and Vice-Chancellors at the instance of the defendant *Duncan*. The original hearing is reported in Volume XIII., page 412.

Mr. *Moss*, for the plaintiff.

Mr. *Roaf*, Q.C., for *Duncan*, referred to *Fisher* on Mortgages, page 483, sec. 900.

(*a*) 10 Jur. N. S. 305.

The judgment of the Court was delivered by

1868.

Trust and Loan Co. v. Cuthbert.

MOWAT, V.C.—My decree on the hearing of this cause was for the defendant *Cuthbert* on the points raised before me. On the rehearing the learned counsel for the defendant *Duncan* did not dispute the accuracy of the view I took of the facts, or of the points of law which had been argued, but raised a new point on behalf of the defendant *Duncan*, viz., that as a mortgagee he had a right to pay off prior claims and to hold the property as a security therefor against all persons having a subsequent lien; that though the execution had, as such, ceased to be a lien, just as a prior mortgage would cease to be a lien as such when paid off; still, as a subsequent mortgagor paying off such prior mortgage, would have a lien therefor by virtue of such payment: so *Duncan* as mortgagee had a lien for the amount which, to protect his title, he was obliged to pay the execution creditors. I think this view is correct (*a*); and if the point had been taken before the Chancellor, when he directed the question of right to be tried before me at Woodstock, the expense of that hearing might have been avoided, and if taken at Woodstock, the present re-hearing would have been unnecessary.

Judgment.

Cuthbert must now be ordered to repay the money and costs which he received under the decree, and to pay *Duncan's* costs of the suit. No costs of the rehearing to any party. Deposit to be returned.

(*a*) *Pitt* v. *Pitt*, T. & R., 180; *Angell* v. *Bryan*, 2 J & La T., 764; *Meyers* v. *The United Guarantee & Life Insurance Co.*, 7 D. M. & G., 112; *Neesom* v. *Clarkson*, 4 H. at p. 100; *Vaughan* v. *Vanderstegen*, 2 Drew, 409; *Brice* v. *Williams*, Wallis, 325; *McQuestien* v. *Campbell*, 8 Gr. 242; *McIntyre* v. *Shaw*, 12 Grant, 295.

1868.

ROYAL CANADIAN BANK v. MITCHELL.

Married Woman's Act—Separate estate.

A married woman who was equitably entitled, as *cestui que trust*, to a life-estate in certain lands, joined with her husband in making a promissory note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill in this Court seeking to enforce his claim against the title of the wife.

Held, that the provisions of the Married Woman's Act had not the effect of increasing the interest of the wife so as to render her estate liable for this debt.

The bill in this cause was filed upon a judgment recovered on a promissory note made by the defendants *Mitchell*, in order to obtain equitable execution against certain lands in which the defendant *Isabella Mitchell* had a life-estate under a conveyance in trust; the property, however, was not settled to her separate use.

Statement. The plaintiffs contended that the life-interest of Mrs. *Mitchell* was liable for her debts as being her separate estate, although not actually settled to her separate use by deed; that under the Married Woman's Act the estate was vested in her in the same manner as if settled to her separate use by deed.

The bill prayed relief in accordance with those statements, and for the appointment of a Receiver.

Mr. *McLennan*, and Mr. *J. Bain*, for the plaintiffs.

Mr. *Roaf*, Q. C., and Mr. *McBride*, for the defendants.

SPRAGGE, V. C.—It is not alleged in the bill, nor is it proved in the case, that the defendant *Isabella Mitchell*, is a married woman. It is, however alleged in the answer, and has been assumed in argument, that before the making of the promissory note set out in the answer, and then and since, she has been, and is, the wife of the

1868.

Royal Canadian Bank. v. Mitchell.

defendant *Charles Mitchell*. The plaintiffs are judgment creditors of *Charles* and *Isabella Mitchell*, their judgment having been recovered upon a joint and several promissory note made by the husband and wife; which is not shewn to be for a debt of the wife. The wife is equitably entitled to a life estate in certain lands set out in the bill, under a conveyance made in the year 1830, to trustees, in trust generally for *Isabella Mitchell* for life; and the bill in this case is filed to obtain equitable execution against the lands contained in the trust deed, and prays, following *Hulme* v. *Tennant* (*a*), for the appointment of a Receiver to get in the rents and profits, and apply them to the satisfaction of the judgment. The question is, whether the lands in which the wife is so interested are liable.

Judgment.

It may be assumed for the purposes of the case, that if the property against which this relief is sought were the separate property of the wife, it would be liable; but the reasons, upon which the separate estate of a married woman is held liable, do not apply to lands in which she has only such equitable interest as the wife has in this case, and which it is quite clear does not constitute separate estate. I speak now without reference to the Married Woman's Act. It is indeed obvious that the making of the separate estate of a married woman liable upon her contracts, does somewhat infringe upon the disabilities of a married woman, and upon the protection which the law throws around her. It gives effect to her contracts, and it exposes her to the loss of the use of her separate property, through contracts which may have been obtained by intimidation or other means used by the husband, and this without the safeguards which the law provides in relation to her parting with her property, of any other nature. Lord *Westbury* in *Taylor* v. *Meads* (*b*), characterises it as "a violence done by Courts of

(*a*) 1 Bro. C. C. 16. (*b*) 34 L. J. Ch. 202.

1868.

Royal Canadian Bank v. Mitchell.

Equity to the principles and policy of the common law, as to the *status* of the wife during coverture." This false position of the wife, as I think it may fairly be called, is now generally prevented in England by the clause, which finds a place in most well drawn instruments, against anticipation.

The liability of the separate estate of the wife to answer her engagements, and in some cases her defaults, and breaches of trust, has been held to flow logically from her position in regard to her separate estate. It is very clearly expressed by Lord *Westbury* in *Taylor* v. *Meads*: "When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property an independent personal *status* and to make her in equity a *feme sole*. It is of the essence of the separate use, that the married woman shall be independent of, and free from the control and interference of her husband. With respect to separate property the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord *Thurlow* devised the clause against anticipation, * * * the interest created by the separate use is a creature of a Court of Equity to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation, that proceeds upon the basis of the existence of control and interest in the husband, and personal disability in the wife."

Judgment.

1868.

Royal Canadian Bank v. Mitchell.

It is manifest that such an equitable estate as the wife in this case has, apart from the Married Woman's Act, has none of the qualities incident to a *separate estate*, which constitute the reasons upon which it is held that a married woman may affect her separate estate by her contracts. She is not as to her estate, a *feme sole*, she is not *sui juris*; she has not the *jus disponendi*, her estate is subject to a form of alienation that assumes the existence of control and interest in the husband, and personal disability in the wife. I should think this sufficient for the disposition of this case, apart from the Married Woman's Act; but it happens that Lord *Westbury*, in the case I have referred to, puts the case as standing upon a different footing from the case of a separate estate, of what he calls "the ordinary equitable estate belonging to a *feme covert*," for example, when lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee who afterwards marries, equity follows the law, and preserving the analogy between legal and equitable estates requires that the equitable estate of the married woman shall be dealt with *inter vivos* in the same manner as a legal estate.

Judgment.

Then what effect has the Married Woman's Act upon this question? Mrs. *Mitchell*, it is agreed was married before the fourth day of May, 1859, (though whether before or afterwards would make no difference), and the estate which she took under the trust deed was a vested equitable estate for life in remainder, expectant upon the death of the creator of the trust, the Hon. *Peter Adamson*. Mr. *Adamson* is dead, the date of his death is not given. It is stated to have been since 1859, and I believe this is not disputed. It was said by the learned Chief Justice of Upper Canada in *Lett* v. *The Commercial Bank* (*a*), that the operation of the Act is in effect to create a marriage settlement for women who mar-

(*a*) 24 U. C. Q. B. at p. 555.

1868.

Royal Canadian Bank v. Mitchell.

ried without a marriage settlement. Applied to the real property of Mrs. *Mitchell* its operation would be that she should have, hold and enjoy it, free from the debts and obligations of her husband, contracted after the 4th May, 1859, and from his control or disposition, without her consent, in as full and ample a manner as if she were sole and unmarried.

Now the question that arises upon this is whether the provision of the statute points to the *enjoyment* only of her real estate by a married woman, or whether it invests her by implication with the *jus disponendi*, which is an incident of *separate estate*. As to the enjoyment of the estate it must be the separate, exclusive enjoyment of the married woman, otherwise it will not be held to be separate estate; and the purpose of the settlor that it shall be separate and exclusive must be clearly indicated so as to exclude all reasonable doubt. (*a*) *Lumb* v. *Milnes* (*a*), *Brown* v. *Clark* (*b*), *Wills* v. *Sayers* (*c*), *Massey* v. *Parker* (*d*), *Kensington* v. *Dollond* (*e*), and other cases.

Judgment.

The distinctions in some of the cases are very nice, but in all of them, I think, it has been held not to be sufficient that the use, or even the absolute use, shall be in the wife, but the husband must be excluded in terms or by implication. In *Roberts* v. *Spicer* (*f*), the gift was by will, to a married daughter of the testator of £200, "to and for her own use and benefit," and Sir *John Leach* "held clearly that this could not be considered as a gift to the separate use of the wife." In *Kensington* v. *Dollond* the trust was to pay the fund to a married woman for her own use and benefit. I refer to the case principally for the language of Sir

(*a*) 5 Ves. 517.
(*b*) 3 Ves. 166.
(*c*) 4 Mad. 409.
(*d*) 2 M. & K. 174.
(*e*) Ib. 188.
(*f*) 5 Mad. 491.

1868.

Royal Canadian Bank v. Mitchell.

J. Knight Bruce, then Vice-Chancellor, "the intention to give a separate estate must be clearly expressed: a gift to a wife for her own use and benefit, does not clearly express such an intention," The case is the less strong as an authority, that, in the previous part of the same instrument the words "sole and separate use" had been used. In *Rycroft* v. *Christy* (*a*), there was a bequest to trustees for the benefit of a married woman and her assigns for life, "for her and their own absolute use and benefit;" the testator had a natural daughter by the married woman; and the husband disclaimed. Lord *Langdale* said, "I have undoubtedly very great difficulty in saying that by the form of words contained in this will, the property is given to her for her separate use; when the circumstances are considered, it is very probable that the testator so intended it, but I cannot say that such is the effect of the words." In *Beales* v. *Spencer* (*b*), trustees under a marriage settlement, were to pay the dividends or interest of a fund unto, or to authorize and empower the wife and her assigns to receive and take the same, to and for her and their own use and benefit; the husband became bankrupt and the wife claimed the interest and dividends as separate estate: and the claim was decided against her.

Judgment.

On the other hand, if the estate, real or personal, were expressed to be for the separate use of the wife, or for her independently of her husband, or if by any other form of expression the intention were manifested that the wife should hold and enjoy the estate separately from, or independently of, her husband, then it would be separate estate. *Wagstaff* v. *Smith* (*c*), and see other cases collected in the note to *Hulme* v. *Tenant*, in *White* and *Tudor* (*d*).

(*a*) 3 Beav. 238.
(*b*) 2 Y. & C. C. C. 851.
(*c*) 9 Ves. 520.
(*d*) 1 W. & T., L. C. 466.

1868.

Royal Canadian Bank v. Mitchell.

To apply this to the Married Woman's Act; she is to have hold and enjoy her estate free from the debts and obligatoins of her husband, and from his control or disposition, without her consent, in as full and ample a manner as if she were sole and unmarried; and if I were placing a construction upon a marriage settlement, or will, or other instrument of the like nature, I do not know that I could, consistently with the authorities, hold the real estate in question to be other than separate estate.

But in the construction of a Statute, we have more to aid us than we have, generally at least, in the construction of a private instrument. We are to look at the state of the law, before the passing of the Act, the mischief and defect intended to be remedied, and the remedy given by the Act. Light is thrown upon the intention of the Legislature by the Married Woman's Act as we find it in the Statutes of the session in which it was passed, and by another Statute (ch. 35), passed in the same session. The preamble of the Married Woman's Act is:—"Whereas the law of Upper Canada relating to the property of married women is frequently productive of great injustice, and it is highly desirable that amendments should be made therein for the better protection of their rights." The Legislature by these words expressed the opinion that the then state of the law, as it affected married women, was unjust to them, and that their rights ought to be better protected; and almost every clause of the Act is directed to that end. I except the 3rd, the 14th, and the 19th sections. The 3rd relates to *torts* by the wife, the 19th to her contracts before marriage. The 14th is different in one material point, in the original, and in the Consolidated Statutes. In the former, a married woman having separate estate not settled by antenuptial contract, is made liable "upon any separate contract hereafter made, or debt incurred by her before

Judgment.

marriage to the extent and value of such separate property." In the Consolidated Statutes the word "hereafter" is left out, advisedly, as I have no doubt, as conflicting with the general intent of the Act, and particularly the 19th section, and in the belief that its being in the act was a mistake. The contract upon which the plaintiffs recovered their judgment was subsequent to the consolidation of the Statutes, and therefore the clause in the latter must govern.

The general scope and tenor of the Act is to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities, except in the case of her *torts* and of her debts and contracts before marriage. The change made in the 14th section applies with peculiar force to the case before me. It is an unmistakable manifestation of intention that the separate estate of married women shall be liable only upon debts incurred or contracts made before marriage. What the Legislature meant by *separate property* it is not necessary to inquire.

Judgment.

The provisions in chapter 35 of the same session is as follows:—"The requirements heretofore necessary to give validity at law to a conveyance by a married woman of any of her real estate, shall continue to be necessary for that purpose, with repect to deeds of conveyance executed after the passing of this Act, notwithstanding anything contained in this Act or in any Act which has been or may be passed during the present session of Parliament. But this section shall not affect any other remedy at law or in equity which a purchaser or other person may have upon any contract or deed of a married woman, which may be hereafter executed in respect of her real estate." In *Enrick* v. *Sullivan* (*a*) the Court declared it to be clearly their opinion that the Married Woman's Act has not

(*a*) 25 U. C. Q. B. 105.

1868.

Royal Canadian Bank v. Mitchell.

changed the law as to the conveyance by married women of their real estate. The clause in chapter 35 was not referred to; if it had been, the point would have been too clear for argument; but the Court decided it (and I agree with them) upon the construction of the Married Woman's Act itself. The qualification in the clause that it shall not affect any other remedy, cannot of course operate to create a new remedy; it simply left the deeds and contracts of a married woman to have the same operation and effect as before.

Now, when we look at the principle upon which it is held in England that the separate estate of a married woman is liable upon her contracts, it is clear that the real property of a married woman is not made liable by the Act. The Act confers upon such property, certain qualities incident to separate estate, but it withholds *that* quality which is the very foundation of the English decisions, the *jus disponendi*. The principle of the decisions is—that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being not personally liable upon her contract, is presumed to contract with reference to her separate estate, and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly.

Judgment.

In this, I apprehend, lies the whole point of the case. But there is another provision in the Act which shews that it is only *sub modo*, if at all, that it makes the real property of the wife separate estate, for it recognizes an estate and interest in the husband, during coverture, and provides that it shall not, during her life, be subject to his debts. It is of the essence of separate estate, that the husband has no estate or interest in it. My construction of the Married

Woman's Act is that it gives to what Lord *Westbury* calls the ordinary equitable estate of a *feme covert* certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient probably if found in a private instrument to constitute a separate estate; but that upon a proper construction of the whole Act, certain qualities incident to a separate estate are withheld and, what is all important, among them, that quality upon which the decisions making the separate property liable for the married woman's contracts is founded. 1868. Royal Canadian Bank v. Mitchell.

The plaintiff's bill will be dismissed with costs.*

De Hertel v. Supple.

A merchant agreed, in writing, to advance money for the purpose of getting out timber to be forwarded to him at Quebec for sale; for which advances he was to be paid certain commissions; the timber was duly forwarded to him in the autumn; but, prices being low, the plaintiff, with the assent of the other party, held the timber over till the following spring and claimed interest on his advances from the first of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:

Held, that interest could not be charged. [Mowat, V. C., dissenting.]

This was an appeal from an order pronounced by his Lordship the Chancellor, as reported *ante* volume xiii., page 648.

Mr. *Walkem*, for the plaintiff.

Mr. *Crickmore*, for the defendant.

VanKoughnet, C., retained the opinion expressed by him on the previous occasion. Judgment.

Note.—See Chamberlain v. McDonald, *post* 447.

1868.

Dellertel v. Supple.

SPRAGGE, V.C.—I think the defendant is not entitled to the interest allowed him by the Master, unless he can claim it upon what he calls the usage of trade, *i. e.* the usage in that particular branch of trade in which the parties were dealing:

The evidence on this head amounts to this; that for a considerable number of years it has been the custom, when timber has been what is called "laid up," over a winter, from one season to another,—for the party who has made advances to the manufacturer, to charge interest upon his advances, and for the manufacturer to acquiesce in such charge. That is not what I understand by a usage of trade; and is unlike any of the cases that I have seen upon that head of mercantile law.

Judgment.

The usage of trade is most frequently appealed to, to give a meaning to that which is otherwise obscure; but it has also been held in some cases to give a legal right; but only upon this principle, that there is an implied contract between the parties to deal according to the usage. No habit by one party, or one set of traders, to exact, under whatever name, more than they are entitled to, and no acquiescence by those who have dealt with them, can convert that exaction into a legal right. It may as between parties dealing together amount to a course of dealing in which the party charged has acquiesced as in *Bruce* v. *Hunter*, (*a*) and by which he is bound; but it is only binding as between parties who have so dealt together.

Apart from this alleged usage there is nothing to entitle the defendant to interest. The most that can be said is that the parties contemplated a sale of the timber in the season; and a consequent reimbursement to the defendant of his advances some months earlier than he

(*a*) 3 Camp. 467.

obtained it; and that it is reasonable that he should have interest upon his money for the longer time than was expected that he was to lie out of it. But, there is the contract between the parties, and by it a mode and measure of compensation for the advances made, are provided. Nor can it even be said, apart from this alleged usage—that the contingency of the timber lying over was not taken into account, for it was a contingency that occasionally happened as appears by the evidence. It was a contingency that it was the part of the defendant to provide for, if he looked for any compensation, beyond that provided for in the contract. I infer from the contract, that the defendant was to be reimbursed out of the proceeds of the sale of the timber; and the amount of his compensation depended in part upon the amount realized therefrom. So there was no default in payment by the plaintiff, and the defendant upon his own judgment, and of his own act and will, postponed the sale of the timber to the following spring.

Judgment.

The correspondence, consisting of two letters from the defendant, is against him. In the first, dated 11th September, 1864, he refers to the probability of his holding over the timber to the following spring, but is silent as to interest. In the second he says that he will charge interest until payment is made; but that letter is dated 10th December, after the close of the season, when it was too late for the defendant to urge that he would prefer an immediate sale to postponement at the expense of a charge for interest.

The defendant certainly does not bring himself within the Statute, "An Act respecting Interest": and apart from the Act the cases are very clear against the allowance of interest in such a case as this.

I agree with the Chancellor that interest cannot be allowed.

1868.

De Hertel v. Supple.

MOWAT, V. C.—I have not been able to come to the same conclusion as the other members of the Court in this case.

It was proved by the evidence, and admitted on the argument, that timber, got out as this was, is usually sold at Quebec in the same season as it arrives there. The defendant's contention is, in effect, that the written contract between him and the plaintiff contemplated a sale in the same season, and made no provision in view of the sale being postponed until the following year; and that his rights in consequence of this postponement are to be determined by the custom of the trade.

I have been unable to satisfy myself that the evidence offered of this custom was either inadmissible or insufficient. I understand the rule to be, that the usages of a trade or business are considered to be tacitly annexed to the terms of every contract made between parties engaged in such trade or business, if there be no words in the contract distinctly excluding the operation of such usages; that such usages are presumed to be known to all persons engaged in the business; and that it is consequently unnecessary to embody in the contract terms which the custom of the trade provides for.

Judgment.

Mr. *Taylor* states in his book on Evidence (*a*), and the authorities he cites appear fully to sustain his statement, that, in order to constitute a custom or usage of this kind, "it is not necessary that it should have been immemorial, or even established for a considerable period, or uniform, or capable of being defined with precision or accuracy. Thus, the custom of the country with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie; and the general usage of trade may be imported into

(*b*) Section 1076, 4th edition.

a contract, though proof has been given of exceptions to such usage. So, although a particular branch of trade has been only established for a year or two, parties connected with that trade will be presumed to have contracted with reference to the usages generally adopted since its existence."

1808.

De Hertel v. Supple.

Now, the evidence of the custom on which the defendant relies appears abundant, and is entirely uncontradicted in any particular, nor is there any proof of one instance of an exception to the custom. Mr. *Joseph Aumond*, one of the witnesses, has been in the trade for the last thirty-four years; and his evidence was this: "I am acquainted with the custom of the lumber trade. * * I have been, in the position both of a supplier, and being supplied. * * When the timber was laid up until the next season after its arrival, I had always to pay interest on the advances made by the supplier, and I believe it is the custom of the busjness to charge interest upon the advances when the timber is laid up. * * I have also been charged a commission upon the balance due, when the timber was laid up, over and above the interest."

Judgment.

Mr. *Alexander W. Powell*, another witness, has been in the business for upwards of twenty years, and his deposition on this point was as follows: "It is customary for suppliers to charge a commission both upon cash advances, and also upon the sale of the timber. When timber is laid over at Quebec until the next season after its arrival, it is customary to charge interest upon the advances from the time the timber is laid up until the sale thereof, in cases where a commission has been claimed upon the advances, and also in cases where a commission is charged upon sales in addition to the commission on advances. * * It is usual to charge interest from the time the timber is laid over. I would not consider five per cent. upon cash advances, and also

1867.

De Hertel v. Supple.

upon the sales, unreasonable. * * The laying up of the timber depends upon the leniency of the supplier." Prices were low in 1864, and it was with the approbation of the plaintiff that the sale of his timber was postponed until the following season. The postponement, if prudent, was desirable in the interest of the plaintiff more than of the defendant, as money was worth more than six per cent; and, in case of a sale at a sacrifice, in the fall of 1864, the loss would have fallen on the plaintiff.

I do not see how I am to doubt the evidence I have read. The witnesses were believed by the Master at Ottawa; and they speak, not merely of what they themselves paid, but of the general custom. There was no attempt to shew, on cross-examination, that these witnesses were wrong as to the existence of the custom, or that for some reason it was inapplicable to the present case; and not one witness is produced to dispute the custom as these witnesses state it, or to weaken in the smallest particular the effect of their testimony. I must say, therefore, that I think the custom clearly and satisfactorily proved.

Judgment.

But is it such a custom as may be engrafted on the written contract? That depends on whether it is inconsistent with it or not. Is a stipulation for commission inconsistent with a custom to pay interest? Surely not. The contrary is established by the evidence that in this very trade both are customarily charged by suppliers, where timber is kept over until another season under the hope of a better price; and in other trades, instances of charging both commission and interest are certainly not unknown. How then can I say, the charge of interest is inconsistent with, or repugnant to, a charge for commission? The writing does not speak of interest, or provide for the timber being kept over until another season; and the writing binds so far as it goes, but

1867.

De Hertel v. Supple.

unquestionably does not exclude evidence of a custom which would add a term in regard to which the writing is silent. There is a collection of the cases on the point in the notes to *Wigglesworth* v. *Dallison*, in *Smith's* leading cases (*a*); and after reading these I confess it seems to me very clear, that, having reference to the terms of the written contract here, the usage to pay interest from the time charged, say 1st December, 1864, until the sale in the following year, is binding on the plaintiff, though not mentioned in the contract. Indeed, in cases of undoubted authority, terms have, by evidence of usage, been imported into a contract, where the argument of inconsistency or repugnancy had much more to go upon than in the present case.

It is therefore my duty to say, that I respectfully dissent from the judgment pronounced by the Chancellor, on the appeal from the Master's report.

Judgment.

(*a*) Vol. 1, page 527, *et seq.*, 5th edition.

1867.

O'Connor v. Naughton.

Partnership—Dissolution—Bad faith.

The plaintiff and defendants, were partners. The defendants, before the expiration of the term, induced the plaintiff to agree to a dissolution, a valuation of the assets was thereupon made by the defendants, and a settlement took place founded on such valuation under the erroneous impression on the part of the plaintiff, that one of the defendants was to retire from the business, and that the interest of the other defendant in the valuation was identical with the interest of the plaintiff: while the fact was, that the defendants had entered into a private agreement, that, after settling with the plaintiff, the stock should be sold for the joint benefit of the defendants, and that they should share equally the proceeds and carry on the business:

Held, that by reason of this deceit the transaction was not binding on the plaintiff.

The facts of this case appear sufficiently in the report of the case on the original hearing *ante* volume xiii., page 423. The defendants reheard the cause.

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

Mr. *Palmer*, for the defendants.

Judgment. VanKoughnet, C.—Assuming, as I do, that the defendants continued together and without interruption, after plaintiff had retired from it, the business, which all had theretofore carried on together, I think the conclusion irresistible, in the absence of evidence to the contrary, that it was understood between the defendants at the time of their arrangement with the plaintiff, that they should get rid of him and carry on the business themselves. In this they were guilty of a gross act of deceit practised on the plaintiff, who had the right to expect and exact from his co-partners the utmost good faith and fair and open dealing. I concur, therefore, in the judgment pronounced by my brother *Mowat*, on the hearing.

1867.

O'Connor v. Naughton.

SPRAGGE, V. C.—If it is a proper conclusion from the evidence that there was a secret treaty between the two defendants, the plaintiff is clearly entitled to a decree. He stood by while they settled, leaving his interests in the hands of *Naughton*, who had, as he thought, a common interest with himself: he forbore to protect his own interests, because he thought they were protected by *Naughton*. In this he was deceived; and if there was a treaty between the defendants and they combined to deceive him their conduct was a deceit to blind him. It is argued there was a fraud on the part of the plaintiff in allowing the valuation to be, as he thought, too low; but the case is different. *Gaughan* was present to protect his own interests, and there would be no fraud in the plaintiff acquiescing in a valuation, or conclusion made upon a valuation, by parties hostile to one another in interest.

Judgment.

MOWAT, V. C.—On the argument upon the rehearing the learned counsel for the defendants did not dispute the view of the duty of partners towards one another which I expressed in my judgment, and I believe the *Chancellor* and my brother *Spragge* concur in what I said as to the law in such a case. It was contended, however, that the evidence did not support my statement of the facts, particularly as to there having been, before the settlement of the 10th March, a secret agreement between the defendants to continue the business on their own account, after getting rid of the plaintiff. There was no direct evidence of such an agreement, but I understood it to be assumed on both sides that the defendants had continued the business together from the time of the alleged settlement with the plaintiff; and I considered it a fair inference, that what from this date they did, they had prior to this date agreed to do. I do not find it stated on the evidence, that the defendants continued the business; and, if the case turned on this point, it would be proper, as the fact is now disputed, to direct an inquiry, if the defendants desired it. I perceive that one of the

1867.

O'Connor v. Naughton.

defendants on his examination stated that the business had been continued by the defendants from the 10th March, but as this examination was not read by the plaintiff, it cannot be referred to as evidence. Both defendants, however, in their evidence before me, stated that there was an understanding between them on the 10th March, that *Naughton* should turn the stock into cash, and pay *Gaughan* his share of it; and that this understanding was not communicated to the plaintiff. It is quite clear that this alone is under the circumstances sufficient to invalidate the settlement. The plaintiff was induced to agree to the valuation of the defendants on the supposition that the defendants had opposite interests in the valuation, and that the interest of one defendant was identical with the plaintiff's; while the fact is admitted to be, that the interest of both defendants was the same, and was opposed to that of the plaintiff. This conduct was entirely opposed to their duty as partners of the plaintiff.

Judgment.

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

Per Curiam—Decree affirmed with costs.

WHATELEY v. WHATELEY.

Will—Construction of.

A general devise of all the testator's real and personal property does not carry after-acquired real estate. [MOWAT, V.C., dissenting.]

This cause was originally heard before Vice Chancellor *Mowat*. The only point was, whether after-acquired real estate passed. By the will in question, the testator's real and personal estate was devised to trustees to sell. The *cestuis que trust* were the same persons who as co-heirs were entitled to undevised property, but some of them being infants, a good title could not be made

1867.

Whateley v. Whateley.

to undevised property except under the decree of the Court. On the original hearing, Vice-Chancellor *Mowat* held that after-acquired real estate passed under the general devise (*a*).

The cause was therefore brought on for re-hearing.

Mr. *Moss*, for the plaintiff.

Mr. *Barker*, for the infant defendants.

No one appeared for the Trustees.

VANKOUGHNET, C.—In this case I am unable to concur in the opinion expressed by my brother *Mowat*, upon the extent of the devise of real estate mentioned in the will, which forms the subject of the decree.

Judgment.

Prior to the Real Property Act of Upper Canada, in 1834, there could be no doubt that, under the devise in question, after-acquired real estate would not pass. The will, like a conveyance, operated only upon such real estate as the testator had at the time of its execution. Devisors had from time to time attempted, by words used for that purpose, to pass after-acquired real estate; but such words were inoperative. To give effect to such declared intentions of devisors, and to remove the obstacles to it theretofore existing, the Legislature by section 49, of chapter 1, 4th William IV., enacted that when the will of any person "who dies after the sixth day of March, 1834, contains a devise *in any form of words* of all such real estate as the testator shall die seised or possessed of such will shall be valid and effectual to pass any land that may have been or may be acquired by the testator after the making of such will in the same manner as if the title thereto had been acquired before the making of such will." Thus far, and thus far only, of course, did the Legislature interfere. They have not said, as is said by the

(*a*) 13 Grant, 436.

1868.

Whateley v. Whateley.

Imperial Act of 1 Victoria, chapter 24, that the will shall operate as to real estate from the time of the death, in the same manner as it always did as to personalty. They are careful merely to say that, if the testator *in any form of words* devises after-acquired real estate, it shall pass. They have not said that, without any such form of words, it shall pass under a mere general devise of realty. To hold that this was the meaning of the Legislature, would be to reverse the whole law as it then stood; and to require that, when parties did not intend their after-acquired property to pass, they should use restrictive words. But the Legislature have not said this. It seems to me that they leave the law as it was, unless the parties choose to extend the operation of the will by some form of words embracing after-acquired real estate. But for my brother *Mowat's* opinion, I would think this construction of the Statute very plain. The Legislature were dealing with the existing law, long in force; and they only altered it to meet a case which had often arisen: namely, of parties endeavoring, by some form of words, to pass after-acquired property; and, to give effect to their expressed intentions.

Judgment.

SPRAGGE, V. C.—The clause of the will in question in this case is as follows: "I give all my real and personal estate to my executors and trustees for the purposes of this my will." My brother *Mowat* held that under this, real estate, as well as personal estate, passed.

Before the passing of the act 4 William IV., chapter 1, the law as to the passing of real and personal estate by will stood thus. As to personal estate, the will took effect as if executed immediately before the death of the testator; as to real estate the testator could not by any form of words devise what he had not, at the date of the will. The reason for the distinction is stated by Lord *Mansfield* in few and clear words in *Harwood* v. *Goodright* (*a*)

(*a*) 1 Cowp. 90.

1868.

Whateley v. Whateley.

"Though as to personal estate the law of England has adopted the rules of the Roman testament, yet a devise of lands in England, is considered in a different light from a Roman will. For a will in the civil law was an institution of the heir. But a devise in England is an appointment of particular lands to a particuar devisee; and is considered in the nature of a conveyance by way of appointment; and upon that principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the Statute 32 Henry VIII. chapter 1, which says that 'any person having lands, &c., may devise,' for the same rule held before the, Statute, when lands were devisable by custom."

The point "that a man cannot make a will of any lands before he has a title in them" had been determined in the House of Lords in *Brownlee* v. *Coke* (*a*), and Lord *Roslyn* in *Brydges* v. *The Duchess* of *Chandos* (*b*) explained the rule and the true nature of a devise of real estate, in much the same terms as the same had been explained by Lord *Mansfield* in *Harwood* v. *Goodright*. Judgment.

It resulted from this state of the law, that whenever a man acquired real estate, which he wished to dispose of by will, it was necessary that he should make a fresh will, if he had made one before; and so, from time to time, as often as he acquired more real estate, or it would go to his heirs; at that time his eldest son alone, if he had one. This, in a country like Canada, where real estate was in a comparatively greater number of hands; and changed hands more frequently than in England, worked, to say the least of it, inconveniently. The evil to be remedied was that a testator could not dispose by will of any property that he had not at the time. To

(*a*) 1 B. P. C. 19. (*b*) 2 Ves. Jr. 427.

1868.

Whateley v. Whateley

remedy this evil the Statute provided that a will containing a "devise in any form of words, of all such real estate as the testator shall die seized or possessed of, or of any part or portion thereof, * * shall be valid and effectual to pass any land that may have been or may be acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof."

Nothing would have been easier than for the Legislature to do what was afterwards done in England by the Imperial Act 7 William IV., 1 Victoria, chapter 26, to enact "that any will shall be construed, with reference to the real estate, and personal estate comprised in it, to speak and to take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." This in few, simple, unambiguous words places a disposition of real estate by will upon the same footing as a disposition of personal estate. If the Legislature of Upper Canada had intended to do the same it is difficult to conceive that they would have missed so plain a way of doing it. I think that their not making an enactment in some such terms, and the terms in which the alteration of the law is made, go far to shew that the Legislature did not intend to place the disposition by will of real and personal estate upon the same footing.

Judgment.

My brother *Mowat* thought that "when a man devises all his real estate, his purpose is to devise all he may own at the time of his death just as much as when he bequeaths all his personal estate." With great respect for my learned brother's opinion, I think there is no warrant for this conclusion. Such may have been the testator's intention certainly. I may even surmise that it probably was his intention, but the language he has used is not such as, in my judgment, to warrant the legal conclusion, that such was his intention.

1868.

Whateley v. Whateley.

In a will of personal estate there is an expressed intention that it should be a bequest of what the testator has at the time of his death, because the law gives his words expression as at the time of his death. But our Statute making no such rule as to real estate, requires the testator to express an intention as to after-acquired property if he has such intention. The language of the Statute "a devise *in any form of words* of all such real estate as the testator shall die seized or possessed of," implies or rather requires that the testator must in *some form of words* express it to be his intention to devise his after-acquired real estate. The words "I give or I devise all my real estate," do not import such intention: the reason being wanting which in the case of personal estate imputes such intention to the testator.

There is, however, this point in the case before us. The testator joins together his real and personal estate making one disposition of both in these words "I give all my real and personal estate." Is that a form of words denoting an intention to devise after-acquired real estate? or may it not with equal propriety be said that they denote an intention on the part of the testator to limit his bequest of personal estate to what he then possessed? I think the proper construction of the will, is to read it, as to each kind of property, as the law requires it to be read, if each were expressed separately.

Judgment.

MOWAT, V. C.—Before the Act of 1834, a testator had not by law the power, in any form of words, to devise lands of which he should die seised unless he was seised of them also at the time of making his will. This incapacity was removed by the enactment (*a*) that when a will contains a "devise in any form of words of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may

(*a*). 6 Wm. IV., ch. 1, s. 49; U. C. Consol. ch. 82, s 11, p. 831.

1868.

Whateley v. Whateley.

have been, or may be, acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof." Now, was the sole object of this clause to remove the incapacity to devise after-acquired property? Or did the Legislature, besides removing this incapacity, mean to require a testator to adopt some form of words expressly referring to after-acquired property 'of which he should die seized.' On that point, I find that I have the misfortune to differ from the other members of the Court.

Judgment.

Mr. *Hayes*, in his excellent book on conveyancing, expressed the opinion that a general devise of real estate, such as the devise in the present case, would carry after-acquired lands, "almost as of course, from the extension of the disposing power to all the real estate belonging to the testator at his decease" (*a*); and the consideration which I have given to the point, since the argument on the rehearing, has confirmed me in the accuracy of this view. Something was said, on that argument, of a different impression on the question having always been held at the bar; but I am satisfied, from my inquiries since, that that is not so. Some gentlemen have no doubt construed the Statute in the way contended for in the present case, but the general opinion has, I have good reason to believe, been in accordance with the view I have myself expressed; and this construction being, as nobody doubts, what the Legislature really meant, and being agreeable to what testators, who use the language of this will, mean, I think that we are bound to adopt it.

The leading principle, according to which wills are interpreted, is the intention of the testator. "The intention of the testator is the polar star by which the Court should be guided, provided no rule of law is thereby infringed. * * In other words, the first thing for con-

(*a*) 1 Hayes' Con. 5th ed. p. 391

sideration always is, what was the testator's intention at the time he made the will; and then the law carries that intention into effect as nearly as it can, according to certain technical rules" (*a*). Now, no one questions that, where a testator devises all his real estate, he means to include all he may have at his death. This has always been the effect of a gift of all a man's personal estate; and, as Lord *Macclesfield* observed in *Winch* v. *Jekyl* (*b*), "the intention of the party must have been the same as to both" his real and personal estate. Under such a general bequest of personal estate, after-acquired leaseholds will pass (*c*) though the term may be for a thousand years or more. In connexion with the same view, it is to be borne in mind, that there is always "a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with regard to the testator's property" (*d*).

1868.

Whateley v. Whateley.

What are the grounds, then, on which the opposite contention is based?

Judgment.

We have been referred to the cases which established that a bequest, of "all my leasehold estates," by a person having at the time leaseholds, does not carry leaseholds which he subsequently acquires. These cases proceed on that particular form of expression, just as a bequest "of all my stock," by a person having stock at the time of making his will, may not carry stock subsequently purchased (*e*); but, beyond all doubt, under a general bequest of all a testator's personal estate, all subsequently-acquired leaseholds, stocks, and every other description of chattels, whether real or personal, would pass.

(*a*) Broom's Legal Maxims, 4 ed. 534, *et. seq.*

(*b*) 1 P. W. at 575.

(*c*) Ib. See also 1 Jarman on Wills, 3rd ed. 54, 55; James v. Dean, 11 Ves. 388.

(*d*) Leake v. Robinson, 2 Mer. 386.

(*e*) 1 Jarman on Wills, 3rd ed. p. 300; 2 Wm. Exrs. 6th ed. 1030.

1868.

Whateley v. Whateley.

Again, reference has been made to the fact, that before the Upper Canada and Imperial Statutes in question, a general devise of real estate did not carry after-acquired freeholds. Was this because such words did not indicate an intention to pass them? No dictum to that effect is to be found anywhere; but the reverse (*a*); and it is quite certain that such was not the reason, for an express devise of all which the testator should thereafter acquire and should die possessed of, would be equally ineffectual (*b*). Thus no words, however clearly shewing an intention to pass after-acquired freeholds, were sufficient to pass them. The meaning of the testator in this respect was wholly immaterial, because, as the law then stood, one of its rules would have been infringed by giving effect to such an intention, it being a settled rule of law that freeholds, not owned at the time, could neither be granted nor devised—could be given, neither by deed *inter vivos*, nor by will; and there is no more reason for holding that a general devise of a man's real estate has received a settled construction which confines it, under the new law, to the real estate a man had when he made the devise, than for holding that a devise of all a man may 'die seized of' has received such a settled construction.

Judgment.

"Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his capacity; and, accordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other), and as to the personalty as a disposition of what he might happen to possess at the

(*a*) Winch v. Jekyl, 1 P. W. 575, &c.

(*b*) Broncker v. Cook, 11 Mod. 121; S. C. 3, Bro. P. C. 19; Arthur v. Bokenham, 11 Mod. 148.

period of his decease" (*a*); for "the method of the Courts is, not to set aside the intent because it cannot take effect so fully as to the testator desired, but to let it work as far as it can" (*b*). It seems to me clearly to follow that, under the new law, where a man makes such a devise, he must as hitherto be considered as meaning to dispose of his property "to the full extent of his capacity"; and, as he is now capable of devising after-acquired freeholds, that after-acquired freeholds pass under such a general devise. I confess that to my mind this single consideration is quite conclusive on the question before us; namely, that there is no more reason for holding that a general devise like this has received a construction which it must retain under the new law, than for holding that an express devise of all the testator dies seized of must be so construed. Under the old law, a devise in either form received precisely the same construction, and had precisely the same operation; and that the latter does now pass after-acquired freeholds is of course not disputed.

Judgment.

The learned counsel referred to what has been said in the books as to a will of real estate operating as a conveyance, and therefore not passing real estate which could not be conveyed. That is one reason which was given for the construction which the Courts put upon the Statute of Henry VIII. respecting wills (*c*). From the time of William I. freeholds had not been devisable, nor at first were they even alienable *inter vivos*. But the right of alienating was gradually acquired; and, at length, by the Statute *quia emptores* (*d*) every man was expressly declared to be at liberty to sell his lands or any part of them. But he could not devise them; one reason for which was, that alienation by will could not be consummated by livery of seisin by the devisor to the devisee. When the

(*a*) 1 Jarman on Wills, 3rd ed. 306.
(*b*) Theliuson v. Woodford, 4 Ves. at 325.
(*c*) 32 H. 8., ch. 1.
(*d*) 18 Edw. 1., ch. 1.

1868.

Whateley v. Whateley.

doctrine of uses was invented, uses began to be devised, and the devisee of the use could in Chancery compel its execution. The owner of land might thus convey it to some one to hold to such uses as the grantor should declare by his last will; and when he made his will, it operated to give the beneficial interest to the devisee. But the Statute of Uses (*a*) united the seisin and the use in the one who was entitled to the use, and thereby defeated this mode of making devises by way of use. Lands not devisable by custom then once more became inalienable except by conveyance to take effect in the lifetime of the proprietor; and this was one of the professed objects of the Statute. Five years afterwards, however, the Statute of Wills (*b*) was passed, giving power to every person "having" lands to devise them; and it was held in *Butler* and *Baker's* case, 33 and 34 Elizabeth, (*c*) chiefly on this word "having," that he could only devise what he had at the time of devising. In other cases (*d*) the same result was arrived at by relying principally on other considerations, viz., the analogy of the common law, which "did never allow any person, by any conveyance at the common law, to dispose of the lands he had not, or had no right or interest in, at the time of making and executing such conveyance" (*e*); and the analogy of "conveyances of land to uses, which the Statute of 27 Henry VIII., chapter 10, has executed into possession (*f*) * * because it appears that the Act of Parliament of wills was made to supply the powers of declaring uses by men's last wills and testaments, which they had before the Statute of Uses" (*g*). But all this reasoning is plainly inapplicable when we have a Statute giving express power to devise after-acquired lands.

Judgment.

(*a*) 27 Henry VIII. c. 10.
(*b*) 32 Henry VIII. c. 1., explained by 34 and 35 Henry VIII. c. 5.
(*c*) 3 Co. 25 a; *ib.* see also Leonard Loveis's case, 10 Co. 78.
(*d*) Arthur v. Bokenham, 11 Mod. 148, &c. (*e*) at p. 150.
(*f*) at p. 153.
(*g*) See Harwood v. Goodright, Cowp. at p. 90, Hagan v. Jackson, at p. 305.

1868.

Whateley v. Whateley.

We were referred to the case of *Brydges* v. *Duchess of Chandos* (*a*), as bearing on this point. There Lord *Loughborough* used this language: "A disposition of land by will is no more than an appointment of the person who shall take the specific land at the death of the person making it. It is so far testamentary, that it is fluctuating, ambulatory, and does not take effect until after the death; but it is in nature of a conveyance, being an appointment of the specific estate" (*b*). That is, no doubt, quite correct; and the reason of it is thus stated by Lord *Eldon* in *Howe* v. *Earl of Dartmouth* (*c*): "Every devise of land, whether in particular or general terms, must of necessity be specific, from this circumstance—that a man can only devise what he has at the time of devising. Upon that ground, in a case at the Cockpit it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is." The same explanation is given in numerous other cases. In *Dady* v. *Hartridge* (*d*), Vice-Chancellor Sir *R. T. Kindersley* expressed it thus: "Before the Act, real estate, of which a testator was not seised at the time of making his will, would not pass by such will. If a testator gave a particular real estate to A., and gave the rest of his real estate to B., inasmuch as he could only devise what he had at the time of making his will, although he used words importing residue, he was in fact devising the specific estates which he was then seised of, and nothing else. It was the same thing as if he had devised those particular estates by name."

Judgment.

All the decisions relied on in argument proceeded on the ground of the testator's having no power to devise lands which he had not at the time; and not at all on the insufficiency of the language of the devise to comprise

(*a*) 2 Ves. Jr. 417.
(*b*) Ib. at p. 437.
(*c*) 7 ves. 147.
(*d*) 1 Dr. and Sm. 289.

1868

Whateley v. Whateley.

after-acquired lands had they been devisable—which is the point we have to consider.

Another argument against the liberal construction of the act is based on the rule, that a will of real estate speaks from the time of its execution, and this rule is appealed to as over-riding all considerations of intention. But I am not aware that any such effect is ascribed to it in the books. On the contrary, the rule referred to is limited to this: the will speaks from the day of execution as respects the question what lands pass under it. For, when real estate subsequently acquired could not pass, a will, so far as related to that question, could not speak from any period subseqnent to the execution. But a will did speak from the date of the death for other purposes connected with real estate, as, for example, in reference to devises for the benefit of classes or fluctuating bodies of persons—those answering the description at the death of the testator, and not at the date of the will, having been held to be the persons entitled to take under such a devise (*a*). So, also, a devise of a manor was held, under the old law, to comprise copyholds acquired by the lord after the making of his will (*b*); and where the testator at the time of making his will had a remainder or reversion in fee expectant on an estate for life, and subsequently acquired the life estate, the will carried the estate so acquired (*c*). On the other hand, a will of personal estate was said to speak from the death of the testator (*d*), but this rule was subject to so many exceptions that Mr. *Hawkins*, in his useful treatise (*e*), speaking of wills before the late Act, after stating the rule to be that "a bequest of all my personal estate" or "the residue of my personal estate", means the personal estate

Judgment.

(*a*) 2 Jarman 142, 143, &c.
(*b*) Ib. at p. 427.
(*c*) Roe d Hale v. Wegg, 6 T. R. 708.
(*d*) Buckingham v. Cook, Holt 253.
(*e*) Hawkins on Wills, p. 17.

1868.

Whateley v. Whateley.

existing at the death of the testator, and that "the rule was the same as to a bequest of "all my household goods,"—adds, as his view of the result of the cases: "But this rule did not, in wills before January 1st, 1838, extend to other bequests of personal estate." The clause in the Imperial Act (*a*) which makes a will speak from the death, unless a contrary intention appears on the will, refers to personal estate as well as real, and confessedly varies the old law in England even as to personal estate (*b*).

I read the clause in our act (*c*) as rendering valid devises of after-acquired real estate, and requiring for this purpose nothing more than any words which shew the intent to pass the property. Thus, if a testator having contracted and paid for land *Blackacre* makes a will, and subsequently obtains the conveyance, his devise of *Blackacre* by description would, I apprehend, give the devisee the legal as well as equitable estate therein; for it is surely not necessary for this purpose that the will should be expressed as devising any or all 'the estate in *Blackacre* that the testator may die seised of.' To require a residuary or general clause to make an express reference to after-acquired property appears to me to be demanded by no sound rule of construction; to serve no good purpose; to create an unnecessary and indefensible distinction between the words which pass after-acquired real estate, and those which pass after-acquired personal estate; and to force upon wills, whenever the rule is applied, a meaning and an effect contrary to the intention of the testator.

Judgment.

(*a*) 1 Vic. ch. 26, s. 24.

(*b*) See the cases collected 1 Jarman, 308, 313; and 2 Wms. Exrs. 1332, 1333, notes *o* and *p*.

(*c*) U. C. Consol. Stat. ch. 82, p. 831.

1868.

SMITH v. GOOD.

Mortgage—Sale where heirs of mortgagors unknown.

Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the Court has jurisdiction, in a suit by the first mortgagee against a subsequent mortgagee and the Attorney-General, to direct a sale of the property; and the proceeding cannot afterwards be set aside by the heirs except for error or fraud.

In such a case the conditions of sale must state these circumstances.

This was a suit by a first mortgagee against the assignee in insolvency of the mortgagee, and Her Majesty's Attorney General.

The bill was *pro confesso* against the assignee, and came on by way of motion for a decree as against the Attorney General.

Mr. *V. McKenzie*, for the plaintiff.

SPRAGGE, V.C.—The plaintiff is mortgagee of three parcels of land each of which stands upon a different footing from the others. I will call them shortly by their numbers, lots 21, 9, and 11; a second mortgage was made by the mortgagor, upon lot 21 to *E. Morris*, and he then sold his equity of redemption to one *Good*, who is a defendant. The second mortgagee is not made a party. The defendant has released his mortgage upon lot 9, to one *Gardham* a purchaser from the mortgagor. The equity of redemption in lot 11, was sold by the mortgagor, and became vested in one *Peter Strong*, who made a mortgage thereof to one *Tompkins*. *Peter Strong*, was killed accidentally in a machine shop in 1855, and his heirs, after a good deal of inquiry after them, have not been found.* The Attorney General is made a party.

Judgment.

* NOTE.—These are the facts as stated in the bill. The Master's report under the decree shewed they had not been correctly stated in the bill.

1868.

Smith v. Good.

The parties entitled to redeem therefore are *Good* and the heirs of *Peter Strong* as parties entitled to the equity of redemption, in two of the parcels, and *Morris* and *Tompkins* as second mortgagees of two of the parcels. These second mortgagees are not made parties nor is *Goodham*. The date of the release to *Goodham* is not given nor is it stated whether it was before or after the mortgage to *Morris*, or whether it was before or after the sale of lot 11. At the hearing my attention was not directed to the fact of the plaintiff's release of lot 9, from his mortgage.

The point discussed was whether, in a case where the heirs-at-law of the party last entitled to the equity of redemption, are out of the jurisdiction, and cannot be found, the Court can make any decree in favor of the plaintiff, and two Irish cases were referred to *Leahy* v. *Damer* (*a*), and *Gowan* v. *Tyghe* (*b*). The first of these cases was upon a bill filed by a judgment creditor of the ancestor: there were four co-heiresses, two of whom were parties, and two were out of the jurisdiction and the Court directed a sale; the Lord Chancellor observing, "The heir-at-law being absent from the jurisdiction, there are authorities that a sale of real estate may be decreed, the particulars of sale stating the fact, and the purchaser buying with notice. The decrees being for all proper parties to join in the conveyance the purchaser will possess, and enjoy in the interim with notice of no conveyance by the heir." In *Gowan* v. *Tyghe* the bill was filed by a mortgagee; and the Court directed a sale of a competent part of the mortgaged premises, stating somewhat more fully the consequences of a sale viz: that the particulars of sale stating the facts fairly the purchaser would be bound, and would take subject only to fraud or error being shewn; that the heir could only be admitted to shew fraud or error. In that case the

Judgment.

(*a*) 3 Moll. 108. (*b*) ib. 113.

1868.

Smith v. Good.

mortgagor had gone to India, where it was reported he had died, leaving six daughters, his co-heiresses who were not to be fonnd. The difficulty in England has always been that the Court will not *foreclose* in the absence of the heir of the mortgagor, but where the case has been one where a sale is proper the Court has decreed a sale. So in *Williams* v. *Whingates* where a testator had devised his estate, real and personal, to his wife and made her executrix and charged his real and personal estate with the payment of his debts, and the widow became insane, and the heir-at-law was in the East Indies. Lord *Thurlow* decreed a sale of the real estate in case of deficiency of personal assets, at the suit of the creditors of of the testator. In *Smith* v. *The Hibernian Mine Company* (*a*) Lord *Redesdale* referred to a similar, perhaps the same case, saying: "The Court ordered the estate to be sold for payment of debts; the heir might file a bill to set aside the proceedings if they were erroneous."

Judgment.

In this country where the mortgagee is entitled to a sale, as he is in Ireland, there is not the difficulty in his way that there is in England.

In the case before me, there are parties now, and to be added in the Master's office, interested in seeing that the plaintiff gets no more than he is entitled to. I think this is a case in which under the authorities, a decree may properly be made for a sale of a competent part of the mortgaged premises upon default in payment of mortgage money: the Master to inquire who are the heirs of *Peter Strong*, and where they are as far as he can ascertain. In case of a sale the particulars to state fact of the heirs-at-law being out of the jurisdiction and unknown, if the fact should so turn out, and that the decree is made in their absence and subject so far as any parcel of land is concerned to fraud or error in the proceedings being shewn by them.

I have indicated what I consider will be a proper

decree in the absence of the heirs of *Peter Strong*. A difficulty however may arise from the release to *Goodham;* that point has not been spoken to, and the release may be material or not according to the time when it was made. It may be that *Goodham* is a necessary party before decree, or he may not be a necessary party at all. The plaintiff may take a decree: which must however be upon his own responsibility, directing an inquiry as to when the release to *Garaham* was made; the Master to report upon all material facts in relation to the release; in such case further directions and costs to be reserved.

1868.

Smith v. Good.

CHAMBERLAIN v. McDONALD.

Married women—Separate estate.

A married woman who has separate estate which is vested in Trustees cannot, on that account, be sued for a legal debt contracted before her marriage. In such a case a creditor has no *locus standi* in Equity until he has obtained judgment at Law.

Quære. Whether a married woman has any and what *jus disponendi* in respect of her personal property, under the Married Woman's Act (Consolidated Statutes of Upper Canada, chapter 73.)

This was a bill by a creditor of the defendant *Jane McDonald* in respect of a debt contracted by her before her marriage to the defendant *Donald M. McDonald;* and the object of the bill was to obtain payment out of the dividends of certain Bank Stock, which, when the debt was contracted, stood, and was still standing, in the names of the defendant *Walter Sheridan* and another person as Trustees for Mrs. *McDonald.*

Statement.

To this bill the defendant *Jane McDonald* demurred.

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

Mr. *Crickmore*, contra.

1868.

Chamberlain v. McDonald.

VANKOUGHNET, C.—I agree with my brother *Spragge* in the view he took of the Married Woman's Act in the *Royal Canadian Bank* v. *Mitchell* (*a*). I think that property held by a married woman is not under that Act made her separate property in the sense in which property settled to her own use with the right to dispose of it, is treated, and therefore her contracts do not bind it. Independently of this I do not see my way to granting equitable execution against the dividends payable on the stock. According to the statements in the bill the executors have assented to her receiving these dividends. By what process are they to be got at? Stock may be seized and sold by the Sheriff. But dividends, how are they to be seized, except as money! There is nothing due from the Corporation till the dividends are declared. It is not alleged that the Bank, who is no party to this suit, does not pay them over to the wife. It seems they are paid to her directly, and not to the executors or trustees. There is of course a difficulty in getting at moneys receivable or paid, and they may go into the pocket, but that never formed a ground for equitable execution or interference. On the note made by the wife before marriage, a judgment at law can be obtained, and execution will be just as operative there as here. I must allow the demurrer.

Judgment.

The plaintiff being dissatisfied with this judgment set the case down to be re-heard before the Chancellor and two Vice-Chancellors.

Mr. *Roaf*, Q. C., for the demurrer, contended that the plaintiff should have sued at law; that if he could reach these dividends by a suit in this Court, it was only in aid of the execution on his judgment that it could be done: referring to *Kramer* v. *Glass* (*b*), *Lees* v. *McPherson* (*c*).

(*a*) *Ante* p. 412. (*b*) 7 U. C. L. J. 120.

(*c*) Lees v. McPherson, 17 U. C. C. P. 266; Enrick v. Sullivan, 25 U. C. Q. B. 105.

1868.

Chamberlain v. McDonald.

Mr. *Strong*, Q. C., and Mr. *Crickmore*, contra, cited *Leys* v. *McPherson* (*a*), *Emrick* v. *Sullivan* (*b*), *Hulme* v. *Tenant* (*c*), and notes.

THE CHANCELLOR referred to *Horsley* v. *Cox* (*d*).

The Court took time to look into the authorities.

VANKOUGHNET, C.—I believe we are all of opinion that the demurrer was rightly allowed though my brothers give different reasons for this conclusion.

MOWAT, V.C.—The debt having been contracted while Mrs. *McDonald* was a *feme sole*, the plaintiff should have sued at law, as mentioned in the 18th section of the Consolidated Statutes respecting the property of married women (*e*). The debt was not a charge on her property any more than a debt contracted by a man is a charge on his estate before judgment, and execution. The question whether the dividends can be reached to obtain payment of the debt, does not arise until after the plaintiff has recovered judgment at law, as it is only in aid of the proceedings at law, that this Court has jurisdiction, if it has jurisdiction at all, to help the plaintiff. Judgment.

I express no opinion at present, on the other points discussed or mentioned on the argument; but I may observe that I see great difficulty in holding, that a married woman has, under the Act, no *jus disponendi*, except by will, of her personal property. She is, by the Statute, entitled to "enjoy * * her personal property * * free from * * (her husband's) control, * * in as full and ample manner as if she were sole and unmarried."

(*a*) 17 U. C. C. P. 266.
(*b*) 25 U. C. Q. B. 105.
(*c*) 1 W. and T. L. C. 435.
(*d*) Weekly Notes of 14th Dec. 1867, page 292.
(*e*) Ch. 73.

1868.

Chamberlain v. McDonald.

Money and many other descriptions of personal property, cannot be enjoyed at all without being disposed of, and to require the consent of the husband to the disposition by the wife, of any of her personal property would, as Lord *Westbury* observed in *Taylor* v. *Meads* (*a*), be to make her subject to his control, which is what the Statute says shall not be.

There is much greater reason for denying the right as to real estate, because since the Statute, any more than before, she certainly cannot convey her real estate without her husband's concurrence, but the statutory enactments on the subject should if possible, be so construed as may give some meaning to the proviso to the 15th section of the Consolidated Statute, chapter 85, as well as to the preceding part of that section.

Judgment.

SPRAGGE, V.C.—Concurred in the judgment of Vice-Chancellor *Mowat*.

The order allowing the demurrer was affirmed with costs.

(*a*) 34 L. J. N. S. Chan. 203.

1868.

GOFF v. LISTER.

Unpatented lands—Registration—Notice.

Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent.

Where a party claims under a quit claim deed, he is, in general, not protected as a purchaser for value without notice.

This was a re-hearing before the full Court of a cause heard at Chatham, before Vice-Chancellor *Mowat*, whose judgment thereon is reported *ante* vol. xiii. page 406.

The present re-hearing was at the instance of the defendant.

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

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

VANKOUGHNET, C.—I think the decree in this case should be affirmed; and I desire to rest my opinion to that effect upon the actual notice which *Lister* had, through his agent, of the terms of the assignment from *Ireland* to *Brown*, a copy of which has been furnished us in evidence. That assignment states the sale to *Brown* of one-half of the lot "as divided longitudinally between *Brown* and *Goff*." Now as *Lister* was searching into the state of the title in the Crown Lands Office, it must be assumed that, by his agent, he read this assignment. He would know also that *Ireland* once held the whole lot from the Crown, and that, in selling one-half of it to *Brown*, he, *Ireland*, recognized *Goff* as entitled, in some way or by some interest, which he could have derived from *Ireland* alone, to the other half. He could not reasonably come to any other conclusion. He could not for a moment imagine that *Ireland* was speaking in

Judgment.

1868. Goff v. Lister.

the assignment to *Brown*, of a division of the lot between the latter and *Goff*, if *Goff* was only in as a trespasser. He could not doubt that *Goff* was in under some arrangement with *Ireland*. And this was sufficient notice to him, express and clear, that *Goff* claimed under *Ireland*; and he took, therefore, subject to that claim, whatever it might be He knew all this when he went to *Ireland*. *Ireland* told him he had sold the whole lot. *Lister* knew that he had. But *Ireland* said that he had sold it all to *Brown*, (as he originally had.) *Lister* told him he had only conveyed the west-half to *Brown*; and *Ireland* said, if that were true, then he could only have sold him that half. *Lister* knew that *Goff* had the other half, or some interest in it, but he never mentioned his name to *Ireland*.

Judgment.

I agree with the view expressed by my brother *Mowat*, as to the effect of notice upon assignments, registered in the Crown Lands Department, and I have myself acted upon this view in prior cases.

SPRAGGE, V. C.—I concur in the judgment of the Court below. I think the defendant had express notice of the previous sale and took subject to it. I am of opinion also that a person who holds under a quit claim deed only, cannot set it up as the foundation of a defence of a purchaser for value without notice, and I have so held in other cases.

MOWAT, V. C.—At the hearing of this cause I was of opinion that the defendant *Lister* had express notice of the prior sale by *Ireland* of the property in question; and that, consequently, *Lister* was not in the position of a purchaser without notice. This view of the evidence I stated at the close of the argument at Chatham, and I only reserved judgment there on some of the points of law which were raised. As to these questions of law, I remain of the opinion afterwards expressed in my judg-

ment as reported in Mr. *Grant's* 13th vol. (*a*), and I do not consider it necessary to add anything to what I have already said; but as on the present occasion the learned counsel for the defendant relied chiefly on the defence of a purchase for value, and as my former observations on that point, made at the close of the argument at Chatham, have not been reported, I think it right, in deference to the able argument which was addressed to us on the re-hearing, to state fully the view which, after having had the benefit of that argument, I take of this part of the defendant's case.

1868.

Goff v. Lister.

The assignment to the defendant was a quit-claim without covenants; and the learned counsel for the plaintiff argued, with much force, that a person with such a deed is not entitled to the protection of the Registry Acts; that, purchasing from one who asserts no title to the estate claimed under the deed, the principle on which the Registry Acts are based does not apply to his case. This appears to have been the opinion of my brother *Spragge* in *Graham* v. *Chalmers* (*b*), where he observed: "The conveyance from *Chalmers* to *Knowlson* was by what is called a quit-claim deed. I think such a conveyance is a mere transfer to the purchaser of whatever title the grantor may have, and does not place him in the same position as a conveyance in the ordinary mode." The same view receives some support from the case which was cited (*c*), and from other cases both in England and in this country (*d*). It is said to be by assignments in this form that rights to unpatented lands have usually been transferred, even when there was no question as to the title; the assignments to *Goff* and *Brown* were in this form; and in this view the decisions, which, before Sheriff's

Judgment.

(*a*) p. 406.

(*b*) 7 Gr. 597.

(*c*) Rice v. Connor, 12 Ir. Ch. 424.

(*d*) Farrow v. Rees, 4 Beav. 18; Jones v. Williams, 24 Beav. 47; Bethune v. Caulcutt, 1 Gr. 81; McMaster v. Phipps, 5 Gr. 253.

1868. Goff v. Lister.

deeds were specifically mentioned in the Registry Acts, as they are now (*a*), held that the grantees in such deeds were within the protection of the Registry Law (*b*), may have a bearing, as Sheriff's deeds are commonly, if not always, in the same form. In the present case, there are other circumstances, which, without either resting the decision on the form of the deed or excluding it altogether from consideration, seem to me to make it clear that the defendant is not protected by the registering of his deed.

The facts to be borne in mind with regard to the question of notice are these. *Ireland*, the original locatee, in the same year that he took up the lot, contracted for the sale of his interest in the whole lot, he thinks to *Willis Brown* only, for $800, payable by instalments of $200 a year. *Ireland* does not recollect whether this contract was in writing. Nothing was paid down upon it; and in the following year *Brown* came to him and paid him $600 cash, which *Ireland* accepted in full.

Judgment.

If *Brown* alone made the bargain with *Ireland* and paid the money, it appears that he acted in doing so for *Goff* as well as himself; and, accordingly, on receiving the money, *Ireland*, at *Brown's* request, executed two assignments—one, of the west-half of the lot to *Brown*, and the other, of the east-half (which is now in question) to *Goff*. This was on the 24th September, 1855. These facts are not now disputed. In consequence of that sale, *Ireland*, from that time until the 1st January, 1866,—more than ten years,—never claimed any interest whatever in either half of the lot. Nor did he claim any interest in it even on the 1st January, 1866. On that day, the defendant *Lister*,—who had

(*a*) 29 Victoria, chapter 24.
(*b*) Doe v. O'Neill, 4 U. C. Q. B. 8; Waters v. Shade, 2 Gr. 457.

1868.

Goff v. Lister.

learned the state of matters at the Crown Land's Office and, making search for the locatee *Ireland*, had found out that he resided in Chatham,—went to *Ireland's* house there, taking with him a blank assignment of the half lot. What thereupon occurred is, I have no doubt, correctly stated in *Ireland's* evidence:

"Until Mr. *Lister* came to me, I considered that I had sold the whole lot to *Brown*. I told him that I had sold the whole lot to *Brown*. * * Mr. *Lister* then produced a paper—I think a certificate from some of the officers of the Crown Lands Department—stating that I had a right to the patent of the east-half; and Mr. *Lister* then asked me if I had made any assignment of it. I said I thought not—that I thought I had sold and assigned the whole lot to *Willis Brown*. *He then told me* that I had this right, and that he would like to purchase it. He offered me $75 *for my signature* to get the patent. I told him that if my signature was worth $75, it ought to be worth $100. Mr. *Lister* then agreed to give me $100. All that I undertook to give him was my signature to enable him to get the patent. I knew that the land was worth a great deal more than $100. Mr. *Lister* said it was seven or eight miles from the oil land. He told me that either he had seen or was going to see *Brown*, to buy the interest of *Brown* in the lot. He said he had either bought, or was going to buy, *Brown's* interest—I forget which. * * I told him he must take the land on his own risk." On cross-examination the witness added the following statements bearing on the same point: "I told *Lister* that I *thought* I had only executed one instrument, and that was in favour of *Willis Brown*. My impression then was, that the right to the east-half had been forfeited by not making the payments to the Crown, and that I was still entitled to the patent for it. * * Mr. *Lister* and I went to Mr. *McCrea's* house after making the bargain. I told Mr.

Judgment.

1868.

Goff v. Lister.

Lister there that I *thought* I had not made any assignment of the east-half. I thought I must have some right or other, or Mr. *Lister* would not be looking after the patent. When I found from what Mr. *Lister* told me, that I had still the east-half, it took me quite by surprise." In answer to some questions from myself the witness stated: "When he (*Lister*) shewed me that I had only assigned half, I thought I must have been wrong in supposing I had sold more than half. * * I could not imagine how I had any right when Mr. *Lister* shewed me the papers, but he said I had a right; and I said if my right was worth $75 it was surely worth $100." Mr. *McCrea*, who was called for the defendant to prove what passed when the parties went to his office, stated it pretty nearly as *Ireland* did: "*Ireland* mentioned that *if* his assignment to *Brown* did not include the half spoken of, he (*Ireland*) was still entitled to it. * * I understood that *Ireland* said, he had never made an assignment except to *Brown*. *Lister* seemed apprehensive there might have been an assignment since his last search at the Crown Lands office. * * *Ireland* asserted more than once that *if* the one assignment he had made did not include both halves, he had made no assignment of the one half." It was at Mr. *McCrea's* office on this occasion that the assignment to *Lister* was executed, and the $100 paid to *Ireland*.

Judgment.

It thus appears that *Lister* had express notice, at the outset of the conversation, that *Ireland* had sold and assigned the whole lot many years previously; and *Lister's* answer contains an admission to the same effect. *Ireland* was in error in saying that he had assigned the whole lot to *Brown*, for, if he sold the whole to *Brown*, *Brown* was acting therein for *Goff* as to half the lot, and he had procured two assignments to be executed, one of half to *Brown* and the other of half to *Goff*; each assignment stating that the lot had been divided longi-

tudinally between *Brown* and *Goff*. *Ireland's* error, however, was immaterial (*a*); and if, notwithstanding *Ireland's* statement that he had assigned the lot as well as sold it, the fact had been, that, though he had sold the whole, he had not executed an assignment of any part of it, such a notice would clearly have entitled the prior purchaser to enforce against *Lister* any sale which, at the time of the assignment to *Lister*, such prior purchaser was in a position to enforce against *Ireland* himself.

But was this express notice neutralized by what occurred between *Lister* and *Ireland* afterwards? Clearly not. Up to the last, *Ireland* did not pretend to recollect that he had been in error as to having sold the whole lot. It was *Lister* who told him he had still an interest in half of it; the information surprised *Ireland*, and he did not conceal his surprise. *Lister* shewed him some certificate from the Crown Lands' Office (which has not been produced to us) and this certificate puzzled him. *Lister* offered him $75, and then agreed to give him $100, for his signature to an assignment. Still *Ireland* did not assert a title to the land; but he thought he had executed but one assignment, and he said so; and, recollecting no other, he said that if the assignment was of the west-half only, he thought he had not made any assignment of the east-half; that if his assignment to *Brown* did not include this half, he (*Ireland*) was still entitled to it. On the other hand, *Lister* asked no particulars of the previous sale; and, notwithstanding the evidence which *Lister* produced and *Lister's* own assertions, so clear and distinct was *Ireland's* recollection of having sold the whole, that up to the last he was not satisfied that the registered assignment did not embrace the whole lot; and accordingly he put hypothetically the statement he made as to title: if

Judgment.

(*a*) Taylor v. Baker, 5 Pri. 306; Penny v. Watts, 1 MoN. & G. 150; Gibson v. Ingo, 6 H. at 124; Gurney v. Glanmore, 5 Irish Ch. 439, 440; Wilson v. Hart, 13 W. R. 988.

1868. Goff v. Lister. the registered assignment did not embrace but one-half, he had sold but half. He also told *Lister* he must take his signature at his (*Lister's*) own risk; and the deed to which *Ireland* put his signature, contained no covenant that he had any title.

I am quite clear that such a purchase is not within the protection of the Registry law. To confine myself for the moment to the question of notice. What is it that *Lister* asks me to presume? That he believed, and he asks me to hold that he had a right to believe, that *Ireland's* memory for so many years as to having sold the whole lot (of which *Lister* had express notice) was incorrect, and that the impression on *Ireland's* memory at the end of ten years as to his having executed but one assignment, was entirely correct; in other words, that the ten years' memory in reference to that which alone concerned him and which had influ-
Judgment. enced his conduct all that time, was a mistake, and that a recollection at the end of that period,—begotten under the influence of a communication which surprised him, and of an offer made to him in his poverty to buy this supposed interest, and in regard to a circumstance which did not concern him, and which he had had no occasion to keep in mind,—was accurate and reliable. Such a supposition is out of the question.

Again, as *Ireland* expressly referred to the former deed in the way I have mentioned, and did not pretend to be satisfied that it was not of the whole lot, *Lister* was bound to examine that deed, if he had not done so already; and, indeed, the Master of the Rolls has held that a person who relies for his defence on the register must be taken to have notice of the whole register, and of whatever the register would put him on inquiry respecting (*a*). Search was made on behalf of *Lister*

(*a*) Ford v. White, 16 Beav. 120.

1868.

Goff v. Lister.

at the Crown Lands' Office by his solicitor or agent; and notice by a solicitor or agent of an unregistered instrument has the same effect as express notice to the party himself (*a*). Now the statement, in the registered assignment, of the lot having been equally divided longitudinally between *Brown* and *Goff*, was not communicated to *Ireland*, and was sufficient to explain to *Lister* the error into which, from misrecollection, *Ireland* fell; and if there had been any room for a doubt on the point after reading the assignment and hearing *Ireland's* verbal statements, a reference to *Ireland* would at once have cleared up the doubt.

Under these circumstances, I have no doubt whatever, that I was bound to hold that what passed between *Ireland* and *Lister* was entirely insufficient to relieve *Lister* from the effect of the express notice which *Ireland* gave of the previous sale.

Judgment.

The small sum which *Lister* gave for the property is a circumstance material in reference to this defence. The amount was so small as, apart from any question as to the morality of the transaction, made it well worth *Lister's* while to give it for the chance of thereby securing the enormous profit he would make if he got the lot; and there seemed but little chance that a claim which had been unregistered for ten years, should turn up before *Lister's* object would be secured. The learned counsel for the defendant contended, that there was no sufficient evidence that *Lister* was not giving the full value; but it seems to me there was very satisfactory evidence. The sum ($100) was but one-third of what *Ireland* had got for the land ten years previously, and long before the oil excitement arose; and, within a few days after getting *Ireland's*

(*a*) Le Neve v. Le Neve, Amb. 436; Lenehan v. McCabe, 2 Ir. Eq. 342; Nixon v. Hamilton, 2 D. & Wal. 391; Benham v. Reeve, 1 J. & H. at 701.

1868. signature, *Lister* sold fifty acres of the property for $875; and, within less than three months, he sold the other fifty acres for $3,000, after paying what was due the Government ($245.62). The defendants have given no evidence of any rise in value between the date of the assignment to *Lister* and the dates of these sales; and, in the absence of any such evidence, the dates of the sales were quite near enough to afford a good test of the value at the time of the assignment. The consideration was, therefore, considerably less than one-tenth of the cash value of the property. Now in *Lee* v. *Hart* (*a*) Parke B. observed that "buying goods at an under-rate would be evidence of a guilty knowledge, if the vendor had no right to sell; and if the prisoner had been indicted for receiving stolen goods, knowing them to be stolen, that fact would have been evidence of such knowledge."

Goff v. Lister.

Judgment. So, as against a prior voluntary conveyance, a subsequent vendee for value is not entitled to the protection of the Statute of Elizabeth (*b*), if the consideration he paid was but a mere fraction of the value of the property. In *Metcalfe* v. *Pulvertoft* (*c*) one-third was considered by Lord *Eldon* a sufficient disproportion for this purpose; his Lordship saying that "if the estate has, as it is alleged, been purchased at a third part of its value, then, according to the case decided by Lord *Mansfield*, that purchase would not prevail against the voluntary settlement." A disproportion of one-tenth is spoken of for the same purpose in *Doe* v. *Routledge* (*d*), and *Parry* v. *James* (*e*). Such a conveyance is considered to be really a gift, and only in form and name a sale or purchase.

(*a*) 10 Ex. 560. (*b*) 27 Eliz. ch.
(*c*) 1 V. & B. 184. (*d*) Cowp. 705.
(*e*) 16 East 212.

The principle of both these classes of cases appears to apply to the present case. 1868.

Goff v. Lister.

I am of opinion, on reconsideration of the whole case, that the decree was correct.

Rev. on appeal 16 Gr. 9

LIVINGSTONE v. THE WESTERN ASSURANCE COMPANY.

Fire insurance—Mortgage.

A fire policy in the name of a mortgagor contained this clause: "In the event of loss under this policy, the amount the insured may be entitled to receive shall be paid to A. Livingtone mortgagee." There was evidence that the insurance was applied for by the mortgagee and was intended for his security:

Held, that to the extent of the mortgagee's interest a subsequent act of the mortgagor to which the mortgagee was no party, would not avoid the policy.

Statement.

The plaintiff was the mortgagee of one *Porte* for the sum of $300 upon a building in the city of Kingston. The mortgage contained a provision for the insurance of the premises by the mortgagor to the extent of the mortgage debt, and in case of his failing to insure, then that the mortgagee might do so and charge the premiums to the mortgagor.

The building mortgaged was afterwards insured with the defendants by a policy bearing date the 15th of August, 1865, and the building was destroyed by fire in December of the same year. The policy contained a provision for its becoming avoided in case of subsequent assurance in another office. *Porte* did, after the date of this policy effect an insurance on the same building in another office, though without the plaintiff's privity; and the defendants contended that by reason of such subsequent assurance the policy became vitiated.

1868.

Livingstone v. Western Assurance Co.

There was also parol evidence that it was the plaintiff who had applied to the insurance agent to effect the insurance; that he paid the agent the premium, and that the agent gave him a receipt therefor in the plaintiff's own name; and that he subsequently delivered to the plaintiff the policy in question. This evidence was objected to on the part of the defendants.

The policy named the mortgagor *Thomas Porte* instead of *Francis Porte*.

The bill alleged that the plaintiff was not aware until after the fire, that the policy was not in the plaintiff's own name; and that he had no remedy at law, both by reason of the mistake in the name and because of the subsequent insurance by the mortgagor. The bill also alleged that the plaintiff had not any notice of this subsequent insurance.

The cause came on for the examination of witnesses and hearing, before Vice-Chancellor *Spragge*, at the sittings of the Court in Toronto.

Mr. *McLennan*, for the plaintiff.

Mr. *Strong*, Q. C., and Mr. *D. A. Sampson*, for the defendants.

Judgment.

SPRAGGE, V. C.—[After stating the facts as above set forth.]—The question that I have to decide, arises out of the peculiar form of the policy. In words, it insures *Porte* and the words "the assured," in the passage to which I shall have to refer mean *Porte*; this is clear from the use of the words in the description of the building insured, which is stated to be "owned and occupied by assured," it being in fact owned by *Porte*, subject to the plaintiff's mortgage and in fact occupied by him. The plaintiff relies upon this provision in the policy

1868.

Livingstone v. Western Assurance Co.

"In the event of loss under this policy, the amount the assured may be entitled to receive shall be payable to A. Livingstone, mortgagee." He refers me to the case of *Burton* v. *The Gore District Mutual Insurance Company*, (*a*), and contends that upon the whole policy the plaintiff is the assured. Upon a careful consideration of the whole instrument; and of the law bearing upon contracts of insurance, I agree with him.

To consider first the nature of the contract of assurance. It is essentially a contract to indemnify. It is thus defined by Mr. *Phillips* (*b*), in his treatise on the subject: "Insurance is a contract whereby for a stipulated consideration, one party undertakes to indemnify the other against damage or loss, on a certain subject, by certain perils. In *The Sadlers' Company* v. *Badcock* (*c*), a case of insurance against fire, Lord *Hardwicke* thus stated the principle: To whom or for what loss are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage," and Mr. *Angell* in his treatise on the subject, defines the principle of the contract in these terms. "The principle of indemnity is the general principle which runs through the whole contract of insurance. A contract of indemnity is given to a *person* against his sustaining loss or damage, and cannot properly be called one that insures the thing, it not being possible so to do."

Judgment

To enlarge a little upon the principle and to apply it in this case. The substance of a contract of insurance is to pay to the extent of a sum of money named, in the event of damage by fire to a certain building—to pay to

(*a*) 12 Grant, 156. (*b*) Page 1.
(*c*) 2 Atk. 504.

1868.

Livingstone v. Western Assurance Co.

some person. Is not the person to whom the money is made payable the party assured? Is it not he that is the party indemnified, another word for assured, against loss? Then what is the legal effect of this policy? Is it not a covenant by the Company to pay Livingstone to the extent of $300 in the event of a certain building being damaged by fire? And if so, is there any other person to whom the term, "the assured" can properly be applied? The calling *Porte* by that term, can make no difference if upon a proper construction of the instrument, *Livingstone* and not *Porte* is the party to be indemnified *i. e.*, "assured;" and the instrument is explicit upon that head. It was *Livingstone* who was to be paid in the event of loss. *Porte* was to receive nothing, and therefore in no proper sense of the term could he be the assured, but *Livingstone* only.

Judgment.

But a question is made upon the terms of the clause by which the insurance money is made payable to *Livingstone*, and the sense in which the term "the assured" is used in that clause may aid in its construction. There is in this clause, read literally, a contradiction in terms. It provides that the amount "the assured may be entitled to receive," shall be payable to *Livingstone*. By the assured is meant *Porte*, as I believe, but he was not to be entitled to receive, but *Livingstone*. It is a verbal inaccuracy, the obvious meaning is, the amount that *Porte* would but for *Livingstone's* title as mortgagee, be entitled to receive, shall be payable to *Livingstone*. The question is, what is meant by this? The defendants give it this meaning, that *Livingstone* was only to be entitled in case *Porte* should be entitled; that his rights were subrogated to those of *Porte*; and that in the event of anything occurring to defeat *Porte's* right, if he had been the party to receive the money, *Livingstone's* right should fall with it. At the argument I was inclined to adopt this construction. But the words are open to another meaning; viz.: that it is a form of expression

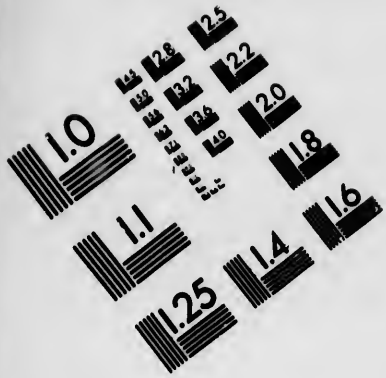
rendered necessary, or at least used, by reason of *Porte* being called the assured. The thing to be expressed was that *Livingstone* was to be the party to receive the money; but what amount of money? it would not do to say the said sum of $300, because the sum payable might be only the half or the quarter of that sum, according to the loss sustained. The same meaning if that was the meaning might, to be sure, have been expressed in other words, and therefore it is not certain that such was the meaning of the parties. In the connexion in which they are used they were intended either to point to, and to restrict the amount to be received, or, to qualify the right of the party entitled to receive: the words may mean one or the other. Certainly, they are not necessarily a qualification of the right to receive.

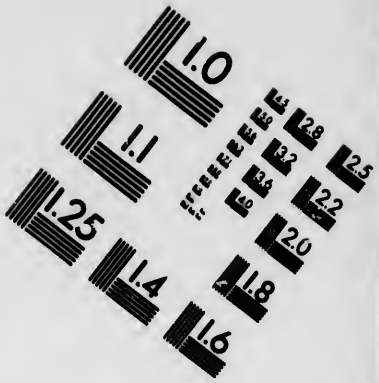
Then to look at the nature of the contract, a contract to pay *Livingstone* to the extent of $300 in the event of a house occupied by one *Porte*, miscalled the assured, being damaged by fire. If that be the true nature of the contract, as in my judgment it is, it would be wrong to put that construction upon the clause which would make *Livingstone* the party really assured, subject to have his title to the assurance money defeated by some act of *Porte*, which by the terms of the contract would defeat it, *only* if made, by the party assured. The parties might certainly have so provided; but it would have been an unreasonable, incongruous provision; and the Court will not, while the words are fairly open to another construction, so construe them, as to make the instrument unreasonable and incongruous. My opinion is, looking at the whole instrument, its real nature, and the legal effect, that the proper construction of the words is to hold them not to be a qualification of the plaintiff's right to receive the assurance money, as is contended for by the defendants.

Judgment.

Putting that construction upon the clause in question,

[redacted]





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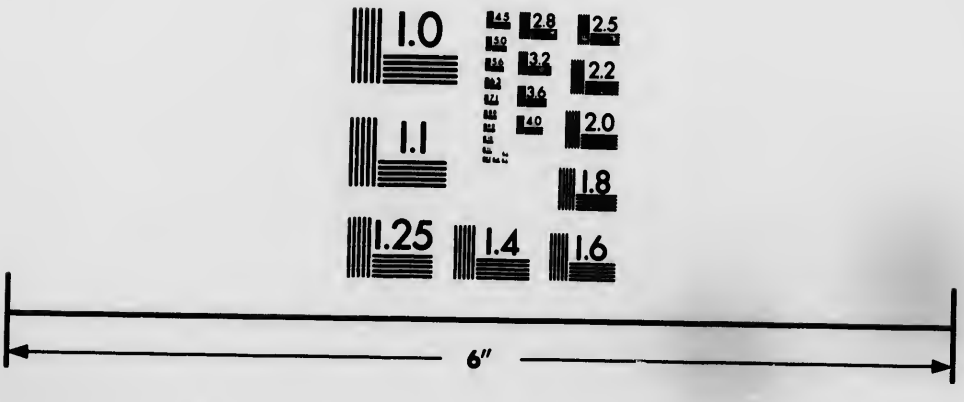

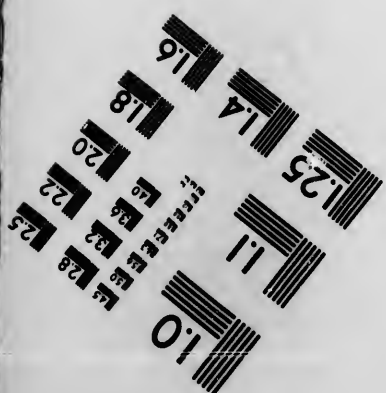

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1868.

Livingstone v. Western Assurance Co.

the instrument must be read as a contract to insure *Livingstone* to the extent of $300, if the building insured were damaged by fire to that extent, or to such less extent as the building might be damaged, and the case has not to encounter the difficulty which existed in *Burton* v. *The Gore District Mutual Insurance Co.*; that case, however, is in point in this way. There was not in that case on the part of the assurers any direct contract with *Burton* and *Sadlier* tho assignees of the assured. There was an assignment assented to by the assurers, and from thence sprung an implied contract to assure the assignees; a contract which was held not to be affected by acts of the party originally assured; though acts, which but for such assignment would have vitiated the policy *in toto*. In like manner in this case the contract is not expressed to be directly with *Livingstone*, but I think such contract arises by implication, more clearly than in the case referred to. The consequence must be the same in this case as in that, the contract cannot be impaired or affected by the act of any other than the party really assured.

Judgment.

Upon these grounds my opinion is that the plaintiff is entitled to a decree and with costs.

The defendants asked at the hearing that in the event of my opinion being against them, the plaintiff might be directed to assign to them his mortgage and the plaintiff assented to this. Such order was made in *Burton* v. *The Gore District Mutual Insurance Company.*

The defendants re-heard the cause, which came on for argument before the Chancellor and two Vice-Chancellors; when the same counsel appeared for the parties.

1868.

Livingstone v. Western Assurance Co.

VANKOUGHNET, C.—I am of opinion that there was no contract of assurance with the plaintiff, under the policy of assurance in question; and that the only contract with him was to pay him any money to which the assured might become entitled under the policy. This is not the case of an assignment of a policy, by virtue of which the assignee may become entitled to take the place of the person originally assured. The plaintiff's claim is here upon and under the original policy; and, unless he be the party assured under it, he can have no claim. Now, read the policy: and, is he by any terms or language used in the policy "the assured"? Is not *Porte*, the mortgagor, the party assured? If language means anything, he is. The clause written in the policy in which alone the plaintiff's name appears, declared him, the mortgagor, to be the assured; and the only undertaking to the plaintiff arises under that clause, which says "In the event of loss under this policy the amount the assured may be entitled to receive shall be payable to *A. Livingstone*, mortgagee." Can language be plainer than this, to shew that it is the mortgagor, not the mortgagee, whom the Company were insuring? Surely if they were insuring the mortgagee, very different language would be used. Do not the Company tell the plaintiff, in language as plain as possible, that what they undertake to pay him, is the money, which may be coming to the "assured"? And is there any doubt that by the "assured," as here used, is meant the mortgagor? What was the sense, meaning, or object of this language, and of the language of the policy generally, if it is the mortgagee, and not the mortgagor who is assured? That the Company might assure the mortgagor alone, no one will doubt. It is not pretended that both mortgagor and mortgagee are insured. In what form of words could the Company have effected insurance with the mortgagor alone, if not by the words here used? That they declare him to be the assured party, is too plain, from the language of the policy, for any one to doubt.

Judgment.

1868.

Livingstone v. Western Assurance Co.

That the contract of insurance in the policy is with him alone, in express terms, is equally plain. If so, why should ingenuity be tortured to twist this contract, in terms made with the mortgagor, into a contract with some one else? Is there anything unreasonable in treating the contract of assurance here as made with the mortgagor? We must assume that all parties knew what they were about when this policy was made. The mortgagor was owner of the property. The mortgagee had a charge upon it. The mortgagor was in possession. The mortgagee is anxious that the property should be insured. Application is made by him to the Company to grant assurance. The Company say (that is, reading the policy, I think we must assume they did say) "We will insure the mortgagor, the owner of the property, who is in possession of, and has charge of it;" and it is quite reasonable that they should have further said, "We won't assure you, who are not in possession and cannot take care of the property, and are not the owner of it, but we will pay you on account of your claim as mortgagee anything which may be coming to the mortgagor under the policy which we will issue to him."

Judgment.

Now, is this not really what occurred; what, as an inference of fact, we must say did occur, if the language of the policy is to have the natural and usual meaning and construction given to words. Surely, there was nothing to prevent a contract by the Company on this basis; and, it seems to me this was the basis of the contract; and, indeed, the contract itself, as evidenced by the language of the policy. The policy, which contains the contract with the assured, contains also the stipulation with the mortgagee. We have to read the two together. We have no right to reject the one or the other, if they can be consistently read together; neither have we any right to say that these two express contracts shall be blended into one, unless we cannot give effect to both, according to their express terms. I see no dif-

ficulty in construing and giving effect to both. Suppose the stipulation with the plaintiff had been contained in a separate instrument, executed at the same time, would it be contended that, therefore, the policy, which granted insurance to the mortgagor, was to be read as a policy of insurance with the mortgagee—that all its meaning and language, as expressed on the face of it, were to be changed, and, that the parties were to be told, they did not mean what they said? But, look at the consequence of treating the mortgagee as the party assured! He comes under no responsibility for himself—and is to be freed from all responsibility for the acts of the mortgagor. Though the policy in express terms stipulates that if the mortgagor commits or omits certain acts, the policy shall be void, yet, he may violate any one of these, and, for aught I see to the contrary, if the mortgagee can alone claim under the policy, he, the mortgagee, may assist him in it, and yet recover the assurance money. Although in the very policy, in the very contract of assurance, on which arises, if at all, the plaintiff's right to sue, it is stipulated that the assurance is granted subject to the conditions of its becoming void in case the mortgagor does certain acts—and although the plaintiff took the policy, if he is to be treated as the person who did take it, subject to this condition, he is yet to be entirely relieved from it. All the conditions in fact are to be struck out, and the plaintiff is to be entitled to the assurance money, on the premises being burned down, even though the mortgagor, himself burned them—even though the mortgagor, contrary to the provisions of the policy, kept on the premises inflammable material, which caused the fire. In fact, if the plaintiff's contention is right, the policy is to be stripped of every thing, beyond a mere naked undertaking to pay the plaintiff the insurance, whenever a loss occurs by fire, no matter how occasioned: I cannot consent to make such a contract for the Company in face of their own language to the contrary. Suppose plaintiff had been paid his mortgage debt before

1868.

Livingstone v. Western Assurance Co.

Judgment.

1868.

Livingstone v. Western Assurance Co.

any loss occurred, would the mortgagor have no rights under the policy? Could he not claim to have the money paid to himself, now that the debt to the plaintiff was discharged. It seems to me clear that he could. He was insured. The payment of the money coming to him was another thing. If the plaintiff had no right to it, it must belong to the assured, for it was his, subject only to the plaintiff's claim. I read the contract with plaintiff to be this, and no more than this: "whatever sum *Porte*, the assured, may be entitled to under his policy, we, the Company, will pay to you on your mortgage debt." Suppose that *Porte* had assigned the policy, with the assent of the Company, in those very words, could the assignee claim anything more than *Porte* himself could have claimed under the policy? Here, however, it is part of the same instrument, by which the insurance is granted to *Porte*, and the parties could contract to a greater or less extent as they pleased. The plaintiff, it seems to me, was content to take whatever might be payable to *Porte* under the policy; and, as nothing was payable to him under it, the plaintiff should get nothing. It is not like the case of *Burton* v. *The Gore District Mutual Ineurance Co.*, where the policy was assigned with the assent of the Assurance Company; so that from that time forward the assignee, as to a certain interest, became the party assured. Here, the rights of the parties are declared *ab initio* by the contract itself; and no subsequent arrangement took place between them to alter these rights.

Judgment.

I think the bill should be dismissed with costs.

SPRAGGE, V. C., remained of the same opinion as on the original hearing.

MOWAT, V. C.—The provision in the policy for paying the money to the plaintiff, describing him as mortgagee, shews the policy was effected for his benefit; without

1868.

Livingstone v. Western Assurance Co.

referring to the parol evidence, to the admissibility of which objection is taken on the part of the Company. If effected for his security, he was the assured; or rather one of the assured, for the mortgagor was no doubt entitled to the advantage of the insurance; and, if he had not by his own act forfeited the right, he could have insisted on the application of the money by the plaintiff in payment of the mortgage; or, if the mortgage were paid otherwise, the mortgagor would have been entitled to receive from the plaintiff whatever sum the plaintiff received from the Company. Both were, therefore, from the nature of the transaction, assured, that is, indemnified, to the extent of the sum named, against loss by fire. The policy sometimes speaks of the assured when, read grammatically, the reference is to the mortgagor only; but I do not think that circumstance entitles the Court to say that that limited signification is to be ascribed to the expression where the context does not demand it. It is to be remembered, that the policy is in a printed form, adapted to the ordinary case of an insurance by a party for his own sole benefit, and not to the case of an insurance by one person for the benefit of another; and that the provision shewing the plaintiff's interest in the policy is written, and, therefore, if necessary, controls the printed words. Lord *Ellenborough* in *Robertson* v. *French* (*a*), speaking on this point, said: "The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there could be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general *formula*, adapted equally to their

Judgment.

(*a*) 4 East 136.

1868.

Livingstone v. Western Assurance Co.

case, and that of all other contracting parties upon similar occasions and subjects."

I think that the case cannot in principle be distinguished from *Burton* v. *The Gore District Mutual Insurance Co.*, (*a*) and that, the plaintiff being to the extent of his interest the assured, he was not prejudiced by any act of his mortgagor to which he was no party.

The rule of the Company is said to be not to insure the interest of mortgagees, but I see nothing to this effect in the conditions endorsed on this policy. The Company have a right to adopt such a rule; but if they adopt it, they should make it distinctly known, in order that mortgagees may be aware how little security a policy in this Company gives them. For this purpose the Company might add to the printed conditions, or otherwise embody in their policies, a stipulation declaring, in clear unmistakeable language, that they do not

Judgment.

insure the interest of mortgagees; that when the payment of insurance money to a mortgagee is provided for by a policy, or when a policy in the name of a mortgagor is assigned to a mortgagee with the consent of the Company, the mortgagee is, notwithstanding, not to be considered the assured, but the mortgagor only; and that a further assurance by the mortgagor, or any act of his increasing the risk, though the mortgagee may be no party thereto, is to avoid the policy as respects the mortgagee as well as the mortgagor. The conditions indorsed on policies are often unread by the parties insuring; but if the Company do their best to put parties in possession of what it is material for them to know, no more can be demanded. No doubt, if this alleged rule of the Company is generally known and understood, no prudent mortgagee will insure with this Company, or accept a policy in it

(*a*) 12 Gr. 156.

from his mortgagor; for the mortgagee would, in regard to the validity of the policy, be entirely at the mercy of the mortgagor, since the policy is to be avoided by an act of wrong, or even of ignorance, or inconsiderateness, on the part of the mortgagor, of which the mortgagee may know nothing until after a fire has taken place; and insurances by mortgagees or for their benefit would always be made in one or other of the many solvent and reliable Companies that do not object to take such risks. But, if in this way the Company may lose the profits that such insurances would yield, the Company would also be free from the hazards they wish to avoid.

1868.

Livingstone v. Western Assurance Co.

I think the decree should be affirmed.

Per Curiam.—Decree affirmed with costs.
[VanKoughnet, C., dissenting.]

THE COMMERCIAL BANK v. WILSON (*a*).

[*Before the Hon. Sir John Beverly Robinson, Bart., Chief Justice of Upper Canada; the Hon. Chief Justice Draper; the Hon. Mr. Justice McLean; the Hon. Vice Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Mr. Justice Richards; and the Hon. Mr. Justice Hagarty.*]

Judgment fraudulent in part.

A judgment fraudulent against creditors as to part of the sum included therein is void as against such creditors *in toto*.

Statement.

This was a suit by *The Commercial Bank of Canada* against *John Wilson*, *Andrew Hoggarth*, *George Moore*, and *James Cowan*, setting forth that on 9th May, 1859, the plaintiffs recovered judgment against the

(*a*) Reported also in Error and Appeal Reports, Vol. iii. p. 257.

1868.

Commercial Bank v. Wilson.

defendant *John Wilson*, one *McNaughton*, and *Jame Wilson*, for £3306 12s. 3d. and took out a *fi. fa.* against lands. They had their judgment registered on the 9th May, 1859.

Before that, viz. on 17th March, 1859, *Charles Wilson* son of the said *John Wilson*, had obtained a judgment against his father for £2450, with interest and costs, and had registered his judgment on the same day.

Charles Wilson died 9th August, 1859. The defendants in this suit other than *Wilson* were his executors.

The judgment obtained by the plaintiffs against *John Wilson* was on several bills of exchange which the plaintiffs had discounted; and on which *John Wilson* was liable. The plaintiffs had discounted the bills under an agreement made for the accommodation of *McNaughton* and *James Wilson*.

Statement.

The plaintiffs alleged that while *John Wilson* was indebted to them in the sum for which they afterwards recovered this judgment, he fraudulently colluded with his son *Charles Wilson*, to set up a fictitious debt upon which *Charles Wilson* might recover a fraudulent and pretended judgment against him, under which his lands and goods might be protected against the plaintiffs, and the plaintiffs delayed and defeated in the recovery of their debt; that thereupon *John Wilson* made and delivered to his son *Charles Wilson* a promissory note for £2000 on which, and also another pretended debt of £450, *Charles Wilson* brought an action against his father *John Wilson*, who allowed judgment to go by default, and a final judgment was obtained which was registered according to law; and that at the time of such registration *John Wilson* was seized of certain lands described in the bill: and prayed that the judgment obtained by *Charles Wilson* against his

father might be declared fraudulent and void as against the plaintiffs, and might be set aside, and that the lands might be sold by order of the Court, and the plaintiffs' debt satisfied out of the proceeds. 1868. Commercial Bank v. Wilson.

The defendants, the executors of *Charles Wilson*, in their answer declared that they knew nothing of the facts set forth in the bill and they referred to the answer of *John Wilson*, which they believed to be true.

John Wilson in his answer gave a long account of transactions alleged to have taken place between his sons *Charles* and *James Wilson*, and himself, in consequence of which, as he alleged, the note for £2000 was made by him in favor of *Charles Wilson*. It was made, as he said, for that sum as being the assumed value of 150 acres of land which he had contracted to buy in his own name, but which on an understanding between him and *Charles Wilson* were to be the exclusive property of the latter. There was nothing in writing as he stated, to shew that *Charles* had any equitable interest in this land, or that he was bound to convey it to him when he received the legal title himself. Statement.

This note for £2000 was dated 4th April, 1855. In 1857 or 1858 *John Wilson* received a deed to himself of the 150 acres from the person who had contracted to sell the land to him; but he made no deed of it to *Charles Wilson*.

On the 15th March, 1859, *Charles Wilson* sued his father on this note for £2000 claiming interest upon it from 7th April, 1856, and he included in his particulars of demand indorsed on the process, another claim for £450 as the amount of an account rendered 5th March, 1859, in which £450 was charged for taking stones and stumps off of 100 acres of land, for *John Wilson*. Judgment was signed in this action for default of appearance.

1868.

Commercial Bank v. Wilson.

The action at the suit of the plaintiffs was commenced on 5th March, 1859. A good deal of evidence was given in this cause respecting the alleged consideration for the £2000 note and the charge of £450 for what the witnesses called stumpage and stonage; and upon the hearing before Vice Chancellor *Esten* it was considered by him that *Charles* appeared upon the evidence to be the equitable owner of the 150 acres; that the note given by *John Wilson* to him for £2000 was really given in security for the conveyance to him of the legal estate; and that inasmuch as, in the view taken by the Court, he was always entitled to this, the note did not appear to be founded on any valuable consideration, and so the judgment obtained upon it could not be supported. But this the Vice-Chancellor regarded as only a constructive fraud, whereas the bill stated a case of actual fraud. He dismissed the bill therefore as to so much of the judgment impeached as was founded on the £2000 note, but without prejudice to filing a new bill; but as to so much of the judgment as represented the interest on the note, and the alleged debt of £450 (on the account), he held the case to be one of actual fraud, and that so far as those two charges were concerned, the judgment was fraudulent within the meaning of the Statute (13th) of Elizabeth, and should so far be set aside; that is that the plaintiffs should get no relief as to the £2000 note further than the interest upon it, but that upon a proper bill filed for that purpose it might be declared void on the ground suggested by his Honor.

Statement.

A decree was accordingly made on the 29th of April, 1861, declaring "that the judgment of *Charles Wilson* in the pleadings mentioned, is fraudulent and void as against the plaintiffs' judgment in the said pleadings also mentioned; in so far as the said first mentioned judgment is composed of interest on the note for £2000 in the said pleadings mentioned, and of the claim for £450 in the said pleadings also mentioned, and that the said judg-

ment should be reduced as against the said plaintiffs by the said amount in taking the account hereinafter directed, and doth order and decree the same accordingly: and it is ordered that this decree is to be without prejudice to the right of the said plaintiffs to file a new bill impeaching the said judgment in respect of the amount of the said note if they shall be advised so to do." And declaring also "that the said defendant, *John Wilson*, was, prior to the recovery of the plaintiffs' said judgment, and he has ever since continued, and now is, a trustee of the legal estate in the premises in the bill in this cause mentioned, for the late *Charles Wilson*, and his representatives, who were, and are, the beneficial owners of the same, and that the plaintiffs' said judgment does not affect the same." And in taking the accounts thereby directed, the Master was to allow to the plaintiffs, as against the defendant *John Wilson*, only such costs as would have been taxed and allowed in a suit by a judgment creditor to enforce his lien; and was to allow no costs to the plaintiffs in respect of their having made any other defendants parties, nor was he to allow to the plaintiffs any costs of the suit as against the other defendants.

1808.

Commercial Bank v. Wilson.

Statement.

With respect to other lands of the judgment debtor, the decree contained the usual reference and other directions.

From this decree the plaintiffs appealed, on the ground that the judgment having been found to be against the Statute 13th Elizabeth, and void for actual fraud as to a part of the sum recovered by it, should have been held altogether void and set aside altogether and not in part only.

Mr. *Galt*, Q. C., and *M. A. Crooks*, for the appellants.

Mr. *Blake* and Mr. *Wells*, for the respondents.

1868.

Commercial Bank. v. Wilson.

Judgment.

Sir J. B. ROBINSON, Bart., C. J.—[After stating the facts to the effect above set forth.]—It is, to say the least, very suspicious that this large judgment was obtained, by the son against his father, a few days after these plaintiffs had commenced their action against the father for large sums of money which the plaintiffs had advanced for the other son *James Wilson*, and his partner *McNaughton*, upon the father's acceptances given for their accommodation. And it is not altogether immaterial to observe that *John Wilson* was apparently so willing at that critical moment to allow his son *Charles* to recover a large judgment against him as expeditiously as possible, that he suffered the judgment to be entered against him altogether irregularly; for the endorsement of particulars of demand in the case included some years' interest upon a current account for work and labor, on which interest was not demandable of right, and the account had only been delivered a few days before; to say nothing of the absurdity and apparent want of foundation for the charge itself. The writ including such a demand could not be specially indorsed under the Common Law Procedure Act (*a*). By that irregularity judgment was obtained by *Charles Wilson* for default in appearance, without a trial, for his whole demand, which gave to that judgment a priority in point of time over that obtained by the Bank. This was an unfair advantage which the father seems to have been willing to give to his son. The irregularity, however, could only be taken advantage of by the defendant in the cause; and it has no other importance in this case than as it tends to shew an unfair collusion between the two to defeat the action of the plaintiff.

I must say that I feel convinced the account given by *John Wilson* about the land, and the giving the note to represent its value in case he should not leave it by his

(*a*) 10 Exchequer Rep. 67.

1868.

Commercial Bank v. Wilson.

will to *Charles*, is not to be relied on; *James Wilson's* evidence, when carefully considered, and *Cowan's* and Mr. *Ketchan's* also, leave little doubt in my mind; and the other evidence in the case strengthens the impression. It may have been intended that *Charles* should have some of the land spoken of; and he may have been entitled to some of it fairly, by reason of the previous transactions and dealings between him, and his father and brother, if he had not in some other way received an equivalent. But it may be naturally asked if the father got his title to the 150 acres from Mr. *Dickson* before 1855, why did he not give *Charles* the deed of the land instead of giving him notes for its supposed value? If he got the deed afterwards, as it seems he did, why did he not make a conveyance to *Charles* of his land instead of allowing judgment to go against himself by default on the note? I can hardly bring myself to entertain a doubt after considering the evidence, that whenever the £2000 note may have been signed, and wherever it may have been kept for years after its date, it was first brought forward and sued upon, in order to hinder and defeat "the creditors of the father, and especially the plaintiffs in this suit, by enabling *Charles* to set up a judgment against him sufficient in amount to cover his property."

Judgment.

It does not seem to me to have been quite correctly held that supposing the bill to have been otherwise framed, this note could have been held void for want of consideration, supposing all the statements of *John Wilson* to be true, on the ground that *Charles Wilson* had already an equitable interest in the 150 acres, according to his father's account of the business in his answer; for what proof is there of any trust in his favour as regards the 150 acres, at the time this note was given? He had then nothing that he could shew as a title in law or equity, though now when it suits his father, in his answer to this bill to uphold *Charles's* judgment against

1863.

Commercial Bank v. Wilson.

him, he does admit a trust. But even if he could shew that *Charles* had when this note was given, a good equitable interest in the 150 acres, of which I see no proof, I should still think that a note given to him by his father as a security that he should receive the legal title also would not be a note given wholly without consideration, for he had nothing then with which he could go into the market if he desired to sell the land, and nothing upon which he could recover in an ejectment.

The legal title could be hardly held to be of no value, and therefore of no consequence to be secured to him.

And if the note could rightly be held to have been void for want of any valuable consideration to support it, as was the Vice-Chancellor's impression when he gave judgment below, I rather think the rule is not quite so inflexible against holding a judgment void for a constructive fraud, when the case has been rested in the bill upon a charge of actual fraud, as to prevent the Court in a case of this description from giving relief on the bill as originally framed.

Judgment.

But I need say no more on this point, for we concur in the opinion, which alone disposes of this case, that the judgment having been held in the Court below, and as we think rightly, to be void as regards the charge of interest on the note which under the circumstances, there could be no just pretence for claiming, and also as regards the £450 and interest, which it is plain on the evidence was a fictitious demand merely intended to swell the amount of the judgment, it ought to have been treated as fraudulent and void altogether.

Being tainted with *actual fraud*, and to a great extent, it should not be upheld as to any part, but in the words of the Statute, 13 Elizabeth, chapter 5, section 2,

1868.

Commercial Bank v. Wilson.

being made "of fraud, collusion, and guile, with intent to delay, hinder, or defraud creditors of their just and lawful actions and debts, it must be deemed and taken (as against the plaintiffs, who are judgment creditors) *to be clearly and utterly void, frustrate and of non effect.*" The Court does not in such cases attempt, or as it has been said they will not condescend to go into the consideration whether any and what part of the fraudulent judgment may not have been founded in a just and legal demand. I refer to *Saunders* 66, note Q.—*Twynne's* case, 3 Co., 83 and *Thomas's* note to that case, 2nd vol. *Coke's* Reports, page 222, note *w*. *Hobart's* Rep. 14.

The judgment which is made "of fraud," that is, with the fraudulent intent to defeat creditors is taken to be void altogether, without considering whether there may not be some portion of the sum for which judgment was given that was honestly due. If this was not so held the Statute would fail greatly in its effect, for then parties would be in a situation to attempt such frauds without risk of loss of anything real in case of detection.

udgment.

And besides, in any case like this, when we find that a large portion of the alleged debt is evidently fictitious, it throws such suspicion upon the rest as makes it the duty of the Court to entertain all presumptions against the honesty of the case where there is any room for doubt.

When we see included in this judgment one charge of several hundreds of pounds for interest under such circumstances as make the demand really absurd, according to the statement made by *John Wilson* himself, and another charge of £450 and interest, of such a description as to make the honesty of it absolutely incredible, we cannot but feel that no confidence whatever can be safely placed in the statements made about the note for £2000 which formed the residue of the sum in-

1868.

Commercial Bank v. Wilson.

cluded in the judgment. There may be truth in the story about *Charles* having a claim to expect the land to be given to him, or left to him by will, but there is very strong reason for concluding that the note was made merely as a contrivance to create a money claim that might be made available for covering the property of the father against the claims of creditors, whenever he might have occasion to use it; and if so, I should think the judgment as regards that part of the alleged debt would stand on no better footing than the rest of the judgment.

But the principle that under the very words of this Statute (*a*), the judgment if fraudulent as to part is utterly void, as against the creditor whose action is attempted to be defeated by it, puts an end to all argument. We have so applied the principle in other cases in this country and must equally do it in this.

Judgment.

Our opinion is that the decree made must be reversed, and that the judgment in favour of *Charles Wilson* must be set aside altogether and not be allowed to interfere with the order which in the absence of such a claim it would have been proper to make in the case; plaintiffs to have the costs of the cause, but not of the appeal.

The other Judges concurred in the opinion that the judgment was void *in toto* and that the decree as to the same should be reversed.

The parties afterwards differed as to whether the Court of Appeal intended to reverse the decree as far as it declared *John Wilson* a trustee of the legal estate in the premises in the bill mentioned, for the late *Charles Wilson* and his representatives who were the beneficial

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(*a*) 13 Eliz. chap. 5.

owners of the same, and that the plaintiffs' said judgment did not affect the same; or so far only as it declared that the judgment of *Charles Wilson* was fraudulent and void as against the plaintiffs' judgment, in so far as the said first-mentioned judgment, is composed of interest on the note for £2000 and of the claim for £450, and that the said judgment should be reduced against the plaintiffs by these amounts in taking the account thereby directed, and the point was spoken to more than once; but delay arose in consequence of changes in the composition of the Court. On the 15th day of March, 1867, the Court directed the order to be drawn up simply declaring that "the said judgment of *Charles Wilson* in the said pleadings mentioned is fraudulent and totally void as against the appellants."

1868.
Commercial Bank v. Wilson.

The plaintiffs then made this order an order of the Court of Chancery and set down the cause to be heard for directions consequent on the order. The matter came on before Vice-Chancellor *Mowat*, in January, 1868, when

Mr. *Crooks*, Q. C., for the appellants, renewed the contention that the decree as to the land in the bill mentioned should be reversed and not as to the judgment merely.

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

MOWAT, V.C.—I have carefully read and considered, the printed papers and the judgment of the Chief Justice, and I think it quite clear, that the setting aside of the judgment *in toto* does not necessarily involve a decision, that *Charles Wilson* was not beneficial owner of the land described in the bill. The learned counsel for the defendants argued that, on a view of the whole case and of the judgment of the Chief Justice, it sufficiently appears that the Court of Appeal must have intended

Judgment.

1868.

Commercial Bank v. Wilson.

to reverse that part of the decree which relates to this property; but I cannot learn that the other judges so intended; and, as the decree as to this property might well have been sustained while the judgment was set aside, and the order of the Court of Appeal is expressly confined to the judgment, I must hold that the declaration of the Vice-Chancellor as to the land described has not been interfered with. As to costs, the effect of the order in appeal, read in connection with the decree, appears to be, that the plaintiffs are entitled, as against all the defendants, to the costs of the suit so far as relates to the impeached judgment; and that there should be no costs to any party so far as relates to the ownership of the one hundred and fifty acres. The plaintiffs should also have against *John Wilson*, individually, such of the remaining costs (if any), as would have been incurred in a suit by the plaintiffs as judgment creditors to enforce their lien, had the two questions as to the validity of the judgment of *Charles Wilson*, and as to the ownership of the one hundred and fifty acres, not arisen.

Judgment.

Aff. on appeal 16 Gr. 420

GLASS v. HOPE.

Building Society—Forfeiting shares.

Where after the death of a member of a Building Society his shares were permitted to run into arrear:

Held, that in the absence of a personal representative, the Society could not take any steps to forfeit the shares any more than they could have enforced their claim by action of debt as provided by the Statute.

This cause was heard at the sittings of the Court in London, in the spring of 1868.

Mr. *Roaf*, Q. C., and Mr. *Glass*, for plaintiff.

Mr. *Strong*, Q. C., and Mr. *Flock*, for defendants.

1868.

Glass v. Hope.

VANKOUGHNET, C.—It is admitted that the intestate at the time of his death was not in arrear on any of the calls made by the Society; that every thing up to that time had been paid up, and that after his death the Society received on account of his shares, from a person who owed him that amount, $65.00. The intestate died on the 1st of January, 1864, and, though dilligent inquiries on behalf of the Society were made for his next of kin, none of them could be found.

Administration to his estate was not taken till the 6th day of June, 1867, and, on the 19th of July following, the administrator, as such, applied to be admitted as a member of the Society, but was refused. Several monthly payments on the shares having fallen in arrear after the intestate's death, the Society, on the 13th of November, 1865, passed the following resolution "that whereas five shares standing in the name of *J. H. Gibb*, (the intestate,) having long since been forfeited according to the rules of the Society, the Secretary be instructed to write the same off to the credit of the profit and loss account." The Secretary accordingly entered the shares in the books of the Society as forfeited.

Judgment.

The rule of the Society in respect of forfeiture is as follows: "That every member *so long as he shall continue to be a member*, and until the object of the Society be obtained, pay 10s. per share per month on or before the day appointed for that purpose, and in default thereof shall pay a fine of three pence per share for the first month, six pence per share for the second month, and one shilling per share for the third month; doubling the fine each succeeding month till the expiration of of the first six months, and after that time if the same remain unpaid, the share or shares of such member, or *his representative*, shall become forfeited."

The second section of the Building Societies' Act,

1868.

Glass v. Hope.

(chapter 53, Consolidated Statutes of Upper Canada), gives to the Society power to inflict reasonable fines, penalties and forfeitures upon the members of the Society infringing its rules.

The 23rd section provides, "Every such Society may declare forfeited to the Society the shares of any member who is in default, or who neglects to pay the number of instalments or monthly subscriptions fixed by any stipulation or by-law, and may expel such member from the Society, and the Secretary shall make a minute of such forfeiture and expulsion in the book of the Society, or instead of such forfeiture and expulsion, the Society may recover the arrears by an action of debt."

Judgment.

This seems a case of first impression. I can find none like it, and the learned and skilled counsel who argued it, have been equally unsuccessful. I have looked into cases of forfeiture of leases for some analogy, but have not found it. In *Bacon's* Abridgment and *Comyn's* Digest, are collected many instances of forfeitures excused, when condition broken through the act of God: or from no default of the obligor. The section (23) authorizes the forfeiture of the share of a member, and his expulsion; or in lieu thereof an action of debt; and the by-law of the Society provides for the forfeiture of the share of a member or his representative. Now, does not this provision of the Statute equally with the by-law of the Society, contemplate the share of a living member? The member whose share is to be forfeited, may be expelled. You cannot expel a dead man. The by-law of the Society evidently contemplates that if the original member be dead, his share shall have a representative. Suppose the Society had but the one remedy, an action of debt, it could not proceed without procuring representation to the estate of the deceased. Ought the more summary, violent process of forfeiture to be enforced in the absence of such representative? It

seems to me not, and that there must be a living owner of the shares, either in his own or in his representative capacity, and, as such, a member of the Society before or at the time confiscation is effected. 1868. Glass v. Hope.

It may be inconvenient to procure representation. This is the case of many a creditor when his debtor dies. It may be very convenient towards the winding up of societies that such property should be confiscated though not represented; but then the Legislature must say so. I think the attempt to enforce forfeiture here was not only illegal but unreasonable, when the owner of the shares died without being in any default; and his shares had then, and when declared forfeited, a marketable value.

I think the Society should have procured representation to the estate of the deceased, as they would have been obliged to do had they chosen to proceed by action of debt. Judgment.

It is said that the Society was wound up in January, 1867. This does not seem to be so, for there are outstanding assets, though they may be of little value. But if these shares have been, as I think they were, improperly dealt with, the Society cannot be considered as legally terminated. The plaintiff must be still treated as owner of existing shares—those held by intestate at his death—and there must be the necessary inquiries, unless the parties can arrange the matter.

Decree for plaintiff with costs.

1868.

MUIR v. WADDELL.

Assignment in equity.

Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid to return the order, and subsequently institutes proceedings against the drawer, in respect of such claim, he cannot afterwards proceed to enforce his equitable claim against the drawee.

Examination and hearing at Hamilton.

Mr. *Proudfoot*, for the plaintiff.

Mr. *Hodgins*, for *Waddell.*

The defendant *Lucas* did not appear.

Judgment. SPRAGGE, V. C.—The plaintiff was a creditor of the defendant *Lucas*, and *Lucas* was a creditor of one *Penfold*, and had recovered judgment against him; and the defendant *Waddell* was *Lucas's* Solicitor in the suit, and was to receive the debt due from *Penfold*. Under these circumstances *Lucas* was prevailed upon to give an order upon *Waddell*, dated 28th September, 1865, in favor of the plaintiff for $320. The plaintiff's debt against *Lucas*, which was upon promissory notes, was for a larger amount than the order.

The order was not given absolutely; that is, the plaintiff did not choose to accept it absolutely. A witness, *Green*, a relative of the plaintiff's who assisted in the transaction, describes how the order was given. "She (the plaintiff) said she would not give up the notes until she knew whether or not *Waddell* would accept. If he accepted and paid, she was to write to

me, and I was to give them up. If not, the order was to be sent to me to be given up to *Lucas* within a reasonable time. The notes were afterwards sued on by Miss *Muir*. I never received instructions from her to give them up. I was a witness in the action on the notes. The order was never sent to me either. * * She was to give up the notes if the order was accepted; if not, she was to give up the order."

1868. Muir v. Waddell.

The order was presented to *Waddell*, and he, on the 13th of November, 1865, paid to the agent of the plaintiff, one *A. G. Muir*, $50 on account, writing a receipt therefor across the face of the order, which was signed by *A. G. Muir*. The order was not accepted, unless by such payment and indorsement; and *Waddell* made no further payments upon the order. Sometime afterwards, the plaintiff sued *Lucas* upon the promissory notes. The declaration bears date the 30th January, 1866, and is marked as served on the following day. In a copy of the Judge's notes put in, it is stated that the plaintiff recovered a verdict for $392.31, with leave to the defendant to enter a verdict for the defendant if the order was a payment. The Judge had ruled at the trial that the order was not a payment, in accordance with the contention of the plaintiff's Solicitor.

Judgment.

The order would have been an equitable assignment of the debt due by *Penfold* to *Lucas*, if the plaintiff had chosen to have it so; and that without an acceptance by *Waddell*. I held this to be the law (following English cases), in *Farquhar* v. *The City of Toronto* (*a*). But the plaintiff chose to make it contingent upon an event, —the acceptance and payment of the order by *Waddell* within a reasonable time. *Green*, in his evidence, says that in his opinion two weeks would be a reasonable time. I am relieved, however, of the necessity of deciding what

(*a*) 12 Grant, 191.

1868. Muir v. Waddell.

would be a reasonable time by the course taken by the plaintiff in bringing the action on the notes against *Lucas*.

When a reasonable time had expired, whenever that was, the parties were relegated to their positions before the order was given; or, assuming that the stipulation as to reasonable time was for the benefit of the plaintiff, and that she might enlarge it if she thought fit, still, if by word or act, after a reasonable time had elapsed, she pronounced that it had elapsed, the old position of the parties would revive; or, the contingency provided for would have occurred, and the consequences agreed upon would follow: the plaintiff would be entitled to the notes, and *Lucas* to the order. The plaintiff cannot be heard to say that that reasonable time had not elapsed when she brought her action upon the notes; and the moment she acted upon it as elapsed, and proceeded upon the notes as having reverted to her, that moment *Lucas* became entitled to the order; for it is clear from the terms of the agreement that the rights of the parties must be co-relative, to this extent at any rate, that the plaintiff could not take back the notes, and be entitled to the order also.

Judgment.

I do not agree that *Waddell*, by setting up this provisional agreement, and the rights of *Lucas* under the circumstances, is setting up a *jus tertii*. As soon as *Lucas* was entitled to have the order restored to him, and *Waddell* was informed of the fact, *Waddell* had no right to pay any further moneys to the plaintiff; and when the plaintiff claimed from him such further moneys as she does by this suit, he was surely entitled to say that the proper person for him to pay was, not the plaintiff, but *Lucas*.

The case of *Ex parte South* in the matter of *Row* (*b*),

(*b*) 3 Swanst. 392.

in which it was held that a party to whom an order was given by his debtor did not lose the benefit of it by arresting his debtor, differs from the case before me in this, that in that case there was no provision that the order should in any event be returned to the debtor. This case was not, indeed, cited by the plaintiff, but by the defendants, upon another point.

1868. Muir v. Waddell.

Waddell was, however, wrong upon one point. A letter of his is put in, dated 23rd November, 1865, addressed to *Lucas*, in which he encloses to him, as he says, $50 on account of "*Lucas* v. *Penfold*," he mentions having paid the plaintff a few days before $50, and adds that he shall pay the balance to *Lucas* instead of to the plaintiff, "for the reason," as he says, "that the person who transacts her business is somewhat too fast in his demands, insisting upon the immediate payment of the order you gave, namely, $320, without waiting until I can get the matter closed with *Penfold*;" and he adds, "you can easily mail the money to Miss *Muir* should you wish to do so." This course was taken by *Waddell* under a misapprehension of the rights of the plaintiff. He ignored her rights as assignee of the debt due from *Penfold*, and assumed that he was at liberty to pay Lucas, which he was not. It does not appear whether *Waddell* paid over to *Lucas* any further sums received from *Penfold* before the plaintiff proceeded at law against *Lucas* upon the notes. I think upon the evidence that I must take that proceeding as the happening of the contingency provided for in the agreement. It may be, however, that she obtained the notes, or did some other equivalent act, at an earlier date; and it may be that payments were made between the two periods. Any payments made after any act by the plaintiff which entitled *Lucas* to have the order returned to him, would be good payments by *Waddell*. The plaintiff is entitled to an inquiry as to any further payments made by *Waddell* to *Lucas*, if she desires it.

Judgment.

1868.

Muir v. Waddell.

I think she should be satisfied by an affidavit from *Waddell*, stating whether or not he made such further payments, and, further, if she desires it, an affidavit from *Lucas* stating whether or not he received any such further payments.

I think this is a case in which it is proper not to give costs to any of the parties. Not to the plaintiff, because she fails in the main purpose of her suit; not to *Waddell*, because he was wrong in paying to *Lucas* what he ought to have paid to the plaintiff, and in his refusal to make any further payments to the plaintiff; and not to *Lucas*, because he was wrong in receiving and retaining what properly belonged to the plaintiff. I think I ought to add that the correspondence of the defendants, in relation to the plaintiff's debt, is not very creditable to them.

Judgment.

McDonell v. West.

Mortgage payable without interest.

A mortgage dated 23rd May, 1846, secured the payment of £112 10s., without interest, on or before the 23rd May, 1847; contained a power of sale on default of payment, and provided that the mortgagee after deducting the costs and expenses of sale "and the said sum of £112 10s., without interest," should pay the surplus to the mortgagor.

Held, that interest was payable from default: but from the correspondence between the parties the Court treated the interest as paid up to May, 1859.

This was an appeal by the plaintiff from the report of the Master at Cornwall.

Mr. *Moss*, for the appeal.

Mr. *S. Blake*, contra.

1868.

McDonell v. West.

SPRAGGE, V. C.—The questions in this case are, whether the mortgagee is entitled to any interest upon his mortgage debt; and, if so, whether he is entitled to more than six years' interest. The Master has allowed no interest.

The mortgage bears date 23rd of May, 1846, and recites: "Whereas the said *James West*, by his bond or obligation, bearing even date herewith, stands bound to the said *George Crawford* in the penal sum of £225 of lawful money of Canada, to be paid to the said *George Crawford*, or his certain attorney, executors, administrators, or assigns, with a condition thereunder written for the payment of the sum of £112 10s. of lawful money aforesaid without interest, on or before the 23rd day of May next, which will be A. D., 1847." The words "without interest" are reiterated again and again in the mortgage; they are so in the proviso for redemption, and in the power of sale which the mortgage contains, and, what is most strongly in favor of the mortgagor's contention, is that while the power of sale cannot by its terms be exercised without thirty days' notice being given thereof, and that after default, it is provided that the mortgagee, after deducting the costs and expenses of sale, and "the said sum of £112 10s., without interest," should pay over the surplus, if any, to the mortgagor; and that after such payment the mortgagee should convey to the mortgagor any of the said premises that might remain unsold.

Judgment.

Apart from this provision, I should not feel any difficulty in construing the mortgage as not restricting the payment of interest after default, the words "without interest" only express in words what the law would imply without them, to be the contract of the parties, viz.: that interest not being made payable before default, it was not the agreement of the parties that the debt should bear interest before default. After default the

1868.

McDonell v. West.

debt would bear interest without any contract of the parties that it should do so. *Farquhar* v. *Morris* (*a*), *Ashwell* v. *Staunton* (*b*).

There are two cases before Lord *Romilly*, *Thompson* v. *Drew* (*c*), and *Ashwell* v. *Staunton*. In the former case a mortgage was given to secure a small debt, £33, by quarterly payments of £5, and the mortgage contained a power of sale after default upon giving three months' notice; and the mortgagee was to hold the proceeds, in trust to pay himself the £33, and after payment thereof in trust for the mortgagor; in substance the same provision as in the case before me, and there was a covenant by the mortgagee, that at any time before such sale took place, he would, on payment of £33 reconvey the premises; and the mortgagor covenanted to pay the £33. The mortgage was silent as to interest on the £33. The bill was filed for foreclosure and interest was asked for from the date of default. Lord *Romilly* held that no interest was payable. His reason is thus given: "There is an express contract to reconvey on payment of £33."

Judgment.

In *Ashwell* v. *Staunton* the mortgage was prefaced with a recital that the mortgagor had requested the mortgagee to lend him the sum of £3000, which the mortgagee had "agreed to do on having the same, with interest secured in the manner hereinafter expressed." The proviso was for payment of £3000 six months after the date of the mortgage, without any deduction or abatement; it was silent as to interest as was also the covenant for payment. There was a power of sale, in default of payment of "the principal money hereinbefore secured, on any part;" the proceeds were to be held in trust to pay the costs of the sale, "and in the next place to apply

(*a*) 7 T. R. 144. (*b*) 30 Beav. 52.
(*c*) 20 Beav. 49.

such money in or towards satisfaction of the said sum of £3000, and then upon trust to pay the surplus, if any, to the mortgagor. The bill was for foreclosure: payment of interest was resisted, and *Thompson* v. *Drew* was cited. Lord *Romilly* allowed the interest; he said, "I think that on the deed interest would run on the principal from the covenant to pay on a day certain. But, assuming that if the mortgagee sold the property he was bound by the power, and could only retain the principal sum of £3000 and could not retain the interest; still I am of opinion that on this deed, where there is a recital that the £3000, is to be secured with interest, and which contains a covenant to pay the principal on a particular day, no question could be raised." It does not appear from the report of the case whether interest was allowed from the date of the mortgage, as appears from the recital to have been intended, or only from the day of payment; but I understand Lord *Romilly* to mean, that independently of the recital, interest would run from the day of payment; and that assuming that if the mortgagee exercised the power of sale he might be restricted to the principal, still upon a bill to foreclose he would be intitled to interest.

1868.

McDonell v. West.

Judgment

It is, after all a question of construction. Lord *Romilly* had, in the recital to the mortgage in *Ashwell* v. *Staunton* more to guide him than I have; he was able to see distinctly that the proviso for redemption and the power of sale being silent as to interest, and the latter speaking of principal money only, and providing for the payment to the mortgagor of the surplus after retaining the sum advanced only, were all conveyancers' mistakes. It was not necessary to rectify the instrument unless the mortgagee chose to exercise the power of sale; what Lord *Romilly* did decide, however, was that, although upon the exercise of a power of sale the mortgagee might be restricted to principal money without interest, yet if he elected to take the ordinary remedy of fore-

1868.

McDonell v. West.

closure, he was not so restricted, but was entitled to interest. The ordinary right of a mortgagee is to have interest after default, and I ought to allow it in this case, unless I see that interest was not to run after default. I have nothing to shew this except the same provision as to payment over to the mortgagor, of surplus after default, as was contained in the mortgage in *Ashwell* v. *Staunton*, the words "without interest," in other parts of the mortgage do not shew it, being in my judgment only intended to assure that interest should not be payable before default; then, does this provision as to payment of surplus negative the ordinary right? Does it shew that interest was not to be paid? I have come to the conclusion that it does not shew this; and though I cannot come to this conclusion with the same confidence that Lord *Romilly* was able to do, I think it is the proper conclusion, and that the provision to pay over the surplus without interest is a conveyancer's mistake; or possibly it may have been intended, that if the mortgagee exercised the stringent remedy of a sale, which he might do with a delay of only thirty days after default, he should have no interest: but I think the better opinion is, that it was, as in *Ashwell* v. *Staunton*, a conveyancer's mistake.

Judgment.

In that case, and in the case before me, the whole difficulty is created by the provision I have referred to in the power of sale. In *Thompson* v. *Drew*, there was another difficulty; there was a covenant by the mortgagee to reconvey at any time before sale upon payment of the principal money; and Lord *Romilly* disallowed interest expressly on that ground.

Then as to the time for which interest may be allowed. Can it by carried back beyond six years? By our Act 4 William IV., chapter 1., following the Imperial Act 3 & 4 William IV., chapter 27, it is provided *inter alia*, that no interest in respect of money charged upon, or

payable out of land shall be recovered, but within six years next after the same shall become due, or next after an acknowledgment in writing. So that if there be a mortgage and nothing more, and no acknowledgment in writing the arrears of interest must be confined to six years.

1868.

McDonell v. West.

In *Du Vigier* v. *Lee* (*a*), it was held that where there was a bond securing a mortgage debt, the mortgagee was entitled in a suit for foreclosure to carry the interest back to the whole period for which he would be entitled to recover it upon his bond. But the authority of this case has been shaken by subsequent decisions and by a contemporaneous decision by Lord *St. Leonards*, then Lord Chancellor of Ireland, *Hughes* v. *Kelly* (*b*). Other cases upon the point are collected by Lord *St. Leonards* in his treatise on the new Statutes relating to property; and the opinion of Lord *St. Leonards* himself is evidently against the authority of the case in *Hare*. The case indeed was not cited to me by Mr. *Moss*, I suppose because he did not consider it now to be authority.

Judgment.

The mortgagee then, to entitle himself to interest beyond six years, must rely upon the acknowledgment by cognovit, or by the letter in evidence. The fact of a cognovit having been given is not established by any other evidence than that of *Alexander Farlinger*, the husband of the *cestui que trust*, for whose immediate benefit this bill is filed. It is she that is beneficially entitled to the mortgage money, and he is not therefore a competent witness to prove the fact.

As to the acknowledgment in writing; a letter from defendant *West* to *Alexander Farlinger*, dated 26th of December, 1863, is proved. In it the writer says,

(*a*) 2 Hare, 321.

(*b*) 3 D. & W. 482.

1868.

McDonell v. West.

"Yours of the 16th instant was received by me only yesterday, when I came home to spend Christmas. Neither me nor my family have forgotten the mortgage on our Kemptville property, and had it not been for the great failure of crops in the last two or three years, the interest at least should have been settled and paid." In another passage he says: "I feel that you and Mrs. *Farlinger* have been very patient with me, for which I feel grateful."

The letter to which this is an answer is not proved, being verified only by the affidavit of *Farlinger*: but a copy of a letter is among the papers, as a copy of the letter to which the one I have quoted from is an answer, and which I can look at as an admission. The writer says: "I beg to call your attention to the mortgage on your Kemptville property, and must urge the payment of arrears of interest." This is as indefinite as to time as it well could be. The arrears claimed may have been for one or two years, or for seventeen, as now claimed. We must look to the letter in answer to gather from it as far as we can, what arrears are thereby admitted. The writer makes the failure of crops for the preceding two or three years his apology for non-payment, and he speaks of the mortgagees as having been very lenient with him. There is nothing very definite in this, but I think it amounts to an admission of arrears for some time—how long is the question—before the failure of the crops. I think I may safely carry it back to four years, say to May, 1859, and allow from that date. I do not know that I should be warranted from the terms of the letter in going back to an earlier date.

Judgment.

But it is contended on the part of the defendant *Morley*, who was a purchaser of a portion of the mortgaged premises before the date of this correspondence, that an acknowledgment by the mortgagor cannot at all

events affect him; but there is this difficulty; the mortgagee is not bound to re-convey any part of the estate except upon payment of the whole mortgage money: and even supposing the portion purchased by *Morley* not to be chargeable by the acknowledgment of the mortgagor, that portion retained by the mortgagor is certainly so chargeable; and all that *Morley* could get upon payment of the whole mortgage money, would be his portion only of the mortgaged premises: if he desires an alteration in the decree, putting his right to redeem in that shape, he may apply. I think the Master wrong to the extent I have indicated, and that to that extent the appeal must be allowed. No costs to either party.

1868.
McDonell v. West.

GALT v. THE ERIE AND NIAGARA RAILWAY COMPANY.

Railway Company—Mortgage—Sale of lands.

A mortgagee or judgment creditor of a railway company is not entitled to enforce payment of his demand by sale or foreclosure of the railway: he is only entitled to have a manager or receiver of the undertaking appointed; and,

Quære, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money.

Application to vary decree.

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

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

Mr. *G. D. Boulton*, for the plaintiffs.

SPRAGGE, V.C.—The bill in this case was filed originally against the *Erie* and *Niagara Railway Company* only. It is for the foreclosure of a mortgage, dated 23rd March, Judgment.

1868.

Galt v. Erie, etc., Railway Co. et al.

1866, made by the Railway Company, of a large piece of land, forty acres, in the Town of Niagara, fronting upon the Niagara River. Over a portion of this land runs the track of the Erie and Niagara Railway, and upon it are constructed station grounds and other appurtenances of the railway. A decree for foreclosure has been pronounced, and the Master was directed to make subsequent incumbrancers parties in his office.

The case comes before me now upon the petition of the Great Western Railway Company, which Company was made a party in the Master's office, as a subsequent incumbrancer. The petition states that the Company is not an incumbrancer only, but also that under and by virtue of articles of agreement of 11th of October, 1866, made between the petitioners and the Erie and Ontario Railway Company, the petitioners acquired the right to work that part of the line of the other Company lying between Fort Erie and Niagara, and are bound under the agreement to work the railway and keep it open for traffic for a period of five years. It is further stated that the agreement was duly approved, and that the petitioners have since worked the railway as a public thoroughfare, according to their agreement; and they complain that a foreclosure of the mortgaged premises would debar them from access to the harbour in the Town of Niagara, which is the only terminus of the railway in that town, and that without it no traffic can be obtained.

Judgment.

The petitioners ask for certain declarations, protecting their rights under the agreement; and lastly, that it may be declared that the plaintiffs have such rights, and are entitled to such remedies only as are appropriate to mortgagees of a railway, in so far as their mortgage covers the track and station grounds and appurtenances, necessary for the proper working of the Erie and Niagara Railway. The agreement and other facts set forth in the petition are admitted to be correctly stated.

1868.

Gult v. Erie, etc., Railway Co. et al.

The petitioners contend that the plaintiffs are not entitled to a foreclosure or sale of any portion of the Railway, but to a Receiver only. The plaintiffs' contention is that they are entitled to the full ordinary rights and remedies of mortgagees.

The cases of mortgages of railway property in England do not apply. They are, universally I believe, only of "the undertaking," with its tolls and profits, not of the land itself. A foreclosure of the undertaking would be simply useless, as the franchise would not pass to the mortgagee. Questions have however arisen in what may be regarded as cases analagous to those of mortgagees of the land on which railways are constructed; *i.e.*, cases where the judgment creditor has issued an *elegit*.

Judgment.

Potts v. *The Warwick and Birmingham Canal Navigation Company*, (*a*) before Sir *W. Page Wood*, was a case of this nature. The plaintiff was a mortgagee of the rates, tolls, and dues, and was also a judgment creditor of the Company for another debt; and he presented a petition praying for payment of his judgment debt out of the tolls, or for leave to sue out a *fi. fa.* against the goods, and an *elegit* against the lands of the Company. Sir *W. Page Wood* held that the *elegit* creditor could only obtain the land subject to all the rights of the public to use the canal, and subject to the powers of the Company. The learned Vice-Chancellor observed: "The *elegit* creditor has a right to have such possession of the land as may avail him, subject to the rights and interests of the Receiver and Collector of the rates, tolls, aud dues, and to the provisions of the Act of Parliament as to user of the canal by the public. Mr. *Rolt* argued that if the question were against the

(*a*) 1 Kay, 162.

1868.

Galt v. Erie, etc., Railway Co. et al.

Company alone, the *elegit* creditor could not be prevented from taking the land. I think that, if the mortgagee were not in the way, the *elegit* creditor would be able to take all that the debtor had, which was the right of occupying the land covered by the canal of the Company, subject to all the provisions of the Act of Parliament which vested this particular property in the Company. But this property was vested in the Company for the purpose of being used as a canal, 'for the purposes of the Act,' as it is expressed in the Act itself, 'and for no other use or purpose whatsoever.' The Company could no more convert the land to any other purpose, into a garden for example, than the owner of a high road could alter its nature. The Company take this land under their Act, with an express direction in the Act that the canal shall be open to the public always on payment of the rates and dues provided by the Act, and the *elegit* creditor, if he takes it, must hold it in the same manner."

Judgment.

Sir *W. Page Wood* proceeded in a great measure upon the language of the Act, and the provisions for keeping the canal open, and working it for the benefit of the public. Our general Railway Act makes provisions of the like nature, and provides also for the carriage of the mails, and of military forces and stores. But apart from any special provision, it is of the very essence of a railway, as much as it is of any public highway, that it is for the public use the franchise is granted: and private rights are interfered with upon that ground.

Furness v. *The Caterham Railway Company* (*a*) was a case of a like character. The plaintiff, who had built the railway for the Company, was the holder of debentures secured by an assignment of the undertaking,

(*a*) 25 Beav. 614.

1868.

Galt v. Erie, etc., Railway Co. et al.

with its tolls and profits, and was also a judgment creditor for another debt, and had issued an *elegit*, under which he had been put into possession of the railway and tolls; and he prayed by his bill, among other things, that the lands of the Company might be sold under the direction of the Court, in such manner and subject to such conditions as the Court should think fit. On the part of the Company it was contended that there could be no decree for either sale or foreclosure; that the Act of incorporation authorized the construction of the railway principally for the benefit of the public, and in order to form a highway, subject to certain restrictions, which are specified. That the Company is in some respects a trustee for the public, and that no mortgagee or purchaser can exercise the powers conferred by the Legislature exclusively upon the Company. Lord *Romilly* appears to have acceded to this argument. His language is not given, but the Report states that during the argument he pointed out the inconvenience of granting either a sale or foreclosure, whereby the benefit of the line of railway might be lost to the public; and that he afterwards expressed his opinion that there could be neither a sale nor foreclosure.

Judgment.

The first of the cases I have cited was decided in 1853, the latter in 1858. In 1862, the case of *Peto* v. *The Welland Railway Company* (*a*), was heard before my late brother *Esten*. In giving judgment he said he apprehended it to be clear that the Legislature conferred the powers conferred by the Act of incorporation, "and especially the power to acquire lands for the purposes of the railway, on the understanding and with the intent that those lands should not be diverted or alienated to any other purpose through a proceeding *in invitum*. The result is that no sale of the land and buildings of the railway can be effected under process of execution."

(*a*) 9 Grant, 455.

1868.

Galt v. Erie, etc., Railway Co. et al.

In that case the plaintiffs were judgment creditors with execution against lands in the hands of the Sheriff. The plaintiffs did not ask for a sale or foreclosure, but that, in case of default in payment, a manager of the railway might be appointed, and the learned Judge made the remarks which I have quoted, in a manner prefatory to dealing with the question as to what remedies the execution creditor was entitled to.

Walker v. *The Ware, Hadham and Buntingford Railway Company* (*a*), was heard before the same learned Judge who decided *Furness* v. *The Caterham Railway Company*. It was a bill by the vendor of land to the Railway Company, to establish a lien for unpaid purchase money; and Lord *Romilly* held the plaintiff entitled to the usual remedy of a vendor. He placed his judgment expressly upon the ground of a vendor's lien, and its being "an inherent equitable right, which can only be taken away by Act of Parliament, or by agreement express or implied;" and he held that the rights of the vendor should be preferred to the rights of the public. He intimated no change of opinion since his decision in *Furness* v. *The Caterham Railway Company*. The proper inference from this, and from the ground upon which he placed his judgment, is, that he had not changed his opinion. That case, indeed, was cited before him, but not upon the question of what was the proper remedy for enforcing the debt.

Judgment.

In *Martin* v. *The London, Chatham and Dover Railway Company* (*b*). The plaintiffs were equitable mortgagees of certain lands required for the purposes of the Railway; and the owner of which dealt with the Railway Company for their sale; and they were sold to and used by the Railway Company. Questions were raised as to whether the plaintiffs ought not to have

(*a*) 1 L. R. Eqy. 195. (*b*) Jur. N. S. 775.

intervened, and made a claim upon the Company pending the negotiations, of which they were cognizant, between the owner of the land and the Company. Lord *Cranworth* decided the different points raised in favour of the plaintiffs and by his decree directed that, in default of payment, the Company should execute to the plaintiffs an assignment of the land upon which they were equitable mortgagees. It does not appear by the report of the case that it was made a point before the Lord Chancellor that such a decree would be injurious to the public interests. His intention was clear; for in answer to an observation from the plaintiff's counsel, he said: "The Company must pay you, otherwise you will get a slice out of their railway."

1868.

Galt v. Erie, etc., Railway Co. et al.

This case was heard and decided in May and June, 1866, and in November of the same year the case of *Pell* v. *The Northampton and Bunbury Junction Railway Co.* (*a*), was heard before the Lords Justices *Turner* and *Cairns*. The bill was by the vendor of land sold to and used by the Company, and prayed for an injunction restraining the Company from using the land until payment of the purchase money, that it might be declared that the plaintiff had a lien for the unpaid purchase money and for specific performance. The Master of the Rolls had refused an injunction. The appeal was overruled, and Lord Justice *Turner* seems to have indicated what he conceived to be the proper remedy. He said, "If the Company were destroying the property, the plaintiff might be entitled to an injunction; but he has let them into possession, and they are only using the land for the very purpose for which he sold it to them. The plaintiff may, perhaps, be entitled to a Receiver, but I do not think that he is entitled to such an injunction as he asks."

Judgment.

(*a*) 2 L. R. Ch. & App. 100.

1868.

Galt v. Erie, etc., Railway Co. et al.

This case was referred to in the subsequent case of *The Bishop of Winchester* v. *The Midhants Railway Company* (*a*). It was a bill by a vendor, and asked for specific performance; for payment of purchase money; for an injunction, restraining the Company from continuing in possession in the meantime; for a declaration that the plaintiff had a lien as an unpaid vendor, and that said lien might be enforced by a sale of the lands. The general tenor of the remarks of Sir *John Stuart*, before whom the cause was heard, are to the effect that Railway Companies stand in the same position as individuals, in regard to their engagements. The decree that he made, however, was this: he decreed specific performance, and declared the plaintiff entitled to a lien for the unpaid purchase money, and gave leave to the plaintiff, in the event of the purchase money not being paid, to apply for an injunction, "and for the appointment of a Receiver for the purpose of enforcing his lien," not for a sale as prayed, but for a Receiver.

Judgment.

The case before Lord *Cranworth* stood upon a peculiar footing, the rights of the plaintiff existed before any dealing with the Company for the land, and independently of any such dealing; and the questions argued were as to the liability of the Company, not as to the remedy. Besides this case, *Walker* v. *Ware* is the only case in which a decree or order is made, which would interfere with the working of the Railway, and the authority of that case in that respect is somewhat shaken by the observation of Lord Justice *Turner* in the case before the Lords Justices, followed by the case before Sir *John Stuart*.

If it were conceded that persons selling lands to a Railway Company are entitled to the ordinary remedies for enforcing a vendor's lien for unpaid purchase money,

(*a*) 2 L. R. Eqy, 17.

and that their rights and remedies are to be held paramount to the public interests, a point which, in the present state of the authorities, I consider doubtful, it does not follow that a mortgagee has such paramount right. The right of a vendor for his lien was put by the Master of the Rolls as an inherent equitable right, which could only be taken away by Act of Parliament, or by agreement, express or implied, and the compulsory powers of the Company to take the land they require, may be a reason for holding the payment for it paramount to all other considerations. I certainly do not think that these later cases overrule those which decide that the remedy of an *elegit* creditor is subject to the user of the undertaking, be it canal or railway, by the public.

1868.

Galt v. Erie, etc., Railway Co. et al.

I find no case similar in all respects to the one before me, no case of a mortgage of the land of the railway itself. It is not pointed out to me by what authority this mortgage was made. I assume that it was not *ultra vires*, because, if so, the petitioners would, I take it for granted, have taken that ground in their petition. The petitioners assume it to be a valid mortgage; and it is, I suppose, authorised by the Legislature. There is room for the contention, that the authorization by the Legislature of a mortgage of land on which a railway is built, generally, without restriction as to the mode of enforcing it, carried with it the right to all the remedies to which a mortgagee of ordinary private property is entitled. I have considered this point, and I think that the proper view is that the Legislature did not mean to give any new remedy against the railway Company. A party having a charge upon the land of a Railway Company by registered judgment, or by *fi. fa.* in the hands of the Sheriff, had a remedy known to the law, and which was acted upon and enforced in several cases. When a charge, not *in invitum*, but by contract, was authorized, it is not to be presumed, I think,

Judgment.

1868.

Galt v. Erie, etc., Railway Co. et al.

that a larger remedy was intended. The remedy to creditors was restricted because it was conceived that they ought to be subordinated to the public interests, and that the power to acquire lands was conferred, with the intent that they should not be limited or alienated to any other purpose, and these reasons applied with the same force to charges created by contract, as to charges *in invitum*.

My opinion, therefore, upon the case before me is, that the Great Western Railway Company are right in their contention, and that the decree must be altered as they pray that it may be altered. It is suggested, however, that the plaintiffs have rights beyond their rights as mortgagees; the mortgage money, or part of it, being as they say purchase money of the land, or part of the land used by the Erie and Ontario Railway Company, that Company having purchased from the mortgagees, of whom the plaintiffs are assignees. No-

Judgment.

thing of this appears upon the papers, and I am not sure that I understood it correctly; but I understood the contention to be that the plaintiffs are entitled to the position of vendors, and to a lien for unpaid purchase money, and to a sale to enforce it, and I am asked to direct an inquiry.

I think I ought not to do that. I have no facts proven before me to warrant it, and questions will arise as to whether, supposing the mortgagees to have been vendors, and supposing they had a *primâ facie* right to a lien, whether it is not lost by taking the mortgage, or otherwise; and there is besides the legal question whether the vendor of land to a Railway Company has the ordinary vendor's lien, and whether the vendors in this case had.

The only course that I think I can properly take is to direct that the order upon this petition be not drawn

for one month, with liberty to the plaintiffs in the meantime to present their petition, if so advised, setting forth their claim, if any, otherwise than as mortgagees.

1868.

Galt v. Erie, etc., Railway Co. et al.

I think the petitioners are entitled to the costs of and incidental to the hearing, those costs being occasioned by the plaintiffs' resistance to the variation of the decree which the petitioners are entitled to; they are not entitled to the costs of the petition, as it does not appear that the plaintiffs were cognizant of the interest of the petitioners in the Erie and Ontario Railway Company; the latter Company are not entitled to their costs; they appear now in support of the position taken by the petitioners; they should themselves have taken that position at the hearing, in which case the costs of the present hearing would in all probability have been saved.

The Toronto Savings Bank v. The Canada Life Assurance Company.

Life assurance—Interest on amount insured.

The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim.

Statement.

The question raised in this case was as to the right of the plaintiffs to call upon the defendants to pay interest on the amount covered by a policy of life insurance which the assured had assigned to them.

Mr. *Fitzgerald* for the plaintiffs.

Mr. *Burton*, Q. C., contra.

1868.

Toronto Savings B'k v. Canada Life Ass. Co.

SPRAGGE, V. C.—The plaintiffs are assignees of a policy of assurance effected with the defendants by one *Hallinan* upon his own life.

Hallinan died, and some negotiation took place between the plaintiffs and defendants, with a view to the latter paying over the amount insured to the plaintiffs, without requiring administration to the estate of *Hallinan* to be taken out. The question submitted to me, which is put in writing, is, "Whether the plaintiffs are or are not entitled to interest on the amount of the policy in question in this cause?" The plaintiffs claim interest from the date of their furnishing to the defendants, proof of the death of *Hallinan*.

I have read the correspondence between the parties, and the affidavits put in. It is not denied that the defendants were not *bound* to pay over the money without the presence of a personal representative to the estate of *Hallinan*, or his presence being dispensed with by the Court. They appear, however, to have been willing at one time to pay over the money, upon being indemnified, without waiting for (what was looked upon as a formality by reason of the alleged insolvency of *Hallinan*), the appointment of a personal representative. At a later date, 16th August, 1865, they refer, in a letter put in, to certain garnishee proceedings to which they were made parties, and inform the plaintiffs that they do not feel warranted in paying the claim except upon a full and legal discharge; but they add that, to free themselves from the suspicion of a desire to delay or evade payment, they would "pay the money into Court, if that can be legally done, so soon as you furnish us with the necessary evidence of *Hallinan's* age."

Judgment.

It can of course be only after the above date, and after furnishing the evidence of *Hallinan's* age, that the plaintiffs can claim interest. But upon what ground can

1868.

Toronto Savings B'k v. Canada Life Ass. Co.

they claim it? They were notified before this that the defendants stood upon their right to have a full legal discharge. They had a perfect right to take that ground. It was urged against them that they had not paid the money into Court in accordance with their letter of 16th August, 1865; but it was not for them to obtain the order for payment into Court. It does not appear that, upon the plaintiffs furnishing proof of *Hallinan's* age, or afterwards, they applied for such order, or even intimated to the defendants their desire that the money should be paid into Court.

I have come to the conclusion that there is nothing special in the case. If, therefore, the plaintiffs are entitled to the interest they claim, it must be because the assignees of an assured are entitled to interest, as a general rule, upon furnishing the assurers with the necessary evidence to establish their claim, even though they are not in a position to give such a discharge as it is the right of the assurers to have. They produce no authority for this: the authorities are all the other way; and I may add, in justice to the defendants, that so far as I can judge from the affidavits and the correspondence, they offered no vexatious opposition to the plaintiffs' claim, but took the course they did simply for their own protection. I am not informed that there was any delay after the plaintiffs were in a condition to give a valid discharge. No question is raised upon that point.

Judgment

1868.

McLennan v. Wishart—In re Nelson.

Will—Imperfect enumeration.

A testator commenced his will by saying he disposed of the whole of his estate, and then gave $2000 to one person and $500 to another person; his estate in fact, being greatly in excess of these two amounts.

Held, [affirming the decree of VanKoughnet, C.] that as to such excess there was an intestacy; the rule as to cases of imperfect enumeration not applying to cases where a sum of money is named in the will.

Re-hearing of decree, pronounced by his Lordship the Chancellor, as reported *ante* page 199; at the instance of the plaintiff.

Mr. *McLennan* and Mr. *E. Henderson*, for the plaintiff.

Mr. *Moss*, for the defendant.

Judgment. VanKoughnet, C., remained of the opinion expressed by him on the criginal hearing.

Spragge, V. C.—I have examined the cases to which we have been referred; which, however, do not throw very much light upon the will before us. I agree in the conclusion at which his Lordship the Chancellor has arrived, as to the proper construction of the will; and in the reasons given in his judgment. No other conclusion could be arrived at unless the words "$2000" can be treated as mere words of imperfect enumeration. I believe there is no case of that class, where a sum of money named in a will has been held to be an item of imperfect enumeration. It is usually some article or articles which the testator apprehends might be overlooked, or which occurs to the mind of the testator, which he particularly wishes should pass, but it is diffi-

cult to understand a testator naming a particular amount of money, if he means the whole of his property to pass. 1868. McLennan v. Wishart.

I think the decree should be affirmed with costs.

MOWAT, V. C., concurred.

Decree affirmed with costs.

SHEA v. DENISON.

Equitable execution—Pleading.

Where a suit is brought for equitable execution against lands, in aid of a judgment at law, the bill must shew that an execution at law had been placed in the hands of the Sheriff.

Hearing *pro confesso*. Bill, by assignee of judgment at law, to obtain equitable execution in aid of the judgment. Statement.

Mr. *D. Mitchell McDonald*, for the plaintiff.

Mr. *R. Sullivan*, for defendant, objected that it did not appear by the bill that any writ against lands or goods had been placed in the hands of the Sheriff.

Bank of Upper Canada v. *Thomas* (*a*), *Neate* v. *The Duke of Marlborough* (*b*), *McDowell* v. *McDowell* (*c*), *White* v. *Beasly* (*d*), *McMaster* v. *Noble* (*e*), were amongst other cases, referred to.

(*a*) 9 Gr. 336.
(*b*) 3 M. & C. 407.
(*c*) 1 Chan. Cham. 140.
(*d*) 2 Gr. 660.
(*e*) 6 Gr. 581.

1868.

Shea v. Denison.

SPRAGGE, V. C.—This is a bill for equitable execution against lands, and has been taken *pro confesso*. The question which arises is, whether it is necessary to allege that a *fi. fa.* lands at law had been placed in the hands of the Sheriff, and if so whether it is sufficiently alleged in this case.

The allegation is that it "issued and is in full force." This allegation would be satisfied by its issue only without its being lodged with the Sheriff, and it would be in full force if still running, unspent.

There is therefore no allegation of the writ being placed in the hands of the Sheriff.

Then is it necessary that it should be so alleged, in other words, that the writ should be lodged with the Sheriff.

Judgment.

In *Shirley* v. *Watts* (*a*), *Angell* v. *Draper* (*b*), and other cases, the writ was not taken out at all, and it was held that it must be sued out. No question was raised as to whether it must be lodged with the Sheriff; that may have been comprehended, or intended to be so, in the suing out, but the cases stopped short of that point; probably the lodging with the Sheriff was comprehended in the words sued out; those words were used in the judgment in *Gore* v. *Brown* (*c*), where the writ had been placed in the Sheriff's hands, but this would not be sufficient upon an allegation in a pleading.

The Lord Chancellor *Cottenham*, in giving judgment in *Neate* v. *Duke of Marlborough* (*d*), says: "The effect of the proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be

(*a*) 3 Atk. 200.
(*b*) 1 Ver. 399.
(*c*) 3 S. & G. 1.
(*d*) 3 M. & C. at p. 417.

a legal impediment, he then comes into this Court, not to obtain a greater benefit than the law, that is, the Act of Parliament, has given him; but to have the same benefit by the process of this Court, which he would have had at law if no legal impediment had intervened. How then can there be a better right; or how can the judgment which *per se* gives the creditor no title against the land, be considered as giving him a title here."

1868.

Shea v. Denison.

The rule then seems to be this, that the creditor must proceed at law as far as, considering the nature of the title to the land, he can proceed. I do not suppose that any seizure by overt act as entry, or that seizure of any kind is necessary, or would indeed be proper, inasmuch as the land being equitable estate is not seizable at law, but the plaintiff must be in such a position, that if it were legal estate instead of equitable, he could seize it. Such appears to be the rule upon the authorities, and I must hold the allegations in this bill insufficient. The plaintiff can amend, if in fact the writ was delivered to the Sheriff.

Judgment.

1868

aff. on appeal 16 Gr. 76

WASHBURN v. FERRIS.

Principal and agent—Fraud—Res judicata—Costs.

The plaintiffs and their father had been in possession of the lands in question about 20 or 30 years, the title however being all the while in another party. The plaintiffs employed one of the defendants, *A. F.*, to obtain a conveyance which he took in his own name for the avowed purpose of defeating the claim of one P., from whom a lease had been taken by the plaintiffs, and in a suit by P. against the plaintiffs to establish his right to the land, one of them swore that the deed to the defendant (the agent) was *bonâ fide* and for his own benefit: and subsequently to the dismissal of this bill in that suit, the plaintiffs took a lease of the premises from *A. F.*

Held, that the circumstances did not preclude the plaintiffs from establishing the agency of A. F., and afterwards, shewing themselves entitled to the land as owners, and that the dismissal of the bill in *P.'s* suit was not *res judicata* of the question involved in this: but, under the circumstances, the court while granting to the plaintiffs the relief to which they proved themselves entitled, refused them any costs of the proceedings to establish their right.

This cause came on for the examination of witnesses and hearing, at the sittings of the Court at Whitby.

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

Mr. *Crooks*, Q. C., and Mr. *Armour*, for the defendants.

Judgment. SPRAGGE, V. C.—The subject of this suit is a parcel of land consisting of about 200 acres, being an Island, in a lake in the Township of Mariposa. It is spoken of by witnesses as a farm of considerable value, with about 100 acres under cultivation. For some 20 or 30 years past it has been in the possession first of the father of the plaintiffs, and then of the plaintiffs themselves, the title however being in a Mrs. *Hartwick*, wife of one *Norris Hartwick;* the *Hartwicks* being residents in the United States, in Indiana. The question in this suit is whether a conveyance from the *Hartwicks* to the defendant *Arthur Ferris* was procured by the latter in the

1868.

Washburn v. Ferris.

capacity of agent for the plaintiff *Jarvis A. Washburn*. The parties are spoken of in the evidence as relations or connections, and one *Purdy*, whose name is a good deal mixed up with the transactions, was the brother-in-law of the elder *Washburn*, the father of these plaintiffs. *Washburn* the father, according to the account of *Purdy* who is a witness in this cause, went into possession under him, *Purdy*, and the sons subsequently took a lease from *Purdy*. Disputes afterwards arose, and the plaintiffs or *Jarvis* for himself and his brother, sought to obtain an independent title from the *Hartwicks;* and the defendant *Arthur Ferris* was the instrument for that purpose. He went to the *Hartwicks*, who seemed to have been previously unaware of their title, and representing to them that the *Washburns* had been for many years in possession and had made large improvements upon the place, he obtained from them, for a small consideration, a conveyance of the land to *Jarvis A. Washburn:* so far there is no question. Subsequently he again went to the *Hartwicks*, and obtained from them a conveyance of the same land to himself; and the question is whether in that, he was agent for the plaintiffs or one of them *Jarvis*, or was himself a purchaser from them, or from *Jarvis*.

Judgment.

The plaintiff *Jarvis A. Washburn* has created some difficulty by the terms of his answer in a suit instituted by *Purdy*, in this Court against *Arthur Ferris* and himself, and it is contended also that the dismissal of that bill operates as *res judicata* upon the subject therein in question: a difficulty has also been created by the plaintiffs after the conveyance from the *Hartwicks* to *Arthur Ferris*, having taken a lease of the premises in question from *Ferris* to themselves.

And first, as to the answer in *Purdy's* suit. *Ferris*, by the conveyance from the *Hartwicks* to himself had the legal estate. While it was in *Jarvis A. Washburn*, under the previous conveyance from the *Hartwicks*, he

1863.

Washburn v. Ferris.

was estopped by the lease from *Purdy* from setting up that conveyance against him. *Purdy* alleged in his bill that the conveyance to *Ferris* was in trust for *Washburn*, raising in fact the same issue as is raised in this suit. *Washburn* by his answer in that suit, states and reiterates, that the conveyance to *Ferris* was for value and *bona fide*. In the tenth paragraph he puts it thus distinctly "that in his belief the conveyance to *Ferris* was for his own sole use and benefit," and that *Ferris* "is the sole and absolute owner of the said lands and premises:" and he adds, "and I have not, nor I believe has any other person, any interest therein or any right or title thereto."

This is a very distinct and solemn negation of the title, which is asserted by the plaintiffs in the suit, and an admission of the title in *Arthur Ferris*, which is impugned in this suit: and it is upon oath: and the commissioner who administered the oath states in evidence that he read the answer to *Washburn* who said it was correct, and the commissioner says he has no reason to doubt that he understood it. It is contended that this is conclusive; and the language of text writers supports the defendant's position. Mr. *Taylor* (*a*) says: "The mere fact that an admission was made under oath does not seem alone to render it, conclusive against the party, but it adds vastly to the weight of the testimony, throwing upon him the burthen of shewing that it was a case of clear and innocent mistake." So Mr. *Greeley*(*b*), "an answer is evidence of almost irresistible strength against the defendant who filed it, or any person claiming under him, for it is a deliberate statement upon oath of all that it contains. It is only so far not conclusive, that it may be proved to have been sworn under erroneous impressions."

Judgment.

If this be a correct statement of the law, the sworn statement of *Washburn* in his answer is conclusive, at least as against him; for he shews no mistake or mis-

(*a*) p. 784. (*b*) p. 323.

apprehension. If conclusive it must I apprehend be upon the ground of public policy, that he who has knowingly and deliberately pledged his oath to the truth of an allegation, shall not be permitted to shew the fact to be otherwise, in short, that he is estopped. 1868. Washburn v. Ferris.

I think the authorities referred to by these learned text writers, scarcely support their position; and the case of *Thomas* v. *White*, (*a*), one of the cases referred to by Mr. *Taylor*, is clearly against it. The plaintiff was the widow of a man who died in embarassed circumstances. She deposited certain goods with the defendant; the principal part of them having belonged to her husband, the rest having been purchased by herself. Subsequently, in an adminis'ration suit brought by a creditor of her husband, a decree was made against her, and an attachment issued, and she was committed to prison. She applied to the Insolvent Court for her discharge and in her schedule stated that the goods in question belonged to the creditors of her husband. The action was trover against the depositee of the goods, and it was contended that the plaintiff was concluded by her schedule. The jury having found for the plaintiff, the question came up *in banc*, and the ground was taken that the plaintiff was precluded by the oath she had taken, from from afterwards claiming the goods as her own. But *Parke*, B., emphatically denied the position. "How is she," he asked "estopped by her false oath? It was only evidence to go to a jury. It is quite clear she was not precluded from afterwards denying her former statement." And the Court, Lord *Abinger*, and Baron *Parke*, *Alderson* and *Gurney* held, "that the fact of the plaintiff's swearing that the goods belonged to her husband's creditors, and afterwards claiming them to be her own was an inconsistency for the consideration of the jury; but that she was not estopped by her oath, from setting up a right to the goods in herself." Judgment.

(*a*) 1 Ty. & Gr. 110.

1868.

Washburn v. Ferris.

There was no suggestion in that case, and there was no room for it, any more than in this, that the oath was made under mistake. It was treated simply as a matter of evidence. Whether the interests of morality would be promoted by the adoption of a more stringent rule is another question. This case may be found to furnish some cogent reasons against it. But however that may be, the case from which I have quoted decides that an oath, though taken with the knowledge that what is sworn to is untrue, and though taken in order to serve a party's own interest, does not preclude the party taking it from shewing that the truth is otherwise. I allow that the truth must be shewn to be otherwise by clear, convincing testimony, but this is only a question of the weight of evidence, not of the exclusion of evidence.

Judgment.

The evidence satisfies my mind that the conveyance to *Arthur Ferris* was taken in his name only, but for the benefit of *Washburn*. His own intention may have been to keep it for himself; but I am satisfied that he accepted the position of agent for *Washburn*, and avowedly in that character obtained the conveyance. It is undeniable that he was agent in obtaining the first conveyance; and there is not a tittle of evidence, of any purchase by him from *Washburn*. The whole thing is easily explicable, though not very creditable to the parties concerned. This conveyance and the answer put in to *Purdy's* suit, and even the lease by *Ferris* to the *Washburns* are plainly referrable to a scheme to defeat *Purdy's claim* and I think the evidence warrants the conclusion that the moving spirit in the scheme was *Arthur Ferris*. He is described as a man of shrewdness and some education. What is said of him in the evidence and what I saw of him at the hearing of the cause, leaves me no doubt of his shrewdness or of his being an apt instrument for the concoction and carrying out of the scheme which was resorted to for the defeat of *Purdy's* claim. The plaintiffs are described as farming men without any education.

1868.

Washburn v. Ferris.

Ferris seems to have stated to several persons the object of the conveyance to himself. To Mr. *Bigelow* he stated that he was going to take a deed in his own name, and that in defending the suit brought by *Purdy*, the parties would be in a better position by the land being in his, *Ferris's* name. To the same witness he spoke of the lease, that it was for the purpose of defeating *Purdy* in his suit. To *John Shaw* he said that "he was going west to obtain a deed for the *Washburns*," and this appears to have been his second visit to the States, the visit in which he obtained the deed to himself. The evidence of Mr. *Major* who travelled as far as Detroit with *Ferris* on his second visit to the States is very material. He says: "he told me he was going to Mrs. *Hartwick* to get a deed exchanged, that Mrs. *Hartwick* had given a deed to the *Washburns*, but that he was to get a new one in his own name in order to defeat *Purdy's* claim * * * he said nothing about having purchased from the *Washburns*." On cross-examination he said: "I understood the *Washburns* were tenants of *Purdy*, and that the deed was in *Ferris's* name to defeat *Purdy*." To another, *Hurley*, he spoke of his lease to the *Washburns*, and that he had told them that its object was to defeat an apprehended second suit by *Purdy*, while his real object was to raise money upon the land; and there is other evidence to much the same effect. These witnesses were examined before me and I had no reason to doubt either their intelligence or their veracity. The evidence of *Leonard Major* is very full and explicit to the same point, but he had an interest in the plaintiffs' succeeding in the suit and I did not feel that I could safely rely upon his evidence alone. There was also the evidence of the vendor *Morris Hartwick*, taken upon foreign commission, which, if true, and I believe it to be true, establishes the plaintiffs' case beyond question. I confess too that I am by no means satisfied in regard to the letter written by *Ferris* to *Hartwick* and afterwards

Judgment.

1868.

Washburn v. Ferris.

procured from *Hartwick* by *Ferris* and which he says he has lost. The account that he gives of the loss is not at all satisfactory.

It is probable that the witnesses do not remember the exact laguage used by *Ferris*, but they concur in saying that he used the term "in his own name," when speaking of the deed to himself, and of the reason of its being in his name, being to defeat *Purdy*. They are not likely to be mistaken, or at any rate to be all mistaken upon these points. If not mistaken it is a necessary inference that he was not a purchaser from the *Washburns*, but merely their agent in carrying out a scheme to defeat *Purdy*, and it is to be observed that while the lease taken by itself is a strong piece of evidence against the plaintiffs, the statements of *Ferris* in regard to the purpose for which it was taken are on the other had strong evidence against him. They do more than negative the effect of the lease, for if he had said nothing about the purpose of the deed to himself, and had said what he did about the purpose of the lease, it would be strong evidence to shew that the *Washburns*, not himself, were the real owners of the land.

Judgment.

To refer again to *Washburn's* answer to *Purdy's* suit, that answer was the act of *Ferris*, he gave instructions for *Washburn's* answer as well as his own. I would not say a word in excuse of a man who pledges his oath to what is false. His doing so at the bidding of another is scarcely a palliation. If the rule were that his oath precluded him, I should have applied the rule in this case, though its application would have been for the benefit of the no less guilty man, at whose instance the oath was taken; but I am glad to find that I am not compelled to exclude the truth of the transaction, and the truth, to my mind clearly and convincingly established, is, that in the second deed as in the first, *Arthur Ferris* was the agent of the *Washburns*, and never purchased from them or from either of them.

1868.

Washburn v. Ferris.

The question in this suit was clearly not *res judicata* in the suit brought by *Purdy*. Apart from other reasons that suit did not proceed far enough. How far it did proceed is not shewn. It certainly is not shewn to have been set down to be heard.

Thomas Ferris, the father can stand in no better position than *Arthur*. He has not paid his purchase money, and the *Washburns* have all along continued in possession.

In regard to the costs, I have felt some hesitation, not out of consideration for *Ferris* certainly, but as to whether I ought to give costs to parties whose conduct, especially that of *Jarvis A. Washburn*, has been very far from blameless. I think it is a salutary rule to refuse costs in such a case.

Judgment.

There will be no costs to any of the parties.

1868.

IN RE SHAW, A LUNATIC.

Lunacy—Changing conduct of order.

Although the general rule of the Court is, that no course will be taken that will prejudicially affect the interests or the comfort of a lunatic, even for the benefit of creditors: still the Court will not refuse to assist creditors where that can be done without prejudice to the lunatic: and where the Court, by its orders, has induced creditors to prove their debts in this Court and thus prevented them from proceeding at law, *quære*, whether the court is not bound to afford them relief, even to the prejudice of the lunatic's estate.

In June, 1864, the committee of a lunatic's estate applied for and obtained an order for the sale of lands for the payment of debts reported due by the lunatic; instead of proceeding to realize the estate the committee took no action whatever under the order, and in 1868, after a delay of nearly four years, certain of the creditors applied for the conduct of the order directing the sale of the lands and the Court under the circumstances made the order.

This was an application on behalf of certain creditors of the lunatic for an order giving them the conduct of an order made in this matter, directing a sale of the lunatic's lands under the circumstances stated in the head-note and judgment.

Mr. *Roaf*, Q. C., in support of the application.

Mr. *Crickmore*, contra.

Judgment. SPRAGGE, V. C.—This is an application by creditors of the lunatic, that the conduct of the order made in the matter of the lunacy on the 11th of June, 1864, may be committed to them. That order was made on the petition of the Committee of the estate; and ordered that the real estate of the said lunatic or a competent part thereof, should be sold for the payment of debts reported by the Master, to be due by the lunatic; and the order directed that the Committee should proceed forthwith with the prosecution of the same; and

that if he should not proceed to prosecute the same with due diligence the creditors of the lunatic, or any one or more of them, should be at liberty to make such application as is now made. 1868. Re Shaw.

The Committee has taken no step towards the prosecution of the order; nor did he even cause it to be drawn up; that has been done by the creditors, who make this application.

If this was an administration suit, or indeed a proceeding of any kind, other than in a matter of lunacy, there could be no doubt as to the propriety of granting this application; for the Committee gives no good reason for not prosecuting his order. But, it is said, that the Court will not take any course that will affect prejudicially the interests or even the comfort of the lunatic, even for the benefit of creditors; this may be conceded, but on the other hand the Court will not, I think, refuse to assist creditors, where it can do so without prejudice to the lunatic. The order was no doubt applied for by the Committee, and granted by the Court on the ground, that it would benefit the lunatic in bringing his estate to sale in a way that it would go further in the payment of debts, or require less of it to pay them, than if creditors, were to proceed to realize their debts by the process of the Courts of Common Law. This application is of course for the benefit of creditors. Judgment.

It is not necessary that I should say, that the Court having by its orders in this matter induced creditors to prove their debts in this Court, instead of proceeding at Law, is bound to give them their remedy, in this Court, even to the prejudice of the lunatic's estate; because it is not shewn to us that the lunatic's estate would be prejudiced by the prosecution of this order. It may be indeed, that by waiting an indefinite time better terms of sale might be obtained, and I understand *Mr. Crickmore's*

1868. Re Shaw. position to be, that the creditors having come into this Court to prove their debts, are bound to wait until such time as the Court shall see it to be for the interest of the lunatic that his estate should be sold. I cannot accede to this: I do not think it would be keeping faith with creditors. It would be inducing then to come into this Court in order to their having their remedy here, and then refusing them any remedy, and besides, depriving them of their remedy at Common Law.

I have no doubt that this Court ought either to give them their remedy in this Court or to leave them to their remedy at Common Law, and if (which I do not know), they have lost their remedy at Law by coming to this Court, that this Court is bound to give them their remedy here. It is not necessary to say more because the creditors having the right to have the lands of the lunatic sold for the satisfaction of their debts, either at Law or in this Court, it is more for the interest of the lunatic, that this should be done in this Court than at Law.

Judgment.

Then as to the instrumentality by which this should be done. It was made the duty of the Committee by this order of June, 1864, but the Committee in his zeal for the interest of the lunatic, thinking no doubt that the estate would be benefitted by delay, left the order a dead letter. This is not fair to creditors, and I think after what has occured I ought to do that, which will give to creditors an effectual and a reasonably prompt remedy, and I do not know that I can do so better than by granting the prayer of this petition, and I think it the more proper to do this, inasmuch as by the terms of the order creditors were led to expect it, in the event of the Committee failing, as he has done, to prosecute the order diligently.

A claim is made on behalf of the Committee for compensation for services. I do not think, at all events, that this should be made a condition to the granting of this

1868.

Washburn v. Ferris.

application; nor, as at present advised, can I see that it would be just to make it precedent to the claims of creditors. Moreover it is very unusual, and the case *Ex parte Fermor* (*a*), and the case in *Philips* (*b*), are not favourable to its being granted in cases like this.

It is conceded that the order of June ought to have provided for the costs in lunacy; the omission can be supplied in this order. All moneys that the Committee has been warranted in expending under Orders of the Court, must be allowed to him.

My present order is intended to carry out the order of June, and I cannot assume that it would leave the lunatic in want. I may remark from what has come under my notice in the matter of this lunacy, that the scale of allowance to the lunatic, and that to the lunatic's family appear to have been based upon calculations of the value of his estate, which have not been justified by experience. It may probably be right that this should be reviewed. As to the lunatic himself he cannot be exposed to want in the ordinary sense of the term as he is an inmate of the Provincial Lunatic Asylum, but it is desirable that such comforts as he has hitherto enjoyed should, if possible, be continued to him. Judgment.

The order will be drawn up in the terms of the notice of motion. The costs in lunacy omitted in the former order to be provided for in this.

(*a*) Jacob, 404. (*b*) Re Walker, 2 Ph. 630.

1868.

ARMSTRONG v. ARMSTRONG.

Undue influence—Father and son.

In the case of a deed of gift from a father to a son, there is no presumption of undue influence in obtaining it.

Where a father made a deed of gift of all his property to his son and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the Court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences; and the deed was upheld.

Examination of witnesses and hearing at Barrie.

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

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

Judgment. SPRAGGE, V.C.—The bill in this case is filed by the heirs-at-law, with one exception, of the late *James Armstrong*, against *James Armstrong*, a son of the deceased; and its object is to set aside a conveyance made by the father to his son *James*, which is dated the 22nd day of August, 1864.

Two leading questions arise in the suit: one, whether there was a complete execution of the conveyance: the other, whether the same having, as it is alleged, been made without consideration, the grantor was perfectly informed as to the nature, effect, and consequences of the instrument which he was executing.

My conclusion from the evidence is, that the deed was not delivered on the 22nd of August. It might be doubtful upon the evidence of the subscribing witnesses; but the examination of the defendant himself, makes it clear that there was no delivery at that date. He says that, according to the agreement between his father and

himself, "the understanding was that it was to be at his (the father's) pleasure whether he delivered me the deed or not. If he pleased he might make some other disposition of his property, either by will or deed. My idea was that if he did not deliver the deed to me before he died, and did not make any other disposition of it, it would go to the children; and that was his idea also, as far as I know. Until he gave me the deed it was not to come under my control at all. * * The agreement between me and my father was, that I was to have no control of the property until after his death. * * My father pushed the deed over to me, and told me to sign it; and I handed it back to him. It was understood that it was not to be delivered to me. His handing it to me was not intended as a delivery."

1868.

Armstrong v. Armstrong.

It is contended that there was a subsequent delivery. No inference is to be drawn against the fact of a subsequent delivery from the silence of the defendant upon that point at his examination. His counsel asked him whether or not there had been a subsequent delivery? and the question was objected to as tending to prove an independent fact. I held that the question could not be put; but at the request of Mr. *Strong*, who conceded that my ruling upon the point was in accordance with the practice of the Court, I noted that the question was put and overruled, in order to his raising the question upon rehearing or appeal. I could not but feel that the rule operated somewhat harshly against the defendant, for he was made to establish by way of discovery against himself, that there was no delivery at the date of the deed; and disabled from proving that there was a delivery afterwards. I am satisfied, however, that such is the rule, and I do not mean to say that it is an unsound one.

Judgment.

The fact of subsequent delivery is, however, supported by other evidence. After the partial execution of the

1868. Armstroog v. Armstrong.

22nd of August, the instrument was placed in a trunk in the father's bed-room: and so remained in his possession for a long time. A witness, *Hugh Wilson*, deposes to a conversation with him in the fall or winter of 1865, a few weeks or months before his death. He died in January or February, 1866. He had some years previously spoken of making a will, leaving the land to his son *James*, and asked *Wilson* to be his executor, which *Wilson* declined. On the occasion, shortly before his death, he told *Wilson* that he had settled the matter about which they had been speaking, and had made a deed of the land to his son *James*. *Wilson* said that he hoped that he had secured himself. *Armstrong* said that was right, that that was made all right. I should not say that, that by itself was evidence of any after-delivery of the deed. Another witness, *Samuel Cherry*, says that *Armstrong* had repeatedly told him of his intention to will or deed this land to his son; and within a year of his death he told him that he had deeded the land to his son *James*. He says he might have been drinking when he said this, but was able to speak rationally. In connexion with this, is a piece of evidence which was taken, subject to the objection of the defendant's counsel, but which I think makes in his favor. It is in the evidence of *James Long*, who says that *Armstrong*, the father, in the fall before his death, upon being asked by the witness whether he had given *James* a deed of the property, answered that he had not. A good deal of this evidence is material upon another branch of the case.

Judgment.

On the 10th of January, 1866, the deed was registered. Whether this was done by the father or the son does not very clearly appear. The father was alive at the time, and it does not appear that he was not in perfect possession of his faculties. When *Wilson* saw him, a few weeks or months before his death, he was on horseback riding into town.

From the evidence of *Raynor*, I should take it to have been done by the son. *Raynor* was a farm labourer, very unintelligent; so much so, as I noted at the time, that his evidence was scarcely reliable. I think, however, the proper inference is that the registration was by the son. If by the father, I should take it to be clear evidence of a delivery of the deed: and if by the son, still an important piece of evidence in favour of delivery: for the deed, and the memorial which appears to have been executed at the same time, must have been as a fact in the hands of *James* the son. Now what, is the proper conclusion from that fact, as to how it came into his hands. It must have been either delivered by the father, or abstracted surreptitiously from the father's possession by the son. Ordinarily when a document is found in the possession of a person, the legal inference is that it came into his possession lawfully and properly; and the circumstance that it was to the interest of the person to have the document in his possession does not lead to the presumption that he obtained it fraudulently. All that can be said in this case is that he may have had the opportunity of obtaining it fraudently, that is, that he had access to the trunk or whatever other place it was, that the father kept it in. This is not to be confounded with cases, where papers come properly without delivery, into the hands of a party, *e. g.*, where a bond or other evidence of debt to a testator given by one named as his executor, is produced by the executor as evidence of its payment; but here I must either infer a deli ery, or presume a fraud, in fact a larceny. I think the proper legal conclusion is that there was a delivery of the instrument.

Judgment.

The testimony to which I have referred, though perhaps not sufficient of itself to establish the fact even of a delivery, strengthens this conclusion. Take in the first place the evidence of *James Long*, and of *Wilson*, the former speaks of a conversation in which *Armstrong*

1868.

Armstrong v Armstrong.

stated that he had not given a deed, and this conversation he places in the fall before *Armstrong's* death, the latter speaks of a conversation in the fall or winter of 1865, a few weeks or months before *Armstrong's* death, in which *Armstrong* stated that he had made a deed to his son. Take these conversations to have taken place in the order in which I have placed them; and the language of the witnesses, imports that order—the language of *Armstrong* would be truthful and correct as to both if in the interval he delivered the deed to his son, and would account for the deed being rightfully in the possession of the son. It may be, certainly that one of these statements was untrue, but is this to be presumed, when upon an hypothesis which has the fact of the possession of the deed in the son, to support it, both would be true? It may be said that *Armstrong* would, in mere conversation, speak of having given a deed to his son after its partial exe-

Judgment.

cution in August, 1864. It may be so, but I doubt much, whether after the distinct understanding that is shewn to have existed as to the footing of the parties, and the control retained by the father over both the document and the land, the father would have spoken of having given a deed to his son without more passing between them afterwards. I doubt this, because I am satisfied that he did not feel that what passed in August, 1865, amounted to the giving of a deed; and it is not a thing the effect of which a man would be apt to exaggerate. My remarks upon this head apply also to the evidence of *Henry*. I think the proper conclusion from the evidence is that there was a delivery of the deed, after its partial execution in August, 1864, and before its registration.

Upon the other branch of the case it is proper to consider the position of *Armstrong* and his family. For several years before August, 1864, his wife and family lived apart from him. His son *James* was an exception

1868.

Armstrong v. Armstrong.

to this, at least for a very considerable time, some two or three years as I gather from the evidence, before August, 1864. The father was intemperate, occasionally, rather than habitually. Further he was almost helpless, his feet being in a bad state, from frost bite, as supposed by some witnesses, but from a less reputable cause as is said by others, and one hand was injured, "crooked," as one witness says, by a fall from a waggon. The land purported to be conveyed by the deed in question, was a farm upon which *Armstrong* lived, and was his only property at least his only remaining property, and the place was in poor condition. He is described by the witnesses as a man of at least average intelligence; one describes him as shrewd, another as a man of more than ordinary ability. His son *James* attended to his personal wants, dressed his feet, described to be an unpleasant task, and took care of him generally; and his father spoke of him as the only one of his children who had, as he said, "stuck to him."

Judgment.

The bill alleges that at the date of the deed, *Armstrong*, who was addicted to excessive drinking, was incapable from a fit of intoxication of attending to, or apprehending or managing any matter of business or the disposition of his land; and there are other allegations to the like effect. It is also alleged that the deed and memorial were not signed by *Armstrong's* own hand, "who, though a good penman, was at that time, from intoxication, unable to sign or seal the same." I may say shortly that none of these allegations are established in evidence, unless that of the intemperate habits of *Armstrong*, which are rather overstated; and as to the signatures not being in his own hand, that is explained by the injury he had received, and which on another occasion he gave as a reason for not signing his name. When he signed the deed and memorial, his son, by his desire, wrote his name—he taking the top of the pen. The evidence does not lead me to doubt

1868.

Armstrong v. Armstrong.

that he knew that what he was executing was a conveyance of his farm to his son.

But, it is argued that assuming that he knew generally that the document was a conveyance to his son; yet this being a conveyance without consideration, a mere donation, the onus is upon the grantee to prove that the conveyance was explained to him; that he was made acquainted with its nature and its consequences; that a deed was in its nature irrevocable; and that its effect would be to divest him of the dominion and usufruct of his estate: and, in fine, that nothing was left unexplained, which, if explained, might have induced him not to make that conveyance in that particular shape. And *Henry* v. *Mount* (*a*), *Anderson* v. *Ellsworth* (*b*), *Cooke* v. *Lamotte* (*c*), and other cases of that class, are cited to me in support of the proposition.

Judgment.

The fact of the conveyance being only partially executed, and the nature of the arrangement between *Armstrong* and his son go very far to answer these objections; and to shew that *Armstrong* perfectly comprehended what he was doing. It is said for the plaintiffs that there is no evidence of any explanation being given to him, when he perfected the execution of the conveyance by delivery; and this is true, but if it be shewn that he perfectly comprehended the effect of the deed; and the difference between delivering it and keeping it in his own hands undelivered, in August, 1864, it must, I think, be assumed that he continued perfectly to comprehend the same at the subsequent date, whenever it was, that he did deliver it.

I do not mean, however, to dispose of the case upon that ground; but upon this: it is a conveyance from a father to his son, which I assume to be without valuable

(*a*) 8 Beav. 489. (*b*) 3 Giff. 154. (*c*) 15 Beav. 234.

consideration. There is no evidence of undue influence; or of advantage taken of a state of intoxication; or of the conveyance being obtained under circumstances which would lay it open to be impeached in a Court of Equity as obtained unconscientiously; and my ground of decision is this: that the rules to which I have referred, as laid down in the cases cited to me, do not apply to the case of a conveyance from a father to his son. The cases upon this head of Equity Law are numerous, and none of them, none at least that I have seen, are cases where the conveyance was from a father to his son—cases I mean where the mere fact of the conveyance being voluntary, has been laid down as the ground for applying the rule to such a conveyance. A gift from a father to his son stands upon a different footing from a gift from one stranger to another; and a presumption of an intended gift arises in the case of a child where it would not arise in the case of a stranger. We may take as a familiar instance, a purchase in the name of one, with the money of another. If that other be a stranger, there is a resulting trust in favor of the person who furnishes the money, but if he be a child, the presumption is that the purchase was for his advancement; and circumstances are not easily yielded to as negativing such presumed intention; *Grey* v. *Grey* (*a*), and *Sidmouth* v. *Sidmouth* (*b*), are instances of this. In the latter case Lord *Langdale* said, "The circumstance that the son was adult does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred; but in the relation between parent and child, it does not appear to me, that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son to secure him any benefit which he voluntarily thinks fit to bestow upon him; and it

1868.

Armstrong v. Armstrong.

Judgment.

(*a*) 2 Sw. 594.

2 Bea. 447.

1868. Armstrong v. Armstrong.

does not follow that because the reason for doing it is not known, there was no intention to advance at all."

It appears to me that to apply the doctrine invoked by the plaintiff to a voluntary conveyance from parent to child would be strangely inconsistent with the doctrine to which I have just adverted. Where a father purchases land and directs the vendor to convey to his child, the law, without any evidence of intention and without any evidence as to the father comprehending the nature and consequences of such, a conveyance, presumes that the father intended a gift to his child; it would surely be inconsistant with this, to hold, when the father makes a direct gift, that the son must prove that the father comprehended its nature and consequences. The very relation of parent and child makes the doctrine appealed to, inapplicable to a conveyance from the one to the other.

Judgment.

The bill says that this conveyance was improvident and would not have been made if the father had known what he was about. But the law does not put it upon the child to prove the reasonableness of the gift, and Lord *Langdale's* observations which I have quoted shew this. If there were no evidence of intention one way or the other, I apprehend that the Court would not put the son to prove what, according to some of the cases, especially *Cook* v. *Lamotte*, one not a child would be put to prove; but in this case the son stands in that respect upon strong ground. He had, or his father declared that he had, special claims upon him, beyond those of any other member of his family; and there is abundant evidence of his expressed intention to make a gift of this land to his son.

I have treated the conveyance as voluntary, and I think it must be so regarded, for though services were rendered which as between parent and child, would, I

think, be sufficient to support a deed as for valuable consideration if so intended by the parties: yet between these parties the services rendered appear to have been looked upon rather as claims upon the bounty of the father, than as services rendered by way of an equivalent for land conveyed; indeed the retention by the father of the deed itself, and of the control of the land, seem to negative any other interpretation. The treaty for the renting of the place is explicable upon the same ground. 1868. Armstrong v. Armstrong.

There may be a defect in the constitution of the suit, one of the plaintiffs, *Thomas*, is described in the evidence of *William Long*, as a young lad going to school, he does not sue as an infant. I call attention to this that the plaintiff may correct the defect in case he should desire to carry the case further. Judgment.

The decree will be for dismissing the bill, with costs.

LUTON v. SANDERS.

Confidential relation—Deed by a father to children.

A widower, a shrewd, thrifty man, possessed of considerable real and personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children,—which he did taking conditional notes for the purchase money. The children did not occupy any confidential relation towards him, and the transaction was his own suggestion without any influence or pressure on their part. What he retained was more than ample for his wants.

Held, in a suit instituted by the father seven years afterwards, that the deeds could not be impeached.

The bill was filed to set aside certain deeds executed by the plaintiff on the 13th December, 1861. The

1868. Luton v. Sanders.

grantees on the same day gave the plaintiff their certain promissory notes of which the following was one :—

"St. Thomas, 13th Dec., 1861.

Two years after date I promise to pay *William Luton*, and him only, four hundred dollars, without interest; this promise to be void and of none effect in case of the death of the said *William Luton* happening before the expiration of two years or before paid.

(Signed) ELIZABETH GILBERT."

The other notes given by Mrs. *Gilbert* and the other grantees respectively were in a similar form. The other facts appear in the judgment.

The cause came on for the examination of witnessess and hearing at London.

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

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

Judgment.

VANKOUGHNET, C.—The transaction was carelessly carried out in one respect, *i. e.*, in the taking deeds with absolute covenants. This was the fault of the Solicitor; but it does not appear to be prejudicial; nor that there is any fault in the title, nor is it made a cause of specific complaint. It is used as a circumstance to shew that the plaintiff had not competent legal advice. But in the view I take of the case this would not be sufficient to cause the transaction to be declared void. Here, the plaintiff was a man vigorous in body and mind, and competent, and having the full right to judge and act for himself. No confidential relation of any of the other parties to him, no influence in any way exercised over him is shewn. He lived with his son *Thomas*, who does not appear to have advised him on any occasion.

1868.

Luton v. Sanders.

He appears occassionally to have consulted *Daniel*, with whom he did not live, about his matters, and very natural that he should. He seems to have been a shrewd, thrifty, saving man, constantly lending out money, &c. Nothing more natural than that he should ask *Daniel* whether he thought this or that transaction a good one or safe; but it does not appear that he ever consulted *Daniel* on the transaction in question, or that in it or in anything else the son *Daniel* ever exercised any influence over him. He had some years before stated his intention of dividing his lands among his children. He was possessed of personal means to the amount of several thousand dollars, more than ample for his wants. Being sued for a breach of promise of marriage made at the advanced age of eighty, he became alarmed at the consequences, fearing large damages might be given against him, and he resolved to put his land out of his hands, and at once carry out his previously conceived plan or intention of dividing it among his children. He appears to have acted of his own free will throughout, without persuasion or pressure, and from the motives I have referred to. His great anxiety seems to have been to save the property from any judgment which might be recovered against him; and no doubt his fears were excited lest the jury might punish him as a wealthy man for his folly or breach of faith, and he thought he would at once give those who were best entitled to it his property. He seems to have been a man of wonderful vigor for his age, and is so yet, judging from his appearance in Court. It seems he subsequently made another promise of marriage; but this he took care to fulfil, with a widow, the mother of three living children; and this is, probably, the cause of the present suit. I should have observed that three years after this distribution of his property, the plaintiff affirmed it in the most solemn manner by suing one of his sons for the consideration money to be paid by him for his share, and, obtaining it.

Judgment.

1868.

Luton v. Sanders.

All parties now consenting,

Decree.—That property, other than that conveyed to *Thomas*, be vested in plaintiff for his life, on the delivering up by him of the notes or paper writings received by him from the defendants, other than *Thomas*, at the time of the execution of the deeds, and order plaintiff to pay the costs of this suit.

CAYLEY v. MCDONALD.

Mortgage by absolute deed—Costs.

A conveyance absolute in form, but intended as a security, was made by the owner of real estate. The sum secured was paid, but no reconveyance executed. The owner, however, was always permitted to deal with the estate as his own, and created a mortgage thereon with the knowledge of the person holding the legal title, who, after the death of the mortgagor, commenced proceedings in ejectment, claiming under the absolute conveyance: on a bill filed for that purpose, the Court restrained the action, and ordered the plaintiff therein to pay the costs in this Court.

Hearing *pro confesso*.

Mr. *Crooks*, for the plaintiffs.

The defendants did not appear.

SPRAGGE, V. C.—Among the allegations in the bill is this—that the conveyance, if made to the *Donald McDonald* who now claims, was made to him by the appointment of the *Donald McDonald*, who mortgaged to the plaintiffs, to secure £30, and that that sum has been paid. It is also alleged that the mortgage to the plaintiffs was with the knowledge of the defendant in this suit, who with such knowledge permitted him, the

mortgagor, to deal with the lands as owner. The bill has been taken *pro confesso*. If these allegations are true, as they are taken to be, it was inequitable in this defendant to set up title in himself and to assert it by ejectment. 1868. Cayley v. McDonald.

Upon the payment of the £30 this defendant was a trustee of the legal title for *McDonald* the mortgagor. The heir of the mortgagor is also a defendant. The mortgagor was estopped from saying that he was not owner, and his heir is estopped; and the defendant *Donald McDonald* is estopped from denying that the legal title is in him.

The plaintiffs are entitled, therefore, to a vesting order, and the defendant *Donald McDonald*, having made an inequitable use of his legal title, and so made it necessary for the plaintiffs to bring this suit for their own protection, must pay the costs of it. Judgment.

STEVEN v. HUNTER.

Infants—Partition—Sale.

In a suit for partition where infants were interested, affidavits were produced showing that a sale rather than partition would be more for the benefit of the infants; and that the property from its nature and situation was not susceptible of equal partition—the Court directed a reference to the Master to enter into contracts for the sale of portions of the estate, which sales should be carried into effect upon being approved of by the Judge.

This was a hearing *pro confesso*, and by way of motion for decree as against the infant defendants.

The suit was for partition or sale.

1868.

Steven v. Hunter.

Mr. *Proudfoot*, for the plaintiffs, asked that a sale might be directed, as being more advantageous, than a partition of the estate would be, for all parties interested therein.

Mr. *Bruce* for the infant defendants.

SPRAGGE, V. C.—The affidavits shew, and counsel for the infants agree, that the fact is—that it would be for the interest of the infants that the lands left by the intestate should be sold rather than partitioned. It is also stated that from the nature and situation of the property, it is not susceptible of an equal partition: but no reason or explanation is given in support of this opinion. I should think it proper to refer that point to the Master unless the circumstance of a sale being more for the advantage of the infants is itself sufficient. The fact of all the adult parties desiring a sale, and the saleable value of the property, compared with its annual value, and the charges upon it, sufficiently prove, I think, that a sale would be for the interest of the infants, that is such a mode of sale as is proposed, namely, sales of the various portions, as opportunities may present themselves from time to time; provisional contracts to be entered into and presented to a Judge from time to time, with evidence upon affidavit, shewing that the proposed sale would be advantageous to the infants; the sale to go into effect upon being marked as approved by the Judge.

Judgment.

I find that in *Knowles* v. *Knowles* (*a*), the Court went as far as I am asked to do in this case, the inquiry directed, being whether a partition or sale would be most for the benefit of the parties interested. *Bennett* v. *Bennett* (*b*) is also an authority in the same direction; and in that case the late learned Vice-Chancellor *Esten*, himself, directed a sale.

(*a*) Registrar's Book 18, p. 192. (*b*) 8 Grant, 446.

1868.

WILSON v. HODGSON.

Decree improperly obtained—Concealment—Misrepresentation.

A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The Court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated.

Hearing *pro confesso.*

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

The facts are stated in the judgment.

SPRAGGE, V. C.—I have not been able to overcome the difficulty that occurred to me when the bill was read at the hearing. The bill asks for equitable execution against certain lands, treating the defendant *Brunskill* as absolute equitable owner in fee. *Brunskill* and one *Henderson* were joint owners, and made a mortgage, which mortgage through several *mesne* assignments became vested in defendant *Hodgson*, as trustee for *Brunskill*. A bill was then filed, in the name of *Hodgson* and his assignor of the mortgage, against *Brunskill* and *Henderson*, and a final order of foreclosure was obtained. Judgment.

My difficulty is that the true position of the parties, as disclosed by this bill, did not appear in that suit. The suit purported to be by a mortgagee by assignment against the two owners of the equity of redemption: while it was in truth as stated in this bill, a suit by one of the two owners of the equity of redemption, in the name of his trustee, against the other joint owner of the equity of redemption. *Brunskill*, the real plaintiff, of course would not redeem, as doing so would defeat his

1868.

Wilson v. Hodgson.

object; and there would therefore necessarily be a foreclosure, unless *Henderson* paid the whole of the mortgage money. If *Hodgson* had been the owner of the mortgage that would be his right, but it was not the right of the real plaintiff. He was entitled to call upon *Henderson* for no more than as between them was due to him from his joint mortgagor. It appears, therefore, upon the face of this bill, that the decree upon which the plaintiffs in this suit rely as vesting an equitable estate in their execution debtor, was obtained under a concealment of the true position of the parties, and a misrepresentation of material facts; and was not such a decree as would have been made if the facts now disclosed had then been made known. The true facts now disclosed seem to me to shew an equity in *Henderson* to open the foreclosure, unless indeed he is barred by something that has occurred, but which is not before the Court. To found a decree in this suit upon the proceedings in that suit would be making a decree for these plaintiffs, founded upon proceedings which upon the plaintiff's own shewing are impeachable.

Judgment.

Whatever decree the plaintiffs may be entitled to against *Brunskill*, as joint owner of the equity of redemption, they are entitled to; but beyond that I do not see my way to making a decree in their favor.

1868.

McDONALD v. McDONALD.

Lunacy.

Rev. Dec. on appeal 16 Gr. 37

To avoid a transaction on the ground of lunacy it is not necessary to shew that the lunacy was connected with or led to the impeached transaction.

But to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware or had notice of the seller's mental condition.

Where, amongst other delusions, a vendor who was insane imagined that he was bewitched; and it was proved, that the purchaser learned this from conversation with the vendor during the negociation for the purchase, and that the purchase money was only one-half the sum which the seller had previously been offered, and might have obtained from another person, the transaction was set aside.

Examination and hearing at Cornwall.

Mr. *James Bethune*, for the plaintiff.

The defendant in person.

Judgment.

MOWAT, V. C.—*William McDonald*, deceased, was in his life time entitled to a patent for the east-half of lot No. 11, fourth concession, Lancaster. He died in the Lunatic Asylum, at Toronto, the bill says in December 1863, intestate, and without issue. The plaintiff is one of his brothers and co-heirs, and has a conveyance from the other heirs of all their interest in this property. On the 13th May, 1861, *William McDonald* assigned the half-lot in question to the defendant, and the defendant obtained the patent on the 15th of the same month. The bill impeaches the validity of the assignment, on the ground of the mental condition of *William McDonald* at the time of executing the assignment; and prays, that the patent may be repealed, or the defendant declared a trustee for the plaintiff; and for general relief.

1868.

McDonald v. McDonald.

The property appears to have been purchased from the Crown by the deceased's father, *Donald McDonald*, who, on the 13th May, 1856, assigned his interest to one *McLeod*, *McLeod* giving back a bond for reconveyance on payment of £21 11s. 3d., and interest. *McLeod* afterwards paid the Government the balance due in respect of the purchase money, and applied for the patent. Upon learning this, *Donald McDonald* employed the defendant to resist *McLeod's* application, which the defendant did successfully; and the family seem to have felt grateful to him for the services he then rendered to them. It was only accomplished, however, on condition of *McLeod's* being paid his debt, and what he had paid to the Government. To provide means for this purpose, some money was borrowed from one *James McDonald*, for which *William* gave his note; and £50, which the defendant had in his hands belonging to Mrs. *McRae*, a sister of the plaintiff, was, with her consent, applied to the same object. In part payment of this sum, Mrs. *McRae* was to have four acres at the north-east corner of the lot, at $6 an acre, making £6; and the remaining £44 was to be a loan, payable by instalments, with interest, and was to be secured by a mortgage on the rest of the half lot as soon as the patent issued. *William* was also to build a log house for his sister on the four acres within one year after obtaining the patent, and was to have the half-lot to himself subject to these obligations. Accordingly, on the 31st July, 1857, *Donald McDonald* assigned the property to *William*, and *William* executed a bond to his sister, conditioned for the performance of the stipulations made in her favour. On the same day *William* gave the defendant his note for £5 19s. 10d., payable one day after date. On the 4th of August, 1857, *McLeod*, having been paid whatever he was entitled to, assigned the lot to *William McDonald*. *William* appears to have left Canada for the United States shortly afterwards, and to have remained away for three years.

Judgment.

1868.

McDonald v. McDonald.

Before his return, viz., on the 1st of January, 1861, his sister Mrs. *McRae*, being in want of money, sold and assigned her bond to the defendant. This transaction is not impeached.

During *William's* absence in the United States, his mind became deranged, and was so when he returned in March, 1861, but he was not violent or dangerous. *James McDonald* appears to have been one of the first of his acquaintances who saw him after his return. He met *William* in Cornwall, and assisted him with money to get home. *William*, notwithstanding his mental aberration, recollected his debt to *James McDonald*, and also knew that he was indebted to the defendant; and he spoke of these debts several times. On the 13th of May, 1861, he accompanied *James* to Cornwall, to see the defendant, with the professed object of selling to him the property in question; and it was then the sale took place which the bill impeaches. No one was present when the proposal was made to the defendant. No one can speak to the terms of the bargain except the defendant himself; and there was no writing to shew what the consideration was or how it was made up; and no release or other discharge of the liabilities of *William*, which the answer states constituted the greater part of the consideration, was executed.

Judgment

The plaintiff alleges that the price the defendant was to pay was an inadequate price. The witnesses, as usual, vary greatly in their estimates of the value of the property. The consideration named in the assignment to the defendant was £125, made up in the way he explains; and he says that he was also to release *William* from the obligation to build the log house, which would probably have cost some fifty dollars. The defendant has called some witnesses who put a value on the property which would not exceed, or would not much exceed, this consideration; and some sales are put in

1868.

McDonald v. McDonald.

evidence which took place at rates that support the same view. But, on the whole evidence, I think the lot was worth considerably more. One of the defendant's own witnesses, an intelligent man, and who was specially sent by the defendant to value the lot, pronounces it worth £175 in 1861, exclusive of Mrs. *McRae's* four acres, assuming the lot to contain one hundred acres (it is sworn by a witness to contain one hundred and twenty). Another of the defendants' witnesses actually offered for half, what the defendant gives for the whole; and the plaintiff's witnesses place the value in 1861 at £350 or £400. The weight of the evidence on this point is thus in favour of the plaintiff.

Judgment.

I have no doubt that *William* was rational enough at the time to know what he was doing; that he knew that he was indebted to both *James McDonald* and the defendant; that he meant to dispose of the lot; that he understood he was selling it; and that he understood the consideration was in part the debts due *James* and the defendant. Indeed, the learned counsel for the plaintiff expressly disclaimed all ground for charging the defendand with fraud in these matters. There was nothing in the appearance of the deceased at this time that would alone make a stranger, or one who had not been intimately acquainted with the deceased and had not heard of his affliction, perceive that he was not in his right mind. It is clear, however, that *William* was of unsound mind at this time. This was so certain on the plaintiff's evidence that it was not disputed in argument. Among other delusions and fancies, he imagined that his wife's relations and neighbours had bewitched him; that they did so by putting nails in the stove, and in other ways related by the witnesses; that spirits and fairies were passing through him and around him; that his wife had come into a shanty where he was working, in the shape of an Indian dog; that his friends put snakes and frogs into his food, even into eggs boiled

1868.

McDonald v. McDonald.

in the shell; that the birds of the air mocked him and called after him; that when the church bells rang, and the cocks crowed, and the cars sounded, they cried "banish *William McDonald* out of the world;" that a switch he carried was a thing of great power; that there was the power in it of seven priests; that if his brother got hold of it, the brother could hang him or do what he liked with him, &c., &c. He was constantly brooding over all these delusions, was never free from them, seldom if ever conversed without bringing them forward, and was in the deepest dejection on account of them. They changed all his habits; prevented his working; interfered with his eating, and drinking, and sleeping; and influenced his whole conduct. In less than two months after the transaction in question, he was in jail at Cornwall as a lunatic, and was subsequently removed to the Asylum at Toronto, where he remained until his death.

Judgment.

It does not appear to be necessary to shew that a man's delusions were connected with or led to an impeached transaction; though, if that were necessary, I cannot say that such evidence is wanting here, for *James McDonald* testifies to having offered *William*, shortly before the sale to the defendant, as much for half the lot as *William* accepted from the defendant for the whole, and no explanation is offered to account for this on any ground consistent with the sanity of the seller (*a*).

It appears to be the rule now, that a purchase for value from a lunatic may not be void if the purchaser had no notice of the lunacy. The evidence on this point is, that *William* spoke to the defendant of his delusion on the occasion of his purchase. They were alone in

(*a*) See Hadfield's case, Howell's State Trials, vol. 27, p. 1281; Shelford on Lunacy, 2nd ed. 44; Steed v. Calley, 2 M. & K 52; Creagh v. Blood, 2 J. & La. 509; Symes v. Greene, 5 Jur. N. S. 742.

1868.

McDonald v. McDonald.

the defendant's inner office when *William* offered to sell the lot to the defendant, and it was then that whatever occurred on this subject took place. What we know is, that, after the interview had lasted some time, the defendant called in *James McDonald* (who had accompanied *William* to the defendant's office), and told him that *William* said he had been bewitched. *James*, who was aware of *William's* mental condition, said he did not know how that was, and he was asked no more questions. I must presume that *William* made his statement with every appearance of earnestness, for he felt it intensely, and he generally spoke of this delusion in connection with some of his other fancies (*a*).

Now it may be true that some persons can be found who believe in the present existence of witches; but a serious belief by a man that he is himself bewitched is something so like insanity that any one dealing with such a man with notice of this mental peculiarity, must be held to deal with him at his peril; and if the man is proved to have been insane, the other cannot be treated as if he had no notice of his condition. Made aware by the man himself of this one delusion, the defendant had in his hands the clue which, if followed up, would have put him in possession of a great deal more, if more was necessary.

Judgment.

Being of opinion that the deceased was of unsound mind, and that the defendant had sufficient notice of his condition at and before his purchase, my decree must be for the plaintiff,—without reference to some other grounds for relief urged by the plaintiff. As a party coming into equity must do equity, it seems proper to require, as a condition of relief to the plaintiff,

(*a*) Elliott v. Ince, 7 D. M. & G. 475; Neill v. Maley, 9 Ves. 478; Price v. Berrington, 7 Hare, 394; Greenslade v. Dare, 20 Beav. 284; Molton v. Camroux, 2 Exch. 487; Beavan v. McDonell, 9 Exch. 309.

that he should pay the amount due by the deceased to the defendant, including all advances made to the deceased or for his use, the defendant's expenses in resisting *McLeod*, and the liability of the deceased under the bond to Mrs. *McRae*. The Master will make to both parties all just allowances. Against the amount found due to the defendant, must be set off the plaintiff's costs of this suit. The decree will declare, that, subject to the payment of the balance, the defendant is a trustee for the plaintiff of the half-lot, except the four acres in the north-east corner; and on payment is to execute a deed accordingly.

MORLEY v. MATTHEWS.

Executors—Improvements.

An executrix, who had an annuity charged on the income of the testator's estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was, in consequence, found largely indebted to the estate:

Held, that her expenditure in improvements should be allowed in reduction of her indebtedness, so far as the expenditure had enhanced the value of the estate and benefitted those interested in it.

Where an executrix, jointly with one or more of those entitled to the testator's estate, and during the minority of others of them, contracted for the sale of portions of the real estate, and the purchasers made improvements: the Court refused to disturb the possession of the purchasers before the time had arrived for the partitioning of the estate, and charged them meanwhile with a ground rent only and not with the improved value.

Rehearing of cause on further directions.

Statement.

This was a suit for the administration of the estate of *Edward Matthews*, who died on the 22nd June, 1850, having first made his will whereby, amongst other things, he directed his wild lands and personal property, with

1868.

Morley v. Matthews.

certain specified exceptions, to be sold, and the proceeds to be invested; and out of the annual income of his estate he bequeathed to his wife and his sister *Elizabeth* £500 per annum for their support and for the support and education of his children, and £50 per annum to his sister *Sophia* for her life; he directed the remainder, if any, to be invested at interest and an equal share of the income over and above the £550 per annum to each of his children, to be paid to them severally when they married, and the same share to the testator's step-son *Samuel Sexton Pomeroy*; and at the death of his wife and sister the whole of his estate, both real and personal, was to be equaliy divided between his surviving children and the said *Samuel Sexton Pomeroy*. He named his wife an executrix of his will; and she alone proved, his sister *Elizabeth* also named executrix having died before the testator, and the Rector of London, named as executor, having declined to prove. The testator left several

Statement.

daughters and no son. One of his daughters, *Elizabeth*, afterwards died under age and unmarried. The plaintiff, who is another of the testator's daughters, filed her bill on 26th March, 1860; and on the 25th June, 1861, obtained a decree directing the usual inquiries and such others as the case required, and reserving further directions and costs. The Master at London made a separate report on the 28th June, 1864, and a general report on the 21st January, 1865. An appeal from this latter report was brought on upon the 4th September, 1865, and an order was made upon the 12th of the same month, referring the report back to the Master to be reviewed in certain particulars mentioned in the order; and the Court, by the same order, declared that the meaning of the testator, according to the true construction of his will, was, that the surplus of the income of his estate, after paying the two annuities, should belong equally to all his children and to his step-son *Pomeroy*, whose share was intended to be equal to that of one of his children; that on the marriage of each

daughter, and not before, her share of the accumulations should be paid to her, and that thenceforward her share of the annual surplus should be paid to her as the same accrued and was ascertained; that the share of his step-son should be paid to him from year to year after the death of the testator; and that on the death of the testator's daughter *Elizabeth* the share intended for her went to the other children and to the step-son, in the same manner as the residue of the said surplus income. The Master made his further report in pursuance of this order on the 10th of July, 1866; and the cause was brought on for further directions on the 20th February, 1867, and a decree thereon made by the Chancellor upon the 23rd April, 1867. This decree was objected to by the plaintiff in several particulars, and the cause was reheard on further directions in order to obtain the judgment of all the Judges in regard to these particulars.

1868.

Morley v. Matthews.

It appeared from the pleadings and the Master's reports that from the testator's death until the 29th of June, 1859, the executrix managed the estate through the defendant *Samuel Sexton Pomeroy*, who was her son, and who had in the testator's lifetime married his daughter by a former wife; that on the 29th of November, 1859, *Pomeroy* absconded from the Province, having previously made an assignment bearing date the 26th of November, 1859, to the defendants *Thomas Scatcherd*, *Edward Adams*, and *John Birrell*, for the benefit of his creditors; that during *Pomeroy's* management he and the executrix contracted to sell and dispose of certain farms and building lots belonging to the testator; that Mrs. *Pomeroy* was a party to most of these sales, and the plaintiff and her husband were parties to two of them; that the purchasers (made parties in the Master's office) paid large sums on account of the purchase money, and made valuable improvements on the lots they purchased; that large sums belonging to the estate were invested in the improve-

Statement.

1868.

Morley v. Matthews.

ment of certain real estate of the testator, and in other unauthorized ways, a good deal of which was utterly lost; that without giving her credit for these sums the balance of capital for which she was accountable on the 20th of August, 1860, (the date of the appointment of a Receiver,) was $62,366.42, over and above all proper disbursements on account of capital; and that the balance of income for which she was accountable at the same date was $16,830.97, over and above the annuity to which she was entitled up to that date, and all proper disbursements. This balance of $16,830.97 included $5,039.37 received for interest on the purchase money of the lands which were sold without authority as already mentioned. The Chancellor charged both the executrix and *Pomeroy* with the balances so found by the Master.

Mr. *Hodgins*, for the plaintiff.

Mr. *Roaf*, Q. C, for the defendants *McKinnon* and wife.

Mr. *Strong*, Q. C., for the assignees of *Pomeroy*.

Mr. *English*, for Mrs. *Matthews*.

The judgment of the Court was delivered by

Judgment.

MOWAT, V. C.—One of the objections to the decree of the Chancellor relates to the lands of the testator on which the money of the estate was expended in improvements. The Chancellor has given the legatees (all of whom are of age) an option either (1) to retain the improvements at the values fixed by the Master, giving credit for the amount to Mrs. *Matthews* and *Pomeroy* against the sums they are liable to make good to the estate; or (2) to have these properties sold, and credit the same parties with so much of the proceeds as the Master may find attributable to the improvements. The plaintiff claims

1868.

Morley v. Matthews.

that the legatees are entitled to the property as improved, without making any allowance for the improvements. But the rule of the Court in giving relief against defendants is to allow them for lasting improvements by which the value of the estate has been enhanced. This, within certain limits (*a*), is so in the case of trustees (*b*), solicitors, (*c*) agents (*d*) and others (*e*) in possession of estates under deeds which are void in equity. The rule is the same in the case of receivers who have without authority expended in that way money in their hands as Receivers (*f*). A similar allowance has been made to the committee of a lunatic (*g*). So if an executor without authority carries on his testator's trade, and puts into it other moneys of the estate and moneys of his own, the Court does not appropriate the whole of the estate. In view of what has been done in such cases, I do not perceive any substantial ground on which the expenditure by Mrs. *Matthews* in the present case can be disallowed in reduction of her indebtedness. The expenditure was, no doubt, made in good faith, in the confidence that it was for the interest of all the legatees that it should be made, and in the expectation that all, as they came of age and were applied to, would approve of what had been done, and give to it their sanction; and so far as the expenditure has enhanced the value of the estate and benefitted the legatees, it would be contrary to the

Judgment.

(*a*) Jortin v. South Eastern Railway Co., 2 Sm. and Giff. at 73; Quarrel v. Beckford, 14 Ves. at 179.

(*b*) Williamson v. Taber, 3 Y and C. Ex. 717; Lawder v. Lewis, 1 Y. and C. 427: Bridge v. Brown, 2 Y. & C. C. C. 191.

(*c*) Robinson v. Ridley, 6 Madd. 21; Seton on Decrees, 3rd ed. 647.

(*d*) Trevalyan v. White, 1 Beav. 588.

(*e*) Neesom v. Clarkson, 2 H. 176; S. C. 4 H., 97; Davey v. Durant, 1 De. G. & Sm. 534; Donovan v. Fricker, Jacob, 165; Bevis v. Boulton, 7 Gr. 39; Townsley v. Neill, 10 Gr. 62; Smith v. Bonnisteel, 13 Gr. 35; Slater v. Young, before Esten, V. C.; same case, on another point, 11 Gr. 266.

(*f*) Tempest v. Ord, 2 Mer. 55.

(*g*) Re. Churchill, 3 Jur. 719.

1868.

Morley v. Matthews.

spirit of many authorities not to give her credit for such expenditure in a suit against her for an account.

The same remarks apply, I think, to the expenditure by *Pomeroy* of money received by him for the estate, and applied with the sanction of the trustee and executrix in the same way.

Another objection made by the plaintiff to the decree on further directions relates to the lands sold without authority, and improved by the purchasers. The Chancellor allowed the purchasers to retain possession, paying what would be a fair rent upon the footing either of a "ground rent on building lease," or "the improved rent, deducting therefrom so much as is attributable to the improvements made by the said parties on the said properties;" and declared, that this decree should not prejudice any question as to the right of the purchasers to have the improvements considered on partition. The plaintiff, and the other legatees, insist that until the time comes for partition, viz., the death of Mrs. *Matthews*, the Receiver should have possession of these properties, or the purchasers should pay the improved rents without deduction. The injustice of this contention nobody can doubt, and we all think the objection not maintainable (*a*).

Judgment.

So far as relates to past rents, even at law, in an action for *mesne* profits, the value of improvements made by the defendant is taken into account, and the balance only allowed to a plaintiff; and it would be strange if the rule of this Court on the point were less liberal and less equitable than the rule at law.

I understood it to be conceded on the argument, that when the the time for partitioning the property arrives,

(*a*) See Brazill v. Brazill, 11 Gr. 253.

1868.

Morley v. Matthews.

namely at the death of Mrs. *Matthews*, the purchasers may be entitled to have the improved property assigned to them in the way pointed out in *Swan* v. *Swan* (*a*) and other cases; and if so, it seems to follow that they should have the benefit of their improvements in the meantime, so far as this may be practicable consistently with the just rights of other parties.

I think it clear that if a conveyance were required from the purchasers, or some other relief which could only be had in this Court, the relief would only be granted against them on terms of paying for their improvements. I think the authorities to which I have referred shew this. *Ramsden* v. *Dyson* (*b*) was cited as negativing the defendants' right to such an allowance. But that case bears less anology to the present than the other cases to which I have referred. The circumstance of the claim having been then set up by the plaintiff is alone sufficient to distinguish it from the present (*c*). These purchasers are defendants; and though the plaintiff, at whose instance I presume they were made defendants, is but one of the devisees, the other devisees who are defendants, have made no objection to the purchasers being made or retained as defendants, no doubt concurring with the plaintiff in considering it for the common interest of all the devisees that the purchasers should be parties to the suit. True, it is not a conveyance that is sought, nor any relief which perhaps might not be had at law; but I do not see that that circumstance makes any difference. The parties concerned were either obliged to make the purchasers defendants, or without being obliged, elected to do so; and, coming to this Court for relief of some kind against them, the plaintiff and those in the same interest must on their part submit to do equity.

Judgment.

(*a*) 8 Price, 518. (*b*) Law Rep. 1 Eng. & Ir. App. 129.
(*c*) Neesom v. Clarkson, 4 Hare, 97; Campbell v. Inglebly, 1 DeG. & J. at 402.

1868.

Morley v. Matthews.

The decree on further directions, as drawn, does not, it is said, charge anybody with the rent of these lands since the appointment of the Receiver. This seems an oversight. The purchasers should be charged from that period, if the property, unimproved, would have been worth anything to rent. The learned counsel for the purchasers said, that to select the time of the Receiver's appointment as the period from which to charge the purchasers with rent, would be selecting an arbitrary date. But the parties interested do not ask us to name an earlier period, Mrs. *Matthews* having, I believe, been charged by the Master for the preceding period, and not objecting to the charge. Except for that circumstance, the purchasers would probably be chargeable from an earlier date, as at law; for the decree does not deprive them of their improvements, and justice would not be done to the estate if the purchasers were allowed to occupy without compensation, provided the property, if unimproved, would have been worth anything to rent.

Judgment.

The decree is also objected to, because it gives liberty to Messrs. *Wilson* and *Hughes* to give further evidence in regard to their claim. We cannot say that this part of the decree is wrong.

The directions which the decree contains as to the claim of *Charles Stead* were given, as his Lordship informs us, on the view that all parties appeared to take of the meaning of the Master's report as to that claim, but which meaning is now disputed. In lieu, therefore, of the directions contained in the decree as to this claim, the Master will be directed to review his report as to the claim; and in doing so he should, on the evidence already before him, or which may hereafter be produced, either allow or disallow the claim; so that if either party is dissatisfied, the matter may be disposed of separately.

1868.

Morley v. Matthews.

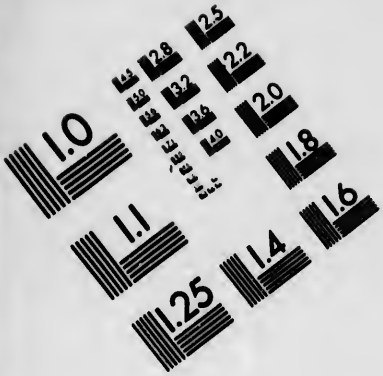
Mr. *Hodgins*, for some of the legatees who are defendants, asked that the testator's wild lands not yet disposed of should be sold. This was not asked when the case was before the Chancellor; but being asked now the proper directions will be inserted in the decree, for the testator desired all his wild lands to be sold and the proceeds inv[illegible].

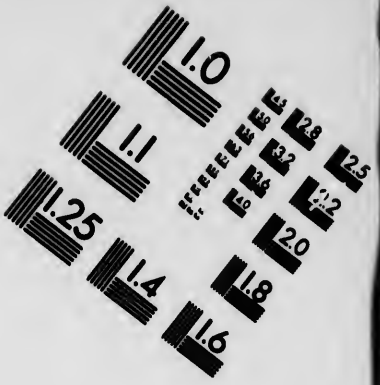
On behalf of the assignees of *Pomeroy*, it was suggested that no sufficient ground appeared for charging *Pomeroy* and his assignees with the sums *Pomeroy* received while managing the estate: that the Master had proceeded altogether on the admissions of Mrs. *Matthews*. We do not find from the reports that this is so; and we must assume now that the Master had good ground for the statements in his report which have not been appealed against. We did not understand the learned counsel to contend, that, the statements of the reports being taken as true, *Pomeroy* was not, under the circumstances, properly chargeable jointly with the executrix. There appears enough to justify the decree in this respect.

Judgment.

The learned Counsel for the assignees claimed the costs of the suit, the decree not having given them costs; urging that their costs should be paid either out of the estate, or, as the bill had falsely charged them with fraud, by the plaintiff. On reading the paragraph of the bill (No. 22) to which the learned counsel referred us, we do not find that it contains such a charge of fraud as was contended. We think the assignees are not entitled to their costs out of the estate. They cannot in that respect be in a better position than *Pomeroy*; who, under the circumstances, would have had no such right, if he had not made the assignment.

We have not considered any other question than those which were raised before us in the argument.





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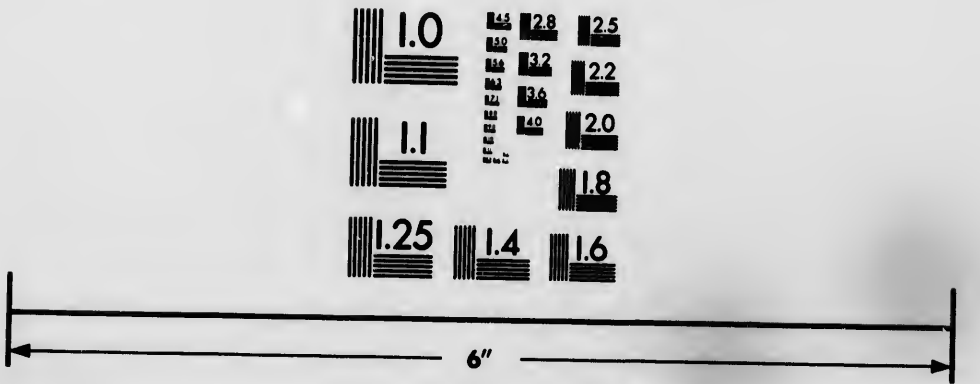

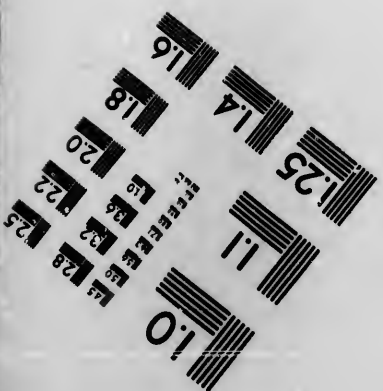

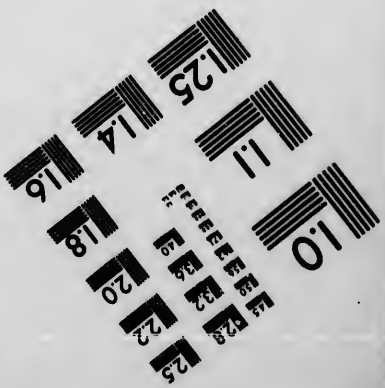

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1868.

Morley v. Matthews.

The purchasers will have the costs of the rehearing, but only one set of costs amongst them. One-half the deposit to be paid to *Wilson* and *Hughes*, and the residue to the purchasers on account of their taxed costs. No costs to any other parties.

This has been a tedious and expensive suit—much more tedious than the proceedings shew the reasons for; and now that all the testator's children are of age, and that all the most important questions involved in the suit have been decided, we hope that the solicitors for all parties will be able to prevail on their clients to settle amicably what remains to be settled of the affairs of the estate, and thus render it unnecessary to keep the suit any longer before the Court.

ROBINSON v. COYNE. 1868.

Husband and wife—Purchase by executor to the prejudice of legatee.

Where a wife took an active part in her husband's business and had the custody of his money, sums paid to her were treated as paid to the husband.

An executor without proving the will has power to do almost all the acts which are incident to his office; and on the other hand, if he acts, or does not renounce, or make known his intention not to act, he is in general disqualified to engage in any transaction for his own benefit, to the prejudice of those interested in the estate, quite as much as if he had taken out probate.

A. died leaving all she had to her sister, B., an old, feeble and ignorant woman, and appointed C., her executor; C. did not prove the will, but he acted as executor: he also removed the plaintiff to his house, and intimated that he meant to take care of her during the rest of his life. The testatrix had a life estate in some cottages, and after her death the remainderman was induced by C. and others, for the purpose of benefitting the plaintiff, to sell them for less than half their value, and to convey them to C.'s wife, it being supposed that C. would have to advance the money out of his own funds, but the fact being that he had money in his hands, as trustee for the plaintiff, sufficient to pay the price.

Held, that C. and his wife could not retain the benefit of the purchase, and that the plaintiff was entitled to a conveyance.

Examination and hearing at the sittings of the Court at Toronto, in the Spring of 1863.

Mr. *McLennan* and Mr. *E. Henderson*, for the plaintiff.

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

MOWAT, V. C.—The plaintiff's sister, Mrs. *Mary Ann Wilson*, a widow, died on the 18th October, 1865, leaving a will, executed the day before her death, by which she gave all her real and personal estate to the plaintiff, and appointed as executors the defendants, *Thomas Coyne* and *Thomas John Coyne* his son, there- Judgment.

1868.

Robinson v. Coyne.

in described as her trusty and worthy friends. Her property consisted chiefly, so far as the evidence shews, of her little household furniture and effects; $200 in gold; two mortgages, on which there seems to have been due about $600; a further sum of $100 due to her by the defendant *Thomas Coyne*, for money paid to her use the day before her death by *Thomas Morton*, one of the mortgagors; and an estate for her own life in two cottages in Yorkville, one of which she and the plaintiff then occupied, and which since her death has yielded a rental of $6 a month.

The bill is against the executors, and *Ann Coyne* the wife of the elder executor; and, as originally filed, it stated that the executors had proved the will. The object of the bill was, to obtain the benefit of a purchase of the cottages, made by *Thomas Coyne* and his wife, from *Thomas Mulholland*, who became entitled thereto in remainder on the death of the testatrix. It appears that this purchase was completed, the consideration paid, and a conveyance by *Mul[illegible]nd* to Mrs. *Coyne* (by desire of her husband) execu[illegible] on the 7th December, 1865, or somewhat less than two months after Mrs. *Wilson's* death. In anticipation of the conveyance, *Thomas Coyne* and his wife had, on the 10th November, 1865, executed a life-lease in favor of the plaintiff, at an annual rent of $16, and delivered this lease to one *George H. White*, an old friend of the plaintiff's family, who took an interest in the plaintiff, and had, on that account, at the instance of Mrs. *Coyne*, been active in inducing Mr. *Mulholland* to sell at a low price. It is stated in the defendant's evidence, that the rent named in this lease was merely nominal, and that it was not intended to exact any rent from the plaintiff. But the plaintiff claims the whole benefit of the purchase.

Judgment.

The answers to the original bill stated, that the executors never proved; upon which the plaintiff, through

her solicitors, obtained from the defendants the will, and took out administration *cum testamento annexo*, the executors failing to appear when cited by the Surrogate Court. The plaintiff then amended her bill, setting up these facts; alleging that she was ignorant, until she learned from the answers, that the executors had not proved; and charging that the executors, and *Ann Coyne* with her husband's knowledge and consent, had got in considerable sums of the personal estate, and otherwise intermeddled therewith. To the statements introduced by amendment the defendants filed no answers.

1868.

Robinson v. Coyne.

Mrs. *Coyne* takes an active part in the management of her husband's business, and keeps his money. *Morton* had been referred to him by Mrs. *Wilson* as authorized to receive the money which *Morton* wished to pay on his mortgage, and the amount was paid, by *Thomas Coyne's* desire, to his son *Thomas John Coyne*, then a minor, at the father's house; and was by the son immediately handed over to Mrs. *Coyne*, like other moneys of her husband. Mrs. *Coyne* also took possession of the $200 of gold, either immediately before or immediately after Mrs. *Wilson's* death; and on the 7th of November, 1865, a sum of $80 was paid by one *James Graham* on one of the mortgages in substantially the same way as the $100. There was nothing secret about the receipt of these moneys, and I have no doubt that *Thomas Coyne* was aware and approved of his wife's receiving them. It is not pretended that she used the money without his knowledge, or against his will, but he has attempted to repudiate liability for the sums named. It is quite clear that he is liable (*a*), and that upon the evidence, I must treat him as having in his

Judgment.

(*a*) Pemberton v. Chapman, 7 E. & B. 210; S. C., E. B. & E. 1056; Head v. Briscoe, 5 Car. & P. 484; Attorney General v. Riddell, 2 C. & J. 493; Cotteral v. Kenyon, 30 Beav. 310; Williams on Executors, 6th Ed. 223, *et seq.*

1868.

Robinson v Coyne.

hands, at the date of the impeached deed, about $380, belonging to Mrs. *Wilson's* estate, and to which the plaintiff, then living in his house and under his care, was beneficially entitled.

The principal question in the cause is as to the right of Mrs. *Coyne* to retain for her own use the purchase of the cottages. The answers allege, that the purchase was made for the sole benefit of Mrs. *Coyne*, and with no reference whatever to the plaintiff; that the defendants were compelled by *White*, who had the legal estate, and whose signature to the conveyance was therefore needed, to execute the life-lease to the plaintiff; and that they did so without consideration, and as a mere act of kindness and charity to her. But this statement of the transaction is confessedly not supported by the evidence. The purchase was undoubtedly made with express reference to the plaintiff, and except on her account would not have been effected at the price accepted. The property was worth $700, but Mrs. *Coyne* and other friends of the plaintiff appealed to the proprietor to sell at a low price from humanity and good feeling towards the plaintiff, whom they represented as poor, and as having been taken under the care of the *Coynes* for the remainder of her life. The plaintiff was at this time about 77 years old; and had been feeble and in poor health for many years. She is an aunt of Mrs. *Coyne*, and does not appear to have had at this time any means except what she was entitled to under her sister's will. She had never been married, or had had anything to do with business; and soon after her sister's death she was taken to the defendant's house, and was living there when the transaction in question occurred. She is an illiterate person, unable to read or write; and, though the desire to purchase the cottages for her benefit was spoken of in her presence, the transaction was completed without any communication to her of the manner in which the thing was done, or in which the

Judgment.

transaction as carried out was to benefit her; and it is more than doubtful if she had the capacity to understand the matter in case the transaction had been explained to her, or to exercise any judgment about it.

1868.

Robinson v. Coyne.

The following is the substance of what appears by the evidence as to the means by which the purchase was effected. Immediately after Mrs. *Wilson's* death Mrs. *Coyne*, who, with her husband's concurrence, is in the habit, as I have stated, of taking an active part in the management of his affairs, gave out that she and her husband had become the plaintiff's "guardians, and meant to buy the houses for her," and to advance the money needed for this purpose. Mr. *Mulholland* was first spoken to on the subject one day that he was at the house of the deceased, after her death and before the funeral, when the plaintiff's friends who happened to be there at the time, and of whom Mrs. *Coyne* was one, spoke to him of their wish, and urged him to sell at a low price on account of the plaintiff's old age and poverty, and in order to assist in keeping her. Mr. *White* was one of those whom Mrs. *Coyne* interested in the endeavour to get the property at a low rate, with a view to the plaintiff's benefit; and in his evidence he makes these statements: "Mrs. *Coyne* and Mrs. *Ferrott*, another neice, said that as Mrs. *Coyne* was going to take charge of the plaintiff, it would encourage them if they could buy this property cheap * * I saw Mr. *Mulholland*, and had a hard battle with him to influence him to reduce the price. I told him the plaintiff was old, &c. * * It was my interest in the plaintiff that led to my speaking to Mr. *Mulholland*. I understood the object to be, to give the plaintiff the benefit of whatever they could get the property for below its value. * * I understood, at the second interview, that the property was to be a gift to Mrs. *Coyne* from her husband, but that the cheaper she got the property the more the old lady (the plaintiff) would benefit by the

Judgment.

1866.

Robinson v. Coyne.

purchase. I approved of the purchase if she carried out all she said. It was I who suggested the life-lease. It had not been proposed previously. I made the suggestion for fear that the children of Mr. *Coyne* and the old lady might not agree, and she would not be comfortable there. * * The *Coynes* were also to take proper care of the old lady. It was the prospect of this that influenced me. I told Mr. *Mulholland* that the *Coynes* were going to take care of the old lady, and that he should therefore sell the property cheap." These influences and persuasions were effectual, and Mr. *Mulholland*, who considered the property worth $700, sold it for $300, or $320 including his wife's dower. Mr. *Mulholland* deposed—"If I had thought it was Miss *Robinson's* (the plaintiff's) money, I would not have deeded the property to Mrs. *Coyne*. * * The life-lease to the aunt (the plaintiff) and her support were the inducements held out to me by them to sell cheaply.

Judgment.

* * I understood *Coyne* bought for his wife, and paid for the property with his own money, subject, of course, to the life-lease in favor of the plaintiff."

It was contended on the part of the defendants, that they occupied no fiduciary relation towards the deceased or towards the plaintiff; but the reverse is clear. *Thomas Coyne* had been the agent of the testatrix before she and the plaintiff moved into town, and as such agent he had collected her rents, and managed her property. He appears also to have attended to any little business in which she needed the services of another, after she came to live in town. It was young *Coyne* for whom she sent, on her death-bed, to draw her will, and it was the father and son whom she named as her executors; the plaintiff, to whom she gave everything, not being associated with them in the executorship, she being without doubt considered incompetent for even the simple duties which the executorship of the little estate demanded. The son and Mrs. *Coyne*, who is his

1868.

Robinson v. Coyne.

step-mother, were two of the witnesses to the will. The executors did not renounce the executorship, or intimate to the plaintiff, or to any one for her, that they did not intend to prove the will. The elder *Coyne* removed the household effects of the testatrix to his own house, and they remained there until a year afterwards, when they were delivered up to the plaintiff. This alone was sufficient to render *Coyne* liable as executor. He also, through the agency of his wife, took possession of the mortgages and papers of the deceased; received money due to the testatrix; and paid some small accounts she owed. I think that unless an executor renounces, or at all events makes known his intention not to act, he must in general be held to be disqualified to engage in any transaction for his own benefit to the prejudice of those interested in the estate, quite as much as if he had proved and acted; but certainly if he acts as executor, his neglecting or refusing to prove does not help him. It is to be remembered, that the probate is merely operative as the authenticated evidence, and not at all as the foundation, of an executor's title; that he derives all his interest from the will itself; that the property of the testator vests in him from the moment of the testator's death; and that without probate he is entitled to take possession, to sell the goods, to receive or release debts owing to the estate, to pay or take releases of debts owing by the estate, to assent to legacies, and, in brief, to do almost all the acts which are incident to his office, except some which relate to suits (*a*). I think, therefore, the want of a probate made no such difference in regard to the executors' duties, as in the present case it was necessary to contend for on their behalf. I think, also, that until the plaintiff left *Coyne's* house he was in the relation of guardian to her as well as trustee, and was under all the disqualifications which those relations created in regard to transactions affecting her interest.

Judgment.

(*a*) Wms. on Executors, 6th ed., pp. 282, 291, &c.

1868.

Robinson v. Coyne.

Availing himself of these relations, he obtained for his own benefit and his wife's, an advantage which should have gone to the plaintiff; and, on the common equity of this Court in such cases, in is plain that neither he nor his wife can be permitted to retain this advantage (*a*).

It was said, in argument, that *Mulholland* meant to sell to *Coyne*, and that the only benefit he stipulated for on behalf of the plaintiff was the life lease which the defendants executed, though the answers do not admit even that stipulation. The test in such cases is not merely what the party in *Mulholland's* position intended, but what the obligation of the parties dealing with him was. *Mulholland* consented to sell to *Coyne*, but this was a mere mode of benefitting the plaintiff—the mode desired by *Coyne*, who was supposed, to be advancing the consideration money out of his own pocket, and was thenceforward to have the care of the plaintiff and to support her. Part of the specific money with which he paid *Mulholland* was the coin of the testatrix; and *Coyne* had in his hands, in trust for the plaintiff, money enough to pay the whole consideration; but of this the defendants kept *Mulholland* in ignorance. By this conduct they intercepted part of the benefit, the whole of which it was their clear duty to secure for the plaintiff. But for the dissimulation which was practiced, it is plain that the conveyance to *Anne Coyne* would never have been made. Even if *Coyne* had not quite money enough in his hands belonging to the plaintiff to pay the whole price, the result would be the same. I may observe here that the life-lease, on which so much

Judgment.

(*a*) Vide Keech v. Sandford and notes, 1 Wh. & T. 39; Robinson v. Pett, 3 P. W. 249; Edwards v. Lewis, 3 Atk. 538; Griffin v. Griffin, 1 S. & Lef. 352; Mulvaney v. Dillon, 1 B. & B. 409; Giddings v. Giddings, 3 Russ. 243; Fosbrooke v. Balguy, 1 M. & K. 226; James v. Dean, 11 Ves. 383. Also cases collected, Lewin on Trusts, 5th Ed. 226, 229.

stress is laid on the part of the defendants, was not executed so as to bind a married woman.

The defendants set up, that Mr. *White* acted on behalf of the plaintiff, and was a party to the impeached transaction. His intervention was not at the instance of the plaintiff, but of Mrs. *Coyne;* his evidence shews, that he never conferred with the plaintiff as to what was proposed, and did not consider her competent to understand it; and that what he did in the matter, with a view to the plaintiff's advantage, was as her voluntary friend, and not as her authorized agent. Nor did he even know the facts which were essentially necessary to enable him to judge, in case he had been consulted, what was best in her interest to be done. It is quite clear, on these and other grounds, that his intervention did not put the plaintiff in such a situation as to prevent her now claiming the benefit of the defendant's purchase (*a*).

Judgment.

The plaintiff seems to have left the defendant's house about June, 1866, and to have gone to reside in the country with a friend named *Anderson*. On the 19th of October, 1866, she came into town with her brother—an illiterate man, of limited ability, though to the extent of his capacity and knowledge somewhat keen; and through him she demanded her papers. Mrs. *Coyne*, whom I must regard as acting both for herself and as agent of her husband, refused to give up the papers without general releases being executed to all the defendants. Such releases were accordingly prepared by the defendant *Thomas John Coyne*, who was a law student; and were executed by the plaintiff and her brother. The papers of the testatrix, and a copy of her will, were then given up. Before the getting of these releases, no account was given to the plaintiff of the sums received

(*a*) Bowles v. Stewart, 1 S. & Lef. 209; Lewin on Trusts, 668-4.

1808.

Robinson v. Coyne.

by the defendants, or of the application of them: and it is not pretended that the plaintiff had at this time the full knowledge of her rights which is necessary, in a case of trust, to support a release. Her brother, who was acting for her, had not the information which her adviser in such a transaction needed, nor was he a competent adviser for the purpose. I think the releases are entirely unavailing as a defence to the suit.

Thomas John Coyne was a minor when the suit was commenced, though he became of age before filing his answer; and I have therefore refrained from referring to the part he took in the transactions in question, except so far as it directly affected the case of the other defendants. The bill must be dismissed as against him; but, under all the circumstances in evidence, without costs. He was called as a witness by his co-defendants, and I took his testimony *de bene esse*. Being of opinion that, even with his evidence, the plaintiff is entitiled to a decree, I have not considered the question of his competency.

Judgment.

The decree will declare, that the other defendants hold the property in trust for the plaintiff, subject to anything that may be due to *Thomas Coyne* from the plaintiff, as administrator, or otherwise. Account to be taken. *Thomas Coyne* to pay the plaintiff's costs to the hearing. Further directions and subsequent costs reserved.

If both parties waive an account, the decree may vest the property in the plaintiff.

1868.

CAYLEY v. THE COBOURG, PETERBOROUGH, AND MARMORA RAILWAY AND MINING COMPANY.

Railway Company—Amalgamation

A Statute gave the bondholders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this "converted bonded stock" and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of 8 per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the Company was authorized to unite with another company, and it was declared, that the two companies, and those who should become shareholders in the new company under the acts relating to the Cobourg and Peterborough Railway Company and under the deed of union, should constitute the new company:

Held, that the union did not extinguish the right of the bondholders to elect.

The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act:"

Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary; but did not give them legislative authority over the rights of other persons.

A Statute authorized two companies to unite into one company by either a complete or a partial union; and either of joint or separate, or absolute, or limited liabilites to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies:

Held, that the new company thereby assumed all the liabilities of the old company to third persons.

Statement.

Hearing at the sittings of the Court at Toronto, in the Spring of 1868.

The Statute 16th Victoria, chapter 242, respecting the Cobourg and Peterborough Railway Company, enacted as follows (sec. 5): "That the said company are hereby authorized to make any bonds or debentures to be issued by the said company for the construction

1868.

Cayley v. Cobourg, &c. Railway Co.

of new works, a preferable charge on the said railway, and convertible into stock at the option of the holder; and by such bonds or debentures to mortgage and pledge the lands, tolls, and revenues, of the said company, and all other property, real or personal, belonging to the same: provided always that any bonds or debentures so issued, preferable or convertible, or both, shall on the face of such instruments shew that the same are so preferable, or convertible as aforesaid, under and by virtue of this Act; and that all such preferable bonds or debentures issued as aforesaid, shall be a first charge and mortgage on the said railway, and the tolls and revenues of the same, and all other property, real and personal, of the said company as aforesaid; the said bonds or debentures to be in such form as the directors of the company may appoint, and each and every bond or debenture shall be registered in the registry office of the County of Northumberland in a book to be provided by the said company for that purpose on the payment of a fee of two shillings and sixpence."

Statement.

In 1862, the company being in debt to an amount far exceeding its means of payment, an Act (25 Victoria, chapter 58) was passed, enacting (sec. 1) that "all the properties and franchises of the said railway company, comprising the real property, the corporate rights and the personal property (if any) shall be valued, and all claims of bond-holders or creditors against the said company, or against the property of the company, shall be ascertained and their priorities determined by three indifferent persons" to be chosen as therein mentioned. By this Act (sec. 6) it was further enacted that "The effect of the award, when so made, shall be to limit the amount of all the incumbrances or liens on the said railway, and against the said company, to the present value of the railway properties and franchises as declared in the award; and on

payment of the said award, in the manner hereinafter provided, all incumbrances, liens, judgments, and claims against the said company, of what kinds soever, shall be wholly discharged and acquitted, and all parties interested either as bondholders or creditors of the said company, shall, as such, thereafter be for ever foreclosed and debarred from claiming any right or interest in or over the said railway; provided, always, that the claims in full for unpaid rights of way or stations and depot grounds, as agreed on or arbitrated on with the company, shall be a first charge upon the award."

(Section 7). "The amount of the award so to be made shall, within eighteen months from the filing thereof in the office of the Clerk of the Peace for the United Counties of Northumberland and Durham, as herein provided, be paid by the said company into the Court of Chancery for Upper Canada, to be paid out or distributed by that Court: in the first place towards unpaid rights of way and depot and station grounds in full, and thereafter by *pro rata* distribution to the respective bondholders and creditors in accordance with the amounts and priorities established by the award, and upon petition by the claimants verified by affidavits: provided, always, that any of the holders of the said bonds shall have the option of converting their bonds into paid-up new capital stock, in the proportion of double the sum which he or they would be entitled to receive under the award."

Statement.

(Section 9). "Upon the railway properties and franchises so reverting to the original shareholders, the original shares shall be reduced to twenty-five per cent. of the amount subscribed, and the capital shall consist of that proportion of the paid-up stock, the amount, if any, of the converted bonded debt, and any further subscription of new stock by municipalities or other parties, to the full amount of their

1868.

Cayley v. Cobourg, &c. Railway Co.

subscriptions, which shall be called in from time to time, as the directors shall decide, such calls not to exceed ten per cent. at one time, and to be payable after sixty days' notice; and the said new subscribed stock, and this converted bonded stock, shall be a preferential stock, and shall be first entitled to dividends at the rate of eight per cent. per annum, before any profits are divided among the other shareholders."

No valid award having been made under this Act, the Legislature, by a subsequent Act [29 Victoria, chapter 79,] fixed the value of the property and franchises of the company at $100,000.

An Act passed in the same session [chapter 81] authorized the Railway Company to unite with "the Marmora Iron Company," and, "for the more effectual carrying into effect of the said union, consolidate their respective debts, and unite their stocks, properties and effects, and on such terms, either of complete or partial union, and either of joint or separate, or absolute or limited liabilities to third parties," as the companies should deem meet; and any agreement for the purpose, under the seals of the companies, ratified by two-thirds of the shareholders of each, was declared to be "valid and binding, to all intents and purposes, in the same manner as if the same had been incorporated with the Act," from the filing of such deed "in the Registry Office of the West Riding of Northumberland and the North Riding of Hastings, and the publication of notice thereof two weeks in the *Canada Gazette*."

Statement.

Another Act was passed in the following year (*a*), providing that, after such filing of the deed of union and notice thereof in the *Gazette*, the two companies and those who should "become stockholders under the provisions of the

(*a*) 29 & 30 Vic. ch. 103.

1868.

Cayley v. Cobourg, &c. Railway Co.

Acts respecting the said companies, and under the said deed when so filed," should be a body politic and corporate, under the name of "the Cobourg, Peterborough, and Marmora Railway and Mining Company;" and that all the respective properties, rights, powers, and franchises of the said companies so united should be vested in and belong to the said Cobourg, Peterborough, and Marmora Railway and Mining Company.

A deed of union was executed accordingly on the 28th December, 1866; and was registered on the 23rd January, 1867; and the necessary notices appeared in the *Gazette* on the 28th January and 2nd February of the same year. This deed provided for the absolute union of the companies, and that the new company shall be called "The Cobourg, Peterborough, and Marmora Railway and Mining Company," and by that name shall be a corporate company, and shall have succession and a common seal, and shall possess and hold all the corporate rights and powers conferred by the charters and amending Acts regulating the affairs of each company;" it being declared nevertheless that the "Marmora Iron Company shall merge in the Cobourg and Peterborough Railway Company, and that the Statutes regulating the company shall, so far as they are valid and unrepealed, continue to govern and regulate the affairs of the Cobourg, Peterborough, and Marmora Railway and Mining Company."

Statement.

"Second. New preferential stock not exceeding $600,000 (six hundred thousand dollars) shall be subscribed, which shall be appropriated as follows:—The sum of $170,000 of paid-up preferential stock shall be set apart for, and subscribed in the name of *Edward Burstall*, Esq., of Quebec, or such persons as he shall appoint. The sum of $430,000 shall be set apart for, and subscribed in the name of, such new subscribers of stock as shall become shareholders in the undertaking."

1868.

Cayley v. Cobourg, &c. Railway Co.

"The company may increase their capital stock either by increasing the number and denomination of the shares as paid up shares, or by putting new shares unpaid in the market, by by-law to be passed by a majority of the shareholders at a special meeting to be called for that purpose, of which at least two weeks notice shall be given in a Cobourg newspaper and in the *Canada Gazette*, and in such case the holders of stock shall be entitled as amongst themselves to a proportionate amount of new shares."

"The sum of $30,000 paid to the proprietors of the Marmora Iron Company at the delivery of these presents shall be a credit on the new stock on which the calls producing that sum shall have been paid."

Mr. *McLennan*, for the plaintiff.

Mr. *Strong*, Q. C., and Mr. *Roaf*, Q. C., for the defendants.

Judgment.

MOWAT, V. C.—This is a bill by two holders of mortgage bonds of the Cobourg and Peterborough Railway Company, on behalf of themselves and the other bondholders, against a new company formed by the union of the Cobourg and Peterborough Railway Company with the Marmora Iron Company. The plaintiffs claim to be entitled, under the provisions of the Acts affecting these companies, to have their bonds converted into the stock of the company. The bonds amount to £100,000 sterling; and of these, the plaintiffs hold forty-nine of £100 sterling each.

By an Act passed in 1853, this company was authorized to issue bonds that should be convertible into stock. In 1862, the company being in debt to an amount far exceeding its means of payment, provision was made by the Legislature for reducing the company's subscribed stock

($516,000) to twenty-five per cent of its nominal amount (or $129,000); for ascertaining by arbitration the value of the property and franchises of the company; for payment by the company of the sum so ascertained; and for the distribution of the money among the bondholders and other creditors, according to their priorities, in full of their respective claims on the company: and it was provided, that any of the holders of the bonds should have the option of converting their bonds into paid-up new stock, in the proportion of double the sum which he or they would be entitled to receive under the award; and that this "converted bonded stock," and any "new subscribed stock," should be a preferential stock, and should be entitled to dividends of eight per cent. per annum before the division of any profits among the other shareholders.

1868.

Cayley v. Cobourg, &c. Railway Co.

The defendants contend, that this option was taken away by the subsequent Act; or has been lost by the delay in exercising it; or has been extinguished by the deed of amalgamation with the Marmora Company. No time was limited by the Statute for the exercise of the option; no notice was given by the company to the bondholders calling upon them to make an election within a named period, if such a notice would be sufficient to limit the time; and the plaintiffs contend that under these circumstances they were not bound to elect until the money was paid into Court, and the necessity was thereby created of choosing between their share of the money, and preferential stock. The money was not paid in until after the amalgamation on the 13th day of September, 1866. This bill was filed 1st November, 1867.

Judgment.

The points thus raised were discussed before my brother *Spragge* on a demurrer to the plaintiffs' bill; and he decided them all in favor of the plaintiffs.

The deed of amalgamation was not fully set out in the

1868.

Cayley v. Cobourg, &c. Railway Co.

bill. It provided for new preferential stock being subscribed to an amount not exceeding $600,000; and this sum, on the day of the execution of the deed, was subscribed by two persons (not bondholders), on behalf of themselves and others for whom they acted. These facts did not appear by the bill; and they were relied on before me as constituting an additional ground for holding that the plaintiffs' right to convert is no longer in existence.

Assuming the right to convert to have subsisted (as I agree with my learned brother in thinking that it did) up to the moment of the execution of the deed of amalgamation, I think the company had no power to destroy that right by a provision to that effect in the deed. The enactment, that any deed of union which the companies executed should be valid in the same manner as if incorporated with the Act, enabled these companies to bargain together in respect of the rights which each had, and to make such mutual arrangements as their union rendered necessary, but certainly did not give them unlimited legislative authority over the rights of other persons.

Judgment.

I assume that the company had a right to limit the amount of new subscribed stock, so far as this should not interfere with the rights of other persons. But as to the continued right of the bondholders to convert their bonds into stock, it is to be observed, that a company has no right, without express legislative authority, to create a preferential stock. The Act of 1862 made preferential the converted bonded stock, and any new subscribed stock; and by the Act of 1866 the new company was to consist of the old companies, and such other persons as might become stockholders under the provisions of the Acts regulating the companies, and the deed of amalgamation. I think, therefore, that the companies had a right to give the new stock a preference over the ordinary stock of the old companies; but the very enactment on which this right depends

having provided for converted bonded stock, as well as new subscribed stock, I see no ground for holding that this provision could be interfered with. It stood, and continues to stand, on the same foundation as the new subscribed stock itself. Nor does the amalgamation deed profess to interfere with it. That deed merely provides that "new preferential stock not exceeding $600,000 shall be subscribed," &c., making no reference to the bondholders. As, then, the Statute, under the authority of which I must consider this provision to have been introduced, expressly distinguishes between converted bonded stock and new subscribed stock, I cannot say, from this provision of the deed, that the companies were stipulating together, unauthorized and illegal as I think such a stipulation would have been, for the extinction of converted bonded stock or of the right to convert into such stock. This conclusion is confirmed by the other terms of the deed, declaring, that the Marmora is merged in the Cobourg Company, and that the Statutes relating to the Cobourg Company, "shall, so far as they are valid and unrepealed, continue to govern and regulate the affairs of the" new company.

1868.

Cayley v. Cobourg, &c. Railway Co.

Judgment.

So, the Act of 1865 authorized either a "complete or partial union, and either of joint or separate, or absolute, or limited liabilities to third parties." The union which the companies determined upon was an absolute union, without any provision limiting the liability of the new company to third parties in respect to the past transactions of either company; and the effect seems to be that the new company assumed all the liabilities of the two old companies. One of these liabilities was to have the bonds of the Cobourg Company converted into preferential stock of the same degree as the new subscribed stock; and this liability seems to be as binding on the new company as it was on the old.

No valid award having been made under the Act of

1868.

Cayley v. Cobourg, &c. Railway Co.

1862, the Act of 1865 fixed the value of the Cobourg Company's property and franchises, for the purposes of the former Act, at $100,000; and directed that half of this sum should be paid into Court in two years, with interest, and the other half in four years, with interest; that $70,000 of the amount should go to the bondholders, and $30,000 to other purposes mentioned in the Act. The first instalment having accordingly been paid into Court on account, proceedings are now in progress in the office of the Master at Cobourg to ascertain the persons entitled to share in the distribution; and a short day must be named for the bondholders (other than the defendants) to exercise their right of electing between their shares of the money and the amount of stock which by the Act each is entitled to take in lieu of the money. The money which the plaintiffs and the other bondholders who may elect to take stock, would otherwise be entitled to, will belong to the defendants.

Judgment

The decree must be with costs.

YOUNG v. HERON.

Suits by persons of unsound mind—Costs.

When a bill was filed in the name of a person of unsound mind, not so found by inquisition, by a next friend, the Court, on the submission of the defendant, made a decree declaring, that the plaintiff was entitled to certain lands of which the defendant had the legal estate, subject to the defendant's lien for taxes, &c., which he had paid thereon; and the defendant not asking a sale, and it not appearing that a sale or other direction following the declaration was necessary in the interest of the plaintiff, the Court made no order founded on such declaration; and it not appearing that the suit was necessary, or that the defendant was guilty of any blameable conduct, he was held entitled to costs, and the next friend was ordered to pay them without prejudice to any question as between him and the plaintiff's estate.

Hearing on bill and answer against the defendant *John Young*, and *pro confesso* against the other defendants.

1868.

Young v. Heron.

Mr. *Hodgins*, for the plaintiff.

Mr. *Roaf*, Q.C., for the defendant, *John Young*.

MOWAT, V. C.—This is a bill by one of the children and residuary devisees and legatees of *John Young*. The plaintiff is a person of unsound mind, not so found by inquisition or by the Court under the Statute (*a*), and he sues by a "next friend," the husband of a grand-daughter of the testator's. The defendants are the executors of the last surviving executor of *John Young*, and another of the residuary devisees and legatees under the will who bears the same name as the testator. The bill refers to the testator's personal estate,—and to three parcels of land, two of which the plaintiff is interested in, jointly with the defendant *John Young* and four others, under the general devise in the will; the third belongs to the plaintiff wholly, and his title to it is not under the will. The prayer of the bill is, that an account may be taken of the estate of said testator, and that the share or portion to which the plaintiff is entitled may be made over to trustees for his benefit; that the defendants may account for their dealings with the estate; and that they may be charged with wilful default and with annual rests; that the defendant *John Young* may account for the plaintiff's share or interest in a farm in the Township of Niagara, occupied by him, and which passed under the will; that the plaintiff may be allowed for certain work and labor which the bill alleges he did thereon; that the testator's estate may be administered under the direction of the Court; that the plaintiff may have the costs of the suit; and for other relief.

Judgment.

The bill is *pro confesso* against the executors, and the

(*a*) U. C. Consol. ch. 12, sec. 33.

1868.

Young v. Heron.

plaintiff is therefore entitled to the usual administration decree against them, so far as regards the personal estate; but the next friend will take this decree at his peril; and if the plaintiff does not appear to be advantaged by the result, the next friend may personally be charged with the costs. It does not seem likely that any good can come of administering the personal estate of a farmer who died nearly sixty years ago, and who, judging from the provisions of the will and the sworn statements of the defendant *Young*, does not appear to have left much personal estate. Further directions and costs will be reserved as to this part of the case until after the Master has reported.

Judgment.

The cause has been heard on bill and answer as between the plaintiff and the defendant *John Young*; and I have therefore, as against this defendant, to treat as unproved whatever allegations in the bill he has not admitted; and to treat as true all the statements of the answer which the defendant would by the practice have been at liberty to prove if he could, in case the plaintiff had replied to the answer, and brought on the suit for examination of witnesses. Now, the defendant does not admit those paragraphs of the bill which set forth the character of the other defendants. The plaintiff is, notwithstanding, entitled to a decree against them, because *John Young* is not a necessary party for that purpose (*a*); but the bill must be dismissed against him, as unproved, so far as relates to this branch of the case.

The first of the three properties mentioned in the bill is the testator's farm in the Township of Niagara. What the answer states with respect to it is, that the defendant has occupied it as owner of a one-sixth share, and under agreements, not now in question, with the

(*a*) G. O. No. 6 sec. 2, Rules 1, 3, 7.

devisees of four-sixths; that the plaintiff has always lived with the defendant as a member of his family, and has been well and carefully treated; that the plaintiff has not by his work or otherwise earned any part of his livelihood, and for very many years has not done any work at all; and that the expense to which the defendant has been put in maintaining the plaintiff, now sixty-three years old, far exceeds the plaintiff's one-sixth share. The answer does not state that the defendant lived on the Niagara farm, though he in some sense occupied it, or that the plaintiff lived on it, or occupied it, with him. The defendant submits that, having regard to the Statute respecting the limitation of actions, and to the length of time which has elapsed since the defendant first entered into possession of the farm, and to the circumstances of the case,—the plaintiff has no equity against him. The question was argued as to whether the defendant, as a tenant in common, was bound to account to his co-tenant in respect of the occupation, and the plaintiff's counsel relied on *Leak* v. *Corder* (*a*) as overruling *Henderson* v. *Eason* (*b*), and *McMahon* v. *Burchill* (*c*), and the other cases of that class. I do not so read *Leak* v. *Corder*. But the defendant having, by his answer, set up length of possession, and claimed the benefit of the Statute of Limitations, I must hold that defence to be a bar, even if the plaintiff would otherwise have been entitled to an account.

1868.

Young v. Heron.

Judgment.

The second property consists of some land in Saltfleet, which is stated in the bill to have been granted by the Crown to the testator's executors, to be held by them in trust for the uses of the will; and the bill alleges, that it was subsequently conveyed by the last surviving executor to the defendant, and that he thereby became the trustee thereof. The defendant by his

(*a*) 4 W. R. 806. (*b*) 17 Q. B. 701.
(*c*) 2 Ph. 184.

1868.

Young v. Heron.

answer does not expressly admit these allegations, but he does not claim any beneficial interest in the property. He says that he never claimed (beneficially) more than the one sixth to which he himself was entitled under the will; and that this one-sixth he has sold. I gather from the bill that the trust appears by the deeds; but a decree may go, declaring the plaintiff entitled to an undivided one-sixth share, subject, as the defendant in his answer claims, to the taxes which the defendant has paid in respect of this land. It is not charged in the bill that this land has ever been in the plaintiff's possession; and nothing appears calling for any account with respect to it. It is probably a wild lot. I observe, as bearing on the question of costs, that the answer explains how the conveyance came to be made to the defendant; and that it does not seem to have been procured in bad faith, or against the will or the interests of the other devisees; that the defendant does not appear to have ever claimed the plaintiff's one-sixth beneficially; and that no application or suggestion is alleged to have been made to him by anybody on behalf of the plaintiff, before this suit, to execute any deed, declaration, or other instrument, with reference to the plaintiff's share.

Judgment.

The third property mentioned in the bill is some land in Medonte belonging to the plaintiff and not derived under the will. The bill alleges, that the defendant, "though pretending to be a trustee for the plaintiff," allowed the taxes to accumulate, and the land to be sold for the arrears; and that the defendant became the purchaser for his own use, benefit and advantage. The answer does not admit these statements. It alleges that the defendant had no means of the plaintiff's to pay taxes; and proceeds to make certain other statements respecting "a lot" belonging to the plaintiff, not identifying it as the lot in Medonte; but counsel for both parties assumed on the argument that the Medonte lot was the one meant. The statements referred to are,

1868.

Young v. Heron.

that for several years the defendant had advanced out of his own means money to pay the taxes; that he was unable to continue doing so; that he afterwards bought the lot in to prevent its being lost; and that he is ready and willing that the plaintiff should have it, on the defendant's being paid his outlay in respect of the purchase money and the taxes he has paid. I think the decree may contain a declaration, that the plaintiff is entitled to the lot on these terms; though, independently of the submission, the answer does not admit facts enough to shew that the plaintiff has any right to the lot. The next friend is himself in possession of this lot.

The defendant does not ask a decree for a sale; and nothing appears shewing, that the interest of the plaintiff requires a sale; or that the defendant is not a proper person to hold the legal estate; or that any decree against this defendant, beyond the declarations I have mentioned, is necessary or proper for the plaintiff's protection. The answer, the only evidence I have before me, exculpates the defendant from everything blameable, and entitles him to the costs of the suit against the next friend, but without prejudice to any question as to the right of the next friend to obtain the same out of the plaintiff's estate. If the next friend is aware of facts which shew the interference of the Court to be necessary or desirable for the comfort of the plaintiff or the security of his property, he may take the proceedings pointed out by the Statute for accomplishing such objects (*a*); and should he, in the course of such proceedings, satisfy the Court that the present suit was proper, and in the plaintiff's interest, and that the costs incurred in it should be allowed, he may obtain payment of them out of the plaintiff's estate. Suits by the friends of persons unable, by reason of infancy or

Judgment.

(*a*) U. C. Consol. Stat. ch. 12, sec. 30 *et seq.*; 28 Vic. chap. 17, sec. 5.

1868. mental incapacity, to protect themselves, are not to be discouraged; but persons who bring such suits, as next friends of the plaintiffs, should, as in other cases, ascertain that the suits are really necessary; and should be prepared to shew this to have been so, in order to entitle such persons to costs against defendants, or out of the estate of the plaintiffs.

Young v. Heron.

The defendant's counsel argued that the bill is multifarious, and that for that reason no relief should be given upon it. But multifariousness is an objection which must be taken by demurrer. The Court may of its own motion, refuse relief at the hearing on the ground of multifariousness, but the objection cannot then be insisted upon by a defendant. I think the present case is not one in which the Court should refuse to make such a decree as I have mentioned.

Judgment.

HARRISON v. HARRISON.

Trustee—Principal and agent—Bank stock.

A trustee or agent has no right to invest in bank stock without authority; but that rule does not apply where the *cestui que trust* or principal is of full age and competent in point of law to act for himself, and gives his sanction to such an investment.

It is a settled rule that a trustee or agent, authorized to make a purchase for his *cestui que trust* or principal, cannot make the purchase from himself without disclosing the fact. Such transactions are so dangerous that they are wholly forbidden, and are not merely declared void where damage has arisen from them, or fraud was mixed up with them.

Accordingly, where an agent, authorised to invest in bank stock, appropriated to his principal some shares of his own, and rendered an account as if he had purchased so many shares for her, his principal, years afterwards, on the fact coming to her knowledge, was held entitled to repudiate the transaction, without any inquiry as to the fairness of the rate which she had been charged for the shares.

The principal question argued at the hearing of

this cause was, as to the liability of the estate of the late Hon. *Samuel B. Harrison*, of Toronto, to make good to the plaintiff the loss occasioned by the investment, or supposed investment, of money belonging to her in Upper Canada Bank stock. 1868. Harrison v. Harrison.

The bill alleged, and the answer admitted, that the plaintiff was an orphan, and had no experience in business, or in the investment of money; that Mr. *Harrison* was her uncle, and her nearest relative in Canada; that he received for her $2,589, to which she became entitled as next of kin to two persons who died in England; that at this time he was her sole trustee and legal adviser, and stood to her *in loco parentis;* that these relations continued up to his death; that by reason of her inexperience, and an apprehension that the money she had become entitled to would be lost if left to her own management, Mr. *Harrison* and her other Canadian friends prevailed on her to leave the money in his hands for the purpose of being invested for her benefit, and to consent to the execution of a deed appointing him her trustee for that purpose. The plaintiff was at this time of full age, and living with her step-mother, at Palermo, in this province. She had several half-brothers and sisters. Statement

Mr. *Harrison* recommended that the investment should be in Bank stock, in which the plaintiff, in reliance on his judgment and with the concurrence of her other friends, acquiesced. Accordingly, having received the first sum, $680.20, on the 7th October, 1859, Mr. *Harrison*, the same day, invested $600 of it in the purchase of 14 shares of Bank of Upper Canada stock. On the 18th of January, 1860, he received the remaining sum to which she was entitled, $1,908. On the 24th of that month he invested $941 of this amount in Bank of Toronto stock; and to this purchase the plaintiff makes no objection. On the 20th February he invested a

1868.

Harrison v. Harrison.

further sum of $471, in the purchase of 11 shares in Bank of Upper Canada stock. The three transfers were taken to Mr. *Harrison* himself. On the 24th of February he wrote to the plaintiff, enclosing an account of these transactions. The account mentioned another investment as follows: (1860) "Feb. 22nd, by paid for 13 shares do. (Upper Canada Bank stock) at 86 and brokerage $4—$563." This left a small balance, which Mr. *Harrison* subsequently accounted for to the plaintiff. This last investment was not, in fact, made as stated in this account, but Mr. *Harrison* had at the time 14 shares of his own, which he had bought in August, 1859. With the account he sent a deed of trust which he had prepared for joint execution by himself and the plaintiff. The letter which accompanied the account and deed contained this passage: "I herewith send you the deed I have prepared for you to sign. Please to get it executed in the presence of Mr. *Switzer*, and return it to me as soon as possible. As the stock is standing in my name, I shall want the deed for my own protection, to shew that I hold it as trustee; and also, the terms of the trust." The deed contained a recital that the plaintiff "now has and is entitled to certain shares in the capital stock of the Bank of Upper Canada and the Bank of Toronto respectively, all fully paid up, and now standing in the name of the said" *Samuel B. Harrison*; and the deed declared the trusts on which he was to hold the same. The plaintiff executed the deed as directed, and returned it with a letter to Mr. *Harrison* on the 27th February, thanking him for securing her money in the way he had done.

Statement.

On the 21st November, 1860, Mr. *Harrison* purchased for himself 20 shares of Upper Canada Bank stock, nominal value $1,000; and on the 6th February, 1861, another 20 shares. In June, 1861, the Bank was unable to declare any dividend. On the 9th January, 1862, 40 per cent. was written off the stock of the

Bank by authority of an act of Parliament (*a*); and no dividend was declared for that half year. 1868.

Harrison v. Harrison.

In May, 1863, the reduced stock was quoted at 83 per cent.; and in August of that year Mr. *Harrison* sold forty-one shares at that rate, in payment of some land he had bought. There then stood in his name thirty-eight shares, the total number mentioned in his account as bought for the plaintiff. Dividends appear to have been paid on the reduced stock until July, 1865, when there was no dividend; and there has been none since. The value of the shares continuing to fall, Mr. *Harrison* sold the thirty-eight shares on the 3rd August, 1866, for $182, under the authority of a provision for that purpose in the deed. Both before and after this Mr. *Harrison* remitted several half-yearly sums to the plaintiff in order thereby "in part to make up for the loss" she had "sustained by the failure of the Bank of Upper Canada;" and in his letter to the plaintiff of 15th January, 1867, he mentioned his intention, as he could afford it, to send to her, with her dividend from the Bank of Toronto every half-year, an additional sum from himself; but he only lived to carry out this intention for another half-year. In August, 1867, he died.

The cause came on for hearing at the Toronto Spring Sittings, 1868.

Mr. *English*, for the plaintiff.

Mr. *Moss* and Mr. *Morgan*, for the defendants.

MOWAT, V. C.—The plaintiff's counsel contended that the whole sum mentioned in the account as invested for her in Upper Canada Bank stock, should be made good to Judgment.

(*a*) 25th Victoria, chapter 63.

1868.

Harrison v. Harrison.

the plaintiff, on the ground, that Bank stock was an improper investment for an agent or a trustee to make, or to advise, and that the result shewed that an investment in Upper Canada Bank stock, of all others, was imprudent and objectionable. But though a trustee or agent has no right to invest in Bank stock without authority, that rule does not apply where the *cestui que trust* or principal is of full age and competent in point of law to act for herself, and gives her sanction to such an investment. Her concurrence would warrant any sort of investment she chose to allow. As to its being Mr. *Harrison's* duty not to advise this sort of investment, there is no rule that would make him answerable for such advice, given, as no doubt this advice was, in entire good faith, and from the best possible motive. He invested his own money in Upper Canada Bank shares, as well as the plaintiff's; had done so before he invested hers; and did so afterwards also. Like many other prudent and experienced men, he was mistaken in his opinion of the Bank; but for such a mistake he was not to blame; and for the plaintiff to complain of his recommendation eight or nine years after she agreed to it, and acted upon it, is out of the question.

Judgment.

The learned counsel further contended, that the transfers should have been procured to Mr. *Harrison* as trustee, and the shares he held for the plaintiff distinguished in that way from those he held for his own benefit. That would, no doubt, have been the proper course; and the plaintiff might perhaps have reason to complain, if the course taken had not been sanctioned by herself. It is not pretended that there was any *mala fides* on the part of Mr. *Harrison* in not requiring the transfers to state that they were made in trust; and by the Act then in force in relation to the Bank (*a*), it was provided that the Bank should not be bound to

(*a*) 18th Victoria, chapter 39, section 6.

see to the execution of any trust in such cases. Then Mr. *Harrison's* letter of 24th February, 1860, to the plaintiff, expressly told her that the stock was standing in his name, and that one object of the deed was to shew that he held the stock as trustee. The deed itself is to the same effect. I think, therefore, I must hold, that the plaintiff was duly informed that the shares stood in the name of Mr. *Harrison* individually, and not as trustee; and that she concurred in this. As the form of the transfers was not a matter in which Mr. *Harrison* had any interest, or from which he was to derive any profit, or which has occasioned the plaintiff any damage, her concurrence clearly binds her.

The plaintiff having sanctioned the stock's standing in Mr. *Harrison's* name, I do not see that the fact of his having at the same time other stock in his name entitles the plaintiff to repudiate the purchases. Besides, in a letter to the plaintiff of the 15th July, 1861, Mr. *Harrison* expressly referred to his having a large amount of stock of his own in the Bank of Upper Canada; and this would naturally be in his own name. In a letter of the 15th January, 1867, also, he mentions that, in addition to what she had lost, he had himself lost very heavily from the Bank's failing to pay dividends. The plaintiff has therefore not now learned for the first time that Mr *Harrison* had other shares in this Bank in his own name, besides those belonging to the plaintiff.

Judgment.

The learned counsel further contended, that the sale made by Mr. *Harrison* in 1863, should be taken to have been made on the plaintiff's behalf; but I am not able to perceive any satisfactory ground for so holding. It is clear that that sale was intended to be of his own shares, and not of the plaintiff's; and it is admitted that the consideration was land, not money. The plaintiff's shares might have been sold at that time at about the same rate in money, if the plaintiff had so desired, or

1868.

Harrison v. Harrison.

if Mr. *Harrison* had chosen of his own authority to sell them; but he was not asked to sell them, and no doubt, in the exercise of his own best discretion, he thought it more prudent not to sell. It is not pretended that he had any personal interest to serve by retaining the plaintiff's shares unsold, or that he had any other motive in doing so except the plaintiff's supposed advantage. No authority was cited to me in support of the learned counsel's contention on this point, or on the other points upon which he relied.

Judgment.

It was further contended that, at all events, to the extent of the sum of $563 charged as paid on the 22nd February, 1860, for thirteen shares, the plaintiff is entitled to a decree; and this contention, I think, is well founded, as no such payment or purchase was made then or at any time. The learned counsel for the defendant suggested that there was in effect an appropriation to the plaintiff of thirteen shares of Mr. *Harrison's* own—a purchase in fact from himself; and he argued that such a transaction is valid where the agent derives no special advantage from it, that is, where he sells to his principal at the market price. It is not proved that 86 per cent. was the current rate at the date of this purchase; and 85 was the rate when the eleven shares were purchased for the plaintiff two days previously. But independently of this circumstance, the transaction cannot be sustained, for it is a settled rule, that an agent or a trustee, authorised to buy, cannot buy from himself; and that if he does so without disclosing the fact, his principal or *cestui que trust* may repudiate the transaction when it comes to his knowledge, and has this right whether the price was fair or not. Such transactions are so dangerous that, to prevent them, they are wholly forbidden, and are not merely declared void where damage has arisen from them, or where fraud was mixed up with them. Neither damage nor fraud is pretended here; but the plaintiff invokes the rule

1868.

Harrison v. Harrison.

in order to compel the defendant to make good her her loss so far; and the cases of *Gillett* v. *Peppercorne* (*a*), and *Rothschild* v. *Brookman* (*b*), clearly shew that the rule is applicable to her case, and that to this extent she is entitled to a decree, with interest at 6 per cent. from the 22nd February, 1860,—less the dividends received by her on these shares, and the gratuities which Mr. *Harrison* remitted to her in part compensation of her loss. I presume the amount can be ascertained without a reference, and may be embodied in the decree. The suit having been unsuccessful as to the other sums, there will be no costs (*c*).

Judgment.

The decree will also provide for new trustees; but an office-copy must be served on such of the other *cestuis que trust* as reside in this country (*d*), unless hey consent to the appointment—as I dare say they will, in order to avoid further unnecessary expense.

(*a*) 3 Beav. 78.

(*b*) 2 Dow. & Clark 188. See also Bentley v. Craven, 18 Beav. 75.

(*c*) See Prideaux v. Lonsdale, 1 DeG. J. & Smith 439.

(*d*) Jones v. James, 9 Hare, App. lxxx.

1868.

DICKSON v. BURNHAM.

Riparian proprietors.

A riparian proprietor has the same right to forbid others from backing water on his land, as he has to prevent them from taking possession of any other vacant property he has, and making use of it against his will.

Where it appeared that the defendants had backed water on the plaintiffs' mills and overflowed their land, but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants, the Court directed an inquiry by an engineer named by the Court under the general orders.

The works of a riparian proprietor should be sufficient to prevent damage to other riparian proprietors, not in cases of ordinary floods only, but also of the periodical or occasional freshets to which the river is subject; but this rule does not in equity apply to extraordinary freshets which cannot be guarded against, or cannot be so by means consistent with the reasonable use of the stream.

Examination of witnesses and hearing at Peterborough, Autumn, 1867.

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

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

Judgment.

MOWAT, V. C.—This case was heard at the sittings in Peterborough last Autumn. I have delayed giving judgment until to-day (4th March, 1868,) because of the difficulty, upon the evidence given at the hearing, of framing the proper decree to give effect to the opinion I have formed on the questions of law and fact which were discussed. The works complained of in the bill were erected several years before the filing of the bill; but no defence founded on the delay was suggested. The plaintiffs appear to have been in no hurry, either, in bringing their cause to a hearing after filing their bill.

1868.

Dickson v. Burnham.

The law affecting the matter seems clear. The water to which every riparian proprietor is entitled, consists of the difference of level between the surface where the stream in its natural state first touches his land, and the surface where the stream leaves his land. He has no right to dam the water back so as to throw it upon the land above his own. If he does so by a single foot or less, he is liable to an action, even though the proprietor above him suffers no material injury, and though the mill of the trespasser is a public benefit. This rule follows from the sacred character which the law attaches to private property, property being one of the chief mainstays of society, and one of the most active agents in promoting civilisation and national prosperity. As Sir *William Blackstone* observed in his Commentaries (*a*): "So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. * * The public good is in nothing more essentially interested than in the protection of every individual's private rights, as modelled by the municipal law." This right of private property is made by Parliament to give way, on proper terms, and with proper precautions, in order to enable railways and canals to be built, and other objects of general utility to be accomplished; and I see no reason why the Legislature should not on the same principle make some provision of a like kind to encourage the building of mills and manufactories. Laws for this purpose were passed in several of the neighbouring States when they were Colonies of Great Britain, and still exist in them (*b*). In Lower Canada there are statutory provisions on the same subject. But no such legislation having yet taken place in reference to Upon Canada, a riparian owner here has

Judgment.

(*a*) Vol. 1, page 139.

(*b*) See Angell on Watercourses, Appendix, 5th edition.

1868. Dickson v. Burnham.

the same indefeasible right to forbid others from backing the water on his land, whether he is himself using the land or not, as he has to prevent them from taking possession of any other property he has, and making use of it against his will.

It was contended by the learned counsel for the defendants, that a reasonable use of the stream was within the powers of every riparian proprietor; and that a use which did no substantial injury to a neighbour, could not be the subject of a suit here, the principle being, as he urged, *de minimis non curat lex.* This argument, so far as it relates to the right to equitable relief in such a case, has the support of the opinion of the late Vice Chancellor *Esten* (*a*); but against it are the judgments of a majority of the Judges in *Graham* v. *Burr* (*b*), and *Wright* v. *Turner* (*c*), by which I am bound. The rule which generally prevails in the Courts of the neighbouring States, where questions of this kind frequently arise, seems to be to the same effect (*d*).

Judgment.

I am satisfied, upon the whole evidence here, that the defendants' dams do back the water upon the plaintiffs' mills, and have occasioned damage by overflowing and washing away other portions of their property, but all the backwater, or all the washing away, spoken of by the plaintiffs' witnesses, does not appear to me to be attributable to the defendants' dams; and what I have been unable to satisfy myself of, by the present evidence, is, what portion of the injury is owing to the dams of the defendants, and to what extent their dams must be interfered with in order to remove the plaintiffs' cause of complaint. The plaintiffs' counsel waived any claim for

(*a*) And see Lingwood v. Stowmarket Co., Law Rep. 1 Eq. 77. Crump v. Lambert, Law R. 3 Eq. 409; Kerr on Injunction, 378, *et seq.*

(*b*) 4 Gr. 1.

(*c*) 10 Gr. 67.

(*d*) Angell on Watercourses, sec. 449, and cases there cited.

1868.

Dickson v. Burnham.

past damages, and asked only a declaration, that the defendants' dams do back the water up so as to interfere with the plaintiffs' rights. But a mere declaration of the legal right unaccompanied with any other relief, would be contrary to the course of the Court in a case like this. The defendants' counsel contended, that the uncertainty, which exists on the evidence, as to the proportion of the backwater and overflowing which the defendants' works have caused, is a sufficient reason for dismissing the plaintiffs' bill. But no authority was cited for this proposition, and I do not think the rule is as contended for. I think that the plaintiffs, having established the wrong they complained of, are clearly entitled to an inquiry, as to such particulars as may be necessary to determine the exact extent of the relief which should be granted. This course, indeed, is in the interest of the defendants as much as of the plaintiffs.

Judgment

The dams complained of were built on the faith of an agreement entered into on the 2nd December, 1851, between *George B. Hall*, a former proprietor of the premises now owned by the plaintiffs, and *Zaccheus Burnham*, through whom the defendants claim. By an indenture of that date, made between these parties, after reciting, amongst other things, that *Zaccheus Burnham* was the owner of a grist and saw mill, and other buildings and machinery, situate upon part of lot 30, in the 13th concession of the Township of Otonabee; that these mills and machinery were supplied with water by means of a dam leading into and from the River Otonabee; that it had been found useful and necessary to increase the head of the water of the said dam and race both in height and in quantity; that in order to do so, it was necessary to erect a new dam from some point in or near the then dam or race across the River Otonabee to the bank or mainland upon the opposite or west side thereof; that this bank or mainland was owned by or in the possession of the said *Hall*; and that he had

1868.

Dickson v. Burnham.

agreed to sell the same, as also a certain part, thereinafter described, of lot No. 31, in the same concession; it was witnessed that, in consideration of £1050, the said *Hall* conveyed to the said *Burnham* in fee, certain parcels therein described, and which consisted, in effect, of the land on both sides of the river, from certain points situate about four chains from *Hall's* dam (which was on the same river) to the points where, as I understand the evidence, the defendants' main dam has been erected across the river; the conveyance being subject to a proviso, that *Burnham*, his heirs and assigns, should not erect or place upon the premises thereby conveyed any mill, factory, or building of any kind except dams, walls, piers, gates, slides, posts, and what might be required to dam back the water; and should not back the water upon the land of *Hall*, or upon land he had theretofore leased to *Samuel Dickson*. It was further, by the same indenture, provided that *Burnham*, his heirs and assigns, should be at liberty to build a wall or bank from *Hall's* dam to a southerly point at which the description of the land conveyed to *Burnham* on the southerly side of the river commenced; and to keep this wall in repair; the said wall being, as the indenture declared, for the purpose of keeping the water of the river within its natural channel; and not to be higher than should be necessary for this purpose; and not to interfere with the rights of *Hall*, his heirs and assigns, to the land on which the said wall was to be built, or on either side thereof, or to the use of the wall, he and they doing no damage thereto. The other provisions of this indenture do not appear to be at present material.

Judgment.

Two points were raised as to the proper construction of this deed. One was as to the extent of the land thereby conveyed on the north side of the river. The description is, of the land in front of land theretofore conveyed to certain persons named. These conveyances are not produced, but it seemed to be admitted, that the

side lines of the various parcels theretofore conveyed were parallel, and extended to the top of the bank, which, from the action of the waters, has since varied considerably; and the question was, whether the land conveyed to *Hall* as "lying between the top of the bank and the waters of the said river Otonabee in front of" what had theretofore been conveyed, was that found by producing the side lines of the land so previously conveyed, until they reached the water; or, that found by lines drawn at right angles to the bank, from the extremities of the same side lines on the top of the bank. My opinion is in favor of the former construction.

The other question on the construction of the deed was, as to the right of the plaintiffs to discharge the water from one of their mills called *Hughes's* mill into the main channel of the river. That mill is on the south side of the river; and I am satisfied that, previous to 1851, and for years afterwards, the water therefrom did not discharge itself into the main channel, but into a small creek that ran across the island lying west of the ground on which the defendants' wing-dam now stands, and entered the river below the defendants' main dam. There does not appear to have been any intention, when the indenture of 1851 was executed, to change the locality of the tail-race from this mill; and the defendants seem clearly entitled, according to the only possible construction of that indenture, to build the wall provided for by the indenture, though this might close up the plaintiffs' present tail-race, and compel them to build another to discharge the water from the *Hughes* mill into its former channel.

Judgment.

I think the defendants are entitled to build the wall from the plaintiffs' dam, high enough to keep the water in its natural channel at all seasons of the year; that they are entitled by means of their other dams, to raise the water as high as may be without backing it beyond

1868.

Dickson v. Burnham.

the land conveyed to them; and that they are bound so to construct, and keep in repair, the dams on their land which protect the plaintiffs' property, and the wall they are authorized to build from the plaintiffs' dam to the property conveyed to *Zaccheus Burnham*, as will make them sufficient at all seasons to prevent the water from overflowing the adjoining land of the plaintiffs. The dams and wall should be sufficient to meet the case, not only of ordinary floods, but also of the periodical or occasional freshets to which the river is subject. There may be extraordinary freshets which cannot be guarded against, or cannot be so by means consistent with the reasonable use of the stream; and the obligations of the defendants are not to be so construed and enforced in this Court as to defeat the object for which it appears from the indenture of 1851 that the rights thereby obtained were bargained and paid for. On the other hand, the defendants are bound

Judgment

to render an honest obedience to that injunction which lies at the foundation of the rules of law on this subject —*sic utere tuo ut alienum non lædas*. Thus, the plaintiffs have complained of back-water; and this must be abated. They have given no evidence that the defendants' dams and wall, which should protect the plaintiffs' property from inundation, are not properly constructed for this purpose; or that they have not been built in the usual manner, or as a prudent and discreet owner would have built them for the protection of his own property; but they appear to me to have established, that the wing-dam is not, in some places, high enough; and this must be remedied. But, having reference to the terms of the agreement of 1851, as bearing on this part of the case, I do not think that the defendants should be required by this Court to adopt any unusual mode of construction, which would give unusual security, at an expense that might render the privilege useless to them.

1868.

Dickson v. Burnham.

I have said that a declaration of right, unaccompanied with any directions for the guidance of the parties, would be contrary to the course of the Court, as I understand the rule in such cases; and being unable to say with confidence, in view of the contradictory evidence of the professional and other witnesses, and in the absence of any argument as to the directions which would be proper, I availed myself of the General Order (*a*) which authorizes the Court to obtain the assistance of an engineer, or other scientific person, "the better to enable it to determine any matter in evidence in any cause or proceeding;" selecting for this purpose Mr. *J. S. Dennis*, the gentleman chosen in *Graham* v. *Burr* and other cases, for a like duty.

Mr. *Dennis*, after reading the evidence, has informed me, that, on the present evidence, he can come to no satisfactory conclusion on the point referred to, without seeing the property. What I propose doing, therefore, unless something more satisfactory can be suggested, is, to request Mr. *Dennis* to visit the property; to make such surveys and obtain such information, with the assistance of both parties, as he may deem necessary, with respect to the alterations which should be made in the defendants' main dam and otherwise to prevent the backing of water on the plaintiffs' property lying above the defendants', and what is proper to be done in reference to the wing-dam, wall, and otherwise, to prevent the overflowing of the plaintiffs' land (*b*); and to certify his opinion to me with all convenient speed. I shall defer pronouncing any decree until after I have received his certificate, and until counsel have had an opportunity, if they desire it, of being again heard (*c*).

Judgment.

(*a*) 3rd June, 1853, No. 34, sec. 2.

(*b*) See Sanderson v. The Cookermouth and Workington Railway Co. 11 Beav. 501; Storer v. The Great Western Railway Co. 2 Y. & C. C. C. 54.

(*c*) See Case v. The Midland Railway Co. 27 Beav. 247.

1868.

MILLS v. MCKAY.

Pleading—Parties—Tax sale.

The corporation of the local municipality is not a proper party to a bill impeaching a tax sale.

This was a suit by a mortgagee to set aside a tax sale of land in the town of Woodstock. The sale was impeached, as well on the ground that the taxes were not unpaid, as for various alleged irregularities and acts of misconduct on the part of the County Treasurer, and of the various officers of the town, who by the Statute have to do with the taxation of land and the sale thereof for unpaid taxes. One of the defendants was the Corporation of the town; and the Corporation demurred on the ground of having been improperly made a party.

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

Mr. *Barrett*, contra.

Judgment. MOWAT, V. C.—The learned counsel who appeared for the plaintiff referred to *Ford* v. *Boulton* (*a*) as an express authority for making the Corporation a party. My brother *Spragge* there held the local (*b*) Corporation to be a necessary party, on the ground that a defendant who has a remedy over against another person, has a right to insist on that other person being made a party, so as to avoid the necessity for a second suit. But the learned Vice-Chancellor does not appear to have considered the question, whether there was in fact a remedy over against the Corporation, all parties, it appears, having assumed that the remedy over existed. It was afterwards expressly held, however, by the Court of Queen's Bench, in *Austin* v.

(*a*) 9 Gr. 482. (*b*) Vide Black v. Harrington 12 Gr. 175.

Corporation of Simcoe (*a*), that a purchaser had no right to recover back his purchase money from the county; and the same view was taken by my brother *Spragge* in the subsequent case of *Black* v. *Harrington* (*b*). If the purchaser has no such right at law, it has not been argued that he had the right in equity. The learned counsel for the plaintiff pointed out, that the case in the Queen's Bench was against the county, not against the local municipality; but the grounds of the judgment apply to both. In the present case it is not alleged by the bill that the money has been paid over to the town.

The learned counsel then contended, that the Corporation was properly made a defendant in order to answer costs, though no other relief could be obtained. But to sustain that position a case of fraud must be charged against the defendant. Here no fraud is charged against the Corporation. The acts complained of are not the acts of the Council of the town; nor is the Council alleged to have been privy to them: they are the wrongful or irregular acts of officers in the exercise of powers, and discharge of duties, assigned to them by Statute (*c*).

Judgment.

I think the demurrer must be allowed; but, having reference to the state of the authorities, without costs.

(*a*) 22 U. C. Q. B. 78. (*b*) 12 Grant, 175.

(*c*) See Metcalfe v. Hetherington, 11 Ex. 257; S. C. 5 H. & N. 719.

1868.

STINSON v. PENNOCK.

Mortgagor—Mortgagee—Fire insurance—Re-building.

Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure, and a loss by fire occurs whereby the insurance money becomes payable, the mortgagee is entitled, under the Act (14 George III. ch. 78, sec. 83), to have the insurance money laid out in re-building.

This was a motion by a mortgagee to restrain the defendant, the mortgagor, from receiving money which had become payable under a policy of insurance effected by him on the mortgaged premises.

Mr. *Roaf*, Q. C., in support of the application relied on the Statute 14 George III. ch. 78, secs. 83 & 84,—*Marriage* v. *The Royal Exchange Assurance Co.* (*a*), *Exp. Garrie* (*b*), *Garden* v. *Ingram* (*c*), *Bunyan* on Life Insurance, 151.

Mr. *Boys*, contra.

Judgment. MOWAT, V. C.—The plaintiff is mortgagee of certain freehold estate, and the defendant is mortgagor. The mortgage contains no covenant to insure. The mortgagor after executing the mortgage took out a policy; and the houses on the property have since been burnt (18th March, 1868). The mortgagee claims that he is entitled to have the insurance money laid out in re-building. The defendant says that he intends to lay it out in re-building, but contends that the plaintiff has no right to compel him to do so.

The Statute 14 George III. ch 78, sec. 83, was relied on upon the part of the plaintiff, and seems to sustain his

(*a*) 18 L. J. N. S. Cham. 216. (*b*) 10 Jur. N. S. 1085.
(*c*) Ib. 478

1868.

Stinson v. Pennock.

claim. The object of that section is stated in the preamble to be, "to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining for themselves the insurance money, whereby the lives and fortunes of many families may be lost and endangered;" and the section provides, "that it shall be lawful for the governors and directors of the several insurance offices, and they are thereby authorised and required, upon the request of any person or persons interested in, or entitled to, any house or houses or other buildings, which may thereafter be burnt, demolished or damaged, * * to cause the insurance money to be laid out and expended, so far as the same will go, towards re-building, re-instating, or repairing such house or houses or other buildings, unless the party claiming the insurance money shall, within sixty days, next after his, her, or their claim is adjusted, give a sufficient security to them that the money shall be laid out as aforesaid, or unless it shall be in that time settled and disposed of amongst all the contending parties to the satisfaction of the insurers." The title to this Act would indicate that it refers to certain localities only, and not to the whole kingdom; and most of its provisions are expressly confined to certain limits described in the Act; but Lord *Westbury* held in *Re Barker* (*a*), that the section I have quoted is general, and not local; and if so, it became part of the law of this Province when the body of English law was introduced by legislative enactment.

Judgment

Then, is a mortgagee a person interested within the meaning of the section? I do not see how I can hold that he is not. He is within the words of the enactment, and his case is within the mischief against which Parliament was providing (*b*).

(*a*) 34 Law J., Bankr., 1.

(*b*) See Brooke v. Stone, 34 Law Jour. N. S. Chancery, 251.

1868.

Stinson v. Pennock.

The mortgage money is not yet due, but I am clear that that circumstance makes no difference; especially as it appears that without the buildings the property is not worth the mortgage money.

The motion was to restrain the defendant from receiving the money from the Insurance Company. The more proper course would seem to have been a motion to restrain the Company from paying the money except as provided by the Statute, or to have the money paid into Court (*a*) with a view to its being applied as the Statute directs, if the Company were going otherwise to pay it to the defendant. No objection, however, was made to the form of the motion, and the only question discussed was the one on which I have expressed my opinion.

Robson v. Wride.

Petition of review—Practice.

Where a petition of review is filed on the ground of new matter, the respondents may file affidavits without leave, as in the case of other petitions.

On the case coming on, the Court, instead of then deciding the issues of fact raised by the affidavits, may direct a special answer to be filed with a view to the more convenient trial of the question at issue, where this course seems expedient.

Statement.

Petition of review.

Mr. *Sullivan* for the petition.

Mr. *Blain*, contra, asked leave to answer.

(*a*) Marriage v. The Royal Exchange Assurance Company, 18 Law Jour. N. S. Chancery, 216 (Wigram 1849).

1868.

Robson v. Wride.

MOWAT, V. C.—This was a petition of review presented under the General Orders (*a*), and on its coming on to be heard it appeared that the respondents had filed no affidavit, but the counsel for the respondents asked leave to file an answer, suggesting that the respondents could not file any affidavit or answer without leave: that this was the practice as recognized by the other Judges. I have conferred with the other members of the Court; and I find that they are not aware of any such practice, and that they agree with me in thinking that the General Order does not sanction it. A petition of review is to be met by the respondents in the same way as any other petition. If, when the petition comes on, the Court finds the questions of fact to be such as cannot be decided on affidavits, or as ought not to be so decided, some other mode of trial will be ordered; and in that case a "special answer to the petition" may be thought by the Court to be the most convenient way of raising the issues for the purposes of the trial; but the General Order was never intended to forbid any defence until the expensive formality had been gone through of counsel's appearing on the petition, and asking for leave to answer. As the respondents have acted on a different supposition, they may have a week to file their affidavits or answer, as the case may be; and the petition will stand over meanwhile.

Judgment.

(*a*) Order 9, sec. 12, of 18th June, 1853.

1868.

KEATING v. MCKEE.

Injunction—Mortgage.

A mortgagor filed his bill alleging that nothing was due on the mortgage, and moved for an injunction to restrain execution in ejectment. The defendant set up a purchase and release of the equity of redemption, and alleged that except by means of this purchase the mortgage was not paid. The Court considered that the evidence shewed there was a fair case to try as to the validity of the alleged purchase; and granted an injunction on the plaintiff's paying into Court $200, and entering into the usual undertaking.

The plaintiff moved on notice for an injunction to restrain execution in an action of ejectment by the defendant, for property mortgaged to him, the plaintiff alleging, that the mortgage had been paid in full, and that the defendant claimed the property as owner under a deed which the plaintiff impeached as either a fraud or a forgery. The defendant swore, that the mortgage was not paid in full except by means of the impeached deed; that that deed was duly executed by the plaintiff, in pursuance of a sale by him of the mortgaged property; and that the balance of the consideration had been paid by the defendant. The affidavits of the respective parties were supported by the affidavits of other persons.

Mr. *Bain*, for the plaintiff.

Mr. *Blain*, contra.

Judgment. MOWAT, V. C.—I think there is a fair question to try with respect to the purchase deed; and that, so far as the question depends on its validity, possession should not be changed until the trial takes place. But if this deed should prove to be invalid, the parties will be remitted to their former relation of mortgagor and mortgagee; and the rule is, that the Court will not, ordinarily, interfere with a mortgagee's taking possession of the mortgaged property, pending an inquiry as to the amount

1868.

Keating v. McKee.

due on the mortgage, though the mortgagor may deny that anything is due, provided the mortgagee swears that something is due. In *Booth* v. *Booth* (*a*) Lord *Hardwicke*, while recognizing the general rule, granted an injunction, on the mortgagor's giving security to redeem, upon the ground that the case "was not quite so clear as the common case, being entangled with an account of the personal estate." The mortgagee had been guardian of the mortgagor, who was dead. On the whole, I think the injunction may go in the present case, on the plaintiff's paying into Court $200 for the defendant's security, within ten days, and entering into the usual undertaking. Otherwise, motion refused.

IN RE MCDOUGALL.

Will—Infants—Maintenance—Petition under 29 Victoria, ch. 28, sec. 31.

Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of the death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both: the Court held that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees.

In such a case, the executors and trustees presented a petition under the Statute 29 Victoria, ch. 28, sec. 31; and it appearing, that the parents of the legatees had abandoned them; that the legatees had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support—the Court made an order approving of the application of part of the principal to supply the deficiency.

This was a petition under the Statute of 1865 (29 Victoria, chapter 28, sec. 31), for the opinion, advice, or

Statement.

(*a*) 2 Atk. 343.

1866.

In re Dougall.

direction of the Court as to applying, for the maintenance and education of two infant legatees, *Abigail McDougall* and *Duncan McDougall*, part of the money coming to them under the will of their grandfather *Duncan McDougall*. The infants were of the ages of twelve and nine years, respectively. They had been abandoned several years before by their parents, who had not been heard of for some years. The children were living with the testator at the time of his death (Aug. 1867), and were still living with his widow, the testator's second wife, and had no means of support except what they were entitled to under the will. The testator directed his trustees and executors to invest the share of the infants for their use, "the interest thereof to be applied to their support and education until they should attain the age of twenty-one years, or such previous time as the said trustees may see fit to pay over the same to" the said two legatees, "and in case of the death of either of them, then the portion of the deceased shall be paid to the survivor of them." The will contained no gift over in case of the death of both legatees.

The petition was by the executor and executrix, and represented, that the share of the infants had been ascertained to be $430; and that at least $60 a year was required for their support and education, which sum exceeded the interest that could be obtained for the $430.

Mr. *R. Sullivan*, in support of the petition.

Judgment.

MOWAT, V. C.—As the executors have a discretion to pay the principal to the legatees before they arrive at the age of twenty-one; and as in that case the right of neither legatee is contingent on his attaining twenty-one, or on his surviving the other legatees, it follows, upon the modern authorities, that the executors have a discretion under the circumstances stated, without

any previous sanction from the Court, to apply part of the principal for the benefit of the legatees, as they propose (*a*). But for their protection against any possible question hereafter, they wish the opinion and advice of the Court as to whether they should do so. I shall, therefore, make an order declaring that, in the opinion of the Court, it is fit and proper, under the circumstances alleged in the petition, that the executors do from time to time apply for the maintenance and education of these two legatees, so much of the principal money coming to them under the will as, added to the interest on their share, shall be necessary to make up the annual sum of $60. 1868. In re McDougall.

Counsel for the petitioners asked for their costs of the application out of the general estate, relying for this purpose on the rule as to the costs of proceedings which become necessary in order to obtain an authoritative declaration of the true construction of a will. But this is not a case of that kind. If it was, the petition would be contrary to the practice, and would have to be dismissed (*b*). I do not recollect that costs were asked out of the infant's share. If asked, the amount should be limited in the order. Judgment.

(*a*) Worthington v. McCraer, 23 B. 81; Prince v. Hine, 26 B. 636; Robison v. Killey, 30 B. 520. See also Barlow v. Grant, 1 Vern. 255; Bridge v. Brown, 2 Y. & C.C.C. 189.

(*b*) Re Owens, 1 Ch. Cham. 372; Cæsar's Will, 13 Gr. 210; and the English cases collected, 2 Daniell's Prac., 4th ed., page 1877, notes (*d*), (*f*), (*g*).

1868.

In re Cameron.

Tax titles—Quieting Titles' Act—Practice under.

The County Treasurer is not at liberty to become a purchaser at a tax sale.

Under the Act for Quieting Titles, where a contestant sets up a tax sale, which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper per centage to which the owner would have been liable if no sale had taken place.

Under the Act for Quieting Titles, it is proper to give a further opportunity to a contestant to supply any deficiency in the proof of his title, as well as to give such opportunity to the petitioner.

Where a petition was filed under the Act, and a person holding a Sheriff's deed put in an adverse claim, it was held, that the Referee could by consent report thereon before he was ready to decide on the petitioner's title, but should not do so without consent; that the petitioner must make out his title; and that until he has done so, he cannot, generally, demand an adjudication on an adverse claim.

Statement. This was a matter under the Act for Quieting Titles. The patent for the lot in question was dated the 22nd of October, 1840. The petitioner claimed the property under a recent deed from the patentee. His claim was contested under the Act by *Thomas Holden* and others, claiming under a prior deed from the patentee to one *Michael Galpin*, dated the 1st of August, 1846; and by *Francis McAnnany*, under a Sheriff's sale for taxes, which took place on the 9th of January, 1856. The Referee on the 11th of May, 1868, made a separate report as to the claim of Mr. *McAnnany*, finding his title to be invalid for several reasons set forth in the report; and against this report *McAnnany* appealed, on various grounds.

Mr. *Hodgins*, for the appeal.

Mr. *Wells* and Mr. *McMurrich*, for the respondents.

1868.

In re Cameron.

MOWAT, V. C.—Apart from the main questions, the appellant contended, on the argument, that, holding a *bonâ fide* claim, he should not have been dismissed with costs until the petitioner had proved his right to a certificate of title. I agree that, if a petitioner has not himself a good title, he has no right to insist upon an adjudication as to the *bonâ fide* claims of others. But if a contestant prefers that his claim should be first considered, and consents thereto, he cannot afterwards complain: and that, the referee informs me, is the reason he decided on the claim of *McAnnany* before he was ready to decide on the claim of the petitioner,—all parties, including the appellant, having thought that course the most convenient, and having concurred in its adoption. The Referee informs me, also, that it was with the consent of the appellant that he made a separate report as to his claim.

Judgment

On the merits, the principal question relates to the original validity of the tax sale. No defence to the petitioner's claim is suggested on the ground of laches (*a*), acquiesence, or of any other matter arising since the sale.

The first objection, mentioned in the report, to the sale, is, that the Sheriff's advertisement did not state whether the land was patented or not. The Statute under which the sale took place (*b*), contains the following enactment: "The Treasurer, in the warrant hereinbefore required to be issued, shall distinguish such lands as have been patented from those which are under a lease or license of occupation, and of which the fee still remains in the Crown; and the Sheriff, in the advertisements *hereinbefore* required, shall similarly distinguish the lands patented from those the fee of which is in the Crown," &c. The learned

(*a*) Scholfield v. Dickenson, 10 Gr. 226. (*b*) 16 Vic. ch. 182, sec. 56.

1868.

In re Cameron.

Counsel for the appellant pointed out, that the advertisements to which this section refers are advertisements thereinbefore mentioned; that no advertisements for the sale of land had previously been mentioned; and he contended, that the word "hereinbefore" could not be read "herein" or "hereinafter"; and that the Sheriff's omission was therefore immaterial. But I think it clear, that the clause is to be construed as referring to the advertisements required by the Act, though the reference is found in a subsequent section only. That part of the 56th clause which relates to the warrant, was held in *Hall* v. *Hill* (*a*),—first by the Court of Queen's Bench, and afterwards by all the Judges of the Court of Error and Appeal (*b*),—to be compulsory; and its language is identical with that which relates to the advertisement. It is impossible to say, that it may not be of service to the unfortunate owner of the land that the advertisement, as well as the warrant, shall distinguish between land patented and land unpatented; and the Legislature seems to have regarded both as standing in this respect on the same footing. The Court of Queen's Bench, in *Hall* v. *Hill*, was of that opinion, though the case did not turn upon it.

Judgment.

Another objection which seemed to the Referee fatal is, that *McAnnany* was Treasurer of the County at the time of his purchase, as he has been ever since; and on this point I agree with the Referee. Independently of statutory enactments, Sheriffs and their officers (*c*) have been held disqualified to become purchasers; and Treasurers stand on the same footing. *McAnnany*, as Treasurer, had in charge the collection of the arrears of taxes in respect of this lot (*d*); he kept the books required by law to shew from time to time the amount due; it was his duty to give information on the subject

(*a*) 22 U. C. Q. B. 578.
(*b*) 2 Er. & App. 569.
(*c*) Massingbred v. Montague, 9 Gr. 92.
(*d*) Secs. 50, 53.

1868.

In re Cameron.

to the owner or others interested (*a*); he had certain offices to perform in correcting any errors and omissions in the returns from time to time made by the collector (*b*); he had jurisdiction, on being satisfied that there was a distress on the land, to issue *ex parte* his warrant to the Sheriff to levy the arrears on the goods and chattels (*c*); and, whenever any part of the taxes had been due for five years, he had power to issue *ex parte* his warrant to sell the land (*d*). The learned counsel for the appellant likened these warrants to executions, observing that execution creditors or their agents can buy. But if the warrants are executions in this sense, the Treasurer, in issuing a warrant, performs in his own person the functions of the witnesses, the Court, and its officers, who all have a part to perform before a plaintiff at law gets his writ of execution: and the Treasurer performs them all without notice to the opposite party. I think it entirely opposed to the policy of the law, as recognized in this Court, that an officer having such important powers and duties with reference to the land before the sale, should be at liberty to become the purchaser at the sale. Nor did the appellant's official duties end with the sale, for it was to him that the redemption money was to be paid within a year afterwards, if the owner had become aware of the sale, and been able to raise the money required for saving his property (*e*). In a word, the duties imposed by the Legislature on the County Treasurer may conflict with what would be his interest as an intending or actual purchaser; and he cannot lawfully put himself in a position that would raise such a conflict.

Judgment.

It was contended on the appeal, that the evidence shewed the amount due to be less than was named in the warrant; but in the view I have taken of the other

(*a*) Sec. 51. (*b*) Sec. 52. (*c*) Sec. 54.
(*d*) Sec. 55. (*e*) Sec. 64.

1868.

In re Cameron.

point, it has not been necessary for me to consider the calculations and arguments on which this contention was based.

The Referee was of opinion, that sufficient evidence had not been given of any part of the amount having been in arrear for five years before the issuing of the warrant; or of the due publication of the advertisement in a local newspaper; or of its having been posted as the Statute required. If the contestant's evidence on these points did not quite satisfy the Referee, and the case had turned on them, it would, I think, have been proper, under the Act, before barring forever the appellant's claim, to allow additional evidence to be supplied, as is done in the case of a petitioner (*a*). But there was no object in putting the parties to this expense, if the title of the contestant was bad on other grounds.

Judgment.

It was contended on behalf of the appellant, that, by the rule of this Court, he had, at all events, a lien for the taxes that he had paid, or that were paid by means of his purchase money. The amount which appears to have been thus paid is small; but I think the appellant had a lien for it, with the proper per centage to which the owner would have been liable if no sale had taken place. I see no reason why a petitioner under the Act should not be required to submit to this lien, as well as a plaintiff in a suit.

It was further contended, that the appellant should not be ordered to pay the costs of the proceedings before the Referee, if the petitioner does not make out his title. This is reasonable. On the other hand, as the appellant failed in the contention he raised before the Referee, as well as before me, I think

(*a*) 29 Vic. ch. 25, sec. 11.

he cannot get against the petitioner the costs of his proceedings, whatever becomes of the petitioner's application for a certificate of title. 1868. In re Cameron.

My order on the motion will declare *McAnnany* entitled to the lien I have mentioned; but I shall give no further direction as to the same, and shall make no declaration or order as to the costs of the contest in regard to the appellant's claim either before the Referee or here—until the petitioner's claim is disposed of. Liberty to apply in Chambers. Except to this extent, I refuse the appellant's motion.

COSGROVE v. CORBETT.

Patent—Setting aside.

A bill by a squatter to set aside a patent, on the ground of fraud or error must allege the custom of the Crown in favor of squatters, and such other facts as may shew his interest in obtaining the recission of the patent.

Possession of Crown lands by a person who entered under an agreement with another, to clear and improve for the latter, on stipulated terms, is not such a possession as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest.

The bill in this cause alleged that, several years ago, the plaintiff settled on lots, Nos. 28 and 29, in the 13th concession of the Township of Brant; that he had cleared and improved, and remained in possession ever since; that after taking possession, the plaintiff applied to the Crown Lands Agent to buy these lots, when he learned they had been entered in the name of *Samuel Corbett* the younger (the defendant); that this was done by the defendant's father; that the defendant was at the time only ten years old; that there was then and Statement.

1868.

Cosgrove v. Corbett.

thenceforward a regulation of the Crown Lands Department against permitting the purchase of Crown Lands by minors under eighteen, or by persons who were not actual settlers; that the defendant's name had been entered, and the patent had subsequently been issued to him through fraudulent representations on the part of his father on these points, and in ignorance by the Department of the facts; and prayed a repeal of the patent.

There was another suit with similar allegations, in which another *Cosgrove* was plaintiff, and a brother of *Samuel Corbett* the younger, was defendant. That suit related to two neighbouring lots, the patent for which was obtained by the father, at the same time as the other.

It appeared that the plaintiffs had gone into possession under an agreement with the father of the defendants to clear and improve the respective lots as they had done, and for a term which was expired.

The fiat for the patents was granted by the Chancellor (then Commissioner of Crown Lands), and a motion was made in each case before the Chancellor for an injunction to restrain an action of ejectment, brought by the patentee, when the following judgment was pronounced:

Judgment.

VanKoughnet, C.—The Crown Lands Department have furnished me with the papers on which, as Commissioner, I directed the patent to *Corbett* to issue. On looking at these and my memorandum I am satisfied that I was not aware that the defendants in these two suits were, if they were, under the age (18, I think,) at which settlers were permitted to take up lands. I appear to have disposed of the matter as if there was but one *Corbett, Samuel* the elder, the father; and in consequence of this memorandum patents appear to have been issued

to the sons, as the claimants, who did not execute any leases to the *Cosgroves*. These appear to have been executed by the father, who had no claim to the lots. I think the department was misled, and acted in error in this respect, and particularly if the two defendants were under the proper age at the time.

1868.
Cosgrove v. Corbett.

Witnesses were subsequently examined, and the two causes came on for hearing before Vice-Chancellor *Mowat*.

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

Mr. *Moss*, for the defendant.

MOWAT, V. C.—The points urged before me at the hearing were of almost equal importance on the motions for the injunction, which his Lordship granted; and I cannot say the materials before me differ much from those which the Chancellor had then before him. Under these circumstances, and the subject being one with which his Lordship is more familiar than any other Judge can be, I have come to the conclusion that I should follow his decision on that occasion, reserving the independent consideration of the case for a re hearing or an appeal, should the defendants be advised to take the cases further. I have formed no opinion as to the view I would have taken in the absence of the Chancellor's decision on the motion, having found it impossible to come to any conclusion at present without taking that decision into account. The decrees will therefore be to set aside the patents with costs.

Judgment.

The two causes were thereupon re-heard before the Chancellor and Vice-Chancellors, at the instance of the defendants, when the same counsel appeared.

SPRAGGE, V. C.—The first grand difficulty in the way of the plaintiffs is that they do not shew either upon

1868.

Cosgrove v. Corbett.

the pleadings or upon the evidence that they have a *locus standi* in this Court. Nearly all of the bill is taken up with allegations of fraud committed by the defendants or their father upon the Crown. This, if proved, might be sufficient if the Crown were in the Court complaining of a fraud practised upon it; but the Crown makes no complaint, and a party coming into Court must shew not only that a wrong has been done, but that he is entitled to complain of that wrong. In all the cases in this Court that I have seen the plaintiff has made a case of equity, not against the Crown certainly, but a case for the equitable consideration of the Crown, founded upon the practice of the Crown to grant lands to persons having such claims upon its consideration as the plaintiff presents: or, he presents peculiar claims of his own. His allegations shew that he has claims, or is of a class whose position is recognized by the usage of the Crown, in the Crown Lands Department, as giving a claim for the granting to him of land, in preference to the person to whom the grant has been made. In the cases before us the allegations are very bald in this respect; they amount to little more than that the plaintiffs have made improvements upon the land.

Judgment.

The claims of what are called squatters amount in substance to this, that, it being the usage of the Crown, and having been its usage for many years in disposing of its land, to give a preference to those who have actually cleared and cultivated the land, in order to become settlers thereupon, (even though all this has been done without any authority from the Crown), the Crown would have granted it to them, but for want of information or from misinformation as to their position; and that in granting it to some one else, the Crown has acted under mistake.

No such case as this is made by the bill: nor does

the evidence establish any such case. The plaintiffs did not go upon the land as settlers, in order, or with a view to the acquiring of this land by purchase afterwards, nor indeed as settlers at all. But, certain persons having already acquired that position—whether rightfully or wrongfully is beside the present question—these plaintiffs went in under them, for an agreed time, for an agreed purpose, and to be compensated for what they did in a stipulated mode; all which was entirely inconsistent with their going upon the land as settlers. The very improvements which they made upon the land, and upon which they found their claim for the consideration of the Crown, were made on behalf of those under whom, and through whom, they obtained possession, and against whom they bring their suits.

1868.

Cosgrove v. Corbett.

This case is not unlike one of the aspects of the case of *Dougall* v. *Lang* (*a*); in this, that in making a claim upon the Government they made a fraudulent use of the possession obtained from Mr. *Corbett;* and of the fact of having made improvements, those improvements having been made under agreement with Mr. *Corbett*. If the Crown were to grant to the plaintiff it would be a proceeding adverse to some of the principles upon which *Dougall* v. *Lang* was decided. Consistently with those principles the plaintiff's possession and improvements could not possibly give him any claim upon the consideration of the Crown: and if such be the case, he can have no *locus standi* in this Court, for however wrong the conduct of *Corbett* may have been these plaintiffs have occupied no position which entitles them to complain of it. It is not necessary to enter into the question whether he has done wrong or not. The plaintiffs fail at the very threshhold of their case. To examine the conduct of *Corbett* would be to inquire into matters with which the plaintiffs have nothing to do.

Judgment.

(*a*) 5 Grant, 292.

1868.

Cosgrove v. Corbett.

I may add, though it is not necessary to the disposition of the cases before us, that the point to which I have adverted—the relative position of the *Cosgroves* and *Corbett*, was considered by the Commissioner of Crown Lands, and dealt with and disposed of by him adversely to the *Cosgroves*. The agreement between *Corbett* and the *Cosgroves* is in these terms: "The said *Samuel Corbett* bargains with and agrees to let the said *George Cosgrove* have the use of all the land he clears on lots Nos. 28 and 29 in 13th concession, in the township of Brant, for the term of eight years, provided he clears fifty acres on the said lots in the said term of eight years." This agreement was before the Commissioner, and the following letters to the Local Crown Lands Agent shew the view taken by the Commissioner.

Judgment.

The first dated 18th February, 1859, is as follows: "With your report of the 31st ultimo, you sent an agreement only between *Samuel Corbett* and *George Cosgrove*, relating to lots Nos. 28 and 29, in the 13th concession of Brant, and do not explain when and by what means *Robert Riddel* came into possession of lots, Nos. 17 and 18, and *Thomas Cosgrove* of Nos. 32 and 33. "As regards the first mentioned lots, I certainly do not think that the Department could, with propriety, encourage *George Cosgrove* to repudiate his agreement with Mr. *Corbett*."

The next letter is dated 12th November, in the same year. "With reference to your reports of the 31st of January and the 23rd of July, I have to inform you that it is decided to protect Messrs. *Corbett* in their possession of lots, Nos. 17, 18, 28, 29, 32 and 33, in the 13th concession of Brant; the parties in occupation and making improvements being evidently tenants of Messrs. *Corbett*."

The matter appears to have been finally disposed of

by the Commissioner's letter of 12th March, 1862. "I beg to state, with reference to your letter of the 27th ultimo, that I was satisfied early in the year 1859, that Messrs. *George* and *Thomas Cosgrove* were placed as tenants upon the lots, Nos. 28, 29, 32 and 33, in the 13th concession of the township of Brant, by Messrs. *Corbett*, the purchasers thereof, from the Crown, who have regularly paid the annual instalments; and, having now completed the purchases, I cannot refuse to grant them the patents, on their confirming the *Cosgroves* in possession, for the term agreed on."

1868.
Cosgrove v. Corbett.

It is quite evident from this that the patent was not issued under any error or mistake, and it is clear that it was not withheld from the *Cosgroves* from ignorance of their position. Their claim was adjudicated upon and denied; and, in my judgment, rightly.

I think the bills in these suits should be dismissed with costs. Judgment.

THE CHANCELLOR was satisfied, on further examination of the papers, that he must deliberately have decided in favor of the patentees, with full knowledge of all the facts, and that the patents should not be disturbed.

MOWAT, V. C.—Concurred.

1868.

BOGART v. PATTERSON.

Gold Lands—Getting in title—Dower.

The defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same; agreeing to give the plaintiff one-fourth of the land for his trouble on his paying one-fourth of the consideration; and to reconvey to the owner of such title another one-fourth part. The title having been bought up the defendants did reconvey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff.

Held, that the agreement was such as this Court would specifically perform and decreed the same accordingly with costs.

Where a woman's right of dower is released by an instrument separate from the conveyance by her husband, an examination and certificate is still necessary as before the late Statute.

Examination of witnesses and hearing at Belleville.

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

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

Judgment.

SPRAGGE, V. C.—The plaintiff claims from the defendants a one-undivided-fourth of lot No. 19 in the 6th concession of Madoc. The defendants had acquired some interest in the land; and were desirous of getting in the interest of one *Forward*, a resident in Louisiana, and a brother-in-law of the plaintiff. The plaintiff's case is that the defendants made him their agent for that purpose; and that the agreement between them was that the two *Pattersons* and *Irwin* should between them have three-eighths of the land, *Carman* one-eighth, the plaintiff one-fourth, and *Forward* one-fourth; each party to pay in proportion to his interest such sums as might be necessary for perfecting the title to the land.

A document embodying an agreement to this effect dated 27th March, 1867, was executed by the plaintiff

and delivered to the defendants. The defendants, besides objecting that this agreement is not binding upon them, say, that it was repudiated by *Forward*; and that *Forward* himself afterwards entered into another agreement with the defendants, whereby he agreed to accept one-fourth of the land in payment and satisfaction of his interest therein, and the defendants say that they paid to the plaintiff $100 for his trouble in the matter. The defendants also contend that the plaintiff was not their agent but the agent of *Forward*. I have no doubt however that he was their agent in negotiating, in the first instance at any rate: the answer almost admits it. It says, "the defendants believing that the plaintiff on account of such relationship" (the plaintiff and *Forward* being brothers-in-law) "would have more ready access to, and be more readily entrusted by the said *Forward*, with the management and disposal of such pretended title of the said *Forward*, the plaintiff thereupon applied to and obtained from the said *Forward*, authority to the plaintiff to act as agent for the said *Forward*, in disposing of such his pretended right to redeem the same," &c. The sentence is imperfect. It commences with the defendants as if it were a statement of something done by them, and then follows their motive, their belief that the plaintiff would be a fit person to negotiate with *Forward*, and then breaks off and proceeds to state what the plaintiff did. That and the evidence leave no room to doubt that the defendants employed the plaintiff as their agent; that the negotiation with *Forward* originated neither with the plaintiff nor with *Forward*, but with the defendants, who employed the plaintiff as their agent to negotiate with *Forward*.

1868.

Bogart v. Patterson.

Judgment.

Then as to the alleged repudiation by *Forward* of the agreement of March, 1867. It does not appear that the contents of that agreement were communicated to *Forward*, either by the plaintiff or by the defendants until February, 1868. *Forward* had in the meantime

1868.

Bogart v. Patterson.

come to Belleville, and while there put up at the house of the plaintiff. While at Belleville he caused a bill to be filed against these defendants claiming, as I understand from the papers, one-half of the land. It was not until after he had left that he learnt of the existence of the agreement of March, and then through his solicitor Mr. *Gilbert*, to whom it was brought by the defendants or some of them. The plaintiff who was examined at the hearing gives no explanation of this, but the very unsatisfactory one that he had entirely forgotten its existence.

Judgment.

Mr. *Gilbert* communicated the contents of this document to *Forward* as binding upon him, and there is no evidence of *Forward* himself treating it otherwise than as binding, or in any way repudiating it, or making new terms with the defendants. On the contrary, one of the defendants, *Reuben S. Patterson*, who was called by the plaintiff as a witness says, speaking of that agreement, "It was understood by all the defendants to be their contract with *Bogart* in regard to the land. A conveyance was afterwards made to us in consequence, I presume, of having this contract. I know of no other contract before the execution of the conveyance." This contract then, it appears, was delivered to and kept by the defendants and produced and set up by them as defining the rights of *Forward*, and was acquiesced in by *Forward*; and the defendants obtained a conveyance from *Forward*—through the plaintiff—in pursuance of it. The conveyance indeed is dated in April, 1867, and purports to be executed by *Forward* by his attorney the plaintiff. There is also a release of dower by *Forward's* wife to the defendants dated in May of the same year, whether executed at the time of their date may be doubtful, as the suit seems to have been instituted some time afterwards; and the agreement only, not the conveyance or release of dower, was produced by the defendants to Mr. *Gilbert*; and this is the more

doubtful from the circumstance of the release of dower being dated long before *Forward* was informed of the agreement in pursuance of which it was executed. This idea of a repudiation by *Forward* is further negatived by this that the defendants through one of their number, *Carman*, instructed their solicitor to draw the conveyances from *Forward* to themselves, and from themselves to *Forward* and the plaintiff; and that conveyance was as *Patterson* says in his evidence made "in consequence" of the agreement. In fact there was, as he says, no other contract.

The defendants next set up that the plaintiff cannot have specific performance of this agreement inasmuch as it is a contract for an interest in lands and is not signed by them, and is therefore void under the Statute of Frauds; but it appears to me that there was a clear part performance by the plaintiff. It was by his procurement that the defendants obtained a release of the interest of *Forward* and his wife, the defendants entirely adopted the agreement and acted upon it, and in pursuance of it one of them, *Carman*, instructed their solicitor, Mr. *Simpson*, to prepare conveyances from them to *Forward* and to the plaintiff each of one-fourth. *Simpson* did draw a conveyance from *Forward* to the defendants, and as he says another deed was to be drawn from them to *Forward* and the plaintiff for the interests they were to have. It is I think a proper conclusion that the conveyance from *Forward* to the defendants was executed by the plaintiff upon the faith of their conveying one-fourth to himself and one-fourth to *Forward*, and if so this case is brought within the principle of *Eby* v. *Clarke* (*a*). The conveyance both ways were to be what may be called one set of conveyancing, to carry out one object. It would be a fraud in the defendants after getting a conveyance to

Judgment.

(*a*) 11 Grant, 89; 13 Ib. 371.

1868.

Bogart v. Patterson.

themselves, not to make the conveyances which were to be made from themselves.

Another point made by the defendants is that Mrs. *Forward*, not the plaintiff, was to have one-fourth. This rests upon nothing more than a declaration of intention by the plaintiff to make a present to *Forward* or his wife of the fourth of the land which under the agreement he was to have. There is clearly nothing in this.

With respect to the $100 paid by defendant *Carman* to the plaintiff, no very satisfactory explanation in regard to it is given. The plaintiff's account of it, that it was to compensate him for his trouble in getting the release of dower may however possibly be correct for though a title from *Forward* would not be perfect unless his wife's dower were barred, still as the agreement says nothing about her dower the defendants might have been content to pay $100 in order to get it in. From the date of the payment, 10th April, 1867, as appears by the cheque, it is quite certain that the $100 was not a substitution for the fourth which under the agreement made only a fortnight before he was to receive. The land (which is in the township of Madoc) was, as I gather from the evidence, estimated as of considerable value, the time too was that of great excitement in regard to what are called gold lands in that township.

Judgment.

The defendants make also this objection, that the plaintiff was agent for *Forward*, and could not, as he did in the contract which he made, stipulate for an advantage to himself. I have already stated my opinion that he was agent for the defendants. He was no doubt trusted by *Forward*, and from the circumstance of *Forward* looking upon himself as bound by the plaintiff's agreement with the defendauts; he seems to have

considered him as acting for him in the matter. He was probably a negotiator between the parties chosen by the defendants, for the reason they state, or at least imply in their answer; and accepted by *Forward* without any particular inquiry or thought as to the character in which he acted. The fourth of the land to be given to the plaintiff was a mode of compensation, agreed to by the defendants to be given to their agent, for procuring a certain benefit to themselves; and I am clear that the defendants, after getting that benefit, cannot set up this objection. I think there is nothing in the objection. It is not at any rate open to the defendants to make it.

The case is shortly this: the defendants having some interest in certain land were willing to give two-fourths of it in order to get in an outstanding title; whether that title was worth that or worth anything is beside the point. They did get in that title through the plaintiff; for that they agreed to give him one-fourth and the owner of the title one-fourth. The latter they have conveyed, the other they refuse to convey upon various grounds, which appear to me to fail. If they can escape the conveyance of the one-fourth to the plaintiff they will have got in the outstanding title at a cost of just half what they were to give for it. I think both the facts and the equity of the case are against them.

Judgment.

The plaintiff should however obtain a perfect conveyance of Mrs. *Forward's* dower. It is released by an instrument separate from the conveyance by her husband. The law in that case requires an examination and certificate, according to the old practice. Upon the plaintiff procuring this and paying one-fourth of the expenses of getting in titles as provided by the agreement, he will be entitled to a conveyance of a one-undivided fourth of the land. The decree will be with costs.

1868.

WILSON v. PROUDFOOT.

Parties—Practice—Costs.

A plaintiff filed a bill to enforce a legal right only, and in the course of the proceeding it appeared that there were others, in regard to whom it was a question, proper to be discussed, whether they had not an equitable right in the subject of the suit; one of whom had not been made a party, and the other had failed in a legal defence which he had set up, but the point was not raised by the parties; the Court, under the circumstances, ordered the cause to stand over, without costs, in order to add parties; the party so failing in his legal defence to be at liberty to put in a supplemental answer if so advised.

Examination and hearing at Hamilton.

Mr. *E. Martin*, for the plaintiff.

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

Mr. *Proudfoot*, for the defendants *Proudfoot* and *Thomas*.

Judgment. SPRAGGE, V. C.—The plaintiffs file their bill as assignees in insolvency of one *Hamilton*, and as entitled in that capacity to certain trust moneys in the hands of the defendant *Proudfoot*; to which moneys *Hamilton* himself would have been entitled but for his insolvency. The defendants are the trustee, *Mr. Thomas*, Sheriff of the county of Wentworth, and *Knox*, *Aldwell*, *Sharp*, and *Secord*, creditors of one *Taylor*.

Knox is also a creditor of *Hamilton*, and, in that character, claims the trust moneys, which are claimed by the plaintiffs. He placed his execution against the goods of *Hamilton* and *Taylor*, in the hands of the Sheriff, on the 13th September, 1864; the assignment to *Proudfoot*, as trustee, was on the 23rd of the same month; and the writ of attachment in insolvency against

1868.

Wilson v. Proudfoot.

Hamilton was issued on the 1st of October. The assignment to *Proudfoot* was of the proceeds of the sale by the Sheriff of certain goods of *Taylor;* upon executions at the suit of a number of creditors, the majority of them being creditors of *Taylor* and *Hamilton*, *Knox* being one of that class; and the rest of them, creditors of *Taylor* alone, of which class *Hamilton* was one.

Upon the sale a large sum of money was paid in hand, and notes were given by the purchaser for the residue, payable to one *Williams*, and by him indorsed to the trustee.

Oswald, as an execution creditor of *Hamilton*, and *Knox* as an execution creditor of *Hamilton* and *Taylor*, seem to stand upon the same footing in respect of the moneys payable upon *Hamilton's* execution against *Taylor*. *Oswald* is not made a party, but the facts in relation to his case are set up in the answer of the Sheriff. The answer states that *Oswald* is dead, and that one *Fisher* is his personal representative, and suggests that he should be made a party.

Judgment.

It is urged that *Oswald* is not a necessary party inasmuch as he claims, it is said, adversely to the trust. I do not see that he does so. He has brought an action against the Sheriff for a false return, in not levying upon the notes taken upon the sale, so at least the Sheriff says in his answer; that is not adverse to the trust deed. *Hamilton* had a prior claim to other creditors upon the goods of *Taylor*, and had a like claim upon the proceeds of the sale; and *Oswald* and *Knox* and the plaintiffs also claim only derivatively through *Hamilton*.

The plaintiffs come into Court as representing *Hamilton's* estate in insolvency, and claiming that that estate

1868.

Wilson v. Proudfoot.

is a *cestui que trust* of the trust estate of *Taylor*, of which defendant *Proudfoot*, is a trustee, and they deny the right of *Oswald* and *Knox*, because their legal executions cannot reach the trust estate; and they ask the Court to direct that the trust estate be applied to pay them, to the exclusion of *Oswald* and *Knox*.

Judgment.

If it appears to me that *Oswald* and *Knox* may have an equitable claim upon this fund, though they have no legal claim, I ought not, if a payment to the plaintiff will interfere with their equitable claim, to direct such payment to be made; and I ought not to direct it if I think that it is a question upon which *Oswald* ought to be heard. If *Oswald* could file a bill for an equitable execution, he ought to have the opportunity of either taking that course or of setting up his claim in this suit. He might indeed already have filed his bill, and not having done so he has run the risk of having the trust funds disposed of behind his back. But being, as I am, judicially informed of the position of *Oswald*, I think I ought not to dispose of the fund without giving him an opportunity in this suit of contesting the plaintiff's interest in it, and of asserting his own; and *Knox* should also have an opportunity of setting up by supplemental answer, his equitable right to the fund. His present answer sets up a legal right only, based upon alleged facts which he fails to prove. In saying what I have said, I shall of course be understood as not prejudging the rights of the parties. But the plaintiff comes into Court upon an equitable right only; and in the course of the proceedings it appears that there are others, in regard to whom it is a question proper to be discussed, whether they also have not an equitable right in the same fund. One of these has not been made a party, and the other has set up a legal right only, in which he has failed. The question which I have suggested as to their right was not raised before me, nor did it occur to me at the hearing. The proper course will

be for the cause to stand over, in order to the personal representative of *Oswald* being added as a party, and with leave to *Knox* to put in a supplemental answer if so advised, without costs to any party. 1868. Wilson v. Proudfoot.

It is not necessary that the Sheriff should be retained as a party. He appears to have been made a defendant as a claimant upon the fund. In his answer he states that he makes no claim upon the fund, but he does not say that he has made no such claim. The bill may properly be dismissed as against him without costs.

It is unfortunate that I have been able to obtain the papers only very recently, so that one sitting has been lost, and the cause cannot now be carried down to be heard until next Spring. Judgment.

HEALEY v. DANIELS.

Mortgages—Favoured creditors—Costs.

Where a deed was absolute in form, and the alleged consideration was, in part, promissory notes theretofore held by the grantee against the grantor, the fact of those notes being left in the possession of the grantee, is not alone sufficient to prove that the deed was intended as a mortgage.

Where a *bona fide* transaction takes place between a failing debtor and a favored creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and to afford to the other creditors reasonable satisfaction as to the real character of the transaction; and, if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this Court by the other creditors whom it disappointed.

Examination and hearing at St. Catharines, at the Spring sittings, 1868.

1868.

Healey v. Daniels.

Mr. *Moss* and Mr. *McCarthy*, for the plaintiff.

Mr. *Eccles*, for the defendant.

MOWAT, V. C.—On the 20th of February, 1860, *William R. Havens*, by a deed absolute in terms, for the expressed consideration of $1,000, conveyed to the defendant the grantor's interest in a farm in the Township of Grantham. This farm had belonged to the grantor's father, and had been devised by him to his widow for life, with remainder to *William R. Havens* and his heirs. *William R. Havens* afterwards took proceedings to obtain the benefit of the Insolvent Act, and the present suit is brought by his assignee. The object of the suit is, to obtain a declaration that the deed of 1860 was intended as a mortgage only, and for liberty to redeem. After perusing the evidence several times, and after repeatedly considering the case, I have failed to see sufficient grounds for taking that view of the transaction.

Judgment.

I have said that the conveyance was in form absolute. The bill admits that there was some indebtedness by *Havens* to the defendant, and does not allege that the deed was void. The only evidence of the amount of the debt is by *Havens*—whom the plaintiff called as a witness; and by the defendant—whose deposition the plaintiff put in in evidence. *Havens* names $1,300 as about the amount, and his statement accords substantially with that of the defendant. My impression, from the defendant's deposition, the testimony of *Havens*, and the other evidence as to the existence and appearance of the notes, is, that the amount named was probably really due: but it would have been satisfactory, in a case of this kind, to have had further evidence on the point. Others must know something of the loan of the money, and of the existence of the notes from the time they are said to have been given, or, at all events,

1868.

Healey v. Daniels.

at a date anterior to *Havens's* embarrassments; and if the plaintiff desires further inquiry on the subject, I shall give a direction for the purpose, reserving further directions and costs. At present I assume that the sum named, or a considerable part of it, was really due. The mortgages on the property amounted to about $2,700; and the weight of the testimony as to the value of *Havens's* estate in the property, subject to his mother's life estate, fixes the amount at about $3,500, —considerably less than the defendant's debt and the mortgages come to. Assuming, therefore, as the fact appears to be, that the defendant paid the full value for the interest conveyed to him in the property, the rest of the evidence has to be considered in the light of this leading fact.

The testimony of the same two parties, whose depositions the plaintiff found himself obliged to put in, is the only express testimony which there is as to the intention of the deed in question; and I do not see how I can reject their statements on this point. The plaintiff undertakes to prove that the deed, which on its face is absolute, was really intended as a mortgage; and for this purpose he lays before me these statements (amongst other things), the transaction being so free from marks of fraud that it is not impeached on that ground. Now these two parties concur in swearing that the transaction was intended, not as a mortgage, but as an absolute purchase by the defendant, in discharge of the debt due him by *Havens*. The grantor's estate being in remainder only, there is no possession of the land that can interfere with this view of the transaction.

Judgment.

No doubt the defendant did not want the farm as an investment, or as a speculation, or for his own occupation. He only took it because *Havens* owed him money; offered him the lot in payment; and would probably never be able to pay him otherwise, as he was consider-

1868.

Healey v. Daniels.

ably in debt at the time. But all this is entirely consistent with the defendant's account of the transaction. He appears, also, to have offered the property soon afterwards to the creditors for what *Havens* had owed him; but they did not choose then to avail themselves of his offer. *Havens's* estate, however, has since become more valuable, by the wearing away of the life of the widow (who is now in her 88th year); and it is now an object to the creditors to redeem, and to the defendant to resist redemption.

What is the evidence on which the plaintiff relies against the sworn statements of *Havens* and the defendant, supported as these are by the form of the deed, and the other facts I have mentioned?

Judgment.

An expression, which appears in the notes made by the learned Judge in Insolvency of the defendant's deposition before him, is relied on; but, taking as well the testimony of the learned Judge as that of the other persons present, I am satisfied that the defendant did not then mean to give, and did not give, and it is clear that he was not understood by the learned Judge as giving, a different account of the transaction from what the defendant gives now.

Evidence of parol admissions is often given in cases of this kind; but there was no such evidence here; and the plaintiff's evidence is entirely circumstantial. The strongest of the facts relied on upon his behalf, is the retention of the promissory notes which the defendant held against *Havens* for the debt; and such a circumstance, in connexion with sufficient other evidence leading to the same conclusion, might go far towards proving that the deed was not taken in discharge of the debt. But here it is almost the only, and is certainly the chief, circumstance which has much appearance of being in conflict with the defendant's case; and if the contro-

1868.

Healey v. Daniels.

versy were between the defendant and *Havens* himself, the keeping of the notes would, under the circumstances, have little weight: should it have more as between the defendant and the assignee of *Havens*? It appears that the defendant lives in the State of New York; that *Havens's* wife was the defendant's adopted daughter; that the defendant was on a visit to *Havens* in this country, when the transaction was proposed and carried out; that he had not come over to obtain payment of the debt, or probably with any thought of such a thing; and that there was no reason why he should have the notes with him at the time. I think that, from the relation and confidence existing between the parties, it was extremely natural that the notes, when understood to be satisfied, should not again be thought of by either; and they do not appear to have been mentioned on either side until *Havens* was going through the Insolvent Court, when he asked for them and got them.

Judgment.

Evidence was given of another transaction which took place shortly afterwards, and which was relied on at the hearing as throwing light on the transaction as to the farm. I mean the purchase by the defendant of *Havens's* farm-stock and chattels at Sheriff's sale. This transaction is not mentioned in the bill, and the exact date of it does not appear on the evidence. It seems that the defendant gave the Sheriff his note for the purchase money ($800 or $900), and left the stock and other chattels in the possession of *Havens*; and that *Havens* paid, out of the proceeds of the stock and otherwise, about half the amount of the note, leaving the defendant to pay the other half, and delivering to the defendant some stock. These circumstances shew that there was some bargain, not expressed in writing, as to the chattels, but afford little aid in making out that the transaction relating to the land was intended at the time as a mortgage.

1868.

Healey v. Daniels.

Havens has also made some payments on a mortgage which is upon the property. He says that, after the transaction referred to, there was an agreement between him and the defendant, that he should work the farm, and use the stock, for the defendant's benefit, after providing for his mother's comfort (who had the sole right to the possession of the farm during her life); and that he was to be allowed $350 a year to live upon for his services; that it was out of the proceeds of the farm and stock, accordingly, that he made, on behalf of the defendant, the payments on the mortgage and note. I have given my best consideration to the observations made by the learned counsel on both sides upon these statements, and to all the circumstances relied on by the the plaintiff to prove the case made by the bill; but, on the whole, am of opinion that, whatever force they possess in the plaintiff's favour, it is insufficient to overcome the express testimony in favour of the defence, coupled with the fact that, according to the view which I have taken of the evidence as to the debt and the value of the property, the consideration for the conveyance exceeded the value of the property at the time.

Judgment.

I think there was quite enough in the case, however, to justify judicial inquiry; and, according to the rule in such cases, to relieve the plaintiff, though he has failed, from liability to pay the defendant's costs (*a*). Where a proper transaction takes place in good faith between an embarrassed and failing man on the one hand, and a favoured creditor on the other, it is not too much for this Court to hold it obligatory on the creditor that he shall employ all practicable means to free the transaction from undeserved suspicion, and afford to the other creditors reasonable satisfaction as to its real character;

(*a*) Thompson v. Webster, 4 DeG. & J. 600; Hale v. Saloon Omnibus Co. 4 Drew. 500; Dennistown v. Fife, 10 Gr. 374.

and to hold, that, if this duty is neglected, the favoured creditor should bear his own costs of afterwards establishing the transaction, if impeached in this Court by the parties whom his good fortune disappoints. Though, therefore, I dismiss the plaintiff's bill, yet, if the plaintiff waives any further inquiry as to the debt alleged to have been due to the defendant, I will give no costs.

1868. Healey v. Daniels

FORSYTH v. JOHNSON.

Vendor and purchaser—Compensation—Lapse of time.

Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:

Held, that the heir could sue the vendor in equity for compensation.

There was a lapse of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time:

Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit.

With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property.

Statement.

Hearing at the sittings at Hamilton, in the Spring of 1868.

Mr. *R. Martin*, for the plaintiff.

Mr. *Moss*, for the executors of *Randolph Johnson*,

1868. Forsyth v. Johnson.

cited *Brown* v. *Monk* (*a*), *Collyer* v. *Jenkins* (*b*), *Griffin* v. *Griffin* (*c*), *Kindall* v. *Becket* (*d*), *Sainsbury* v. *Jones* (*e*), *Wyse* v. *Jee* (*f*), *Johnson* v. *Wyatt* (*g*) *Cotton* v. *Wilde* (*h*), *Headley* v. *Emery* (*i*), *Eaden* v. *Firth* (*j*), *Davenport* v. *Ryland* (*k*), *Lewis* v. *Shaftesbury* (*l*).

The bill was heard *pro confesso* against *George Forsyth* and *Sarah Forsyth*.

MOWAT, V. C.—On the 24th of April, 1852, one *Randolph Johnson*, since deceased, contracted for the sale to the plaintiff's father, *William J. Forsyth*, of the south-easterly half of lot No. 18, in the fifth concession of Carradoc. *Johnson* gave the purchaser his bond conditioned for conveying the land on receiving $100 in two instalments, one on the 1st of November, then next, and the other on the 1st of April, 1853. *Forsyth's* note to *Johnson*, for $50, of the same date as the bond, and payable 1st April, 1853, is produced, and was paid after *Johnson's* death. I have no doubt this note was given for the second instalment of the purchase money, and that another note was given for the first instalment, but was delivered up and cancelled on the 23rd of May, 1853, when *Forsyth* paid *Johnson* $50 on the bond, and gave him a new note for 16s. 3d., which was, I presume, for interest. On the 2nd of October following, *Forsyth* died at the house of his father, the defendant *George Forsyth*, with whom he was living at the time. He left no will. The plaintiff, his only child, was then a mere infant, and is not of age yet. The widow on the 11th October, nine days after the intestate's death, executed, as his "legal representative," a paper which purported

Judgment.

(*a*) 10 Ves. 597.
(*b*) Young, 295.
(*c*) 1 Sch. & Lef. 352.
(*d*) 2 R. & M. 88.
(*e*) 2 Beav. 462.
(*f*) 3 Drew, 396.
(*g*) 9 Jur. N.S. 1333; S. C. 10; *ib.* 191.
(*h*) 32 Beav. 266.
(*i*) 1 L. R. Eq. 54.
(*j*) 1 H. & M. 575.
(*k*) Ib. 302.
(*l*) 2 L. R. Eq. 270.

1868.

Forsyth v. Johnson.

to be an assignment to the defendant *George Forsyth* of *Johnson's* bond. On the 14th of the same month, *Johnson* conveyed the property to *George Forsyth*, received payment from him of $53.25, the amount due to him of the purchase money, and a bond of indemnity for having made the conveyance. *George Forsyth* sold the property the same day to one *Francis Glover* for $500.

The property is proved to have been worth $200 at the time of the sale to *William J. Forsyth*, and that is the sum named in the conveyance to *George Forsyth*. I have no doubt $200 was the purchase money agreed upon, though there is no other express evidence of the fact, except by *George Forsyth*, whose evidence, I think, was inadmissible.

In March, 1855, the more valuable half of the lot was sold by *Glover* for $400, and the other half in 1861 for a like sum. It is sworn that the whole lot would now, without the improvements of the purchasers, be worth about $800. The purchasers have been in possession since they bought from *Glover*; and they purchased without notice of the plaintiff's equity. The bill is against the widow and administratrix of *William Forsyth*, *George Forsyth*, and the executors of *Johnson* (who is stated in the bill to have died on the 25th of December, 1865). The bill prays, that the defendants may be decreed to make compensation to the plaintiff for the loss of the property, and to pay the plaintiff's costs; and for general relief.

Judgment

On behalf of the defendants it was contended that the bill was for damages, and that such a bill would not lie. This objection, if good, might have been taken by demurrer. But I think the objection is not maintainable. It would be most unjust that a purchaser who had paid the greater part of his purchase money, and

1868.

Forsyth v. Johnson.

made, perhaps, valuable improvements, but had been guilty of some trifling default which deprived him of a right to sue at law but had no effect in equity, should have no remedy in case of the seller's subsequently selling the property to a purchaser without notice, and putting the money into his own pocket. If the wrongful sale in such a case is after the purchaser's death, and in collusion with the personal representative, it would be equally unjust that the heir, who would thereby lose perhaps a valuable property, should not be permitted to get compensation from the wrong-doer. The cases cited by the learned counsel for the defendant on this point do not support his contention. The contrary opinion was intimated in *Davis* v. *Snyder* (*a*), and is supported by the analogy of sales by express trustees (*b*), and many other cases. I have no doubt that this Court has the jurisdiction claimed for it by the plaintiff.

Judgment.

Reliance was placed on the lapse of time as a bar to relief; and it was submitted that it would have barred a suit for specific performance, and must bar a suit for compensation, if such a suit will lie at all. With reference to this part of the case, the defendants set up that, but for the arrangement made with the vendor, it would have been impossible for the plaintiff to have had any benefit from the contract of purchase; that her father left but little personal property, much less than sufficient to pay his other debts; that in fact, he left the plaintiff and her mother entirely destitute; that there was no source from which money was forthcoming to pay the balance due on the contract; that *George Forsyth* paid all he received for the property, and more, in discharging debts and demands against his son, the

(*a*) 1 Gr. 134.

(*b*) See cases, Lewin on Trusts, ch. 27, sec. 3, pl. 8, *et seq.*, p. 651, 5th edition.

purchaser; and, besides, maintained and supported the plaintiff and her mother for several years after *William Forsyth's* death. These statements, if proved, might have been very material in considering the effect to be given to the lapse of time: to prove them, the executors of *Johnson* produced *George Forsyth* as a witness. His competency was objected to, and I took his evidence subject to the objection; but I have already said that I think his evidence was inadmissible, and I must therefore disregard it. A party to the suit can only be examined as a witness by another "party adverse in point of interest" (*a*); and by reason of his bond of indemnity, *George Forsyth* has, legally, a greater interest in defeating the suit than *Johnson's* executors have.

1868.
Forsyth v. Johnson.

Then, is the mere lapse of time a bar to the plaintiff's claim, without the circumstances which *George Forsyth* stated in his evidence? The bill was filed on the 5th December, 1867. It is not alleged that the delay before *William Forsyth's* death was sufficient to bar his remedy here. Time was not by the contract of the essence of the bargain, and no notice was subsequently served to make it so; the purchaser had paid about three-fourths of the purchase money; it is not shewn or alleged that any demand was made to him after his last payment; and he died less than five months after making the last payment. Assuming, therefore, that up to the time of his death he had his remedy for specific performance, it is to be observed, that the conveyance to *Glover* took place in less than a fortnight afterwards; and that the delay thereafter was the natural result of *Johnson's* own conduct. He was in fact the cause of the delay. His arrangement was made with the very persons, as he knew, who would otherwise be the parties to look after the plaintiff's rights during her minority, and it prevented their

Judgment.

(*a*) General Orders, June, 1853; No. 22, sec. 1.

1868.

Forsyth v. Johnson.

doing so. I think *Johnson* or his executors cannot, in the absence of other circumstances, set up such a delay in bar to the plaintiff's suit. I ground this opinion on the large proportion that was paid of the purchase money; the short interval which elapsed between the purchaser's death and the wrongful conveyance of the property to another person,—in connexion with the other circumstances I have mentioned.

What, then, should be the measure of the compensation to be allowed to the plaintiff? No fraud on the part of *Johnson* is pretended; and he was not directly or indirectly to get any benefit from the transaction, beyond the immediate payment of the small sum which was justly due to him on account of the purchase money. He did not make the conveyance under an idea that *George Forsyth* was entitled to it—the bond of indemnity which he took shews that; but I have no reason to think that he considered what he was doing to be against the plaintiff's interest. What damages under such circumstances would the plaintiff be entitled to at law, if the remedy were at law? If, for example, *Johnson* had executed to the plaintiff's father a deed with the usual covenants, and had after her father's death been induced by her friends to make a new deed to a purchaser from them, and such new purchaser had by prior registration got priority over the plaintiff? Is the plaintiff, under the actual circumstances, entitled to more than she could recover in such an action? Did *Johnson* stand in the situation of a trustee for her to such an extent, and in such a sense, as subjects his estate to the full liability of an express trustee who wrongfully effects a sale which places trust property beyond the reach of his *cestuis que trust?* The proper measure of damages was not discussed at the hearing with reference to authority, or to analogous cases.

Judgment.

I think the plaintiff should not be in a better situation

than if *Johnson* had declined to convey to *George Forsyth*. If there were no funds applicable to the payment of what was due in respect of the purchase money, or if *William J. Forsyth's* estate got the benefit of what *Glover* paid, these considerations may be very material in determining the amount the plaintiff should now receive. If *William J. Forsyth* left debts, and no other means of meeting them, the property could have been made available by the creditors in this Court for payment of their debts, and the amount due to *Johnson* might also have been raised in that way; and the expense of the suit would have come out of the property. Without knowing, therefore, the condition of the estate at the time of *William J. Forsyth's* death, the proper amount of compensation cannot be stated. I shall refer it to the Master to inquire whether anything, and what is due and payable to the plaintiff in respect of the compensation to which she is entitled by reason of the plaintiff's having made an unauthorized conveyance of the property after *William J. Forsyth's* death, and having thereby prevented the plaintiff from obtaining the specific performance of the contract of the 24th of April, 1852; and in making the inquiry the Master is to ascertain what other property *William J. Forsyth* left, and what debts he owed, and whether the plaintiff or her father's estate got the benefit of the purchase money received by *George Forsyth*, or of any and what part thereof; and the Master is to report the facts to the Court, with any special circumstances. I shall reserve further directions and costs.

1868.

Forsyth v. Johnson.

Judgment.

George Forsyth's evidence may not be correct; but if it is correct, there would seem to be no great margin for the plaintiff, assuming that the law is as favourable to her as I have stated, though there may be something payable to her. I would strongly urge, therefore, that a compromise be come to, so as to save the expense of further proceedings.

1868.

ZIMMERMAN v. O'REILLY.

Constructive waste—Practice—Dismissal for want of parties.

A person who has an interest in remainder, subject to an estate for life, cannot maintain a bill in respect of merely permissive waste, by whomsoever committed.

Where the will had not been proved, and a bill was filed for (amongst other things) an account against persons said to be in possession of the assets, the answer took the objection that a personal representative was a necessary party: the suit failing, so far as it related to other objects, the Court at the hearing dismissed the bill with costs.

Hearing at the sittings in Hamilton in the Spring of of 1868.

Mr. *Dunne*, for the plaintiff.

Mr. *M. O'Reilly*, Q.C., for the defendants.

Judgment. MOWAT, V. C.—This is a bill by one of the legatees of *Mathias P. Zimmerman*, deceased, praying for an injunction to restrain two of the defendants, *Nicholas Zimmerman* and *Philip Zimmerman*, from interfering with the testator's real or personal property; for the appointment of a person to manage the estate for the benefit of the testator's widow, who is also a defendant and is entitled to the estate for her life, and for the benefit of the plaintiff and others, entitled in remainder; for an account of the rents and personal estate which have come to the hands of *Nicholas* and *Philip*; for the administration of the testator's estate; and for general relief.

The executors named in the will, *Miles O'Reilly* and *William Tremble*, are defendants to the bill, but never proved or acted, and the bill so states. By their answers they disclaim any interest as executors or

otherwise. The will gave them a power to sell the land, but no estate.

The bill alleges, that the defendants *Philip* and *Nicholas Zimmerman* have gone into possession of the testator's lands; that, through their bad management and improper cultivation, the property has become deteriorated in value; and that they have committed other waste. I held, at the hearing, that the plaintiff could not complain of permissive waste; that as the tenant for life was not responsible in this Court to the persons entitled in remainder for waste of that kind (*a*), it followed that no one else during her life was so responsible. In respect of such waste and of the rents, these two defendants may or may not be liable to the widow, but I know of no authority for holding them liable in equity to any one else during her life. The learned counsel for the plaintiff admitted that the evidence he had intended to offer was of permissive waste only; and in consequence of my ruling no evidence was given. Since the hearing, I have not found any reason for thinking I was wrong in the view which I took as to this point. Judgment.

There remains so much of the bill as relates to the testator's personal estate. But there can be no account of such estate in the absence of a personal representative (*b*). The objection was taken by the answer. The learned counsel for the plaintiff asked that he should be allowed to add a personal representative in the Master's office, which at the moment I was inclined to allow if consistent with the practice, but I reserved the point for consideration; and I am now of opinion that it will be more proper to dismiss the bill. Except for that part of the bill on which the plaintiff fails, a bill would be unnecessary. An administration decree

(*a*) Porvis v. Blagrave, Kay, 495; S. C. 4 D. M. & G. 448.
(*b*) Vide Rawlings v. Lambert, 1 J. & H. 458, 467.

1868.

Zimmerman v. O'Reilly.

might be taken without a bill. Quite possibly, when an administrator *cum testamento annexo* is appointed, he may render a suit unnecessary; and I think that, on the whole, the more proper course, and the course likely to involve the estate and the parties in least expense, will be to dismiss the bill; leaving the plaintiff to take any new proceedings that he may be advised, should proceedings be hereafter found necessary. The decree will, therefore, dismiss the bill with costs, but there will be only one set of costs to the two executors, as they need not have severed.

GRUMMET v. GRUMMET.

Will, construction of—Implied power of executors to sell.

It is not settled whether, under a will that went into effect before the Act 29 Victoria, chap. 28, sec. 15, a charge of debts on real estate by the will gave executors an implied power to sell.

Executors sold and conveyed land under a supposed power in the will. This construction of the will being disputed, they filed a bill to confirm the purchaser's title, the defendants being the purchaser and one of the devisees. But the Court *Held* that the question could not be decided on a record so constituted.

Hearing in Hamilton at the Spring sittings of 1868.

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

Mr. *Robertson*, for the defendant.

Judgment.

MOWAT, V.C.—This is a bill by the surviving executor, and the executrix (the widow) of *William Grummet*, deceased, who died in 1858, praying for an administration of their testator's estate, and that the title of the defendant *Christopher Recker* to certain land of the testator, which was sold and conveyed to *Recker*

by the executors and executrix, should be confirmed. So far as relates to the administration of the estate, no objection was suggested to the bill; but the real object of the suit appears to be the confirmation of *Recker's* title.

1868.
Grummet v. Grummet.

The material parts of the will bearing on the power of the executors to sell are these: "My will is, first, that my funeral charges and just debts shall be paid by my executors hereinafter named. The residue of my estate and property, which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will, and the administration of my estate, I give, devise, and dispose thereof as follows:" He then gives certain parcels of lands to his wife for her life, or during her widowhood. "All the rest, residue, and remainder" of his personal estate, he gives her a like interest in, with certain merely nominal exceptions. Then follow two provisoes, the terms of which may demand careful consideration, as bearing on the question argued.

Judgment.

The effect of the will is to charge the testator's lands with his debts; and the weight of authority in equity seems to be that such a charge gives to the executors an implied power of sale (*a*); though Lord *St. Leonards* does not concur in that view of the law (*b*). It has been controverted by others also (*c*), and is opposed to *Doe* v. *Hughes* in the Court of Exchequer (*d*). There

(*a*) Robinson v. Lowater, 17 Beav. 601; S.C. on Appeal, 5 D. McN. & G. 272; Wrigley v. Sikes, 21 Beav. 337; Sabin v. Heape, 27 Beav. 553; Cook v. Dawson, 29 Beav. 123; S. C. on Appeal, 3 DeG. F. & J. 127; Hodgkinson v. Quinn, 1 Johns. & H. 303; Greatham v. Cotton, 11 Jur. N.S. 848. See Colyer v. Finch, 5 H. L. 922.

(*b*) Sug. Powers, 8th ed. ch. 4, sec. 1. pl. 60; Sug. V. & P. 14th ed. ch. 18. sec. 2, p. 662, note.

(*c*) See the references in Vaizey on Lord St. Leonards' Acts, p. 49, *et seq.*

(*d*) 6 Exch. 223.

1868.

Grummet v. Grummet.

are expressions and directions in this will which appear to afford a stronger argument for the power of the executors to make a good title, than in the simple case of a charge of debts. It is the residue only after payment of debts that is devised; and then there are some remarkable expressions in the provisoes to which I have referred. All these matters require to be weighed. Had the will not gone into operation before the Act of 1865 for the Amendment of the Law of Property and Trusts, it would be clear, independently of these peculiarities in the will, that the executors had power to sell (*a*).

But only one of the children to whom the testator devised the property subject to his wife's estate, is a party to the suit—perhaps because he is the only devisee who is of age; and counsel on his behalf argued that the executors had no power to sell, making no objection to the ju isdiction of the Court to decide the question on this bill. I do not feel at liberty, however, to decide it, for the plaintiffs do not appear from the bill to have any interest in the question. They have sold and conveyed; and, so far as I see, it is nothing to them now, as executors or otherwise, except as a matter of right feeling, whether the title they gave is good or bad. It is impossible to decide the point on a record so constituted, especially as but one of the parties interested against the sale is a defendant. I doubt if there is any way to get the question decided at the present time except under the Act for Quieting Titles, as the purchaser took at all events an estate for the life of the widow.

Judgment.

I must dismiss the bill as against *Recker* without costs. As respects the other parties the usual administration decree may go, if any of the parties desire it, reserving further directions and costs.

(*a*) 29 Vic. ch. 28, sec. 15 (Canada); 22 & 23 Vic. ch. 35, sec. 16 (Imperial.)

1868.

BURN v. STRONG.

Partnership—Evidence—Gold-digging—Statute of Frauds.

A partnership was formed between three persons, A, B, and C, to dig for gold on the property of one Allan; two of them, A and B, were to do the work, and the third, C, to pay the expenses; all three were to share in the profits. The place so named was afterwards abandoned by mutual consent, and the two working partners, A and B, removed, at the instance of the third, C, to a lot in another township (Elzevir), where they resumed work, C paying expenses as before: *Held*, that in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally named.

The plaintiff had occasion to leave the work on the 2nd March, and did not return. He filed a bill to enforce his partnership rights on the 30th July: *Held*, that, as there was no stipulation respecting the time he was to work, and he was not requested to resume work, and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit.

C, in his own name, bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a Company by whom that lot was purchased: *Held*, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C. in this transaction.

There was no writing signed by C. acknowledging the agency and trust; but it was held that, A and B having entered and worked on the lot, the Statute of Frauds did not apply.

Hearing at Cobourg at the Spring sittings of 1868.

Mr. *Hector Cameron*, for the plaintiff.

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

Judgment.

MOWAT, V. C.—After the discovery of gold in the Township of Madoc and its neighbourhood, the plaintiff appears to have engaged in "prospecting" for gold locations, and to have afterwards joined one of the companies that were formed or projected for the business of gold mining. He was regarded as a desirable

1868.

Furn v. Strong.

partner in such an enterprise: and the defendant *Norman Strong*, being desirous of sharing in the golden harvest which so many were counting upon, induced the plaintiff to withdraw from the company with which the plaintiff was associated, and to enter into an agreement with *Strong* himself for a like object. One *Drape*, a mason or stonecutter, was also taken into the partnership. All three were residents of Port Hope. Their agreement was not in writing, but the principal terms of it are not matter of dispute. All admit, that the plaintiff and *Drape* were to be the working men of the adventure; that in working, *Drape* was to be subordinate to the plaintiff; that *Strong*, instead of working, was to pay all their expenses to the mine, and while working there (including their board); and also all expenses connected with the work; and that they were to share the profits equally. *Strong* alleges that there were two other terms to the contract;

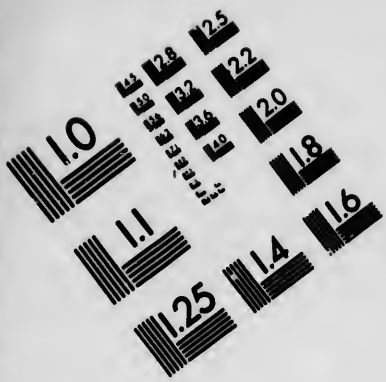
Judgment.

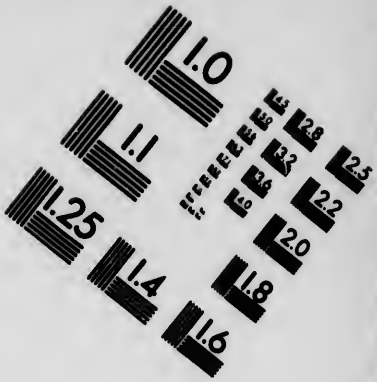
and that one was a condition that the two were to work without intermission until gold should be found in paying quantities; but no such stipulation was proved. The other particular insisted on is, that the agreement had reference only to a farm of one *Allan*, in Madoc, with whom, *Strong* says but has not proved, that he had an arrangement for liberty to dig and mine for gold and other minerals at his own expense, paying ten per cent of the produce to *Allan*. One witness, a man named *Spry*, was to have been a partner in the adventure, but withdrew in favour of *Drape;* and he swears he did not understand that the agreement was confined to *Allan's* property, though it was there they were to begin working. *Drape*, who has disclaimed any interest in the adventure, was called as a witness by the defendants, and is now in their employment and friendly to them. He swears he understood the bargain to apply, not to a single farm, but to any property owned by any one of the name of *Allan*. Assuming that the *Allan*

property was alone contemplated when the parties made their bargain, I think, for reasons I shall state presently, that what took place afterwards had the effect of making it just as applicable to the property they did in fact work upon as to the property at first in their view. 1868. Burn v. Strong.

Immediately after the agreement was made, the plaintiff and *Drape* proceeded to a lot in Madoc belonging to one *Allan*, *Strong* accompanying them from Belleville to Madoc Village, from which place they proceeded to the lot without *Strong*; and they went to work there. While so engaged, *Strong* made a bargain with the defendant *Robert Barry*, who supposed there was gold on his farm in Elzevir, six or eight miles from *Allan's*. *Strong* paid *Barry* $100 for liberty to dig on this lot, and on the 29th of January the following receipt for this sum was signed by both, to shew the agreement between them: "Received from *Norman Strong* the sum of $100, in consideration of a mineral right on the east half of lot No. 5, in the second concession of Elzevir. A line to be drawn over the mine; Mr. *Strong* to take one side of the mine, Mr. *Barry* the other, and to leave it to two practical men what Mr. *Strong's* half is worth." Judgment.

The bill alleges that this agreement was entered into by *Strong* on behalf of himself and his co-partners, the plaintiff and *Drape*. That this was *Strong's* intention at the time seems clear, for he immediately sent *Barry* to bring the plaintiff and *Drape* from *Allan's* lot to *Barry's*, that they might work there instead of continuing their work at *Allan's*. They came at once, and commenced working on the *Barry* lot on the 30th January, *Strong* paying their board, and all expenses attending the work, precisely as provided for by their original agreement, without proposing or suggesting any new agreement on the subject. He also on several occasions admitted to others, while the plaintiff was at





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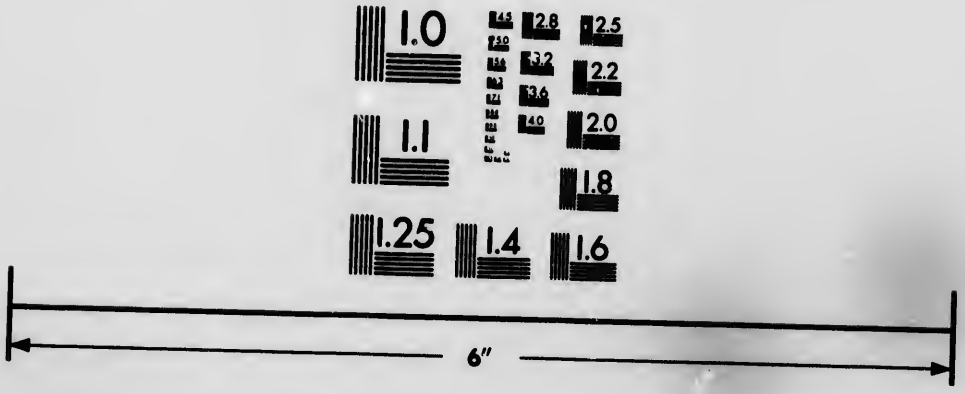

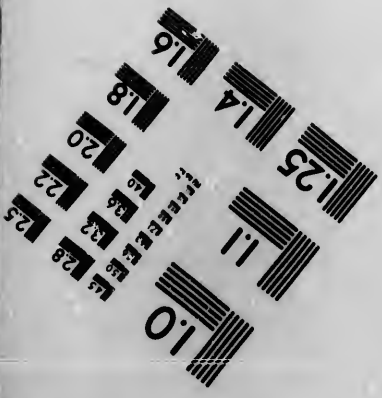

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1868.

Barn v. Strong.

work on the *Barry* lot, that the plaintiff had a partnership interest in it. Assuming that no other than the Allan lot was contemplated before they left Port Hope, the law, I apprehend, would under the circumstances, and in the absence of any express bargain, imply that they were working on the *Barry* property on the same terms as stipulated between them as to the *Allan* lot. This conclusion seems to me inevitable, and to be supported by the principle of the cases collected in *Taylor* on Evidence, sec. 155 (*a*), and *Lindley* on Partnership, pp. 804 to 807 (*b*), as well as in other authorities. If persons agree to carry on a particular business in one street, or one town, as partners, and they are found afterwards carrying on a precisely similar business, in a precisely similar way, in another street or town, without any new agreement as to terms, the right of each, *primâ facie*, to insist that the business is still a partnership, is too clear for argument. This view is independent of the evidence, which I entirely credit, that *Strong* expressly admitted such to be the relation between himself and the plaintiff in respect of the Barry mine.

Judgment.

That there was gold at the mine was ascertained about the middle of February or earlier; and on the 18th of February, *Strong* paid *Barry* a further sum of $375 "to apply on the mineral right of" the lot. On the 2nd of March the plaintiff went away to attend, he said, to a Chancery suit he had, but he left his tools, and part of his clothes. On the 8th of March, an accident occurred at the mine, which disabled Drape, and for a time put an end to working. *Barry* (against whom I dismissed the bill at the close of the plaintiff's case) stated in his evidence for the defendants that he, some time afterwards,

(*a*) P. 195, 5th ed. (*b*) 2nd ed. Bk. 3, ch. 9, sec. 1.

told *Strong* that he wanted him to resume the work, and that, if it was not resumed, he would revoke the license. *Barry* did not state the date of this conversation. *Strong*, in his answer, stated that he received the intimation in the latter part of April; and that immediately afterwards he saw the plaintiff, told him of the notice, and asked him to resume work; that the plaintiff refused; and that on several subsequent occasions, he, *Strong*, repeated the request, and the plaintiff repeated his refusal. These statements were not proved. Work seems to have been resumed about a fortnight after *Barry's* conversation with *Strong*, but there is no evidence of the amount which was expended before the filing of the bill. The defendants rely on the plaintiff's alleged refusal to resume work, and the lapse of time (three months) between the period of such alleged refusal and the filing of the bill (30th July), as constituting a bar to the plaintiff's suit. But as the defendants have not as yet proved any notice to the plaintiff of what *Barry* had said; or any request to the plaintiff to resume the work; or any intimation to the plaintiff, or any knowledge by him, that it was *Strong's* wish that the plaintiff should resume work, the defendants having not made out even a *primâ facie* case against the plaintiff on the ground of delay (*a*).

1868.

Burn v. Strong.

Judgment.

On the other hand, the plaintiff alleges that it was at the request of *Strong* himself that he did not resume work, in consequence of negotiations for the sale of the property; and this statement is equally unproved by any direct evidence, though it receives some support from the admission, which *Strong* proceeds to make in his answer, that he had no means of carrying on the the work, his funds at this time being about exhausted by the two payments to *Barry*, which amounted to

(*a*) See Lindley on Partnership, Bk. 3, ch. 10, sec. 3, *et seq.*

1868.

Burn v. Strong.

$475, and by the other expenses which he had already incurred about the mine, amounting, he says, to nearly $300, but of the amount of which he has given no evidence. In consequence of this want of funds, he says that he offered the defendant *Vindin* an equal share with himself in the adventure, provided *Vindin* would furnish the necessary funds to carry on the work; that *Vindin* accepted the proposal, and advanced the money required; and that the work was thereupon resumed *Strong* does not pretend that he made any advances out of funds of his own after this time, or that he was damnified by the plaintiff's not having resumed the work. The case has very much the complexion of a plan, on the part of *Strong*, to deprive the plaintiff of any share of the profits of the adventure, when it was found to be a profitable one; for he does not pretend that he gave notice to the plaintiff of his subsequent dealings with the property, or informed him, until shortly before the filing of the bill, that he meant to claim for himself whatever benefit he could make out of the property.

Judgment.

In May, *Strong* made a conditional bargain with *Barry* for the purchase of the property, and the formation of a company to pay for it, and to work the mine. This bargain was not carried out. In July, another company was formed for the same purpose; and *Barry*, in consideration of $5,000, conveyed to trustees for this new company, 115 acres of his farm, including the place where the plaintiff had been working, with certain privileges, conditions, and reservations applicable to the whole property. *Barry* until after this time had no notice of the plaintiff's claim.

In addition to the grounds of defence to which I have already adverted, the defendants set up the Statute of Frauds. In *Forster* v. *Hale* (*a*), and *Dale* v. *Hamilton*

(*a*) 5 Ves. 809.

1868.

Burn v. Strong.

before Vice Chancellor Sir *James Wigram* (*a*), it was held that an agreement for a partnership in land was not within the Statute. The authority of *Dale* v. *Hamilton* before the Vice-Chancellor, is somewhat shaken by what occurred on the appeal to the Lord Chancellor (*b*), and by the subsequent case of *Caddick* v. *Skidmore* (*c*); but here the agreement was acted upon by the plaintiff's entering and working on the land—acts which take the case of even an ordinary purchaser out of the Statute, on the ground of part performance. So, new leases obtained by a partner of premises theretofore occupied by the partnership, have been held to inure for the benefit of the partnership without any writing acknowledging a trust, though the partners obtaining the renewal had previously given to the other partners notice of dissolution, and of their intention to renew the old lease for their own benefit (*d*).

Judgment.

I have said that the bill was filed on the 30th of July. The defendants other than *Drape* were notified of it by letter of the 3rd of August; and *Strong* filed his answer on the 25th September. Two other defendants filed their answers on the 28th September. *Drape* says, that in that month the plaintiff told him the thing was not worth looking after unless gold was found, and that he did not mean to serve the papers on *Drape* until then; and *Drape* says he was not served until a month afterwards. Considering that this conversation occurred so long after the suit, I am clear that, under the circum-

(*a*) 5 H. 369. See also Essex v. Essex, 20 Beav. 449; and head note Cowell v. Watts, 2 H. & Tw. 224.

(*b*) 2 Ph. 266.

(*c*) 2 DeG. & J. 52. See also Smith v. Matthews, 3 DeG. F. & J., at 151.

(*d*) Clegg v. Edmondson, 8 DeG. McN. & G. 787. See Featherstone v. Fenwick, 17 Ves. 298; Clegg v. Fishwick, 1 McN. & G. 294; Clements v. Hall, 1 DeG. & J. 173, Darby v. Darby, 3 Drew. 504, 505; Bank of England Case, 3 DeG. F. & J. 645.

1868.

Barn v. Strong.

stances of the case, it affords no ground for refusing the plaintiff relief, even assuming the conversation to be accurately stated.

It was further argued, that the agreement was not sufficiently detailed or definite to found a suit upon. The agreement is certainly not so indefinite as to be entirely void (*a*). But, no doubt, a contract, though valid at law, may be in some respects so vague that the Court may have no reasonable assurance that the decree asked for would be in accordance with the true intent and meaning of the parties; and it may therefore be necessary to refuse a specific performance. This objection has much greater weight where the contract is wholly *in fieri*, than where it has been partly executed (*b*). In the present case, the contract has been acted upon, and a profit has been made in the adventure to which it relates; and I am clear that there is no such question with respect to the meaning of the parties as entitles *Strong* to exclude the plaintiff from sharing this profit. In fact, there is no question as to its meaning, which has prejudiced the defendant, or can prejudice him, in the events which have occurred.

Judgment.

I think, therefore, the plaintiff should have a decree declaring him entitled to one-third of all profit, benefit, and advantage, made by *Strong* from or in respect of the adventure, including the land bought from *Barry*, and including the $1000 which *Barry* paid *Strong* for effecting the sale. It is true that the sale by *Barry* was of the whole mine; and not of half only, which was all

(*a*) See Fry on Specific Performance, ch. 4, p. 102.

(*b*) Price v. The Corporation of Penzance, 4 Hare, 506; Storer v. The Great Western Railway Co. 2 Y & C.C.C. 48; Sanderson v. The Cockermouth and Workington Railway Co. 11 Beav. 497; Parker v. Taswell, 4 Jur. N. S. 183; Wilson v. West Hartlepool Railway and Harbour Co. 11 Jur. N.S. 124.

1868.

Burn v. Strong.

Strong had bargained with him for on the 29th of January. But the $1000 was clearly an item in the profits of the general adventure; and was paid in respect of the half bargained for in January, as well as the remaining half; and the transaction is so mixed up that it is impossible to divide the transaction into two. Viewing the three as partners, it follows inevitably that this benefit cannot be appropriated by *Strong* for himself (*a*). I presume that the transaction was known to the other defendants at the time, and acquiesced in. At all events they make no claim to share this sum.

The defendant *Wallace* appears to be a purchaser of his ten shares for value without notice of the plaintiff's claim, and the bill must therefore be dismissed as against him. *Vindin* has not proved payment of any consideration for the shares he holds. *Brogdin*, in his examination, admits, that before his purchase he had notice of the plaintiff's claim; but one of his shares he bought from *Wallace*. *George Strong* does not allege that he paid anything for his share. Therefore, *Vindin* holds his four shares, *Brogdin* one of his shares, and *George Strong* his share, subject to the plaintiff's rights; but as the plaintiff is only entitled to one-third of ten shares, and as *Norman Strong* still retains four shares, it will not be necessary to disturb the interests of those to whom he has assigned shares, and it will be sufficient to declare the plaintiff entitled to three shares and one-third of a share, part of the four shares still held by *Norman Strong*,—subject to the payment of what, if anything, may be found due to *Strong* by the plaintiff on taking the accounts between them.

Judgment.

I think that, by a fair and reasonable construction of

(*a*) See cases collected, 1 Lindley on Partnership, book 3, chap. 2, sec. 2, p. 586, *et seq.*, 2nd ed.; and Tyrrell v. Bank of London, 11 H. L. 26.

1868.

Burn v. Strong

the agreement, *Strong* should be allowed any payments he may have made to or for hired men before the 2nd of March, as well as the sums he paid *Barry*. His other expenses up to that date go against the plaintiff's work. Any disbursements by *Strong* after the 2nd of March he should get credit for, and any sums he received he should be charged with, as well as with the plaintiff's costs of the suit. An account is to be taken on this footing, and all just allowances are to be made to each party. The balance is to be paid to the plaintiff by *Strong*, or by the plaintiff to *Strong*, according to the result. In this account the other shareholders do not appear to be interested.

The bill will be dismissed against *Barry* with costs, which the plaintiff must pay. *Drape* has disclaimed, but, as he was properly made a defendant, the bill can only be dismissed against him without costs. I allow one set of costs to the defendants *Vindin*, *Wallace*, and *Brogdin*, which the defendant *Norman Strong* will pay. No costs to or against the defendant *George Strong*.

Judgment.

1868.

CAMERON v. BARNHART.

Tax sales—Fraud—Relief against forfeiture.

In case of a tax sale, if the owner, instead of paying the redemption money to the County Treasurer for the Sheriff's vendee, pays it to the latter personally and he accepts it, the payment is, in equity, as effectual to save the property as payment to the Treasurer would have been.

So, if the Sheriff's vendee verbally agrees to accept payment personally at a distance from the County Town, in lieu of its being made to the Treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the Treasurer; refuse to receive it himself, when it is too late to pay the Treasurer, and insist on holding the land as forfeited.

Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the Court, holding that the presumption in a case of doubt must be in favor of fair dealing and not of forfeiture, gave the owner relief.

Hearing at the Sittings at Barrie, in the Spring of 1868.

Mr. *Strong*, Q.C., and Mr. *Hector Cameron*, for the plaintiff.

Mr. *Moss* and Mr. *Leith*, for the defendants.

MOWAT, V. C.—The plaintiff represents himself as being owner in fee of lot No. 42, in the 12th concession of the Township of Nottawasaga. This lot was sold for taxes, on the 10th April, 1865, in two parcels: the east-half to *Charles McDonell*, as agent for *Noah Barnhart*, then residing in Streetsville, in the County of Peel, for $148; and the west-half to *Peter Ferguson*, for $139.32. The lot was worth about $12 an acre, and *Barnhart* sold his half, on the 22nd November, 1867, to *John Currie*, for $1300, cash. The plaintiff Judgment.

1868. Cameron v. Barnhart.

has filed a bill against *Barnhart* and *Currie*, in respect of the east-half of the lot; and another bill against *Ferguson*, in respect of the west-half. Both causes were heard before me at Barrie, on the 13th May, and a considerable part of the evidence is common to both. The plaintiff alleges that both sales were illegal; and also, that he had an agreement with the purchasers that they would accept the redemption money at Collingwood, instead of its being paid to the County Treasurer, and would execute assignments of their interests under the sales; that, in reliance on these agreements, he did not pay the redemption money in either case to the Treasurer within the time limited for that purpose; that *Barnhart* and *Ferguson* respectively, on the last day for redeeming, refused to accept the money; and that, when the plaintiff's agent learned that they would not accept the money as agreed, it was too late to make the payment that day at Barrie, where the County Treasurer has his office. The bills pray, that the sales may be declared illegal and void; or that the agreements may be enforced; for an account; and other relief.

Judgment.

The defendants respectively deny the agreements, and the illegality of the sales. It was admitted at the hearing, that the defendant *Currie* had notice of the plaintiff's claim before he made his purchase, and took from *Barnhart* a bond of indemnity against it. No question was raised as to laches by the plaintiff since the defendants got their deeds from the Sheriff.

I shall not enter into the question of the illegality of the sales, or of the plaintiff's right to relief in equity on that ground, as I have come to the conclusion that, assuming the plaintiff to be the owner subject to the tax sales, he is entitled to a decree in both cases on the other ground on which the bills proceed. The plaintiff's counsel contended, that the evidence established a combina-

tion between *McDonell* and the defendant *Ferguson* to entrap the plaintiff's agent into refraining from paying the redemption money to the Treasurer until too late; and there is certainly some ground for suspecting that there was such a combination, but not enough, I think, to sustain the contention that the combination has been established.

1868.

Cameron v. Barnhart.

However, if the facts are in other respects as the plaintiff contends, I think they constitute a good ground in equity for relief in both suits. Beyond all doubt, payment to a purchaser, if accepted, would be as effectual to save the property in this Court as payment to the Treasurer. Whether, in the absence of any agreement, a tender to the purchaser, instead of the Treasurer, would do, it is not necessary to consider; though it is to be observed, that payment to the Treasurer is provided for in case of the owner, rather than for the convenience of the purchaser who is entitled to the money. But, however that may be, I am of opinion, that, if a purchaser agrees to accept payment personally, and the owner is thereby induced to refrain from sending the redemption money to the Treasurer, this consent cannot be withdrawn to the owner's prejudice. To attempt to do so is to attempt to commit a wrong and a fraud, which I think there is abundant authority to shew that equity will not in such a case permit (*a*).

Judgment.

In making the alleged agreements the plaintiff, who is a resident of Toronto, acted through Mr. *Peter*

(*a*) Bath and Montague's case, 3 Ch. Ca. 67, 68; Thynn v. Thynn, 1 Vern. 296; Chamberlaine v. Chamberlaine, 2 Freem. 34; Reech v. Kennigate, 1 Ambl. 67; Young v. Peachy, 2 Atk 258; Drakeford v. Wilkes, 3 Atk. 539; Dixon v. Olmius, 1 Cox. 414; Dundas v. Dutens, 1 Ves. Junr. 199; Barrow v. Greenough, 3 Ves. 154; Stickland v. Aldridge, 9 Ves. 519; Mestaer v. Gillespie, 11 Ves. 638; 14 Ves. 290; Chamberlain v. Agar, 2 V. & B. 261; Middleton v. Middleton, 1 J. & W. 96; Podmore v. Gunning, 7 Sim. 644; Kerr on Injunctions, 40–42.

1868.

Cameron v. Barnhart.

Ferguson, formerly Reeve of Collingwood, and who is a relative of the defendant *Ferguson*. Mr. *Peter Ferguson's* correspondence appears to have been with Mr. *John Cameron*, who formerly owned the lot, and from whom the plaintiff held a conveyance in consideration of five shillings; but that Mr. *Ferguson* was the plaintiff's agent in the matter in question, was assumed on both sides at the hearing.

Now, in regard to the defendant *Ferguson*, the proof is clear, that on or before the 6th April, he agreed with this agent to accept the redemption money himself, and to execute an assignment of his interest; that the plaintiff's agent then sent to Toronto for and obtained the money in the form of a Bank cheque marked good; that repeatedly afterwards the defendant renewed his promise to accept the money and execute the assignment; that on various pretexts he delayed actually doing so, but did not intimate any change of intention until the last train had left Collingwood for Barrie on the last day that the Treasurer could receive the redemption money; that he then refused to receive the money except through the Sheriff, meaning, I presume, the Treasurer; that both went down next morning to Barrie, and there the defendant refused to receive the money at all, and said he would have the land. No justification of the defendant's conduct is attempted; and the only possible explanation of it is, that, whether in combination with *McDonell* or not, his object had been to delude the plaintiff's agent with the expectation that the defendant himself would accept the money, until it should be too late to pay the Treasurer; and to avail himself of the advantage which the over-confidence placed in his word by his relative (the plaintiff's agent) might give him. I have no doubt of the right to relief against the forfeiture, as respects the half-lot bought by this defendant.

Judgment.

In the case of the other half of the lot, the agreement on which the plaintiff relies, was not with *Barnhart*, the purchaser or nominal purchaser, personally, but was with his agent *Charles McDonell*, through whom this purchase had been made. *McDonell's* authority to agree to payment being made to *Barnhart* personally, instead of its being made to the Treasurer for him, is disputed; and *McDonell*, in his evidence, states that *Barnhart* had given him "no authority that he is aware of to deal with the lot." That means he had no express and specific authority that he is aware of on this particular point; but that he had at this time authority as agent for *Barnhart* in matters of much greater importance than this, is admitted. Whatever authority he had was verbal, and not written. *Barnhart* was living at Streetsville, in the County of Peel, but owned mills at Collingwood, and carried on business there. This business had for nearly a year been entirely managed by *McDonell*, *Barnhart* visiting Collingwood about once a week only. He had no other agent than *McDonell* either at Collingwood, or in the Township of Nottawasaga within which the land in question lies. I have already said that *McDonell* had been his agent in the matter of the purchase of the lot. Indeed, *Barnhart* does not seem to have known anything of the lot himself; he gave general authority to *McDonell* to make purchases for him at the tax sale, not limiting him as to the lots he should buy, the price he should pay, or otherwise; and *McDonell*, under this authority, bought for him the lot in question. The purchase money was not paid through *McDonell*; but *Barnhart* gave *McDonell* the Sheriff's certificate on the 10th April, 1866, to get the deed; it was in *McDonell's* presence that he saw the plaintiff's attorney when the attorney came on the 10th to pay the redemption money; it was *McDonell* who, on the morning of the 11th, went down to Barrie with the certificate to get the deed from the Sheriff; and it was he who got the deed for *Barnhart* accord-

1868.

Cameron v. Barnhart.

Judgment.

1868.

Cameron v. Barnhart.

ingly. To the extent of all these particulars, *McDonell* was, confessedly, *Barnhart's* duly authorized agent; and they shew that he had *Barnhart's* entire confidence. I may add, that it was to *McDonell* that *Currie* applied to buy the property; that most, if not all, of *Currie's* conversations on the subject preparatory to the purchase were with *McDonell;* that it was through *McDonell Currie* received *Barnhart's* offer as to terms; and that *McDonell* was present when at length the bargain was closed at Collingwood between *Barnhart* and *Currie*.

In view of all these facts, it is to be remembered, that evidence of express authority to consent to the redemption money being paid to *Barnhart* instead of to the Treasurer for him, was unnecessary (*a*); and I think the admitted facts which I have mentioned are more than sufficient to warrant the inference by a Court or jury, that the arrangement in question was not beyond the cope of *McDonell's* authority, and to shew that under the circumstances *Barnhart* is bound by it (*b*). It is impossible to doubt that the authority would never have been questioned or doubted, but for the hope that by disputing it the plaintiff's property might be held to be forfeited.

Judgment.

Then, was it a promise or agreement by *McDonell* that occasioned the omission to pay the redemption money to the Treasurer on the 10th? *McDonell* admits, that *Ferguson* (the plaintiff's agent) applied to him on

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(*a*) Story on Agency, sec. 84, &c.

(*b*) Vide Torrance v. Hayes, 3 U. C. C. P. 278; DeBlaquiere v. Becker, 8 Ib. 167; McGuire v. Shaw, 15 Ib. 310; Waddel v. Gildersleeve, 16 Ib. 565; Brady v. Western Insurance Company, 17 Ib. 597; Gilpin v. The Royal Canadian Bank, 26 U. C. Q. B. 445; Butler v. The Earl of Portarlington, 1 D. & War. 20; Wing v. Harvey, 5 DeG. McN. & G. 265; Pole v. Leask, 28 Beav. 562; Scholefield v. Templer, Johns 155; S. C. 4 DeG. & J. 433; Eyre v. Burmiston, 10 H. L. 90; Smith v. McGuire, 3 H. & N. 554; Udell v. Atherton, 7 Ib. 171.

the subject; and that he replied that he thought *Barnhart* would accept the money—would accept the cheque. He says, that he did not say he was sure, but that he does not know what *Ferguson* understood. He admits, that *Ferguson* came to him several times about the matter before the 10th, and that he never intimated to *Ferguson* any doubt *Barnhart* would take the money.

1868.
Cameron v. Barnhart.

Mr. *Ferguson* swears to more distinct statements than Mr. *McDonell* acknowledges or recolle[illegible]; and I see no sufficient reason for accepting *McDonell's* version where it does not correspond with *Ferguson's*. The object of *McDonell's* evidence is, in effect, to shew that, by *Ferguson's* over-confidence in *McDonell's* expressed opinion as to what on this little point *Barnhart* would do, and in *Barnhart's* fairness, the plaintiff's property has been forfeited to *Barnhart* for a fraction of its value, after the money had, with the knowledge of all parties, been furnished for the redemption of the lot; while, on the other hand, if *Ferguson's* evidence states correctly all that is material of the conversations between them, this piece of sharp practice fails of being accomplished. No Court or jury, in a case of any doubt, can presume in favor of forfeiture rather than fair dealing; and I could only adopt *McDonell's* version of the facts if I were very sure that it was more accurate than *Ferguson's*; and that I cannot say. Mr. *Ferguson* states as follows:—"I was aware that the east-half of the lot in question had been bought in Mr. *Barnhart's* name for taxes. I was informed that Mr. *McDonell* had bought it for him, and I therefore communicated with Mr. *McDonell* about it before the time for redeeming was out. * * Mr. *McDonell*, in answer to my inquiry, said he knew perfectly well Mr. *Barnhart* would take the money, and be glad of it: that he had found out the land was stony. This was on the 4th or 5th of April. I communicated Mr. *McDonell's* answer to Mr. *Cameron* at once."

Judgment.

1868. Cameron v. Barnhart.

This he did by telegram and letter, both dated 6th April. The telegram was to this effect: "All arranged. Send money and documents per afternoon train. Fail not." His letter, so far as relates to this half-lot, was as follows: "I have seen *Charles McDonell*, the agent of *N. Barnhart*. He told me he would sign a quitclaim deed or any other instrument or document, on payment of the amount, and ten per cent. additional. Mr. *Barnhart* will be home to night. However, I am sure he will do it. I have sent you a telegram requesting you to forward the money and documents per this afternoon's mail, which I trust you will do." The witness proceeds with his evidence as follows: "I received from him the produced cheque E. and an assignment. I received them on the evening of the 7th April; and on the following morning (8th) I saw Mr. *McDonell* and shewed him the cheque and assignment. He said it was all right, that Mr. *Barnhart* would accept the cheque, and execute the assignment when he came up, and that he expected him by the next train. * * On the morning of the 10th, I saw Mr. *McDonell* again. I asked him if it would be all right, and said, if not, I would send the cheque to the Treasurer to redeem. I knew that was the proper course. I had had such transactions previously. He said it would be all safe—it would be all right. *Barnhart* had not then come." The witness then went into the country with the other defendant to complete the transaction with him, and returned to Collingwood in the afternoon, just as the train was about to leave; and he then learned that Mr. *Barnhart* had refused the money. By this time it was too late to send the money to Barrie; and the telegraph wires were down, so that he could not telegraph. On the following day, at Barrie, *McDonell* refused the money, and insisted on having the land. On cross-examination Mr. *Ferguson* was shewn to be inaccurate in some of his dates, but I have no doubt that he stated correctly the substance of what had occurred; and,

Judgment.

1868.

Cameron v. Barnhart.

assuming *McDonell* to have been authorized to speak for *Barnhart* on such a point,—which I have no difficulty in presuming,—Mr. *Ferguson's* evidence shews that enough was said to prevent *Barnhart* from afterwards insisting that payment should be made through the Treasurer, on pain of the property being forfeited.

McDonell indeed says, that when the cheque and assignment were presented to him (9th April) he expressly refused to sign any paper guaranteeing that *Barnhart* would carry out what was proposed, and stated he had no authority to do so, but still intimating no doubt that *Barnhart* would carry it out. Mr. *Robertson*, a witness for the defendant *Barnhart*, and who is solicitor for the defendant *Ferguson*, corroborates *McDonell's* statement in part. *Ferguson* swears he does not recollect that *McDonell* ever told him "he had no authority to take the money, or to bind Mr. *Barnhart* in the matter, or to that effect." But if *McDonell* really had authority to bind *Barnhart* to accept the money personally, instead of through the Treasurer; had promised that *Barnhart* would so receive it; and had led to *Ferguson's* acting on that promise and getting the money transmitted to him, I do not think that any such subsequent conversation as *McDonell* mentions to have taken place on the day before the money had by law to be paid, entitled *Barnhart* to refuse the money on that day, and to insist in equity on a forfeiture because the money was not paid to the Treasurer in Barrie. I have referred to the contradictory evidence as to this alleged profession of *McDonell's* on the 9th, of want of authority. If anything was said on the subject, I am satisfied from *Ferguson's* evidence that it was said in such a way as not to be understood by *Ferguson*, or not to make any impression on him if he heard it. It did not serve to warn him, and was evidently not intended to warn him, to send the money to Barrie, or to com-

Judgment.

1868.

Cameron v. Barnhart.

municate with his principal, with whom indeed there was not then time to correspond. I am satisfied that nothing was further from *McDonell's* wish or thought than to lead *Ferguson* to take either of those courses; and the result was, that *Ferguson* took neither, but waited unsuspiciously for *Barnhart's* arrival. I think *Barnhart* cannot in equity claim the benefit of the legal forfeiture which the conduct of his agent thus gave him the opportunity of bringing about.

I think the tender of the cheque to *Barnhart* was a sufficient tender, if any tender was required, no objection on that ground having been made by him (*a*). But I do not think any tender to either him or the defendant *Ferguson* was necessary. They both knew that the agent had received and was in possession of the cheques; and they both positively refused to accept the money. After that, a tender would have been a mere formality, which is seldom necessary to entitle a party to relief in equity (*b*).

Judgment.

The plaintiff's ownership of the lot, subject to the tax-sales, is not disputed in the answers; but neither is it admitted; and the plaintiff omitted at the hearing to produce and prove some of the deeds through which his title is derived. I think he should be at liberty to supply this defect in his proofs (*c*), in case the defendants do not waive the proof. If the mode of proof be not agreed upon, the matter may be spoken to in Chambers. No decree can be drawn up until the necessary evidence is given or waived.

(*a*) Jones v. Arthur, 8 Dowl. 442; Polgrass v. Oliver, 2 Cr. & J. 15; Richardson v. Jackson, 8 M. & W. 298; Reynolds v. Allan, 10 U. C. Q. B. 350.

(*b*) Biddulph v. St. John, 2 Sch. & Lef. 534; Wallis v. Glynn, 19 Ves. 381; Millington v. Fox. 3 M. & C. 352.

(*c*) 1 Dan. Pr. 4th ed. 793.

Subject to this evidence being supplied, the defendants must execute conveyances. The plaintiff is entitled to the costs of the one sui against *Barnhart*, and of the other against the defendant *Fe guson*, less in each case the redemption money and interest at six per cent. I shall give directions as to the costs of the supplementary proof when the proof is furnished.

1868.

Cameron v. Barnhart.

HOUCK v. TOWN OF WHITBY.

Purchase by municipal corporation.

The name of the seller or his agent must appear in a contract of purchase by a municipal corporation.

Where a municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken, it was held that the contract could not be enforced by the vendor against the corporation.

Hearing at Whitby, at the Spring sittings, 1868.

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

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

MOWAT, V. C.—This is a bill for payment of the purchase money of certain land, which the plaintiff alleges that he sold and conveyed to the corporation of the Town of Whitby for a market site. Judgment.

There is no doubt that a contract was deliberately entered into to the effect alleged by the plaintiff; that in August, 1867, it duly received the sanction of the ratepayers in the manner required by the Statute; that, in

1868.

Houck v. Town of Whitby.

pursuance of the contract, the plaintiff, on the 18th of November, 1867, in good faith, executed a conveyance, which was prepared by a Solicitor employed by the Council for this purpose; and that he left this conveyance with the Solicitor to be given up to the corporation on the purchase money being paid to certain incumbrancers on the property.

It seems that the ratepayers have, since August last, changed their minds in regard to the policy of the purchase, and do not wish to take the property. The plaintiff's bill was filed on the 27th of February, 1868, and the corporation resist the relief prayed. They allege, amongst other things, that the Solicitor had no authority under seal; that the authority he had, besides not being under seal, did not in terms authorize him to accept a conveyance, but only to prepare one; that the corporation had never become bound to the plaintiff, by any act under seal; and that they never accepted the

Judgment.

conveyance, or authorized any one to accept it for them. It appears also, that they never entered into possession of the property. The objection which seems to me to be fatal to the plaintiff's case is the want of the corporate seal.

It was not contended on behalf of the plaintiff, that, in a case of this kind, the rule which requires a corporation to contract under seal was not as obligatory on this Court as on a Court of Law. I have looked at the cases cited, some of which were cases at Law, and some were cases in Equity, and I am clear that a seal was necessary to bind the corporation. Now, while several important resolutions of the Council were put in evidence, the only document in evidence to which the corporate seal was attached, is the by-law which was submitted to the ratepayers. The insufficiency of this by-law to meet the requirements of the rule was urged on various grounds; but, apart from every other difficulty, the

1868.

Houck v. Town of Whitby.

circumstance that the name of the seller does not appear in the by-law is fatal. That the mention of the seller (or his agent) is essential to make out a contract has been clearly settled. I refer to *Champion* v. *Plummer* (*a*), *Warner* v. *Willington* (*b*), and *Williams* v. *Lake* (*c*).

Though, therefore, if the plaintiff, had contracted with a private individual, or with an unincorporated company, what occurred would have entitled the plaintiff to the relief which he prays; yet, as the defendants are a corporate body, I am obliged to hold that as against them the contract was not binding; and that the plaintiff's bill must be dismissed. It is not a case for costs (*d*).

THE ATTORNEY GENERAL v. THE TORONTO STREET RAILWAY COMPANY.

Street railway—Information—Parties.

An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the streets, &c, : it was *held*,

(1.) That the rails must not only be flush when laid, but must be kept flush.

(2.) That to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary.

(3.) That an information by the Attorney General to enforce the Statutory restrictions was proper; and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the Statute, the Attorney General was entitled to a decree for the removal of the rails as of a nuisance.—But,

(4.) That the municipal corporation was a necessary party to the information.

This case was brought on for the examination of Statement.

(*a*) 5 Esp. 240. (*b*) 3 Drew. 523. (*c*) 6 Jur. N.S. 45.

(*d*) The Leominster Canal and Navigation Co. v. The Shrewsbury and Hertford Railway Co. 3 K. & J. 674.

1868.

Attorney General v. Toronto Street R. W. Co.

witnesses and hearing at the last sitting of the Court in Toronto.

Mr. *Strong*, Q. C., Mr. *Crooks*, Q. C., Mr. *Blake*, Q. C., Mr. *McLennan*, and Mr. *Morgan*, appeared for the relators.

Mr. *Roaf*, Q. C., and Mr. *English*, for the defendants.

MOWAT V. C.—This is an information by the Attorney General, at the relation of certain residents of the City of Toronto, against the Toronto Street Railway Company, complaining that the company has not complied with its agreement with the corporation of the city, nor with the requirements of the Statute authorizing the construction of the railway (*a*); and praying an injunction against the continuance or use of the railway in its present condition, and for other relief

Judgment.

I think a suit against the company to enforce this agreement with the city corporation must be brought by the latter; but that the Attorney General has a right to insist that the statutory restrictions which bind both parties shall not be disregarded. (*b*)

By the 6th section of the Act, it was enacted, that "the rails of the railway shall be laid flush with the streets and highways, and the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways." I think the Attorney General, as

(*a*) 24 Vic. ch. 83.

(*b*) Attorney General v. Mid Kent Railway Company, Law Rep. 3 Ch. App. 100, and cases there referred to. Also, Spencer v. The London and Birmingham Railway Company, 1 Railw. 159; Attorney General v. The Great Northern Railway Company, 1 D. & S. 154; Attorney General v. The Metropolitan Board of Works, 1 H. & M. 298.

1868.

Attorney General v. Toronto Street R. W. Co.

representing the general public, is entitled to any equitable relief to which the violation of this enactment may give a right. Now the evidence shews, that in many places, the rails were not "laid flush with the streets," and did not "conform to the grades of the same," to the extent which was practicable, and which the Statute, according to any reasonable construction, must be held to have intended; that, from the way in which the work was done, the rails have from the first offered unnecessary "impediments to the ordinary traffic of the streets," and occasioned numerous accidents; that, though the road has been considerably improved of late, yet the original defects have been but partially removed; that, up to the time the evidence was given, there were portions of the road on which the rails were not flush with the street, and created unnecessary impediments to the ordinary traffic. I think that, not only should the rails have been laid properly in the first instance, but they should be kept, as far as practicable, in the state which the Statute describes. I think the language of the Act admits of this construction; and that if such a construction is admissible, no other can be adopted, for it was as important for the Legislature to provide for the subsequent condition of the road, as for its condition at the outset.

Judgment.

I am in favour of the information so far; but when I come to consider the relief which can be granted on the present record, I am unable to see my way to making any decree. What the relators really desire is, to have the road put into proper order; and in the *Attorney General* v. *The Weston Plank Road Company* (*a*), it was held by the three learned Judges who then presided in this Court, that they had no jurisdiction to compel the repair of a road; that the remedy was by indictment. (*b*). I think, however, that, though the Court cannot

(*a*) 4 Gr. 211.

(*b*) See also Paxton v. Newton 2 Sm. & Giff. 440.

1868.

Attorney General v. Toronto Street R. W. Co.

order the repair of the road, the Attorney General has a right to insist on the removal of the rails as of a nuisance, if he thinks the public interests demand their removal (*a*). In case the parties concerned should not choose by proper alterations and repairs, to comply with the requirements of the Statute and if the case had been ripe otherwise for such a decree, a reasonable time would probably be allowed for performing the work, if the parties desired, before the decree for the removal would be issued (*b*). But such a decree cannot be made without having the city corporation before the Court; rather than lose the railway, the corporation may prefer doing the work, if necessary, and looking to the company for re-imbursement. Besides, the company ascribes the unsatisfactory state of the road, in part, to the default of the city corporation; and by making the corporation a party to the suit, an opportunity will be afforded of contesting this question, if necessary. I think all I can do now is to order the cause to stand over, with liberty to amend by making the city corporation a defendant. I reserve the costs.

Judgment.

The only reason suggested why the city has not taken steps for compelling the due performance of the company's contract is, that the company was not known to have any available property out of which payment could have been enforced. If a suit had been brought with this result, I presume that in default of any other remedy the company would have to submit to the appointment of a Receiver by this Court, and that the revenue would then have been applied in the first place to putting and keeping the road in proper condition. I hope that some reasonable arrangement may now be

(*a*) See Attorney General v. Johnston 2 Wil. Ch. 104 105.

(*b*) Spencer v. The London and Birmingham Railway Co. 1 Rail. 172; Price v. The Corporation of Penzance, 4 Hare 510; The Attorney General v. The Proprietors of the Bradford Canal, L. Rep. 2 Eq. 83.

made that will render further litigation unnecessary, as the representatives of the company express a desire to do every thing in their power towards complying with the statute, and with their agreement.

1868.

Attorney General v. Toronto Street R.W. Co.

BROUSE v. CRAM.

Patent issued after decease of grantee—Costs—Demurrer.

A patent was issued in favor of a person, as the daughter of an U. E. Loyalist, who had died six months previously:
Held, that her heir could not file a bill to set aside a conveyance executed under a power of attorney from her, alleged to have been forged.

Where, instead of demurring to the bill, the defendant put in an answer, and went to an examination and hearing; the Court on dismissing the bill, gave the defendant costs only as upon a demurrer.

It is no part of the functions of this Court, to take evidence or find facts, upon which the officers of the Crown may act in the disposition of the rights of claimants to grants of Crown lands.

Examination of witnesses and hearing at Cornwall.

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

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

SPRAGGE, V. C.—This bill is filed by the heir-at-law of one *Nancy Brouse*. *Nancy Brouse* was the daughter of *John Parlow*, an U. E. Loyalist, and as such entitled, according to the usage of the Crown, to a grant of 200 acres of land. Judgment.

She went through the usual preliminary steps to prove her title, and in November, 1833, her petition, having been presented to the Lieutenant Governor, was

1868. referred to the proper officer for information, and on the 2nd of January, 1834, an order in Council was made, directing that she should receive a grant of 200 acres of land. On the 30th of July, in the following year, a patent issued purporting to grant Lot 23, first concession, Plympton, to *Nancy Brouse*, as the daughter of an U. E. Loyalist. *Nancy Brouse* was then dead, having died on the 1st day of January, in the previous year, one day before the making of the order in Council. The patent was, of course absolutely void. The bill alleges that one *Nicholas Brouse* forged two papers, one purporting to be a bond executed by *Nancy Brouse* and her husband for the conveyance to *Allan Napier MacNab*, of such land as might be located in the name of *Nancy Brouse*; and the other, a power of attorney to two persons named therein, to convey the same to *MacNab*. The defendants claim under *MacNab*.

Brouse v. Cram.

Judgment.

The difficulty in the plaintiff's way is, that his ancestor died, having yet but an inchoate title to a grant of land. This Court has jurisdiction to repeal patents issued through error or improvidence; but by this is obviously meant patents that unless repealed would have legal effect. To repeal that which is void, which is a patent only in name, would be simply absurd. The Statute also gives jurisdiction to the Court "to decree the issue of letters patent to rightful claimants." But it is clear, I think, that no claim as of right can be made by this plaintiff. Any claim that he can make must be to the grace and favor of the Crown, and that more emphatically than in the case of one who is a son or a daughter of an U. E. Loyalist.

The Statute 7 William IV., chapter 118, made provision for limiting the future issuing of free grants of land to certain classes; among them to "U. E. Loyalists and their children." The word "children," used in

this connection would not extend beyond the immediate sons and daughters of U. E. Loyalists. 1868.

Brouse v. Oram.

Statute 16 Victoria, chapter 159, section 3, provides that "any claim or claims to land, arising out of any Act hereby repealed, or out of and under the authority of any order in Council, or other regulation of the Government heretofore or now in force, shall be adjudged and determined by the Governor, by and with the advice of the Executive Council, or by the Commissioners of Crown Lands, in cases or classes of cases referred to his decision by the Governor in Council: provided always that hereafter no claim for land, not now actually located, shall be entertained, whether arising from Militia, United Empire Loyalist, or Military Rights;" and this provision is reiterated in the Consolidated Statutes of Canada, chapter 22, section 9.

It is manifest, from these provisions, that the heir of *Nancy Brouse* would have to make a special case for the grace and favor of the Crown—a case of exemption from general rules, by reason of particular circumstances, and that he cannot by any means be considered as a rigtful claimant whom this Court could declare to be entitled to a patent. Judgment.

The bill is placed also upon some other grounds. It is said that the bond and power of attorney are clouds upon the plaintiff's title. The plaintiff's title or claim is proper for the consideration and adjudication of the proper officers of her Majesty's Government, and if it is established and a patent should issue to him, the bond and power will be no cloud upon his title.

It is said further that the purpose, or one purpose of the bill, is to establish facts upon which the officers of the Crown may act, and that the witnesses may die. I do not think that it is any part of the functions of this

1868. Brouse v. Cram.

Court to take evidence or to find facts for such a purpose; and no reason is shewn why the evidence should not be produced, or should not have been produced, (for the bill was filed as long ago as September, 1866), before the proper officer.

I think the plaintiff fails to establish any case, and I do not see what course I can take other than to dismiss the bill. It is to be regretted that the bill was not demurred to. The argument of Counsel for the defendants, at the hearing, was indeed an argument as upon a demurrer *ore tenus*: for upon the issue of fact the weight of evidence was certainly with the plaintiff. I dismiss the bill with costs to the defendants as upon a demurrer.

In re Hunter.

Infants—Past maintenance.

In a proceeding under the 12 Victoria, chapter 72, the mother of the infants was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered; which was accordingly effected, the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order: the whole of such proceeds together with $5321 in addition, were expended in the support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The Court refused the application; notwithstanding that the Master reported the amount claimed was a proper sum to be allowed.

This was a petition to sell the remainder of the real estate belonging to the infants under the circumstances stated in the head note and judgment.

Mr. *Proudfoot*, in support of the application.

Judgment.

Spragge, V. C.—In March, 1853, an order was made, under which the mother of the infants has been appointed

1868.

In re Hunter.

their guardian. That order authorized the sale of several parcels of land, being, as appears by a report recently made, all the real estate to which the infants were entitled with the exception of a dwelling house and premises. It does not appear whether there was any personal estate. The proceeds of the sale were directed to be applied first, in payment of certain debts not secured by mortgage; next, in or towards payment of certain mortgages; and the balance was directed to be invested for the maintenance of the infants, and it was referred to the Master to fix a proper sum for maintenance.

The lands authorized to be sold have been sold, and the Master reports that the debts directed to be paid have been paid. The balance was never invested, but in some unexplained way got into the hands of the guardian. It amounted to $5773, including the rent of the house remaining unsold, and a sum of money allowed for maintenance of other infants in another matter, and the whole has been expended by the guardian—faithfully, as I have, no doubt, for the maintenance and education of the infants; but, still in a manner wholly unauthorized by the order. The reference to the Master to fix a proper sum to be allowed for maintenance does not appear to have been prosecuted. The guardian now claims to have expended $5321, beyond the moneys so received, in the maintenance and education of the infants, and the Master reports that this is a proper sum to be allowed to her, and it is asked that the dwelling-house, the only property remaining to the infants, may be sold for that purpose. Its value is not stated, and I am not informed whether it would probably bring more than sufficient to pay this claim of the guardian for past maintenance. The guardian is the widow, and the infants three daughters of the late Dr. *Hunter*, formerly a medical practitioner in Hamilton. The eldest is reported to be twenty years of age, the youngest sixteen. The second is married. The young ladies have been maintained and educated by their mother.

Judgment.

1868.

In re Hunter.

I have looked at the authorities to which I have been referred, and found, as I expected, no warrant for the granting of such an application as this. It would be unprofitable to go through the cases cited, they are so entirely unlike this. The effect of granting this application, (supposing the house to realize no more than sufficient to pay the sum named for arrears) would be to leave two young ladies of twenty and sixteen utterly destitute. The mother has, as I have no reason to doubt, done her best to bring up and educate her daughters well, and I have no doubt that she intends, if this money were to come to her hands, to expend it for their benefit as well as her own; but the order asked for, it would be very improvident to make. There was no investment before though expressly ordered by the Court, and there might be none now.

Judgment.

It may be well to sell this house. The interest of the proceeds of sale might be worth more than the rental; and upon a proper scheme, the Court might make an order which may assist, if it does no more, in the future support of the infants.

This application must be refused.

BROWN v. WOODHOUSE.

If a first mortgagee, with a power of sale, proceeds to a sale of, and sells the mortgage premises to a *puisne* incumbrancer, the purchaser thereby acquires an irredeemable interest, as against the mortgagor; and the effect would be the same notwithstanding such subsequent incumbrancer had been paid off, and had in his hands moneys of the mortgagor sufficient to pay off the first incumbrance, but which moneys were not specially intrusted to him for that purpose.

Examination of witnesses and hearing at Belleville.

Mr. *Hodgins*, for the plaintiffs.

Mr. *J. A. Boyd*, for the defendant *Woodhouse*.

1868.

Brown. v. Woodhouse.

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

SPRAGGE, V. C.—The plaintiffs file their bill as heirs and heiresses of their mother, *Elizabeth Emily Brown* deceased, formerly the wife of *John Wendall Brown*, one of the defendants. The other defendants are *Henry Woodhouse* and *William Gemmell*. *Woodhouse* alone answered the bill, and appeared at the hearing.

The plaintiffs' equity as stated in the bill is shortly this: that their mother was entitled to certain premises in or near the town of Belleville; that in March, 1861, she joined her husband in mortgaging these premises to *Gemmell;* that *Brown* the husband was indebted to other creditors; and that by collusion between him and *Gemmell*, the latter recovered a judgment for a much larger amount than was due to *Gemmell*, under which judgment, execution was issued, and the stock-in-trade and furniture of *Brown* were sold and bought in by *Gemmell*, whereby *Gemmell* was considerably overpaid what was due to him. The bill further states that prior to the mortgage to *Gemmell*, *Brown* and his wife had given a mortgage to one *Wensley* to secure a sum of £70; which mortgage contained a power of sale; that *Wensley* sold under the power, without, as the bill alleges, any notice to *Brown* or his wife; and that *Gemmell* became the purchaser; that at the time of the sale *Gemmell* had in his hands moneys and property belonging to *Brown* or to the plaintiffs more than sufficient to satisfy the *Wensley* mortgage.

Judgment.

The bill then puts this as a point of law, that in any event the purchase by *Gemmell* was in fact and law only the exercise of *Gemmell's* right to redeem, to protect his own security, and that the plaintiffs are, notwithstanding, entitled to redeem.

1865.

Brown v. Woodhouse.

The defence of *Woodhouse* is, that he purchased the premises in question from *Gemmell* for £400, *Gemmell* having purchased them at the sale under the *Wensley* mortgage for £110; and that he, *Woodhouse*, had no notice of the dealing between *Brown* and *Gemmell*, or of the other facts upon which the plaintiffs found their equity. The sale under the *Wensley* mortgage is impeached only on one ground, want of notice, and this ground is removed by proof of notice given in accordance with the power of sale. The legal point raised by the bill, becomes therefore a cardinal point in the case. At the argument indeed that point was hardly insisted upon, but the learned counsel for the plaintiffs relied upon the terms of the mortgage to *Gemmell* and upon the recitals contained therein, as evidencing a trust which precluded *Gemmell* from obtaining in himself a title by purchase or otherwise. I have looked carefully through the mortgage, and find nothing in it to place *Gemmell* upon a different footing in that respect from any ordinary mortgagee.

Judgment.

Upon the point of law: It seems to be now settled, that upon a purchase by a second mortgagee under a power of sale contained in a first mortgage, the second mortgagee acquires an irredeemable interest as against the mortgagor. This point was decided by the late learned Chancellor of this Court in *Watkins* v. *McKellar* (*a*). It came before the Master of the Rolls some years later in *Shaw* v. *Bunny* (*b*), and was decided in the same way. Lord *Romilly's* decision was appealed from, and was affirmed by the Lords Justices, though after some doubt and hesitation on the part of the Lord Justice *Turner* (*c*).

I ought however to direct an inquiry as to the dealings between *Brown* and *Gemmell* if the fact of a

(*a*) 7 Grant 584.
(*b*) 33 Bea. 494.
(*c*) 2 DeG. J. & S. 468.

second mortgagee having in his hands moneys of the mortgagor sufficient to pay off the first mortgage will make a difference in his position, *i.e.*, apart from the position of *Woodhouse* as a purchaser. 1868. Brown v. Woodhouse.

I do not see how it can make any difference. In the case put, he is no longer a mortgagee but a bare trustee to reconvey to the mortgagor. The mortgage is no longer a security, when that for which it was a security is paid off; and the purchaser could not be said to purchase in order to protect his security, when it had ceased to exist. But having, it is said, moneys in his hands sufficient to pay off the prior mortgage he is trustee of those moneys for the mortgagor; but he is trustee only to pay them to the mortgagor. Has he a right to apply them in any other way? Suppose moneys in the hands of one who had not held a second mortgage sufficient to pay off a mortgagee who was exercising a power of sale, and suppose such person to purchase, there could be no doubt of his right to hold it, simply because there was no trust to apply the moneys in the purchase of the mortgage premises: and if a person so circumstanced were to purchase, the mortgagor would be at liberty to repudiate the application of his moneys for that purpose; and could do so in the case of a satisfied *puisne* incumbrancer, as well as in the case of one who had held no incumbrance. Judgment.

The result then is: if the second mortgagee was not paid off when he purchased, he comes within the cases to which I have referred. If he was paid off, he was in effect a stranger purchasing, having indeed in his hands moneys of the mortgagor sufficient to pay off the *Wensley* mortgage; but neither, being under any obligation so to apply them, nor having authority so to apply them: there is therefore no ground for directing the inquiry asked for. *Woodhouse*, therefore, is not put to his defence of purchase for value without notice. He

1868.

Brown v. Woodhouse.

proves that he is a purchaser for value, and that is sufficient. The plaintiffs indeed have no *locus standi* in Court; for their position is only that of heirs of a mortgagor, and in that character entitled to redeem this land. The land itself is gone, past redemption, and the plaintiffs' bill must be dismissed, and it must be with costs.

BEATTIE v. MUTTON.

Mortgage—Registration—Release—Supplemental answer.

A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place.

Held, that the registration was sufficient under the Statute; but, that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority of an instrument which had been subsequently executed by the husband and wife, and duly registered.

The title acquired by a purchaser at Sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon.

A defendant neglected to set up a Sheriff's sale and deed (part of his chain of title), but evidence thereof was given, and the conveyance put in without objection, so that there was no surprise upon the plaintiff; the Court gave the defendant liberty to set them up by supplemental answer, if desired.

Statement.

Examination of witnesses and hearing at Cobourg.

Mr. *J. Hillyard Cameron*, Q. C., and Mr. *Tilt*, for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *W. Kerr*, for the defendant.

1868.

Beattie v. Mutton.

SPRAGGE, V. C.—The bill is by the plaintiff as mortgagee; it alleges a mortgage made by *James Perry* and *Emily Jane*, his wife, to the plaintiff, dated 8th October, 1849, to secure payment of £100; no part of which has, as the bill alleges, been paid. It is alleged shortly that the defendant is entitled to the equity of redemption.

The defendant sets up that he is owner of the lands stated by the plaintiffs to be comprised in his mortgage; and not bound to redeem. He deduces his title by documentary evidence, as follows:—

Patent from the Crown to *Willet Casey*.

Conveyance: *Willet Casey* to *Samuel Casey*, 14th Feb., 1846; not registered.

Conveyance: *Samuel Casey* to *James D. Goslee*, 2nd March, 1847; registered 20th April, 1851.

Conveyance: *James D. Goslee* to *Emily Jane Perry*, 28th January, 1848; registered 13th Nov., 1850.

Judgment.

Sheriff's deed upon *fi. fa.* against lands of *James Perry* to *John M. Grover*, purchaser, (*James Perry* being husband of the grantee, *Emily Jane Perry*, 23rd November, 1849; registered 8th April, 1850.

Release (by the word release): *James Perry*, and *Emily Jane Perry*, his wife, to *John M. Grover*, with certificate of examination of the wife, under the Statute, 21st September, 1850; registered 10th October, 1850.

Conveyance: *John M. Grover* to *Simon Nelson*, 30th September, 1854; registered 16th December, 1854.

Conveyance: *Simon Nelson* to *John T. Day*, 12th June, 1855; registered 13th June, 1855.

Conveyance: *John T. Day* to defendant, 20th January, 1858; registered 22nd January, 1858.

It is in evidence that *Grover* entered into possession shortly after his purchase at Sheriff's sale; and it is

1868.

Beattie v. Mutton.

admitted that possession has been in him and those claiming under him from that time to the present.

The plaintiff's mortgage was not, at the date of its execution as above given, effectual to pass the wife's estate, she not having been examined apart from her husband. This mortgage was registered 13th October, 1849. On the 1st of April, 1850, it was re-executed by the husband and wife; and the wife examined; and the deed made effectual to pass her estate. There was no re-registration of the mortgage.

The mortgage as first executed, on the 8th of October, 1849, was effectual as a mortgage of the husband's estate, and was so held in the case of *Moffatt* and *Grover* (*a.*) It was however subject to the *fi. fa.* against his lands; which it appears from the dates must have been advertised, and so seized by the Sheriff, before the execution of the mortgage. By the Sheriff's sale and conveyance to *Grover* the estate of the husband passed, and so the estate of the mortgagor became divested. The next thing in order was the re-execution of the mortgage whereby, as the plaintiff contends,—and it is not necessary for the purpose of this suit to question it,—the estate of the wife passed in mortgage to the plaintiff. The next in order was the release by *Perry* and wife to *Grover*, which is expressed to be, and is proved to be for a valuable consideration, and which was registered on the 10th of October, 1850, being the first registration after the registration of the first mortgage. *Primâ facie* then *Grover* became entitled to priority over the re-executed mortgage.

Judgment.

Against this the plaintiff contends that the examination of the wife upon the re-execution of the mortgage

(*a*) 4 C. P. U. C. 402.

1868.

Beattie v. Mutton.

relates back to its first execution; and if so, the plaintiff has priority both in date and registration; or failing that, that there was no effectual registration in October, 1849; and therefore, that the registry laws do not apply, and *Grover* gained no priority by the registration of his release. He contends also that nothing passed by the release. It will be convenient to consider the last point first. The release is a bare release and nothing more; and the plaintiff's contention is that there was no estate in *Grover* for a release to operate upon; and so that the release was ineffectual. I am not prepared to agree with defendant's counsel, that mere possession without title is sufficient for a release to operate upon: and the contrary was held by our Court of Queen's Bench, in *Acre* v. *Livingstone* (*b*). There was however in this case the estate which passed to *Grover* by the Sheriff's deed, and that was an estate which, I think it clear, was an estate upon which a release could operate, to enlarge it to the estate which was released. The effect, it appears to me, must be the same as if the husband had first conveyed effectually his estate in the land, and then husband and wife had joined in releasing theirs.

Judgment.

As to the other points, the examination of the wife upon the re-execution of the mortgage cannot date back to the first execution of the mortgage, unless under the Statute 22 Victoria, chapter 35; and that Statute cannot apply because it would validate the first mortgage, to the prejudice of the conveyance subsequently acquired by *Grover*, *i. e.*, the release.

The registration of the first mortgage was, in my opinion, a registration under the Statute. It was of a conveyance that did pass some estate. The words of the Statute under which it was made, 9 Victoria, chap-

(*b*) 26 U. C. Q. B., 231.

1868.

Beattie v. Mutton.

ter 34, are comprehensive enough to embrace it, all deeds, &c., of or concerning, and whereby any lands, &c., "may be in any wise affected in law or equity." All that is necessary to make the Statute apply is, that it was a good registration at the time. The Statute is made to apply "after any memorial is so registered." The estate of the grantor having become divested afterwards can in reason make no difference. And this appears to have been the opinion of the Court in *Moffatt* v. *Grover*.

There is some evidence of notice to *Grover* of the mortgage to the plaintiff; assuming the notice to have been sufficient, still there is no notice proved as against the subsequent purchasers, *Nelson*, *Day*, or the defendant; and the defendant, it is clear, is not affected by the notice to *Grover*. He sets up by his answer that he is a purchaser for value without notice.

Judgment.

The defendant has omitted to make the Sheriff's sale and the Sheriff's deed to *Grover* a part of his chain of title. He relies upon the conveyance from *Perry* and wife to *Grover*, and the *mesne* conveyances by which he obtained title; evidently overlooking the necessity of the release having some estate to operate upon. The evidence of the Sheriff's sale and conveyance was however given; and the Sheriff's deed was put in without objection; and as far as I could judge from the proceedings on the hearing and the course of the argument, the production of the Sheeiff's deed was no surprise upon the plaintiff; and indeed it could be no surprise upon the plaintiff, for it is one of the documents referred to in the defendant's affidavit on production, as in his possession and ready to be produced.

It may be doubted whether it is necessary for him now, after what took place at the hearing, in the evident absence of all surprise, to put the fact of the sale and

the Sheriff's deed as part of the defendant's case upon the record, *Smith* v. *Kay* (*a*). The defendant may however, if he desire it, set up the sale and Sheriff's deed by supplemental answer. If the plaintiff can shew any good reason why this should not be done, he may move to rescind my direction in this respect. 1868. Beattie v. Mutton.

The bill is dismissed with costs.

McDonald v. Reynolds.

Equity of redemption in leaseholds—Merger—Lease of rectory lands—Mortgage—Priority

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at Sheriff's sale under common law process and the purchaser paid off the prior mortgage:—

Held, that the purchaser being bound to protect the mortgagor against both the incumbrances was not at liberty to keep alive the prior mortgage as against the second mortgage.

In such a case, the purchaser, upon the expiration of the term, obtained a new lease from the Rector and created a mortgage on such new term.—

Held, that such new lease was a mere graft upon the original one, and as such, was subject to the mortgage which had been left outstanding; but as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority.

Whether an equity of redemption in a leasehold interest is saleable under common law process—*Quære.*

Examination of witnesses and hearing at Toronto sittings.

Mr. *Blake*, Q. C., and Mr. *D. M. McDonald*, for the plaintiff.

(*a*) 7 H. L. C. 758.

1868.

McDonald v. Reynolds.

Mr. *Strong*, Q. C., for the defendant *Reynolds*.

Mr. *Roaf*, Q. C., for the *Freehold Building Society*.

SPRAGGE, V. C.—The plaintiff claims as assignee of a second mortgage made by *Terence J. O'Neil*. The first mortgage was made by the same mortgagor to one *O'Beirne*, and is dated 28th December, 1857; the second mortgage, dated 26th September, 1859, was made to one *Laughlin*, by *Laughlin* assigned to *Wm. J. Macdonald*, and by him assigned to the plaintiff. The assignment to the plaintiff was for a very small consideration—$150,—the mortgage being for £520=$2080. The claim upon this mortgage was evidently considered a doubtful one: but nevertheless unless brought within the principle of *Prosser* v. *Edmunds* or cases of that, or a cognate class —which I think it is not—the plaintiff is in the same position as if he were the original mortgagee. The property mortgaged is a leasehold in the city of Toronto. In the mortgage to *Laughlin* it is described as part of the Church ground, described in the original patent as a square, lettered A, on the north side of King Street; and, after giving the position and dimensions, it is added, "and it is hereby expressly declared that the title of the said party hereto of the first part, of and in the above land and premises is a leasehold, and is in all respects subject to the provisoes, conditions, and covenants expressed and set out in a certain indenture bearing date the first day of January, 1841, and made between the Honourable and Right Rev. *John*, Lord Bishop of Toronto, of the first part, and the party hereto of the first part, of the second part."

Judgment.

O'Neil's equity of redemption was sold by the Sheriff in execution, whether against goods or lands does not appear. It is contended that an equity of redemption in leasehold property is not saleable at law under any writ; and, looking at the Statutes for the sale of the

1868.

McDonald v. Reynolds.

equity of redemption in real estate, and in goods and chattels respectively, it is by no means clear that an equity of redemption in leaseholds is so saleable. But the point is not taken by any of the answers put in. In the answer of defendant *Reynolds* to the amended bill she refers to the purchase at Sheriff's sale, declaring that she purchased thereat, and that the purchase was for herself, not for *O'Neil;* and that it was made with her own moneys. She does not in any of her answers repudiate the sale; and I apprehend that it was not open to her to do so. She took proceedings in this Court which she could have taken only if she were such purchaser. She was dealt with as purchaser, and as entitled in that character to the equity of redemption; and in that character paid off the prior mortgage, and took a conveyance. Having derived a benefit from the assumption of that character, which benefit she retains, she cannot get rid of the obligations incident to that character.

Judgment.

She contends now that she is entitled to keep alive the prior mortgage to *O'Beirne*, as against the second mortgagee. It was clearly the duty of the mortgagor as between himself and the second mortgagee to pay off the prior mortgage; and it was the duty of the purchaser of the equity of redemption as between herself and the mortgagor to protect him from both mortgages. I think it is not going too far to say that it was her duty to pay them off, so as to relieve him from liability —her duty, that is, to the mortgagor; it is not necessary to go so far as to say that it was her duty to the mortgagees to pay them off. The question whether a prior mortgage is to be held as merged or as kept alive is, as has been often said, a question of intention, and the intention to keep it alive will be presumed when it is the interest of the party to keep it alive. This, as a general rule. But the Court will never *presume* that a party intends a wrong. If she could only keep it alive,

1868.

McDonald v. Reynolds.

at the expense of a duty which she owed to the mortgagor, then no presumption to keep it alive can arise, and such I apprehend is her position here.

Upon the evidence there is no ground for the position taken by her answer that *Bacon* purchased from *O'Beirne;* and that she purchased from *Bacon.* In the character of purchaser at Sheriff's sale and as such entitled to redeem *O'Beirne*, she applied for and obtained an order, to open the final order for foreclosure. She says she afterwards advisedly abandoned that order, and put her dealing with *O'Beirne* into the shape of a purchase from him of the land. There is some conflict of evidence upon this point, but the circumstances shew that it was a mere paying off of mortgage money, whatever Miss *Reynolds* or her solicitor might choose to call it. There was no dealing with *O'Beirne* as for a purchase of land, but merely interviews with *O'Beirne's* solicitor, and those only for his receiving the mortgage debt, interest and costs. They could indeed have been for no other purpose, for the solicitor had no instructions other than as solicitor, and of course had no authority to sell; and the sum paid had no relation to the value of the land, but was a mere computation of debt, interest and costs due to a mortgagee. Further, the conveyance was made to *Bacon* simply because he advanced the money, and in order to secure him for his advance; and when he was repaid he conveyed to Miss *Reynolds.* That *Bacon* was not a purchaser, but stood only in the relation of a lender of money to Miss *Reynolds*, is apparent from the agreement drawn up between them, and indeed from the whole transaction, and from the account of it taken altogether, given in the evidence of Mr. *Crombie* solicitor to both of them.

Judgment.

It is apparent from the evidence of Mr. *Crombie* that he desired on behalf of Miss *Reynolds* to cut out the

1868.

McDonald v. Reynolds.

mortgage to *Laughlin*, and that he believed that he had accomplished it: but how? Not by keeping alive the prior mortgage to *O'Beirne*, but by placing her, either directly or mediately, through *Bacon* in the position of an original purchaser from *O'Beirne*, there was no idea of keeping alive *O'Beirne's* mortgage. According to this theory *O'Beirne* was no longer a mortgagee, but absolute owner, the mortgage was extinguished, had ceased to exist, and the effort to revive it and to reinstate the parties in their original position was abandoned. It is inconsistent with all this that the mortgage was kept alive for the benefit of Miss *Reynolds*, or that it was intended to be so, and the only question upon this branch of the case is that to which I have already addressed myself, viz., whether either *Bacon* or Miss *Reynolds* was an original purchaser from *O'Beirne*. I have already given my reasons for coming to the conclusion that she was not, and it is perfectly certain that he was not.

Judgment.

So far, I have treated Miss *Reynolds* as the purchaser at the Sheriff's sale, but I am by no means certain that it is not a proper conclusion from the evidence, that *O'Neil* the original mortgagor, was the real purchaser. In that event the plaintiff's case would be clear, for *O'Neil's* liabilities to his mortgagees, after such purchase, would be precisely the same as they were before. *O'Neil* is represented in this case by his assignee in insolvency, who is made a defendant.

Another position taken by Miss *Reynolds* is, that she is now an original lessee of the premises comprised in the lease to *O'Neil*, and in the mortgage made by *O'Neil*. The lease is of Rectory lands and the lease to *O'Neil* was made by the late Rector, who was also Bishop of Toronto, and was for twenty-one years from the 1st of January 1841 or 2, it is not certain which, nor is it material. It seems to have been taken by the parties to have expired

1868.

McDonald v. Reynolds.

pired on the 1st of January, 1862, and a lease for twenty-one years from that date was made by the present Rector to Miss *Reynolds* on the 29th of April, 1865. The conveyance from *Bacon* to her was, as stated by her answer, made on the same day. Mr. *Crombie* was solicitor for the Rector as well as for Miss *Reynolds* and Mr. *Bacon*, in all these transactions; and not only will notice be imputed to the Rector of Miss *Reynolds's* title, derived through the original lessee, but it is an inference of fact that Mr. *Crombie* did communicate to the Rector the position of Miss *Reynolds*, and her connection with the former lease, as grounds and reasons for making to her a new lease. We see her position under the old lease which was also, I conclude, known to the present Rector; and we see her obtaining a lease to commence from the assumed expiry of the old lease; she having also received rents from the tenants, not only up to the expiry of the old lease, but continuously thereafter as appears by the statement put in by Mr. *O'Neil*. Assuming that the present Rector was not bound by the covenants in relation to renewal contained in the old lease, still it appears to me that there is no room for reasonable doubt that the new lease was a graft upon the original one.

Judgment.

There is this further point in the case. A mortgage was made by Miss *Reynolds* to the Freehold Permanent Building and Savings Society. This mortgage is not among the papers. Its date is stated in the answer of the Building Society to be 16th June, 1865. I will assume it to have been made on that day. The question is, whether this mortgage or the mortgage to *Laughlin* is entitled to priority. The mortgage to Laughlin was registered on the 26th September, 1859; and it is contended for the plaintiff that under the clause of the Statute making registration notice, the Building Society had thereby notice of the mortgage to *Laughlin*. In considering this point it is proper to look at the law affecting this species of property. I take the law to be as

stated by his Lordship the Chancellor, in *Kirkpatrick* v. *Lyster* (*a*), that a Rector can make a lease of rectory lands for no longer term than twenty-one years, and that he cannot make such lease renewable so as to bind his successor. This being the state of the law, and this being known, as we may properly assume, to the Building Society, Miss *Reynolds* carries to them a lease from the present Rector to herself for twenty-one years, and asks for a loan. Supposing them to be affected with notice of the mortgage to *Laughlin*, they would see by the description to which I have already adverted that it was a mortgage of a term created by a lease dated 1st January, 1841, from a former Rector to *O'Neil*. They would be ignorant of the circumstances disclosed in this suit which shew this lease to Miss *Reynolds*, to be a graft upon the lease to O'Neil, they would see a mortgage for a term which by the law must have expired; and they would have a right to assume that the former Rector did not exceed his powers in granting a lease; and they would only see a lease from another Rector to another lessee commencing from the date when by the law the old lease would have expired, assuming it to be made for the full term for which the former Rector could grant a lease; and shewing upon the face of it no connection between the old lease or the old lessee and the new.

1868.

McDonald v. Reynolds.

Judgment.

Suppose, however, that the Society had seen the lease to *O'Neil*, they would see it probably in the hands of *O'Neil* or of Mr. *Crombie*. Neither of them would represent the lease to Miss *Reynolds* as a graft upon it, but the contrary, for both have always maintained the contrary; then as to what the lease itself would shew, they would find in it a covenant respecting renewal: and if the new lease had been in accordance with it, and particularly if it had been to the same person, it would be a reasonable inference that the present Rector

(*a*) 13 Grant, 323.

1868.

McDonald v. Reynolds.

had made his new lease out of respect to the promise of his predecessor; and, though not legally bound, had still made it in accordance with the provisions entered into, so that faith might be kept with the lessee; and so the new lease might be looked upon as a graft upon the old one. The covenant in regard to renewal is in substance this, that upon giving six months' notice the lessee should be entitled to a renewal for a further term of twenty-one years at such advanced rent as might be settled by arbitrators; or at the then present rent, if thought sufficient. In case the lessee should not desire a renewal or should not give notice, he was to be at liberty to sell or otherwise dispose of the buildings and other improvements made by him. There appear to have been buildings of considerable value put upon the demised premises. Now assuming this known to the Building Society, what information would it convey? The new lessee might have purchased them from the

Judgment.

old one. The present Rector certainly did not claim them as his own, without compensation, for the rent payable under the new lease bears but a very small proportion to the rent received by Miss *Reynolds* before she became lessee; and is plainly only a ground rent. It is indeed smaller than the rent payable under the old lease, that being $300 a year while that payable under the present lease is only $215. The Building Society would see then, that the present Rector had dealt with the new lessee as entitled to the benefit of the improvements made by *O'Neil;* and she might have become so entitled either as having acquired the benefit of the lease from him; or, as having purchased the improvements in the hope that they would be allowed by the Rector, or perhaps upon his promise to allow them, or upon a contract for a lease. There is no evidence how this was, but it is material in this way that if the fact of Miss *Reynolds* being lessee could reasonably be accounted for, without her being assignee of *O'Neil,* the Building Society is entitled to the benefit of it: and

there is this circumstance against her appearing to be assignee, that whereas the original lease contemplated that a renewal if made, would be at an advanced rent, or at least at the same rent; the rent payable under the lease to Miss *Reynolds* is actually considerably less. The answer of the Building Society, being that of a corporate body, is put in without oath. It denies notice of the mortgage to *Laughlin*, and notice is not proved. The equity of the Society is as good as that of the plaintiff, and the Society has the legal estate. It lies upon the plaintiff to affect the Society with notice, and this is not done unless by registration of the mortgage to *Laughlin*, and I have been considering the case as if notice was thereby to be imputed to the Society. To consider the same point further, a very cautious person might have made inquiries of the holder of the prior mortgage. It does not appear that any officer or legal adviser of the Society did make such inquiry; and there was no intentional abstaining from inquiry, for upon the evidence I must take it that there was no knowledge of its existence. There is imputed notice only: and good faith as I must assume in advancing the money and taking the mortgage. The law upon the point of notice was a good deal considered in the Court of Appeal in this Province in *Greenshields* v. *Barnhart* (*a*). The conclusion of Sir *James Macaulay* upon that point is thus expressed (*b*) "clear and indubitable notice, or gross negligence, or wilful forbearance from inquiry amounting to fraud will do; but not mere suspicion of notice, much less mere suspicion of fraudulently abstaining from inquiries, whereby notice might have been obtained." And he cites *Hine* v. *Dodd*, *Jolland* v. *Stainbridge*, and other cases—some of them cases where a registered title was to be affected, and others where this was not the case. At pp. 101, 2, of the same case other authorities are referred to, among them that of

1868.

McDonald v. Reynolds.

Judgment.

(*a*) 3 Grant, 1.

(*b*) p. 57.

1868.

McDonald v. Reynolds.

Jones v. *Smith* (*a*), on appeal where the language of the Lord Chancellor—Lord *Lyndhurst*, I believe—is this, "I don't think, therefore, that the present case goes beyond this—that a prudent, cautious, and wary person would have inquired further; the want of that prudence, caution, and wariness, is not sufficient according to the decisions and the principles which have hitherto been acted on, to affect the party with notice. I do not consider this a case of gross negligence, and I am of opinion that the party having acted *bona fide*, and having only omitted that caution which a prudent, cautious, and wary person might and probably would have adopted is not to be fixed with notice of this instrument. I am satisfied that he acted *bona fide* in the transaction; and under these circumstances I think the Vice-Chancellor's decision was right, and that the appeal must be dismissed with costs."

Judgment.

It is necessary to affect the Society with notice of two things: one of the mortgage to *Laughlin* and I have assumed that notice of that is to be imputed from the fact of registration: the other is, that the lease to Miss *Reynolds* was a graft upon the lease to *O'Neil*. Now it will be found upon turning to the bill that it does not allege notice of either fact, but only charges that the mortgage was made at the request, and for the benefit of *O'Neil:* a fact immaterial to the Building Society, and it claims that it is subsequent to the mortgage to *Laughlin*. The only question of notice made by the pleadings is that of the fact of the *Laughlin* mortgage, and that is made only by the denial of notice by the answer of the Society If the plaintiff relied upon anything beyond his priority of date, he should have stated it in his bill, and if priority of date is by itself not a sufficient ground, he must in strictness fail. But suppose he had alleged notice of this second fact how has he proved it? Not by any

(*a*) 1 Ph. 257.

direct evidence; but only if at all, by an inference to be drawn from the fact of notice of the mortgage. But the mortgage does not itself furnish evidence of this second fact; and if it be said the Society should have inquired of the mortgagee it is a fact which would not necessarily be in the knowledge of the mortgagee: it would be merely a surmise that the mortgagee might know something which would shew his mortgage a charge upon the *Reynolds* lease as well as upon the *O'Neil* lease. I do not think that this is sufficient to affect the Society with notice. The result is that the plaintiff must redeem the Building Society, and the defendant *Reynolds* must redeem the plaintiff. The plaintiff asks for a Receiver, and is entitled to have one appointed. 1868. McDonald. v. Reynolds.

As to costs. The plaintiff must pay the Building Society their costs, and is not entitled to have them over against the defendant *Reynolds*. The plaintiff is entitled as against the defendant *Reynolds* to his general costs of the cause excepting thereout the costs occasioned by his claiming priority over the Building Society. Judgment.

HAGGART v. QUACKENBUSH.

Specific performance—Costs.

The general rule in England is that where an abstract of title has been demanded, and a vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit; but where the question really in issue between the vendor and purchaser was one other than of title and was decided against the purchaser, the Court gave the vendor the costs of the suit, although a good title had not been shewn until after bill filed—no abstract having been demanded previously.

Hearing on motion for decree, the bill having been filed by a vendor to enforce specific performance under the circumstances stated in the head-note and judgment.

1868.

Haggart v. Quackenbush.

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

Mr. *Moss*, for the defendant.

SPRAGGE, V.C.—The plaintiff, a vendor of real estate, has filed his bill for specific performance, and upon a reference as to title, the report is that a good title was first shewn after bill filed. *Primâ facie* this, according to the English rule, entitles the purchaser to his costs; the rule is founded upon this, that the vendor has filed his bill prematurely; and, taking into account the practice among English conveyancers, for the purchaser to demand and the vendor to furnish an abstract of title, the rule is doubtless a sound one. In the cases cited to me by the defendant's counsel abstracts had been delivered. In the case before me the vendor's title was perfect before bill filed; and the evidences of title were also in his possession—with one exception—a will which was found after some little search. His title could just as well and as easily have been shewn to be good out of Court as in Court, and it is fair to assume that it would have been so shewn if an abstract of title had been asked for before bill filed. But, the question of title was not really the matter in contest between the parties; but another question—namely, whether the purchaser had or had not paid a part and tendered the balance of the purchase money; and the fact that such was the question shews, that the question of title was not. The purchaser's contention was that he had paid his purchase money in full or tendered it, which he would hardly have done if there was a question as to the title. The point really in question is decided against the purchaser, and yet he now asks for costs under the general rule. If I give him his costs, it would be because the vendor did not furnish an abstract and verify it when no abstract was ever asked for, and when the real question between him and the vendor has been decided against him. It was the purchaser's right at the hearing to have a reference

Judgment.

as to title; but that and the result cannot, under the circumstances, entitle him to the costs of the cause. Exceptions to the general rule invoked by the purchaser are to be found in *Long* v. *Collier* (*a*), *Scoones* v. *Morrell* (*b*), *Holwood* v. *Bailey* (*c*). 1868. Haggart v. Quackenbush.

I think the plaintiff is entitled to the general costs of the cause, including the costs on further directions.

There are costs in the Master's office which the purchaser is entitled to receive and to set off against the costs of the cause: these are the costs occasioned by his imperfect abstract of title carried into the Master's office, and his imperfect verification of the abstract which was proceeded upon:—in short, all costs occasioned by the omission to carry in a proper abstract in the first instance and to verify it. Judgment.

MOORE v. HOBSON.

Mortgagee under absolute deed—Practice.

Although the rule is that a prior Mortgagee can be made a party only to redeem him, still if such prior security has been created by a deed absolute in form, a subsequent mortgagee is at liberty to bring him before the Court for the purpose of shewing his interest to be redeemable, without offering to redeem him.

Bill by subsequent mortgagee against a prior mortgagee and the mortgagor, setting forth that the incumbrance in favor of the defendant had been created by deed absolute in form and was registered prior to the mortgage in favor of the plaintiff, although executed two years after it. The bill alleged that such conveyance, though absolute in form, was intended as a security

(*a*) 4 Russ. 267.
(*b*) 1 Beav. 251.
(*c*) 4 Russ. 271.

1868.

Moore v. Hobson

only, and prayed foreclosure or sale subject thereto. A difficulty was suggested whether, under the words of the order of the 6th of February, 1858 (section 2), which directs that "when a bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause. But, when the plaintiff in any such case prays a sale or foreclosure, subject to the prior mortgage such mortgagee is not to be made a party either originally or in the Master's office," the prior incumbrancer had been properly made a party.

Mr. *Bain*, appeared for the plaintiff. The bill had been taken *pro confesso* against the defendants.

After looking into authorities,

Judgment.

SPRAGGE, V. C.—I do not think this order should stand in the plaintiff's way. It would be wrong and in contravention of the order to make a prior incumbrancer a party unless in order to redeem him, except under special circumstances. The two defendants have made this necessary in this case by putting *Runciman's* security in an unusual form; one not expressing its true character and which would bar plaintiff's remedy if it stood unimpeached. The right of plaintiff, as second mortgagee, is to have the option of redeeming *Runciman*, or of foreclosing or selling subject to his mortgage; and he cannot be deprived of that right by the course these defendants have taken.

The decree will be with costs against the mortgagor. No costs against *Runciman*, as he has not opposed the plaintiff's right.

AN INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

See "Practice," 11.

ABSOLUTE DEED BY WAY OF MORTGAGE.

A conveyance absolute in form, but intended as a security, was made by the owner of real estate. The sum secured was paid, but no re-conveyance executed. The owner, however, was always permitted to deal with the estate as his own, and created a mortgage thereon with the knowledge of the person holding the legal title, who, after the death of the mortgagor, commenced proceedings in ejectment, claiming under the absolute conveyance; on a bill filed for that purpose, the Court restrained the action, and ordered the plaintiff therein to pay the costs in this Court.

Cayley v. McDonald, 540.

See also "Practice," 20.

ACCOUNT.

A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to his widow. The widow and son, and an infirm daughter, lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill

by the widow against her son's representatives for an account of her share of the produce was dismissed with costs.

Gilmore v. Gilmore, 57.

See also "Sales for Taxes."

"Sheriff's Poundage."

ADMINISTRATION.

1. The widow of an intestate married again, and allowed her husband to use the moneys of the estate in her hands.

Held, on appeal from the report of the Master, that she was liable to pay interest at six per cent. per annum, and no more.

Fielder v. O'Hara, 223.

2. A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to other persons. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt.

Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised.

Ricker v. Ricker, 264.

See also "Parties."

ADVERSE POSSESSION.

See "Quieting of Titles' Act," 4.

ALIMONY.

1. After a decree for alimony had been made, and alimony paid for several years under it, the Court entertained a petition by the husband to be relieved from the decree, on the ground of adultery subsequently committed by the wife.

Severn v. Severn, 150.

2. On the hearing of a petition by a husband to be relieved from a decree of alimony, an act of adultery was sworn to by two credible witnesses: and the general conduct of the wife raising no presumption in her favour, an order was made as prayed.—*Ib.*

AMALGAMATION.

See "Railway Company." 2, 3, 4.

AMENDING DECREE.

See "Practice," 14.

ANCIENT DEED.

Although the rule is, that an ancient deed produced from the proper custody proves itself, this does not preclude a party interested from proving that the deed was a forgery; or that on any other ground this deed is not a valid and binding instrument.

Chamberlain v. Torrance, 181.

ANSWER.

(OBJECTION BY.)

See "Pleading," 4.

APPEAL FROM COUNTY COURT.

1. In appeals against the orders of the County Court, this Court will assume those orders to be correct until the contrary is shewn; and care must be taken to point out the defects on the pleadings and proceedings brought into this Court.

Murphy v. Morrison, 203.

2. The defendant [illegible] a suit on the equity side of the County Court had, before being served with an injunction restraining the removal of a building, removed the same by direction of the City Inspector as being a nuisance, having been erected

partly on the public street; notwithstanding this, an order was made by the Judge of the County Court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this Court: in making an order allowing the appeal and directing the discharge of the defendant, the Court did so without giving him the costs of the application. —*Ib.*

APPEAL FROM MASTER.

1. Where it was considered that the finding of the Master was, under the circumstances, a fit subject for discussion; the Court, although it dismissed an appeal from the finding of the Master, did so without costs.

Secord v. Terryberry, 172.

2. Where an appeal from the Master was dismissed, on a ground raised for the first time on the appeal and had not been taken in the Master's Office, the Court refused to give costs to the successful parties.

Heward v. Wolfenden, 188.

3. Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent.; and if the principal were not then paid, twelve per cent. should be thereafter charged:

Held, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named.

Waddell v. McColl, 211.

4. After default in payment of a mortgage, a tenant who had been put in possession by the mortgagor, promised to pay the mortgagee rent but failed to do so:

Held, that the mortgagee was not chargeable with such rent. —*Ib.*

5. A local Master in making his report is not at liberty to date it until the costs taxed by himself have been fin revised, and settled by the Master in Ordinary under ... General Orders.—*Ib.*

ARBITRATION.

In proceeding under the Acts, whether there should not be separate findings or awards in respect of the filling-in of the

esplanade, and the grading, levelling, &c., of the strip to the north of it.—*Quære.*

See also "Esplanade Acts."

Brooke v. the City of Toronto. 258.

ASSIGNMENT IN EQUITY.

Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid to return the order, and subsequently institutes proceedings against the drawer, in respect of such claim, he cannot afterwards proceed to enforce his equitable claim against the drawee.

Muir v. Waddell, 488.

ASSIGNMENT OF DECREE.

See "Trustee," &c., 2.

ATTORNEY GENERAL.

See "Pleading," 2.

BAD FAITH.

See "Partnership," 1.

BANK STOCK.

See "Principal and Agent," 7.

BUILDING SOCIETY.

Where after the death of a member of a Building Society his shares were permitted to run into arrear:

Held, that in the abence of a personal representative, the Society could not take any steps to forfeit the shares, any more than they could have enforced their claim by action of debt, as provided by the Statute.

Glass v. Hope, 484.

CONDITION.

After an injunction restraining the felling of timber had been issued and on the same day the writ was served, the plaintiff entered into a written agreement with the principal defendant in the cause, by which the latter agreed to give up possession of the premises in question on a particular day, and to refrain from cutting or removing any timber cut in the

meantime; and the plaintiff thereby agreed "that I, the said T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," &c. The defendant, having, notwithstanding continued to cut down and remove the timber, a motion was made to commit him for breach of the injunction, when it was *held* that the suit was still pending, the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit.

Mulholland v Downes, 106.

CONFIDENTIAL RELATION.

A widower, a shrewd, thrifty man, possessed of considerable real and personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children,—which he did taking conditional notes for the purchase money. The children did not occupy any confidential relation towards him, and the transaction was his own suggestion, without any influence or pressure on their part. What he retained was more than ample for his wants:

Held, in a suit instituted by the father seven years afterwards, that the deeds could not be impeached.

Luton v Sanders, 537.

CONVEYANCE.

(EXECUTION OF—BY COMMISSIONERS OF TRUST AND LOAN CO., UNDER STATUTE 25 VIC. CHAP. 72.)

See "Power of Attorney."

COSTS.

See "Absolute Deed."

"Appeal from Co. Court," 2.
"Appeal from Master," 1, 2.
"Favored Creditor."
"Fraudulent Conveyance," 3.
"Limitations—Statute of," 5.
"Lost Will."
"Opening Foreclosure."
"Pleadings," (form of.)
"Practice," 14, 17, 19.
"Principal and Agent," 4.
"Quieting Titles Act," 4.
"Sheriffs' Poundage."
"Specific Performance," 1, 4.
"Unsound Mind."

4. Possession of Crown lands by a person who entered under an agreement with another to clear and improve for the latter, on stipulated terms, is not such a possesston as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest.—*Ib.*

DATING REPORT.

See "Appeal from Master," 5.

DECREE—AMENDING.

See "Practice," 14.

DECREE—ASSIGNMENT OF.

See "Trustee," &c., 2.

DECREE—IMPROPERLY OBTAINED.

A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The Court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated.

Wilson v. Hodgson, 543.

DECREE—SETTING ASIDE.

See "Practice," 13.

DEED OF GIFT.

See "Confidential Relation."
"Parent and Child."

DELAY.

See "Partnership," 3.
"Practice," 5.

DELAY IN MOVING.

See "Injunction," 1.

DELAYING CREDITORS.

See "Fraudulent Conveyance," 1.

DEMURRER.

(SEVERAL GROUNDS OF.)

See "Practice," 7, 19.

DISMISSAL FOR WANT OF PARTIES.

See "Practice," 18.

DISSOLUTION.

See "Partnership," 1.

DOWER.

1. Where a woman joins in a mortgage to bar her dower for the purpose of securing a debt of her husband, and after his death the property is sold for more than is sufficient to satisfy the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband.

Sheppard v. Sheppard, 174.

2. Where a woman's right to dower is released by an instrument separate from the conveyance by her husband, an examination and certificate is still necessary as before the late Statute.

Bogart v. Patterson, 624.

ELECTION.

See "Will," 4.

ESPLANADE ACTS.

Arbitrators appointed to determine the amount to be paid between the city and a water lot owner, in respect of the construction of the esplanade, in setting a value on the water lot, did so as at the time of the grant; and awarded interest in respect of the sum found payable by the owner to the city. The award was set aside on both grounds, as the arbitrators should have valued the lot as at the time it was taken possession of by the city, and the Statutes give them no power to award interest, which is chargeable only from the time of the registration of the Surveyor's certificate or the making of the award.

Brooke v. The City of Toronto, 258.

EQUITABLE EXECUTION.

Where a suit is brought for equitable execution against lands, in aid of a judgment at law, the bill must shew that an execution at law had been placed in the hands of the Sheriff.

Shea v. Denison, 513.

EQUITABLE LIENS.

See "Registry Law."

EQUITY OF REDEMPTION.

See "Dower," 1.

"Execution—Sale under," 3.

"Leaseholds."

"Taxes—Sale for," 4.

EVIDENCE.

Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due

execution, the other party may give evidence of the character of such deceased witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him.

Chamberlain v. Torrance, 181.

See also "Fraudulent Conveyance," 4,
"Partnership," 5.

EXAMINATION OF DEFENDANT.

See "Practice," 10.

EXECUTION—SALE UNDER.

1. Inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a Sheriff under execution. The rule could only be applied in an extreme case.

Laing v. Matthews, 36.

2. A Sheriff, in obedience to a writ of *venditioni exponas*, in November, 1849, exposed for sale, by auction, and sold to the attorney of the plaintiff in the writ, for £70, a farm of 150 acres, variously estimated as worth £2 10*s.* and £5 per acre; but, which was subject to three rights of dower, two of the parties being young women. In April, 1867, the party claiming under the purchaser at Sheriff's sale, filed a petition under the Act to quiet his title. The devisee of the execution debtor opposed the certificate on the grounds of improper conduct in the matter of the sale by the Sheriff, evidenced by the gross inadequacy of consideration. The Referee of Titles reported in favour of the claimant; and, on appeal, both parties desiring an adjudication on the facts appearing in the affidavits and proceedings before the Referee, the Court affirmed the finding of the Referee, and dismissed the appeal with costs. —*Ib.*

3. Where several lots of land are mortgaged, the equity of redemption in one or some of them only, cannot be sold under common law process—and,

Semble, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity.

Heward v. Wolfenden, 188.

See also "Vendor's Lien" 1.
"Leaseholds," 3.

EXECUTORS.

1. An executrix, who had an annuity charged on the income of the testator's estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was, in consequence, found largely indebted to the estate:

Held, that her expenditure in improvements should be allowed in reduction of her indebtedness, so far as the expenditure had enhanced the value of the estate and benefited those interested in it.

Morley v. Matthews, 551.

2. Where an executrix, jointly with one or more of those entitled to the testator's estate, and during the minority of others of them, contracted for the sale of portions of the real estate, and the purchasers made improvements: the Court refused to disturb the possession of the purchasers before the time had arrived for the partitioning of the estate, and charged them meanwhile with a ground rent only and not with the improved value.—*Ib.*

3. An executor without proving the will has power to do almost all the acts which are incident to his office; and on the other hand, if he acts, or does not renounce, or make known his intention not to act, he is in general disqualified to engage in any transaction for his own benefit, to the prejudice of those interested in the estate, quite as much as if he had taken out probate.

Robinson v. Coyne, 561.

4. *A.* died leaving all she had to her sister, *B.*, an old, feeble and ignorant woman, and appointed *C.* her executor; *C.* did not prove the will, but he acted as executor; he also removed the plaintiff to his house, and intimated that he meant to take care of her during the rest of her life. The testatrix had a life-estate in some cottages, and after her death the remainderman was induced by *C.* and others, for the purpose of benefiting the plaintiff, to sell them for less than half their value, and to convey them to *C.'s* wife, it being supposed that *C.* would have to advance the money out of his own funds, but the fact being that he had money in his hands, as trustee for the plaintiff, sufficient to pay the price:

Held, that *C.* and his wife could not retain the benefit of the purchase, and that the plaintiff was entitled to a conveyance. —*Ib.*

—•—

EXECUTORS—IMPLIED POWERS OF, TO SELL.

See "Will," 10, 11.

FAVOURED CREDITOR.

Where a *bona fide* transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and to afford to the other creditors reasonable satisfaction as to the real character of the transaction; and, if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this Court by the other creditors whom it disappointed.

Healy v. Daniels, 633.

FIRE INSURANCE.

1, A fire policy in the name of a mortgagor contained this clause: "In the event of loss under this policy, the amount the insured may be entitled to receive shall be paid to A. Livingstone, mortgagee." There was evidence that the insurance was applied for by the mortgagee and was intended for his security:

Held, that to the extent of the mortgagee's interest a subsequent act of the mortgagor to which the mortgagee was no party, would not avoid the policy.

Livingstone v. The Western Assurance Company, 461.

2. Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure, and a loss by fire occurs whereby the insurance money becomes payable, the mortgagee is entitled, under the Act (14 George III. ch. 78, sec, 83), to have the insurance money laid out in re-building.

Stinson v. Pennock, 604.

FORFEITING SHARES.

See "Building Society."

FORFEITURE—RELIEF AGAINST.

See "Taxes," 8.

FRAUD.

See "Principal and Agent," 4.
"Taxes." 8.

FRAUDS, STATUTE OF.

See "Partnership," 5.

FRAUDULENT CONVEYANCE.

1. A debtor sold his property, reserving by parol certain future rents to pay a creditor, and which were sufficient for the purpose; the object was to delay the creditor, and to compel him to wait for payment until these rents should accrue, and all parties combined for that object. The sale was held wholly void against the creditor—a transaction to delay a creditor being within the Statute 13th Elizabeth, as much as a transaction to defeat him altogether.

Murtha v. McKenna, 59.

2. A deed purporting to be a bargain and sale in consideration of £1,000, and bearing date the day before the marriage of the grantor to the grantee, was impeached by a subsequent creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her or any one acting for her, until long after the marriage. The Court of Appeal, however, being satisfied that the deed was executed as a marriage settlement, and not considering there was any proof of a fraudulent intent upheld the deed and varied the decree made in the Court below accordingly with costs.—[VanKoughnet, C., J. Wilson, J., and Mowat, V. C., dissenting.]

Mulholland v. Williamson, 291.

3. A bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved, failed to establish more than a case of suspicion against the *bona fides* of the transaction; and the same relief having been sought in a bill by other creditors who were also the personal representatives of the debtor and which relief was refused, the Court in dismissing the present bill did so with costs, notwithstanding the reasons for doubting the *bona fides* of the transaction.

Scott v. Hunter, 376.

4. The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband:

Held, that, notwithstanding such interest, on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed.—*Ib.*

FUNCTIONS OF COURT.

See "Court."

FRAUDULENT JUDGMENT.

(IN PART.)

See "Judgment."

GETTING IN TITLE.

See "Gold Lands."

GOLD DIGGING.

See "Partnership," 2, 4.

GOLD LANDS.

The defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same; agreeing to give the plaintiff one-fourth of the land for his trouble on his paying one-fourth of the consideration; and to reconvey to the owner of such title another one-fourth part. The title having been bought up, the defendants did reconvey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff:

Held, that the agreement was such as this Court would specifically perform and decreed the same accordingly with costs.

Bogart v. Patterson, 624.

GUARDIAN AND WARD.

See "Undue Influence," 1.

INSOLVENCY.

See "Vendor's Lien."

INSOLVENT.

See "Marriage Settlement."

INSURANCE.

Toronto; that otherwise the receipt would be cancelled and the amount of unearned premium refunded, and that the receipt would be void should campheno oil be used on the premises.

The agent did not report the transaction to the Company, and after the expiration of sixty days a fire occurred:

Held 1st, That this receipt contained a valid contract for *interim* insurance.

Held 2nd, That the Company, and not the insured, should sustain any damage occasioned by the agent's neglect, and that the Company was liable for the loss by the fire.

Patterson v. The Royal Insurance Co., 169.

INTEREST.

See "Administration."
"Life Assurance."
"Timber Trade."

INTEREST—INCREASED RATE OF.

See "Appeal from Master," 3.

INTEREST—WITHOUT.

See "Without Interest."

JUDGMENT.

(FRAUDULENT IN PART.)

A judgment fraudulent against creditors as to part of the sum included therein, is void as against such creditors *in toto*.

The Commercial Bank v. Wilson, 473.

LACHES.

See "Partnership," 3.
"Specific Performance," 3.
"Trusts, &c." 3.

LAPSE OF TIME.

See "Vendor and Purchaser," 3.

LEASEHOLD—EQUITY OF REDEMPTION IN.

1. Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at Sheriff's sale under common law process and the purchaser paid off the prior mortgage:

Held, that the purchaser being bound to protect the mortgagor against both the incumbrances was not at liberty to keep alive the prior mortgage as against the second mortgage.

McDonald v. Reynolds, 691.

2. In such case, the purchaser, upon the expiration of the term, obtained a new lease from the Rector and created a mortgage on such new term:—

Held, that such new lease was a mere graft upon the original one, and as such, was subject to the mortgage which had been left outstanding; but as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority.—*Ib.*

3. Whether an equity of redemption in a leasehold interest is saleable under common law process—*Quære.*—*Ib.*

LEGATEES.

(PURCHASE BY EXECUTORS TO THE PREJUDICE OF.)

See "Executors," 4.

LETTERS PATENT—REPEAL OF.

Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative.

McIntyre v. The Attorney General, 86.

Where it appeared that the Commissioner of Crown Lands in deciding between rival claimants to a lot of land, to which neither claimant had any right, was under a false impression as to a matter of fact, and the fact had not been untruly stated by the party in whose favor the Commissioner decided, and was not shewn to be material,—the Court *held* that the error did not constitute a sufficient ground for setting aside the patent at the suit of the disappointed claimant.—*Ib.*

LIFE ASSURANCE.

The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim.

The Toronto Savings' Bank v. The Canada Life Assurance Co., 509.

LIMITATIONS—STATUTE OF.

1. The filing of a petition, under the Act for Quieting Titles, is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations.

Laing v. Avery, 33.

2. To prove title by length of possession, the plaintiff shewed that a person under whom he claimed, had, at an early date, cleared part of the lot in question; but there being no evidence that he did so under any claim of right, it was held that such clearing was not constructively a possession of the rest of the lot.

McMaster v. Morrison, 138.

3. The Act 25th Victoria, chapter 20, abolishes all exceptions and distinctions in favor of absentees: therefore twenty years adverse user or occupation of land will bar the right of the party having the legal paper title, whether resident within or without the jurisdiction during such period of twenty years.

Low v. Morrison, 192.

See also "Quieting Titles' Act," 3.

LOCAL MASTER.

See "Appeal from Master, 5."

LOST WILL.

Where, in consequence of the state in which a testator left his papers a reasonable doubt was created as to his having left a will, the costs of the parties necessary to discuss the question of "Will or no Will?" were ordered to be borne by his estate.

Bessey v. Bostwick, 246.

LUNACY.

1. Although the general rule of the Court is, that no course will be taken that will prejudicially affect the interests or the comfort of a lunatic, even for the benefit of creditors: still the Court will not refuse to assist creditors where that can be done without prejudice to the lunatic: and where the Court, by its orders, has induced creditors to prove their debts in this Court and thus prevented them from proceeding at law, *quære*, whether the Court is bound to afford them relief, even to the prejudice of the lunatic's estate.

In Re Shaw, 524.

2. In June, 1864, the committee of a lunatic's estate applied for and obtained an order for the sale of lands for the payment of debts reported due by the lunatic; instead of proceeding to realize the estate, the committee took no action whatever under the order, and in 1868, after a delay of nearly four years, certain of the creditors applied for the conduct of the order directing the sale of the lands; and the Court, under the circumstances, made the order.—*Ib.*

3. To avoid a transaction on the ground of lunacy, it is not necessary to shew that the lunacy was connected with, or led to the impeached transaction.

McDonald v. McDonald, 545.

4. But to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware, or had notice of the seller's mental condition.—*Ib.*

5. Where, amongst other delusions, a vendor who was insane imagined that he was bewitched; and it was proved, that the purchaser learned this from conversation with the vendor during the negociation for the purchase; and that the purchase money was only one-half the sum which the seller had previously been offered, and might have obtained from another person, the transaction was set aside.—*Ib.*

MAINTENANCE.

See "Will," 8, 9.

MARRIAGE SETTLEMENT.

A person in insolvent circumstances conveyed by way of settlement to his intended wife, a lot of land, on which the

settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in Insolvency, the Court declared that for so much of the building as was completed after marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignees the amount of such expenditure: and it subsequently appearing that the husband had created a mortgage prior to the settlement; the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors.

Jackson v. Bowman, 156.

See also "Fraudulent Conveyance," 2.

MARRIED WOMAN'S ACT.

A married woman who was equitably entitled, as *cestui que trust*, to a life estate in certain lands, joined with her husband in making a promissory note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill in this Court seeking to enforce his claim against the title of the wife:

Held, that the provisions of the Married Woman's Act had not the effect of increasing the interest of the wife so as to render her estate liable for the debt.

Royal Canadian Bank v. Mitchell, 412.

A married woman who has separate estate which is vested in Trustees cannot, on that account, be sued for a legal debt contracted before her marriage. In such a case a creditor has no *locus standi* in Equity until he has obtained judgment at Law.

Chamberlain v. McDonald, 447.

Quære. Whether a married woman has any and what *jus disponendi* in respect of her personal property, under the Married Woman's Act (Consolidated Statutes of Upper Canada, chapter 73.)—*Ib.*

MARRIED WOMEN—EXAMINATION OF.

See "Practice," 8.

MASTER'S OFFICE.

See "Practice." 5, 6.

MISREPRESENTATION.

See "Decree Improperly Obtained."

MORTGAGE—MORTGAGEE—MORTGAGOR.

1. Where a deed was absolute in form, and the alleged consideration was, in part, promissory notes theretofore held by the grantee against the grantor, the fact of those notes being left in the possession of the grantee, is not alone sufficient to prove that the deed was intended as a mortgage.

Healey v. Daniels, 633.

2. A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place:

Held, that the registration was sufficient under the Statute; but, that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority of an instrument which had been subsequently executed by the husband and wife, and duly registered.

Beattie v. Mutton, 686.

See also

"Absolute Deed."
"Administration."
"Fire Insurance," 1, 2.
"Injunction," 3, 4.
"Opening Foreclosure."
"Partition."
"Practice," 20.
"Prior Incumbrance."
"Railway Company."
"Sale by First Mortgagee to Puisne Incumbrancer."
"Sale where heirs of Mortgagor unknown."
"Taxes," 2, 3, 4.
"Without Interest."

MOTION FOR DECREE.

See "Practice," 1, 2, 3.

MUNICIPAL CORPORATION, PURCHASE BY.

The name of the seller or his agent must appear in a contract of purchase by a municipal corporation.

Houck v. The Town of Whitby, 671.

Where a municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken, it was *held*, that the contract could not be enforced by the vendor against the corporation.—*Ib.*

NEW TRIAL BEFORE A JURY.

A trial was ordered before a jury to try the question as to the genuineness of a deed more than thirty years old, produced by one of the parties, when evidence was adduced which was a surprise upon the defendants. The Court, at their instance, ordered a new trial or re-hearing of the cause upon payment of costs of the hearing already had, including the costs occasioned by a jury being summoned and empanelled, as also the costs of the motion; and defendants undertaking to pay the costs of the second jury, should they demand one, whatever might be the result of the cause.

Chamberlain v. Torrance, 181.

NOTICE.

See "Purchase for Value without Notice."
"Quit Claim."
"Unpatented Land."

OPENING FORECLOSURE.

L. and *S.* were joint owners of certain lands, and *L.* had created a mortgage on a part of his undivided interest, in favour of *R.* With a view of effecting a partition, *L.* conveyed his interest to his co-tenant *S.* who thereupon re-conveyed to *L.* a certain defined portion; and in order to protect *S.* against the mortgage outstanding in *R's* hands, *L.* executed back to *S.* an indemnity mortgage: *L.* did not pay off *R's*, mortgage; and *R.* having obtained a final decree of foreclosure sold his interest in the property to *S.* *L.* after the partition, had sold a portion

of the estate to the plaintiffs who in respect of their interest had been made parties to the foreclosure suit by *R.* Subsequently, in an action of ejectment *S.* set up title under the indemnity mortgage from *L.*:

Held, that he had thus let in the plaintiffs to redeem who were entitled to do so upon paying what *S.* had paid or was liable to pay to *R.*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those, *S.* was ordered to pay the costs.

Read v. Smith, 250.

ORDER—CHANGING CONDUCT OF.

See "Lunacy," 2.

PARENT AND CHILD.

In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence shewing imposition or undue influence, to support the deed, by the evidence which might be necessary in the case of a gift from a child to a parent.

Wycott v. Hartman, 219

See also "Confidential Relation."
"Undue Influence." 2, 3.

PARTIES.

1. On an application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; and the order asked for was granted, with a direction that an office-copy of the decree should be served on each of the parties interested in the real estate under the will.

Stewart v. Hunter, 132.

2. The corporation of the local municipality is not a proper party to a bill impeaching a tax sale.

Mills v. McKay, 602.

See also "Pleading," 4, 2, 4.
"Practice," 11, 17.
"Street Railway."

PARTITION.

1. Although partition may be directed of an estate subject to a mortgage thereon, still, if one of several co-tenants creates an incumbrance on his undivided share, and institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the Court so as to bind the legal estate: and the party creating the charge must bear any additional expense occasioned thereby.

McDougall v. McDougall, 267.

2. In a suit for partition where infants were interested, affidavits were produced shewing that a sale rather than a partition would be more for the benefit of the infants; and that the property from its nature and situation was not susceptible of equal partition—the Court directed a reference to the Master to enter into contracts for the sale of portions of the estate, which sales should be carried into effect upon being approved of by the Judge.

Steven v. Hunter, 541.

PARTNERSHIP.

1. The plaintiff and defendants were partners. The defendants, before the expiration of the term, induced the plaintiff to agree to a dissolution, a valuation of the assets was thereupon made by the defendants, and a settlement took place founded on such valuation under the erroneous impression on the part of the plaintiff, that one of the defendants was to retire from the business, and that the interest of the other defendant in the valuation was identical with the interest of the plaintiff: while the fact was, that the defendants had entered into a private agreement, that, after settling with the plaintiff, the stock should be sold for the joint benefit of the defendants, and that they should share equally the proceeds, and carry on the business:

Held, that by reason of this deceit the transaction was not binding on the plaintiff.

O'Connor v. McNaughton, 428.

2. A partnership was formed between three persons A, B, and C, to dig for gold on the property of one Allan; two of them, A and B, were to do the work, and the third, C, to pay the expenses; all three were to share in the profits. The place so named was afterwards abandoned by mutual consent, and the two working partners, A and B, removed, at the instance

of the third, C to a lot in another township (Elzevir), where they resumed work, C paying expenses as before:

Held, that in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally named.

Burn v. Stong, 651.

3. The plaintiff had occasion to leave the work on the 2nd March, and did not return. He filed a bill to enforce his partnership rights on the 30th July:

Held, that, as there was no stipulation respecting the time he was to work, and he was not requested to resume work, and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit.—*Ib.*

4. C, in his own name, bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a company by whom that lot was purchased:

Held, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C in this transaction.

5. There was no writing signed by C, acknowledging the agency and trust:

Held, that, A and B having entered and worked on the lot, the Statute of Frauds did not apply.—*Ib.*

PAST MAINTENANCE.

In a proceeding under the 12 Victoria, chapter 72, the mother of the infants was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered; which was accordingly effected, the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order: the whole of such proceeds together with $[illegible] in addition, were expended in the support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The Court refused the application; notwithstanding that the Master reported the amount claimed was a proper sum to be allowed.

In re Hunter, 680.

PERSONAL REPRESENTATIVE.

(DISPENSING WITH.)

See "Practice," 12.

PETITION UNDER 29 VICTORIA CHAPTER 28.

See "Will," 9.

PLEADING.

1. A bill was held to lie by a Corporator of the Church Society of the Diocese of Toronto, on behalf of himself and all other members of the Society, to correct and prevent alleged breaches of trust by the Corporation.

Boulton v. The Church Society of the Diocese of Toronto, 123.

2. To such a bill the Attorney-General is not a necessary party.—*Ib.*

3. Where a bill was not maintainable in respect of its principal object, and its statements were confused and verbose, the Court of Appeal declined to consider a minor relief to which the plaintiff claimed to be entitled, and allowed a demurrer to the bill, leaving the plaintiff to file a new bill for the latter relief, if he should be so advised.

Mutchmore v. Davis, 346.

4. A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the Company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person:

Held, that the Company must be presumed to know who this person was, that there was no presumption that the plaintiff knew him; and that the person not being named in the answer the objection could not be insisted on at the hearing.

Woodside v. The Toronto Street Railway Company, 409.

See also "Equitable Execution."
"Parties," 2.

PLEADINGS—FORM OF.

Pleadings should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. In future, where pleadings are filed containing useless or improper statements, or admissions so restricted as to render proof necessary, the costs

of such pleading will not be allowed to the party filing it; but, on the contrary, he will be ordered to bear the costs occasioned thereby.

Kennedy v. Lawlor, 224.

POSSESSION—ADVERSE.

See "Quieting of Titles' Act," 4.

POSSESSION—CESTUI QUE TRUST, ENTITLED TO.

The rule is that when property is devised in trust to pay the rents and profits to the *cestui que trust* the *cestui que trust* is entitled to the possession.

Whiteside v. Miller, 393.

This rule applies though there are charges on the property; proper terms being in that case imposed by the Court as the condition of giving possession.

But, the Court will not give possession to the *cestui que trust* where it sees that doing so would do violence to the intention of the testator.—*Ib.*

POSSESSION OF PART.

See "Limitations" (Statute of).

POSSESSION—ORDER FOR.

See "Vendor and Purchaser," 1.

POWER OF ATTORNEY.

1. The purchaser of lands in Canada from the Trust and Loan Company, cannot insist upon a conveyance under the corporate seal of the Company, for, it being an English Company, it would be highly inconvenient if all conveyances had to be sent to England for execution, and the Statute 25 Victoria chapter 72, effectually provides against the doubts and difficulties in a title, to which the execution of conveyances under powers of attorney ordinarily give rise.

The Trust and Loan Company v. Monk, 385.

2. But the Company is bound to place the purchaser in the same position as nearly as may be, as if the conveyance were directly by the Company, and therefore it should provide and annex to the conveyance executed by the commissioners referred to in the above Act, a certified copy of the commission or power of attorney authorizing them to act for the Company.—*Ib.*

3. An execution by one of two or more commissioners, whose appointment is authenticated as provided by the above Act, is not a compliance with its provisions, and a purchaser is not bound to accept a conveyance so executed.—*Ib.*

PRACTICE.

1. On a motion for decree, the plaintiff was assumed, for the purpose of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term.

Wilson v. Cossey, 80.

2. A bill of redemption alleged that an absolute conveyance which the plaintiff had executed, was intended as a security for a debt then due by the plaintiff; the defendants admitted that the conveyance was intended as a security, but alleged that it was to secure future advances, as well as the existing debt, and interest at twelve per cent. The plaintiff moved for a decree on the answer:

Held, that the defendant was entitled to a declaration that the security was to cover the future advances, and twelve per cent interest, as well as the existing debt; but the Court gave leave to the plaintiff to abandon his motion, and to file a replication and proceed to a hearing in term, if he chose.—*Ib.*

3. The defendants, by their answer, specified a certain sum as the amount of the debt due at the time the conveyance was executed, and certain other amounts, as admitted by the plaintiff to be due at subsequent periods:

Held, that, on a motion for decree, these allegations were not binding on the plaintiff, and that they must be established before the Master.—*Ib.*

4. If an injunction may be granted to a defendant before the hearing, (as to which query?) the answer must pray therefor specifically.

Brandon v. Elliott, 109.

5. Where a plaintiff had been guilty of delay in bringing a decree into the Master's office; and, after taking out warrants to consider, procured two postponements, and did not attend the

13. On a bill to enforce a vendor's lien, the decree, which through oversight, directed that in default of payment of the amount to be found due by the Master, that an execution against the goods, &c., of the original purchaser should issue, without first selling the land, was set aside at the instance of the purchaser after the execution had been issued and placed in the hands of the Sheriff; the defendant, though served with the bill having taken no proceedings in the case.

Switzer v. Ingham, 287.

14. Where a decree which had been taken out by the plaintiffs in an administration suit, erroneously made provision for payment of certain annuities and legacies in priority to the provision made by the will for the widow of the testator, the Court upon the petition of the widow directed the decree to be amended, but refused costs to either party.

Eadie v. McEwen—*Re* Eadie, 404.

15. Where a petition of review is filed on the ground of new matter, the respondents may file affidavits without leave, as in the case of other petitions.

Robson v. Wride, 606.

16. On the case coming on, the Court instead of then deciding the issues of fact raised by the affidavits, may direct a special answer to be filed with a view to the more convenient trial of the question at issue, where this course seems expedient.—*Ib.*

17. A plaintiff filed a bill to enforce a legal right only, and in the course of the proceeding it appeared that there were others, in regard to whom it was a question proper to be discussed, whether they had not an equitable right in the subject of the suit; one of whom had not been made a party, and the other had failed in a legal defence which he had set up, but the point was not raised by the parties; the Court, under the circumstances, ordered the cause to stand over, without costs, in order to add parties; the party so failing in his legal defence to be at liberty to put in a supplemental answer if so advised.

Wilson v. Proudfoot, 630.

18. Where the will had not been proved, and a bill was filed for (amongst other things) an account against persons said to be in possession of the assets, the answer took the objection that a personal representative was a necessary party: the suit failing, so far as it related to other objects, the Court at the hearing dismissed the bill with costs.

Zimmerman v. O'Reilly, 646.

19. Where, instead of demurring to the bill, the defendant put in an answer, and went to an examination and hearing; the Court, on dismissing the bill, gave the defendant costs only as upon a demurrer.

Brouse v. Cram, 677.

20. Although the rule is that a prior Mortgagee can be made a party only to redeem him, still if such prior security has been created by a deed absolute in form, a subsequent mortgagee is at liberty to bring him before the Court for the purpose of shewing his interest to be redeemable, without offering to redeem him.

Moore v. Hobson, 703.

See also "Appeal from County Court," 1, 2.

PRÆCIPE DECREE.

See "Practice," 9.

PRECATORY DEVISE.

See "Will," 1.

PRINCIPAL AND AGENT.

1. *A.* had authority to collect rent, and to contract for the sale of property, and to receive the down payments:

Held, that such authority did not entitle him to receive payments on a mortgage given for the unpaid purchase money.

Greenwood v. The Commercial Bank, 40.

2. Where such an agent had at one time, without authority, received some payments on such mortgage, which the principal did not publicly repudiate, and another mortgagor who did not appear to have had notice of these payments, made a payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment.—*Ib.*

3. At a sale of lands under a writ of execution, the nephew of the execution creditor, a person without means, attended at the sale, and bid off the property; and, on a subsequent day, produced to the Sheriff the receipt of the plaintiff in the writ for the amount bid at the sale, and paid the Sheriff his fees,

who thereupon conveyed the lands sold to the nephew, who was allowed by his uncle to retain the title in himself. The uncle subsequently agreed for the sale and conveyance of this land to a purchaser who made default in completing the bargain, and the nephew wrote to his uncle pointing out the proper proceedings to be adopted to compel the purchaser to complete the contract. The uncle died without any further proceedings in respect of such contract, having, by will, devised the property. The nephew, after the death of the uncle, set up a claim to be entitled to the property absolutely. On a bill filed by the devisee against the nephew, the Court declared the defendant to be a trustee, and ordered him to convey to the plaintiff.

McDonald v. McMillan, 99.

4. The plaintiffs and their father had been in possession of the lands about twenty or thirty years, the title, however, being all the while in another party. The plaintiffs employed one of the defendants, *A. F.*, to obtain a conveyance which he took in his own name for the avowed purpose of defeating the claim of one *P.*, from whom a lease had been taken by the plaintiffs, and in a suit by *P.* against the plaintiffs to establish his right to the land, one of them swore that the deed to the defendant (the agent) was *bonâ fide* and for his own benefit; and subsequently to the dismissal of the bill in that suit, the plaintiffs took a lease of the premises from *A. F.*

Held, that the circumstances did not preclude the plaintiffs from establishing the agency of *A. F.*, and afterwards, shewing themselves entitled to the land as owners, and that the dismissal of the bill in *P.'s* suit was not *res judicata* of the question involved in this: but, under the circumstances, the Court while granting to the plaintiffs the relief to which they proved themselves entitled, refused them any costs of the proceedings to establish their right.

Washburn v. Ferris. 516.

5. A trustee or agent has no right to invest in bank stock without authority; but that rule does not apply where the *cestui que trust* or principal is of full age, and competent in law to act for himself, and gives his sanction to such an investment.

Harrison v. Harrison, 586.

6. It is a settled rule that a trustee or agent, authorized to make a purchase for his *cestui que trust* or principal, cannot make the purchase for himself without disclosing the fact. Such transactions are so dangerous that they are wholly forbidden, and are not merely declared void where damage has arisen from them, or fraud was mixed up with them.—*Ib.*

7. Accordingly, where an agent, authorized to invest in bank stock, appropriated to his principal some shares of his own, and rendered an account as if he had purchased so many shares for her, his principal, years afterwards, on the fact coming to her knowledge, was held entitled to repudiate the transaction, without any inquiry as to the fairness of the rate which she had been charged for the shares.—*Ib.*

PRIOR INCUMBRANCES.

(PAYING OFF.)

A mortgagee paying off a prior execution has a lien therefor against subsequent executions.

The Trust and Loan Company v. Cuthbert, 410.

PRIORITY.

See "Leaseholds," 2.

PROFESSIONAL ADVISER.

See "Purchase for value without notice."

PROVISIONAL RECEIPT.

See "Insurance." 2.

PUBLIC COMPANY.

The Act respecting railways declared a shareholder liable to judgment creditors of the company for "an amount equal to the amount unpaid on the stock held by him":

Held, (reversing a decree of the late V.C. Esten), that a shareholder in an action against him by a judgment creditor of the company could not set off, in equity, a debt due to him by the company before the judgment was recovered.—[VAN-KOUGHNET, C., and SPRAGGE and MOWAT, V.CC., dissenting.]

McBeth v. Smart, 298.

[See further mention of this case, *post* volume xv.]

See also "Power of Attorney."

PURCHASE FOR VALUE WITHOUT NOTICE.

A testator, the registered owner of the property in question, gave an annuity to his wife, and charged it on his real estate. His heirs being also his devisees, did not register the will, and made a partition of the property as heirs. One of the heirs who was an attorney, sold part of his share to *P.*: the latter employing no other attorney in the transaction; *P.'s* interest afterwards passed to the defendant *M.* The widow filed her bill to enforce her annuity against this property, and *M.* set up that *P.* was a purchaser for value without notice.

Held, that *P.'s* vendor was not his attorney so that his knowledge of the charge could be imputed to *P.*; and the Court not being satisfied with the evidence of express notice dismissed the bill with costs.

Rykert v. Miller, 25.

See also "Quieting of Titles' Act," 2.
"Quit Claim."

PURCHASE MONEY—EXECUTION FOR.

See "Practice," 13.

QUIETING OF TITLES' ACT.

1. Where a petitioner in proceeding under the Act, makes out his title satisfactorily, he is entitled to a certificate unless the title can be successfully impeached at law or in equity; and if a bill filed by the contestants impeaching the transaction, by which the claimant's title arose, could be successfully resisted by the claimant on any ground, it will form no obstacle to a certificate being granted to the claimant.

Laing v. Matthews, 36.

2. In proceedings under this Act to quiet a title, if it appears that the opposing claim is such that had a bill been filed by the party entitled to enforce it, the applicant would have had a good defence as a *bonâ fide* purchaser for value, without notice, the applicant will be entitled to obtain the usual certificate of title.

Cochrane v. Johnson, 177.

3. When a Referee finds in favor of a title, acquired by adverse possession for twenty years, against the legal paper title, his certificate must shew of what portion of the lot the claimant has been in possession; as by the occupation of one

QUIT CLAIM.

RAILWAY COMPANY.

closure of the railway: he is only entitled to have a manager or receiver of the undertaking appointed; and,

Quære, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money.

Galt v. The Erie and Niagara Railway Co. 499.

2. A Statute gave the bondholders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this "converted bonded stock," and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of eight per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent Act the company was authorized to unite with another company, and it was declared, that the two companies, and those who should become shareholders in the new company under the acts relating to the Cobourg and Peterborough Railway Company and under the deed of union, should constitute the new company:

Held, that the union did not extinguish the right of the bondholders to elect.

Cayley v. The Cobourg, Peterborough and Marmora Railway Mining Company, 571.

3. The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act:"

Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary; but did not give them legislative authority over the rights of other persons.—*Ib.*

4. A Statute authorized two companies to unite into one company by either a complete or partial union; and either of joint or separate, or absolute, or limited liabilities to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies:

Held, that the new company thereby assumed all the liabilities of the old company to third persons.—*Ib.*

REAL ESTATE.

(SALE OF).

See "Parties," 1.

RE-BUILDING.

See "Fire Insurance," 2.

REDEMPTION.

See "Taxes," Sale for, 4.

REGISTERED JUDGMENTS.

1. A bill was filed to enforce a registered judgment while the law for the registration of judgments was in force. After the registration of the judgment, the debtor executed a mortgage on his land, and then assigned his estate for the benefit of his creditors. The bill was against the debtor only, and the mortgagee and assignees for creditors were not made defendants until after decree, nor until after the time limited for bringing suits by the Act abolishing registration of judgments.

Held, that the registration of the judgment did not affect the mortgagee or the creditors entitled under the deed of trust; and that the mortgagee was entitled to priority over the plaintiff.

McDonald v. Wright, 284.

2. Land was conveyed in trust to pay (first) mortgages, and (secondly) registered judgments. A creditor whose judgment was registered before the date of a mortgage given by the debtor to another creditor, assented to the deed, and his assignee afterwards filed a bill stating such assignment and praying for the administration of the estate.

Held, that the judgment creditor had submitted to be paid according to the order provided by the deed.—*Ib.*

REGISTERED TITLE.

See "Purchase for value without notice."

REGISTRATION.

See "Unpatented Lands."
"Mortgage," &c., 2.

REGISTRY LAW—CONSTRUCTION OF.

The 66th section of the Registry Act (1865), which enacts that "no equitable lien, charge or interest, affecting land shall

be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act,"—is not retrospective.

McDonald v. McDonald, 133.

RELEASE.

The title acquired by a purc h at Sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon.

Beattie v. Mutton, 686.

RENTS AND PROFITS.

See "Appeal from Master," 4.

REPEAL OF LETTERS PATENT.

See "Letters Patent," 1.

REPORT OF MASTER.

(DATING.)

See "Appeal from Master," 5.

RESIDUARY ESTATE.

See "Will," 3.

RES JUDICATA.

See "Principal and Agent," 4.

REVIEW—PETITION OF.

See "Practice," 15.

RIGHT OF PURCHASE.

See "Vendor and Purchaser," 1.

RIPARIAN PROPRIETORS.

1. A riparian proprietor has the same right to forbid others from backing water on his land, as he has to prevent them from taking possession of any other vacant property he has, and making use of it against his will.

Dickson v. Burnham, 594.

2. Where it appeared that the defendants had backed water on the plaintiffs' mills and overflowed their land, but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants, the Court directed an inquiry by an engineer named by the Court under the General Orders.—*Ib.*

3. The works of a riparian proprietor should be sufficient to prevent damage to other riparian proprietors, not in cases of ordinary floods only, but also of the periodical or occasional freshets to which the river is subject; but this rule does not in equity apply to extraordinary freshets which cannot be guarded against, or cannot be so by means consistent with the reasonable use of the stream.—*Ib.*

SALE—BY FIRST MORTGAGEE TO PUISNE INCUMBRANCER.

If a first mortgagee, with a power of sale, proceeds to a sale of, and sells the mortgaged premises to a *puisne* incumbrancer, the purchaser thereby acquires an irredeemable interest, as against the mortgagor; and the effect would be the same notwithstanding such subsequent incumbrancer had been paid off, and had in his hands moneys of the mortgagor sufficient to pay off the first incumbrance, but which moneys were not specially intrusted to him for that purpose.

Brown v. Woodhouse, 682.

SALE—FOR TAXES.

See "Parties, 2.
"Taxes," Sale for.

SALE—OF REAL ESTATE.

See "Parties," 1.
"Partition," 2.
"Railway Company."

SALE—TO SOLICITOR.

See "Solicitor."

SALE—UNDER EXECUTION.

See "Execution."

SALE—WHERE HEIRS OF MORTGAGOR UNKNOWN.

Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the Court has jurisdiction, in a suit by the first mortgagee against a subsequent mortgagee and the Attorney General, to direct a sale of the property; and the proceedings cannot afterwards be set aside by the heirs except for error or fraud. In such a case the conditions of sale must state these circumstances.

Smith v. Good, 444.

SEPARATE ESTATE.

See "Married Woman."

SET OFF.

See "Public Company."

SETTLEMENT OF SUIT.

See "Condition," 1.

SEVERAL GROUNDS OF DEMURRER.

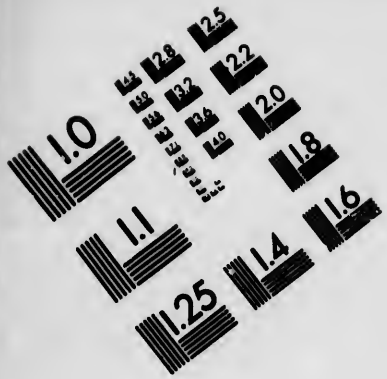
See "Practice," 7.

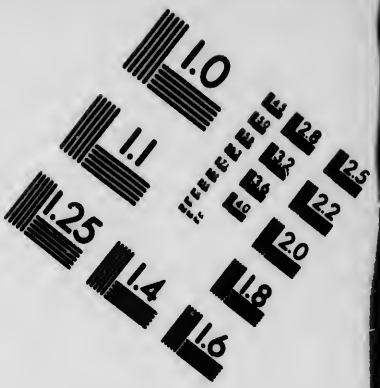
SHARES—FORFEITING.

See "Building Society."

SHERIFF'S POUNDAGE.

Where a Sheriff had moneys in his hands which were properly applicable to paying off certain executions in his office, but the debtor having otherwise arranged with the plaintiffs in the writs, obtained from them orders on the Sheriff for payment





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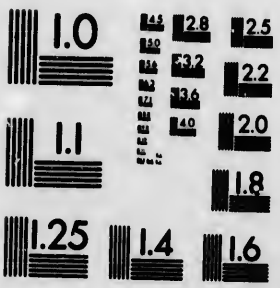

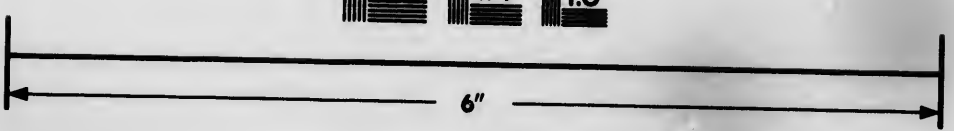

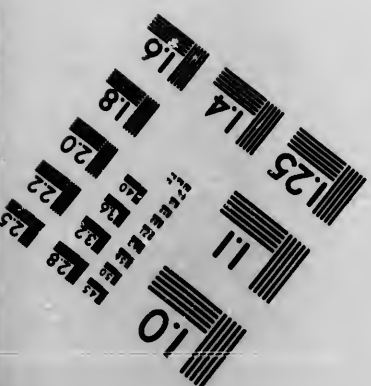

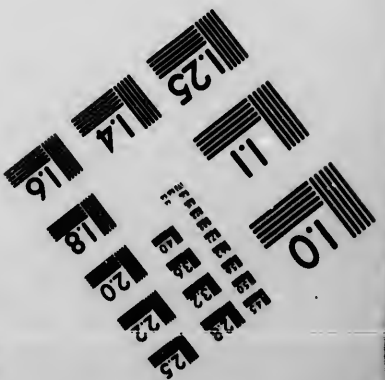

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of the amounts coming to them respectively, but these the Sheriff refused to pay, unless the debtor would consent to pay the full amount of his poundage, as if a sale had taken place, which under the circumstances he was not entitled to claim; and defended an action brought to recover the amount, in which the Sheriff succeeded in defeating the plaintiff. This Court, on a bill filed against the Sheriff, granted a decree for an account and ordered him to pay the costs up to the hearing.

Davies v. Davidson, 206.

SHEWING A GOOD TITLE.

A vendor does not shew a good title by producing and furnishing to the purchaser an abstract shewing on the face of it a good title; he does so only when he verifies such abstract.

Granger v. Latham, 209.

SOLICITOR.

(SALE TO.)

In August, 1860, the plaintiff, being pressed for money, applied to the defendant to purchase from him a mortgage belonging to the plaintiff, and the defendant agreed to purchase on such terms as would give the defendant fifteen per cent. per annum. In October of the same year, the transaction was completed. In 1865, the plaintiff filed his bill, alleging that the defendant was his solicitor, and had taken advantage of his necessities, and praying that he might be relieved. The defendant did act as attorney for the plaintiff in 1854, but he did not appear to have acted for him from that time until February, 1860, when the plaintiff put two claims into the defendant's office for collection, one of which proceeded no further than issuing a writ. The money in the other had been collected and paid over to the plaintiff in June, 1860; the defendant knew nothing of either suit, and was never afterwards employed professionally by the plaintiff. The Court having reference to all the circumstances and the delay in instituting proceedings, dismissed the bill with costs.

McLennan v. McDonald, 61.

SPECIFIC PERFORMANCE.

1. The vendor of real estate having died before the conveyance of property agreed to be sold, leaving infant heirs, the purchaser instead of proceeding to enforce the contract in this

Court, instituted proceedings at law to recover back the purchase money paid, partly to the vendor and partly to his administrators; whereupon a bill was filed by the representatives of the vendor, seeking to restrain the action at law and for specific performance. The Court made the decree as asked, and ordered the defendant to pay costs up to the hearing.

VanWormer v. Harding, 167.

2. A vendor agreed that the purchaser should have sufficient water to drive a saw mill and other machinery: in a suit by the vendor against the purchaser the Court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land: the decree to provide for this with liberty to the parties to apply from time to time.

Hincks v. McKay, 233.

3. The intestate contracted with the defendant George Brown for the purchase of a village lot in Bothwell, and paid part of the purchase money. The vendor afterwards agreed to erect certain buildings on the premises, for which the purchaser was to pay by instalments, and the vendor was to hold possession and receive the rents meanwhile on account. The purchaser, having made default, died intestate, leaving no other means. The heirs lay by for a number of years and until oil was discovered near Bothwell, and property had in consequence risen in value, and they then filed their bill to enforce the purchase, but the Court dismissed the bill with costs on the ground of laches.

Walker v. Brown, 237.

4. The general rule in England is, that where an abstract of title has been demanded, and the vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit; but where the question really in issue between the vendor and purchaser was one other than of title and was decided against the purchaser, the Court gave the vendor the costs of the suit, although a good title had not been shewn until after bill filed—no abstract having been demanded previously.

Haggart v. Quackenbush, 701.

STATUTE OF LIMITATIONS.

See "Limitations."

STREET RAILWAY.

An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the street, &c.: it was *held*,

(1.) That the rails must not only be flush when laid, but must be kept flush.

(2.) That to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary.

(3.) That an information by the Attorney General to enforce the Statutory restrictions was proper: and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the Statute, the Attorney General was entitled to a decree for the removal of the rails as of a nuisance;—but

(4.) That the municipal corporation was a necessary party to the information.

The Attorney General v. The Toronto Street Railway Company, 673.

SUPPLEMENTAL ANSWER.

A defendant neglected to set up a Sheriff's sale and deed (part of his chain of title), but evidence thereof was given and the conveyance put in without objection, so that there was no surprise upon the plaintiff; the Court gave the defendant liberty to set them up by supplemental answer, if desired.

Beattie v. Mutton, 686.

TAXES—SALE FOR.

1. The five years for which lands are to be in arrear for taxes, before they are liable to be sold, must be before the delivery of the Treasurer's warrant to the Sheriff.

Kelly v. Macklem, 29.

2. Land having been sold for taxes, a party interested therein as mortgagee applied to the vendee of the Sheriff to be allowed to purchase, on the ground of his having an interest in the land, and which he was permitted to do, his only interest in the land being as mortgagee.

Held, that the purchaser could not afterwards set up his title in opposition to the mortgagor's claim to redeem.—*Ib.*

3. Although a mortgagee may, as well as a stranger, purchase lands of which he is mortgagee, still, if he purchase as mortgagee, and makes his interest in the land a ground for being allowed to purchase, he cannot afterwards set up his title thus obtained against the mortgagor's right to redeem.—*Ib.*

4. The equity of redemption in mortgaged lands was offered for sale under execution at law, and the mortgagee bid off the property at $200; but the sale proved to be inoperative.

Held, that the mortgagee could not add the amount so paid to the amount of his mortgage debt.

Paul v. Ferguson, 230.

5. Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable.—*Ib.*

6. The County Treasurer is not at liberty to become a purchas

In re Cameron, 612.

7. In case of a tax sale, if the owner, instead of paying the redemption money to the County Treasurer for the Sheriff's vendee, pays it to the latter personally and he accepts it, the payment is, in equity, as effectual to save the property as payment to the Treasurer would have been.

Cameron v. Barnhart, 661.

8. So, if the Sheriff's vendee verbally agrees to accept payment personally at a distance from the County Town, in lieu of its being made to the Treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the Treasurer; refuse to receive it himself, when it is too late to pay the Treasurer, and insist on holding the land as forfeited.—*Ib.*

9. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the Court holding that the presumption in a case of doubt must be in favor of fair dealing and not of forfeiture, gave the owner relief.—*Ib.*

TIMBER TRADE.

A merchant agreed, in writing, to advance money for the purpose of getting out timber to be forwarded to him at Quebec for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the

autumn; but, prices being low, the plaintiff, with the assent of the other party, held the timber over till the following Spring and claimed interest on his advances from the 1st of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:

Held, that interest could not be charged. [MOWAT, V.C., dissenting.]

De Hertel v. Supple, 421.

TRUST DEED FOR BENEFIT OF CREDITORS.

See "Registered Judgments."

TRUST ESTATE.

Where trustees with power of sale had in good faith, but erroneously, made a conveyance of a portion of the trust estate to one of the *cestuis que trust*, for the collateral advantage, to the whole property to be derived from certain buildings and improvements to be made on the part conveyed thereon, thus committing a technical breach of trust; upon discovering which the grantee joined with the trustees in a conveyance of the whole trust estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the Court might consider him entitled to, and thereupon filed a bill for that purpose: the Court, under the circumstances, directed the grantee to be allowed such sum as it should be made to appear the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever should be the lesser in amount, and referred it to the Master to ascertain the amount; although the rule is that in such cases payment for improvements will not be allowed at the instance of the party making them.

Pegley v. Woods, 47.

TRUSTS—TRUSTEE AND CESTUI QUE TRUST.

1. Trustees made payments to one class of creditors over whom another class of creditors were entitled to priority, without first paying, or retaining sufficient to pay, the prior class; and a suit for the administration of the trust estate

having been instituted, the creditors, who had received such payments, were ordered to repay what they had erroneously received, and the unpaid creditors were held entitled to a lien on the trust funds in Court in priority to the claims of the trustees, and all subsequent creditors, for debt and costs.

Wood v. Brett, 72.

2. Where a decree by mistake gave a trustee priority, in respect of a debt due to him by the estate, over claims of certain parties who were entitled to priority over the trustees:

Held, on an application to correct the error, that an assignment for value, executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all the equities to which the trustee himself was subject.—*Ib.*

3. The plaintiff, a squatter on Crown Lands, made an assignment thereof to the defendant to enable him to obtain the patent for the plaintiff. There was no writing shewing the trust, and the defendant procured the patent to be issued in his own name, and thereupon the defendant induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in respect of their business capacity and otherwise; and the defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure and influence.

The Court *held*, that the plaintiff was entitled to redeem, on payment of the amount of the defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transaction; the excuse assigned for the delay being his poverty: it appearing that the parties could be restored to their original positions without loss to the defendants.

Brady v. Keenan, 214.

See also "Principal and Agent," 3, 5, 6.

UNDUE INFLUENCE.

1. An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece feeling herself bound by the promise so given to her

uncle, conveyed the lot selected by him, which was much more valuable than the other. The money (if any) paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and the institution of the suit impeaching the transaction.

McGonigal v. Storey, 94.

2. In the case of a deed of gift from a father to a son, there is no presumption of undue influence in obtaining it.

Armstrong v. Armstrong, 528.

3. Where a father made a deed of gift of all his property to his son and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the Court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences; and the deed was upheld.—*Ib.*

UNPATENTED LANDS.

Express notice of an unregistered assignment of unpatented lands has the same effect as like notice of an unregistered conveyance after patent.

Goff v. Lister, 451.

UNSOUND MIND.

(SUITS BY PERSONS OF.)

When a bill was filed in the name of a person of unsound mind, not so found by inquisition, by a next friend, the Court, on the submission of the defendant, made a decree declaring, that the plaintiff was entitled to certain lands of which the defendant had the legal estate, subject to the defendant's lien for taxes, &c., which he had paid thereon; and the defendant not asking a sale, and it not appearing that a sale or other direction following the declaration was necessary in the interest of the plaintiff, the Court made no order founded on such declaration; and it not appearing that the suit was necessary, or that the defendant was guilty of any blameable conduct, he was held entitled to costs, and the next friend was ordered to pay them without prejudice to any question as between him and the plaintiff's estate.

Young v. Heron, 580.

VENDOR AND PURCHASER.

1. The defendant, who was entitled to purchase certain land, had been guilty of default in paying the purchase money; had failed to erect a new saw mill on the land, as stipulated for; had allowed the saw mills already thereon to fall into disrepair; and had been cutting and removing the timber, so that the saw mills were in such a condition that they would become utterly lost to the plaintiffs if the defendant was allowed to retain possession; and that the saw mills and timber constituted the almost entire value of the mortgage security:

Held, that the plaintiffs were entitled to an order for possession in case the defendant did not pay the over-due instalments in a month, without prejudice to the plaintiff's right to enforce the agreement for sale.

Phillips v. Preston, 67.

2. Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:

Held, that the heir could sue the vendor in equity for compensation.

Forsyth v. Johnson, 639

3. There was a lapse of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time:

Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit.—*Ib.*

4. With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit or any part of the purchase money on the subsequent sale of the property.—*Ib*

See also "Shewing a good Title."

VENDOR'S LIEN.

1. Land subject to a vendor's lien for unpaid purchase money, was sold under execution at Sheriff's sale to a purchaser without notice. The execution debtor subsequently repurchased the land from the Sheriff's vendee in the name of a

third party, who conveyed to a brother of the debtor, in trust for the latter, who having become insolvent, made an assignment under the Insolvency Act of 1864.

Held, that the vendor's lien attached on the lands in the hand of the assignee; but,

Semble, that the Sheriff's vendee would have held free from the lien; though, if the execution creditor had himself become the purchaser at Sheriff's sale he could have so held the land, free from such lien, though ignorant of the latter: *Quære.*

Van Wagner v. Findlay, 53.

2. One of two partners on retiring from the partnership, conveyed to the remaining partner all his interest in the partnership lands, mill, and stock-in-trade, who gave the retiring partner his promissory note for £500, payable on the 1st September, 1867, agreeing at the same time, that in case of his effecting a sale of the premises before that time, to pay the note though not due. There was no evidence of any express agreement for lien on the property assigned.

Held, that the circumstances were such as to negative the retention of any vendor's lien by the retiring partner.

Mathers v. Short, 254.

VOLUNTARY BOND.

A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's lands.

Anderson v. Paine, 110.

VOLUNTARY DEED.

As against a purchaser for value, a voluntary deed, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted either by or against him, this Court will not interfere to remove the registration of the void deed as a cloud on the title.

Buchanan v. Campbell, 163.

WASTE.

A person who has an interest in remainder, subject to an estate for life, cannot maintain a bill in respect of merely permissive waste by whomsoever committed.

Zimmerman v. O'Reilly, 646.

WATER POWER.

See "Specific Performance," 2.

WIDOW'S SHARE.

See "Account."

WIFE.

(MISCONDUCT OF—AFTER DECREE FOR ALIMONY.)

See "Alimony."

WILL.

1. A testator, by his will, devised thus: "All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number.

Held, that the words used were directory, not precatory only; that the power reposed in the widow was not properly exercised, as she was bound to divide the property among all the children, although she might, in her discretion, give personalty to one and realty to another.

Finlay v. Fellows, 66.

2. A will gave land to the testator's heir-at-law for life with power to appoint the same to one or more of his sons; and declared that the devisee (his heir) was not to alien or mortgage the lot; and that it was not to be attachable by his creditors:

Quære, whether this power was a naked power, or created a trust in favor of the devisee's sons.

McMaster v. Morrison, 138.

3. The testator left two unsigned and undated scraps of paper, on one of which he had written, "I leave the whof of my personal property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, $2000; and on the second scrap of paper he had written, "I give Peter Cran $500 for himself," which were admitted to probate as the last will of the deceased.

Held, that there was an intestacy as to the residue of the personalty over and above the $2,500 mentioned in these bequests.

In re Nelson—McLennan v. Wishart, 199, 512.

4. A testator devised his farm to a grandson, and directed the same to be rented during his minority; and that the testator's widow should be comfortably supported from the proceeds of the farm during life. The testator also directed his goods and chattels to be sold, and the proceeds placed at interest to support his widow and defray all necessary expenses. The widow after his death asserted a life-interest in the property and rented it.

Held, that the widow had elected to take under the will, and that she was not entitled to any benefit in the personalty other than the interest to accrue on the money produced by sale thereof; the *corpus* of the personalty being distributable amongst the next of kin.

Montgomery v. Douglas, 268.

5. Where a will, which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues, and profits thereof, after deducting all necessary expenses thereout, to be paid by his executors * * to his widow by half-yearly payments during the residue of her natural life, but devised the dwelling-house on the farm to herself directly and not to the trustees; gave them power to lease and keep under lease the farm with the exception of the dwelling-house; directed them to sell the stock, crops, and farming implements, and to permit the widow to take firewood from the bush-part of the farm for the use of the dwelling-house; it was *held*, that the widow was not entitled to the personal possession of the farm.

Whiteside v. Miller, 393.

6. A general devise of all the testator's real and personalt estate, does not carry the after-acquired real estate.

Whateley v. Whateley, 430.

7. A testator commenced his will by saying he disposed of the whole of his estate, and then gave $2000 to one person and $500 to another person; his estate in fact, being greatly in excess of these two amounts.

Held, [affirming the decree of VAN KOUGHNET, C.] that as to such excess there was an intestacy; the rule as to cases of imperfect enumeration not applying to cases where a sum of money is named in the will.

McLennan v. Wishart, 512.

8. Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or

such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of the death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both: the Court *held*, that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees.

In re McDougall, 609.

9. In such a case the executors and trustees presented a petition under the Statute 29 Victoria, ch. 28, sec. 31; and it appearing that the parents of the legatees had abandoned them: that the legatees had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support: the Court made an order approving of the application of part of the principal to supply the deficiency.—*Ib.*

10. It is not settled whether, under a will that went into effect before the Act 29 Victoria, chap. 28, sec. 15, a charge of debts on real estate by the will gave executors an implied power to sell.

Grummet v. Grummet, 648.

11. Executors sold and conveyed land under a supposed power in the will. This construction of the will being disputed, they filed a bill to confirm the purchaser's title, the defendants being the purchaser and one of the devisees. But the Court *held*, that the question could not be decided on a record so constituted.—*Ib.*

WITHOUT INTEREST.

(MORTGAGE PAYABLE.)

A mortgage dated 23rd May, 1846, secured the payment of £112 10s. without interest, on or before the 23rd May, 1847, contained a power of sale on default of payment, and provided that the mortgagee after deducting the costs and expenses of sale "and the said sum of £112 10s., without interest," should pay the surplus to the mortgagor.

Held, that interest was payable from default; but from the correspondence between the parties the Court treated the interest as paid up to May, 1859.

McDonell v. West, 492.

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