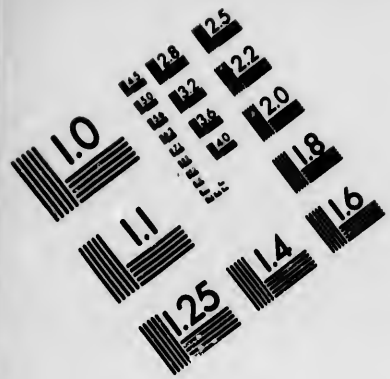

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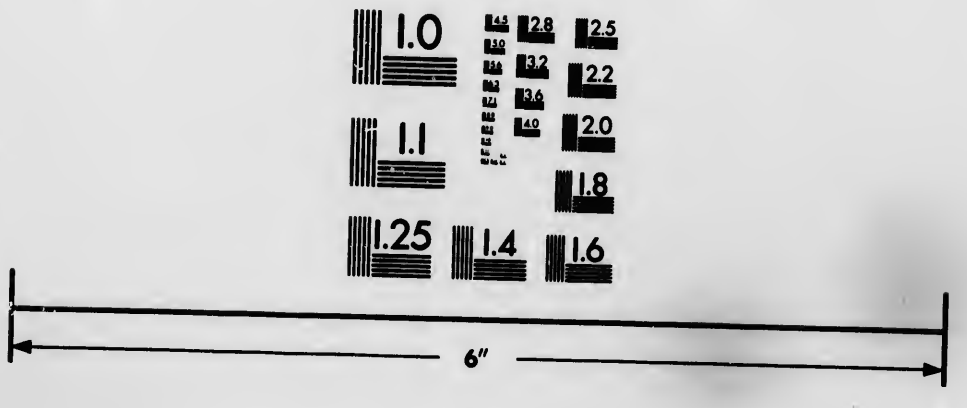

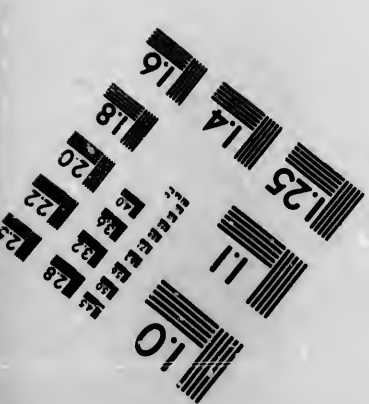

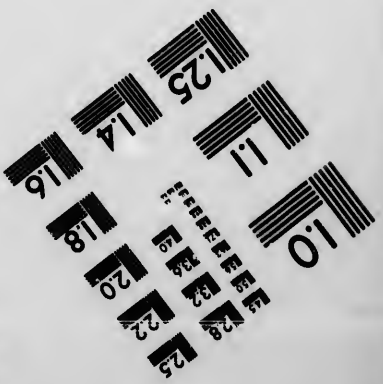

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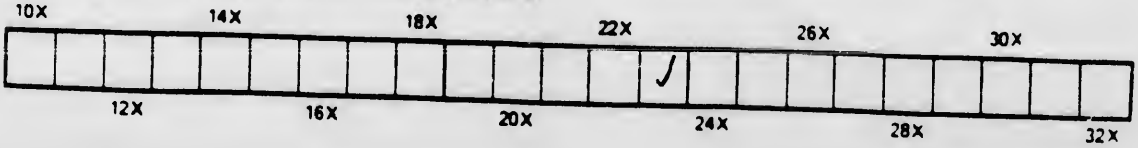

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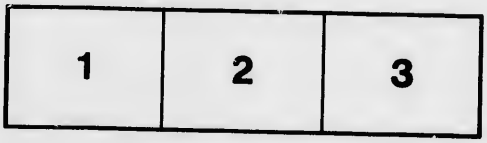

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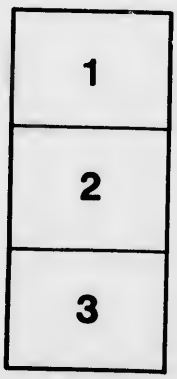

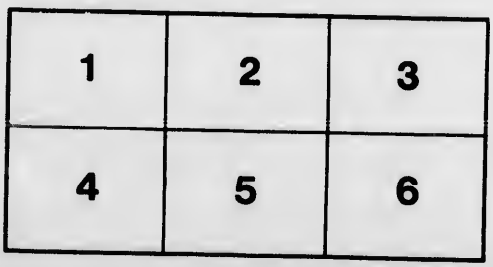

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OF

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BY

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REPORTER TO THE COURT.

VOLUME XXI.

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1875.

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COURT OF CHANCERY.

ORDERS OF COURT.

FEBRUARY 18TH, 1875.

610. In any proceeding in the Court in which it may be necessary to appoint a guardian *ad litem* for an infant the person desiring such appointment shall, upon an allegation contained in the præcipe of the infancy of the person for whom such guardian is sought, be entitled to an order *ex parte* from the Clerk of Records and Writs, or where the bill is filed or the proceedings are taken outside of Toronto, from the Deputy Registrar of the county where such bill is filed, or proceedings are had, appointing a guardian *ad litem* to such infant.

611. With the order appointing such guardian shall be served on the guardian one copy of the proceedings had up to the time of such appointment, or of such part thereof as may be necessary to enable the guardian to protect the interests of the infant to whom he has been appointed guardian.

612. Any person aggrieved by such order may move before a Judge in Chambers, on such material as he may think proper, to discharge the same, whereupon such order as may be considered most conducive to the interests of the infant, shall be made.

613. Hereafter it shall not be necessary to serve a married woman with an order requiring her to answer separately. A married woman shall be served as a party to a suit or matter, not under any disability, is now served; and the like proceedings may be had on such service and with the like effect, as if the married woman were a *feme sole*.

614. Where it is made to appear to the Court either upon a motion for that purpose, or on the hearing of any application that may be pending before it, that it will be conducive to the ends of justice to permit it, the Court may direct any application that may be made before it, to be turned into a motion for decree, or a hearing of the cause or matter, and thereupon the Court may make such order as to the time and manner of the giving the evidence in the cause or matter, and with respect to the further prosecution thereof, as the circumstances of the case may require; and upon the hearing it shall be discretionary with the Court either to pronounce a decree or make such order as it deems expedient.

615. In lieu of the fees allowed to the Master in Ordinary, the Local Masters, the Deputy Registrars, the Sheriffs and the Special Examiners, by the former tariff—the fees set forth in the tariff appended to this Order may, from this date, be charged in respect of the services there enumerated, and no other fees, costs or charges than are therein set forth shall be allowed in respect of the services therein mentioned. This Order shall not interfere with the matters referred to in Order No. 553, in respect of which the fees heretofore charged shall continue to be allowed.

616. Orders 298, 299, 300, 301, 302, and 303, and all Orders and portions of Orders inconsistent with these Orders now promulgated, are hereby abrogated.

SHERIFF.

Receiving, filing, entering and endorsing every paper.	$0 25
Return of all process and writs except subpœnas	0 50
Return of subpœnas, orders, notices of motion, warrants or other papers.....	0 25
Warrant to Bailiff on writ not executed by Sheriff or Deputy	0 75
Service of office copy of Bill (including affidavit and oath): stamped form of affidavit to be furnished by Solicitor.....	1 50

Each additional party served	0 50
Serving each warrant, notice, certificate, subpœna or other paper	0 75
Each additional party served	0 50
Actual and necessary mileage from the Court House to the place where service of any Bill, process, paper or proceeding is made, per mile	0 13
Writ of arrest, arrest on, where amount does not exceed $200	2 00
Ditto $400	4 00
Ditto over $400	6 00
Mileage going to arrest when made, per mile	0 13
Ditto conveying party arrested from place of arrest to the gaol, per mile	0 13
Attachment, arrest on (besides mileage and expenses)	4 00
Sequestration upon seizure of estate and effects under writ of sequestration	4 00
Schedule of goods taken in execution (including copy for defendant) if not exceeding five folios	1 00
Each folio above five	0 10
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Master, or by order of the Court or Judge.	
Poundage upon sequestration followed by sale or collection, or on execution, where amount made shall not exceed $1,000, six per cent.: over $1,000 but under $4,000, three per cent. on whatever exceeds $1,000 in addition to the poundage allowed up to $1,000. When the sum is over $4,000, 1½ per cent. on whatever exceeds $4,000, in addition to the sum allowed up to $4,000, exclusive of mileage for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property—to be allowed by the Master in Ordinary in his discretion.	
Executing writ of assistance (besides mileage and expenses)	5 00
Every search not being by a party to a cause or his solicitor	0 30

Certificate of result of search—when required, [a search for a writ against lands of a party shall include sales under writ against same party, and for the then last six months]	0 75
Drawing every affidavit when necessary and prepared by Sheriff	0 25
Notice of appointment for ballot of Jury	0 50
Notice to Clerk of the Peace of such appointment	0 50
Fee on balloting Jury	5 00
Fee on striking	2 50
Serving each Juror, besides mileage at 13 cents per mile	0 50
Keeping and checking pay list of Juror's attendance in each case	1 00
Every Jury sworn	1 00

CORONERS.

The same fees shall be taxed and allowed to Coroners for services rendered by them in the service, execution and return of process, as allowed to Sheriffs for the same services above specified.

CRIER.

Calling every case with or without Jury	0 60
Swearing each witness or constable	0 15

ALLOWANCE TO WITNESSES.

To witnesses residing within three miles of the Court House, per diem	1 00
To witnesses residing over three miles from the Court House, per diem	1 25
Barristers and attorneys, physicians and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or to give professional opinions, per diem.	4 00
Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem	4 00

If the witnessess attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

MASTER.

Filing and entering decree in Master's book	$0 20
Every summons, warrant, or appointment	0 50
Administering oath or taking affirmation	0 20
Marking every exhibit	0 20
Drawing depositions, reports or orders, per folio	0 20
Fair copy, per folio (when necessary)	0 10
Copy of papers given out when required, per folio	0 10
Every attendance upon a reference	1 50
For each additional hour	1 50
Fee on report signed (only one to be allowed in each suit)	2 00
Every certificate, *if not longer than two folios*	0 50
For each folio over two	0 20
Filing each paper	0 10
Taxing costs per hour	1 00
Making up and forwarding depositions, bills of costs, and proceedings in Master's office	0 50
Every special attendance out of office within two miles	2 00
Every additional mile above two	0 20
Every attendance on application to a Master in Chambers	1 00

Searching files in office, same allowance as to Deputy Registrar.

SPECIAL EXAMINER.

Every appointment..	$0 50
Administering oath or taking affirmation	0 20
Marking every exhibit	0 20
Taking deposition, per hour	1 50
Fair copies for Solicitor, per folio (when required)	0 10
Every attendance out of office when within two miles.	2 00
Every attendance over two miles out of office—extra per mile	0 20
Every certificate	0 50
Making up and forwarding answers, depositions, &c., including filing præcipe	0 50
Every attendance upon an appointment, when Solicitor or witnesses do not attend, and examiner not previously notified	1 00

DEPUTY REGISTRAR.

Entering parties names and filing bills	0 50
Filing answer or demurrer	0 50
Entering and filing all other pleadings, affidavits on production, interrogatories, and depositions or other evidence..	0 20
Filing other papers	0 10
Entering note, *pro confesso*	0 75
Subpœna, including filing præcipe	0 50
Fi. fas. and other Writs	1 00
Copy of papers required to be given out, per folio	0 10
Examining and authenticating same, when office copy prepared by Solicitor, every three folios	0 05
Amendment of Record when re-engrossment not necessary, per folio	0 20
Forwarding papers from Deputy Registrar's office, including bills of costs	0 50
Setting down a cause for hearing	8 00
Certificate, if not more than two folios	0 50
For each additional folio	0 20
Searching files in office (if within one year)	0 20
Over one year and within two years	0 30
Every search over two years or a general search in one cause	0 50

Marking every exhibit produced on the examination of witnesses	0 20
Swearing each witness	0 20
Taking account on Præcipe Decree	1 00
Taxing costs on same	1 00
Attending on opening Commission	1 00
Stamping affidavit of service in each suit	0 10
Attending on inspection of documents produced with affidavits on production, per hour	1 00

SHORT-HAND REPORTER.

On the certificate of the Judge before whom the examination of a witness or witnesses takes place, the Master may allow on taxation, a reasonable sum for the expense of a short-hand reporter.

J. G. SPRAGGE, C.

S. H. BLAKE, V. C.

WM. PROUDFOOT, V. C.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

DURING PORTIONS OF THE YEARS 1874 AND 1875.

JARVIS V. CRAWFORD.

Will, construction of—Period of distribution—Practice.

A testator directed his executors, as soon as provision was made for the payment of the annuities given by his will, and upon payment of his debts, funeral and testamentary expenses, to divide with all convenient speed the residue of his estate amongst the persons mentioned in the will; and the executors after having invested a sufficient sum to meet the annuities, and having paid the debts, funeral and testamentary expenses, divided a portion of the residue of the estate amongst the persons entitled to receive the same; but before the balance of the residue was divided one of the persons entitled to share therein died:

Held, that the share of the deceased vested at the time when under the will the distribution should have been made, and that the executors could not postpone the period of distribution, but that it was a question of fact whether the executors could with all convenient speed after making the payments and provisions directed by the will, have divided the residue of the estate before the death had occurred; and directed a reference to ascertain this fact before it would determine to whom the balance of the share of the deceased person should go.

Statement.

This was an amicable suit instituted to obtain the construction of the will of the late Hon. *George Crawford*, by the executors thereof against the parties beneficially interested in the residue of the estate, and came on to be heard on bill and answer.

1874.

Jarvis v. Crawford.

Mr. *Crombie*, for the plaintiffs.

Mr. *Blake*, Q. C., Mr. *Moss*, Q. C., Mr. J. A. *Boyd*, and Mr. *A. Hoskin*, for the defendants.

Judgment.

BLAKE, V. C.—Under this will, I am of opinion the testator intended that, as soon as provision was made for payment of the annuities given thereby, and upon payment of his debts, funeral and testamentary expenses, there should be a division of the residue of his estate. This division was to be made "with all convenient speed," after the above provision and payments. No further division was to be made until the death or marriage of certain annuitants, and after the happening "of each such event," the sum set apart for the payment of the annuity thus falling in was to be divided as by the will directed. The will was made on the 28th of January, 1870. The testator died on the 5th of July, 1870. By the 1st of April, 1871, the executors had invested a sufficient sum of money to answer the annuities called for by the will; and they had also paid all the debts, funeral and testamentary expenses. On that day the executors divided $82,500, part of the residue of the testator's estate, and transferred the same to the persons specified in the will as the recipients thereof. The residue of the estate, not required to meet the annuities, which is worth about $35,000, the plaintiffs considered could not then be divided with advantage. On the 18th of May following, *Charles Henry Crawford*, called in the will *Charles Crawford*, died, leaving no child. The plaintiffs allege that the residue of the estate above referred to is now ripe for division, but that difficulties arise in carrying out the trusts of the will, as those representing *Charles Henry Crawford* claim that they are entitled to his fifth share of this residue, which it is alleged could and should have been divided before his death, whereas those interested adversely claim that this share goes over to the brothers. The clause in question

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is as follows: "And in case any of my said last mentioned sons shall be dead before the distribution of any of the shares under this my will, then, and in every and any such case, the share which would have been paid to such one as shall be dead as aforesaid, shall be paid to the child or children which he may leave him surviving, share and share alike; but in case such one being so dead as aforesaid do not leave any child or children him surviving, then in such case, the share that would have been paid to such one as shall be dead as last aforesaid shall he paid to such others of my said last above mentioned sons as shall then be living; and to the child or children of such of my said last mentioned sons as shall be dead."

Judgment.

The distribution in respect of which the present question arises, is the one to be made "with all convenient speed," after certain payments and provisions are made by the executors. I do not think the executors can defeat the claim of any of these five beneficiaries, by postponing the period of the distribution. When the time at which the division under the will was to take place arrived, then each of these five being alive could claim his share; he then became entitled to what was at such time coming to him; and the fact that the executors did not carry out the terms of the will, cannot have the effect of cutting out this son. It is, therefore, a question of fact, whether or not the executors could have, with all convenient speed after making the payments and provisions directed by the will, divided the residue of the estate before the death of *Charles*. I must refer it to the Master to ascertain this fact before determining to whom the balance of *Charles's* share goes. At page 797 of the 1st volume of *Jarman* on Wills, there is the following passage: "So, where a testator clearly expressed his intention that the benefits given by his will, should not vest till his debts were paid, or until a sale directed thereby should be completed, or until assets in

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a foreign country should be actually remitted to the legatee, the intention was carried into execution, and the vesting as well as payment was held to be postponed." This is somewhat qualified by the following note by the author: "But not necessarily to the time when the debts have been actually paid, or the sale completed; for the Court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period."

It is true as stated in *Ellison* v. *Airey* (*a*), that, "No certain rule can be laid down in cases of this kind. They must be various, as very few words will vary the evidence of the testator's intention." *In re Dodgson's* trusts (*b*), Sir *Richard Kindersley* says, "What the testator here meant to refer to was not the period of the fund actually getting into the legatee's hands, but the happening of the event on which she would be entitled to receive it."

Judgment.

In *Birds* v. *Askey* (*c*), the Master of the Rolls concludes "that the words 'after satisfying the trusts of my will" mean after providing for the due execution of the trusts of my will, which is a duty which falls on his executors immediately on his decease, and in that case, the words can only apply to the period when that duty falls on the executor, viz., at the death of the testator."

In *Elwin* v. *Elwin* (*d*), Sir *William Grant* determined that, as the produce of the sale was to be distributed at such time as the sale should be completed, and as *Peter Elwin* died before the sale, he did not take a vested interest in the produce of the estates.

(*a*) 1 Ves. Senr. 111.
(*b*) 1 Drew 440.
(*c*) 24 Beav. 615.
(*d*) 8 Ves. 547.

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A convenient rule to have adopted was that laid down by Lord *Thurlow* in *Hutcheon* v. *Mannington* (*a*), "Where a real estate is devised to be sold for the purpose of distributing the money, it is clear it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence, for it might be the very next day, or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for, where there is a trust, that is always considered here as done, which is ordered to be done."

But in *Faulkner* v. *Hollingsworth* (*b*), *Elwin* v. *Elwin* (*c*), and *Law* v. *Thompson* (*d*), it was restricted. Lord *Eldon* in *Gaskell* v. *Harman* (*e*), differed from the opinion there expressed, and says the only use he made of this case (*Hutcheon* v. *Mannington*) was "as an authority for the principle that the intention of the testator in similar cases must be clearly expressed. * * The best construction is generally to consider the interest vested and in hand, though strictly not collected for the purpose of enjoyment as between the particular interests and the capital; and, if that is wise, the Court will not conjecture in favor of an intention against the general rule."

Judgment.

In *Law* v. *Thompson*, Sir *John Leach* held that the money was to be equally divided between the brothers and sisters who should be alive when the money was remitted. But he adds, "If, however, the executors named in the testator's will, having taken upon themselves the administration of his estate, could, with

(*a*) 1 Ves. 366.
(*b*) Cited, 8 Ves. 558.
(*c*) Ves. 558.
(*d*) 4 Russ.
(*e*) 11 Ves. 498.

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reasonable diligence, have collected it, and remitted the produce to his father in his lifetime, I should be of opinion that the rights of the father could not be defeated by the accidental circumstances of this case; and, upon that principle, it must be referred to the Master to inquire, whether, if the will had been proved by the executors named in it and reasonable diligence had been used by them, any and what part of the testator's property, given to the father, could have been remitted to him in his lifetime." In *Vickers* v. *Scott* (*a*), the same learned Judge says, "The tenant for life, by the clear language of the will, is not entitled to the rents and profits of the residuary real estate, until it has been sold and the produce invested. The sale is by the will directed to be made with all convenient speed after the testator's death; and that the sale has not yet taken place can work no prejudice to the tenant for life. It is consistent with principle and authority that twelve months should be considered as the time within which the sale might reasonably have been made, and from that time the tenant for life is entitled to the rents of the estate." See also *Sitwell* v. *Bernard* (*b*), citing *Stuart* v. *Bruere* (*c*).

Judgment.

I am of opinion that the share of *Charles Henry* vests at the time when, under the will, the distribution should be made, although this may differ from the period when, as a matter of fact, it is effected. Further directions and costs will be reserved until after the Master has reported on this point. The Master can add all necessary parties in his office.

(*a*) 3 M. & K. 500. (*b*) 6 Ves. 520.
(*c*) At. p. 529.

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BURNS v. BURNS.

Assignment.

J. W. B., a widower, was locatee of the Crown, and agreed with his son, *J B*, to assign his interest in the land on condition of his son's making certain payments, and performing certain services for the father, which were all duly made and performed; and afterwards the patent was issued in the name of *J. B.*, by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements, without any claim by the father except for his support under the agreement made between the father and son. After the father's death the widow filed a bill for dower in the premises, but the Court *Held*, that even admitting that the grant of the land was to, and was by the Government meant to be to, the father, that he could be treated only as a trustee for the son, and dismissed the bill with costs.

This was a bill by *Agnes Burns* against *John Burns*, *Margaret Patton*, *John Patton*, *Jane McNair* and *Duncan McNair*, and *The Oxford Permanent Building and Saving Society*, setting forth that in December, 1857, the plaintiff married the late *John Wilson Burns*, a widower, who at the time of the marriage was the owner in fee of lot No. 4, in the 12th concession of Blandford, and with whom she continued to reside as his wife for about a year, when, owing to the ill treatment of the said *John Wilson Burns*, the plaintiff was compelled to leave and thereafter continued to live separate from him: that *John Wilson Burns* died on the 10th of March, 1872, intestate, leaving the defendants *John Burns*, *Margaret Patton*, and *Jane McNair*, his children and heirs-at-law: that the deceased had for many years before the plaintiff's marriage with him been known as *John Burns*, and only shortly before plaintiff's marriage he assumed the name of *Wilson*: that deceased purchased the lot above mentioned from the Crown and paid therefor out of his own moneys, and resided on and used and enjoyed the same as his

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own property, which (as the bill alleged) in truth and fact it was: that when the plaintiff left her late husband he owned no property other than the said lot, and he then and always thereafter falsely represented and pretended that he was not the owner thereof, but that the same was the property of his son, the defendant *John Burns*, in order to deter, and which did deter, the plaintiff from taking proceedings against him to obtain alimony: that defendant *John Burns* was well aware that his father was patentee of the lot in question, but in order to deter the plaintiff from taking steps as aforesaid, connived with his father in fraudulently representing that he was the owner of the lot: that for the purpose of giving color of right to such fraudulent claims and representations of defendant and his father, they did on the 26th February, 1869, enter into an agreement whereby the defendant agreed to pay to his father $100 a year, which he made a charge on said lot in favor of his father, and fraudulently pretended that he owned the lot; and on the 24th February, 1874, executed a mortgage to the defendants *The Building Society* for $507.52, which mortgage the plaintiff claimed was only a charge on defendants (*John Burns's*) own interest, and prayed a declaration that she was entitled to dower as widow of the late *John Wilson Burns*, and relief accordingly.

Statement.

The defendant *John Burns* answered, setting forth that in and prior to 1853 he was residing with his father on the land in question, and having at that time attained the age of twenty-one years intended leaving his father and obtaining a farm of his own: that his father was then over sixty years of age, and, being unable to work the farm himself or support his family, he proposed to defendant that if he would remain and help to work the farm and afford the father a living, give him a house until his death, and pay the arrears due the Crown, and pay to the defendants his sisters the sum of $1000 each, he would convey to the defendant the lot in question, to

which request defendant acceded, and remained on and worked the lot and made valuable improvements thereon, and in 1855 paid the Crown $300, the arrears due; and on the 11th December of that year a patent was issued granting the lot to defendant, and which patent was so issued at the instance of his father: that under the terms of the agreement he had paid to his sister *Jane* the sum of $1000: that defendant resided on the said premises ever since, with the exception of about eighteen months, and had made valuable permanent improvements and that the property had always been considered by the deceased and the other members of the family as belonging to defendant: that defendant had also provided a house for his father according to their agreement until the beginning of the year 1869, when his father preferred having a certain sum paid him annually instead of the provision defendant had agreed to furnish him, and thereupon defendant bound himself to pay his father $100 a year, and which was paid regularly and a house provided for him until November, 1870, when his father, being very old and infirm, preferred to live in defendant's house, and thereupon he went and lived with, and was provided for and taken care of by defendant until his death: that the agreement was made between defendant and his father and the patent issued prior to any intention on the part of his father to marry the plaintiff. Statement.

The plaintiff thereupon amended her bill, alleging that there was no memorandum or note in writing evidencing any such agreement as that set up by the answer, and that no assignment of the right of *John Wilson Burns* to the patent was ever executed by him to the defendant, nor was the Crown ever requested to issue the patent to the defendant or to any other person than the deceased, and that no conveyance after the issue of the patent was ever executed by the deceased to the defendant.

The defendants *McNair* answered, disclaiming any

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interest in the premises. The defendant *Margaret Patton* answered, claiming to be entitled to a one-third share of the estate as heiress of *John Wilson Burns*, who she asserted was up to the time of his death owner of the lands.

The cause having been put at issue came on to be heard before Vice-Chancellor *Blake*, at Goderich, when a decree was pronounced dismissing the bill for costs.

Statement.

The documentary evidence put in at the hearing consisted in part of a printed copy of the rules of the English Congregational Church, at Paisley, (Scotland), dated 1823, signed by the deceased "*John Wilson Burns*," as one of the elders. The certificate of his marriage with the plaintiff also was produced, in which his name was given as *John Wilson Burns*, also the bond from defendant to him (1869) in which he was called and he signed as *John Wilson Burns*. The original application on behalf of the deceased was also produced and that was in the name of *John Bains* by mistake of the person preparing the petition. On the 18th November, 1855, a note written by defendant to the Crown Lands Agent at Zorra was also produced, in these words, "Dear Sir,—I have been looking long for my deed it being so long since I paid the last instalments, as I am now over sixty years of age I think it is time I had it so that I can make proper arangements; when it comes to hand please forward it to me by Chesterfield post office. Yours respectfully, *John Burns*." The patent was afterwards issued in the name of the locatee appearing in the books of the department, *John Bains*, which on the 27th March, 1855, was returned to the Commissioner of Crown Lands by *John Carroll*, Crown Lands Agent at Zorra, with a letter explaining that a mistake had occurred in the certificate of Deputy Surveyor *Smiley*, in calling the applicant *Bains* instead of *Burns*, a note of which had been made by the agent when *Burns*

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applied to him in 1847 to purchase, when under the head of remarks in his book he wrote, "*Bains*, error, should be *Burns*," and the sale was then carried out; and in compliance with a request to that effect this letter was laid before the Executive Council, when the Committee recommended "that the patent to *John Bains* be cancelled, and a minute thereof made in the margin of the Registry of the original letters patent, and that another patent for the same land issue to *John Burns*;" and another patent was accordingly issued to *John Burns*.

The plaintiff reheard the cause.

Mr. *Moss*, Q.C., for the plaintiff and the defendant *Margaret Patton*.

Mr. *Blake*, Q.C., and Mr. *J. A. Boyd*, for the defendants *Burns* and *McNair*.

Mr. *J. H. McDonald* for the defendants *The Building Society*.

Judgment.

SPRAGGE, C.—The doubt that I entertained at the close of the argument was, whether the defendant *John Burns* sufficiently makes a case by his answer of equitable title in himself as between himself and his father. Upon reading his answer I think that he does.

He insists certainly that he is himself the patentee, but he sets out an agreement and dealings between his father and himself, shewing how it came about that he was, with the assent of his father, substituted for him, as he alleges, as patentee. This agreement and these dealings constitute the equitable case insisted upon by defendant's counsel; and it is contended that if in fact the father was the patentee, he held the patent as bare trustee for his son.

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I do not think that the defendant's allegation that he was the patentee weakens the equitable case made by his answer. One test of this is, that if his allegation had been that, his father having been the original purchaser from the Crown, the patent had issued to him, his case that as between his father and himself he was equitably entitled, would stand as it now stands upon the present pleadings.

The defendant might indeed have put his case, that if he failed in shewing that he was in fact the person named in the patent, he was still *equitably* entitled, but the plaintiff had no right to assume that the allegations constituting the defendant's equitable case were intended only as a narrative, by way of inducement to the fact of legal title which he sets up. And I judge from the allegations by way of amendment to the plaintiff's bill, that she did not so assume; and I infer from the same allegations that she was not taken by surprise—as indeed she ought not to have been—by the defendant's equitable title, as well as his legal title, being insisted upon, and evidence being given in support of it at the hearing.

Judgment.

Taking the defendant's case to have been open to him at the hearing, I think there was evidence to establish it. Several witnesses, *McNairn*, *Baird*, *Slater*, *Armstrong*, *Pettigrew*, and *Loughead*, all gave evidence in support of it. If truthful, their evidence was sufficient, and we must assume that the learned Judge before whom the case was heard attached its due weight, and not more than its due weight, to the evidence given. If the defendant's equitable case is made out the plaintiff is not dowable of the land in question, for, assuming in her favor that her husband was in fact the person named in the patent, he was when he married her a trustee for his son *John*, and at the time of his death a bare trustee to convey to him.

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I prefer to rest my judgment for the affirmance of the decree upon this ground, for I cannot help entertaining considerable doubt whether the father was not in fact the patentee of the Crown of the land in question.

In my opinion the decree should be affirmed with costs.

STRONG, V. C.—I have come to the conclusion that the effect of the patent was to vest the legal estate in *John Wilson Burns*, the defendant's father. The case is one of a latent ambiguity, that is to say, the extrinsic evidence shews that there were two persons, the father and son, answering to the description of the grantee in the patent deed, and this being so parol evidence is admissible to shew the intent of the officers of the Crown, through whose ministry the grant was made. The evidence, I consider, establishes that the intention was to grant to the person who had entered into the original contract of purchase, and that person was the father.

Judgment.

I, however, entirely agree with the other members of the Court in the opinion that the evidence shews that the legal estate acquired by the father was bound by an equitable title in the defendant, paramount to the plaintiff's right to dower. As authority on this point I refer to a case decided by the Court of Appeals in New York: *Freeman* v. *Freeman* (*a*.)

I think this case is sufficiently made in pleading, and at all events there could have been no surprise, for the great mass of the evidence is directed to this particular point.

I think the decree should be affirmed with costs.

BLAKE, Q. C.—I am convinced there was an arrangement between the father and the son, whereby, for

(*a*) 3 Am. Reports, 657.

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certain considerations, the son was to have the land in question—that this was made before the father's last marriage—that the conditions on which the son was to obtain the property have been fulfilled—that the father at the time of his marriage to the plaintiff had no beneficial interest in the premises, and therefore that the plaintiff is not entitled to dower thereout. On the examination of witnesses and the hearing of the cause, the case was not restricted in the manner insisted on at the rehearing. It was then argued not only that the patent issued in the name of the son, but that even if this were not so the acts and dealings connected with the property made the father a trustee for the son, and enabled the latter to call for a conveyance of the premises. Both parties, without question, adduced evidence on these two points, and I do not think, when the case comes on for rehearing, it would be proper for the Court, when there has not been any mistake or misapprehension as to the nature of the issue tendered by the defendant, to listen to the argument for the first time raised, that on the pleadings as they stand the first ground alone is open to him. The bill and answer, however, do, I think, sufficiently raise all that is required for the consideration of both the questions relied on by the defendant in argument. The defendant says the father promised, for certain considerations, which were satisfied, to convey the premises to hm. He likewise alleges his improvements thereon, and various dealings therewith; he then alleges that in pursuance of their agreement the patent issued to him. The plaintiff in her amended bill does not confine herself simply to a denial of the fact of the issue of the patent to the son, but in paragraph 9*a* proceeds to deny that there was any agreement to convey made between the father and son. All the matters discussed on the rehearing were thus, I think, fairly brought before the Court. The answer of the defendant *John Burns* has been substantially proved, and the decree should be affirmed with costs.

Judgment.

HAYNES v. GILLEN. 1874.

Description, mistake in—Registry Act—Notice—Costs.

The owner of two town lots, 25 and 26, sold a portion of 26 to one *P.*, but by mistake the description in the deed was such as at law to pass the whole lot; he subsequently sold lot 25 and all that part of lot 26 not before sold to *P.* to the plaintiff, and the deed thereof was duly registered; subsequently to the registration of this deed the defendant obtained a conveyance from *P.*, the description of the land being the same as that in the deed to *P.*: *Held*, that the registration of the plaintiff's deed was notice to the defendant of the plaintiff's claim to that part of lot 26 not sold to *P.*, and that the plaintiff was entitled to a reconveyance thereof.

A defendant in an ejectment suit entitled to relief in equity on the ground of mistake defended the action, in which he was unsuccessful, instead of coming at once to this Court for relief. Subsequently he filed a bill and obtained a decree with costs; but the plaintiff at law was held entitled to set off against such costs his costs of the ejectment subsequent to the writ.

Gillen v. *Haynes*, 33 U. C. R. 516, followed but not concurred in.

Examination of witnesses and hearing at Belleville.

Mr. *Bethune* and Mr. *McDougall*, for the plaintiff.

Mr. *J. A. Boyd* and Mr. *J. H. Bell*, for the defendant.

Judgment.

BLAKE, V. C.—*Jacob Cronk*, being the owner of lots 25 and 26 on the west side of George street, in the Town of Belleville, agreed with one *Powell* for the sale to him of 78 feet of lot 26. The evidence of *Cronk* and *Powell* is express and conclusive on the point, that what the one sold and the other purchased, was 78 feet on the west side of George street, and not the whole of lot 26. A deed, intended to carry out this sale, was, on the 13th of April, 1865, executed by *Cronk*, and on the 15th of July following, it was duly registered. The description in that deed, is as follows:—

"All and singular that certain parcel or tract of land, and premises situate, lying and being in the town

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of Belleville, in the County of Hastings, and being composed of lot No. 26, as laid down upon a plan of lots laid out by *George Taylor* and *William Johnstor Taylor*, being on the west side of George street, in the said Town of Belleville, described as follows: commencing at the north east corner of said lot No. 26, running in a straight line westerly along the northerly boundary line of said lot 26, 132 feet; then running south 78 feet along the western boundary line of said lot 26; and then running easterly in a straight line parallel with the northerly boundary line of said lot 26, unto George street; and then northerly along the westerly side of George street in a straight line to the place of beginning."

Judgment.

I should have thought that under this description, the grantee took 78 feet only of lot 26; that there were here two descriptions of the "parcel or tract of land" conveyed; the first, a general description; the second, a particular one: that the second description was not a "*demonstratio*" of what lot 26 contained, but a fuller description of the "parcel or tract of land," the subject of agreement; therefore, that the rule, "*falsa demonstratio non nocet*," is inapplicable, but the principle "that if premises be described in general terms, and a particular description be added, the latter controls the former" governs (*a*). In this description we find the most cogent evidence to convince us that it was not by any error that the line did not run down so as to include the whole lot, and that the figures 78 were thus inserted in place of 82½ feet, for we find that while the first course runs "*along the northerly boundary*" of lot 26; the second course "*along the westerly boundary*," and the fourth course *along the westerly side* of George street, the third course runs, not along the southerly boundary but *parallel with the northerly boundary*. If the vendor

(*a*) Doe dem. Smith et al. v. Galloway, 5 B. & Ad, 51.

had sold and intended to convey the whole of this lot, the third course would have been, I think, as are the others, along the boundary, but as the 78 feet would not reach this limit, the description was varied and the line run not along the southerly boundary, but parallel to the opposite boundary. *Jamieson* v. *McCollum* (*a*) was a clear case of "*falsa demonstratio.*" There, the "particular description" could not be referred back to "the parcel or tract of land" intended to be conveyed, for it ran "part of broken lot number 94, and numbers 95 and 96, butted and bounded as follows: Lot number 94 commencing, &c." Here, it is clear, the "*demonstratio*" was not of the "parcel or tract of land," but of lot 94, It is also to be observed that, in that case the particular description was clearly inaccurate in many respects, and therefore no reliance could be placed upon it, nor could it be used to control the general description. Here, the particular description cannot refer to the first description as being a more accurate designation of it, for it depends entirely on the first description, beginning at the north east corner of lot 26.

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Judgment.

The Court of Queen's Bench, have found that, in this case, the whole of lot 26 passed to the grantee (*b*). I am bound by this ruling, and would not have touched upon the question of description, but that the parties may not be satisfied with a suit in the Queen's Bench and in this Court, as to the 4½ feet of land, valued at $40, the subject of their litigation, and may desire to ascend to the Court of Error and Appeal; and I desire for this reason to explain that, without concurring in it, I follow this decision. The position of the parties *Cronk* and *Powell*, on the 13th of April, 1865, must be taken by me to have been that while intending that 78 feet of the lot should be conveyed, by an instrument then executed, the whole lot passed to *Powell*, and *Cronk* was entitled to

(*a*) 18 U. C. R. 445. (*b*) See Gillen v. Haynes, 33 U. C. R. 516.

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shew this mistake, and procure a re-conveyance of the 4½ feet in error conveyed to *Powell*.

On the 7th of August, 1865, by a conveyance of that date, and duly registered on the 13th of September following, *Cronk* conveyed to the plaintiff lot 25, "and all that part of lot number 26, on said west side of George Street, not heretofore sold and conveyed by said party of the first part to one *William Powell*." Under this conveyance, the plaintiff claims the 4½ feet of lot 26, which he purchased from *Cronk*, and which were, as he alleges, excluded from the conveyance to *Powell*. No doubt, as against *Powell*, this claim could be successfully enforced. The defendants, however, allege that whatever may be the position of the plaintiff as against *Powell*, he cannot succeed against them, as the conveyance to the defendant *Hannah Gillen*, made on the 9th day of August, 1866, and registered on the same day, passed all the land covered by the conveyance, *Cronk* to *Powell*; and under the Registry Laws, the title thus acquired cannot be impeached. The land set forth in the conveyance, *Powell* to *Hannah Gillen*, is described in the same manner as in the conveyance *Cronk* to *Powell*.

Judgment.

The Registry Act, under which the defendants claim protection, is 29 Vic. ch. 24. Section 66, on which they rely, is as follows: "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." It has been held in *Bell* v. *Walker* (*a*), that this clause applies to interests such as that now claimed by the plaintiff; and in *Forester* v. *Campbell* (*b*), and *Wigle* v. *Setterington* (*c*), that notwithstanding its terms, notice of an equity must still

(*a*) 20 Gr. 558. (*b*) 17 Gr. 379. (*c*) 19 Gr. 512.

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prevail against registration. The defendants allege they had no notice of this equitable interest of the plaintiff when their purchase was effected. But section 64 of this same Act, says, "The registry of an instrument under this Act, or any former Act, shall, in equity, constitute notice of such instrument, to all persons claiming any interest in such lands subsequent to such registry," so that when the defendant purchased, she then had notice of the conveyance to the plaintiff, which had been registered against lot 26; and she then knew that, notwithstanding the conveyance *Cronk* to *Powell*, *Cronk* still claimed he had not conveyed the whole of the lot; still claimed he had the right to deal with a portion of it; and that he made the subject of an agreement between himself and the plaintiff, that part of the lot "not heretofore sold and conveyed by him" to *William Powell*. The defendants admit they knew before the purchase that lot 26 had a frontage of 82½ feet. Admitting they rightly construed the deed and knew that, as a matter of law, the whole lot passed under the conveyance, they still knew, as a matter of fact, that the course ran 78 and not 82½ feet; they then saw that the person who executed their deed executed another, conveying that which was claimed to be unsold of this lot, and they must have known that the 4½ feet, the difference between the 78 and the 82½ feet was that which was intended to be affected by this second deed. This notified the defendants of the fact that *Cronk* had not sold the whole of lot 26 to *Powell*; that he claimed the right to dispose of this unsold portion; and in pursuance of that right had sold it to the plaintiff. If it were clearly established that *Cronk* had gone to the defendants and made the above statement, it could not be questioned that, if the sale were thereafter concluded, the purchaser would take, subject to whatever right the plaintiff may have had; and that a vendee, under such circumstances, would not stand in any better position than the vendor, as against whom, in this case, the

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planitiff's title to relief is clear: *Jones* v. *Smith* (*a*), *Ogilvie* v. *Jeaffeson* (*b*), *Hewett* v. *Loosemore* (*c*). I do not think it weakens the plaintiff's case, because the notification, in place of being verbal, has been given through the medium of an instrument under the hand and seal of the person giving it, and solemnly recorded in the office where such information is to be looked for. Taking this view of the Registry Law, it is not necessary for me to consider whether the evidence sufficiently supports the plaintiff's contention that notice was otherwise brought home to the defendants, although I must say, I should find a difficulty in concluding from all the facts proved, that the defendants were not well aware that *Powell* only bought 78 feet of the lot. I think the plaintiff entitled to a declaration, that he is, as against the defendants, entitled to the 4½ feet in dispute, and to a conveyance or order, as between these parties, vesting the same in the plaintiff. I cannot interfere with the rights of any person who may, in the meantime, have acquired an interest in the premises in question. The injunction will be made perpetual.

Judgment.

The plaintiff is entitled to his costs of this suit, but against them must be set off the costs of the action of ejectment subsequent to the issue of the writ. The plaintiff here should have come at once to this Court, in place of defending at law, and putting the defendants in equity to costs at law in which the plaintiff here was unsuccessful. I must follow the rule laid down by the Lords Justices in *Watson* v. *Allcock* (*d*). There, Lord Justice *Turner* says, "But it was the duty of the plaintiff to have elected at an earlier stage of the action at law, to what proceeding he would resort. He should not have pleaded and put the defendant in equity to a further expense at law. My opinion is, that the right

(*a*) 1 Ha. 43, Affd. 1 Ph. 244.
(*b*) 6 Jur. N. S. 970.
(*c*) 9 Ha. 449.
(*d*) 4 DeG. M. & G. 242.

mode of dealing with the costs at law, will be to direct that the plaintiff in equity should pay the costs at law subsequent to the declaration." 1874.

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COATES v. BACON.

Setting aside or varying deed—Misrepresentation.

The rule is that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach and does not choose to do so, he will not, on the facts turning out to be different from what they were represented, be entitled to any relief.

On the negociation for a lease of real estate in the City of Toronto, the intended lessee asked the intended lessor, who had owned, occupied, and paid the taxes assessed on the proposed leasehold premises for several years, what the taxes would be on the property, and the intended lessor answered they were about $70 or $75, but that he could not tell exactly as he had never separated them from his personal assessment:—the fact being that for some years the owner had been paying nearly double that amount. The intending lessee, however, accepted the owner's statement and executed the lease without making any reference to the Chamberlain's office, where the exact amount rated on the premises could have been ascertained. The Court, under the circumstances, refused any relief to the lessee on the ground of misrepresentation.

Examination of witnesses and hearing.

Mr. *Attorney General Mowat* and Mr. *Morphy*, for the plaintiff.

Mr. *M. Crombie* and Mr. *E. Crombie*, for the defendant.

The facts are fully stated in the judgment.

BLAKE, V. C.—The defendant, being the owner of the premises in the bill set forth, on the 6th or 9th of May, 1872, executed a lease of them to the plaintiff for a Judgment.

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period of five years from the 9th of May of the same year, at an annual rental of $525. In the lease there was a covenant on the part of the lessee to pay all taxes and assessments then rated, or thereafter to be charged on the premises. The bill contained the allegation that, at the time of the negotiation for the lease, the defendant assured the plaintiff the taxes would not exceed the sum of $70 or $75 per annum. At the hearing of the cause, the plaintiff asked leave to amend the bill by alleging that the defendant also assured the plaintiff that the taxes up to the time of the agreement for the lease had not exceeded that sum per annum. I allowed the amendment then and think, as the defendant has not been in any manner misled by it, that it should be allowed to stand, and that the case must be considered as if this allegation were on the record. The plaintiff states that on this representation he acted, that the defendant well knew the premises were subject to an assessment double the amount stated by him, and that he knowingly made this false representation to him, which induced him to become his tenant, and agree to pay the rent specified and all the taxes to be assessed against the premises.

Judgment.

The bill claims that the plaintiff is entitled to have the representation as to the taxes made good by the defendant, and that the lease may be reformed so as to shew the true agreement as to the taxes.

The defendant, in his answer, denies that he "represented at any time to the plaintiff that the taxes were, and would be, $70 per annum, or any other fixed sum," but says he told the plaintiff, as the fact was, that the taxes were paid on these premises along with those charged on his personalty, and he could not tell their amount; but, whatever they might be, the rent was to be $525, clear of all taxes; that at the time of the preparation of the lease no mention was made about any stipulation

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that the taxes would not exceed $70, or any other fixed sum, and that he would not have excuted a lease containing any such stipulation. The plaintiff and defendant were both examined in the cause, they appeared sharp, shrewd business men, well able to make a bargain, and in little need of assistance from any one in looking after their respective interests. On his examination the plaintiff says that the defendant stated the taxes would not be more than $70 to $75; that he agreed to give $525 and $75 taxes, in all $600, and that this was the highest figure he intended to go to. "Nothing was said," he continues, "about what the taxes had been, simply that $70 or $75 would be what they would be. I put my question this way: 'How much is the taxes on the property.' He said $70 or $75. Before this I saw him several times on the place, and on asking again about the taxes he said that all his property, including some cottages, &c., &c., were assessed at $120, and he considered that the taxes on the place would be what he had before stated, $70 or $75; he could not exactly say how much the taxes were. * * I would not have taken the place had I known the taxes were more than he told me. I did not go to the city office to inquire as to the taxes, *Bacon* said his place was assessed as farm land, and this set at rest any suspicion I might have had. At the time *Bacon* told me that all his property was assessed together, he again stated that he reckoned my taxes would not be more than $70 or $75. This was the last time I spoke about the taxes before signing the lease."

Judgment.

Mr. *Hallam* says he was present at a conversation that took place between plaintiff and defendant, before the lease was signed, when the defendant remarked the taxes were between $70 and $80, and he then explained that it was assessed as farm land. As a matter of fact in 1869 the premises were assessed to defendant as valued at $9,000, and the taxes paid were $135; in

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1870 at $10,800 and $162; in 1871 the same; in 1872 $11,000 and $165; and in 1873 $12,650 and $158.12.

The defendant's account of what took place is, that the plaintiff asked him what the taxes were, when he said he was not sure, it was assessed as farming property, and was assessed with his personal property, so that he could not say exactly; the plaintiff asked whether he thought they would be more than $75, and he said he thought not, that $75 was a large assessment, but that he could not say as he never separated these assessments from his personal assessments. The defendant thinks the conversation to which *Hallam* refers took place after the signing of the lease, that on this occasion plaintiff said, "did I think the taxes would be over $75. I said I thought not." The defendant bought the property about 1866, and lived on it two or three years before the lease to plaintiff. In assessing the premises to him, in the assessment bill the realty and personalty were separately entered, and a value placed opposite each, although these sums were added together, and it was upon the aggregate that the calculation was made of the amount of taxes to be levied. As to this the defendant says, "I did not know about how much I was paying for each. I never took the trouble of separating them. I only looked to see if the real estate was not assessed for too much and the personal estate for too much, and if not for too much in all, I was satisfied. * * Until I made the calculation in November, 1872, I still thought the taxes on the $11,000 was about $75. * * Until I made the calculation I did not believe there was the difference stated. * * Until I did so I still thought the taxes were about $75. * * *Coates* asked me what the taxes would likely be, if I thought they would be more than $75. I said I thought not; that I could not tell, as I had never separated them from my personal assessment."

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It seems clear from the evidence that the plaintiff believed the taxes would be about $75 a year; and it seems equally clear that the defendant thought he was renting the premises for $525 and taxes, and that he would not have rented the premises for $600 with the understanding that he was to pay the taxes. I must take it as established, in fact the plaintiff admits it, that the defendant stated to him that he could not exactly tell what the taxes would be, as all his property was assessed together. It is not clear whether defendant did more than state the probabilities as to what the taxes would be, from an estimate made as to the past, but as to which estimate the plaintiff was made aware that it could not be taken as exact from the data on which it was based. The expressions made use of by the defendant were doubtless such as invited inquiry on the part of the plaintiff, and the public office was open to him for investigation, and ample time was given to make all the inquiry needed. It would have been better if *Bacon*, in place of giving information which turned out inaccurate, had at once said he did not know what the taxes were, and left *Coates* to ascertain for himself this point. No doubt he led the plaintiff to believe the taxes to be less than they turn out to be; but whether or not the defendant may be compelled in this Court to make good the representation, is another matter. Both these parties set about making the best bargain they could. Doubtless they had in their minds, admitted as admirable, and acted upon a free translation of, the maxim, "*Emptor emit quam minimo potest: venditor vendit quam maximo potest.*"

Judgment.

Apart from the nature of the representation made, there is a great difficulty in cases of this kind, under the authorities, in this Court interfering. In *Wilkins* v. *Felker* (*a*), the language of Lord *Hardwicke* is quoted

(*a*) 7 Gr. 349.

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as follows: "The proof ought to be the strongest possible." And of Lord *Thurlow*, "It must be irrefragable." This language is approved of by Lord *Eldon*.

In *Mortimer* v. *Shortall* (*a*), Lord *St. Leonards* says, "Now, in cases of this nature the Court cannot act except upon the very clearest evidence." Where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears without a remedy.

In *Cotton* v. *Corby* (*b*), the Court said, in order to its interference, there must be "in the minds of both parties an intention different from that expressed in the deeds."

Judgment.

But, admitting that the evidence of the plaintiff and the other witnesses, strengthened by the admissions of the defendant, proves a misrepresentation on the part of *Bacon*, which would otherwise entitle the plaintiff to relief, it is necessary to consider the nature of the representation made. There is no doubt the answer to the question as to the amount of taxes was an uncertain one, and that *Bacon* gave the reason for not being able with greater accuracy to state the exact amount. There is no doubt also that, because the taxes happen to be $135 one year, it does not follow that will be the sum charged the next. The question is one on which it is impossible to give precise information. What was material to the plaintiff was, not what the taxes may have been in years past, with which he had nothing to do, but what they would be in the future. It is not as if the premises were subject to an annual rental, fixed so as to be spoken of with certainty; but the taxes formed a charge fluctuating from year to year, and depending upon so many causes that no ground could be furnished for any-

(*a*) Dr. & War. at p. 373. (*b*) 8 Grant 51.

thing like an accurate calculation as to their amount. This seems, on the authorities, a material element in considering the position of the parties. A misrepresentation to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion (*a*).

In *Trower* v. *Newcome* (*b*), Sir *W. Grant* thought "the representation made by the printed particulars so vague and indefinite that the Court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser."

In *Clapham* v. *Shilito* (*c*), Lord *Langdale* says, "But if the subject is in its nature uncertain—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other." I think, here, the plaintiff knew as well as the defendant the value of this land. He knew as well as the defendant the method of charging the lands with taxes. He knew that this varied from time to time according to the method of assessing all the lands of the city and its wants for improvements and other requirements. The information possessed by the defendant consisted of certain papers, to which if he had referred, and had made a calculation, there would have been shewn then, what the plaintiff could have found with equal accuracy from the Chamberlain's office. The defendant did not refer to these papers. He

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(*a*) Kerr on Frauds, p. 39. (*b*) 3 Mer. 704.
(*c*) 7 Beav. 146.

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swore, and I cannot conclude he was speaking anything but the truth when he said so, that it was not until after the conclusion of the transaction, and the difficulty arose between him and the plaintiff, that he discovered that the taxes were more than he had theretofore considered they amounted to. There was not, therefore, any knowledge on the subject in the breast of the defendant that the plaintiff did not possess. They had the means of ascertaining the fact, and they rested content without investigating it. The taxes, during the plaintiff's tenancy, did not depend on what they were during the previous years. What the defendant did, was to make a speculative statement on which I do not think the plaintiff was justified in acting. It was such a statement as comes under the language of Sir *James Wigram*: "I agree that an indefinite representation by a vendor ought to put a purchaser upon inquiry." See also *Price* v. *Macaulay* (*a*), *Higgins* v. *Samels* (*b*), *Jennings* v. *Broughton* (*c*), *Stephens* v. *Venables* (*d*), Lord *Brooke* v. *Roundthwaite* (*e*), *Brown* v. *Fenton* (*f*), *White* v. *Cuddon* (*g*), *Jordan* v. *Sawkins* (*h*).

Judgment.

In *Edwards* v. *McCleay* (*i*), Lord *Eldon* says, "If one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract."

In *Conybeare* v. *The New Brunswick Railway Company* (*j*), Sir *George Turner* explains this language, saying, "Which the other party had no means of knowing, means had no sufficient means of knowing." I agree that the rule of *caveat emptor*, where there is misrepresentation, if applicable at all, must be applied with

(*a*) 2 DeG. M. & G. 359.
(*b*) 2 J. & H. 460.
(*c*) 5 DeG. M. & G. 126.
(*d*) 31 Beav. 124.
(*e*) 5 Ha. 298.
(*f*) 14 Ves. 144.
(*g*) 8 Cl. & Fin. 766.
(*h*) 8 Bro. C. C. 388.
(*i*) 2 Swa. 89.
(*j*) 1 DeG. F. & J. 578.

great caution: *Colby* v. *Gadsden* (*a*)—but I think it can be invoked here, and that the opinion given, the statements made, their nature, and the caution conveyed when presenting them to the plaintiff, should have led him to further inquiry rather than to the acceptance of them as warranties on the part of the defendant. Even if I arrived at the conclusion that the representations were essentially material to the subject in question, I cannot say the plaintiff used proper diligence in the course of the transaction. 1874. Coates v. Bacon.

The case may be strong enough to enable the Court to say we will not compel specific performance against an unwilling defendant, when it would not interfere in favor of a party alleging a mistake denied by the other side, and grant him compensation in respect of the matter complained of: *Dart* V. & P., vol. 2, page 736.

It may be doubted whether on the authority of *Newham* v. *May* (*b*), cited with approval by Mr. *Kerr* and other text writers (*c*), as the relief asked by the plaintiff is simply compensation, the bill would lie. The later cases, such as *Hill* v. *Lane* (*d*), *Hoare* v. *Bembridge* (*e*), and *Slim* v. *Croucher* (*f*), *Wakeman* v. *The Duchess of Rutland* (*g*), seem to lay down a principle so wide as to cover a case such as the present, if the facts would warrant its application. I should have been inclined, under all the circumstances of this case, to have exercised the discretion the Court possesses as to costs by dismissing the bill without costs, were it not that the defendant agreed to throw off $25 a year from the rent, on account of the misapprehension as to the taxes. Judgment.

(*a*) 15 W. R. 1185.
(*b*) 13 Price 749.
(*c*) Kerr on Frauds, page 5, Sugden Am. Ed. Sec. 235; Fry on Spec. Per. 355.
(*d*) L. R. 11 Eq. 215.
(*e*) L. R. 14 Eq. 522.
(*f*) 1 DeG. F. & J. 108.
(*g*) 3 Ves. 235.

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I think this offer should have been accepted; and, as the plaintiff did not do so, but proceeded unsuccessfully to recover $40 or $50 a year in addition, I think the costs must be borne by the plaintiff. This decree will not interfere with any rights at law which the plaintiff may have.

SCATCHERD v. KIELY.

Mortgage, &c.—Contradictory evidence.

In 1859 a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with *M.* who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought and had for years been under the impression, that the whole claim under the assignment had been paid: that the plaintiff (*M.*) was not interested in this note; and that the same had, through oversight, not been delivered up. The attorney who had acted for *M.* having sworn that this note was the one in which *M.* was interested, and that it had never been paid, the Court, in view of the fact that the mortgage and note were both found in the hands of the assignee, and that no demand during so many years had been made for their discharge, pronounced the usual decree in favor of the plaintiffs.

Statement.

This was a foreclosure bill, filed by *Thomas Scatcherd* as trustee and *Daniel Macfie*, claiming to be the party beneficially interested in the amount of a promissory note of *George W. Kiely*, and to secure which (with other notes) a mortgage made by the defendant *William Thomas Kiely* to his brother the said *George W. Kiely* had been assigned to the plaintiff *Scatcherd* by the mortgagee.

The only question in dispute between the parties was whether this note was really the property of *Macfie*.

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George W. Kiely, in his evidence (taken in December, 1873), swore "The mortgage was not given to secure *Macfie's* claim in any way; such a thing was never spoken of, and I never heard of it until about two years ago; the assignment was not made to secure *Macfie* at all. About two years ago I heard that *Cornish* and *Scatcherd* were setting up a claim on behalf of *Macfie*. The mortgage was assigned to secure the payment of these three notes [which are mentioned in the judgment], and so take the place of the chattel mortgage. The amount of the $194 note never became due to *Cornish;* it was given to make up the amount of the chattel mortgage which *Cornish* held as indemnity against any liability as indorser for my brother. I never gave a note for *Macfie's* debt; the $194 note was not for his debt * * * when I gave the $194 note it was not stated who it was for; I supposed it would be my brother's property, as it was so far taking the place of the chattel mortgage * * * The $194 note was paid, I thought, by money due me by my brother * * * I think at the time of my brother's insolvency I gave him credit on my claim. I thought the note for $194 was settled between me and my brother, there having been a lumping settlement between us. He owed me a good deal; I had worked for him for about ten years, and only received the mortgage." Statement.

Alexander J. B. McDonald, a witness also called for the defence, swore, "I have been in partnership and studied with Mr. *Cornish* at London. I recollect the defendant being in the office about July, 1871, searching for some papers in connection with this lot, when Mr. *Cornish* was present; in doing so we came across a note for $194; I have no doubt this is the same note; Mr. *Cornish*, in speaking to the defendant, said he supposed it was given for the horse transaction, but that had all been fixed, and I thought *Kiely* took away the note * * * Mr. *Cornish* did not then claim to

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have any claim on the note * * * I have heard *Macfie* frequently say that his claim against the defendant was lost; he since said he had security for it."

The defendant was also examined on his own behalf, and in his evidence he swore, "I recollect going to Mr. *Cornish's* office about two years ago to search for papers connected with the property in question, which I had agreed to sell * * * on doing so two notes were found, and on talking over it I said, I suppose this had some connection with the horse transaction, and he said he supposed it had, but that at any rate it was all settled, and it made no matter about the notes, that they were paid anyway. I made the contract to sell the horses to my brother; I knew nothing more as to the mortgage being given; I don't think there were three notes given for the $800; the debt was made up of $200 Gore Bank, $250 for *Cornish's* account, and the *Askin* claim and the residue would make up the $800 * * * I have no recollection of the transaction, but I always understood *Macfie's* claim was included in a larger amount, for which a judgment was to be given; Mr. *Cornish* suggested this to save expense; I know *Cornish* got a judgment and had an execution against me. I made the arrangement with *Cornish* about selling the horses to *George;* no one else could; I made the arrangement to secure any amount *Cornish* might have to pay. I presume the $194 note was part of the $800: this would be held by *Cornish* as security. I suppose the claim of $800 was divided up to meet the different notes that were pressing; $194 was not to go in any way to secure *Macfie.* I knew that *George* was to make the assignment of the mortgage to *Scatcherd.* According to my view of the transaction if *Cornish* had paid anything for me he would now be entitled to hold the $194 note for his own benefit. I thought the mortgage had been released when the payments were made; I did not ask about it;

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I could have got the notes from *Cornish* when I was there if I had asked it. I did not include the $194 note as one of my assets, as I had owed *George* about $2000, and I considered it paid; there was a settlement with *George*, and his claim reduced to about $1200; I recollected the balance on the horses at the time. A year or two after I assigned Mr. *Macfie* asked me for his demand, but never said he had any security for it; on the contrary, he said he supposed now I never would pay him."

Mr. *Cornish* had been examined under commission at Winnipeg. He swore that *Macfie* had held a note of defendant's, indorsed by one *P. H. Brown*, for $178.25, which he did not think could be collected, but which the witness told him he thought he could have secured in some way, being mixed up as accommodation indorser with *Kiely*; and that *Macfie* left it with the witness, not to be sued upon, but to secure it in the best way the witness could, and that the note for $194.50—that in question—was the one he took at the time of the assignment to *Scatcherd*, and covered *Macfie's* claim. "The note in question was *Macfie's*, to the amount of his claim at least. It may include some charges made by me in endeavouring to collect *Macfie's* claim from *Kiely*, and which *Macfie* would owe me, or *Macfie* may have since paid me these charges, if any."

Statement.

The plaintiff was also examined at the hearing of the cause. He swore he "was employed to obtain a judgment against the defendant * * * The action was brought on one promissory note for $1125 and one for $178.25" (the latter being the note said to have been left by *Macfie* with *Cornish*); and that a memorandum was signed by *Cornish* and the defendant, as follows:

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Mr. *Cornish* to take judgment against Mr. *Kiely*.

C. B.	£ 950 00
G. B.	50 00
Scanlon	37 10
Costs	25 00
Account	62 10
	£1125 00

Any other expense and costs to be allowed.

To apply as follows:

1st—To pay amount Gore Bank.
2nd—Scanlan's Judgment.
3rd—Mr. Cornish's account.
4th—Commercial Bank, and costs of suit, interest and any and every expense.
5th—Daniel Macfie.

The above claims are estimated at £1125, exclusive of *Macfie's*. The account is fixed by consent at £62 10*s*., after giving credit for contra account.—August 9th, 1859." Statement.

That the £1125 mentioned in the memorandum was the same claim as the note for that amount; that judgment (in the name of *Cornish*) was obtained and execution issued on the 30th August, 1859, and placed in the hands of the sheriff of Middlesex. He also swore that nothing was ever paid to him on account of any of the claims referred to in the memorandum signed by *Scatcherd*, and that shortly before the institution of the present suit the defendant wanted the mortgage in question discharged. The witness stated, "I claimed it as security for a debt of *Macfie's* and one of my own; my own debt was for costs due me. The defendant neither disputed nor admitted my demand. I told the defendant to sue *Macfie* and Mr. *Cornish*."

Mr. *Meredith*, for the plaintiff.

Mr. *Ferguson*, for the defendant.

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BLAKE, V.C.—The defendant, the owner of the premises set forth in the bill, on the 17th November, 1858, mortgaged the same to his brother, *George Washington Kiely*, to secure £300. On the 31st day of the August following, the mortgagee assigned the above, with another mortgage, to the plaintiff *Scatcherd*, for the expressed consideration of £500. On that day *Scatcherd* signed the following memorandum to shew how he held these mortgages:

"Received from Mr. *George Washington Kiely* an assignment of two mortgages, No. 5715, township of London, £200, No. 9340, city of London, £300, in security for the sum of £200, at four months from this date August 31st, 1859; that is to say, three notes with all interest, costs, and expenses that may be made thereon in consequence of the nonpayment by *George Washington Kiely*, who is the maker.

"1st note, $140.65, at four months.
2nd " 464.85, "
3rd " 194.50, "

"THOMAS SCATCHERD."

Judgment.

It is admitted that *Scatcherd* has no beneficial interest in the mortgage, and that the co-plaintiff, *Macfie*, has a claim against *George Washington Kiely* which is still unsatisfied. The case of the plaintiffs is, that this mortgage was given to *Scatcherd* to secure the debts due to one *Cornish* and *McDonald*, and that the *Macfie* claim is represented by the note $194.50, referred to in the above memorandum. The defendant denies this, and alleges that at the time of the assignment he owed a small amount to *Cornish*, in whose favour he had executed a chattel mortgage on his personal property to secure him against this indebtedness and certain indorsements; that desiring to carry out a sale of certain horses, covered by this chattel mortgage, to his brother *George Washington Kiely*, and to secure *Cornish* to the

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extent of the value of the horses thus removed from the effect of the chattel mortgage, the mortgage in question was assigned by the defendant to *Scatcherd*, and on no other trust and for no other purpose; that the claims of *Cornish* were satisfied, and he became entitled to a reconveyance of the premises, which was given to him by *George Washington Kiely*, but refused by *Scatcherd*, and that the mortgage cannot be enforced against him.

The memorandum signed when the sale of the horses took place is as follows:—

"London, 31st August, 1859.

"Received from *George W. Kiely*, $800, by his three notes at four months, in full for twenty horses now in pasture in the township of London, the delivery hereof to be a delivery of his horses.

"F. Evans Cornish."

Judgment.

Cornish was examined in the suit, and he says that *Macfie* left a $178.25 note with him for collection, knowing that he had dealings with the *Kielys*, and thinking he could thus obtain security therefor or payment thereof; subsequently, when it was proposed that the horses covered by the mortgage should be sold, it was arranged that the before mentioned mortgages should be assigned; and they were at the request of the *Kielys* transferred to *Scatcherd* to secure, amongst other liabilities, that of *Macfie*; and notes were thereupon taken payable to *Cornish*, representing these sums; that the note for $194.50, is the one he took at the time of the assignment to *Scatcherd;* and that it covers *Macfie's* claim; that the difference between the note of $178.25 and the $194.50 note, must be accounted for by the addition to the latter note of some charges incurred in endeavouring to collect it. *Cornish* also says that it was not until after he left London he heard the *Kielys* repudiated the *Macfie* claim. The documentary evidence

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proves the plaintiffs' case; for we have the mortgage produced, a memorandum that it is to secure amongst other notes one for $194.50, and this very note is produced; none of these papers being in the hands or under the control of the defendant. It is for the defendant to meet the *primâ facie* case thus made out against him. The documents, supplemented by the evidence of *Cornish*, shew that this note for $194.50, was taken to secure the claim of *Macfie*, whose debt, the defendant admits, has not been paid.

The defendant's story is, that the note in question was simply given to secure the balance of the $800, the amount of the purchase money of the horses; that the mortgage assigned was not given to secure *Macfie's* claim; that the mortgage was assigned to secure the payment of the three notes referred to in the before mentioned memorandum, and was to take the place of the chattel mortgage; that the $194.50 note never became due to *Cornish;* it was only given to secure the indorsements covered by the chattel mortgage, and as these were satisfied by the *Kielys*, no indebtedness arises on the security given to indemnify *Cornish*. The defendant's brother at the same time says, that at the request of *Cornish* there were the three notes given, and that he supposed they would be the defendant's property. He states also he thought the note in question was settled between his brother and himself, "there having been a lumping settlement between them." The defendant further says, "I presume the claim of $800 was divided up to meet the different notes that were pressing. * * I did not include the $194.50, as one of my assets, as I had owed *George* about $2,000, and I considered it paid; there was a settlement with *George*, and his claim reduced to about $1,200. I recollected the balance on the horses at the time."

Judgment.

On the one hand we have the documentary evidence

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supporting the plaintiffs' claim; the papers are found in the hands of those entitled to hold them against the defendant, if the story of *Cornish* be correct; we have the evidence of *Cornish* shewing that these papers truly set forth the plaintiff's claim, and against this, there is the statement of the *Kielys* that these mortgages and notes were only to take the place of the chattel mortgage, as the horses had been sold. But, if as a matter of fact these mortgages and notes were given merely to take the place of the chattel mortgage, and to secure *Cornish* against indorsements for the *Kielys*, then they would not have been given in the shape in which we find them. If this story were true, in place of finding the notes divided up so as to answer separate liabilities, we should find the one note given, and in place of a memorandum which states the mortgages were assigned to secure these three notes, it would have been a memorandum verifying the present statement of the defendant, that the assignment was intended to cover the indorsements now spoken of, as the consideration for the assignment. The brothers speak of a lumping settlement made between them. But they do not say they had in it forgotten these notes then outstanding. They make no demand for them or the mortgages. This rather leads to the conclusion that the settlement was truly a "lumping" one; and that the question of the notes was looked upon as one which might as well not be disturbed, lest time, the adjuster of so many claims, should be arrested in the course of discharging this debt. The plaintiffs have not for years taken proceedings to recover the amount claimed by them; but this is explained by the fact that a suit had been brought on a prior mortgage, and some of the land foreclosed, and the plaintiffs were not aware that certain property was embraced in the mortgage, free from any charge but that in question. If the view of the defendant is the correct one, it is strange that he should not, during the past ten years, have demanded a discharge of this mortgage.

Judgment.

I must find that the plaintiffs' case has been proved, and that they are entitled to the usual decree for foreclosure.

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Scatcherd v. Kiely.

Barwick v. Barwick.

Mortgage—Statute of Limitations.

A suit of foreclosure or for the sale of mortgaged premises in default of payment is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon land within section 24 of chapter 88 of the Consolidated Statutes of Upper Canada. Where therefore, a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever loaned to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was *held* sufficient to take the case out of the statute.

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

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

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

Judgment.

Blake, V. C.—This bill is filed for the purpose of realizing the amount alleged to be due on a mortgage dated the 24th of May, 1847, made between the defendant and one *Hughes* and their wives and the plaintiff. The mortgage secured repayment of £125 and interest, payable in one year after date; the defendant is now the owner of the equity of redemption of the balance of the premises mortgaged, remaining unsold. On the 18th of January, 1866, the defendant wrote a letter to the plaintiff in answer to a demand for payment, in which are the following expressions: "I will comply with your request with pleasure as to the repayment of $500 I borrowed from you so many years ago, and until

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I pay the money, I will execute anything you wish me to do for its security. * * * It is likely you would like *Fred* to arrange with me for the $500 debt. I will do whatever you wish." There was evidence to shew that the only money ever loaned by the plaintiff to the defendant, was this sum of $500 advanced on this mortgage; the bill asks for sale in default of payment, and for a personal order for any deficiency against the defendant. The answer alleges that there is not anything due on the mortgage; and that the Statute of Limitations is a defence to the claim, even supposing the mortgage had not been paid in full. It was admitted that the question of account was one for the Master's office, and the only point argued before me was, whether the Statute of Limitations formed a bar to the relief asked by the plaintiff. On the part of the defendant, it was not denied but that the acknowledgment of the debt was sufficient to take it out of the effect of section 24,

Judgment.

of chapter 88 of the Consolidated Statutes of Upper Canada. The authorities seem very clear on this point. But it was urged that section 24 does not here apply; that the present is not a case for the recovery of "money charged upon land," within section 24, but is for the recovery of land within section 15, and, this being so, that the acknowledgment of the right to the money which is sufficient under the former section, is of no avail under the latter, which calls for an acknowledgment of the title to the land in favor of the person claiming. Section 40 of the English Act, 3 & 4 Wm. IV., chapter 27, corresponds with section 43 of the Canadian Statute, 4 Wm. IV., chapter 1, which stands as section 24 of the Consolidated Act. It is as follows: "No action or suit or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same, shall have accrued to some-

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person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid; or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case, no such action or suit, or proceeding shall be brought, but within 20 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given."

I should have thought, from the wording of this section as it stands, that whatever proceedings might be taken at law or in equity to recover the amount secured by a mortgage, could be had where an acknowledgment of the debt was given within 20 years, whether such proceedings were in an action at law whereby ultimately the mortgaged lands were sold, in a suit in equity which might have the same result, or in a suit for foreclosure, which extinguished the equity of redemption in the mortgagor.

Judgment.

The first section of the Act, it is true, deals with the question of actions to recover land; and section 15 is the one which provides for the acknowledgment needed to postpone the period when the right of action accrued. But it is to be observed these clauses likewise refer to proceedings to recover rent. When we come to section 21 then we have seven clauses which appear to deal with the question of mortgages; and the rights of parties under these instruments should be dealt with, I think, by this part of the Act under which they are peculiarly embraced, and not by other portions, by the general words of which alone they could be covered. At law, the estate on default is absolute; but in equity, it is said the land is still a mere pledge in the hands of the mortgagee; and the mortgagor is given, on demand of the

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mortgagee, a day within which the money may be paid, whereupon the land is freed from the charge. It is true, the result may be that the land is lost to the mortgagor; but this proceeding is the only one in a Court of Equity for recovery of money on a mortgage, in a suit; and I know not what is referred to in section 24, by a "suit to recover any sum of money secured by any mortgage," unless it be such a proceeding as the present.

Lord *St. Leonards* in *Henry* v. *Smith* (*a*), took this view of the matter, although afterwards in *Wrixon* v. *Vyse* (*b*), he altered his opinion and held that a bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, but is a suit in effect to recover land.

Judgment.

In *Dearman* v. *Wyche* (*c*), it is held that a bill of foreclosure is in substance a suit in equity to recover money. The Master of the Rolls in *Sinclair* v. *Jackson* (*d*), follows this decision, saying, "The mortgagee has a legal right to recover the land, but this Court interferes and prevents him from doing so, upon the mortgagor paying the money charged upon it. It is, therefore, in fact a suit to recover money."

Vice-Chancellor *Shadwell*, in *Du Vigier* v. *Lee* (*e*), approves of *Dearman* v. *Wyche*.

Mr. *Browne*, in his work on the Statute of Limitations (*f*), cites the cases decided by Lord *St. Leonards*, and follows them. In *Darby* on the Statute of Limitations (*g*), these authorities and the others are quoted, and, doubtfully, an opposite conclusion is arrived at.

(*a*) 2 Dr. & W. 387.
(*b*) 3 Dr. & W. 104.
(*c*) 9 Sim. 570.
(*d*) 17 Beav. 405.
(*e*) 2 Ha. 334.
(*f*) Pages 308, 309.
(*g*) Page 115.

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In *Fisher* on Mortgages (*a*), in one place Lord *St. Leonards* seems to be followed; in another, the learned author appears to favor the authorities of his own land (*b*).

Mr. *Dart* (*c*) evidently thinks the safest course in dealing with the subject is to doubt. He says, "whether a foreclosure suit be a suit for the recovery of 'money charged upon land' within the 40th section, or for the recovery of land within the 24th section, seems to be doubtful."

I should have thought the weight of authority against the decision of Lord *St. Leonards*. But a more careful perusal of the Act, as it originally stood in this country, furnishes the key to the intention of the Legislature in passing it; and furnishes here, I think, a solution of the difficulty which is presented by the above quotations.

The contention of the defendant is, that the section in question cannot apply to a suit to foreclose, because that is a proceeding to recover land; that proceedings to recover land, are covered by sections 1 and 15, and that only proceedings to recover money, are brought within clause 24—therefore, that, as the equity of redemption is by this suit being taken away from the defendant, and that is an interest in land, the plaintiff must rely on those sections which affect land. Judgment.

But if this be so, there was no object in the legislature making provision for the preservation of the equity of redemption; and yet we find a clause to that effect appended to the section in question. At the time of the passing of this Act, there was no Court in this Province with an equity jurisdiction established, and so the Act went on as follows: "Provided always, that in respect

(*a*) Vol 1, p. 374. (*b*) Vol. 2, p. 929.
(*c*) 1 Dart. V. & P. 364.

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to persons now entitled to an equity of redemption or to any legacy, the right to bring an action or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, until, &c." If section 43 of this Act, was intended to apply only to money demands, and it was not the intention to allow persons to take advantage of it in respect of certain interests in lands, such as equities of redemption, then this provision was objectless. If, on the other hand, the section was intended to cover suits to foreclose as well as actions to recover the mortgage money, then the proviso was one which it was reasonable to have inserted.

Judgment.

I am of opinion, therefore, that I must find in favor of the plaintiff on this point; and I am unable to afford the son the satisfaction of defeating his mother's claim, on the Statute of Limitations, whatever other defence he may have. There will be the usual reference to the Master to take accounts, reserving further directions and costs.

GRANT v. EDDY. 1874.

Demurrer—Jurisdiction—Leave to answer.

A bill was filed in this Court for the purpose of administering an estate in the Province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties to the suit, other than the debtor who resided in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as manager for the trustees; and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of the want of jurisdiction. The Court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings.

The bill in this cause was filed by *Allan Grant* against *Ezra B. Eddy*, *Alexander C. Kelty*, *Charles Thornton Bate* and *Daniel S. Eastwood*, setting forth (1) that in October, 1871, and subsequently the defendant *Eddy* carried on principally at the township of Hull, in Quebec, where he resided, an extensive business as lumber merchant and owner of saw mills. (2) That plaintiff being resident in *Fitzroy* was engaged in getting out logs and other timber for sale to manufacturers. (3) That on the 12th October, 1871, *Eddy* and plaintiff entered into the following agreement: Statement.

"Memorandum of agreement made and entered into this twelfth day of October, one thousand eight hundred and seventy one, by and between *Ezra B. Eddy* of the village of Hull, county of Ottawa, in the Province of Quebec, of the first part, and *Allan Grant* of the township of Fitzroy, Province of Ontario, of the second part, witnesseth: The party of the 2nd part binds himself by these presents to manufacture 50,000 standards of good merchantable white pine saw logs, all to be made straight and free from all shakes, rots and punk knots, all unmerchantable logs to be ranked as culls, all of said logs to be delivered in booms at the the mouth of

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the Bonnechere river, on the river Ottawa, free from all Government dues or slidage of whatever kind or nature, the ensuing spring of 1872, as soon as water will permit, say on or before the 1st of July next. The party of the second part further agrees to mark or cause to be marked on the bark the letter N in two places, about two feet from the end on the side opposite each other, and all logs when measured shall be stamped with the letter E on each end, and no log shall be received unless bark-marked as above, the said logs to be computed as 13½ feet long by 21 inches in diameter at small end per standard, and one-third to be added for all logs 16½ feet long; said party of the second part agrees to make one half or more of said pieces of logs 16½ feet long, and all logs shall be 15 inches and upwards, and the 13½ feet logs shall be 14 inches and upwards in diameter when straightened at small end, and any number of white pine logs made under this size shall be paid for as hereinafter stated in this contract: the party of the second part further agrees by these presents to manufacture 20,000 standards of good merchantable red pine saw logs, all to be made straight and free from all shakes, rot and punk knots, to be marked and delivered in the same manner and place as the white pine logs before mentioned, standards to be computed at 13½ feet long by twenty-one inches in diameter at small end when straightened, and all of said red pine logs to be made 13½ feet long, excepting what few may be made at the drawing of this contract, said *Eddy* to take 100 in every 1000 undersized logs; said *Grant* will make about one-third red pine logs 16½ feet long: the party of the second part agrees also to make sufficient white pine boom timber to boom said logs at four cents per running foot. In consideration of the above agreement the party of the first part agrees to accept drafts at four months in such sums as will enable said *Grant* to carry on his shanties through the winter, and further agrees to pay said party of the second party for said logs after delivery $1.52½

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per standard, as before mentioned, for the white pine logs, and $2.02½ per standard for the red pine logs, and any balance due after delivery; the said party of the first part agrees to accept the said party of the second part's drafts at three, four, and five months, respectively, for such amount equally divided; time to be computed at three months from delivery, and any balance of interest in favor of said *Grant* shall be credited him according as any of his drafts may pass that time. All undersized logs will be paid for at $1 per standard as before mentioned. Having heard the same read we hereunto signed our names.

E. B. EDDY.
ALLAN GRANT."

In presence of

S. S. CUSHMAN.
D. BURTCH."

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(4) That the technical terms used therein were well understood and could be explained with certainty by persons skilled in the lumbering trade. (5) That pursuant to this agreement the plaintiff procured, manufactured, and delivered to the defendant *Eddy* a large quantity of logs, such as are described in, and required by, the agreement, and continued to do so as required by *Eddy* until in or about June, 1873, when the plaintiff learned that *Eddy* had become embarrassed in his business and unable to meet his liabilities, and was about to make an assignment under the insolvent acts, whereupon plaintiff refrained from delivering more logs to him or further executing plaintiff's part of the agreement. (6) That by a notarial document dated the 24th July, 1873, entered into according to the laws of Quebec by the defendant *Eddy* of the first part and the other defendants of the second part, they, the said parties thereunto, declared unto the said public notary, among other things, that in accordance with a deed of agreement executed under private seal, at Hull, on the

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12th July aforesaid, between *Eddy* of the first part, and certain of his creditors of the second part, he (*Eddy*) did cede, assign, transfer, and make over unto the parties thereto of the second part all his estate, movable and immovable, of whatsoever kind or description (excepting certain real and personal estate) to be held by them in trust in the first place to pay all salaries, costs, charges, and expenses to which the said trustees might be entitled; in the second place to pay all crown duties, preferential and privileged debts, and all necessary salaries, &c. In the third place to secure to the creditors of *Eddy* 100 cents in the dollar; and in the fourth place, after such payments in full, to re-transfer the estate to *Eddy*. And the said parties thereto agreed, amongst other things, that *Eddy* should have the management of the said business in its several branches as manager of the trustees, and as such to sell the lumber and other articles made and manufactured in the said business, purchase supplies and articles for the same, and should collect and recover all debts due or to become due to the business, and deposit the same immediately on receipt in the Bank of British North America at Ottawa to the joint credit of the trustees; that the trustees should at all times have access to the books and office papers of *Eddy*; that out of moneys in hand the trustees might from time to time advance such sums of money as they should deem requisite to carry on the business to such extent as they should consider for the interest of the creditors. (7) That plaintiff was not a party to the said notarial document, or to the deed or agreement made and executed under private seal mentioned therein, and did not know the precise terms of such agreement. (8) That the said *Kelty*, *Bate*, and *Eastwood*, immediately accepted the trusts mentioned in the said notarial document and entered upon the execution thereof as such trustees, and *Eddy* undertook and entered upon the management of the said business as manager of and for the trustees—the defendant *Eddy*

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performing his part as manager at Hull and elsewhere as he had done before the making of the said document, and the trustees residing and performing their duties at Ottawa. (9) That afterwards, and while *Eddy* was such manager for the trustees, he addressed to the solicitors of the plaintiff the following letter:— 1874. Grant v. Eddy.

"Ottawa, 22nd August, 1873.

"*Messrs. Lyon and Remon, Ottawa.*

"With reference to my contract with Mr. *Allan Grant* I have merely to reiterate what I previously stated both to Mr. *Grant* and your Mr. *Lyon*, viz., that any discrepancy or errors that there may be on any accounts heretofore rendered by me will, immediately on discovery, be rectified, and any balance that may be coming to Mr. *Grant* after delivery of logs and making up and adjusting of accounts, will be paid in accordance with the terms at three, four, and five months by paper made by me as manager, with the consent and concurrence of my trustees. Without prejudice. Statement.

"Very truly yours,
"E. B. EDDY."

On which was indorsed the following:—

"We consent and concur in within.
"22-8-73.

"D. S. EASTWOOD,
"As Trustee,
"A. C. KELTY,
"As Trustee,
"CHAS. T. BATE,
"As Trustee."

(10) The plaintiff insisted that by such letter the defendants proposed and offered that any discrepancies or errors which might be in any accounts theretofore rendered should be rectified; and that any balance which

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might be due to the plaintiff after the delivery to *Eddy* as such manager of the balance of the logs and timber required to fulfil on the plaintiff's behalf the agreement of the 12th October, 1871, would be paid as agreed, and the defendants would forthwith, and in the usual business way, make up, and adjust the accounts relating to the procuring and delivery of the said logs and timber, under both the said agreements; and that they would immediately thereupon deliver to the plaintiff promissory notes signed by *Eddy* as such manager, in such form as would bind the trustees to the payment thereof; and make the said trust estate in their hands chargeable therewith. (11) That the plaintiff accepted the terms of said letter, and the consent and concurrence of the trustees therein, and thereupon delivered to *Eddy* as such manager as aforesaid, the balance of logs and timber required to fulfil on plaintiff's part the agreement of the 12th October, above mentioned. (12) The plaintiff acted, as stated, upon the faith that his claims would be paid out of the trust estate, and the said logs and timber were used by the defendants in their management and conduct of the said trust estate. (13) That plaintiff had frequently requested the defendants to make up and adjust the accounts, but they had refused to do so, and had refused to make and deliver to plaintiff the promissory notes or any of them; or otherwise to settle with the plaintiff or pay for the logs and timber, although the time for so doing and making payment of the said notes, (if they had been given) had long elapsed. (14) That the accounts were intricate and complicated, and could not be properly investigated in a Court of Law. (15) That the trustees resided at Ottawa, and the said letter and indorsement thereon were written and signed there and within the jurisdiction of this Court: (16) And that for the part of the said logs and timber which was delivered prior to the execution of the said trust deed of the 24th July, 1873, the plaintiff is entitled to rank as a creditor of *Eddy*, upon the said trust estate; and prayed, amongst

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other things, a reference to the Master at Ottawa, to take the accounts between the plaintiff and the defendants relating to these transactions; that the amount so to be found due to the plaintiff might be declared a charge upon the said trust estate, and payment thereof ordered according to the terms of the said agreement; that in any event the defendants might be declared to be personally liable to pay what should be found due to the plaintiff, and for further and other relief.

Subsequently to the filing of the bill the defendant *Kelty* died, and his personal representative was brought before the Court by amendment.

The defendants *Eastwood* and *Bate* demurred for want of equity, and on the ground of want of jurisdiction. The defendant *Eddy* also demurred on the same grounds.

Mr. *Hoyles*, in support of the demurrer.

Argument.

The property, the subject of the trust, is situate in the Province of Quebec; and the debtor, the creator of the trust, is resident there; the fact that the trustees are residents of this Province is immaterial.

Eddy, who is the party chiefly interested in this estate, and not a mere formal party to the suit, is a resident in Quebec, and the proceedings against him ought to have been in the Courts of that Province. He referred to *Norris* v. *Chambres* (*a*), *Penn* v. Lord *Baltimore* (*b*), *Roberdeau* v. *Rous* (*c*), *Cookney* v. *Anderson* (*d*), *Waterhouse* v. *Stansfield* (*e*).

Mr. *Cassels*, contra.

(*a*) 29 Beav. 246.
(*b*) 2 Wh. & T. 923.
(*c*) 1 Atk. 543.
(*d*) 31 Beav. 452.
(*e*) 9 Hare, 234.

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The bill does not contain any statement that *Eddy* is resident out of the jurisdiction, and even if the statements that are made can be considered as amounting to an allegation of that fact, our order of Court is much wider than in England, for here we may serve a defendant out of the jurisdiction in any case. *Smith* v. *Henderson* (*a*), *Steele* v. *Stuart* (*b*), *Vincent* v. *Godson* (*c*), *Tullock* v. *Huntley* (*d*), *Davis* v. *Park* (*e*), were cited.

Judgment.

BLAKE, V. C.—The bill alleges that the plaintiff is a resident of Ontario, and that the defendant *Eddy* is a resident of Hull, which is in Quebec. It is not said where the first agreement was entered into. In the second agreement *Eddy* is described as of Hull; the trustees, *Kelty*, *Bate*, and *Eastwood*, are described as of Ottawa, in Ontario; and it recites a private agreement made at Hull in pursuance of which this agreement was entered into. By this agreement all the property of *Eddy* was assigned over to these trustees in order to pay salaries, &c., to pay preference claims and to secure to the creditors of *Eddy* 100 cents in the dollar; and lastly, to retransfer to *Eddy* the surplus. It was covenanted that *Eddy* should continue manager of the trustees, and should with their consent sell and dispose of the property, purchase supplies, &c.; should collect claims and pay all moneys collected to the credit of the trustees into the Bank of British North America, in Ottawa, and should at all times account to the trustees as to all moneys and matters connected with the trust; that the trustees should at all times have access to the books, &c., of *Eddy*. Out of the money in hand they might make advances to carry on the business; might borrow money and hypothecate the estate.

(*a*) 17 Gr. 6.
(*b*) 10 Jur. N. S. 15.
(*c*) 4 D. M. & G. 546.
(*d*) 1 Y. & C. C. C. 114.
(*e*) 21 W. R. 186.

The trustees accepted the trust and entered upon the execution thereof, and have continued the business; *Eddy* performing his part at Hull, and the trustees performing their duties, or the principal part of them, at Ottawa.

On the 22nd of August, 1873, a memorandum was signed by *Eddy* and assented to by the trustees at Ottawa, whereby they agreed to rectify any errors in the plaintiff's accounts, and that any balance after delivery of logs and adjusting balances, should be paid in three, four, and five months. The balance of the logs was delivered; they were used by the defendants in their conduct of the estate. The plaintiff has demanded an adjustment of the accounts and a delivery of the promissory notes, which have been refused; and the bill prays that for a part of the logs delivered before the assignment the plaintiff may be declared entitled to rank on the estate as a creditor of *Eddy*, and that the accounts may be taken, that the amount proved due may be declared to be a charge on the estate, and payment may be ordered in accordance with the agreement, and that the defendants may be declared personally liable to pay what shall be found due. Judgment.

Apart from the question of jurisdiction raised, the defendants are all properly before the Court; the trustees represent the estate and are bound to account to the creditors, of whom the plaintiff is one, and the defendant *Eddy*, as interested in the surplus, is a necessary party to the taking of the accounts. As the plaintiff and the trustees reside in this province and the trust funds, as they are collected, are to be paid into a bank in this Province, I think the plaintiff is entitled to have an account in this Court against these trustees, and that although *Eddy* lives out of the jurisdiction this fact does not in any way interfere with this right.

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"The Court of Equity acts in *personam*, and where a party is either resident within the jurisdiction, or can be brought within it by the order of the Court, or by Statute, the Court has complete authority to hear and determine equitable matters, even though they relate to estates abroad": *Cookney* v. *Anderson* (*a*). See also *Smith* v. *Henderson* (*b*), *Waterhouse* v. *Stansfield* (*c*), *Tullock* v. *Huntley* (*d*), *Meiklon* v. *Campbell* (*e*), *Shaver* v. *Gray* (*f*), and section 539 of *Story's* Conflict of Laws. "Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the persons being within the territory or upon the thing being within the territory, for otherwise there can be no sovereignty exerted." The Master of the Rolls says, "I think the principles which govern the jurisdiction of the Court over parties to contracts is analogous to that of the civil law, and which, as far as I am aware, has been adopted by all modern nations. They are described by all modern writers to consist of three circumstances, any one of which will give jurisdiction to the tribunals of the country to take cognizance of the matter. The first is where the domicile of the defendant is within the jurisdiction of the Court; the second is where the subject matter of the suit is situated within the jurisdiction, and the third is where the contract in question was entered into within the jurisdiction of the Court; by the word "jurisdiction" I mean territorial jurisdiction, the topographical limits within which the compulsory process of the Court operates to compel obedience to its orders and decrees." In the present case the trustees, whose duty it is to pay the plaintiff his share of the assets to be realized from *Eddy's* estate, are within the jurisdiction; the moneys to be received from the business by their manager are to be paid into a bank in this Province to their credit, and therefore,

Judgment.

(*a*) 31 Beav. 459.
(*b*) 17 Grant, 26.
(*c*) 9 Hare, 234.
(*d*) 1 Y. & C. C. 114.
(*e*) 24 Beav. 100.
(*f*) 18 Grant, 419.

even within the rule laid down in *Cookney* v. *Anderson*, the plaintiff is entitled in this Court to have the account and relief which he asks. 1874. Grant v. Eddy.

But I have considered generally the question raised and principally argued before me, namely, the jurisdiction of this Court to grant relief where the parties to the record or the property, the subject of the litigation, are, territorially, out of the jurisdiction. Our General Order, No. 101, passed in 1853, is based on the 33rd order of the English Orders of May, 1845, which, with the variations necessary to adapt it to the practice introduced by 15 and 16 Victoria, chapter 86, is identical with the 7th rule of the 10th order of the English Consolidated Orders. It is as follows: "Where the defendant is out of the jurisdiction of the Court, then upon application supported by such evidence as may satisfy the Court in what place or country the defendant is or may probably be found, the Court, instead of directing publication as provided for by Order 100, may order that an office copy of the bill be served on the defendant in such place or country, or within such limits as the Court may think fit to direct; and the order is in such case to limit a time (depending on the place of service), within which the defendant is to answer or demur, or obtain from the Court further time to make his defence." Order 100 referred to, provides that, "in case the defendant does not answer or demur within the time limited by such order, the Court may order the bill to be taken *pro confesso* in the manner hereafter provided." Judgment.

In order to do away with the necessity of making an application before service, the Legislature passed section 15 of 12 Victoria, chapter 56, "An absent defendant may be served at any place out of the jurisdiction of the Court, with a copy of any bill or proceeding without an application being previously made to the Court for the allowance of such service, and the service shall be

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allowed on proof to the satisfaction of the Court that the same was duly made." The power of the Court was further enlarged by 28 Victoria, chapter 17, section 12, whereby the only limit to service out of the jurisdiction of the process of the Court, was the discretion of its Judges. "Where a defendant or respondent in any suit or matter is absent from the Province or cannot be found therein to be served, the Court may authorize proceedings to be taken against him, according to the practice of the Court in the case of a defendant whose residence is unknown, or in any other manner that may be provided or ordered, if the Court shall, under the circumstances of the case, deem such mode of proceeding conducive to the ends of justice." Subsequently order 102 was passed. "The Court may provide for or order service in any other manner that the Court, under the circumstances of the case, deems conducive to the ends of justice." Order 90 provides for the period within which an absent defendant is to answer or demur. "The time within which a defendant served out of the jurisdiction of the Court, with an office copy of a bill of complaint, shall be required to answer the same or demur thereto, is as follows: If the defendant is served in the United States of America, &c., he is to answer or demur within six weeks after such service." Then follows the Order (95), limiting the time within which the service is to be made under Order 90. "The service of a bill without the jurisdiction of the Court, is to be of no validity, if not made within a period consisting of twelve weeks, and an additional time equal to that limited by Order 90 for the answer of a defendant, computed from the filing of the bill as to a party made defendant by the original bill, and from the amendment of the bill as to a party added by amendment." Order No. 106, makes provision for the case of a defendant served under the above acts and orders, who does not answer. "Where a defendant not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, has

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been personally served with an office copy of a bill out of the jurisdiction, and has neglected to answer or demur within the time limited for that purpose, the plaintiff may apply to the Court *ex parte* for an order to take the bill *pro confesso* against such defendant; and the Court, on being satisfied by affidavit that an office copy of the bill was served personally, and that no answer has been filed for such defendant may, if it thinks fit, order the same accordingly." I do not find any limit here to the cases in which such service is to be allowed. All parties any where out of the jurisdiction, and no matter where the property in dispute may be located, may be proceeded against under these Acts and Orders. If the intention of the Legislature were simply to render effective the process of the Court under certain circumstances, or as against certain parties, it is scarcely possible that language so wide as that found here would have been used. There can be, I think, no doubt as to the powers of the Court on this head, although it may be proper to exercise with great care the jurisdiction thus granted. The argument of the counsel for the defendants, was based principally on the judgment of the Master of the Rolls in *Cookney* v. *Anderson*, affirmed by Lord *Westbury*. There, no doubt, it was held that the jurisdiction of the Court had not been extended by the then recent statutes and orders; that their effect was merely to give an effect to the process not possessed by it before—but not to enlarge the cases in which the process should issue. See also *Norris* v. *Chambres* (*a*), *Foley* v. *Maillardet* (*b*).

Judgment.

The decisions of Lord *Westbury* were opposed to some cases decided at the time he gave his judgment in the matter. Sir *James Wigram*, in *Whitmore* v. *Ryan* (*c*), felt no doubt that the powers of the Court had been much enlarged by the English Acts and Orders

(*a*) 29 Beav. 246. (*b*) 1 D. J. & S. 339. (*c*) 11 Hare 612.

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similar in their effect to those above set forth as in force in this Province. In *Whitmore* v. *Ryan* the defendant resided in Ireland. It was there argued that the Acts and Orders gave enlarged powers, but powers which they were not enabled to exercise beyond the limits of the former jurisdiction; that they gave no new or enlarged jurisdiction, nor could they consistently with the principles of international law have extended the jurisdiction of the Court to subjects not amenable to its powers, but living within a foreign independent jurisdiction. But the Vice-Chancellor answered this by saying, "I do not deny that great weight is, for some purposes, due to the observation which has been made as to the extensive nature of the 33rd Order; that it empowers the Court, if it thinks fit, to order a subpœna to be served upon a foreigner who has never been within the jurisdiction. But my opinion is that the order does in terms give the Court authority to do so, and I cannot see that such an order, exercised with discretion, does in any respect violate the rules of natural justice. * * * The material question in judicial proceedings is, whether the defendant has due notice of the proceedings, so that he may be enabled to come in and make his defence, and not whether he receives that notice at Boulogne or Dover." Vice Chancellor *Stuart* in *Drummond* v. *Drummond* (*a*), notwithstanding the decisions of Lord *Westbury*, followed *Whitmore* v. *Ryan*, and held that the Court had jurisdiction notwithstanding the absence of the defendant out of the jurisdiction, and that the Court having complete power to allow service in every such case, is was a mere matter of discretion as to whether or not it would be exercised. This case was appealed, and was elaborately argued and all the authorities on the point discussed, whereupon the Lord Chancellor and Lords Justices affirmed the judgment of the Vice-Chancellor. Sir *George Turner* there says, "The

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(*a*) L. R. 2 Eq. 335.

question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property the Legislature of a country may be justified in authorizing the process of its Courts, to be served out of the jurisdiction of those Courts, but whether the Legislature of this country has not in fact authorized the process of this Court to be so served."

In *Steele* v. *Stuart* (*a*), the Vice-Chancellor held the Court had jurisdiction, but he would not in his discretion exercise it. In *Davis* v. *Park* (*b*), Vice-Chancellor *Wickens* held that service on an American citizen domiciled in the United States in respect of an American contract dealing with property in those States, was within the jurisdiction of the Court. In his discretion he discharged the order made for service, but took care to distinguish between the question of jurisdiction and of discretion, and while upholding the former, give relief on the latter ground. The Lord Chancellor and Lords Justices in appeal treated this as a proper exercise of the discretion of the Vice-Chancellor, and upheld the order. In *Hart* v. *Herwig* (*c*), the contract was made with a foreigner, in respect of a foreign vessel, in a foreign country. In the Court below an injunction had been granted. In Appeal the jurisdiction was not questioned, and as a matter of discretion it was held the order made should be affirmed. I was also referred to *Hope* v. *Hope* (*d*), *Vincent* v. *Godson* (*e*), *Penn* v. Lord *Baltimore* (*f*), *Roberdeau* v. *Rous* (*g*), *Story's* Equity Jurisprudence (*h*).

Judgment.

I think that the demurrer should be overruled with costs. If the defendants desire to answer, they must grant the plaintiff such facilities as will enable him to go

(*a*) 12 W. R. 247.
(*b*) 21 W. R. 136 & 301.
(*c*) L. R. 8 Ch. 860.
(*d*) 4 DeG. M. & G. 345.
(*e*) 4 D. M. & S. 546.
(*f*) 2 W. & T.
(*g*) 1 Atk. 543.
(*h*) 741 & 744.

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to a hearing at the approaching Ottawa term if he wishes this; and is in a position as against the other defendants to take his case down there. If on the further prosecution of the cause, it appears that the present is not a case in which the plaintiff should have proceeded in this Court to obtain the relief he seeks, the defendants should be at liberty notwithstanding the overruling of this demurrer, to raise that point before the Court, in such way as they may think proper. It is seldom that such a question can be with advantage raised by demurrer, as the plaintiff can, and generally does, cover by his pleading all the ground required to shut it out, but the defendant should have the right of urging on proper material the reasons which he conceives would deter the Court in its discretion from exercising its jurisdiction against him.

Judgment.

NOTE.—The order over-ruling the demurrer was reheard at the instance of the defendant *Eddy*, when the same was affirmed so far as the question of jurisdiction was concerned; the Court taking time to consider the demurrer for want of equity.

MERRIAM v. CRONK.

Mortgage—Rents and profits—Wilful default.

Although the rule is, that when a mortgagee enters into possession, he does so for the purpose of recovering both his principal and interest; and the estate, in the view of a Court of Equity, is a security only for the money due on the mortgage, and the Court requires him to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor, who is in equity the party entitled to it; still he will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same.

This was an appeal from the report of the Master at Belleville. The suit was for redemption, and in taking

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the accounts the Master had charged the defendant with rents and profits of the premises to a considerable amount over and above what had actually been received by him, there having been evidence adduced in his office to shew that the rents so charged could have been obtained: on the other hand evidence was given shewing that the rents that had been received were a fair rent for the property. There was no evidence that it was ever brought to the mortgagee's knowledge that a greater rent than he was receiving could have been obtained for the property.

Under these circumstances the defendant appealed.

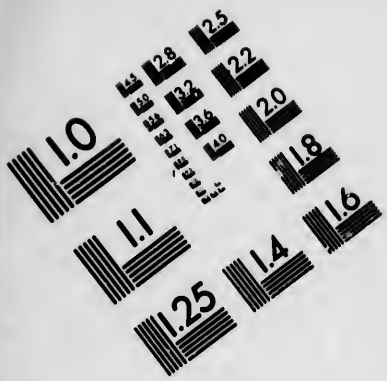
Mr. *Crooks*, Q. C., for the appeal.

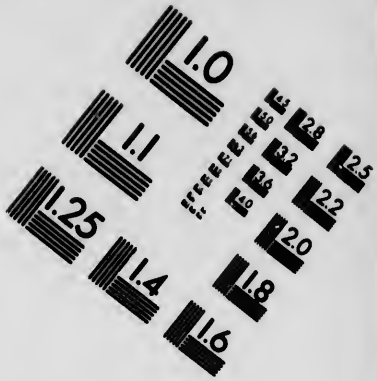
Mr. *Moss*, Q. C., and Mr. *Clute*, contra.

The cases cited are mentioned in the judgment.

Judgment.

BLAKE, V. C.—The defendant is, under and by virtue of a mortgage dated the 9th of May, 1857, the mortgagee of the premises in question. The plaintiff is the owner of the equity of redemption, and has filed her bill to redeem, in which she alleges that the defendant went into possession in June, 1859, and that he is chargeable with the rents and profits of the premises for over 13 years, at the rate of $100 a year. The defendant submits to be charged with the rent received by him during this period, but he alleges that, notwithstanding reasonable exertions made, he could not procure more than from $50 to $60 a year from the tenants; and that he consequently cannot be made accountable for a larger sum than this. The mortgage being in arrear, the defendant brought ejectment and turned the mortgagor and the family out of possession. There were twenty-five witnesses examined; those on the part of the plaintiff shewing that the place, in their opinion, should have been





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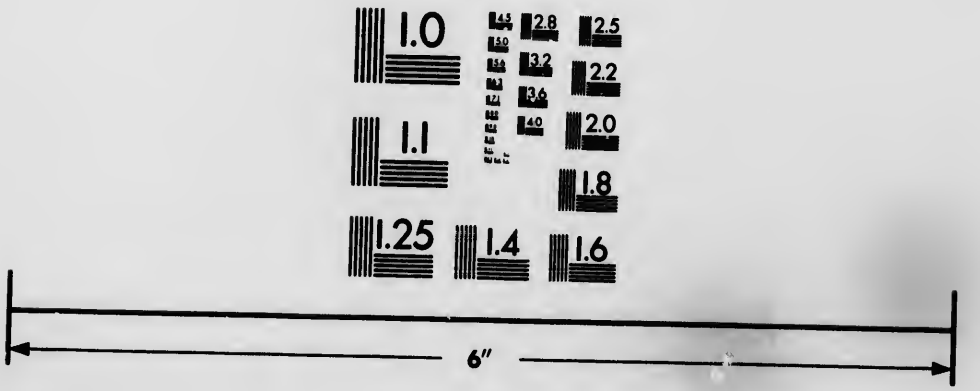

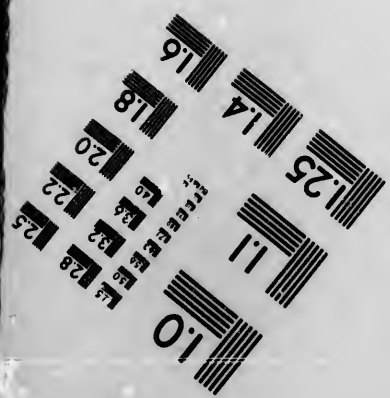

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rented for $100 a year during the period in question, and those for the defendant proving that the rent received by the defendant was the fair value of the premises. The witnesses for the mortgagor lay a good deal of stress on an orchard attached to the house, as being a source of great profit, while for the defence, it is proved that all that was ever made out of this was from $10 to $15 a year. It is also alleged that *Cronk* leased the premises to a family of the name of *Corbett*, who were disreputable characters, and thus the property was depreciated; but Mrs. *Merriam* was aware of the fact of the lease to them; knew of their being in possession, and never made any objection to them as tenants, although she was on the premises, saw them there and purchased from them some of the produce of the garden. Mrs. *Merriam* was in Belleville twice a year during the period in question; knew what was being done with the premises; never remonstrated with the defendant as to the tenants or rent; never offered to procure a better tenant or higher rent, or in any manner objected to what the mortgagee was doing with the premises, unless it can be said she did so when she asked to be accepted herself as tenant; which offer the defendant refused.

Judgment.

At the conclusion of the argument of the case, I was of opinion that the respondent had not shewn sufficient to warrant the finding of the Master. A perusal of the evidence and of the authorities, confirms me in this view.

It is true that in *Chaplin* v. *Young* (*a*), the Master of the Rolls says: "In the case of a mortgagee of the business, if he enter into possession, he becomes the owner of the business, and he stands exactly as regards his powers, in the place of the mortgagor: and, accordingly, he is accountable to the owner of the equity of

(*a*) 33 Bea. 330, 337. (*b*) 7 DeG. M. & G. 134, 157.

redemption for everything which he either has received or might have received, or ought to have received while he continued in such possession;" and in Lord *Kensington* v. *Bouverie* (*b*), the language of Lord Justice *Turner* is as follows: "A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and the estate being, in the eye of this Court, a security only for the money, the Court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this Court, is entitled to it." But Mr. *Fisher* (*a*), while citing the above, goes on to say: "The mortgagee is not usually required to account for more than he has received, or according to the actual value of the land, unless it can be proved, that but for his gross default, mismanagement, or fraud, he might have received more; such may be evidenced by his refusal or removal of a sufficient tenant, who offered or paid a certain rent; his refusal, in combination with the tenant, to receive the rent, or to take out execution on a judgment in ejectment, or his making an improper use of his security, by suffering the mortgagor himself to take the profits, to the prejudice of his other creditors, or, where he is bankrupt, of his assignee. But in these cases, the proof must be distinct. The mortgagor is not suffered to bring in the mortgagee and ask him how much rent he could have got, when in possession, nor to involve him in a minute inquiry whether some person was ready, unknown to him, to have given more rent for the estate."

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"A mortgagee," says Mr. *Coote* (*d*), "shall not account for any imaginary profits which he might have made of the land, but only for the actual rent, unless there be fraud or wilful default in his conduct, as if he turned out a sufficient tenant, or refused higher rent

(*a*) 2 Fisher on Mortgages, 882. (*b*) Coote, p. 538.

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than what he actually received, or the like; but in taking the account, if the mortgagor prove the estate to have been let at a certain rent at any time during the mortgagee's possession, the onus will be thrown on the mortgagee, to shew that such was not the rent during the whole period of his possession. * * If a mortgagee act *malâ fide*, either with regard to subsequent incumbrancers or creditors of the mortgagor, or with regard to the mortgagor himself, he will be personally responsible; as, if he be guilty of gross mismanagement in the cultivation of the estate." Mr. *Powell's* (*a*) view was, that "a mortgagee will not be obliged to account according to the value of the lands, viz., he will not be bound by any proof that the land was worth so much, unless it can likewise be proved that he actually made that sum of it, or might have done, had he not been guilty of fraud or wilful default; as, if he turned out a sufficient tenant, that held it at so much rent, or re-

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fused to accept a sufficient tenant, that would have given so much more for it; for it is the laches of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money, and when it doth, he is only a bailiff for what he doth actually receive, but is not bound to the trouble and pains of making the most of what is another's." In an anonymous case in 1 Vernon, p. 45, there is the following judgment: "A mortgagee shall not account according to the value of the land, viz.: He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful default; as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it." Lord *Erskine* says in *Hughes* v. *Williams* (*b*), "I do not mean that to charge a mortgagee in possession, actual

(*a*) Powell on Mortgages, p. 949. (*b*) 12 Ves. 493.

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fraud is necessary. It is sufficient if there is plain, obvious and gross negligence, by not making use of facts within his knowledge, so as to give the mortgagor the full benefit that the mortgagee in possession of the estate of the mortgagor ought to give him; if, for instance, the mortgagee turns out a sufficient tenant, and having notice that the estate was underlet, takes a new tenant, another person offering more; an offer, however, not to be accepted rashly. But this case does not furnish even that ground, for, with the exception of a proposition to give £7 a year for one tenement instead of £5 a year, the rent then paid, there is no proof of any proposal for an increase. * * Another circumstance," the Chancellor continues, "that weighs with me, is, that the mortgagor, if he knows the estate is underlet, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. * * Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards by way of penal inquiry, to charge the mortgagee with the effect of his own negligence. I agree to the principle, that has been stated by *The Solicitor-General*, that it would be dangerous to say the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shewn as comes up to the description of wilful default, he ought to be answerable for it. But I determine this exception upon the principle, that a mortgagee taking possession is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor; but is liable only for wilful default, of which, in this instance, there is no pretence; this mortgagor not having even communicated that he had any contemplation of improvement, or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more, which was never

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communicated." In *Metcalf* v. *Campion* (*a*), this case was followed. The Chancellor there held that "the Court does not allow the mortgagor to bring in the mortgagee, and put him to the question how much he could have got for the mortgaged premises while he was in possession. The course is this: If the mortgagee deals with them as his own, he is only chargeable with the rent reserved, unless proof can be brought, which lies upon the opposite side, and it is shewn that he acted fraudulently, as in underhand dealing between him and the tenant to whom he rented, or was guilty of wilful default, as by leaving the premises vacant, which would throw upon him the proof that no tenant offered, or could be had with reasonable diligence." In *Wragg* v. *Denham* (*b*), Baron *Alderson* says: "I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to the extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee, gross negligence is sufficient." See also *Bindon* v. *Bindon* (*c*), and *Cocks* v. *Gray* (*d*). The rule as stated in these cases has been followed in this Court in *Caldwell* v. *Hall*, (*e*). There the late Chancellor *VanKoughnet* says, speaking of the rent, "If the master has satisfied himself it was received, well and good. If he merely thinks that the defendant might have received it, then upon what consideration does he base this finding. It is not merely that the premises, if tenants could have been found for them during all the period, would have fetched the rental that would justify charging it against

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(*a*) 1 Moll. 238.
(*b*) 2 Y. & C. Ex. 117.
(*c*) 10 W. R. 287.
(*d*) 1 Giff. 77.
(*e*) 9 Gr. 110, 114.

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the defendant. The mortgagee in possession is not bound to procure tenants at all hazards, or pay the rent himself, if the premises be vacant; neither is he bound to hunt up tenants, or do more than any prudent owner of property would do who had tenements to let. He should always be ready to let them, if a tenant offers himself, and may be expected to use such ordinary means as any owner of property adopts, to make it known that these are for lease; but he is not expected to consume his time in searching out lessees. He should not be indifferent, and thus keep the premises, as it were, out of view and notice, for such conduct would render him liable to a charge of negligence, and so of wilful default."

Here it was for the interest of the defendant to get as high a rent as he could for the premises. No improper motive has been shewn in his leasing to the particular tenants to whom he let the premises, nor has any reason been assigned for his giving them at a bargain. The Master seems simply to have inquired after one matter, and that was, could the mortgagee have possibly procured a higher rent than he has done. He found this against the defendant, and then implied as a result that there must have been wilful default or neglect. The authorities shew that, in addition to this question, must be considered whether the small or lost rent arose from the gross default, mismanagement, or fraud, of the person sought to be charged; and, if not, an account of actual receipts alone can be had in favor of the mortgagor.

Judgment.

I think it is clear the Master erred in his finding, and that the matter must be referred back to him. The plaintiff must pay the costs of the appeal.

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WEST GWILLIMBURY v. SIMCOE.

Demurrer—Municipal Officers—Parties.

Where a bill was filed to restrain the issue of debentures by a Municipal Council, but did not allege that the Warden was individually acting in the matter, or taking any step otherwise than as the officer of the Council, and under the by-law, the Court on demurrer held that he was not a necessary or proper party to the suit.

Bill to restrain the issue of debentures by the *County of Simcoe* in favour of *The Hamilton and North Western Railway*, on the grounds alleged therein, and which are fully stated in the report of this case upon the motion for injunction, reported ante vol. xx, page 211. After the injunction had been refused, the defendant *John Hogg*, the Warden of the County, filed a demurrer on the ground that he was not a necessary or proper party.

The clauses of the bill bearing on the question (the 24th and 25th) are stated at length in the judgment.

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

Mr. *Moss*, Q. C., contra.

Judgment. BLAKE, V. C.—This bill is filed to restrain the defendants, the County of Simcoe, from passing a by-law which the plaintiffs allege is illegal. When the bill was filed this by-law had not been read a third time. *John Hogg*, the Warden of the Municipal Council of Simcoe, is made a party defendant, and he demurs to the bill as not being a proper or necessary party. The only clauses of the bill material to this question are the 24th and 25th. The first of these clauses states that the defendants the municipal corporation threaten and intend and will meet on the 16th of June, 1873, and proceed to read the said by-law a third time. The second clause states that the defendant *John Hogg* is

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the Warden of the Municipal Council of Simcoe, and the defendants other than the railway company threaten and intend immediately to issue debentures under the said by-law, and to deliver the same for the benefit of the said railway in the manner in the said by-law mentioned, and unless the defendants be restrained the said debentures will be so delivered, and will be negotiated before the said by-law can be quashed by a Court of law. It was not argued and could not, I think, be successfully contended that, so far as the 24th clause standing alone is concerned, this defendant should be before the Court. If this were so, all the members of the corporation should also be before the Court, as each of them would have as much to do as the Warden with the reading for the third time the by-law. If, as in *Cline* v. *The Mountainview Cheese Factory* (*a*), cited for the plaintiffs, the plaintiffs were entitled to relief against the co-defendants as well as against the corporation in respect of the same matters, the subject of the suit, then the Warden and Councillors could be brought before the Court by the present bill; but I do not think where a plaintiff has a right only against a municipal corporation, that he can, in order to sustain the right, bring before the Court not only the corporation but all the members that compose it. But it is alleged that this defendant has a peculiar duty to perform as to the issuing of these debentures, and therefore he is a proper party. It is not alleged that he is going to issue them except under the by-law. The bill is filed to intercept the passage of the by-law; it is not pretended but that the plaintiffs can accomplish this in due time if they be entitled to such relief at all, and therefore there is nothing to shew that the state of facts, which alone would warrant the bringing the Warden before the Court, will ever transpire. If the plaintiffs asserted that the debentures were about to be issued by the

Judgment.

(*a*) 20 Gr. 278.

1874. Warden without the by-law being duly read, or some special case were made of that sort, then I think he should be before the Court, but as the record stands at present, he appears to me to be an improper party. The leaning of the Court is to restrict so far as possible the persons to be made parties to suits (*a*), and I think it is necessary to shew on your pleading some obvious reason for adding a defendant before the Court will allow him, when the objection is taken on demurrer, to remain a party to the record. I allow the demurrer with costs.

West Gwillimbury v. Simcoe.

Colonial Trusts v. Cameron.

Practice—Opening publication—Delay in moving.

It is incumbent on the Court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance, should be imposed upon parties; where, therefore, a defendant did not appear at the hearing of the cause, and a decree was pronounced in favour of the plaintiff, and three months afterwards the defendant applied to open publication, so as to let in proof of a document of the existence of which he was aware, and a copy of which he had had in his possession, the Court, under the circumstances, refused the application with costs.

This was a motion on petition of the defendant *Cameron* to open publication and set the case down to be again heard, under the circumstances stated in the judgment.

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

Mr. *Francis*, contra.

Judgment. Blake, V. C.—The bill alleges that the defendant *Angus* is the mortgagor, and the defendant *Cameron* is

(*a*) Brogdin v. Bank of Upper Canada, 18 Gr. 544.

1874.

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mortgagee of certain premises on which the plaintiff also has a mortgage; that this mortgage was given for the purpose of indemnifying *Cameron* in case he should indorse a promissory note for $2,000, made by *Angus* and the defendant *Sutton*; that *Cameron* did not indorse the note in question, but returned it to *Angus*, and it was then agreed that the arrangement as to indorsing should be dropped, and the mortgage security abandoned; that *Cameron* insists on holding the mortgage for certain other advances said to have been made by him, and refuses to deliver it up or discharge it; and the bill prays that he may be compelled to do so. The defendant *Cameron* in his answer, denies that an arrangement was made whereby the mortgage was to be abandoned; and states that on the contrary, he made advances on the strength of this mortgage, to the amount of about $1,000, for which sum *Sutton* gave an order to be met out of certain moneys alleged to be coming to the firm of *Sutton & Angus*, from certain railway contracts in which they were interested. *Angus* admits the truth of the allegations of the bill, which has been taken *pro confesso* against *Sutton*. Notice of examination and hearing was served on the 7th of October, for the 3rd of November. The case was reached on the 5th of that month, whereupon the Counsel for Mr. *Cameron* asked an adjournment owing to his absence, it being stated that he was engaged as counsel on the Midland Circuit. I was prepared and offered to postpone the case to a day that would have suited the convenience of the defendant, but the Counsel for the plaintiff strenuously opposed this; and as his witnesses were present, I did not consider after a four weeks' notice of the examination in the cause had been given, that it was sufficient for the defendant to claim a postponement on the ground that he was a material witness for himself, and was absent on Circuit. I then thought, and still think it was the duty of the defendant to have absented himself for one day from his Circuit engagements, if he desired to be

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present at the hearing of this cause; that the defendant having four weeks within which to make the necessary arrangements for such absence, was without excuse in not having done so, and that it was out of the question, when the application is opposed, to allow such a reason as that given for asking a postponement to prevail. The Court, owing to the 6th being a Public Holiday, adjourned from the 5th to the 7th, but on this latter day the defendant likewise failed to attend, and this case was then closed. It is impossible on this application to consider whether the adjournment asked for was properly refused or not. If the defendant is dissatisfied with the order then made, he must rehear it, but I cannot here review the decision arrived at. The mortgage is in the form alleged by the plaintiff. The witnesses examined on the hearing of the cause, were the defendants *Sutton* and *Angus*, and Mr. *Finlayson*. The evidence of these witnesses proved that no money was ever raised on the $2,000 note, to secure which alone the mortgage in question was given; that money was otherwise obtained; that Mr. *Cameron* was paid $205 for his services in engotiating a loan from a Mr. *Chisholm*, which was subsequently repaid; that he asked for a note for $300 to cover his fee, in case more money was wanted, which *Sutton*, on leaving for Nova Scotia, gave him; that no more money was raised; that *Cameron* never made any claim in respect of the mortgage, until in 1869, when on Mr. *Finlayson* applying to him for it, he refused to give it up, asserting that he had a claim against *Sutton* and *Angus* for about $1,000, $650 of which was for obtaining for *Sutton* the Norfolk Railway charter. He also said he had a claim against the partnership, in respect of a note for $200, the renewal of the above note for $300; and that he would hold the mortgage until this note was paid. He admitted he had no legal right to the mortgage, but said he would retain it until he was paid.

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The documents produced at the hearing corroborated the plaintiff's case. A question arose, whether or not *Cameron* had advanced anything on this mortgage. *Angus* was anxious to be informed on this subject before he disbursed money received as contractor, and on the 9th of November, 1869, he telegraphs to *Cameron* as follows: "How much did you advance *Sutton* on account of *Sutton & Angus* for which you hold mortgage as security?—must know by 4 o'clock, and oblige, GEORGE ANGUS." No satisfactory answer being made to that message, and *Angus* refusing to pay the workmen until it was received, on the 25th of November *Sutton* and *Walsh*, his indorser, sent the following telegram to *Cameron*: "Did you say I had got money raised by *Angus* mortgage? Answer." To which *Cameron* replied: "Did not say so, or that any money raised on mortgage."

Judgment.

On the 8th of December, a letter was written by *Sutton* to *Cameron*, explaining the reason of the sending these telegrams and asking *Cameron*, as not a dollar had been advanced on the mortgage, to give it and the notes up. There is no repudiation by *Cameron* of this position taken by *Sutton* and *Angus*, in any of the correspondence, and on the 28th of January following he writes to Mr. *Finlayson* wanting to know where *Sutton* and *Angus* are, as a note for $206 had fallen due, and stating that he must look to the mortgage to cover it. There could be but the one conclusion drawn from the evidence, oral and documentary, and that was that whereas the mortgage was given for a specific purpose, the mortgagee was endeavoring to hold it in order to secure an alleged debt not covered by it; and thereupon I pronounced a decree for the discharge and delivery up of the mortgage. This decree issued on the 7th of November, and, on the 6th of February following, a petition was presented alleging that *Cameron* has a good defence on the merits, that for the reasons stated at

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the hearing he could not then be present, that the evidence of *Sutton* was untrue, that on the 23rd of June, 1870, there was a settlement of account as between *Sutton* and *Cameron*, and *Sutton*, representing the firm of *Sutton & Angus*, and an order was then given signed by *Sutton* for *Sutton & Angus*, on Mr. *Crooks* for $600, "the amount due by us to Mr. *Hector Cameron* for cash advances as per account, this day adjusted with him": that the claim of *Sutton & Angus* against the government for work done by them as contractors, had been assigned to Mr. *Crooks*, and therefore this order was given. This certainly contradicts the statement of *Sutton* that the order given was not for a debt of the firm, but merely to secure his private indebtedness. The defendant *Cameron*, however, does not deny the statement made by Mr. *Finlayson*, in his evidence, that he, *Cameron*, had stated that $650 of his claim was made up of his fee for procuring a railway charter for *Sutton*, and that he had no right to hold the mortgage in respect of the note claimed to be covered by this security, but that he was determined to do so. At the time *Sutton* gave the order and settled the account he was not a partner of *Angus*, and could not bind him by such settlement, nor could he charge the mortgage with this balance. There may have been a settlement of account between *Sutton* and *Cameron*, but I do not see that this binds *Angus*. If the statement of Mr. *Finlayson* be true, it could not, as almost the whole of the amount embraced in this order was for a matter that *Angus* had nothing to do with. But, even supposing this document altered the complexion of the case materially, can I at this stage admit it, and the evidence of the defendant, to be presented to the Court? I do not think the rule laid down by Lord *Eldon* in *Young* v. *Keighley* (*a*), has been, or should be, deviated from. He says, "The evidence the discovery of which is supposed to form a

Judgment.

(*a*) 16 Ves. 348.

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ground for this application is very material, and I am persuaded that by refusing the application I decide against the plaintiff in a case, in which he might, perhaps, with confidence, have contended that upon the evidence he was entitled to the whole money. On the other hand, it is most incumbent on the Court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The Court must not, therefore, be induced by any persuasion as to the fact, that the plaintiff had originally a demand, which he could clearly have sustained, to break down rules established to prevent general mischief at the expense even of particular injury. * * Upon a supplemental bill in the nature of a Bill of Review, the question always is, not what the plaintiff knew, but what, using reasonable diligence, he might have known. * * Though I feel great reluctance in adhering to the rule of the Court, where it may probably exclude the justice of the case, there is too much difficulty in the way of this application; where it appears upon the original and supplemental bills, that relief might probably have been effectually asked, which has not been asked by either." In *Brigham* v. *Dawson* (*a*), the language is, "If it is to be laid down that a party may go on to a decree without looking for a defence and may then make applications of this kind, there will never be an end to them. It is not a case of a search made, but it does not appear that there was any search at all."

Judgment.

There is no pretence but that *Cameron* knew of the document in question, which he thinks is now material to his case, and no reason whatever is assigned for not having had it produced at the hearing of the cause.

(*a*) Jac. 248.

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So, that, on this ground alone, I think the application should be refused. But, apart from this, the delay of three months from the 7th of November to the 6th February, is fatal to the application. It is the duty of the party applying to the Court to allow the giving of further evidence to come at the earliest possible moment. The application might have been made in last November, and a party has no right to lie by as long as he pleases, and then to expect the Court to grant the same indulgence to him as if he had applied speedily: *Thomas* v. *Rawlings* (*a*). I do not feel that the fresh evidence sought to be adduced should make any difference in the decree pronounced, and therefore I have the less reluctance, on the other grounds stated, in dismissing the application with costs.

Judgment.

NOTE.—The defendant reheard the motion before the full Court, when the order made by the Vice-Chancellor was affirmed with costs.

(*a*) 34 Bea. 54.

1874.

BUCKE v. BUCKE.

Alimony—Consent decree—Costs—Counsel fees—Disbursements.

The parties to an alimony suit consented to a decree whereby the defendant was ordered forthwith to "pay the plaintiff the sum of $75, and all disbursements in the suit as between solicitor and client, including sheriff's fees on executions; such disbursements to be taxed and allowed by the Master of this Court":

Held, that in proceeding under this decree the Master had properly allowed to the plaintiff a sum of $50 paid by the plaintiff to her solicitors, they being also counsel, for counsel fees on the examination and hearing of the cause.

This was a suit for alimony in which, by consent, a decree had been drawn up containing the following clause: "3rd, And this Court doth further order that the defendant do forthwith pay to the plaintiff the sum of $75, and all disbursements in this suit as between solicitor and client, including sheriff's fees on executions; such disbursements to be taxed and allowed by the Master of this Court." In taxing the bill brought in under this decree by the plaintiff, the taxing officer allowed $50 paid by the plaintiff to the persons acting as her solicitors for counsel fees on the examination and hearing of the cause. The defendant appealed against the taxation, on two grounds: First, because the Act 32 Victoria, chapter 18, applied, which it was alleged excluded this charge. And second, because these fees were not disbursements, and therefore they should, in any event, be disallowed.

Mr. *Hoyles*, for the defendant.

Mr. *Cassels*, contra.

BLAKE, V. C.—I do not think the Act relied on assists in the disposition of the question raised. The only section which it could be argued touches the point Judgment.

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Bucke v. Bucke.

is the second, and that refers to suits for alimony, in which the plaintiff fails to obtain a decree for alimony. Here the plaintiff did not fail in her suit, but by consent she agrees to accept a decree which gives her control of property yielding $150 or $200 a year, and this is given to her in lieu of alimony. By the same decree the parties settle the mode in which the costs are to be dealt with, and, in doing so, they do not say that such costs as would be allowed under this Act are to be taxed, nor do they follow the wording of the Act, and say the costs to be allowed shall be "the amount of the cash disbursements properly made by the plaintiff's solicitor," but they agree that the defendant shall pay to the plaintiff "all disbursements in this suit," and, lest any item should thus be omitted they add the words, "as between solicitor and client." It seems, therefore, clear that in place of taking this Act as the measure of costs to be allowed, the parties consented, as they had the power to do, to their taxation in another manner. This was one of the terms on which the plaintiff assented to the decree, and I cannot now listen to the argument that the defendant intended to give only some particular disbursements, but must, on such an application as the present, simply construe the decree as best I can, and decide, upon its wording alone, whether the Master has erred or not. I am of opinion that when parties arrange that the one shall pay to the other all disbursements, as between solicitor and client in a suit, the proper test as to what shall be allowed on a taxation had thereunder, is to ascertain what items are usually found in the disbursement column of a bill of costs taxed as between solicitor and client. Such items should be allowed, and here should be taxed under the decree in question. There is no doubt that fees paid to counsel either by the solicitor or by the client, are correctly placed in the disbursement column of a bill, and therefore *primâ facie* the fees in question should be taxed against the defendant. But, it is said, here the solicitor

Judgment.

and counsel are one and the same: there was not in fact a disbursement, and therefore the fees should be disallowed. Although there was not a disbursement of the solicitor, there was nevertheless one by the client; and can I hold that, because the plaintiff happened to hand a fee as counsel to one who was also acting as solicitor in her suit, she is to be deprived of this charge, although if it had been paid to a third person, it would have been allowed her? I do not see on what principle I could justify such a conclusion. It would place the professional gentlemen receiving the fee in a false position, and in the present case, the unfortunate plaintiff, because she happened to hand the counsel fee to a gentleman who also was her solicitor, would be deprived of $50, which payment, if she had made to an outside counsel, she could now recover against the defendant.

I think the taxing officer was correct in his taxation: and that the appeal should be dismissed with costs. I regret there should be so much expense necessarily attending an appeal to the Court, where so small a matter is involved. The Court has devised a simple and inexpensive method for obtaining the opinion of the Master in Ordinary of the Court, an officer peculiarly competent to deal with such questions, and I think he should have been applied to before the parties dissatisfied appealed to the Court: a course which was not pursued in this case; and I therefore have the less compunction in charging the defendant with the costs of this unsuccessful appeal. Judgment.

Appeal dismissed with costs.

1874.

McFarlane v. Murphy.

Pleading—Demurrer—Husband and wife—Married Women's Property Act, 1872.

To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:

Held, on demurrer, that since the passing of the Married Women's Property Act, 1872, the husband was not a necessary or proper party.

Semble, that such a dealing on the part of a married woman was a "tort," within the meaning of the above Act, for which she could be proceeded against as if unmarried.

State ment

This was a bill by *Duncan McFarlane*, of Montreal, assignee in insolvency of one *J. R. Trumpour*, against *Abigail Murphy* and *Richard Murphy* her husband, stating that on the 14th of November, 1872, *Trumpour* was owner in fee of certain lands in the Township of Hillier, and by a conveyance of that date he and his wife joined in creating a mortgage in favour of the defendant *Abigail*, (who was the mother-in-law of *Trumpour*) for the expressed purpose of securing $200, which mortgage was duly registered on the 14th of December following, and within a fortnight thereafter, *Trumpour* absconded from this Province on account of his debts, leaving liabilites greatly in excess of his assets, and had since continued to reside in the United States; that such mortgage was made in fraud of and with intent fraudulently to impede, obstruct, and delay the creditors of *Trumpour* in their remedies against him, and was so made with the knowledge of the defendants, and that such mortgage had the effect of so impeding, obstructing, and delaying his creditors: that if any debt did exist from *Trumpour* to the said *Abigail* the mortgage so given was given by way of fraudulent preference, and was made within thirty days next before the issue of an attachment against the estate and effects of *Trumpour*; and the plaintiff claimed that under the 13 Elizabeth, Chapter 5, and the Insolvent Act of 1869,

such mortgage was void as against *Trumpour's* creditors, The bill prayed a declaration that the mortgage was void and might be delivered up to be cancelled and an injunction to restrain the defendants from negociating or assigning the mortgage which the bill stated they intended doing.

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The defendant *Richard Murphy* demurred for want of equity.

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

Mr. *Moss*, Q. C., contra.

Wright v. *Garden* (*a*), *Dingman* v. *Austin* (*b*), *Emrick* v. *Sullivan* (*c*), *Chamberlain* v. *McDonald* (*d*), *Mitchell* v. *The Royal Canadian Bank* (*e*), were referred to.

SPRAGGE, C.—In suits against a married woman in respect of her separate estate, the English authorities shew that her husband should be made a party, except in some excepted cases which it is not necessary to consider. For this there is the authority of Lord *Redesdale* (*f*), of Mr. *Daniel* (*g*), of Judge *Story* (*h*), and of Mr. *Calvert* (*i*). And I find that in *Murray* v. *Barlee* (*j*), before *Sir Lancelot Shadwell*, and in Appeal (*k*), where nothing was sought against the husband, but the only remedy asked for was against the separate estate of the wife, the husband, as well as the wife and the trustee of the wife, was made a party. There was, too, in that case, a demurrer by the wife for want of equity, but none by the husband, on any ground whatever. The authorities to which I have referred, treat it as a settled rule, that in such suits the husband not only

Judgment.

(*a*) 28 U. C. R. 606.
(*b*) 33 U. C. R. 190.
(*c*) 25 U. C. R. 105.
(*d*) 14 Gr. 447.
(*e*) 14 Gr. 412.
(*f*) Mitford. 30.
(*g*) Prac. 162.
(*h*) Eqy. Pl. s. 71.
(*i*) 268.
(*j*) 4 Sim. 82.
(*k*) 3 M. & K. 209.

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may be, but must be made a party. This being a demurrer by the husband, on the ground that he ought not to be made a party, it is sufficient for the plaintiff to shew that he is a proper party; it does not lie upon him to shew that he is a *necessary* party. This bill contains no charges that would make him a proper party for the purpose of obtaining any relief against him in the way of costs or otherwise. If not the husband of the principal defendant, he could clearly demur; and, so if a necessary party, it must be for the sake of conformity because he is the husband of the principal defendant.

Unless section 9 of the "Married Women's Property Act, 1872," (35 Vic. ch. 16,) makes a difference, I must hold that the husband of the female defendant in this case, is a proper, if not a necessary party. It is in these terms "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property, by this or any other Act, declared to be her separate property, and shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried."

Judgment.

If the matters in respect of which a married woman may be sued, were stated in as comprehensive terms as the matters in which she may sue, the husband in this case would certainly not be a necessary party. One might think, upon first reading the clause, that the same words might have been used in the second branch of the clause

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—or referred to without repetition—as in the first; but some of the language would be inappropriate, *e.g.*, that a married woman may be sued in respect of her wages and earnings. The word property might, however, have been added with propriety, as a matter in respect of which a married woman might be sued separately, and that would have been sufficient to meet this case. Is it a proper inference that the Legislature meant that a woman might be proceeded against separately in respect of her separate debts, engagements, contracts, and torts, but not in respect of her separate property. There is nothing in the Act to lead to this inference, and the concluding words of the first section lead me to a contrary inference: "And any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*." Reading this with section 9, I should say that she might in respect of any such contract be sued separately, and this would be a suing or proceeding against her in respect of property. I refer to this only as an indication of the intention of the Legislature that a married woman may be sued separately in respect of property. The clause, indeed, is dealing with real estate, but for the purpose for which I use it, it furnishes the same argument as if it were dealing with property generally. It is an *a fortiori* argument, that if the Act empowers a woman to contract in respect of her real estate, and makes her liable to be sued separately in respect of it, it could not be intended that she might not deal, and be dealt with as freely in relation to her personalty.

Judgment.

The question here is not a question of property or of civil rights, but a question of procedure. In a certain class of cases, at any rate, the Legislature has declared that a married woman may be proceeded against separately from her husband, and a new rule of procedure has thus been introduced. The question now is whether this Court can hold the old rule to apply in cases that is,

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where there is no substantial reason for retaining it. "Conformity" is not a substantial reason; and Mr. *Moss* probably felt this, when he contended that there were reasons for the husband being a party in this case.

He contended that by the mortgage a legal title passed to the husband, which could not be got out of him unless he were made a party. I should admit the cogency of this argument if this were a bill in which a conveyance was sought, or was in any way necessary to the relief to which the plaintiff may be entitled, but it is not so. The conveyance is void as against creditors, and void only so far as is necessary to satisfy the debts of the creditors, and no conveyance is sought or needed.

Judgment

It is further contended that the husband has an interest in defending this suit, inasmuch as in the event of the wife dying intestate, a beneficial interest would pass to him. But the same reason would render it necessary to make a presumptive heir a party, which is clearly not necessary. I think the husband is not a necessary or a proper party on either of these grounds.

Then, what is the effect of the provision in the Act of 1872, that a married woman may be proceeded against separately from her husband. Take one of the cases expressly mentioned, *e.g.*, a suit in respect of a contract entered into by her, and her husband made a party, I have no doubt that he might object by demurrer, the statute making it unnecessary to make him a party, the making him a party would have no ground to rest upon, either of necessity or propriety, and he might well object that he ought not to be brought into litigation, as he does object in this case.

In the Common Law cases to which I am referred, the question raised by this demurrer did not arise. It

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is, therefore, a case of first impression, and upon the best consideration that I have been able to give to the question my conclusion is, that under the Act of 1872, and since the passing of that Act, there is no good reason for making the husband a party in such a case as this, and that one of the objects of that Act was to make the wife the party, and the proper party to be sued separately and alone.

I have said, that there are no sufficient allegations in the bill to charge the husband as *particeps fraudis*. They do not go beyond this, that the defendants had notice of the insolvency of the mortgagor, and of some other facts, these allegations not pointing to any connivance or participation in fraud. And the husband is made a party by amendment because of his being the husband of the mortgagee, I cannot help thinking, by mistake, because it was necessary to make him a party under the Act of 1859, and overlooking the change made by the ninth section of the Act of 1872.

Judgment.

The allegation is that he is the husband of the defendant *Abigail Murphy*, and has, therefore, been made a party.

I have not alluded to the word "torts" in section 9 of the Act of 1872. I am inclined to think that it applies to the Acts of the married woman complained of in this bill. The word, in its largest sense, "wrong doings," would apply, for the bill alleges that the mortgage, which is impeached, was made in pursuance of a fraudulent agreement entered into between the parties to defeat creditors. The statute does not use the words "actions of tort," but "torts," and may well apply to such wrongs as are charged in this bill.

The demurrer is allowed (*a*).

(*a*) On a subsequent day a similar demurrer was argued before Vice-Chancellor PROUDFOOT, when the like order was pronounced in the case of *Mason* v. *Trumpeller*.

1874.

REID V. KENNEDY.

Fraudulent conveyance—Creditor—Felony.

The person upon whom a robbery has been committed is, even before conviction, entitled to be considered as a creditor of the party committing the robbery, although the remedy for the recovery of the amount may be suspended until after conviction; where therefore a person had feloniously possessed himself of certain securities, and invested a portion of the money realized therefrom in the purchase of real estate, the conveyance of which he procured to be made to his wife, in order to its being preserved in the event of proceedings being taken by the party robbed, the Court, on a bill filed by a subsequent creditor, declared the conveyance void as against creditors, under the 13th Elizabeth, ch. 5.

Statement.

The bill in this cause was filed by *Calvin Pomeroy Reid*, against *Franklin Kennedy* and *Maggie Knapp Kennedy*, his wife, setting forth that the plaintiff and one *Charles Brown*, formerly a partner of the plaintiff, had recovered judgment against the defendant *Franklin Kennedy*, for goods furnished him to the amount of $291.54, debt and costs, on which judgment execution had been issued, which remained unsatisfied: that in June, 1867, the defendant purchased certain real estate with his own money which he caused to be conveyed to his wife, at which time he was indebted to divers persons in large sums of money, which he had no means of paying other than this land, and he then contemplated entering into business and becoming further indebted, which he subsequently did, and did not pay his creditors, but on the contrary determined to defraud them; and the bill charged that the conveyance was a merely voluntary settlement by *Kennedy* on his wife, made, as she was aware, for the express purpose of delaying and defrauding his creditors, and ought to be declared fraudulent and void as against them, and prayed relief accordingly.

The defendants answered the bill denying the allegations of fraud, and alleging that *Kennedy* had ample

means for the payment of his debts when the conveyance was executed. 1874.

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The cause having been put at issue was carried down for hearing at the sittings of the Court in Toronto, when evidence was taken, the effect of which, as also the cases cited, appear in the judgment.

Mr. *Moss*, Q. C., and Mr. *Morphy*, for the plaintiff.

Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, for the defendants.

BLAKE, V. C.—The defendant *Franklin Kennedy*, then a hotel keeper, in June or July, 1867, began to deal with the plaintiff and his then partner, *Charles*, *Brown*, wholesale merchants of this city. The indebtedness up to July, 1868, was paid; subsequently to that, another account was run, and in April, 1869, it was reduced to $15.13. Thereafter, there were further dealings between the parties, which resulted in a debt of $271.10, which was in September, 1870, reduced to judgment, and remains unpaid, although *fi. fas.* against goods and lands have been duly issued. The present plaintiff is now solely interested in this judgment. On the 22nd June, 1867, the deed impeached by the present bill was executed, and by it the premises in question were conveyed to the co-defendant, *Maggie Knapp Kennedy*, the wife of the judgment debtor. The circumstances connected with the obtaining of this deed, are thus related by the witnesses. Mr. *McCallum*, at the time a clerk in the office of Mr. *Blain*, the solicitor who acted for the *Kennedys*, says, "The business relating to the purchase was mainly conducted by Mr. *Kennedy*, He gave the instructions to Mr. *Blain* to see to the conveyance. Some of the purchase money was then paid by Mr. *Kennedy*; no portion of it was paid by Mrs. *Kennedy*. *Kennedy*, in the outside room, said in pres- Judgment.

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ence of Mrs. *Kennedy* and *Birtch*, in effect, that he fixed it in that way for future protection; if not the words, this is the effect of those used. * * * Mrs. *Kennedy* afterwards spoke about the transaction. *Kennedy* was absent in the States. * * * She then expressed a wish that Mr. *Kennedy* had his property in his own name. This occurred about two years after the deed was executed; I think in 1869. * * * The way that *Kennedy* came to make the remark then mentioned in the outer room was, that Mr. *Birtch* made some remark as to the advantage of taking the deed in that way. *Kennedy* then made the remark to the effect that he had put it in that way for safety. * * * I am quite sure Mrs. *Kennedy* said she wished *Kennedy* had his property in his own name. I am sure the word 'his,' was used."

Judgment.

Patrick Davy, who was on very intimate terms with the defendants, and although a truthful witness, one who did not willingly make any statement to their prejudice, says, "I've heard *Kennedy* and his wife talk about this property, and have heard him state on several occasions in her presence, that he was sorry he had not taken the deed of it in his own name, so as he could sell it. * * *Kennedy*, when speaking about the property, always did so as if it were his own, until after this attempted sale of it; he then found out how it was. * * * I afterwards bought part of the furniture and leased the place from *Kennedy*. The bargain as to the lease was made with *Kennedy*. * * * On one occasion he sent me to try and raise some money on the property, and when it could not be done, he said he wished he had kept the property in his own name. This was in July or August, 1869. * * * *Kennedy* and his wife both assigned as a reason for the deed being taken in her name, that the money paid for it had been taken from the Royal Insurance Company; and they were afraid the law would take it from them if kept in his name." To the plain-

tiff, the defendant *Kennedy* admitted that "it was the first business he had ever done in his life; that he had had the deed made in her (his wife's) name to keep it safe in case anything should occur." 1874. Reid v. Kennedy.

Mr. *Murray*, the solicitor of the Royal Insurance Company, proves that he is acting on behalf of that Company against the defendant *Kennedy* in endeavoring to follow the securities said to have been stolen by him, into the property in question.

The only peculiarity on the face of the impeached conveyance, is the following clause: "And it is hereby expressly understood and agreed, by and between the said parties hereto, and the said *Franklin Kennedy*, that the said party of the second part shall not in any way sell or dispose of the said land, or charge or encumber the same in any way without the consent or approval of the said *Franklin Kennedy* during his life time. Such consent to be in writing signed by the said *Franklin Kennedy*." Judgment.

The plaintiff made reasonable exertions to procure the attendance of the defendants as witnesses, or to have them examined under a commission. The defendants did not enable the plaintiff to procure such examination of them; and they failed to present themselves at the hearing of the cause to sustain their case. It is impossible on the evidence to find that this conveyance was intended by the judgment debtor to be a settlement made by him on his wife in good faith. On the contrary, the testimony proves that, not to make a provision for the wife but, so to place the property that it might be controlled by *Kennedy*, and at the same time preserved from the attack of any claimant against him, was the object intended to be effected by this instrument. The claim of the Royal Insurance Company, spoken of by *Davy*, was one that *Kennedy* feared, and the immediate motive

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which led him to take the deed in his wife's name, was to defeat the Company in any endeavor to fasten it upon this property. The evidence also shews that Mrs. *Kennedy* was without means of her own; and that the money of *Kennedy* derived from the robbery of the Royal Insurance Company, paid for the land.

The question for consideration is, whether this was a deed "devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their lawful actions, suits, and debts, * * * to the let and hindrance of the due course and execution of law." (*a*)

Judgment.

Looking at the Statute alone, apart from the authorities, I should have thought its effect to be, that where an intention to defraud creditors or other persons was shewn at the time of the execution of the deed, then it mattered not whether the creditor attacking the deed existed at the time of its execution or not. In its inception the deed was fraudulent, it remained so, unless cured by some subsequent act, and was liable to be impeached by a subsequent creditor, whose potential equity has not been lost by some matter *ex post facto*. *Totten* v. *Douglas* (*b*), is an instance of such an equity being lost. There is some inconsistency in the decided cases, but from them I think the opinion I have formed as above expressed is correct.

In many of the cases fraud can only be inferred from the effect of the conveyance; the rule adopted being that a grantor must be taken to have intended the natural result of his act. Where there were no creditors at the time of the impeached conveyance, or all those then in existence have been satisfied, it has been frequently argued that the inference of fraud which

(*a*) May on Fraudt. Con., p. 495. (*b*) 18 Gr. 341.

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might be otherwise drawn has been rebutted by the absence of these debts. If the grantor be insolvent at the time of the impeached conveyance, it is clear it is fraudulent and void. But why is this so? Because as there are creditors, and the effect of the instrument must be to defeat or delay, it is therefore concluded that with this intention the grantor executed it. In other words, direct evidence of the fraudulent intent is wanting; but this may be, and is inferred, and therefore the transaction can be impeached. But here, that, which in the cases referred to is inferred, is proved. The admission made by the parties shew the object they had in view was covinous, collusive, and guileful, and the result that should flow from this must be to find such conveyance "void, frustrate, and of none effect," as against a person whose action is thereby hindered, delayed, or defrauded. The words in the Act are "creditors and others," and, proving that the conveyance was tainted with fraud once, I do not think it loses this stain, but remains a conveyance with this infirmity which prevents it being set up as against a creditor whose debt arises years after the instrument was executed. The words "and others" extend the operation of the Act if the word creditors confined it to those existing when the deed was made.

Judgment.

This was the view expressed in *Taylor* v. *Jones* (*a*). "The word 'others' seems to be inserted to take in all manner of persons, as well creditors after as before the settlement, whose debts should be defrauded. The words of the Statute, therefore, seem to be so general in order to take in all persons who shall be in any ways hindered or delayed."

"It is not necessary," says Lord *Hardwicke*, in *Stileman* v. *Ashdown*, (*b*) "that a man should be actually

(*a*) 2 Atk. 600.

(*b*) 2 Atk. 480.

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indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside."

Before these cases I should have noticed the one in *Palmer's* Reports of *Tubervill* v. *Tipper* (*a*). "If a creditor makes a fraudulent gift in order to defraud one creditor alone, it is void towards all the creditors." In *Holloway* v. *Millard* (*b*), the Vice-Chancellor thus paraphrases the Act: "Fraudulent conveyances are such as are devised and contrived by malice, fraud, covin, collusion, and guile, to the end, purpose, and intent to delay, hinder, or defraud creditors;" and he concludes his judgment on this point with, "It is clear, therefore, from the authorities, that a voluntary settlement of real or personal property by a person not indebted at the time, nor meaning a fraud, is good against subsequent creditors."

Judgment.

In *Graham* v. *Furber* (*c*) *Taylor* v. *Jones* is approved of. There Mr. Justice *Williams* says, "The bill of sale had an ulterior object beyond what appeared upon the face of it. It, therefore, comes directly within the doctrine of *Twynes's* case (*d*). If so it was fraudulent and void within the Statute of Elizabeth." In *Jenkyn* v. *Vaughan* (*e*) Sir Richard *Kindersley* says, "If at the time of filing the bill no debt due at the execution of the deed remains due, the distinction may be that then a subsequent creditor could not file a bill, unless there were some other ground than the settlor being indebted at the date of the deed to infer an intention to defraud creditors. But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill, if any debt due at

(*a*) 415 note.
(*b*) 1 Mad. 414.
(*c*) 14 C. B. 410.
(*d*) 3 Co. Rep. 80.
(*e*) 3 Drew. 419, 425.

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the date of the deed remains due at the time of filing the bill. Lord *Hatherley*, then Vice-Chancellor *Wood*, lays it down, in *Neale* v. *Day* (*a*), that "the real test is whether or not a fraud upon the creditors was intended in the transaction": *Spirett* v. *Willoms* (*b*). The language of Lord *Westbury* is, "But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to shew either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement the settlor had no sufficient means or reasonable expectation of his being able to pay his then existing debts, that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."

Judgment.

This dictum upholds the proposition with which I started, that a subsequent creditor can attack a settlement made with express intent to defraud creditors generally, although there be no debt due at the time of the conveyance remaining unpaid. It is true that the authority of this case has been weakened by the remarks made in *Freeman* v. *Pope* (*c*), but on the point for which I cite it it was confirmed.

The view of the Master of the Rolls, in *Barling* v. *Bishopp* (*d*), was "the only thing the Court has here to consider is, whether the object was to defeat the creditors present or *in futuro*." The object or intent of the grantor or settlor governing; and finding, as I do, that in this case it was fraudulent, I think this plaintiff, although a subsequent creditor, has the right to impeach the conveyance under which the premises in question have been claimed by the defendant.

(*a*) 28 L J. Ch. 45.
(*b*) 3 DeG. J. & S. 293, 302.
(*c*) L. R. 5 Ch. Ap. 538.
(*d*) 28 Beav. 417.

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But I am of opinion that the money stolen by *Kennedy* from the Royal Insurance Company, a portion of which found its way into this land, constituted a debt from *Kennedy* to the Company. It may be true this money could not be recovered back until *Kennedy* had been convicted of the crime, or at all events until steps had been taken to bring him to justice; notwithstanding however, that the remedy may be suspended, the Company is a creditor of the robber. The matter was much considered in the case of *Chowne* v. *Baylis* (*a*). There the felon assigned, before conviction, to the persons he had robbed, certain securities, and the bill was filed to impeach such assignment. "I am of opinion," says the Master of the Rolls, "therefore, that on every principle of law, the robbery constitutes a debt due from the robber to the person robbed. And, indeed, this is assumed by the terms of the rules laid down, and to which I referred in the fourth proposition, which only suspend the civil remedy of the person robbed until after the conviction of the robber, though it be true that this suspension necessarily operates as a prohibition, as the remedy cannot be enforced against the property of the felon, until that property no longer exists."

Judgment.

The Dudley and West Bromwich Bank v. *Spittle* (*b*), a decision of the present Lord *Hatherly*, is to the same effect.

The debt from *Kennedy* to the Company existed at the time of the execution of the impeached conveyance. To escape proceedings for the recovery of the money or lands which represented this debt, this voluntary conveyance was made to *Kennedy's* wife. The claim of the company has not been satisfied, and therefore the case is clearly within *Jenkyn* v. *Vaughan*, which has been approved of and followed in *Freeman* v. *Pope*, by the

(*a*) 31 Bea. 351, 359. (*b*) 1 J. & H. 14.

Court of Appeals. I, therefore, think the plaintiff is entitled to the usual decree with costs against the defendants (*a*). 1874. Reid v. Kennedy.

KENNEDY v. BOWN.

Administration of Justice Act—Equitable defence.

Since the passing of the Administration of Justice Act of 1873 (36 Vic. ch. 8) this Court will not, at the instance of a defendant in an action at law, entertain a bill to restrain such action, on the ground that the defendant has an equitable defence thereto; the power given by that Act to the Common Law Courts being to enable them to do complete justice between the parties.

This was a bill seeking to restrain an action at law brought by the defendant *Bown*, against his co-defendant *Leith* and the plaintiff, for the recovery of an amount alleged to be due by *Leith & Kennedy* to *Bown* the plaintiff, alleging that owing to the complication of the partnership dealings between the parties, it was impossible to have the accounts between them properly taken by the Court of Law in the action; that a suit was pending in this Court for the purpose of winding up the partnership business between *Kennedy* and *Leith*, the nature of which was such that the Master of the Common Law Court could not properly take the accounts. The claims consisted partly of a charge for interest on moneys not invested, on the one hand, and on the other of percentage charged by the co-partnership against *Bown* as scriveners; and of costs incurred in suits, some of which were still pending and others disposed of, the claim for which the client disputed. Under these circumstances, Statement.

(*a*) The cause was subsequently reheard before the full Court when, on the conclusion of the argument, the decree was affirmed with costs.

1874.

Kennedy v. Bown.

Mr. *J. A. Boyd*, for the plaintiff, moved for an injunction in the terms of the prayer of the bill.

Mr. *Brough*, for defendant *Bown*, and

Mr. *Delamere*, for defendant *Leith*, contra.

Re Richardson (*a*), *Thompson* v. *Milliken* (*b*), *Falls* v. *Powell* (*c*), were referred to.

At the close of the argument,

BLAKE, V. C., refused the motion, observing that where it was plain justice could not be done between the parties then this Court would interfere. It was at all times most difficult to obtain an injunction where the proceedings at law had been commenced for an account. But whatever may have been the practice then, it is plain the object of the Act for the better administration of justice was to prevent the necessity of coming to this Court for the purpose of modifying or restraining proceedings at law. The power given to the Common Law Courts enables them in such a case as the present to do complete justice, firstly by making such an order of reference as this Court would grant, using the officers of this Court to carry out the reference; or secondly, if the Common Law Courts think it better, to transmit the whole case here.

Judgment.

When, therefore, I am now asked to interfere it must be based upon the proposition that having complete power, and virtually the same machinery and means that this Court possesses, the Common Law Courts will not exercise the powers that have been thus given to them as this Court would. I think, any interference under the circumstances presented to me in this cause would be invading the spirit if not the letter of the Act. This

(*a*) 3 Ch. Cham. R. 144. (*b*) 15 Gr. 197. (*c*) 20 Gr. 454.

Court, prior to the 1st of January, 1874, interfered simply because the Common Law Courts had not adequate means of trying the matter in dispute. They now possess this power—*cessante ratione cessat etiam lex* (*a*). The reason for the interference of the Court ceasing, the power which this Court at one time possessed in this respect should not longer be exercised. I refuse the motion, and, except for *Carruthers* v. *Armour* (*b*), would do so with costs.

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On a subsequent day a motion was made before the same learned Judge, in the suit of *McCabe* v. *Wragg*, by Mr. *C. Moss*, for an injunction to restrain the defendant from proceeding in an action of ejectment, on the ground that the plaintiff had a good defence to the action on equitable grounds, he having entered into a verbal agreement with the defendant for the purchase of the fee simple of the property in question, and that under it he was entitled to a specific performance of the contract so entered into between them; that the Administration of Justice Act did not compel a defendant at law to raise his defence there, but was intended to extend the powers of the Common Law Courts to grant relief on equitable grounds, in cases where the parties thought proper to raise them there. He also distinguished this from *Kennedy* v. *Bown*, as here the relief sought by the plaintiff was in fact a specific performance of the agreement for sale, which the Court of Common Law was not authorized to grant.

Judgment.

Mr. *Cassels*, for the defendant, opposed the motion, on the ground that where a proceeding has been once instituted at law this Court will not, on any equities that may be asserted by the defendant, interfere with the

(*a*) Kerr on Injunc. p. 62, 36 Vic. cap. 8, secs. 2.3.8.9.11.12.
(*b*) 7 Gr. 34.

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rights of the plaintiff at law: that whatever doubts might have existed as to the jurisdiction of the Court under the third section of the Act none such could be entertained upon the language of section eight of the Statute, which states, that for the purpose of "causing complete and final justice to be done in all matters in question in any action at law the Court or a Judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of the action or other proceeding, pronounce such judgment, or make such order or decree, as the equitable rights of the parties require * * and may as fully dispose of the rights and matters in question as a Court of Equity could do."

After taking time to consider the case—

Judgment.

BLAKE, V. C.—I think the intention of the Act is, that wherever the Court is seized of a case that in that Court complete justice should be done between the parties. By section 4, "Any defendant may state by way of defence any facts which, by way of defence, entitle him on equitable grounds to retain possession." Section 8 says, "For the purpose of carrying into effect the objects of this Act and for causing final justice to be done in all matters in question in any action at law, the Court * * may at the trial or at any other stage of an action or other proceeding pronounce such judgment or make such order or decree as the equitable rights of the parties respectively require." The defence of the defendant at law is, that a verbal agreement partly performed exists, under which he is entitled to defeat the action of ejectment. If this be proved the equitable rights of the defendant require that a decree be pronounced vesting the possession in him and for the execution of a conveyance.

No fact in addition to these to substantiate the defence need be proved in order to the granting of this decree,

which follows as a matter of course from the successful raising of the defence.

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I think, therefore, that the defendant is able to obtain in this case at law complete justice, and this being so that he is bound to seek for this relief in the Court where proceedings have been commenced. In case any difficulty should arise under section 9, the Common Law Court can transfer the whole matter into this Court.

This being my view, I refuse the application. The bill can be retained for six months. The defendant at law can apply in the action of ejectment for any relief to which he may think himself entitled. Circumstances may arise which would justify the interference of this Court, whereupon application can be made to it.

Motion refused.

MATTHEWS v. MEARS.

Practice—Order of revivor—Assignment pendente lite.

An order of revivor is the appropriate proceeding in all cases of assignment *pendente lite*.

Motion by the defendant to set aside an order of revivor, on the grounds stated in the judgment.

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

Mr. *Crickmore*, contra.

STRONG, V. C.—This was a motion to discharge an order of revivor. The suit was instituted by *Agnes Matthews* for the purpose of having the arrears of an annuity charged on land raised by a sale of the land. The bill was filed in 1872. On the 23rd July, 1873, Judgment.

1874.

Matthews v. Mears.

Agnes Matthews, the original plaintiff, assigned all her interest in the annuity and arrears, and in the suit, to *Margaret Mears*. On the 22nd February, 1873, *Agnes Matthews* died; and on the 4th March last, the cause not having been brought to a hearing, an order of revivor was issued from the office of the clerk of records, and writs substituting *Margaret Mears* as the sole plaintiff in lieu of *Agnes Matthews*. The defendant now moves to discharge this order on the ground of irregularity. The objection to the order which has been urged at the bar, and which is pointed out by the notice of motion is, that the order should have added the personal representative of *Agnes Matthews*, the original plaintiff, as well as the assignee, in order that the liability of the estate of *Agnes Matthews* to costs may be assured to the defendant. I think there is nothing in this objection. All the books of practice speak of substituting the assignee in the case of assignment *pendente lite*, and the Court will not assume that any right as to costs is acquired until an order for costs is actually pronounced. If the assignment was designed as a fraud on the defendant by enabling an irresponsible person to prosecute the suit for the plaintiff's benefit, the Court would doubtless find the means of dealing with such a case; but that is not suggested to have been the intention of the parties in the present case. The little regard paid to matters of costs in questions of revivor is shewn by the old and well established rule that there can be no revivor for costs, even where costs have been ordered to be paid before abatement, unless a vested right in some specific sum has been established by taxation so as to constitute a debt, or unless there has been a postponement of taxation at the instance of the party ordered to pay, in which case what may be termed an equity is created.

Judgment.

The order appeared to me at first sight to have been unwarranted by the Consolidated Order 337, which is very nearly a transcript of the Imperial Act 15 & 16

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Matthews v. Mears.

Vic., cap. 84, sec. 52, under which enactment it has been held in England that where, as in the present case, under the old practice of the Court the appropriate proceeding to perfect the suit would have been an original bill in the nature of a supplemental bill, the new practice introduced by the statute does not apply, and a bill is still necessary: *Greenhalgh* v. *Lumley* (a), *Pemberton* on Revivor, pp. 45-46. If this practice was applicable here a bill would not be necessary, since under Consolidated Orders 348, 349, the course would be, instead of filing a bill in the nature of a supplemental bill, (a pleading which has been abolished by Consolidated Order 6), to introduce an allegation of an assignment by amendment, or to annex a statement to the bill, a mode of proceeding which I must say seems to me much more convenient than that under Consolidated Order 337, since it would give the defendant a plain and easy mode of contesting the assignment if he desired to do so.

Judgment.

I think, however, that the introduction of the words "by devise, bequest, descent, or otherwise," into our Order 337, words which are not found in the English statute, takes the case out of the operation of the English authorities, and makes the order of revivor an appropriate proceeding in all cases of assignment *pendente lite*.

Such, I believe, has been the almost universal practice since the order in question was passed, and as there is ground for a distinction between the English practice and ours, and the common course here has been such as I have mentioned, it is better not to disturb it.

Motion refused with costs.

(a) 5 N. R. 463.

1874.

COLLINGWOOD v. COLLINGWOOD.

Will, construction of—Vested interest—Costs.

A testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays, for the maintenance and support of herself and six infant children, and gave certain parts of his estate to his children, to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of 21. One of the sons sold the portion devised to him, and the widow joined in the deed to the purchasers, which declared that the widow had put her son in possession of the lands. The only executor beside the widow, who proved the will, was absent from the Province, and gave no consent to the sale. Less than two months after the sale the purchasers sold the estate at an advanced price to one *T*, having in the interval created a mortgage thereon, and shortly afterwards the son died; and thereupon a bill was filed by the executor and the infant children against the purchasers and their vendee, *T*, and also the widow, seeking to set aside the conveyance on the ground that the same was obtained by the purchasers fraudulently, when the son and his mother were both in a state of intoxication, produced and brought about by the purchasers; and that their vendee, *T*, was affected with notice, as the want of consent of the executor should have put him on inquiry. The evidence, however, negatived the fact of intoxication on the part of the son, but showed great mental incapacity on the part of the widow, and the Court, although unable to set aside the transaction, refused the purchasers their costs on account of their conduct in the matter.

Held, also, that under the will of the testator the property was subject, as a first charge thereon, to make good any deficiency there might be in the amounts derived from other properties, to afford a proper sum for the maintenance of the infants; and a reference was directed to the Master to ascertain the proper sum to be allowed, also what had been received on account thereof; and as *T* had resisted the right of the plaintiffs to this account, although he shewed himself to be a purchaser for value without notice, the Court refused him costs also.

Examination of witnesses and hearing at Hamilton.

Mr. *McQuesten*, for plaintiffs.

Mr. *Fitzgerald*, Q. C., for the defendants *Blaicher* and *Ryckman*.

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Collingwood v. Collingwood

Mr. *Boyd* and Mr. *Barry*, for the defendant *Tarbox*.

STRONG, V.C.:— *Thomas Collingwood*, the father of the plaintiff and husband of the defendant *Jane Collingwood*, made his will just before his death, on the 5th November, 1866, and thereby, after some trifling bequests, and a gift to his wife *Jane* of all his household furniture absolutely, and of his dwelling-house for life, he proceeded as follows: "I also give to her the proceeds of all my rentable property after paying for all insurances, repairs, and necessary outlays in and about the said properties, for her own maintenance and support, and for the maintenance and education of my children *Richard Collingwood, Frederick Collingwood, Albert Collingwood*, until they attain the age of twenty-one years, and for the maintenance and education of my children *Jane Collingwood, Lucy Collingwood*, and *Minnie Caroline Collingwood*, until they attain the age of twenty-one years, or until such time as they may be married. But in case my wife should again marry, it shall be in the discretion of my executors hereinafter named to apply the proceeds of each or any portion of real property bequeathed hereinafter to his or her particular support and education. If any of my said children shall die before the age of twenty-one years, or before having acquired a vested right or interest in the lands and premises to them hereinafter bequeathed, without leaving issue, I hereby direct that the portions of personal property and lands and premises of such so dying shall be equally divided among the survivors of the six children last above mentioned, or their children if they have died leaving issue; or if any die leaving issue, his or her portion shall revert and be conveyed to the children of him or her so dying. And it shall be in the power of my wife, with the approval and consent of my executors and trustees, to put either or any of my

Judgment.

1874.

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six children last above mentioned into possession of the real or personal property hereby bequeathed to them, after they become the age of twenty-one years." The testator then gave to his son *Richard*, after the decease of his wife, unless she should give him possession in her discretion sooner, the property in question in this cause. And he also made other devises to his other children in the same terms.

The testator appointed his wife *Jane Collingwood* executrix and trustee, and his son *Edward James Collingwood* and *Charles W. Meakins* executors and trustees of his will. Mr. *Meakins* renounced, but the others proved the will.

On the 16th of August, 1872, the testator's son *Richard* contracted with the defendants *Peter C. Blaicher* and *Samuel S. Ryckman* to sell them the property which had been devised to him by his father for the price of $1260, and on the following day, the 17th August, *Richard* and his mother, the defendant *Jane Collingwood*, executed a deed which had been prepared by Mr. *Barr* as the solicitor for all parties, whereby *Richard* purported to grant to *Blaicher* and *Ryckman* the property in question in fee, and which contained a declaration by *Jane Collingwood* that she had put her son *Richard* in possession of the lands.

Judgment.

The other executor, the testator's son *Edward James Collingwood*, was living in the United States, and gave no consent to the sale, in fact knew nothing at all of the transaction until some time after its consummation. The price, $1260, was paid as follows:—$460 was applied to the discharge of a mortgage on the property to one *Smith*; $600 was paid in cash to *Richard Collingwood*, and for the residue of $200 a promissory note was given, which the purchasers say they discounted, immediately after having given it, for *Richard Colling-*

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wood; what profit they received by way of discount does not appear.

On the 8th October, 1872, less than two months afterwards, *Blaicher* and *Ryckman* sold the estate to the defendant *Tarbox*, having in the interval mortgaged it to *Wilson* for $500. Mr. *Tarbox's* purchase money was 1660.

Richard Collingwood, the grantor, died on the 1st of January, 1873, and soon afterwards the bill was filed by the executor *Edward James Collingwood*, and by *Albert, Jan', Lucy*, and *Minnie Caroline Collingwood*, the latter four plaintiffs being infant children of the testator, devisees under his will, and, as they allege, heirs-at-law of *Richard*, against the testator's widow *Jane Collingwood*, Messrs. *Blaicher* and *Ryckman* and Mr. *Tarbox*, seeking to set aside the deed of August, 1872, on the ground that it was obtained by *Blaicher* and *Ryckman* from *Richard* *Collingwood* and Mrs. *Collingwood* fraudulently, when they were both intoxicated, the intoxication having been brought about by the procurement of the defendants *Blaicher* and *Ryckman*. Then it is alleged by the plaintiff that the defendant *Tarbox* must be taken to have constructive notice, inasmuch as the want of the consent of *Edward James Collingwood*, the executor, should have put him upon inquiry.

Judgment.

The bill prays, first, that the conveyance by *Richard* may be set aside, and that case failing, that the infant plaintiffs may be declared entitled to the rents and profits of the property during their minority, and that the defendants may be ordered to account accordingly.

The defendants *Ryckman* and *Blaicher* by their answers deny the imputed fraud and intoxication, and the defendant *Tarbox* sets up that he is a purchaser for value without notice.

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The cause was heard before me at the last sittings at Hamilton, when the defendant *Jane Collingwood* was produced, and an attempt made to examine her as a witness, which, from the state of imbecility into which she had sunk was, however, found to be impracticable.

Although I do not find sufficient evidence to have enabled me to have set aside the deed even had the estate still remained in Messrs. *Blaicher* and *Ryckman*, I am far from satisfied with their conduct in the transaction. They procured the property at less than its fair value under a bargain made with *Richard Collingwood*, whose confirmed habits of drunkenness must, I should suppose, have been notorious and well known to them; and *Blaicher* admits that he knew the mother was in a silly state. Mr. *Barr*, the solicitor who prepared the conveyance, however, establishes that *Richard* was in a proper state to conduct business, as well when he gave instructions for the deed on the evening preceding its execution, as on the next morning when the parties all met at his office and the conveyance was executed. I must give credit to their evidence, and the case made by the bill, therefore, fails, although I am so far dissatisfied with the conduct of Messrs. *Blaicher* and *Ryckman* that I should in no event give them their costs.

Judgment.

As to the main case, that to avoid the deed, it fails, and must, even if made out against the original purchasers, have failed against Mr. *Tarbox* who, so far as regards the validity of the conveyance by *Richard* of his vested remainder, subject to his mother's life estate, had no notice of any ground of impeachment, and who duly paid all his purchase money. This is put beyond question by the evidence of his solicitor, Mr. *Barry*, through whose agency the purchase was made on behalf of Mr. *Tarbox* and the whole transaction carried out.

It is clear, however, that *Richard Collingwood* could convey only the remainder or executory estate, it matters

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not which, he took under his father's will, and which was not to vest in possession until after his mother's death, unless his mother, with the consent of the other executors, thought proper to accelerate the enjoyment. It is true the mother did assume to consent, that is to say, she signed the purchase deed in which she purported to give her consent; but I hold this to have been an entirely unavailing act, inasmuch as she had not the concurrence of the other executor *Edward James Collingwood;* and, moreover, as regards Messrs. *Blaicher* and *Ryckman* I should also have held it ineffectual on account of the mental state of the unfortunate woman; for from what I saw myself, and from the evidence, I find that she was not at the time competent to perform any act requiring free mental assent. This latter ground, however, could not have availed against Mr. *Tarbox*, who, as I have said, I hold to be a purchaser for value. The last named defendant, however, had on the face of the title notice of what was requisite to accelerate the vesting or enjoyment of the estate of *Richard*, and he therefore had notice in the absence of any evidence of concurrence of *Edward James Collingwood* that the requirements of the will had not been complied with.

Judgment.

Then the plaintiffs insist upon the charge of maintenance contained in the will. That the will does create such a charge in the passage which I have before stated, there can be no possible doubt. The charge is in the nature of a trust for the children, and the mother, even if she had been mentally competent, and had fairly assumed to deal with the property or with the income arising from it, in the absence of her co-executor could nor, I conceive, have done so to the prejudice of the children. Where the income arising from land, or from a fund, is given to a mother who is under no legal obligation to maintain her children, for the maintenance of herself and her children, the cases shew that the Court always treats the mother as a trustee for the children;

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though in the case of a similar gift to a father who is legally liable for the maintenance of his children, no such trust arises.

I refer to *Pride* v. *Fooks* (*a*), *Kearsley* v. *Woodcock* (*b*), *Carr* v. *Living* (*c*), *Berry* v. *Briant* (*d*), *Thorp* v. *Owen* (*e*), *Byne* v. *Blackburn* (*f*), *Lambe* v. *Eames* (*g*), *Castle* v. *Castle* (*h*), *Wallace* v. *Anderson* (*i*), *Page* v. *Way* (*j*), *Lewin* on Trusts, (5th ed.) pp. 79, 80, 490.

It is, however, argued on behalf of Mr. *Tarbox*, that as he is a purchaser for value without notice, and is entitled to hold the estate free from impeachment on the ground of the incapacity of Mrs. *Collingwood*, he is entitled to be considered as a purchaser of her beneficial interest in the rents and profits of the estate.

Judgment.

Although several of the cases cited above, especially *Kearsley* v. *Woodcock* and *Page* v. *Way*, do shew that the assignee of the parent to whom income is given subject to such a trust for maintenance as is imposed in this will, does take the beneficial interest of the parent; yet the same cases shew that the assignee will take subject to the full and proper maintenance of the children, and that he can recover no beneficial interest until that is fully provided for. Therefore if I even find in the present instance a formal and valid assignment by Mrs. *Collingwood* of her beneficial interest in the rents, I should only hold Mr. *Tarbox* entitled subject to the sufficient maintenance of the children, which must be the first charge under the trust. I do not, however, find that the instrument under which the purchaser claims does contain anything amounting to an assignment by

(*a*) 2 Beav. 430.
(*b*) 3 Hare 185.
(*c*) 28 Beav. 644.
(*d*) 2 Drew & Sm. 1.
(*e*) 2 Hare 607.
(*f*) 26 Beav. 41.
(*g*) L. R. 6 Ch. 597.
(*h*) 1 DeG. & J. 352.
(*i*) 16 Beav. 533.
(*j*) 3 Beav. 20.

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the testator's widow of her beneficial interest in the income of this property. She merely assumes in the words of the will to put her son in possession. This, until the concurrence of the other executor, was an inchoate act; it might have been perfected by the consent of *Edward James Collingwood;* but by itself it was ineffectual, and I think, therefore, it is not equivalent to an assignment, and Mr. *Tarbox* had no right to assume that it was intended as anything more than the consent of Mrs. *Collingwood* intended to become effectual upon the consent of the other executor being added to it, but until that was done, entirely nugatory for any purpose whatever. I think the charge of maintenance continues after the death of the widow until the infant children become of age.

I mention this as I am informed Mrs. *Collingwood's* death has taken place since the hearing.

Judgment.

With reference to costs. I shall give none to any party up to the hearing. I do not give *Blaicher* and *Ryckman* their costs for the reason already mentioned, that I am not satisfied with their conduct in the first transaction, and also because they are properly made parties in respect of the account of rents and profits during the interval the title was in them, their liability to which they have unsuccessfully contested. I cannot give Mr. *Tarbox* his costs because, although he has made himself out a purchaser for value without notice as regards *Richard's* estate, he also has defended the plaintiffs' suit so far as it relates to the account to which I find them entitled.

The proper decree to make will be to refer it to the Master to inquire what was a proper sum for the maintenance of the plaintiffs since the 17th August, 1872, and if the amount received by them from the properties other than the sum in question is found to have been insuffi-

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cient for that purpose, then to take an account of rents and profits of the estate received since the date of the conveyance, the whole or a sufficient part of which must be applied to make up any deficiency in the past maintenance of the plaintiffs.

The reference must also be to fix a proper allowance for future maintenance, which is to be a first charge on future rents and profits.

Any incumbrancers can be added in the Master's office. Further directions and costs are reserved.

BOULTON v. BETHUNE.

Vendor and purchaser—Shewing title.

By an agreement between a vendor and purchaser, it was agreed by and between the parties, that so soon as a title to the lands and premises, satisfactory to the solicitors of the vendee, could be afforded him, the vendee should purchase the said land at the price of $4,000 cash.

Held that, in the absence of *mala fides*, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for a specific performance of the agreement.

Statement.

This was a re-hearing* of a decree pronounced by Vice-Chancellor *Blake*, dismissing a bill filed for the specific performance of an agreement entered into for the sale of real estate situate in the city of Toronto. It appeared that during the negociations which took place in reference to the title, the solicitors of the plaintiff transmitted to the solicitors of the defendant the conveyance of the property, which they retained in their possession, and this was relied on as an evidence of acceptance of the title. The question mainly discussed,

* *Present:* SPRAGGE, C., STRONG and BLAKE, V. CC.

however, was as to the right of the defendant to insist on having a title made out satisfactory to his own solicitors. 1874. Boulton v. Bethune.

Mr. *Attorney-General Mowat*, for the plaintiff, relied on *Lord* v. *Stephens* (*a*).

Mr. *Catanach* and Mr. *Francis*, for the defendant, referred to *Williams* v. *Edwards* (*b*).

The judgment of the Court was delivered by,—

STRONG, V. C.—This is a suit for specific performance instituted by the vendor against the purchaser of a house and land in the city of Toronto.

The contract was contained in a lease, dated the 23rd October, 1872, made by the plaintiff demising the property in question to the defendant for a term of seven months, and is in these words, "And it is hereby understood, contracted, and agreed by and between the parties to these presents, that at or before the determination of the term hereby conveyed, so soon as a title to the said lands and premises satisfactory to the solicitors of the said lessee can be afforded to the said lessee by the said lessor, that the said lessor shall sell and convey to the said lessee, and the said lessee shall purchase from the said lessor the said land, at the price of $4,000 in cash, and if such title can be given before the determination of the term hereby conveyed, then these presents shall be no longer of any force or effect; and if upon the determination of the said term, no such title as aforesaid can be given, then the said contract of sale and purchase herein shall be wholly void; and it is hereby declared that time shall be of the essence of this contract." Judgment.

It is established in evidence, that at the time this contract was entered into the plaintiff knew that Messrs.

(*a*) 2 Y. & C. 222. (*b*) 2 Sim. 78.

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Crooks, Kingsmill, and Cattanach were the solicitors of the purchaser. The plaintiff, after the execution of the lease, containing the clause of purchase stated, took some steps to perfect the title to the land, but he never satisfied the defendant's solicitors as to the title; and they, during the pendency of the term, absolutely rejected the title upon certain grounds, which it is not material now to consider. The plaintiff insists that the rejection by the defendant's solicitors is not conclusive, but that on the contrary he has the ordinary right of a vendor to have a reference as to title, precisely as though the contract had not contained any provision as to the title being satisfactory to the defendant's solicitors. The defendant, on the other hand, insists that he is by the express provision of the contract entitled to rely on the determination of his solicitors as final and conclusive. This is the whole point in the case, for we are all of opinion that there was not any acceptance of the title arising out of the delivery and retention of the conveyance; and that the defendant has done nothing to waive his rights as to the title, whatever they may have been, originally assured to him by the contract.

Judgment.

The Vice-Chancellor before whom the cause was heard, considered that the rejection of the title, which was conceded to have been made in good faith, was binding on the plaintiff, and dismissed the bill.

Upon the rehearing, the Attorney-General, on behalf of the plaintiff, has relied on the case of *Lord* v. *Stephens*, (*a*), as an authority in his favour, shewing that notwithstanding the language of the agreement, the plaintiff is not bound by the opinion of the defendant's solicitors.

In this case of *Lord* v. *Stephens*, which was decided by Lord *Abinger*, the stipulation was as follows:

(*a*) 2 Y. & C. Ex. 222.

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"And in case the title shall not be satisfactory to the said *N. S.*, his heirs or assigns, or his or their counsel, these presents shall be void to all intents and purposes." In his judgment, Lord *Abinger* alludes thus meagrely to the point which was made on this clause in the contract: "With respect to what has been said in relation to the form of the contract, I cannot construe it to mean that the contract should be binding on one party and not on the other. I think it must mean that the contract should be at an end in case there was a reasonable difficulty as to the title."

It will be observed that it was not in *Lord* v. *Stephens*, as in the present case, required that the contract should be satisfactory to a third person—the solicitor or counsel of the purchaser—but that it required that there should be a title satisfactory to the purchaser himself; who might, according to the construction contended for on his behalf, have himself arbitrarily put an end to the contract on pretence of an unsatisfactory state of the title. This Lord *Abinger* thought so unreasonable as to require a construction of the contract different from that which the language of the parties *primâ facie* imported. This was certainly, speaking with deference for the opinion of so eminent a judge, taking a great liberty with the agreement which the party had chosen to enter into. There is, however, an important distinction between that case and the present, inasmuch as in the case now in judgment, the parties have, by their agreement, referred the question of title not to the purchaser himself, but to the purchaser's solicitors. There does not, therefore, exist here the same ground upon which Lord *Abinger* held the parties not bound by their contract in *Lord* v. *Stephens*. The present case, whilst distinguishable in the way I have pointed out from *Lord* v. *Stephens*, seems entirely undistinguishable from *Williams* v. *Edwards* (*a*),

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(*a*) 2 Sim. 78.

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a decision of Sir *Anthony Hart*, V. C., which, as far as it appears from the report, was not cited in *Lord* v. *Stephens*. In *Williams* v. *Edwards*, the stipulation was as follows: "If the counsel of the said *Francis Williams* shall be of opinion that a marketable title cannot be made by the time hereby appointed for the completion of the purchase, this agreement shall be void and delivered up to be cancelled." The Vice-Chancellor in giving judgment, said, "This particular clause in the agreement, I must take to be the contract both of the vendor and the purchaser. They might both think that it would be equally to their interest that the agreement should be put an end to, if the counsel for the purchaser should be of opinion that a marketable title could not be made. There appears to be nothing unreasonable in that. There might be incumbrances which might make it very proper for both parties to insert that term, and as it was the contract of both the parties, this court can-

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not make a new contract for them. The parties themselves have stipulated that in a given event which has happened, the agreement should be void." And again, the Vice-Chancellor says, "My opinion is, that if parties make a contract in this very specific manner, the Court which is to compel the specific performance of the contract between the parties, is bound by the terms of the agreement between them; and therefore the purchaser is asking to enforce an agreement which he has himself agreed shall under certain circumstances be void."

This reasoning, it appears to us, applies in full force in the present case and is unanswerable. If, after the rejection of the title in this case by the purchaser's solicitors, he had come to the court asking for specific performance with compensation, *Williams* v. *Edwards* would have been a direct authority for the vendor resisting such relief. Why then should the purchaser as defendant not be entitled also to insist on its application? Were we to give effect to the argument addressed to the

Court on behalf of the plaintiff, we should be remodelling the express convention of the parties, by striking out of it a clause which they had inserted.

Lord *St. Leonards* refers to this case of *Williams* v. *Edwards*, in this connection, in the 14th edition of his Vendors and Purchasers, at pages 31, 317, and 654, without disapprobation, merely remarking that the power given to the purchaser's counsel in such a case must not be abused. In the present case, it is not, and could not be, asserted that there has been any abuse of the power reserved to the solicitors of the defendant of rejecting the title as unsatisfactory.

The class of cases to be found in the books in great numbers, from which *Scott* v. *The Corportion of Liverpool* (*a*) and *Ranger* v. *The Great Western Railway Company* (*b*), may be selected as examples, in which the certificate of the architect or engineer of the party for whom work is contracted to be performed is made a condition precedent to the right to demand payment for the work, also exemplifies the principle here involved, and are in point of legal reasoning undistinguishable from the present case.

Judgment.

Could a Court of Law say that a man who entered into an agreement to sell a chattel, conditional, on approval by an expert to be selected by the purchaser, was not bound by his contract? Surely not. Then I am unable to discover the slightest distinction between that simple case and the present.

The decree is affirmed with costs.

(*a*) 27 L. J. C. 641.

(*b*) 5 H. L. C. 72.

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STINSON v. STINSON.

Will, construction of—Vested interest.

A testator devised all his lands to trustees, and, after providing for certain events, directed that, "immediately thereafter, or as soon thereafter as my trustees can conveniently, they, my said trustees, or the survivors or survivor of them, shall, with all care and to the best of their knowledge and ability, divide all the rest, residue, and remainder of my real and personal estate into three equal portions; and do, and shall, by proper deed, declaration, or other instrument in writing, under their hands and seals, convey and assure," to each of his three sons one of such portions, to be held "by my said sons severally, as fully as I myself could and would have done had I been then living and in like estate." A subsequent clause of the will was as follows: "And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without issue and without having acquired a vested interest in my said estate, that the share or shares of him or them so dying, shall go and belong to the survivors or survivor of my said sons hereinbefore named. * * And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without having acquired a vested interest in my said estate aforesaid, and leaving issue, such issue shall be entitled, if only one child, to the whole; and, if more than one child, then equally—of the share or portion of his father or their father so deceased, under this my will, as fully and effectually in all respects as if his, her, or their father had lived and received the same:"

Held, (1) that the dying without issue here mentioned, must be construed as dying without children; (2) that the "vesting" referred to meant a vesting in interest and not a vesting in possession; and, (3) that the children of a son who died, after the testator, took under their father, and not directly under the will of the testator.

Statement. The question for decision in this case arose upon the construction of the will of the late *Thomas Stinson*. The testator gave all his property real and personal to trustees upon trust to get in and convert his personalty, and to apply the same in the payment of the expenses of the trust, his funeral expenses and debts. He then set apart a sum to be invested for the benefit of his wife during her life, in lieu of dower; and directed certain allowances to be retained by his executors.

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The will next provided that if the personal estate was insufficient for any of these purposes, the trustees and executors might sell a sufficient portion of the realty. It then directed that "immediately thereafter" the trustees should convey to a devisee named a lot of land in Superior, State of Wisconsin, worth $400, and then proceeded as follows: "And I do hereby further direct and declare, and my will is, that immediately thereafter, or as soon thereafter as my said trustees can conveniently, they, my said trustees, or the survivors or survivor of them, shall with all care and to the best of their knowledge and ability divide all the rest, residue, and remainder of my said estate, real and personal estate, into three equal portions, and do and shall by proper deed, declaration, or other instrument in writing under their hands and seals, convey and assure unto my said son *James* one of such portions to and for his own use and behoof forever; and by the like deed or instrument convey and assure unto my son *John* aforesaid one other portion of said residue to and for his own use and behoof forever; and by like deed or instrument convey and assure unto my son *Henry Argue*, if he shall then have attained the age of twenty-one years, or if not when he shall so attain the said age, one other portion of said three portions of said residue to and for his own use and behoof forever; said portions to be held by my said sons severally as fully as I myself could and would have done had I been then living and in like estate."

Statement.

The testator then directed the application of the rents until the division should take place to the payment of taxes and expenses, and also gave a direction to his executors and trustees as to his son *Henry Argue* in the words following: "If they shall require moneys for the support and education of my son *Henry Argue*, to advance and pay the same out of my general estate until such division shall take place as aforesaid, and thereafter to sell, if they shall require to do so, any portion or por-

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tions from time to time of that portion or share of my said estate falling to him as aforesaid, wherewith to realize moneys enough to pay taxes and assessments on his said share, and support and maintain him until he shall attain the age of twenty-one years."

The will next contained the clause on which the principal question in this suit arose, and which was as follows: "And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without issue and without having acquired a vested interest in my said estate, that the share or shares of him or them so dying shall go and belong to the survivors or survivor of my said sons hereinbefore named, share and share alike, if more than one, and if only one, then the whole to such one, to be conveyed and assured unto them or him, as the case may be, as is provided hereinbefore for the conveyance or assurance of my said estate to them upon the division thereof aforesaid, and to be held by them or him in like manner."

Statement.

In a subsequent clause the death of a devisee before the "vesting" of his share leaving issue, was provided for as follows: "And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without having acquired a vested interest in my said estate as aforesaid, and leaving issue, such issue shall be entitled, if only one child, to the whole, and if more than one child, then equally of the share or portion of his father or their father so deceased, under this my will, as fully and effectually in all respects as if his, her or their father had lived and received the same."

John Stinson, one of the testator's sons, survived the testator, and died in 1865, before the estate of his father had been divided, leaving a widow and two children, and after having made his will, whereby he devised a life estate in all his property to his widow. This suit having

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been instituted for the administration of the estate of *Thomas Stinson*, the first mentioned testator, and a decree made, the infant children of *John Stinson* presented their petition praying that it might be declared that they took directly under that provision of the will of their grandfather *Thomas Stinson* already set forth, which provided, in the case of the death of any one of the testator's sons before the vesting of his share, leaving issue, that the issue should be substituted for their parent.

Mr. *Bruce*, for the petitioners.

Mr. *Proudfoot*, Q.C., Mr. *J. A. Boyd*, Mr. *C. Moss*, and Mr. *Gibson*, for the trustees and other parties interested under the will.

STRONG, V.C.—I am of opinion that the three sons of the testator named in his will took vested estates immediately on the testator's death, in so far as that their undivided shares then became indefeasible in point of interest. Judgment.

This was scarcely contested in the argument before me, the contention on behalf of the infant petitioners being that they took under the will of their grandfather, directly, under the clause substituting the issue of any one of the testator's sons who should die leaving issue before his share vested, for their father. The context shews clearly enough that the word "issue" in the present case is to be read "children."

The sole question for my decision is as to the meaning of the word "vested" in the clauses providing for a gift over, in the alternative cases of death without issue and death leaving issue.

I was at first disposed to favour the argument on behalf of the infants that this referred to a vesting in possession

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or enjoyment, and that therefore the substitutional gift took effect. The arguments addressed to me by the learned counsel for Mrs. *McGiverin*, the mother of the infants, and a further consideration of the will and the authorities cited have, however, convinced me that the proper construction is, to attribute to the word "vested" the meaning of vested in interest.

As I have said, there can be no doubt but that the estates vested in interest immediately on the testator's death. Then the only ground for deferring the possession, at least as regards the two sons who were of age, was the conversion of the estate, for the trustees are expressly directed to convert as soon as they conveniently can. *Leeming* v. *Sherratt* (*a*) is sufficient to shew, if any authority was wanting, that this conferred interests vested in the sense I have mentioned. Then it would be a far fetched construction to assume that because the testator thought fit to direct the trustees to do what the law would have implied and considered it their duty to do if the will had simply contained a direction that they were to be trustees for the sons without more, namely, to convey and divide the estate, that the power of alienation and testamentary disposition by the devisees should depend on the mere accident of the promptitude which the trustees might display in executing their trust.

Judgment.

I find, however, the case is governed by authorities, which shew generally that the word "vested" is to be taken as meaning vested in interest unless the contrary construction is made plain beyond all question.

In *Re Arnold's* Trusts (*b*), cited by Mr. *Boyd*, the testator had given certain lands to trustees for his son until he attained twenty-five years of age, and then to

(*a*) 2 Hare 4. (*b*) 33 Beav. 172.

his son absolutely in fee, and a codicil contained the following provision: "Now I do hereby declare my will to be, that in case my said son shall happen to depart this life without having lawful issue of his body living at his decease, and before the said several estates shall become vested in him by virtue of the several limitations aforesaid, then and in such case I give and devise the same estates to such of my daughters as shall be then living." The Master of the Rolls says, "The only remaining question argued before me is, what is the effect of the devise over, contained in the codicil, in the event of *John Arthur Arnold* dying without leaving lawful issue before the estates become vested in him. The words are these [see words of codicil above set forth.] It is argued that the word *vested* must not here receive its ordinary legal acceptation; but that it must mean *vested in possession*, and not vested in interest, for the reason that the devises became vested in interest in him immediately on the death of the testator. But I think the word "vested," here, must mean "vested in interest," and that the only effect of this devise over is, that it would have taken effect in case *John Arthur Arnold* had died before the testator. It is important to give words their ordinary meaning, particularly when a testator makes use of a word which, for the most part, has a received, plain, legal, technical meaning. A devise is vested in the devisee when the right to it is ascertained, and the possession only is postponed. It is true that the Courts have occasionally been compelled to give the word the meaning of 'vested in possession' as in *Taylor* v. *Frobisher* (*a*), before the Vice-Chancellor *Parker*, but the Court always does this with reluctance, and only where the rest of the will and context inevitably fix this meaning upon it. Here I see no reason for departing from the ordinary legal meaning of the term, and accordingly, in my opinion, the interest of *John Arthur Arnold* in the remainder expectant on

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(*a*) 5 DeG. & S. 191.

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the decease of the daughters of *Mary* vested in him in fee simple on the death of the testator, and the devise over in favor of the daughters thereupon ceased to be capable of taking effect."

The case of *Parkin* v. *Hodgkinson* (*a*), is to the same effect. I must adopt this construction, which appears to me most sensible and reasonable in the present case, and determine that the testator here meant, in the clauses of his will which have been stated, to provide for the death of his son in his life time.

I have not failed to consider Mr. *Bruce's* argument, that the effect of this construction is to give the estates to the heirs or devisees of a son dying without children to the prejudice of the testator's other sons surviving. This, however, is not sufficient in my judgment to outweigh the strong arguments stated by the Master of the Rolls in the passage quoted in favour of giving the word "vested" its primary and technical meaning.

Judgment.

The order to be made upon the petition will contain a declaration accordingly.

I should suppose there is no order now required as to the costs of the petition, as they will be part of the costs in the cause; but I think it was properly presented on behalf of the infants, and that the costs of all parties should be paid out of the estate.

(*a*) 15 Sim. 293.

PATRICK v. SHAVER. 1874.

Will, Construction of—Election—Dower.

A testator devised all his real and personal estate to trustees, with full power of leasing, incumbering, and selling the same," as in their opinion might be advisable, and at a certain period to convey the same to his children or child then surviving. By a codicil he directed all his personal property to be equally divided between his three daughters and his widow.

Held, that the widow was, under the terms of the will, bound to elect between the provision for her by the will and her dower.

This was a bill filed by the surviving executor and trustee of the will of the late *Charles Shaver*, and a devisee thereunder, for the construction thereof; the only question involved being whether the widow was entitled to claim dower in the real estate, and to receive the one-fourth share of the personalty bequeathed to her. The clauses of the will bearing upon the question are fully stated in the judgment. The executor, it appeared, had for a time been paying the widow moneys on account of her interest in the personalty, and it was contended that she had thus elected to take under the will. Statement.

Mr. *Boyd*, for the plaintiffs.

Mr. *Fitzgerald*, Q.C., and Mr. *Cassels*, for the defendants.

BLAKE, V. C.—*Charles Shaver*, deceased, on the 22nd December, 1864, made his will, which so far as related to the matters in issue was in the words following:—

"I give, devise, and bequeath all my estate both real and personal, lands, tenements, goods, and chattels, stocks, shares, moneys, securities for money, and choses in action of whatever kind and wheresoever situate, and whether in possession or expectancy," unto four trustees

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whom he named; "or such of them as shall accept the execution of these trusts, and the survivor and survivors of them who shall so accept, for the uses and upon the trusts following, that is to say.—(1.) To assume the conduct of and carry on the mercantile business in which I am now engaged, being, &c. * * * (2.) To make or cause to be made accurate accounts of the said business at least once every twelve months, * * * and whenever by any such accounts it shall appear that no profits have been realized for a period of twelve months, then the said business shall be forthwith closed, and the stock sold to the best advantage; the debts collected, liabilities paid, and the surplus invested. * * * (3.) In trust to manage all the residue of my property so given, devised and bequeathed as aforesaid, and not included in my said mercantile business, to the best advantage for my estate, and for that purpose I give my said trustees and the survivor and survivors of them, and the heirs, executors, and administrators of such survivor, full power of leasing, encumbering, and selling the same as in the opinion of them may be advisable. * * * (7.) To invest all surplus moneys in some good and safe investment or investments, and at pleasure change such investment and allow the increase thereof to accumulate until the younger of my said children arrives at the age of eighteen years, (or in the event of the death of such child when the elder arrives at that age,) and then to render such children or child a just and full account of such trusteeship, and to convey to such children in equal shares as tenants in common, by proper instruments of assurance, all my said estate, lands, tenements, goods, chattels, moneys, stocks, shares, securities for money, and choses in action; and all the accumulations and increase thereof, saving thereout the deduction to be made as aforesaid, on which being done, the interests of said trustees in the premises shall determine; and I direct that if any one of my children die without issue before such event last mentioned, her share shall go to the survivor,

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and in the event of her leaving issue, they shall stand in *loco parentis*, and be equally entitled to their parent's share." He died on the 8th March, 1871, having on that day made a codicil to the will, as follows: "It is my will and desire that all my personal property shall be equally divided between my three daughters, *Mary*, *Emma* and *Florence*, and my wife *Geogiana Shaver*."

The property of which he died possessed, consisted of two lots of land on which three houses were erected, and personalty valued at about $8,500. It was argued for the beneficiaries under the will, other than the widow, that by the terms of the will she has been put to her election, and cannot claim the gift bestowed upon her by the will and her dower. I think this contention must prevail. I by no means desire it to be understood that my own opinion is, that the claim of the widow to dower, favoured as it is, should be extinguished if she accepts a benefit under the will, because there is the power to lease or deal with the property in such a manner as it is said would be inconsistent with such a claim. I think the more reasonable conclusion as to such a will is, that the testator intended to deal with the interest he had in the land, and to leave the widow with her interest untouched. The case is, however, covered by authority. It is only necessary to refer to the case of *Parker* v. *Sowerby* (*a*), There it was urged that *Hall* v. *Hill*, (*b*) was not decided alone upon the power to lease, and on this ground counsel sought to distinguish the cases. Vice-Chancellor *Kindersley* says he adheres to the general propositions he laid down in *Gibson* v. *Gibson*, and adds, "If I were not bound by decision, if the question were *res integra*, I do not think I should adopt the conclusion to which, in the present case, I am obliged to come; but in questions of this sort, I am not justified in departing from the result of established cases. * * * But a long series

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(*a*) 4 D. M. & G. 331.

(*b*) 1 Dru. & W. 102.

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of cases has decided, though a devise to trustees on trust for sale, is not inconsistent with the widow's right to dower, yet a devise on trust to manage or to lease, does indicate an intention so to dispose of the estate, that the widow's enjoyment of dower is inconsistent with it. The cases deciding that are too numerous for me to say that is not the law. If, then, the devise is here to trustees, either with power to lease or in trust to lease, I am bound to follow the decisions." The Vice-Chancellor proceeds, "Then it has been argued that the benefit given to the widow by the will, is not out of the property in which she claims dower; but the rule of law is, that if a testator has devised any part of his real estate, so that the claim of dower is inconsistent with carrying into effect the testator's whole intention, she is put to her election. I am, therefore, of opinion that in this case the widow is put to her election." I should not feel confident that I was bound to follow this decision, carrying as it does the rule further than other cases, and differing as it does from *Warbutton* v. *Warbutton*, but that the case was carried to the Court of Appeal in Chancery, and there received the sanction of Lord Chancellor *Cranworth*, and the Lords Justices *Knight Bruce* and *Turner*. It was there argued broadly that a power to lease could not of itself warrant the conclusion that the testator intended to dispose of the estate freed from the wife's right to dower. It was submitted that the Vice-Chancellor had followed his own decision in *Gibson* v. *Gibson* (*a*), which proceeded upon the case of *Hall* v. *Hill*. It was shewn to the Court that *Warbutton* v. *Warbutton* proceeded upon a different view of *Hall* v. *Hill*, and that the matter came then for adjudication before a tribunal not fettered by any of these decisions. The case was fully argued and all the authorities reviewed. The Lord Chancellor commences by removing a misapprehension as to the principle on which the decisions should proceed.

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(*a*) 1 Drew. 42.

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"It is not," he says, "I think quite correct to state the general rule of law as being, that, to raise a case of election against the wife, the will must shew that the testator had in his mind her right to dower; and that he meant to exclude it; the rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower." His Lordship then proceeds, "The decisions of Lord *St. Leonards*, in *Hall* v. *Hill* and *O'Hara* v. *Chaine* (*a*), followed as they have been by cases in this country, proceeded on the power to lease given to the trustees, thus laying hold of a reasonable and very intelligible distinction, and one which is consistent with all the cases against the right to elect, even supposing those cases to be rightly decided. The power to lease, which must mean a power to lease the whole, cannot, as Lord *St. Leonards* observed, be exercised subject to the wife's right to have a third part of the estate set out by metes and bounds. * * The case thus seems to me to be quite clear; and the decisions of Lord *St. Leonards*, followed by the Lord Justice *Knight Bruce*, when Vice-Chancellor, by Sir *James Wigram*, and by Vice-Chancellor *Kindersley*, not only shew that the power to lease is a distinction, but that it has been recognized and acted on; and I think we ought not to raise a doubt upon the point." The Lord Justice *Turner* says, "The question is, whether the testator meant here to pass his own interest only in the estate, or to pass the entire estate. He has given to the trustees a power to lease; this power could not be exercised if the wife was entitled to dower, such a right would be clearly inconsistent with the power. It is said that it is not shewn that the testator had present to his mind the question of dower, or that he knew that his wife was entitled to dower; but a man devising a property must be taken to know what his interest in that property is." I have

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(*a*) 1 J. & L. 662.

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cited thus largely from this case, because it was argued that in the cases against the widow's contention there were circumstances other than the right to lease, and that the Court based its decision upon these other matters. I think the quotations made prove clearly that, whatever else there may have been on which the decision could be rested, the Court thought proper to base it upon the one plain and distinct ground that the power to lease was inconsistent with a claim for dower. This being so, *Parker* v. *Sowerby* furnishes an authority on the very point argued before me. If the will were revoked by the marriage and birth of a child, and the effect of the codicil were to be as if another will were at that date made, still, the clause as to leasing there appears, although the time within which that power was to be exercised was passed, and there is the clause requiring the trustees not to sell, but to divide the property between his children as tenants in common. In construing the will, it is proper to consider the circumstances under which the clause as to leasing came to be inserted; when placed in the will, it excluded the right to dower—the inconsistency was never removed—when the power to lease ended, then arose another power equally inconsistent with a claim for dower, the duty of partitioning the estates between the children as tenants in common. I think the widow is, under the authorities, put to her election; that she is not bound by the receipt of the money that has been paid to her. On the hearing, the nature of the decree to issue was settled, and the only point reserved was that which I have now determined. Further directions and costs will be reserved.

Judgment.

CLINE v. CORNWALL. 1874.

Municipal corporations—Nuisance.

A municipal corporation, although it has, under the statute, full powers conferred upon it of opening, making or stopping up roads, streets and other communications, is not at liberty to place obstructions thereon whilst retained as roads or streets. Where, therefore, it was shewn that the corporation of the town of Cornwall was constructing a weigh scales on a corner of the principal street in the town, which would have caused a special injury to the plaintiff, who kept a store at such corner, the Court, at the instance of the plaintiff, restrained the construction on the ground of nuisance.

Statement.

This was a bill filed by *Samuel Cline* on the 27th of November, 1872, against *The Corporation* of the town of Cornwall and *The Attorney-General* of Ontario, setting forth, amongst other things, that for the last twenty-five years and upwards the plaintiff had been and was then carrying on the business of a general merchant, at Cornwall, in and upon the store and premises occupied by him at the corner of Pitt and Second streets; that the said store being so situated at the intersection of Pitt and Second streets, could be readily and conveniently approached from four directions, and ever since the plaintiff was engaged in such business, the public had made use of those streets for that purpose; that the plaintiff was, and had, for the period aforesaid, been the owner of the said store and held an estate for years renewable perpetually in the land and premises upon which the same is situate; that the defendants *The Corporation* had recently conceived the illegal purpose of erecting and permanently placing upon Second street, near the place where it intersects Pitt street, a machine called Fairbanks's Hay Scales, and had already commenced, and were engaged in excavating the earth of the street, for the purpose of placing the machine thereon, and that as soon as the said excavation should be completed, the corporation intended to place the machine upon the street; that the excavation had been made on Second street, within a few feet of

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Pitt street, five feet deep and eighteen feet long, by thirteen feet wide, extending into Second street, a distance of 21 feet, being upwards of one-third of the breadth of that street; that the southern limit of such excavation was within eight feet of the northern wall of the plaintiff's store, and the same was placed so near the store as to prevent a team of horses with a waggon or other conveyance passing between it and the store, and the excavation to a great extent obstructed and rendered very inconvenient the passage of waggons and other vehicles from the front of the store to the yard and premises in rear of the same, and that when such scales should be erected, the obstruction and inconvenience would be increased and rendered permanent; that *The Corporation* intended to use the machine for the purpose of weighing hay, pork, grain, and other similar articles loaded upon sleighs, carts, or waggons, and also for weighing live stock, including horses, horned cattle, and hogs, *The Corporation* pretending that the same was required for the public convenience, but the plaintiff charged the contrary; that the machine, if used for the purposes aforesaid, would occasion great annoyance and inconvenience to the plaintiff, and to the public generally, the concourse of horses and cattle and of waggons and sleighs arising from such use of the machine, would occasion great inconvenience and annoyance to the plaintiff and the public generally, by stopping up said streets and causing offensive smells in the neighbourhood of the scales; that the erection and continuation of the machine upon the street would diminish and injure the plaintiff's business, by preventing persons coming to his store to transact business thereat, who would otherwise do so; and that even if such scales were required for the public use, *The Corporation* were possessed of land and premises upon which the same could be conveniently and properly located.

The bill further alleged that the plaintiff had no adequate or sufficient remedy at law in the premises; that

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he had applied to *The Corporation* to discontinue such excavation, and not to erect such machine, but they refused to comply with such request; and, on the contrary, pretended that they were authorized by law to use the public streets of the town for such purpose other than that of a public highway as to the governing body of *The Corporation* might seem meet. The plaintiff charged the contrary of such pretence, and that the streets could only be lawfully used for the use of the public as public highways or some incidental purpose; and that even if *The Corporation* had such power and authority, the exercise of the same in the manner set forth was unreasonable and injurious to the plaintiff and the public generally, and ought to be restrained by injunction. He alleged that *The Attorney-General* for the Province of Ontario, having refused to join with the plaintiff, was made a party defendant in respect of the public interests; and he prayed an injunction to restrain *The Corporation* from continuing such excavation, and from erecting the scales upon the streets; and that an account might be taken of the injury the plaintiff had sustained in his business, in consequence of the obstruction placed upon the street; and that *The Corporation* might be ordered to pay the same and the costs of suit.

Statement.

The Corporation answered the bill, alleging, amongst other defences, that the scales when erected would not occasion injury to the public generally or the plaintiff in particular; that the use thereof would not produce any unwholesome or disagreeable smell, and would not injure plaintiff's business, and submitted, "that the entire and unfettered control of the said street is within the jurisdiction of our council, and that the use of the said street upon which our council has determined for the purpose of erecting the said machine, is reasonable, and that this honourable Court has no jurisdiction to interfere with the said use in this case."

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The Attorney-General did not answer. The cause came on to be heard at the sittings at Cornwall, in the Spring of the 1873, when evidence was taken, the effect of which is clearly stated in the judgments on rehearing.

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

Mr. *Fitzgerald*, Q. C., contra.

After taking time to look into the authorities,

STRONG, V. C., made a decree restraining *The Corporation* from proceeding with the construction. *The Corporation* thereupon reheard the cause before the full Court.

Argument.

Mr. *Bethune*, for *The Corporation*, contended that what was complained of as a threatened injury would not, even if carried out, amount to one, and if it would amount to a nuisance, the plaintiff was premature in instituting this suit. The alleged nuisance complained of was not one in respect of which the plaintiff could sue, as it could not be said that it caused any private or particular injury to the plaintiff over and above that caused to Her Majesty's subjects generally.

He also contended that the council, the governing body of *The Corporation*, under the power vested in it, had the power and authority to devote a portion of any street to the purpose of erecting scales to be used in weighing articles to be publicly sold, and the anticipated bad smells complained of would not result from a proper use of the scales.

He also submitted that this Court had no jurisdiction in the premises, inasmuch as it was a matter, the control whereof, and the remedy in respect whereof, is by the Legislature committed to the Municipal Corporation of the town of Cornwall; and that in any view of the

subject, the matter complained of was too trivial for the Court of Chancery to take notice of, and for this reason alone relief should have been refused.

He cited, amongst other cases, *Attorney-General* v. *Nepean* (*a*), *Attorney-General* v. *Cambridge Consumers' Gas Company* (*b*), *Wandsworth Board of Works* v. *The London and South-Western Railway Company* (*c*), *Crump* v. *Lambert* (*d*), *Haines* v. *Taylor* (*e*), *Attorney-General* v. *Kingston-on-Thames* (*f*), *Hobart* v. *Earl of Ripon* (*g*), *Biddulph* v. *St. George's Hospital* (*h*), *Squire* v. *Campbell* (*i*).

Mr. *Moss*, Q.C., contra. The completion and use of the contemplated scales would occasion a serious nuisance to the plaintiff, as it was apparent that the creation of a nuisance would be the result of the acts commenced by *The Corporation*, and unless the plaintiff had proceeded promptly he might have been debarred from relief on the ground of laches or aquiescence. The rule of equity is clear that the Court of Chancery has jurisdiction to restrain the completion of acts which must inevitably result in the creation of a nuisance. Here it is shewn that the nuisance in question would have inflicted special and peculiar damage upon the plaintiff, and the Court will struggle against any construction of the statute that would authorize the creation of a nuisance. The council have not, by law, any power or authority to create a nuisance upon a public highway to the detriment of any private persons, and have exceeded their jurisdiction in assuming to authorize the creation of a nuisance upon a public highway; and even admitting that the council had jurisdiction, it did not exercise it in a reasonable and *bonâ fide* manner; besides, here it is plain that the

Argument.

(*a*) 2 Gr. 626.
(*b*) L. R. 4 Ch. 71.
(*c*) 8 Jur. N. S. 691.
(*d*) 17 L. T. N. S. 133.
(*e*) 2 Ph. 209.
(*f*) 11 Jur. N. S. 596.
(*g*) 2 M. & K. 169.
(*h*) 8 L. T. N. S. 558.
(*i*) 1 M. & C. 452.

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creation of a nuisance, to the plaintiff particularly, was the inevitable result of the acts complained of by the bill, which would have been serious in its character and unlimited in its duration.

He referred to *Green* v. *The General Omnibus Company* (*a*), *Attorney-General* v. *Sheffield Gas Consumers' Company* (*b*), *Rex* v. *Moore* (*c*), *Walker* v. *Brewster* (*d*), *Broadbent* v. *The Imperial Gas Company* (*e*).

SPRAGGE, C.—The law of nuisance as affecting highways, is thus briefly stated in *Bacon's* Abridgment (*f*): "Every unauthorized obstruction of the King's highway to the annoyance of his subjects, is a nuisance."

Judgment.

The questions here are, whether there is an obstruction—whether it is unauthorized—whether it is an annoyance to the Queen's subjects; and, this being a bill by one of the Queen's subjects, whether it is a special annoyance to him; and, lastly, whether it is a proper case for the interposition of this Court by injunction.

The first point, whether it is an obstruction, is easily answered. It is not necessary to go outside of the evidence of Dr. *Allan*, the Mayor of the town. He says, "the excavation on which the platform (of the weighing apparatus) is to rest, is 14 feet by 9 feet 8 inches." There is also a box about 3 feet high, 4 feet long and 6 or 7 inches wide, which is placed at the side of the scales, and the box, he says, will interfere somewhat with the street, but not more than the posts used for tying up horses, As he describes it, it would not be, apart from its use as a weighing machine, a very serious obstruction if the platform of the scales is laid and pressed flush with the street, but still an obstruction to the highway.

(*a*) 7 C. B. N. S. 290.
(*b*) 3 D. M. & G. 304.
(*c*) 3 B. & A. 184.
(*d*) L. R. 5 Eq. 25.
(*e*) 3 Jur. N. S. 221.
(*f*) Highways, D.

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To pass for the present from the question of its being unauthorized, to the question of annoyance, there is abundant evidence that from its use as a weighing machine, there would be annoyance. To take first the evidence of Dr. *Allan* who was called for the defence. He says, "The scales were to be used for every legitimate purpose. Horses may be weighed on them. I have heard of cattle being weighed on such scales, or grain." They would, as appears by the evidence, be used principally for weighing of hay; and Dr. *Allan* says, "There must be some accumulation of filth at the hay scales, but not so much as at the tieing posts." Other witnesses speak more strongly of the nuisance that the use of hay scales would occasion, and most of them add that they would be an especial nuisance to the plaintiff. *Ronald McDonald* thinks that loads of hay could not be weighed at the place proposed for the scales, without causing a nuisance; he says that he has frequently in winter and spring seen Pitt street, the principal street of the town, and on which the plaintiff's shop fronts, nearly filled with loads of hay; that he has seen the street crowded for hours by loads of hay and wood; and adds that the effect of having the scales at the place proposed, would be to annoy and inconvenience the plaintiff in his business. Another witness, *Robert Eastman*, thinks they would be a public nuisance; and a greater nuisance to the plaintiff than to others; and I have no doubt that this is the the proper conclusion from the whole of the evidence; and, further, that the injury to Mr. *Cline* in his business, would not be a slight but a serious injury.

Judgment.

Upon the next point, whether the municipality has authority to place this obstruction in the highway, it is to be observed that it has not this power necessarily, from the fact of its being a municipal corporation. To have such a power as is contended for, it must be expressly conferred by the Legislature; and I infer from the line of argument taken by Mr. *Bethune*, that such is his

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understanding of the law. His contention is, that larger powers than are involved in placing hay scales in the street of a town, are expressly conferred by the Legislature upon municipal corporations; and that the smaller power, which is brought in question in this suit, is necessarily comprehended in the larger powers conferred. He refers to the powers for opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, and other public communications; but it appears to me by no means to follow that in regard to any road or street, in relation to which they have not exercised these powers, they are at liberty to place obstructions in them.

The municipality had power under the Act to divert or stop up Pitt street, or Second street, or both. They have not diverted or stopped up either of them; they remain, therefore, and are public highways; and the common law as to highways, and what is a nuisance upon a highway, applies to them. A contrary doctrine would be fraught with monstrous consequences. If the municipality of Cornwall has the power contended for, the municipality of Toronto, of course, has the like power; and might place a fish, or meat, or vegetable market at the intersection of King and Yonge streets; or might put up weighing scales there with all the accompanying annoyances, as well as the obstruction; or might place almost any other obstruction or nuisance in the streets, provided it was not found, a matter always difficult of proof, that it was done *malâ fide*. I see nothing in the Municipal Acts to indicate that the Legislature intended to leave the public so much at the mercy of municipal bodies.

Judgment.

As I read the Act, I see nothing to confer the power claimed to be exercised by this municipality; and it seems to me to be very clear that without express Legislative authority, a municipal council has not power to place an obstruction in a highway. The council is the

creature of the Legislature, and certain powers defined by statute are given to it, to carry out the purposes for which it is created. No general power is given. For everything that a municipal council can do, it must, I apprehend, find its authority in the statute book, for everything I mean beyond what is necessary for carrying out the duties imposed, and the powers conferred by law. And even if express authority were given to erect weighing scales within the limits of the municipality, or if such authority is to be implied from the powers that are expressly given, no authority would be implied to place them on the highway. I find no English authority in favor of such a power, and the principles of English law are against it; and the American authorities also are clearly against it. I will quote a passage or two from the estimable treatise on municipal corporations by Judge *Dillon* of the United States Circuit Court (*a*): "The king cannot license the erection or commission of a nuisance; nor in this country can a municipal corporation do so, by virtue of any implied or general power. A building or other structure of a like nature, erected upon a street without the sanction of the Legislature, is a nuisance; and the local corporate authority of a place cannot give a valid permission thus to occupy streets without express power to this end, conferred upon them by charter or statute." And in another passage, after saying that it is incident to the general power to build a market, to determine upon the form, dimensions, and style of the edifice, and to employ an architect, he adds, "But power to a municipal corporation to establish markets and build market houses, will not give the authority to build them on a public street. Such erections are nuisances though made by the corporation, because the street and the entire street is for the use of the whole people. They are nuisances when built upon the streets although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized

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(*a*) Vol. 2, sec. 521.

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by an express Act of the Legislature. But unless so legalized, a nuisance erected and maintained by a public corporation, may be proceeded against criminally or otherwise, the same as if erected by private persons." Judge *Dillon* refers to a number of cases as authority for his text. They are not all in the Law Society Library; such of them as I have been able to refer to support Judge *Dillon's* statement of the law. It is a branch of the law that has been very much considered in the United States Courts, and the decisions, and Judge *Dillon's* statement of law from them, are, in my opinion, in accordance with the principles of English law.

In my opinion, the plaintiff has a right to complain of the injury being done to his trade, as he would have had if the injury had been to his person or dwelling house. The case of *Wilkes* v. *The Hungerford Market Company* (*a*) was a case of injury to trade. The plaintiff was a book seller, and his complaint was, that customers were deterred or prevented from going to his shop by an obstruction in the street. He brought an action on the case; a nonsuit was moved for, and it was contended that the act of the defendants was a public nuisance, for which an indictment would lie, but not a civil action; but the action was sustained. I would refer also to *Baker* v. *Moore*, cited in 1 Lord *Raymond*(*b*); also to *Rose* v. *Miles* (*c*), *Greasley* v. *Codling* (*d*), and *The Mayor and Burgesses of Lyme Regis* v. *Henley* (*e*), and the American case of *Stetson* v. *Faxon* (*f*).

Judgment.

This appears to me to be a proper case for interfering by injunction. There can, I think, be no doubt as to the jurisdiction. *Crowder* v. *Tinkler* (*g*), *Spencer* v. *The London and Birmingham Railway Company* (*h*), and

(*a*) 2 Bing. N. C. 281.
(*b*) Page 491.
(*c*) 4 M. & S. 101.
(*d*) 2 Bing. 263.
(*e*) 1 Bing. N. C. 222.
(*f*) 19 Pickering 147.
(*g*) 19 Ves. 617.
(*h*) 8 Sim. 193.

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the cases cited by Mr. *Bethune*, shew that the only question was the propriety of interfering under the circumstances. In *The Attorney-General* v. *The Cambridge Consumers' Gas Company* (*a*), Lord *Hatherley*, then Lord Justice, commented upon the absence of complaint on the part of those who were the proper parties to complain, and upon the fact that the information was filed at the instance of a rival gas company, and Lord Justice *Selwyn* referred to the principle that the Court will not interfere by way of injunction where the injury proved is only temporary and trifling. So in *The Board of Works for Wandsworth District* v. *The London and South-Western Railway Company* (*b*), Sir *Richard Kindersley* refused an injunction because the interference with the plaintiffs' rights would probably be only temporary, and they had only a dry strict title to a legal estate unaccompanied by any beneficial enjoyment, observing however that if the party asking for an injunction were an individual or body of individuals coming and saying, "We suffer inconvenience," however small it may be, then, in his opinion, the Court would interfere to protect them. It is not necessary to go so far in this case, for the evidence shows that if the proposed scales are erected the plaintiff will suffer not only an appreciable but a serious injury.

Judgment.

In *The Attorney-General* v. *The United Kingdom Telegraph Company* (*c*), which is also cited by Mr. *Bethune*, Lord *Romilly* treated the question as one of legal right, upon which he said he was not at all satisfied that he could come to a correct conclusion, and therefore refused to interfere by injunction till the question of legal right was decided at law, a reason which does not apply here.

Mr. *Bethune* says a proper test is, whether an action at law would lie. The cases that I have cited from

(*a*) 4 Chy. 71. (*b*) 8 Jur. N. S. 691. (*c*) 8 Jur. N. S. 583.

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Lord *Raymond*, from *Bingham's* Reports, from *Bingham's* N. C., and from *Maule* & *Selwyn*, were all cases at law. I do not myself feel any doubt, that, assuming the erection to be one *ultra vires* of the town council, an action at law would lie at the suit of *Cline*.

I do not think that the plaintiff is premature in coming to this Court before he suffers actual damage by the proposed erection. He obviates an objection which might be made if he had waited till the injury had actually occurred, that of looking on, seeing work done and expense incurred in which he acquiesced. If it is meant that this erection may or may not be a nuisance in the sense of its being an injury to the plaintiff, the answer, in my opinion, is, that the evidence shews that it will necessarily be some injury to the plaintiff; the question of the extent of injury is only one of degree. If the tendency of the erection and its proposed use is to deter any customers from going to the plaintiff's shop, that is an injury; and I think it proved that that would be the probable and natural effect of the use of weighing scales at the proposed site. That it would probably deter many, it is not necessary to shew, though I incline to think that that also is shewn.

Judgment.

That the injury will be very much diminished if the by-laws, which were put in in evidence, are rigidly enforced is very probable, but the existence of these by-laws is no answer to the plaintiff's case, for two reasons,—one that they may not be enforced or enforced partially and negligently, so that the plaintiff would be dependent upon the vigilance of persons over whom he had no control; the other, that however vigilant and conscientious in the discharge of duty the servants of the corporation may be, there would still be a nuisance injurious to the plaintiff's business, *e.g.* the proximity of horses' heads to the crossing, which would probably deter timid persons, especially ladies, from using that crossing,

and so divert the stream of custom from the plaintiff's shop. 1874.

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I base my judgment upon the proposed erection being *ultra vires*, and an obstruction to the highway, therefore a public nuisance; and occasioning, as a necessary consequence of its erection, special injury to the plaintiff in the way of his business, and of a permanent character, for which he is entitled to the interference of this Court by injunction. Taking this view of the case, I have not thought it necessary to consider whether if the defendants had the power to put up this erection in the public street, the plaintiff would have had a case to come to this Court. I have examined all the cases cited by Mr. *Bethune* that are accessible; but in the view I take of the cases, I have not felt it necessary to comment upon them further than I have done.

I think that the decree pronounced by my brother *Strong* is right, and that the plaintiff is entitled to the relief given to him by the decree. Judgment.

STRONG, V. C., concurred.

BLAKE, V. C.—I have read the portions of the statute on which *The Corporation* relies in support of its proposition, that it is at liberty to devote portions of the streets of the town of Cornwall to a purpose other than that of a highway. It is true it may have large powers as to closing or diverting, under certain circumstances, the streets within its jurisdiction, but until the powers are exercised and so long as the streets remain highways for the use of the town and the neighbourhood, as highways they must be preserved, and they cannot be diverted to other uses. Because *The Corporation* has the power to close a street, it by no means follows it has the right to keep it open, and, at the same time, allow the public a limited use in respect of it. The statutory power

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given must be exercised in accordance with the Act granting it, and so long as the street is left open, it is no answer to a complaint made against the act of *The Corporation* to say that, "The town has the right to close this street; what is being done, does not affect you as injuriously as if the highway was closed in toto, and therefore the town is justified in its act." If an interference is allowed, it may to-day be in the form of a "hay-scales," to-morrow, in the shape of a "cattle-pen;" and next day, a "court house" or "town hall," may be found partly closing the street, because, forsooth, under the statute *The Corporation* has the power to close it entirely. Any interference with the highway except for the purposes contemplated, and in the manner prescribed by the Act, is *ultra vires*, and liable to be restrained at the suit of *The Attorney-General*. That which is here complained of constitutes a public nuisance, but this does not prevent an individual who has sustained some special damage thereby, over and above the general damage sustained by the rest of the public, from applying to the Court for protection by bill. I think the plaintiff has proved that a peculiar injury would be inflicted on him by allowing the erection of the scales in question. That which would have the effect of fostering the business of a provision dealer, or a Farmer's hotel, may be the means of ruining such a business as that carried on by the plaintiff. There must inevitably be groups of cattle, horses, pigs, and sheep, at times around the scales, brought there for the purpose of being weighed; and when once the corner in question becomes noted for such a concourse, the class of customers who frequent the store of the plaintiff will be driven from it. It was on the argument said, that the corner where this store is erected occupies the same position in Cornwall, as the corner of Yonge and King streets does in Toronto; and I think there can be no question as to the effect on the dry good stores at this latter corner, if the streets were there invaded by a pair of hay scales.

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Quite independently of the impurities that may flow from the congregating of animals, the obvious and certain result must be detrimental to the class of business carried on at this establishment. The weight of evidence is clearly in favor of this contention of the plaintiff, and satisfies me that he has brought himself within the rule that requires, of the individual complaining, that he should shew that the public nuisance complained of causes private injury to him. *The Corporation* alleges that the plaintiff was premature in coming to the Court for relief; and that he should have waited until he ascertained that the threatened nuisance would have resulted in an injury to him. I think it so apparent on the evidence that the act complained of would have the effect contended for, that the plaintiff would not have been justified in delaying further before instituting the proceedings in this Court. If he had done so, the corporation would at once have answered "whatever your rights might have been, had you come at once, your laches and acquiescence have barred them; and you are now without relief. You chose to accept the risk of the act being beneficial to your business or the reverse, and you must accept the consequences of the chance which you have chosen to run."

Judgment.

I think the decree should be affirmed with costs.

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YOUNG v. WILSON.

Easement—Mill race—Dominant and servient tenement.

T, being owner of 275 acres of land, caused a mill dam and race to be constructed and a mill to be erected thereon. For 30 or 40 years this mill, or others built on its site run by water power only, had existed, and were run by the water passing from a natural stream through the race. *T* sold to *W* the whole property, taking back a mortgage for part of the purchase money, on that part of the land through which the race ran, and on which the mill dam was situated, excepting, however, the mill site. It was shewn that the mill could not be supplied with water power otherwise than by the race running through the mortgaged premises. *T* afterwards assigned the mortgage to the plaintiff, and *W* mortgaged the mill and mill site to *D*.

Held, that the right to use the dam and mill race was a necessary, continuous, and permanent easement, and could not be destroyed by the plaintiff, although the servient parcel had been first conveyed without any express reservation of such easement.

Statement.

This was an appeal from a certificate of the Master at London, in which he certified that in pursuance of the decree and final order for sale, he had proceeded to settle an advertisement and particulars and conditions of sale, and he found that the most advantageous mode of offering the same for sale, would be in certain specified divisions; and he also found that no easement existed by reason of the mill race or water course in over and upon the broken front concession of the township of Delaware.

The grounds of appeal were, (1.) Because the Master found that the broken front concession lot should be sold in one lot, while he should have found that it should be sold in parcels, according to certain plans and depositions produced before him; and, (2), because the Master found that no easement existed by reason of the mill race or watercourse which existed in, over, and upon the said broken front lot, while he should have certified that *Sophia Louisa Dunn* and others, the owners of the grist mill and premises referred to in the evidence, were en-

titled to the use of the stream and race and of the banks, tail race and dam, with all necessary access for the purpose of keeping the race, dam, and banks of the same in repair as enjoyed at the date of the mortgage made by *Wilson* to *Tiffany*, viz. 27th January, 1857. 1874. Young v. Wilson.

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

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

Mr. *A. F. Campbell*, contra.

PROUDFOOT, V. C.—Only the second ground of appeal was argued before me, as it was represented that, if that were allowed, the Master would probably review the manner in which he had allotted the premises for sale.

The circumstances giving rise to this appeal, are as follows:—One *Dean Tiffany* being the owner of 275 acres of land in the township of Delaware, caused a mill race to be dug, and a saw mill to be erected thereon, between 30 and 40 years since; this mill rotted down, and was renewed once or twice, till in January, 1857, *Tiffany* sold to the defendant, *Wilson*, the whole property; and for a portion of the purchase money took a mortgage on that part of the property east of Main street, leaving out of the mortgage the part on which the mill was built, and some acres adjoining, being the part west of Main street. This was left out of the mortgage at the request of *Wilson*, who was intending to erect a grist mill, which he has since done, instead of the saw mill, for the express purpose of excepting the mill premises from its effect. At the time of the sale to *Wilson*, there was a saw mill on the mill premises. The mill dam is on the lands mortgaged to *Tiffany*, and it would not be possible to supply water to the mill if the dam was on the mill premises. That the dam is neces- Judgment.

1874. Young v. Wilson.

sarily on the lands so mortgaged to *Tiffany*; that the mill site had been originally purchased by *Tiffany*, embracing the site on which the dam is constructed, and it has always been considered a right appurtenant to the mill, which could not be supplied with water from any other source. *Wilson* in the mortgage to *Tiffany* made no reservation of any easement over the land. The plaintiff is assignee of *Tiffany's* mortgage, and default has long been made in payment.

On the 5th July, 1860, *Wilson* mortgaged the mill site and land west of Main street to Colonel *Dunn*, whose representative is the present appellant. The respondent is the plaintiff, the assignee of *Tiffany's* mortgage, and insists that no easement exists over the property mortgaged to him in favor of that mortgaged to Colonel *Dunn*.

Judgment.

While *Tiffany* owned the whole property he could have no easement in one part in favor of another, all his dealings with the land would be in exercise of his right of ownership. But if in the exercise of such right he made an apparent, continuous, and permanent change in the property itself, then upon severance the purchaser would take it as it existed at the time of severance, benefited or burthened as the case may be, by the qualities which had been so impressed on it (*a*).

A water course, such as that in question, was an apparent, continuous, and permanent change in the nature of the property, rendering one part of it subservient to the other, and a reservation of an easement in favor of the mill would be implied in the mortgage. This easement is a necessary one, in the sense in which such a right is said to be necessary, and without it the mill could not exist: *Ewart* v. *Cochrane* (*b*), *Pyer* v. *Carter* (*c*).

(*a*) Gale on Easements, 4th Ed., 89.
(*b*) 4 McQueen, 117, 7 Jur. N. S. 925. (*c*) 1 H. & N. 916.

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The plaintiff contends that as the easement never existed anterior to the unity of possession, express words of reservation must be used in order to preserve it, and for this he cites *Thomson* v. *Waterlow*, (*a*), *Langley* v. *Hammond* (*b*). In both of these cases the easement claimed was a right of way, which is not a continuous one, and in neither was it necessary for the enjoyment of the property. In *Thomson* v. *Waterlow* the dominant tenement was sold first, but the purchaser of the servient tenement was not held liable to permit the user of an easement not continuous and not necessary for the use of the dominant tenement. In *Watts* v. *Kelson* (*c*), this case is referred to by *James*, L. J., as coming to little more than this, "You have a way from the high-road to your house, a way from the house to your garden, from your garden to your orchard, and from your orchard into your field, to which there is another approach. Nobody could say that the person who bought the field from you would have a right to use the way through your house, garden, and orchard;" and *Mellish*, L. J., distinguishes both cases on the ground that they were cases of rights of way, and that the Master of the Rolls had overlooked the well established distinction between easements like rights of way, which are only used from time to time, and what are called continuous easements. And, in *Langley* v. *Hammond*, the way was not even defined,—as *Bramwell*, B., said, "It is no more a way than the short cut a man may take across his room from the piano to the fireplace is a way."

Judgment.

The plaintiff further contended that as the servient tenement was sold first, a reservation of an easement could not be implied, as it would be permitting the grantor to derogate from his own grant,—and great reliance was placed on *Suffield* v. *Brown* (*d*), as being

(*a*) L. R. 6 Eq. 36. (*b*) L. R. 3 Exch. 161. (*c*) L. R. 6 Chy. 166.
(*d*) 10 Jur. N. S. 111; 4 DeG. J. & S. 185.

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a clear and conclusive exposition of the law regarding easements on the sale by the owner of two tenements of one of them. Every decision of Lord *Westbury* is entitled to the highest respect, and the propriety of what was decided in this case has never been questioned. But beyond what was necessary for the decision the judgment discusses several legal questions, and criticises some of the positions in Mr. *Gale's* Book, and exposes what he terms the fallacy involved in the judgment in *Pyer* v. *Carter* (*a*). It caused much dissatisfaction at the time, and has since been questioned in the Courts. The facts were that one *Knox* was the owner in fee and the occupier of a dock situate on the Thames used for repairing ships, and of a strip of land and coal wharf adjoining the dock on which he had begun to build a warehouse. The two properties were put up for sale at auction, when the strip of land was sold to one *Gibson* under whom *Brown* claimed, the dock was afterwards sold to other persons

Judgment.

under whom the plaintiff claimed. When *Knox* owned both properties whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. The bill was filed for an injunction to restrain the defendant from preventing or interfering with the full use and enjoyment of the dock by the plaintiff in the manner the same had been previously used by allowing the bowsprit of any vessel in the plaintiff's dock to overlie or overhang a portion of the defendants' wharf. The Master of the Rolls granted the injunction which Lord *Westbury* dissolved. The ground of the decision was, that this was a grant of the wharf without any reservation of an easement to the grantor and that he could not derogate from his own grant. The easement in this case was what is termed discontinuous and non-apparent, not in any way affecting, or indicated by, the structure of the tenement in respect of which it was claimed, and the

(*a*) 1 H. & N. 916.

cases seem tolerably uniform that without express reservation none such could be retained by the grantor.

Pyer v. *Carter*, which Lord *Westbury* considered to have been erroneously decided, established that on a sale by the owner of one of two houses through which the other was drained there was an implied reservation to the owner of the use of the drain, which was held to be necessary, apparent, and continuous, and in holding it to be apparent, perhaps, went to the verge of the law. But, assuming it to be a necessary, apparent, and continuous easement, it had no application to *Suffield* v. *Brown*, and is a clear authority that on the grant of the servient tenement the grantee took the property burthened with the easement. Mr. *Gale* (p. 91) cites *Richards* v. *Rose* (*a*), and *Pinnington* v. *Galland* (*b*), for the position that the priority of the conveyances of the two tenements in the order of time is quite immaterial, and these cases do contain opinions to that effect.

Judgment.

Pyer v. *Carter* was cited with approval by *Campbell*, C., in the House of Lords, in *Ewart* v. *Cochrane* (*c*), and formally approved in *Watts* v. *Kelson* (*d*), and in this latter case it was also held that the order of conveyance in point of date, *i.e.*, whether the servient or dominant tenement were first conveyed, made no difference, and that "*Pyer* v. *Carter* is good sense and good law. Most of the common law judges have not approved of Lord *Westbury's* observations on it."

The plaintiff also relied much on *Crossley* v. *Lightowler* (*e*), as in favor of the certificate of the master. But when carefully examined it will not be found of much value in application to the present. There, the plaintiffs had a carpet manufactory at Dean Clough, on

(*a*) 9 Exch. 218.
(*b*) 9 Exch. 1.
(*c*) 7 Jur. N. S. 925, 4 McQueen, 117.
(*d*) L. R. 6 Chy. 166.
(*e*) L. R. 2 Ch. 478.

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the banks of the river Hebble, which was supplied with water not from the stream at the mills, but by means of pipes from a point further up the stream, and below the defendants' works—the plaintiffs had also purchased from the defendants a strip of land a little below the defendants' works.

The bill sought an injunction in favor of the plaintiffs as riparian proprietors in respect both of the mills and the strip of land. The conveyance by the defendants of the strip made some reservations, but did not reserve the right to foul the stream. The defendants contended they had a prescriptive right to foul it. *Wood*, V. C., held that the right had been abandoned, and granted an injunction in regard to both properties. *Chelmsford*, C., on appeal, affirmed the decree as regards the strip, concurring with the Vice Chancellor that the right to foul had been abandoned, he reversed the decree as regarded the fouling of the stream at the mill because the plaintiffs did not use the water opposite the mill, and because it was not proved that the defendants fouled the stream at the mill. The works which had formerly fouled the stream had been abandoned in 1839 or 1840. In 1840 the plaintiffs built their mill,—in 1864 they purchased the strip from the defendants. In 1864 the defendants became the occupiers of these premises, and built large dye works, and were engaged in constructing others when the bill was filed, in May, 1866. It will thus be seen that the defendants did not claim a reservation from their conveyance of an apparent and continuous easement necessary for the enjoyment of their property, but were endeavoring to assert a right to reserve an easement *de novo*, an entirely different right, and which cannot be done without an express reservation. It is plain, therefore, that the decision is no authority in support of the plaintiff's contention. But when the Chancellor quotes Lord *Westbury's* remarks on *Pyer* v. *Carter* with approval, and adds that it appeared to him

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to be immaterial that the easement should be apparent and continuous, I think he is not warranted by the authorities. In *Polden* v. *Bastard* (*a*), in the Exchequer Chamber, it is said, "The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used of necessity or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only they do not pass, unless the owner, by appropriate language, shews an intention that they should pass."

The plaintiff also cited *The Edinburgh Life Assurance Company* v. *Barnhart*. (*b*) In that case, there was a sale by the owner of both properties of the dominant tenement, which had an apparent and continuous easement of backing water for a mill pond on the property retained. *A. Wilson, J.*, says, "If *Jacob Snure* (the original owner), had sold to *George Snure*, (the purchaser), the east half of two in the 4th concession, (the servient tenement) in the like unqualified form in which he sold to him the west half of 2, in the 3rd concession—(the dominant tenement)—*George Snure* might have cut down the embankment upon 2, in the 4th concession; and *Jacob Snure* could not legally have complained, because, having disposed of the servient tenement without reserving his rights upon it for the benefit of number 2 in the 3rd concession, upon which the mills stand, he would have discharged it from the servitude, and the purchaser would have had the right to do as he pleased with his property, without regard to the former privileges or powers which the vendor had exercised or had the right of exercising upon it." This was not the decision, but a hypothetical statement based upon *Suffield* v. *Brown*, without distinguishing between continuous and discontinuous easements, and which I

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(*a*) L. R. 1 Q. B. 156.

(*b*) 17 C. P. U. C. 63.

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think cannot be deemed an accurate representation of the law. The decision itself was clearly correct, as the easement in question was necessary, continuous, and apparent.

In *Sury* v. *Piggott*, Palmer, 444, and other reports as cited in Gale 102, *Dodderidge J.*, puts this case, "A man having a mill and a water-course over his land, sells a portion of the land over which the water-course runs; in such a case by necessity the water-course remaineth to the vendor, and the vendee cannot stop it," which is the case now before me.

In *Canham* v. *Fiske* (*a*), the plaintiff purchased a garden, through which ran a stream of water, from a person who was also the owner of the adjoining field in which the spring, supplying the stream, took its rise. The defendant afterwards bought the field and diverted the stream. At the trial, the plaintiff was nonsuited, but the Court of Exchequer granted a new trial. Lord *Lyndhurst* said: "The plaintiff bought the land with the water upon it, and if the conveyance were silent as to the water, still the water would pass with the grant of the land." And *Bayley*, B., added, "The land is purchased with the water upon it, and the conveyance passes the land with the easements existing at the time." And as I have shown it is immaterial whether the servient or dominant tenement is sold first, this is another proof that a continuous and apparent easement would be reserved impliedly.

Judgment.

Several American cases were referred to by both parties: *Siebert* v. *Levan* (*b*), is in favor of the appellant, and so is *Elliott* v. *Sallee* (*c*), while *Randall* v. *McLaughlin* (*d*), and *Warren* v. *Blake* (*e*), are in favor of

(*a*) 2 C. & J. 126.
(*b*) 8 Penn. 383.
(*c*) 14 Critchfield's Ohio R. 10.
(*d*) 10 Allen 366.
(*e*) 54 Maine R. 276.

the respondent. The two last were decided in 1865 and 1866 just subsequent to *Suffield* v. *Brown*, and adopt the judgment of Lord *Westbury* as a correct statement of the law. 1874. Young v. Wilson.

I think the just conclusion to be deduced from the cases is, that when *Wilson* mortgaged to *Tiffany* there was an implied reservation of an easement such as is claimed, and that the certificate of the Master was erroneous. The exception is allowed with costs.

CUDNEY v. CUDNEY.

Executors—Appraisal—Costs.

The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the Master's report, charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the Court ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest.

A testator had sown a quantity of grain, which was in the ground after his decease; one of the next of kin sought to charge the executors with the value thereof, but the land on which it was having been devised to the widow for life, it was *held* on appeal that she, and not the executors, were entitled to the emblements.

Statement

This was an appeal from the report of the Master at St. Catharines by the plaintiff, on the grounds (1) that no deduction should have been made by the Master from the appraised value of the goods of the testator, but that the executors should have been charged with the full amount thereof (2) that the executors should have been charged with $150, amount of a note mentioned in the evidence, and (3) that they should have been charged with the value of wheat sown by the testator, and also

1874. (4) with interest from December, 1857, to date of report, (6th March, 1874).

Cudney v. Cudney.

The facts giving rise to the appeal are stated in the judgment.

Mr. *Cassels*, for the appeal.

Mr. *C. Moss*, contra.

PROUDFOOT, V. C.—The questions involved in this appeal are, whether, under the circumstances detailed below, the defendants, the executors of *Ezekiel Cudney*, are liable to account for the value of certain portions of the personal estate, according to an appraisal made shortly after the testator's death; and whether they are liable to interest upon the amounts received by them, or which but for their wilful neglect they might have received.

Judgment.

The testator died in Dec. 1857, On the 15th of that month, the witnesses, *Donaldson* and *Young* were called in by the executors to value the chattels. *Young* in his evidence says, "According to my judgment we put a value on the goods as I thought they would sell for cash. * * *Ferris Cudney* (one of the executors) and *James Rogers* were present, pointing out goods * * I could not say we appraised all the goods on the place, we merely appraised what were pointed out. * * If the goods in inventory had been sold on 6 months credit I think they would have brought the amount of valuation in inventory. * * * I would not put a value on goods mentioned in inventory other than what was right. * * * We valued the corn at what we thought it worth at the time. I knew it was mouldy at the time." I don't think the cross-examination of this witness alters the effect of these statements.

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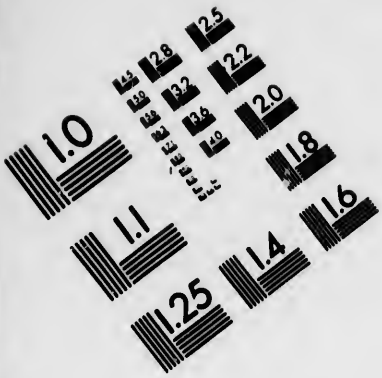
Cudney v. Cudney.

Donaldson says, "We (*Young* and witness) went there as strangers and took everything that was pointed out. * * I thought we might be called on to give an account at some future time, and we were particular as to our valuation. I do not recollect the corn being soft, we put a value on the goods as we found them. I think we valued the property at a fair valuation in case of a sale. I think I said to *John* and *Ferris* that if the things were to be sold for cash they were valued pretty high—if sold on credit of six or nine months the valuation was fair. In April, 1859, I gave evidence before Judge *Campbell* and said 'I appraised the property and valued pretty high—thought it was going to be divided, something was said about a sale—do not think any one would have taken property at the value. After the sale (to *Ferris Cudney*) *Ezekiel* and *John* called on me and told me that the property had been sold for $420, odd; thought it was low at the time and would be sure trouble if nothing done; thought the goods were valued high. Judgment. Thought $430 low; would not have given $598 cash for goods (including keep of mother). I have no doubt this statement being fresh in my mind at the time was correct." On cross-examination he says, "The valuation put on the goods was so made in contemplation of a credit sale of six or nine months of the same, which had been talked of previously. I do not see any reason to change my mind as to this, that the goods were properly appraised at a fair valuation for a credit sale. If *Ferris* had paid for the goods mentioned in the inventory at the valuation put on them therein at a credit of six or nine months, I think he would have got them at a fair price. If the goods mentioned in the inventory, other than those willed, had been sold to *Ferris* for $583 69, besides $150 at six months' credit, I think he would have got them at a fair price.

The whole amount of the goods valued in the inventory was $1,153.69. Of these, however, there were specific



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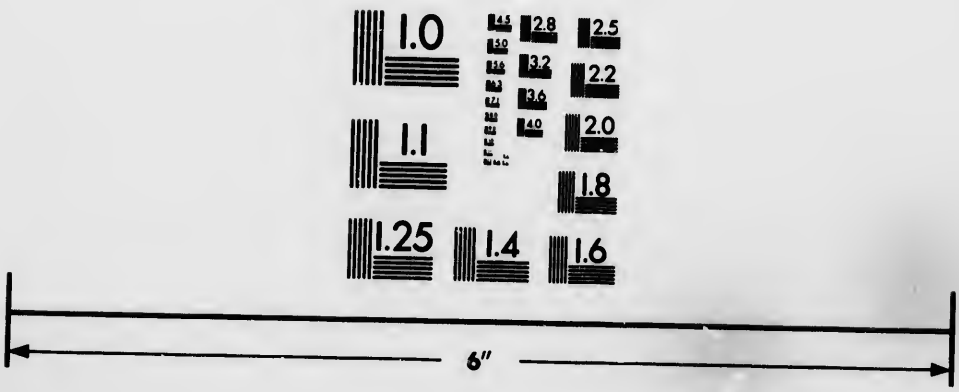

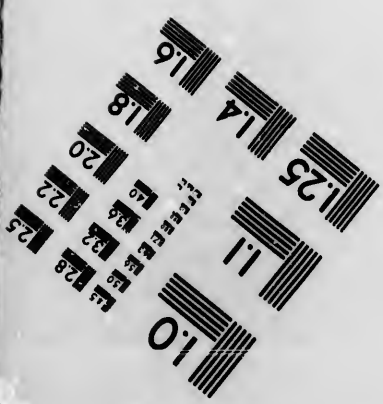

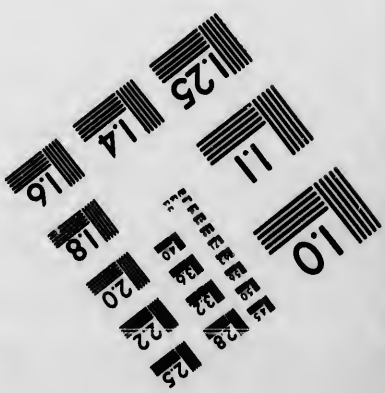

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bequests amounting to $420, and the remainder, valued at $733.69, *Ferris Cudney*, one of the executors, appropriated to himself with the consent of his co-executor for $423, and agreeing to keep his mother till the next harvest. An agreement to this effect was executed on the 16th Dec. 1857, the day following the valuation made between *Ferris Cudney* of the first part, and *James Rogers* and *John Goring*, the other executors, of the second part, whereby *Ferris Cudney* agreed to pay the $423, as follows, viz.: to pay and apply so much thereof as might and should be necessary to satisfy the just and lawful debts of the said estate, also and further to pay and satisfy the different gifts and bequests mentioned in the last will and testament of the said *Ezekiel Cudney* in so far as the same might and should be necessary for the present, and the remainder, if any, after paying the above debts and devises, to be paid in six months from and after the date of that agreement, also

Judgment.

and further to keep and maintain the widow, *Ann Cudney*, with all and every the requirements of the said last will and testament for and until the next harvest.

The Master finds that $92 is a proper sum to allow for the maintenance of the widow, two cows and a horse for that time, so that for $515 *Ferris Cudney* obtains the property valued at $733.69.

I think the valuation was a fair one, and that the executors are liable to account for the amount specified in it. *Ferris* paid to the legatees $209.08, as and for general expenses, $38, and in payment of debts, $180 32, amounting in all to $427.40. The payments to the lagatees seem to have been made in January, July, and August, 1858. And *Ferris Cudney* in his examination says, "I am not aware of anything being said between myself and the rest of the family or the appraisers about dividing chattels amongst the heirs. It was talked over among the executors that the property would not

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Cudney v. Cudney.

bring the appraised value. The executors had not attempted to arrive at any certain value. *Goring* and *Rogers* said that taking into account auctioneer's fees and being a mess of old traps, and the probable loss of some of the notes, it was better to sell by private sale. It had been talked over between my co-executors and myself as to my purchasing chattels. *Donaldson* came to me and said that *John* and *George* complained of the sale of the chattels. I told *Donaldson* that any of them could have them, but I did not tell the heirs this."

Goring, one of the executors says, "*Rogers* thought we could not get as much at a sale as $423. I thought we could, and stuck out for a long time, but finally agreed to the sale. I stuck out for $500," The witness seems somewhat confused as to whether this $500 was to cover the keep of the widow or not, but is certain that the $423 was over and above that.

Judgment.

Ferris Cudney endeavours to show that the sale to him was approved of by the other members of the family, but I don't think it is satisfactorily proved as to any of them, and certainly not as to the plaintiff *John*.

The other question is, as to interest. It was argued for the executors that the amount charged against the executors consists of goods and chattels not included in the inventory which were or might have been received by the executors, and that these not having come to the hands of the executors, and the amount agreed to be paid by *Ferris* having been paid, that no interest should be charged.

The cases of *Vanstone* v. *Thompson* (*a*), and *Blain* v. *Terryberry* (*b*), cited in support of this contention, were

(*a*) 10 Gr. 542.

(*b*) 12 Gr. 221.

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peculiar in their circumstances, and cannot be considered as laying down a general rule that in no case are executors to be charged with interest on sums which have been lost to their estate by their neglect. They were cited and considered in the case of *Sovereign* v. *Sovereign* (*a*), and a contrary decision arrived at by the full Court. The will appointing executors conferred on them the right to the chattels, and it lies upon them to show that they exercised reasonable diligence in getting in the estate. They have not done this, and I think that they should be charged with interest. I don't think the lapse of time sufficient to bar this right to interest. The executors were aware shortly after the purchase that it was complained of.

Another objection was raised on this appeal, that the executors had not been charged with the crops in the ground at the time of testator's death. But the land

Judgment.

was devised to the widow for life, and consequently, she, and not the executors, were entitled to the emblements (*b*).

The second exception was abandoned. The first and fourth exceptions therefore are allowed; the second and third disallowed.

No costs to either party.

The report will be referred back to the Master, unless the parties can settle the amounts themselves.

(*a*) 15 Gr. 559.

(*b*) Williams Ex., 6 ed., 674.

COTTER V. COTTER. 1874.

Appeal from Master—Contradictory evidence—Objection to Master acting.

Where a reference was made to a local Master, who had prior to his appointment been the counsel of one of the litigants, neither party objecting to his taking the reference, and on the contrary, the Master certified that he acted in the reference at the pressing instance of both parties; the Court *held* the other party, against whom the Master reported, could not raise that objection on an appeal from the report, having taken the chance of the Master finding in his favour.

Where on a reference to the Master the plaintiff swore that he never received the amount of a legacy to which he was entitled, and the defendant swore that he had paid all but $80, and a witness called by the plaintiff proved an admission by the defendant that the whole legacy was due, but the Master having reported that this witness was not to be relied on, the Court, in view of all the circumstances, refused to disturb the Master's finding.

Statement.

The decree in this cause directed the Master at Hamilton to inquire and state what sum (if any) was due to the plaintiff by the defendant, on account of his share of the legacy of £150, given by the will of the testator *John Cotter* in the pleadings mentioned to *Mary Louisa Cotter*, and by such will charged upon the lands of the defendant.

The testator had by his will given £150 to *Mary Louisa Cotter*, one half to be paid when she attained 21 years of age, and the other half when she attained 24 years of age, and if she should die previous to receiving the amount bequeathed to her in whole or in part without heirs, the sum remaining unpaid should be equally divided among the survivors or their legal personal representatives. *Mary Louisa* died on the 26th November, 1852, before attaining 21, and without issue, and the survivors entitled to her legacy were the plaintiffs, *Stewart Cotter* and *Horatio Nelson Cotter*. The plaintiff by his bill charged that nothing had been paid to him on account of his ⅓ share of *Mary Louisa's*

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legacy, being $200, and the defendant by his answer alleged that it had been all paid except $80.

The Master by his report found due to the plaintiff $80, and interest for six years—$38.88.

The plaintiff appealed because the Master had erroneously found that the defendant had before the commencement of the suit paid to the plaintiff all but $80 of his share of the legacy.

Mr. *R. Martin* for the appeal.

Mr. *C. Moss*, contra.

PROUDFOOT, V. C.—The plaintiff, the defendant, *Horatio Nelson Cotter*, *John Cotter*, and *Robert L. Ashbaugh* were the witnesses examined. The plaintiff denied having received the $200, or any part of it. The defendant swore that he had paid $120. *Horatio Nelson Cotter's* evidence, if credible, would have established the admission of the defendant in 1872, that the whole $200 were due on the legacy to the plaintiff, and the defendant does not say any payments were made since; but the Master has noted in the deposition that "this witness exhibits a most unbecoming and hostile feeling towards the defendant." The defendant denies this admission. And the Master in a paper containing the reasons for his report says, "I disregard his (*Horatio Nelson Cotter's*) evidence as utterly unsafe to rely upon, the violence of his manner, his bitter hostility towards the defendant, and the studied and precise language in which he puts the alleged admission, (language not likely to be used even if the claim had not been in dispute), render his evidence in my opinion of no value whatever."

Judgment.

I have carefully gone over the papers produced, and the evidence other than that of *Horatio Nelson Cotter*;

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and the circumstances alleged by the defendant, in support of the payment, seem to me to counterbalance those adduced by the plaintiff as inconsistent with the fact of payment. If an admission, however, by the defendant were clearly proved that in 1872 he owed the whole $200 to the plaintiff it would outweigh the circumstances from which the defendant desires payment to be inferred. The propriety of the report turns entirely on the question whether *Horatio Nelson Cotter's* evidence was properly disregarded by the Master. It is impossible for me to say that the Master was wrong. In *Day* v. *Brown* (*a*), the Chancellor speaking for the full Court says, "If upon an appeal involving the question of the weight to be attached to oral testimony, the Judge hearing the appeal should overrule the Master he would run a great risk of being in the wrong. * * * The Master having himself seen the witnesses, having observed their demeanor, and not only their answers but their mode of answering;—their appearance, manner, and the many minor circumstances attending the examination of witnesses which give to or detract from the value of oral testimony, had materials for forming a more correct judgment as to the weight to be attached to it than any one from merely reading the evidence can possibly have."

Judgment:

Counsel for the appellant made some severe strictures on the Master for having undertaken a reference to which the defendant, for whom the Master had formerly acted as Counsel, was a party. It is to be regretted that the Master should have taken the account under these circumstances, but he says he did so at the pressing instance of both parties. In that case it is too late for the plaintiff to have taken the risk of a finding in his favour and when adverse to complain of the Judge. Besides, he had it in his power to have had

(*a*) 18 Gr. 681.

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the reference taken elsewhere, for on the mere suggestion that the Master had stood in such a relation to any party, the Court would have referred the case to another Master.

The appeal is dismissed with costs.

CUMMINS v. THE CREDIT VALLEY RAILWAY COMPANY.

Lands taken for railway—Lands injuriously affected—Damages.

Instead of proceeding under the Statute to ascertain the amount to be paid to the owner of lands taken for the purposes of a Railway, the parties consented to a decree referring it to the Master to ascertain and settle the amount payable by the Company "for compensation or damages for the lands * * *taken or to be taken*" by the Company; the Master to have all the powers of an arbitrator, under Chapter 66. C. S. C., but to act as Master, with a right to either party to appeal.

Held, that under this reference the Master had no authority to award compensation to the owner for the severance of one portion of the property from the other, or on account of access to a spring being obstructed, nor for increased risk of fire to the premises of the owner, nor for lands injuriously affected in any way but not taken.

Statement.

In this case a decree had been made by consent referring it to the Master to ascertain and settle the amount payable by the defendants to the plaintiff "for compensation or damages for the lands of the said plaintiff taken or to be taken by the defendants," and the Master was to have all the powers of an arbitrator, under Chapter 66, of the Consolidated Statutes of Canada, but to act as Master, with a right to either party to appeal if so advised.

In pursuance of this decree the Master reported the amount payable by the defendants to the plaintiff for

compensation or damages for the lands of the plaintiff taken by the defendants was $408.55. 1874.

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The defendants appealed from this report on the grounds (1) that there was no evidence that the lands in respect of which damages were found due to the plaintiff belonged to, or were, in fact, the lands of the plaintiff; (2) that the Master should not have found anything due to the plaintiff until she had established her title to the lands: (3) that an outstanding mortgagee should have been joined as a party in the Master's office; (4) that the plaintiff undertook that evidence should be given of the payment of the mortgage, or of the consent of the mortgagee to be joined or bound by the proceedings, which had not been done; (5) that the damages are excessive by $277; and (6) that the Master made no allowance for the increased value given to the lands by the construction of the Railway.

Statement.

The sum of $408.55, reported by the Master, was made up as follows:—

$2\frac{99}{100}$ acres of land at $55 per acre,...	$143.55.
Diminution in value of two acres by severance,.....	40.00.
Diminution in value of 10 or 12 acres by severance.....	75.00.
Damages from access to spring being obstructed, &c.,.....	50.00.
For increased risk of fire,.....	100.00.
	$408.55.

The $277 excess. mentioned in the 5th ground of appeal, consisted of $12 on the value of the land taken, and all the other items mentioned above.

Mr. *Wells*, for the appeal.

Mr. *J. A. Boyd*, contra.

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PROUDFOOT, V. C.—All the subjects for which the Master has estimated damages are proper for consideration when the inquiry is in respect of lands injuriously affected, and if these are the subject of inquiry under this decree, I think the Master has fairly and properly estimated them according to the evidence.

But the appellants object that damages for lands injuriously affected cannot be inquired into under this decree, which directs the Master to ascertain the amount payable for compensation or damages for the lands *taken or to be taken*,—and in this I think the appellants are right.

The decree is by consent, and the only question to be determined is, whether compensation or damages for lands taken or to be taken, includes compensation for lands injuriously affected. The Railway Act (Consolidated Statutes of Canada, Chapter 66, Section 5), provides that compensation shall be made for the value of lands taken, and for all damages to lands injuriously affected by the construction of the Railway; and section 11, sub-section 5, permits agreements to be made with the owners for the compensation to be paid for the lands, or for the damages; and in case of disagreement sub-section 6 enacts that the notice to be served on the party shall contain a description of the lands to be taken, or of the powers intended to be exercised with regard to the lands, a declaration of readiness to pay a certain sum as compensation for such lands or damages, and the name of an arbitrator.

Judgment.

In the present case I understand that no notice was given by the defendants, which was the reason for filing this Bill; the consent decree may therefore be considered as an agreement between the parties, under the 5th sub-section, and the Master is to have all the powers of an arbitrator under the Act. But an arbitrator under

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the Act on a reference to ascertain the value of lands taken or to be taken, would have no power to inquire as to those injuriously affected. The matters are essentially distinct. One may exist without the other, and the value of lands taken cannot by any reasonable implication include damages to lands that are not taken. The parties have chosen to specify the subject to be submitted for adjudication, and I am in no position to inquire into their reasons for the limited nature of the inquiry.

In the *Great Western Railway* v. *Warner* (*a*), cited by Mr. *Boyd*, the Company had given the Statutory notice as to *compensation and damages*, and the question discussed was, whether the matters for which damages were estimated were proper subjects for compensation.

In all the cases I have seen of damages claimed for land injuriously affected, a specific reference on the subject has been made to the arbitrator, and in *Widder* v. *The Buffalo & Lake Huron Railway Company* (*b*), they were the only subjects of reference. When the notice is given by the Company it must contain an offer to pay the damages caused by the construction of the Railway, which would include damages to lands injuriously affected.

Judgment

The bill, I may remark, seems to be confined to lands taken, as it prays that if the defendants are justified in taking the premises it may be referred to the Master to settle the compensation payable in respect thereof.

As this objection was not taken before the Master, I think it reasonable the appellants should pay the costs of the appeal in respect of it.

It was stated by counsel for the respondent, and I understand assented to by counsel for the appellants, that

(*a*) 19 Gr. 509.

(*b*) 24 U. C. Q. B. R. 520; 27 Ib. 425 in appeal.

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the outstanding mortgage, which was the only objection to the plaintiff's title, was discharged the day after the report was signed. As this, while it relieves the defendants from any difficulty in paying the money, was not a strict compliance with the undertaking to produce such evidence, which must have meant in time for report, and as the fact of a mortgage need not have prevented the defendants from paying into Court, I overrule the 1st, 2nd, 3rd, and 4th exceptions, without costs; and allow the 5th except as to the $12 excessive value of lands taken. I overrule the 6th with costs, as I think there was no sufficient evidence to justify an allowance in regard to increase of value from the making of the Railway.

In Re Mason and Scott.

Arbitration—Special case—Parol evidence.

On the treaty for the lease of a mill property, between the executors and trustees of the deceased owner and an intending lessee, the executors and trustees expressly agreed that they would rebuild a dam upon the premises, and the rebuilding of which was a condition on which the lease was entered into, and without which the lessee would not have executed it; subsequently, two of the executors and trustees resigned, and others were appointed in their stead:

Held, that the agreement which had been made could be established by parol, and that the same was binding on the estate of the testator.

Statement.

This was a motion on the petition of *James Scott*, setting forth a special case stated by an arbitrator for the opinion of the Court under the 162nd section of the C. L. P. Act, which stated that it appeared (1) that in the year 1870 *Joseph R. Cherrier*, *James Stevenson*, and *Daniel S. Murphy*, executors and trustees of the late *Daniel Murphy*, were desirous of renting the property belonging to the estate of *Daniel*

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Murphy, known as the "Bronte Mill Property," in the leases specified, and which consisted of a farm and mill privilege containing in all 200 acres, and capable of being rented in two parcels: one parcel known as "The Farm," of about 150 acres, the other called "The Mill Property," as a flouring mill with the mill privilege and low lying pasture lands along the mill stream containing about 50 acres. At this time the mill property was in a bad state of repair. The mill had been last used as a paper mill, which had been abandoned, and the above-mentioned executors and trustees had determined to restore the mill as a flour mill, for which purpose it had originally been built; and to fit it up with good machinery and make the water power available by proper works. The farm was also in bad order and required expensive improvements. These improvements were absolutely necessary in the interest of the estate to save the property from destruction and make it produce an income.

Statement.

(2) The negotiations which preceded the execution of the lease hereinafter mentioned, were conducted in the first instance on the footing that *Scott* should lease the mill property only, and it was agreed that *Cherrier*, *Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid, should put the flouring mill into good order as a merchant and grist mill, and build within a reasonable time a fixed or permanent dam across the creek on which the mill was built, so as to control and utilize the whole body of the stream passing down the creek, and on this basis the negotiations proceeded, but before the lease was executed it was agreed that *Scott* should take a lease of the farm as well, and make the improvements on it which are mentioned in the lease. In all other respects the original agreement remained unaltered.

(3) In proceeding on the reference counsel for *Scott* tendered oral evidence and documents not under seal to

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prove the alleged agreement in regard to building the dam. Counsel for *John James Mason*, *Daniel S. Murphy*, and *Charles R. Murray*, executors and trustees as aforesaid, *Mason* and *Murray* having been appointed by the Court in the room of *Cherrier* and *Stevenson*, objected to the reception of such evidence, but the arbitrator received the said evidence subject to such objection, and he found as a fact that *Cherrier*, *Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid, did verbally undertake, promise, and agree with *Scott* that they the said *Cherrier*, *Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid, would within a reasonable time after the execution of said lease erect and build a good and substantial dam across the mill stream, sufficient to control and utilize the whole body of the said stream, and which was in fact required for the making of the water privilege and flouring mill in the lease mentioned available to the said *Scott* under said lease, and without which dam the said mill privilege and flour mill were practically valueless

Statement.

(4) He further found that the said lease, dated the 1st day of June, 1871, was executed by all the parties thereto on the date thereof or within a few days thereafter: that such lease was prepared in its present form on the said understanding and agreement that a dam of the nature aforesaid was to be built as aforesaid, and thereafter kept in repair by *Scott*, but there was no evidence of any actual words used by way of promise or agreement of the nature aforesaid at the time of the actual execution or delivery of the lease, but the lease was executed, delivered, and accepted by all the parties thereto on the faith, agreement, and understanding that a good and substantial dam of the nature and character aforesaid would be built as aforesaid, and within a reasonable time as aforesaid, and but for this faith, agreement, and understanding, the lease would not have been executed or accepted.

The said *Cherrier*, *Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid, did repair the said mill, but they did not build, and have not built, a good and sufficient dam of the nature aforesaid, and a reasonable time for building the same has long since elapsed.

(5) There was at the time of the said negotiations, and when the said lease was signed, an old dam on the mill creek in a ruinous condition. This dam had been used to drive the mill when used as a flour mill by *Scott* as a tenant thereof in 1866, and owing to the failure of the said stream, dry seasons and interference th the power by other mills higher up the stream, the said old dam (which did not retain the water of the stream, but merely turned it into the race) was not sufficient to drive the mill, and this fact was known both to the said *James Scott*, and the said *Joseph R. Cherrier*, *James Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid, while negotiating with said *Scott* and at the time of the execution of said lease as aforesaid. Statement.

(6) The said lease, the probate of the will of the said *Daniel Murphy*, and the decree of this Court under which the said *Cherrier* and *Stevenson* were removed from the office of executors and trustees as aforesaid, under the will of the said *Daniel Murphy*, and the said *John James Mason* and *Charles R. Murray* appointed in their places, were to form and be read as part of the case thereby stated.

Two questions were argued before the Court: first, whether the existence of an arrangement of the nature referred to in the third paragraph of the case could be established by oral evidence, or by documents not under seal? and, second, if admissible, were the present executors and trustees liable for the breach of the agreement made with their predecessors?

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Mr. *Bain*, for *Scott*.

Mr. *McKelcan*, for the trustees, contra.

PROUDFOOT, V. C.—I think both questions must be answered in the affirmative. The agreement that the trustees should rebuild the dam was a condition on which the lease was entered into, and unless it had been made *Scott* would not have executed the lease—and although at the time of signing and executing it there was no promise made to the effect of the agreement, I think it was quite competent to *Scott* to show by such evidence that the agreement actually had been made, and that it was the basis on which the lease was executed.

Judgment.

The cases referred to of *Lindley* v. *Lacey* (*a*), *Davis* v. *Jones* (*b*), *Malpas* v. *The London and South Western Railway Company* (*c*), *Morgan* v. *Griffith* (*d*), and *Mason* v. *Brunskill* (*e*), support the contention of *Scott* on this point. Nor does the case of *Losee* v. *Kezar* (*f*), conflict with them. The agreement in that case relied on was a promise to pay for improvements made during the tenancy in case the lease were terminated before the term expired, and the lease contained no agreement to that effect. This could in no sense be considered as collateral to the lease, but was providing for things done under it, and inconsistent with it.

I am equally clear that the existing trustees *qua* trustees are bound by the agreement of the former ones, and I am quite unable to follow the argument of the counsel for the trustees, as applicable to proceedings in this Court, who contended that if the agreement were collateral the present trustees were not bound, as they were assignees of the reversion, and were only liable on

(*a*) 17 C. B. N. S. 578.
(*b*) 17 C. B. 625.
(*c*) L. R. 1 C. P. 336.
(*d*) L. R. 6 Ex. 70.
(*e*) 15 U. C. B. R. 300.
(*f*) 5 U. C. C. P. 234.

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covenants running with the land. It is quite impossible to hold that while the trust continues the transfer of the legal estate to preserve the chain of trustees should have any such effect. The parties to the agreement are the *Murphy* estate on one hand and *Scott* on the other, and it is quite immaterial who represents the estate, or that the same persons should continue to represent it. The award does not purport to affect the trustees with any personal responsibility, and finds against them only in their representative character.

The Erie and Niagara Railway Company v. The Great Western Railway Company.

Interlocutory injunction.

The office of an interlocutory injunction is simply to retain matters in *statu quo*; where, therefore, the railway track of the Niagara Falls Suspension Bridge had been declared to be a public highway and that an agreement that the same should be used by one railway exclusively was *ultra vires* the charter of the bridge company, *The Erie and Niagara Falls Railway Company* moved to restrain the *Great Western Railway Company*, with whom such illegal agreement had been made, from preventing the *Erie and Niagara Railway Company* from crossing the lands of the *Great Western Railway Company* in order to obtain access to the bridge; and it was shewn that the latter company were not *actively* interfering to prevent the approach being obtained, but were simply passive: the Court, on interlocutory motion, refused the injunction, although of opinion that, at the hearing, the relief should be granted.

Motion for injunction under the circumstances appearing in the judgment.

Mr. *Cattanach*, for the motion.

Mr. *Barker*, contra.

Judgment.

Proudfoot, V. C.—*The Erie and Ontario Railroad Company* were incorporated by an Act of the Province

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of Upper Canada in 1835 (*a*), and in 1852 the charter was amended by an Act of the Province of Canada (*b*), by authorizing the Company to vary or alter in their discretion their line of road, and to pass by or near the Niagara Falls Suspension Bridge and thence to the Queenston Mountain at the ravine leading to St. Davids, or atsuch other point as they might deem most advisable, &c., and to extend one or more branches thereof from such point or points on their said road as they might deem advisable to the said Suspension Bridge, to the Clifton House and to the village of Queenston, &c., and they were granted the same rights and powers to enter into, survey, and procure title to the lands required for the purposes of the Company as regards the altered route of the road as well as regards the extension, as were provided for by the original charter of the Company in relation to enteringupon,surveying and procuring title to lands generally for the purposes of the Company.

Judgment.

The fourth section of this Act empowered the Company to contract or agree with any Bridge Company to transport passengers and freight across and to and from the Niagara River at any point between Lake Ontario and the south western terminus of the road. The sixth section enacted that it should be lawful for the Company to cross,intersect, join and unite their railway with any other railway at any point on its route or branches, and upon the lands of such other railway, with the necessary conveniences for the purpose of such connection, and directed the mode of ascertaining the compensation to be made in case of disagreement.

The town of Niagara advanced large sums for the construction of the railroad which were partly secured by first mortgages on the road, and in 1862, neither principal nor interest having been paid, the town obtained an Act

(*a*) 5 Wm. IV., c. 19. (*b*) 16 Vic. c. 50.

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(*a*), authorizing it, with the approval of the Governor in Council, to sell and convey all the right, title, franchises, privileges, and interests, both at law and in equity, conveyed to or vested in i under the mortgages to any person or body politic. The third section of this Act provided that nothing in that Act contained should, among other things, confer or permit any rights on any portions of *The Great Western Railway Company.*

In 1857 an Act was passed incorporating *The Fort Erie Railway Company* (*b*), which in 1863, was amended by the 27 Vic. c. 59 and the name changed to that of *The Erie and Niagara Railway Company*, the present plaintiffs, and they were authorized to construct a railway from Fort Erie to Chippawa and thence, upon the acquisition by them of *The Erie and Ontario Railway*, to the town of Niagara. The 17th section incorporated with this Act the several clauses of the railway consolidation Act with respect to the 1st, 2nd, 3rd, and 4th clauses thereof, and also the clauses in respect to interpretation, incorporation, powers, lands and their valuation, general provisions, &c., except such provisions as apply to matters and things for which express provision was made by that Act. The 20th section enabled the Company to unite or make traffic arrangements with any other railway company or companies, or with the International and any other bridge company; or to lease their railway to any other company with the necessary conveniencies for the purposes of such union, occupation, or traffic arrangements. The 21st section recited that under the 25 Victoria, chapter 32, the Town of Niagara had granted and conveyed to *W. A. Thomson* the Erie and Ontario Railroad, together with all and singular the houses, buildings, stations, station ground, rights, ways, franchises, privileges, and appurtenances of any kind or nature whatsoever to the said *Erie and*

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(*a*) 25 Vic. c. 32.

(*b*) 20 Vic. c. 151.

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Ontario Railroad or *Railroad Company* in anywise appertaining, but subject to the provisoes, conditions and agreements in the indenture mentioned; and enacted that *The Erie and Niagara Railway Company* might purchase from *W. A. Thomson* or his assigns *The Erie and Ontario Railroad*, with all and singular its houses, buildings, stations, station ground, rights, ways, franchises and appurtenances, and when so acquired the same should be incorporated with *The Erie and Niagara Railway Company* and thereupon *The Erie and Ontario Railroad* with all its franchises and privileges should vest in and become part of *The Erie and Niagara Railway Company*, but subject among other things to the following conditions, that nothing *herein* contained should confer any rights on any portion of the Great Western Railway. The 28th section, enacted that the railway should be completed within two years from and after the passing of the Act.

Judgment.

In 1868, the Legislature of Ontario (*a*), incorporated *The Erie and Niagara Extension Railway Company*, with power to construct a line of railway from a point in the township of Bertie at or near Fort Erie westward to Sandwich or Windsor with a branch to Amherstburgh, and incorporated in that Act (but so far only as these clauses might be construed to have reference to any act, deed, matter or thing, to be done, executed, fulfilled, or performed within the limits of the Province of Ontario), the clauses of the Railway Consolidation Act relating to incorporation, powers, lands and their valuation, general provisions, &c. The Legislature of Ontario in 1869 (*b*), changed the name of this company to "The Canada Southern Railway Company": and in 1872 (*c*), the Company were authorized (*d*), to make arrangements for the conveyance or transit of traffic with any other railway company or companies or with the international or any

(*a*) 31 Vic. ch. 14.
(*b*) 33 Vic. ch. 32.
(*c*) 35 Vic. ch. 48.
(*d*) S. 9.

other Railroad Bridge or Tunnel Company, and enter into agreements, among other things, for the use and working of the railway or bridge or of any part thereof and the conveyance of traffic thereon; and (*a*), to acquire by purchase or lease the Erie and Niagara Railway and their lands or other property, and upon such acquisition to exercise all and every the rights, franchises, and privileges conferred by the Acts of Incorporation of that Company so far as relates to any matter or thing to be done or proposed within the Province of Ontario.

The Railway Act (*b*), before referred to as The Railway Clauses Consolidation Act, by the 15th sub-section of section 9, enabled the Company to cross, intersect, join, and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purpose of such connection: and the owners of both railways might unite in forming such intersection and grant the facilities therefor; and in case of disagreement upon the amount of compensation to be made therefor or upon the point or manner of such crossing and connection, the same should be determined by arbitrators to be appointed by a Judge of one of the Superior Courts, &c. The 130th section provides that no Railway Company shall avail itself of any of the powers contained in the 15th sub-section of section 9, without application to the Board of Railway Commissioners for approval of the mode of crossing, union, or intersection proposed; and when such approval has been obtained it shall be lawful for either railway, in case of disagreement as to the amount to be paid for compensation, to proceed for such compensation as provided in the said sub-section. Section 132 makes the 130th section with some others apply to every railway made or to be made in this Province but shall not apply to anything done before the 30th June, 1858. The

Judgment.

(*a*) by S. 11.

(*b*) Con. Stat. Can. ch. 66.

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3rd section enacts that when a special act incorporates any of the clauses of the Railway Act, the clauses incorporated shall, save in so far as they are expressly varied or excepted by such Act, form part thereof. Under the head of "General Provisions" in the Railway Act, is included section 117, which enacts that if the construction of the railway be not commenced and 10 per cent. of the amount of the capital be not expended thereon within three years after the passing of the Special Act, or if the railway is not finished and put in operation in ten years from the passing of such Special Act the corporate existtence and powers of the company should cease.

The Great Western Railway has one of its termini at or near the Suspension Bridge over the Niagara River, and to enable *The Erie and Niagara Railway* to connect with the bridge it is necessary to cross or intersect the lands of *The Great Western*.

Judgment.

By an Act of the Dominion Parliament in 1872 (*a*), the works authorized by the Great Western Railway Acts shall be known as "The Great Western Railway," and they are declared to be for the general advantage of Canada; and the same shall continue subject to the provisions of the Railway Act, except those contained in the sections between the 2nd and the 125th, both inclusive.

On the 13th April, 1872, *The Erie and Niagara Railway Company* entered into an agreement with *The Canada Southern Railway Company*, whereby the latter Company were admitted into possession of the Erie and Niagara Railway, for a period of five years from the 20th of April, 1872, upon the understanding and agreement that they should work the railway, and should among other things pay the plaintiffs 25 per cent. of the gross

(*a*) 35 Vic. ch. 65, S. 5.

earnings, and *The Canada Southern Railway Company* is now working the railway under that agreement.

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In March, 1874, the plaintiffs applied to the defendants for permission to cross and intersect their lands so as to obtain access to the Suspension Bridge, and tendered compensation therefor, but the defendants refused to give such permission. The plaintiffs thereupon applied to the Railway Committee of the Privy Council (which has been substituted for the Board of Railway Commissioners mentioned in the Railway Act) to sanction and approve the crossing and intersection of the Great Western Railway by the plaintiffs as shewn and delineated on a plan annexed to their petition, and that the plaintiffs might be authorized to make and effect the proposed crossing and intersection and to occupy the parcel of land marked on the plan. On the 9th June, 1874, the Railway Committee approved of the mode of crossing and intersecting the defendants' railway by the plaintiffs upon the lands of the defendants and with the necessary conveniences for the purpose of such crossing and intersection proposed by the plaintiffs.

Judgment.

The defendants were then applied to for permission to cross, intersect, and occupy the lands mentioned in the order of the railway committee and tendered compensation, but permission was again refused, and the right denied.

The plaintiffs then applied to a Judge of this Court to appoint arbitrators to settle the amount of compensation to be paid for such crossing and intersection, who on the 30th June appointed three arbitrators for that purpose. The arbitrators made their award on the 9th July, fixing the amount of compensation at $1000.; which sum was, on the following day, tendered by the plaintiffs to the defendants and possession of the lands demanded. The defendants refused the money tendered, and ref- -l

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This bill was thereupon filed, which states so much of the foregoing as does not consist of the enactments quoted, and further that the Suspension Bridge has a railway floor which is now used for the transmission of the traffic, locomotives, and cars of the defendants and certain other railways to and fro between this Provincean d the United States, and it is open to the use of all railways that can reach it without discrimination, but subject to the payment of tolls and to the rules and regulations from time to time made by the Bridge Companies; and that the plaintiffs are entitled, in common with the defendants and other railway companies, to use the said bridge, and a large portion of their traffic would naturally pass over the said bridge in connection with other railways now using it, if they were not prevented from using it by the defendants. And that in the construction of the plaintiffs' railway it was contemplated that a large amount of the revenue should be derived from the use of it by other railways, and with that view special powers were given to the plaintiffs by Statute to permit the use of the line by other railways in the United States which have connection with Canada railways by means of the bridge; and that *The Canada Southern Railway* would also add largely to the traffic over the plaintiffs' line if access to the bridge were not denied to the plaintiffs, inasmuch as its own line connects with the Erie terminus of *The Erie and Niagara Railway*, and gives *The Erie and Niagara Railway* a connection with the western, north-western, and south-western States, as well as with a portion of this Province, extending over nearly 300 miles along *The Canada Southern Railway*.

Judgment.

The bill prays that the defendants may be restrained from preventing the plaintiffs from occupying, crossing,

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and intersecting the lands mentioned in the bill, with all the necessary conveniences as provided for in and in accordance with the order of the Railway Committee of the Privy Council, and from in any way interfering with the plaintiffs in making an approach to said bridge over the said lands, and generally from preventing the plaintiffs from enjoying their legal rights in the premises. The bill also prays that the defendants should be ordered to deliver possession of the lands, and to do all acts required on their part for the purpose of enabling the plaintiffs to complete their connection with the said bridge, and that an injunction may issue for that purpose if necessary, and that an account may be taken of the damages sustained by the plaintiffs.

A motion is now made for an injunction as prayed for in the bill, and affidavits were filed by the plaintiffs verifying the statements of the bill. The defendants also filed affidavits proving the laws of the State of New York, incorporating the *Niagara Falls International Bridge Company*, and also stating that within the last twelve months, and since the completion of the plaintiffs' railway, there has been constructed a short railway connecting with the plaintiffs' railway at its nearest point to the Suspension Bridge, and running from that point easterly for more than a quarter of a mile towards the said bridge, and which short railway is that by which the plaintiffs are seeking to make a connection, over the defendants' lands, with the said bridge; and that the lands mentioned in the bill were acquired by the defendants in 1852 for the use of their railway, and have ever since been used by them and are necessary for the proper, efficient, and convenient working of their traffic; that in 1853 the defendants obtained from the bridge companies a lease, under which they have ever since been and are now in the sole and actual possession of the railway floor of the whole of the bridge, and that no other company carries traffic across the bridge; that

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about half of the bridge is in Canada, constructed under the Act incorporating *The Niagara Falls Suspension Bridge Company*, and the other half is in the State of New York, constructed under the Act incorporating *The Niagara Falls International Bridge Company*; that the plaintiffs have no rolling-stock and are not working their railway, and are not in occupation of it or any part of it; that at the time of passing the Act (*a*) the only railways of the State of New York having their termini upon the Niagara River, were the New York Central Railway having its termini at the Suspension Bridge and at Buffalo, and the Erie Railway having its terminus at Buffalo, which is opposite Fort Erie, and it was then in contemplation to construct the Atlantic and Great Western Railway, westerly to Buffalo, to form a connection there with the Erie and Niagara; and the construction of the railway bridge at Fort Erie had not been commenced, but it was then in contemplation; and that the proposed new line of the plaintiffs upon the lands of the defendants, is neither a connection with nor an intersection of the Great Western Railway, and that the exclusion of the plaintiffs from the traffic crossing the bridge would be no greater damage daily than at any time during the past two years, and that the Canada Southern sends traffic across the International Bridge at Buffalo. I do not find any allegation or evidence that the plaintiffs purchased from Mr. *Thomson* the franchise, &c, of the Erie and Ontario, as contemplated by the 27 Victoria, chapter 59, but no objection was made on that ground, and I assume that such a purchase was made and perfected.

Judgment.

In *The Attorney General* v. *The Niagara Falls International Bridge Company* (*b*), it has been determined that the conveyance by the bridge companies to the defendants of the exclusive use of the bridge was

(*a*) 27 Vic. ch. 59. (*b*) 20 Gr. 34.

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ultra vires so far at least as the Canadian half of the bridge is concerned, and that the public were to enjoy a right of passage across so much of the bridge as is within the Province, subject to the payment of tolls, as freely as if it had been declared to be a public highway. It would be an odd result if the defendants can practically obtain the same exclusive use by having power to prevent other railways from crossing their property, by which alone access to the bridge can be obtained. It is contended by the defendants that they are not subject to the sections of the Railway Act invoked by the plaintiffs; and the clause of the 35 Victoria, chapter 65, is cited, which applies to the defendants the Railway Act, except the sections from 2 to 125, and therefore excluding section 9. with all its sub-sections. But the 130th section, which by the 132nd section is applied to all railways made or to be made in the Province, necessarily imports into it the 15th sub-section of section 9.

Judgment.

It is also contended that this 15th sub-section, if applicable, does not authorize what is sought for by this bill, as the plaintiffs do not ask to cross the road-bed of the defendants' railway, or to unite with it, but only seek for leave to cross the lands of the defendants, to reach the bridge. The language is "to cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for such connection." I do not think this is confined to a crossing or intersecting the road-bed of the other railway, for, excluding that part of the sentence as to uniting, as the sense plainly requires when considering the subject of crossing, it reads as giving power to cross and intersect upon the lands of the other railway, and would include the power of crossing the road-bed, or the lands, or both, and the last clause "with the necessary conveniences for such connection," is to be applied to the case where it is necessary to connect the roads.

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It is said, however, that the plaintiffs are under a special disability to demand such a crossing, as the 25th Victoria, chapter 32, section 3, which authorized the town of Niagara to sell under its mortgages, provided that nothing therein contained should confer or permit any rights on any portions of the Great Western Railway, and that the 27th Victoria, chapter 59, section 21, which authorized the plaintiffs to acquire from Mr. *Thomson* what he had purchased at such sale, also contained a clause "that nothing *herein* contained shall confer or permit any rights on any portions of the Great Western Railway." By the 17th section of this Act the clauses of the Railway Act are incorporated by which the power to cross other railways is conferred on the plaintiffs. But it is said that the word *herein* in the 21st section applies to the whole Act, and for this construction is cited The Interpretation Act (*a*), which provides that whenever the word *herein* is used in any section of an Act it shall be understood to relate to the whole Act, and not to that section only, and therefore that the clauses of the Railway Act are to be qualified in such a manner as not to confer any rights on the Great Western Railway. But this section of the Interpretation Act only applies "unless otherwise provided for, or there be something in the context, or other provisions of the Act indicating a different meaning or calling for a different construction." The 21st section seems to me to indicate a different meaning, and call for a different construction. It is dealing with the purchase of the Erie and Ontario Railway by Mr. *Thomson*, and providing for the transfer by him to the plaintiffs, and enacts that nothing *herein*, *i. e.* in that transfer, shall confer any rights upon the Great Western. Then, confining it in that way, what is the meaning of the prohibition? It seems to me that it applies only to rights over the Great Western that may have been

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(*a*) Con. Stat. U. C., c. 2, s. 18, s.-s. 3.

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previously acquired or contracted for, and intended to secure that any such rights should only be obtained by proceedings under the new Act. By the fifth section the plaintiffs were authorized to construct a railway from Fort Erie to Niagara, which it was impossible to effect without crossing the line of the Great Western, and it would be an extraordinary construction of the Act to say that it at once permits and prohibits the same thing. The whole Act must be construed together, and such a meaning given to it as to carry out the intention of the Legislature. If that be the true construction, it is applicable whether the main line or a branch only is concerned. By the Act of 1852 (*a*), the Erie and Ontario, to whose rights the plaintiffs have succeeded, were authorized to construct a branch to the Suspension Bridge, which would be rendered nugatory if the plaintiffs have not the right to cross the lands of the defendants; and the Act of 1863 (*b*), enabling the plaintiffs to unite or make traffic arrangements with other railway companies, or with the International or other bridge company, would also be nugatory if the plaidtiffs have not the means of reaching the bridge.

Judgment.

It is said also that the compulsory powers of the plaintiffs have ceased, and if they ever had the powers sought to be enforced they are now gone. The different limitations of time in the special Acts,—seven years in the Fort Erie Act (*c*), two years in the 27th Victoria, chapter 59, section 28,—contain no penalty for not completing within the time specified, and are only directory, not imperative. The 117th section of the Railway Act fixes ten years for the completion of the road, and if not complied with the corporate existence and powers of the company shall cease, and that section being among the "general provisions" is incorporated with the Special Act of 1863 (*d*), but by section 3 of the Railway

(*a*) 16 Vic. c. 50, s. 1.
(*b*) 27 Vic. c. 59, s. 20.
(*c*) 20 Vic. c. 151, s. 15.
(*d*) 27 Vic. c. 59.

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Act the clauses incorporated shall form part of the Special Act, "save in so far as they are expressly varied or excepted by such Act." The limitations of seven years and two years are express variations, and therefore the 117th section does not apply.

The defendants further contend that *The Canada Southern Railway Company* are the real plaintiffs, and that they, being incorporated by the Legislature of Ontario, are incapable of exercising rights properly grantable only by the Dominion Parliament. That may be so, and if the agreement between the two companies purports to confer such rights, it may to that extent be invalid or inoperative; but all the rights sought to be enforced by this bill are exercisable within the Province of Ontario, all that is asked is the exercise of the right to reach the bridge, not to cross it. The organization of the plaintiffs' company is kept up; they are entitled to a per-centage of the profits of working the road, and, after five years, to the road itself, and I see no reason why they may not as plaintiffs seek to render it more remunerative to them, and establish a traffic which, after the lapse of the five years, will return the road, with an established and enlarged business, into their possession.

Judgment.

While these considerations induce me to think that the plaintiffs would, in the absence of facts that may be disclosed by the answer to defeat their right, be entitled at the hearing to the relief they ask, it is quite another question whether they can obtain it upon a motion for an interlocutory injunction. Notwithstanding the very much enlarged operation of late years given to this writ, a marked distinction is yet maintained between what is to be effected by an interlocutory injunction and by the decree at the hearing. It is seldom that the whole case can be adjudicated on upon motion; and the use of the writ is confined to maintaining or restoring the *status quo* until the hearing. None of the cases cited to me,

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at all events, and none that I am aware of, do more than this. They command the undoing of a wrongful act, but not the doing of a positive act giving effect to a right which has not previously been actively interrupted. In *Beadell* v. *Perry* (*a*), the defendant was building a wall diminishing the access of light to the plaintiff's windows, and an injunction had been obtained in the long vacation, and leave given to move for a mandatory injunction; in the interval the defendant continued to build, and an injunction was ordered to compel him to take down the wall. In *Lane* v. *Newdigate* (*b*), the defendant was violating covenants entered into by him in a lease, and the injunction compelled him in effect to observe them. In *Robinson* v. *Lord Byron* (*c*), the motion was made on the 7th May, 1785, to restrain the defendant from preventing the water flowing to a mill which the plaintiffs used for a cotton manufactory. Since the 4th of April, 1785, the defendant, who had large pieces of water in his park, supplied by the stream which flowed to the mill, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill; and an injunction was ordered to restrain the defendant from using the dams and other erections otherwise than he had done before the 4th of April, so as to prevent the water from flowing to the mill in such regular quantities as it had done previously. From a report of subsequent proceedings in this case (*d*), it seems that one trial at law was not considered sufficient to determine the plaintiff's right to a perpetual injunction. In *Staight* v. *Burn* (*e*), the defendants were building a wall interfering with the light coming to the plaintiff's windows, and were ordered to stay further proceeding with the wall; not to pull down what had been already built, because the cause

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(*a*) L. R. 3 Eq. 465.
(*b*) 10 Ves. 192.
(*c*) 1 Bro. C. C. 588.
(*d*) 2 Cox, 4.
(*e*) L. R. 5 Ch. 163.

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might be brought to a hearing before the plaintiffs were actually to begin carrying on their business in the rooms of which the light was obstructed. In *Goodson* v. *Richardson* (*a*), the defendant had, in defiance of the prohibition of the plaintiff, laid water-pipes in a highway of which the plaintiff owned the soil, and he was compelled by injunction to remove them (*b*). But none of these cases establish, nor have I been able to find any which do establish the proposition that the plaintiffs can obtain by mandatory injunction the enjoyment of a right which has only recently become a right at all, and which the defendants have done no act to interfere with. The defendants are doing nothing; they simply refuse to recognize the right of the plaintiffs.

Judgment.

Considering that all that the plaintiffs claim, or at least all that it seems to me they can claim, is an easement or right of way over the lands of the defendants, of which they have never been in possession, so far as that expression is applicable, and that the defendants deny the plaintiffs' right on grounds which, though they may appear to me to be untenable, I cannot pronounce to be frivolous; and, considering the nature of the injunction, I think that I should be going further than the Court has hitherto gone if I were to grant this injunction.

The case of *The East Lancashire Railway Company* v. *Hatherley* (*c*), cited for the plaintiffs, is not an authority that the Court will interfere on interlocutory application, in the absence of some wrongful act of the defendants. That was a case between the company and a contractor for building part of their line. The contractor had not completed the work within the time mentioned in his contract, and the plaintiff sent some

(*a*) L. R. 9 Ch. 221.
(*b*) Kerr on Injunctions, 230, 231; 2 Joyce on Injunctions, 1310.
(*c*) 8 Hare, 72.

workmen to perform the works not finished by the defendant. The workmen were driven off by a larger number employed by the defendant, and for a period of two months collisions frequently took place and were daily expected between the workmen of the plaintiffs and the defendant. The order made seems to have been a compromise to a considerable extent, but the peculiar circumstances of that case render it of not much value as applied to this. It is, however, an authority that the damage the plaintiffs complain of here is of that irreparable character which would justify an injunction if otherwise entitled to it.

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The defendants also allege that the contract of the defendants with the bridge companies is not *ultra vires*, so far as the American half of the bridge is concerned, and that the defendants have the right to the exclusive use of that half, and that the Court will not grant an injunction which would be practically useless, as it would at the utmost give the plaintiffs only the right to the use of the Canadian half of the bridge. I need not consider the effect of this, as I think the injunction should not be granted on other grounds.

Judgment.

Motion refused, with costs.

Subsequently, by order of the Court, the cause was brought on by way of special motion for decree, when

PROUDFOOT, V.C., made a decree, granting the *Erie and Niagara Railway Company* the relief asked for.

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FERGUSON v. FRONTENAC.

Mortgage—Tacking—Appeal—Costs.

A treasurer gave to the municipality a mortgage to secure the moneys of the municipality coming to his hands. On taking an account in a suit to redeem, it was *held* that the municipality were not at liberty to tack a simple contract debt due to them by the plaintiff before the execution of the mortgage.

The plaintiff appealed from the report of the Master stating eleven objections thereto. On the argument he abandoned one, two were found in his favor, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the Court, instead of giving one set of costs to the plaintiff and another to the defendant, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff.

Appeal from the report of the Master at Kingston by the plaintiff.

Mr. *Walkem*, for the appeal.

Mr. *Snook* and Mr. *Cattanach*, contra.

Judgment.

SPRAGGE, C.—As to the tenth objection: I think the item in question was not before the Master. It was a sum of money alleged to be due by the plaintiff to the defendants. If due, it was before the giving of the mortgage, and the mortgage is to secure the payment of moneys of the defendants which should thereafter come to the hands of the plaintiff.

Mr. *Cattanach* refers to a passage in *Coote* to shew that upon default in payment of mortgage money the mortgagor would not be admitted to redeem except upon payment also of simple contract debts. Mr. *Coote* does not state such to be the rule, as it clearly is not, but refers to a case in *Finch's Precedents*, and to *Fonblanque* on Equity. The case in *Finch*, *Demaubry* v. *Metcalf*, was the case of the pawning of chattels, some jewels,

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and a subsequent advance of a further sum of money by the pawnee; and, upon bill to redeem, redemption was only allowed upon payment of both sums, and at the end of the case is a dictum that the same rule would apply in the case of a mortgage of lands. Mr. *Fonblanque* expresses no very decided opinion, but refers to *Baxter* v. *Manning* (*a*), where, after a mortgage, the mortgagee advanced to the mortgagor a further sum upon his bond; and the Court decreed that the mortgagor could not redeem without paying both. If this was law now, still this case is different, for here the alleged debt was anterior to the giving of the mortgage; but the law is now settled that for subsequent advances the mortgagee has no equity to charge the land mortgaged merely because he held a mortgage for money advanced. I felt no hesitation upon the point at the time, and said so, but desired to look at the authorities to which I was referred. The Master makes a finding upon this item without charging it against the plaintiff in taking the account. He probably made this finding because issues are raised by the answer as to moneys due by the plaintiff before as well as after the mortgage; but, as it is only in making the inquiry as to the amount due upon the mortgage that the Master is directed to find the issues raised by the pleadings, any issues not pertinent to that inquiry were not before him, and his finding upon the item in question was upon a matter not referred to him. It was indeed unnecessary to appeal as to this item, as it could have been dealt with upon further directions, and it is not necessary now to open the report in order to its correction. The order to be made upon this appeal will declare in regard to the finding of the Master upon that item, that it was not before him, the mortgage being to secure only moneys that should accrue due after its execution.

Judgment.

With regard to the costs of the appeal: The objections are eleven in number. The plaintiff fails as to all but

(*a*) 1 Ves. 244.

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two, and abandons the eleventh. Of the two upon which I agree with him, one is a very small matter ($100), and upon which there might fairly exist a difference of opinion; and the other might have been raised upon further directions. Though there were eleven objections, there were not eleven distinct questions. The first three were in respect of the audits, as to which, I agree with the plaintiff that there were audits, but still agree with the defendants upon the substantial questions that the accounts are impeachable. The fourth, fifth, and sixth objections related to the allowance of interest; the first six objections then raised practically two questions; the seventh and eighth two more, four in all, upon which the defendants succeed. I have observed upon the two upon which I agreed with the plaintiff; the eleventh is abandoned. Instead of giving one set of costs to the plaintiff and another to the defendants, involving the expense of separate taxations, I think, the

Judgment.

defendants succeeding, as they do substantially, though not wholly, the best course will be to give to the plaintiff no costs directly, but to give to the defendants their costs of the appeal generally, deducting however a portion, which I fix at one-fourth, in respect of the partial success of the plaintiff.

DORNYN v. FRALICK. 1874.

Redemption suit—Deed absolute in form—Time for payment of overdue instalments of principal, interest, and costs—Orders 461 *and* 462.

In a suit to declare a deed absolute in form to be a mortgage, and to restrain an action of ejectment against the plaintiff, it appeared that at the date of the commencement of the action the plaintiff was in arrear of payments of interest to the defendant upon the agreement entered into between them when the deed was given. *Held*, that the plaintiff was not entitled to six months for payment of the arrears and costs.

The bill in this case was filed to have it declared that a deed of the north 56 acres of the south half of Lot No. 36 in the 5th concession of the Township of Morris in the County of Huron, made by the plaintiff to the defendant, though absolute in form was only intended to be a mortgage, and to restrain an action of ejectment brought by the defendants against the plaintiff for the recovery of possession of the said land, and for a reconveyance to the plaintiff. Statement.

The bill in substance alleged that the plaintiff was an ignorant and illiterate man much under the influence of the defendant, who was a shrewd and intelligent business man; that the plaintiff being embarrassed and pressed for payment of debts owing by him, applied from time to time to the defendant to assist him; that the defendant did assist him by paying off some of the said debts, and by advancing him small sums of money; that after various transactions between them the plaintiff was induced by the representations of the defendant, that a large sum was due to him, and that a large additional sum was required to pay off debts against the plaintiff, to convey the lands in question to the defendant, the defendant agreeing to pay off the said debts, and to reconvey the lands upon repayment in five years of the amount due to him in respect of the said indebtedness and the amount required to pay off the said debt;

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that the plaintiff had prior to the date of the said conveyance paid to the defendant large sums on account of the said indebtedness, and that the defendant had greatly misrepresented the amount required to pay off the said debts due by the plaintiff; that it would appear on an account being taken that the defendant had been overpaid; that the defendant had commenced and was prosecuting an action of ejectment against the plaintiff and that he had no defence or remedy at law; and the plaintiff amongst other things prayed that it might be declared that the deed though absolute in form was only a mortgage, and the plaintiff let in to redeem, the action of ejectment restrained, and for other relief.

Statement.

The answer amongst other things alleged that the plaintiff was to pay interest at 8 per cent. per annum upon the amount intended to be secured by the conveyance; that in order to raise moneys sufficient to discharge the plaintiff's liabilities, including previous mortgages upon the lands in question, it became necessary to mortgage the lands, and at the plaintiff's request and with his concurrence the defendant executed a mortgage upon the lands to the Colonial Securities Company for the sum of $1000 and interest at 8 per cent.; that the plaintiff agreed to pay the interest upon the said mortgage as it fell due, and also pay the defendant his interest as it fell due; that it was agreed that the plaintiff should only remain in possession of the lands so long as he continued to pay the interest on the loan from the Company and on the amount of the defendant's claim, and that in case of default in payment of the said interest the plaintiff's right to possession should cease; that the plaintiff made default in payment of the said interest, and thereupon the defendant commenced the action of ejectment; and the defendant submitted to account to the plaintiff, and to reconvey the lands upon payment of the amount due by the plaintiff in respect of the defendant's indebtedness to him and upon being indemni-

fied against the Colonial Securities Company's mortgage. 1874.

Dornyn v. Frallick.

The cause came up for examination of witnesses, and hearing at Goderich on the 19th of September, 1873, whne a decree was pronounced referring it to the Master at Goderich to take an account of what, if anything, was due from the plaintiff to the defendant for principal money and interest upon the whole of the transactions in the pleadings mentioned, and what if anything was due and payable from the plaintiff to the defendant for principal money and interest up to the gale day next preceding the date of his report, reserving further directions and costs.

The Master at Goderich amongst other things reported that there was due and payable from the plaintiff to the defendant up to the time specified, for interest the sum of $315.23, and he also ascertained and stated the principal moneys due in respect of the loan from the Company, and the indebtedness to the defendant. Statement.

The cause now came on to be heard on further directions, and as to costs.

The principal question discussed was as to the time to be allowed to the plaintiff for payment of the amounts found due by the Master's report.

Mr. *C. Moss*, for the plaintiff, submitted that the plaintiff was entitled to six months time for payment of the principal interest and costs as in suits for foreclosure, or that at any rate only the arrears should be paid sooner.

Mr. *J. A. Boyd*, for defendant, contended that the plaintiff should under the circumstances be ordered to pay the whole amount found due upon a short day to be

1874. named by the Court, otherwise the plaintiff's bill to be dismissed.

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SPRAGGE, C.—At the hearing I reserved one point in this case, viz: whether, this being a bill to redeem, General Orders 461 and 462, which are in terms made to apply to a suit for foreclosure, apply in this case. I find that the point was before the late Mr. *Blake*, in the suit of *Moore* and *Merritt* (*a*), and he expressed the opinion that it came within the spirit and equity of the order. In that I entirely concur. To hold otherwise would be very unreasonable.

Judgment.

I find that the practice, under the orders I have referred to, has been that the mortgagor shall pay into Court within a short time, named in the order, the interest or instalment in arrear, or both, as the case may be, and costs, not having six months for that purpose. That will be the order in this case, the costs to be paid being, as I directed at the hearing, the costs at law and in this Court.

(*a*) 6 Gr. 550.

BERNARD v. GIBSON. 1874.

Boundary by agreement—Division fences—Statute of Limitations—Smallness of interest.

The plaintiff and defendant were owners of adjoining lots in the township of Vaughan. An Act of the Legislature of Canada (23 Victoria, chapter 102), had been passed providing for a new survey of the township; and, according to a survey made under the provisions of that Act, a strip of land containing about two acres and three-tenths, occupied by the defendant, it was alleged belonged to the plaintiff. On that strip there had recently been standing nine pine trees, seven of which the defendant had cut down. It appeared that some years before 1851 a fence from the front or easterly side of these lots, for a distance of about 60 or 70 rods, had been put up and was then standing on the supposed division line between the two lots: and also another fence running from the rear or westerly side of the lots to a distance of about 25 or 30 rods, leaving a space of about 600 yards in the centre unenclosed; but the parties respectively in occupation of the lots had always used the land on either side of the supposed line as belonging to them, up till about the year 1858, when the father of the plaintiff and the then owner of the defendant's lot procured a survey to be made and a fence to be erected on the division line then laid out, which was paid for jointly by them, and which corresponded with a line which had been run and blazed by the same surveyor in 1851. The plaintiff, in 1873, filed a bill seeking to restrain the further cutting of timber, and for a declaration that the strip in question was his property.

Held, per CURIAM, that there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations, even if the survey made and fence erected in 1858 were not sufficient acts to compel the parties to abide by that line as the true boundary; BLAKE, V. C., being of opinion that they were. SPRAGGE, C., *dubitante* as to the parties being bound under the Statute of Limitations; but, being clear that the matter in dispute was too insignificant to call for the interference of this Court by injunction, he concurred in dismissing the bill with costs.

Held, also, that the Statute of 1860, directing a survey of the township to be made, had not the effect of creating any new right or title, as between parties who had been in undisturbed possession for the statutable period of twenty years before action or suit brought.

The bill in this cause was filed by *Hiram Alonzo Bernard* against *Fullerton Gibson*, seeking to restrain

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the defendant, his servants, workmen, and agents, from trespassing on a strip of land situate between the premises of the plaintiff and those of the defendant, and which, under the circumstances stated in the judgment, the plaintiff claimed to belong to him. The defendant, on the other hand, insisted the slip was his property and claimed a right to take the wood therefrom.

The plaintiff gave evidence in the cause, and swore that he wished to preserve the timber; that payment of its value would be no compensation to him for its loss; that there were nine pine trees on the slip when defendant began to cut, seven of which he had already felled. He also stated that, so far as the original blazed line was discoverable, the fence between the lots was placed on it as nearly as might be.

Statement.

The cause came on to be heard at Toronto, when witnesses were examined at great length, the material parts of the evidence being given in the judgments on re-hearing.

One *Campbell*, a witness for the defendant, in whose statements the Court placed the utmost reliance, and which counsel for the plaintiff did not attempt to impeach, swore that he had "managed lot 53 for his brother, and was interested with his brother in the land, which he purchased in the spring of 1858, and took possession of the place; there was not a line fence all the way through lots 52 and 53; there had been a fence part of the way, but it had decayed. In the fall of 1858 he had employed men to put up a fence, and they commenced to do so. Mr. *H. G. Bernard* (the then owner) was willing to have the fence put up, and we agreed to employ Mr. *McPhillips* to survey the line in order that we might know where to put it up. Mr. *Bernard* said the best way was to get *McPhillips*, as he knew the line and had been there before, *and that*

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it would be well to have it put up in the right place. McPhillips chained the lot. * * * *H. G. Bernard* was there. * * * We chained through the bush on the north side until we came to the second concession; there we found a stake which *McPhillips* had planted a number of years before. Mr. *Bernard* remarked how accurate Mr. *McPhillips* was, for he came out within a hand's breadth of the old stake he planted. He then ran south down the concession, and he came within a few feet of the old stake. He said that stake is the concession line; he placed a stake at a point which he said was to be the corner of the fence." The witness then described the process of running the line on the south through to the east, and proceeded, "The fence was put down on this line. Mr. *Bernard* accompanied us through the whole work, and was perfectly satisfied. It was his suggestion to get *McPhillips;* he said as *McPhillips* had run the line before, we should get him. Mr. *Bernard* proposed to and did pay one half *McPhillips's* expenses. I paid the men for putting up the fence in the first instance, and *Bernard* repaid one-half of the south fence."

Statement.

At the conclusion of the case, BLAKE, V. C., dismissed the bill with costs.

The plaintiff thereupon re-heard the cause.

Mr. *Fitzgerald*, Q. C., and Mr. *Arnoldi*, for the plaintiff, contended that there was nothing proved shewing an agreement on the part of *Bernard* to be bound by the survey of *McPhillips* in 1858. The witness *Campbell* only proved the fact that the survey was made, and that *Bernard* paid one-half of the expense of making it. They also contended that the Act of 1860 (23rd Victoria, chapter 102,) applied where the side lines are laid out, and that the monuments placed by the surveyor must govern, even if the original

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Mr. *George Murray*, contra. There being a fixed and definite point in this case from which to commence, the statute referred to does not apply. That Act was passed merely with reference to actually travelled side lines.

The language of Sir *John Robinson*, C. J., in Doe *d. Beckett* v. *Nightingale*, at page 522 of the report of that case (5 U. C. R.), is very appropriate here, that learned Judge stating: "When the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line or division, and lay their fences accordingly, but carry them out only part of the way, then it perhaps may be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to, if the same were protracted;" but here the fence, by the mutual assent and arrangement of both parties, was carried through all the way, and the plaintiff cannot now, after an enjoyment according to that line for a period of nearly fifteen years, call the line so ascertained and determined in question.

Argument.

The other cases referred to are mentioned in the judgment.

Spragge, C.—As to any defence arising under the Statute of Limitations the question is, was there a continuous division fence between lots 52 and 53 more than twenty years ago, running from the pine stump, which was about half way between the front and rear of the lots? The evidence shews that a fence was put up in 1858 along the old line supposing it to be the true line; but I at least doubt if there was any binding agreement between the parties that that should be the dividing line

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between them, whether it were the true boundary or not. In 1851 there was a fence along portions of this line which had been put up some years before, extending some thirty or forty rods west from the pine stump into the bush, as the witness *Eastwood* says. *Simpson's* evidence is of a fence running from the improvements sixty or seventy rods westerly, and that a fence ran from the rear of the concession easterly some twenty five or thirty rods. These two lengths of fence would be together some five hundred yards, thus leaving between them a gap of about six hundred yards unfenced.

In *Denison* v. *Chew* (*a*), which was an action of trespass a division fence appears to have run the whole distance, along a line surveyed more than twenty years before, as the division line between two lots, and possession had been held on each side accordingly. The Court composed of *Sherwood* and *Macaulay*, JJ., (*Robinson*, C. J., diss.,) held that the Statute of Limitations applied.

Judgment.

In *Bell* v. *Howard* (*b*), which was an action of ejectment, *Denison* v. *Chew* was referred to with approval. In that case a line between two lots had been run more than twenty years before, and fences had been put up in accordance with it along the whole line, with the exception of about sixteen chains in the rear. The case was not decided entirely upon the Statute of Limitations, but upon compact, that the line run should be accepted as the true line; as also of waiver of right to set up any other line. I doubt if what is put as compact and waiver amount to it, but that appears to have been the *ratio decidendi*. See the language of *Draper*, C. J., on referring to the cases of Doe *Beckett* v. *Nightingale* (*c*), and *Denison* v. *Chew* at page 295 and 296.

(*a*) 5 U. C. O. S. 161. (*b*) 6 U. C. C. P. 292.
(*c*) 5 U. C. R. 518.

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In the former of these cases the question of a division fence running along a portion, not the whole of a division line, was considered by the Court. The opinion of Sir *J. Robinson*, C. J., given at page 522 of the report was that as to the portion unfenced it would be a constructive possession to which the Statute of Limitations would not apply, and *Draper*, C. J., in *Bell* v. *Howard* seems to have taken the same view in the passages I have referred to.

In *Wideman* v. *Bruel* (*a*), which was an action of trespass, a verdict was rendered in favor of the defendant—the plaintiff relying on what *Draper*, C. J., calls a "conventional line fifty years old," and partial fencing "compact and arrangement,"—and an application was made for a new trial which was granted on the payment of costs.

Judgment.

In *Heyland* v. *Scott* (*b*), *Davis* v. *Henderson* (*c*), and *Mulholland* v. *Conklin* (*d*) there was no question as to the effect of partial fencing. The question was as to the effect of an owner of land, not a trespasser, having possession, and claiming title—whether his title does not relate to the whole parcel to which he claims title, and not to the spot actually occupied by him only, and the affirmative of this was held in all these cases.

In *Heyland* v. *Scott Hagarty*, C. J., refers to the language of *Draper*, C. J., in *Hunter* v. *Fair* (*e*) putting the case of one without title entering upon land, clearing and fencing a part *and exercising continuous acts of ownership over the residue.*

These cases do not seem to me to establish that where there is a fence along *a portion* of a line there is a con-

(*a*) 7 U. C. C. P. 134. (*b*) 19 U. C. C. P. 165. (*c*) 29 U. C. R. 344.
(*d*) 22 U. C. C. P. 372. (*e*) 23 U. C. R. 327.

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ive possession of the unfenced portion. The opinion of Sir *John Robinson* was against it in Doe *Beckett* v. *Nightingale*, and that of *Draper*, C. J., was against it as a naked proposition in *Bell* v. *Howard*, in which case as I have already stated he proceeded upon compact. Here there is no compact proved, nor is one to be inferred, and there was less than half the distance fenced.

I incline to think the bill properly dismissed on another ground, the acts complained of being of too insignificant a character to warrant the plaintiff in coming to this Court for an injunction.

I agree in the construction put by my learned brothers upon the Act of 1860.

STRONG, V. C.—There can be no doubt upon the evidence but that the possession of the parties has been regulated since 1851 by the line ran in that year by *McPhillips*, at the instance of Captain *Boyd*, under whom the defendant claims. Judgment.

The brush fence spoken of by some of the witnesses is not, it is true, very distinctly proved, but that a line was then defined which was indicated by blazes on the trees, corresponding with the line again marked out in 1858 by the same surveyor, at the instance of *Hiram G. Bernard*, the plaintiff's grantor, and *Campbell*, the then owner of the defendant's lot, No. 53, is beyond dispute, and the weight of testimony is to shew that this was considered as the boundary by all parties until the defendant proceeded to cut the timber, which is complained of by the plaintiff as a trespass, and sought to be restrained by this bill.

The facts as to these surveys and the conduct of the parties are fully stated in the judgment of my learned brother before whom the cause was heard.

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Laying aside for the present the effect of the Statute of 1860 (*a*), the decree dismissing the bill appears to me to be sustained by ample authority.

Although no beneficial enjoyment was had by either party of so much of the land as lay upon each side of the line running through the wood-land, I am of opinion that each party must be considered to have had since 1851, such a possession according to that line as is sufficient to constitute a title under the Statute of Limitations: *Jones* v. *Williams* (*b*).

In *Bell* v. *Howard* (*c*) the facts were very similar and the conclusion of the Court was that the parties were bound. *Denison* v. *Chew* (*d*), *Wideman* v. *Bruel* (*e*), Doe *Beckett* v. *Nightingale* (*f*) are also authorities directly in point.

Judgment.

If therefore there has been nothing to disturb the possession held in fact according to the line of 1851, the defendant's title to the land on which the trespass complained of was committed is established.

If the case had depended on the survey of 1858 alone I should have had some doubt since there would not then have been, in addition to the line run by agreement of the parties, the possession for the requisite length of time to constitute a statutory title, before the filing of the bill. Even in that aspect of the case, however, there is much weight of authority in favour of the decree. The law as laid down by some of these authorities is stated to be that an agreement between co-terminus proprietors settling a boundary line is not within the Statute of Frauds, since the object of the agreement is not to affect title but to ascertain the subjects of the respective titles.

(*a*) 23 Vic. ch. 102.
(*b*) 2 M. & W. 326.
(*c*) 6 U. C. C. P. 292.
(*d*) 5 U. C. Q. B. O. S. 161.
(*e*) 7 U. C. C. P. 134.
(*f*) 5 U. C. Q. B. 518.

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of the adjoining proprietors. Thus in *Penn* v. *Lord Baltimore* (*a*), Lord *Hardwicke* said that a settlement of boundaries is not an alienation, because if fairly made without collusion the boundaries so settled are presumed to be the true and ancient limits; and the result of the cases is summarized in a work of much accuracy—*Hunt's* treatise on Boundaries (ed. 2, at p. 206,)—where the law is thus stated: "It may be well to observe here that in America agreements made in respect of disputed boundaries are not within the Statute of Frauds, because it is said they cannot be considered as extending to the title, nor do they have the operation of a conveyance so as to effect an assignment of the property from one party to another."

In *Davis* v. *Townsend* (*b*) the Court says, speaking of parol agreements to settle boundaries, "Such agreements recognize and confirm the title of both the contracting parties to the lands of which they are respectively the real owners, and seek only to distinguish and place beyond the reach of future doubt the true line of separation between them. It has been repeatedly held in America that a parol agreement to ascertain and establish a boundary line between the owners of adjoining lands, either directly by the parties themselves or through the medium of a submission to arbitration, is not within the provisions of the Statute of Frauds, and has no more bearing upon the abstract question of title than the testimony of a witness shewing the practical location of a deed according to its courses and distances." Judgment.

On looking into the American authorities I have however, been unable to find any case in which a parol agreement to be bound by a particular line has been held conclusive, without the adjunct of either long continued possession sufficient to give a title or, at least, to bar an entry by lapse of time, or such standing by and acquies-

(*a*) 1 Ves. Sr. 448. (*b*) 10 Barb. Sub. C. R. 333.

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cence in the acts of the opposite party on the faith of the established boundary, as would on ordinary principles constitute an equitable estoppel.

In *Denison* v. *Chew* Mr. Justice *Macaulay* expresses himself doubtfully on the point as follows: "Perhaps within twenty years the party might shift the supposed side line between two apparent lots as apparently ascertained by a mutual survey, if not estopped by deed, but after twenty years I should think not so."

I do not further pursue this question, as I am prepared to rest my judgment on the Statute of Limitations, a defence which by his answer the defendant insists upon. I refer, however, to the following authorities as having an important bearing on the view which the Vice-Chancellor took at the hearing: *Hunt* on Boundaries (*a*), *Hilliard* on Real Property (*b*), *Brown* on the Statute of Frauds (*c*), *Corkhill* v. *Landers* (*d*), *Boyd* v. *Graves* (*e*).

Judgment.

I also think that the fact of the defendant having purchased on the understanding that the true boundary was the line of 1851 ought to have weight on the question of estoppel.

Then being of opinion that there had been, previous to the filing of the bill, a continuous possession uninterrupted in point of fact for upwards of twenty years, I have next to inquire as to the effect, upon that possession, of the Statute of 1860.

Upon this question I think much light is thrown by the case of *Denison* v. *Chew* already quoted. In that case a line had been established by agreement between adjoining proprietors prior to the passing of the Statute 59 Geo. III., ch. 14, and afterwards there had been

(*a*) (ed. 2), pp. 224-225, 258-9, 288. (*b*) 343. (*c*) sec. 75.
(*d*) 44 Barb. 218. (*e*) 4 Wheat. 513.

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twenty years' possession according to the agreed boundary, and the question was, whether the passing of the Act before the completion of the twenty years was such an interruption as to make the time elapsed prior to its enactment unavailing. The Chief Justice was of opinion that the effect of the Statute was to give a new right, and therefore the time of possession previous to its passing was not to be taken into account. The other members of the Court, Mr. Justice *Sherwood* and Mr. Justice *Macaulay*, took a different view and determined that the Statute did not disturb the acquired rights of the parties following the case of Doe *Stuart* v. *Redick* (*a*). The necessity for, and object of this statute of 1818, the first Act of Upper Canada regulating surveys, is clearly explained by the Chief Justice in his judgment in *Denison* v. *Chew*. Before that law was made great confusion had arisen with regard to the division lines between lots. There being no guiding course applicable to all the side lines of a concession, the only mode to be adopted in making a survey was to take the courses of the lines of each lot from the patent deed, and as the original surveys had been made by compass much irregularity was occasioned in consequence of the variation of the compass, and of want of care in the original survey. To remedy this the Statute of 1818 provided that the exterior line of the township on the side from which the lots were numbered, should, as the general rule be taken to be the base line, and that the course of all side lines should be parallel to that base line. The operation of this Statute in a case similar to the present was held by the Court of Queen's Bench, in the case cited to be in the words of *Macaulay*, J., as follows: "The Statute is to be the guide in all unadjusted cases to which it applies, but it should not be so construed as to alter the previous law

Judgment.

(*a*) Taylor's Reports, ed. 2, p. 494.

1874. of the land touching rights of property in general as influenced by long continued possession."

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The Statute now in question (*a*) was passed to meet a difficulty which had arisen in consequence of the side roads between lots not having been actually laid out on the allowances reserved for such roads, in the original survey of the township of Vaughan. The township had been long settled, and as the preamble of the Act recites "the greater number of these allowances had been opened up, travelled, and statute labour and public money expended thereon for many years." The object of the Act then was to confirm these roads, and to do that as equitably as possible as regarded the land owners. The Act then provides in the third section that in making future surveys the original posts or monuments should govern in the front of the concession, and that in the rear the several lots should have given them a proportion corresponding to the width of each lot in front, determined by the original posts in front, of the whole breadth between the side roads as actually established on each side, and that the side lines of lots should be drawn from the original posts in front to the new points so to be ascertained in the rear.

Judgment.

This mode of survey was consequently to supersede in the township of Vaughan that first established by the Act of 1818, and afterwards re-enacted in subsequent statutes, and which could not have been applied in this township, without disturbing the road allowances referred to in the recital to the Act which had been opened and on which money had been expended.

It is worthy of note that this Statute contains no provision for indemnifying parties for improvements which might be cut off by the new mode of ascertaining the

(*a*) 23 Vic. ch. 102.

boundaries of lots prescribed by it. The 59th George III. did contain such a provision.

The question now presented for our decision as regards the Act of 1860 is precisely that which the Court of Queen's Bench had before it in *Denison* v. *Chew* in 1827 with reference to the Act of 1818, and I have heard no argument which ought to prevent the application of the reasoning and principle of that decision to the present case. I think we must say here, as was said in *Denison* v. *Chew*, that the new mode of ascertaining boundaries given by the Statute is only to be applied in "unadjusted cases," and that as it is clear that if the parties had before 1860 settled their boundaries by deed, the Statute would not have affected rights thus acquired, so neither does it affect a right acquired by length of possession at the time it was passed, though as in *Denison* v. *Chew* that right did not ripen unto a perfect title until the possession had continued for several years afterwards when the statutory period of limitation had elapsed.

Judgment.

I think the decree should be affirmed with costs.

BLAKE, V. C.—The plaintiff owns a part of lot 52 on the west side of Yonge street, and the defendant a portion of lot 53, the adjoining lot to the north. The plaintiff claims that the defendant is cutting timber on his land, and asks to restrain him. It is not clear that the land on which the defendant has been cutting is not a part of the lot which the plaintiff purported to sell to the *McArthurs*. He has not on this point satisfactorily shewn his title to the premises he claims by his bill. The lot of which the plaintiff owns a portion, patented as a 200 acre lot, has included within its fences about 215 acres; that of the defendant, patented in the same way, contains, in like manner, about 217 acres. The bill of the plaintiff is based upon the Act 23 Victoria, chapter 102, which confirms "certain roads in the township of

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Vaughan," and provides "for the defining of other road allowances and lines in the said township." Under this statute stone monuments were planted, and it is contended, that, in order to ascertain the division line between lots 52 and 53, these are to be taken in making the survey as the true boundaries, in place of the posts planted on the original survey. I thought, at the hearing of the cause, and still retain the opinion, that whatever may have been the intention of the Legislature in passing the Act in question, the wording of the third section thereof would not permit of such a construction. After speaking of the contemplated survey the third section begins, "From and after such survey being effected * * * every survey which may be made of * * * any division, line or limit between lots in the said township, shall be drawn from the post or monument planted in the *original survey*." The plain wording of this section cannot be contradicted by any equivocal statements in other parts of the Act, which, although they may rather lead to the conclusion that the Legislature had another means of making the survey in view, do not in distinct language say so. Making a fresh survey and taking the monuments laid down under this Act as the guide would give the plaintiff 2 acres and $\frac{8}{10}$ths of the land claimed by the defendant. Taking the old survey as the guide would shew, according to the surveyor of the defendant, that he has about an acre less land than he is entitled to, so that finding this point in favor of the defendant disentitles the plaintiff to any relief.

Judgment.

But even if the Act gave the plaintiff otherwise the right which he claims, the facts proved by the defendant shew this has been lost. These lots front on Yonge street, and for about forty years a dividing line has been run from this street through the front halves of the lots. More than twenty years before the filing of the bill this line was continued west to the rear end of the lot—the

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trees were blazed all the way through from front to rear and at the westerly or rear end of the lots a post was planted to designate the division at that point between the lots. The fence which the defendant claims as the division line by which both parties are bound was put up in 1858, and is run on the old blazed line above referred to; not only was the division line designated by the marks on the trees, but a fence was run partly through the rear halves of the lots on the marked line. The fence being erected at the rear and front portions of the half lots. *James Eastwood* speaks of the survey, the blazing of the trees, and the erection of this fence in 1851. He was chainbearer of *McPhillips* the surveyor. *Campbell* speaks of a tree fence which extended thirty or forty rods west from the pine stump into the bush; this fence had been there for years; it had rotted and was pulled down and cut away in order to allow the fence of 1858 to be put up. *James Simpson* had been in the neighbourhood since 1839, and remembered the line fence which ran between these lots. He says "a brush fence ran across until it met the fence that ran north and south, where the improvements on the lot were; this was about where the front half of the lot ended; "this fence ran west sixty or seventy rods from where the improvements were; I first saw the brush fence in 1850; there was then a post at the rear of the lot between 52 and 53; the line fence there to-day is on the old line fence; it commences at the west where the post I have spoken of was put down; in 1850 the fence went twenty five or thirty rods in an easterly direction from the concession, that is from the western or rear end of the lot; there was a new post put down by the surveyor in 1850 where the old post had been."

Judgment.

John Davidson says he has lived near the lots for twenty-two years, and remembers a line being run and a post put down at the south west corner and a fence put up; there had been a brush fence put down at the west

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end which ran to the east about fifty rods or more; "I saw that fence twenty one years ago; I remember *McPhillips'* survey of twenty two years ago, and also that of fifteen or sixteen years ago." *Patrick Naughton*, a witness for the defendant, admits that there was a fence of about three, four, or five rods in length at the east end of the bush. The plaintiff 's father also admits this portion of the fence to have been there. *McPhillips*, the surveyor, more than twenty years before the filing of the bill, had at the request of the then owners of these lots run the line for them. They then admitted the correctness of the line run through the front halves of their lots, and asked the surveyor to take the westerly end of this defined line and from that to run the line to the rear which he did. The marks then made are still in existence, and shew the line run the whole way through to the rear where the post then planted stood, until it was replaced by the one put down at the more recent survey. This line was further defined by the erection of fences at each end of the half lot, and from the time of the survey for over twenty years no act has been shewn inconsistent with the acknowledgement of this as the division between these lots. The more recent authorities shew clearly that matters other than fencing and cultivation can constitute possession; that wild lands need not be enclosed in order to the making out of a title by possession. The question is, whether the person relying on possession has for the statutory period claimed or held the land as owner, and has used it in like manner as the owners of lands, who have uncleared and unenclosed portions on the lots they occupy, usually use their wild lands, or whether the acts relied on are those of a mere trespasser, and not intended to have been in the assertion of right, title or ownership: *Wideman* v. *Bruel* (*a*), *Heyland* v. *Scott* (*b*), *Mulholland* v. *Conklin* (*c*), *Davis* v. *Henderson* (*d*). The opinion of the

Judgment.

(*a*) 7 U. C. C. P. 134.
(*b*) 19 U. C. C. P. 165.
(*c*) 22 U. C. C. P. 372.
(*d*) 29 U. C. R. 344.

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Court in Doe *Beckett* v. *Nightingale* (*a*) was that "when the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line of division, and lay their fences accordingly, but carry them out only part of the way, then it may perhaps be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to if the same were protracted." The Court of Common Pleas approves of *Beckett* v. *Nightingale* and *Denison* v. *Chew* (*b*), in the case of *Bell* v. *Howard* (*c*). There Chief Justice *Draper* says, "I consider it was a question proper to be submitted to the jury upon the evidence whether a division line had been adopted and agreed upon between the owners and occupiers of these two lots, according to which they had used, occupied and enjoyed respectively for more than twenty years before the commencement of this action, and if there had been a division line so agreed upon, and the occupation of the respective proprietors had been so mutually limited thereby for twenty years or upwards, the parties would be bound by it, though on an accurate survey it should be found to vary from the true division line ascertained according to the original plan of the survey. It seems to have been conceded all round that the division line between these lots had not been run on the original survey of the township, but there is strong evidence to shew that a line had been run a good many years ago dividing these lots, the marks of which blazed on the trees are still to be traced, and at the north end of which there was a stake standing more than twenty years ago, and considerably within that period; that the occupants of both lots, in cutting timber or disposing of timber to others had asserted their own rights up to this line, claiming nothing beyond it, and giving directions to those employed by, or acting under, them to observe and not to cut the trees which

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(*a*) 5 U. C. R. 518. (*b*) 5 U. C. O. S. 161. (*c*) 6 U. C. C. P. 292.

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were marked to designate the line. I think this is evidence of occupation on the one hand, and of acquiescence on the other, of mutual agreement as to the boundary, and of waiver of any right to set up or claim any other boundary; and, if believed by the jury, sufficient to warrant their verdict, which was in fact rested on this ground." In this case the evidence is stronger on the point of the survey being had between the parties for the purpose of defining their position, and in order that they might have their rights ascertained as to the boundaries of their lots, although it is weaker as to the subsequent acts of assent to such division. Taking the evidence as a whole I think there is as much to found a verdict in favour of the defendant here as to support that given in *Bell* v. *Howard*.

Judgment.

But even if the Statute of Limitations did not form a defence I think the subsequent survey of 1858, had between the parties for the express purpose of defining their rights as to their respective lots, the paying by each party of the share of the surveyor's expenses, the putting up of a fence, and the settlement of the cost of this matter in the same way, and the acting on this line for upwards of fourteen years would be sufficient to enable the defendant to meet successfully the case of the plaintiff, where at most he can but claim a little over a couple of acres on which the plaintiff can point out but two trees of any value now standing; and when we consider that it is only in respect of these trees that this Court has any jurisdiction to interfere. Unless this line was intended as a binding division between the parties there was no object in having it. Already there had been the line run, and the new one was had only because as it was to be a final settlement of the matter, greater accuracy was needed than if the parties were merely about to put up for a temporary purpose a fence. Where with this intention parties settle on certain boundaries, I think they should be kept to them, unless they bring them-

selves within those rules under which this Court relieves parties at times from such arrangements. 1874.

Bernard v. Gibson.

Admitting that the Act on which the plaintiff relies would, under certain circumstances, enable him to have a settlement of his boundaries according to he recent, in place of the original survey, it cannot be taken as opening up settlements made between parties as to their lands; nor can it be taken as giving a fresh period from which the Statute of Limitations is to run, at most it would amount to this, where a party has not disentitled himself, by any of the various means whereby such a right may be lost, to have a survey of his lot then it shall be had in a particular way. I am of opinion first, that the Act does not apply, and second, if it does that the plaintiff by the agreement and the Statute of Limitations has lost the benefits that might otherwise have flowed to him therefrom.

I think the decree should be affirmed with costs, and I cannot but express my regret that the plaintiff should have spent so much money in a litigation involving a right to property of so trifling value. Judgment.

1874.

MEYERS v. MEYERS.

Judgment creditors—Registration of judgments—Sequestration—Party to a cause—Practice—General Order No. 6.

While the law respecting the registration of judgments was in force, two judgment creditors registered their judgments; the second in point of time proceeded with a suit in this Court to enforce his lien, the other did not, although he had also filed a bill in time, but he proved his claim in the Master's office in the suit instituted by the other creditor, and who in that proceeding had sued out a sequestration, under which proceedings had been taken to obtain payment of his claim:

Held, on re-hearing, (affirming the judgment reported *ante*, vol. 20, p. 185,) that the creditor who had first registered had not by refraining from proceeding with his suit lost the priority obtained by him, by virtue of his prior registration: that to enforce such claim it was not, under the circumstances, necessary for him to revive his own suit in this Court, which had abated meantime by reason of the death of some of the parties; and that the plaintiff in the suit in which he had proved his claim, having sued out a writ of sequestration, under which the sheriff had acted, had not the effect of changing the rights of the parties under their registered judgments.

A writ of sequestration, whether upon *mesne* or final process, is not in any sense an execution against lands, but is simply a means of compelling obedience to the orders of the Court.

Where a bill is filed and a defendant served with a copy thereof, he thereby becomes a party to the cause; appearance by the defendant, or by the plaintiff for the defendant, having been abolished by the General Order (6) of 1868.

Statement

This was a re-hearing of the order pronounced on appeal from the report of the Master, as reported *ante* volume xx., page 185, where the facts giving rise to the appeal clearly appear.

Mr. *Maclennan*, Q. C., and Mr. *S. G. Wood*, for *The Bank of British North America.*

Mr. *Moss*, Q. C., and Mr. *Hodgins*, Q.C., for defendant *Turley.*

Mr. *Fitzgerald*, Q. C., and Mr. *Proctor* for the executors of *Brush.*

1874.

Meyers v. Meyers.

SPRAGGE, C.—The question before us is one of priority between creditors of *Elijah W. Meyers*, who died 21st August, 1868.

Patrick Turley obtained, on the 31st October, 1865, a decree in this Court against *Meyers* for the payment of a sum of money, and placed a writ of sequestration in the sheriff's hands on the 31st January, 1866, and, as appears by a memorandum of the sheriff—put in, I understand, as evidence—he sequestered and leased various lands of *Meyers* from and after 7th February, 1866.

Turley, in virtue of his sequestration, claims priority over one *Brush* and over *The Bank of British North America*, both of whom recovered judgments at law against *Meyers*. The judgment of *Brush* was recovered on the 7th March, 1857, which was registered and re-registered, the last of such re-registrations being on the 31st of May, 1861, and the next preceding one on 16th April, 1860. The judgment of the bank was recovered on the 21st April, 1857, and was last re-registered on the 16th May, 1861. Each of these two creditors filed a bill in this Court upon the registered judgments recovered by them respectively on 17th May, 1861, and the bank obtained a decree 8th March, 1862. *Brush* placed a *fi. fa.* in the sheriff's hands 31st March, 1863, which was renewed 22nd April, 1867. The bank placed a *fi. fa.* in the sheriff's hands 21st of August, 1867, which expired and was returned 29th December, 1869.

Judgment.

Turley's contention is, that under these circumstances his position is that of a judgment creditor who has placed execution against lands in the hands of the sheriff in priority to *Brush* and the Bank; and *Kerr* v. *Amsden* (*a*) and the statutes upon which it is founded are cited in support of his position.

(*a*) 2 E. & A. 446.

1874.

Meyers v. Meyers.

Looking at the language of the statutes I do not see how *Kerr* v. *Amsden* could have been decided otherwise than it was. But the answer made to *Turley's* contention is, that *Turley* had not in priority to *Brush* and the Bank an execution against lands in the hands of the Sheriff, or indeed an execution against lands at all, and when we examine the real nature of the writ of sequestration, the position of *Brush* and the Bank will, I apprehend, be found correct.

In the first place the direction of the writ to the sheriff does not give to that officer any different position from that of any other person to whom the writ might be directed. His relation to the Court and his duties and powers are the same. It is merely that he is made by general order for the sake of convenience the standing sequestrator of the Court, the Court in any proper case appointing some other person to do the duty.

Judgment.

Sequestration, whether upon mesne or final process, is not a proceeding in rem, but is only a process of contempt. This is clear from several cases. In the old case of *Bligh* v. The Earl of *Danbury* (*a*), the Master of the Rolls, Sir *Joseph Jekyll*, held this language: "A decree for a debt does not bind the real estate, acting only *in personam* not *in rem*, and the remedy upon a decree to affect the land is only for a contempt whereupon the party proceeds to sequestration; which process is not of a very long standing." *Maddock*, quoting *North's* life of Lord Keeper *Guildford* (*b*), states how the process came to be adopted in the time of Lord *Coventry*. The Master of the Rolls proceeds "and that a sequestration is but a personal process appears by its falling and abating by the death of a party; on the other hand an extent upon a judgment does not so abate."

(*a*) 2 P. W. 621.

(*b*) 2 Mad. Prac. 224.

1874.

Meyers v. Meyers.

In *Horn* v. *Horn* (*a*), a party recovered judgment at law and took the debtor's body in execution upon a *ca. sa.* He afterwards filed a bill in Chancery to get at some stock which stood in the name of trustees of the debtor and offered to waive the *ca. sa.*, and Lord *Hardwicke* in dismissing the bill took occasion to explain the difference between the writ of *ca. sa.* and the process of sequestration "Where there is an equitable demand, and the party is taken in execution on a decree, this Court will, notwithstanding, issue all its process against his lands and effects; and the body being detained is not in this Court a satisfaction; the reason is because he is detained for the contempt, but at law the detaining of the body is a satisfaction and you cannot afterwards take his goods."

Judgment.

In *Shaw* v. *Wright* (*b*), a sequestration had issued for want of an answer, under which some leasehold houses were taken; a decree was obtained *pro confesso* and accounts were taken, and on further directions and by petition it was prayed that an order should be made directing the sequestrators to sell the houses. Upon this Lord *Loughborough* observed "The order would do you no good. I should not have much difficulty in selling, not only perishable commodities, but if the sequestrators were in possession of rents paid in kind, or the natural produce of a farm; but how shall I make a title? By whom? I cannot well order the sequestrators to sell without at the same time warranting the title; then I do not know how I can do that. It does not transfer the term to the sequestrators. It is only a process to compel an appearance, the performance of a duty. All profits I will direct them to apply. The difficulty is this: if the sequestrators sell, and the purchasers should be brought before this Court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title,

(*a*) Amb. 79.

(*b*) 3 Ves. 22.

1874. Meyers v. Meyers.

which he is to support by a bill for an injunction. You will not find any instance of an order to sell under a sequestration, a subject which passes by title and not by delivery."

It was never conceived for a moment that the sequestrators could sell under the writ. The terms of the writ do not warrant it, and Lord *Loughborough* held that the Court itself would not direct it. All that the Court does is to direct the application of the rents and profits, and this not by way of execution, but upon the ground that the party is in contempt for disobedience of some order of the Court.

Judgment.

In the late case of *Johnson* v. *Burgess* (*a*), a writ of sequestration was issued "as against the defendant's real and personal estate for the non-payment of certain moneys, ordered to be paid into Court." The writ was registered under the provisions of 27 and 28 Victoria chapter 112. The sequestrators entered into possession of, *inter alia*, certain real estate, and it was prayed by petition that the same might be sold. The fourth section of the Act provides that "every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, &c., and whose writ or other process of execution shall be duly registered," shall be entitled to obtain from the Court of Chancery an order for the sale of his debtor's interest in such land. The question was, whether the plaintiff was a creditor to whom land of his debtor had been actually delivered in execution. Lord Justice *James*, sitting for Vice-Chancellor *Wickens*, after observing "It is true that the plaintiffs have a large personal interest in the sums of money which have been ordered to be paid into Court; but that cannot affect the true construction of the Statute," says further on, "But in fact the plain-

(*a*) L. R. 15 Eq. 398.

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tiffs are not, according to the plain meaning of the Act, creditors, to whom the lands of their debtor were delivered in execution; nor are the sequestrators creditors; nor can the Court be considered a creditor to whom the defendant must pay certain sums of money. The defendant has not complied with the order which directed him to pay those sums of money into Court, and he is in that respect guilty of contempt of Court; still I think it would be stretching the provisions of the Statute beyond their plain meaning if I were to hold that the plaintiffs are creditors to whom the lands of their debtor have been delivered in execution."

The point in *Kerr* v. *Amsden* is thus succinctly stated at the beginning of the judgment of the late Vice-Chancellor *Esten*: "The question in this case is whether, where a registered judgment creditor has failed to deliver a writ against lands to the proper sheriff within a year from the entry of his judgment, and an unregistered judgment creditor has lodged his writ against lands in the hands of the sheriff before the registered judgment creditor, the sale of the lands under the writ on the unregistered judgment is, or is not subject to the equitable charge created by the registration of the prior registered judgment." There are charges in favor of *Brush*, and the Bank created by the registration of their judgments. Are those charges postponed by the sequestration issued by *Turley?* If his sequestration is, in the words of the Statute "an execution against lands," the prior registered judgments would be, under the authority of *Kerr* v. *Amsden*, postponed; if not, not. That is the short point as between these creditors. My conclusion, from the nature and office of a sequestration and the authorities to which I have referred, is that a sequestration is not an execution against lands, and that the charge created by the registration of the judgment is not displaced.

Judgment.

1874.

Meyers v. Meyers.

Upon the question between the two registered judgment creditors *Brush* and the Bank I gave my opinion on the appeal from the Master's report. Subsequent consideration and the argument upon this appeal have confirmed the opinion that I then entertained. One new point has, however, been raised on behalf of the Bank; that *Meyers*, the debtor, has never been effectually made a party to the suit in which *Brush* filed his bill on the 17th May, 1861. We expressed our opinion at the time, that the bill having been filed, and *Meyers* served with a copy of it, he thereby became a party; appearance by a defendant or by the plaintiff for the defendant having been abolished by general order.

Against this I see nothing but the practice that has obtained in England, upon a defendant dying before appearance, that an original bill and not a bill of revivor should be filed against his personal or real representative, as the case may be. I do not see that this practice proves that the defendant who died was not a party if the subpœna had been served upon him. It is clear that if a defendant who has been served is in default, he is in contempt. I find it difficult to understand how a party named as such in process issued and served upon him to bring him to enter an appearance, can be in contempt unless he is a party. I do not find it stated in books of practice that he is not a party until appearance entered. But however that may be our practice is different: appearance by the defendant, or for the defendant, is expressly abolished. From the time of service of the bill, time begins to run against him; he must be in a sense before the Court for this to be the case, I do not see how he can be otherwise than a party. It is not necessary as it was, or was supposed to be, in the olden time, that a man should submit himself to the jurisdiction, or disobey successive processes of contempt. He is subject to the jurisdiction as soon as a bill is served upon him. If he is not, there is a strange anomaly, in

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giving him notice of a motion for decree. I give this as an instance. It would be giving notice to a person not a party to a suit that a decree will be moved for against him: upon that notice a decree may be made without appearance by the defendant, without ar[illegible]er from him, and without the bill being taken *pro confesso* against him. The whole practice of this Court as now modelled by our general orders proceeds upon this, that a party named in a bill is a party to a suit as soon as the bill is served upon him. Proceedings on petition and other summary applications proceed upon the like principle. An appearance by a person against whom a bill is filed or other proceeding taken, either in the shape of an answer or otherwise, is now no part of the theory upon which a suit proceeds. The defendant is regarded and treated as a party, and in my judgment is a party as soon as the bill is served upon, him, and perhaps in some instances before, but in this case the bill was served, and in such case it is clear I think that by our practice a defendant served is a party.

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Meyers v. Meyers.

Judgment.

The result is that in my opinion the order made should stand.

STRONG, V. C., concurred.

BLAKE, V. C., did not give any judgment, having been concerned in the cause while at the bar.

1874.

BENNETTO v. HOLDEN.

Conveyance by infant—Subsequent conveyance—Registry laws.

A married woman, while yet under 21 years of age, but representing herself to be of full age, conveyed land to a *bona fide* purchaser for value and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his Vendee (the same day) created a mortgage thereon. *Held*, that the married woman, notwithstanding her non-age, was bound by her representations as to her being of age; and that the other parties having acquired their interests with full knowledge of the existence of the deed by her to the purchaser, and after the registration thereof took subject to all the rights of the purchaser; and the Court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them; and *quære*, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith.

Statement.

The bill in this cause was filed by *John Bennetto*, *Mary Bennetto*, and *James Thomas Bennetto*, *Henrietta Isabella Bennetto*, *Edward Bennetto*, and *Eliza Ann Bennetto*, against *Mary Holden*, *James Edwin O'Reilly*, *Roderick Leander Ashbaugh*, and *Jane A. Mitchell*, the plaintiffs being the widow and the sons and daughters of *John Bennetto*, deceased, who died intestate in 1873, having in the month of May, 1872, purchased from the defendant *Mary Holden* and one *Dennis Nelligan*, since deceased a lot of land in the City of Hamilton, *Mary Holden* being then a married woman, but living apart from her husband, who was a prisoner in Jamaica, and who was not a party to the conveyance, which contained a covenant for further assuranee. The bill alleged that at the time of the conveyance to the intestate the property was mortgaged and there was due on it $420, and a suit for foreclosure had been instituted in consequence of the inability of *Mary Holden* and

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Nelligan to pay the amount due except by sale of the lot, and the purchase money was applied in paying off the mortgage and other liabilities of the granting parties and the balance divided between them. In October, 1873, *Mary Holden*, in compliance with the covenant for further assurance, executed a deed conveying the premises to *Mary Bennetto* in trust for herself and the other plaintiffs in pursuance of an order from the Deputy Judge of the County of Wentworth, pursuant to the Married Women's Real Estate Act, (1873) dispensing with the concurrence of her husband in the conveyance which she so executed to *Mary Bennetto*, and which was duly registered in October, 1873.

The bill further stated that on the 26th May, 1873, *Mary Holden* professed to convey the said land and premises to the defendant *O'Reilly*, her husband not being a party thereto, and no order having been obtained dispensing his concurrence; and it also appeared that in March, 1872, *Mary Holden* and her husband conveyed the said lot and other lands to the defendant *O'Reilly*, and registered the same on the 30th May, 1873; and charged that both of these last named conveyances were executed without any consideration therefor, and though absolute in form, were intended to convey the lands embraced therein in trust for the benefit of *Mary Holden*, as evidenced by letters of *O'Reilly*, who had full notice of the conveyance to the intestate, and of the covenants therein. That by an indenture of 1st (registered 2nd) August, 1873, *O'Reilly* purported to convey the lot to the defendant *Ashbaugh*, but the same was without consideration, and was made with full notice on *Ashbaugh's* part of all the matters above set forth, and the conveyance thereof was made for the purpose of embarrassing the plaintiffs in obtaining a marketable title; and on the same 1st of August *Ashbaugh* purported to convey the said lot to the defendant *Jane A. Mitchell*, by way of mortgage, to secure $400, the said *Mitchell*

Statement.

1874. also having full notice of all the matters above stated as occurring prior to that date, and that *Ashbaugh* claimed to own the said lot subject to such mortgage.

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The bill also stated that *Mary Holden* alleged that at the time of executing the conveyance to the deceased she was an infant under 21 years of age; that by reason thereof such conveyance was voidable, and that she had by her acts since she had attained majority, avoided the said conveyance; the contrary whereof plaintiffs charged to be the case, and that both *Nelligan* and *Mary Holden* before and at the time of the execution of such conveyance represented to the deceased that the defendant *Mary Holden* was of the full age of 21; and charged that even if she was within the age of 21 years the plaintiff *Mary Bennetto*, as administratrix of the deceased, was at all events entitled to stand in the place of the mortgagee, to whom the purchase money had been paid, and to have a lien on the property in priority to *Jane A. Mitchell* for the balance paid to *Mary Holden* and *Dennis Nelligan*, and for taxes, &c.

Statement.

The bill prayed a declaration that no estate passed to the defendants *O'Reilly*, *Ashbaugh*, and *Mitchell*, under the deeds above set forth, and that the same were void, and formed no objections to the title of the plaintiffs: Or if any estate did pass to these defendents that they held the same in trust for the plaintiffs: Or that the plaintiff *Mary Bennetto*, as such administratrix, might be declared entitled to stand in the place of the mortgagee and have the lien as above mentioned.

The defendants *Ashbaugh* and *Mitchell* answered, setting up in effect that they were purchasers for value without notice, and claiming the benefit of the Registry Laws. *O'Reilly* allowed the bill to be taken *pro confesso*.

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The cause came on for hearing at Hamilton, when the plaintiff *Mary Bennetto* and the defendants *Mary Holden* and *Ashbaugh* were examined. The effect of the evidence taken was substantially to establish the statements of the bill as respected the want of consideration for the conveyance to *O'Rielly*, and that he held the lands for the benefit of *Mary Holden*.

The effect of the other evidence is fully stated in the judgment.

Mr. *Duff*, for the plaintiff.

Mr. *Osler*, for the defendants.

Judgment.

BLAKE, V. C.—The facts of this case seem to be as follows:—*Mary Holden*, in May, 1872, when an infant and married woman, executed an instrument purporting to convey the premises to one *John Bennetto*, since dead, and who is represented by the plaintiffs. This instrument was duly registered. Thereafter by two instruments, apparently for value and duly registered, *Mary Holden* conveyed the same and other premises to the defendant *O'Reilly*. This latter gentleman, apparently for value, conveyed to his partner and co-defendant the premises in question, and this grantee mortgaged them to the defendant *Mitchell* for $400, which was then advanced by her. The instruments to *O'Reilly* were executed and registered after *Mary Holden* became of age. Subsequently to the execution of these instruments, and in October 1873, *Mary Holden* duly conveyed the same premises to the defendant *Mary Bennetto* in trust for the representatives of *John Bennetto*, then deceased. There is no doubt that when *Mary Holden* executed the instrument to *John Bennetto* she was not 21 years old, and it is equally clear that at the time of her signing this deed she represented herself to be of age, and that upon the strength of such statement then made the bar-

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Bennetto v. Iden.

gain was completed, and the purchase money paid. The learned counsel for the defendants admitted that these representations bound *Mary Holden* so that in a proceeding between her and *John Bennetto* no advantage could be taken of the non-age of *Mary Holden*. Under these circumstances, it was argued for the plaintiffs, that as the conveyance to *John Bennetto* was registered when the conveyance to *O'Reilly* was given, the latter took with notice of this instrument, accepted with such representations as to bind the grantor, and therefore that the subsequent grantee must be taken to have had notice of an instrument effectual to pass the premises; and so the conveyance to *O'Reilly* was ineffectual to convey him any beneficial interest in the premises. I have had much difficulty in arriving at a conclusion in the case satistory to my mind. When the plaintiffs produce the deed of May, 1872, the answer of the defendants thereto is that as it was executed while *Mary Holden* was under

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age, nothing passed by it. To this the plaintiffs reply, although that be so, yet owing to the representations made at the time of the execution of the instruments an equity has arisen in their favor which prevents *Mary Holden* from raising the question of infancy. But it is alleged, at this stage, that the Registry Laws come to the assistance of the defendants; that by these enactments the defendants have notice of a deed which, on inquiry, they find could pass nothing, owing to the disability under which the grantor was at the time of its execution; that they had no notice of the representations made at the time of its execution, which obviate this result; that as the defendants can rely on the infancy, and the plaintiffs cannot, under the Registry Laws, set up these representations, the case of the plaintiffs fails. For some time I remained of opinion, as I was at the hearing of the cause, that this was the correct view to take. Further consideration has led me to think otherwise. The plaintiffs do not here seek to prove any fact inconsistent with the apparent effect of the deed on which

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they rely. They do not ask to enlarge or alter its apparent effect, to add a single iota to it, or to enforce any equitable lien, charge or interest as affecting the land, and not covered in terms by the instrument. The Registry Laws were intended to protect the title of a *bonâ fide* purchaser with a registered conveyance against claims outside the registry office—claims not to be found on the records which are made the test, and which would otherwise impair a title which may have been accepted in good faith, after search made in the place where all information touching the right to the premises should be found. Here, in the proper office, is produced an instrument executed by the apparent owner of this property, and apparently conveying away an estate in fee simple therein. If persons deal with land thus circumstanced and find the instrument, in effect, conveys that which it purports to do, they can scarcely complain of being misled in the matter. The registry office gives them complete notice, and if with that they deal with the premises thus situated they must, I conceive, be held bound so long as the actual effect of the instrument is not attempted to be proved as more extensive than, or different from its apparent effect. There is a vast difference between the case of a party dealing with property without notice of a claim until it is sprung upon him subsequent to his purchase, and that of a man who has had placed under his notice a conveyance in fee of the premises which shews that *primâ facie* his grantor has no interest to convey to him, and who, with this clear information before him, completes his purchase, and then seeks, not to defend his position against a flaw unknown at the date of his bargain, but one, in spite of which, and running the risk of that which may flow from it, he concludes his agreement. I am of opinion that here the defendant has taken subject to an instrument which bound the grantor, *Mary Holden*, and her subsequent grantees.

Judgment.

The bill, which is *pro confesso* against the defendant

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O'Reilly alleges that the premises were conveyed to him as trustee for *Mary Holden*; that he was to deal with them for her benefit, and that the conveyance to the defendant *Ashbaugh* was voluntary, and made for the purpose of embarrassing the plaintiffs. The defendant *O'Reilly* should not, either on this statement, or that made by *Mary Holden*, in her evidence, have conveyed to the defendant *Ashbaugh*.

In order to prevent any question as to whether the premises under the instrument of May, 1872, passed to *John Bennetto*, or it simply operated as an agreement for their sale, they had better be vested in the plaintiffs according to their respective interests therein. The deeds to *O'Reilly*, *Ashbaugh*, and Mrs. *Mitchell* should be delivered up to the plaintiffs, unless it is contended on behalf of Mrs. *Mitchell* that she is entitled to hold the mortgage, to proceed on the covenant in case of non-payment. If so, and the parties cannot settle their rights in that respect, they can speak to the point. The plaintiffs and Mrs. *Mitchell* are entitled to their costs as against the defendants *O'Reilly* and *Ashbaugh*.

Judgment.

GREENSTREET v. PARIS. 1874.

Trustee and cestuis que trust—Directors of incorporated company—Tax sale—Insufficient description—Municipal officers.

Where a vote of the Shareholders of an incorporated company had authorized the Directors to raise money on the security of the Company's lands, and one of the Directors afterwards, by arrangement with the other Directors, advanced money for the use of the Company and took a mortgage on their lands, it was held that a third party who subsequently became the purchaser of the mortgaged estate, could not resist the claim of the mortgagee, on the ground that a mortgage to a Director was invalid.

In advertising lands for sale for taxes they were described as "Rar lands, Paris Hydraulic Company," no further specification of the locality or quantity to be sold being given:
Held, that the description was insufficient and the sale void.

The Statute 32 Victoria, chapter 36, section 155, limiting the time for bringing suits for setting aside a sale for taxes, applies only where an actual, though irregular, sale of lands has been effected.
Semble: That the mayor of a town or city cannot purchase at a tax sale of lands in his municipality.

Statement.

The bill in this cause was by *Henry J. Greenstreet* against *The Paris Hydraulic Company* and *Charles Whitlaw*, praying, under the circumstances set forth in the judgment, that the tax sale and deed thereunder to the defendant *Whitlaw* might be declared void; and that an account might be taken of what was due to the plaintiff under the mortgage security on the lands in question, and in default of payment, foreclosure.

The defendant *Whitlaw* answered the bill, setting up that the plaintiff's mortgage was invalid for the following amongst other reasons:—that the Company, under their charter, had no power or right to make such mortgage; that the plaintiff was, at the time of the making of said mortgage, one of the directors of the Company, and the secretary or manager thereof, and had the controul and management of the accounts and business of the Company; and the defendant submitted that he was not a proper

1874. party to the suit; and that the plaintiff, under the circumstances, was not entitled to any relief against him. The other defendants allowed the bill to be taken against them *pro confesso*.

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At the hearing *John Smith*, President of the Company, and *Hugh Finlayson*, a director of the Company, were examined, and their evidence proved the advance by the plaintiff to the Company of the money secured by the mortgage to the plaintiff; and that the money had been expended in paying off debts of the Company. The other facts are clearly set forth in the judgment.

Mr. *Boyd*, for the plaintiff.

Mr. *Attorney General Mowat*, for the defendant *Whitlaw*.

Mr. *V. McKenzie*, for *The Company*.

Judgment. BLAKE, V. C.—On the 15th of January, 1857, the defendants *The Paris Hydraulic Company*, executed a mortgage on their premises to the plaintiff to secure repayment of £550 and such other sum, not exceeding in the whole £1,000, as the mortgagee should, at the request of the mortgagors, advance. This mortgage contains the following recital:—"And whereas the original subscribed capital of the said company being insufficient for the completion of the said works, the said parties of the first part applied to the said party of the second part to advance and lend them a sum of money to enable them to complete the same, which he, the said party of the second part, consented to do on having the same, with interest at the rate of ten per cent. per annum, secured by a mortgage of the premises hereinafter mentioned."

The authorized capital of the company was £2,000, the subscribed capital about the same; but at a meeting

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of the shareholders, specially called, they sanctioned this loan of £1,000, and although the directors could not have effectually charged the property without this vote of the shareholders, I am of opinion that a mortgage given as was the present is valid, and cannot, on the ground of *ultra vires*, be impeached by an outsider, or now even by a shareholder. Messrs. *Smith & Finlayson* shew that the money mentioned in the mortgage was received by the company, and the latter says it was spent in paying the debts of the company. The first point argued was that the company had no power to charge their lands by mortgage. I think they are enabled to do so by their Act of Incorporation (*a*). The latter portion of the first section of this statute reads as follows: "And also that they and their successors by the said name, shall be in law capable of having and holding by purchase or gift to them and their successors any estate, real or personal, to and for the use of the said company, and of letting, selling, conveying, or otherwise disposing of any part or parts thereof, for the benefit of, and on account of the said company, as the directors of the said company may from time to time deem necessary or expedient." These words would empower the company to dispose of the lands if the directors thought it expedient to do so.

Judgment.

The disposition in question was one called for in order to enable the company to complete its works, and therefore one sanctioned by the Act. It is true section nine gives power to sell, lease, or dispose on certain terms, not very clearly defined, but this refers to a period when the works are completed, and not to such an exigency as that which here arose, for in that clause there are required "rules and regulations for the using and occupying the same, and keeping the dam and works in repair, as may be agreed upon." This points to a different dealing with

(*a*) 16 Vict. Cap. 255.

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the property at a different period in the affairs of the company, and is not the clause which empowers the mortgage in question. I think it must be taken that the mortgage was executed under the power granted by the first section, and that this empowered the company to mortgage for the purposes mentioned in the instrument in question.

The *bona fides* of the transaction is not impeached, but the defendants assert that as the plaintiff was, at the time the mortgage was given, a director, and one of the three directors who sanctioned the transaction, and also the secretary and treasurer of the company, therefore he could not accept of this instrument as a security, and therefore cannot now enforce it.

Judgment.

The authorities, I think, clearly establish that a director of a Company is a trustee for the shareholders, and that a person occupying this fiduciary capacity is not allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interest of those whom he is bound by this duty to protect. This principle is so strictly adhered to that no question is allowed to be raised as to the fairness or unfairness of the transaction, and it makes no difference whether the contract relates to real estate or personalty; in mercantile transactions the disability arising, not from the subject matter of the contract, but from the fiduciary character of the contracting party. See *York Buildings Company* v. *Mackenzie* (*a*), *Fox* v. *Mackreth* (*b*), *York & Midland Railway Company* v. *Hudson* (*c*), *City of Toronto* v. *Bowes* (*d*), *Brunskill* v. *Clarke* (*e*), and *Aberdeen Railway Company* v. *Blaikie* (*f*). In this latter case

(*a*) 8 Bro. P. Ca. 42.
(*b*) 2 Bro. C. C. 400.
(*c*) 16 Beav. 485.
(*d*) 4 Gr. 5 11 Moo. P. C. C. 463.
(*e*) 9 Gr. 5.
(*f*) 1 Moo. S. C. Ap. 461.

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Lord *Cranworth* says: "It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better, but still so inflexible is the rule that no inquiry on the subject is permitted. The English authorities on this head are numerous and uniform." Again, "As far as related to the advice he should give them, he put his interests in conflict with his duty, and whether he was the sole director or one of many can make no difference in principle."

Judgment.

In *The German Mining Company* (*a*) case, the judgment of Sir George *Turner* is in favor of the plaintiff on two points. He says:—"To hold the shareholders liable for moneys borrowed by the manager *without their authority* would be unjust, for then they would be liable whether the moneys borrowed were expended upon the mine or not, but there is not the same injustice in holding them liable for wages incurred and debts contracted for the purposes of the mine, for then they have the benefit of the expenditure." Again, on the point of the power to raise money beyond the capital authorized, he says:—"It was said that this was a concern with a limited capital, and that the directors could not be justified in expenditure beyond the capital, but this deed must be construed like other partnership deeds. In all such cases the capital is limited, but the engagements of the partnership cannot be measured by the capital. New undertakings were not indeed to be entered into after the full capital had been subscribed, nor is it suggested that any such were entered into, but how was the expenditure upon the existing undertakings to be measured by the extent of the capital? Was the concern to be stopped at the moment when the expenditure equalled the capi-

(*a*) 4 DeG. M. & G. 14, at p. 41.

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I come to the conclusion that the company has the power to mortgage under the Act; that under the circumstances of the case this right exists, notwithstanding that the mortgage represents a sum of nearly £1,000 in addition to the stock authorized and subscribed: that the plaintiff, owing to his position of secretary and director of the company, cannot, the company raising this defence, have a charge by mortgage on the property of the company in his favour which he can enforce against it.

It remains for me to consider whether the defendant *Whitlaw* can be heard to raise this objection to the mortgage of the plaintiff, as to which the company is silent. It has been stated that the reason the Court will avoid these transactions is, that as the directors stand to the company in the position of trustees, the company as a *cestui que trust* has the right successfully to impeach them. But I know of no case in which a trustee who may have taken a mortgage from his *cestui que trust* which he could successfully impeach, on filing a bill for foreclosure, has been allowed to be met by a subsequent owner of the equity of redemption or mortgagee with a defence based on the impeaching of the mortgage, on the ground that the fiduciary character of one of the parties disenabled him from accepting the instrument under which he claims. It is clear that this mortgage is a matter which might be confirmed by the shareholders, and if, when the acts complained of are capable of confirmation, a single shareholder cannot impeach them I think it *a fortiori* that an outsider should not have this right. See *Brogdin* v. *Bank of Upper Canada* (*a*). The corporation is a party defendant. It raises no question as to the validity of the mortgage, nor has any shareholder

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(*a*) 13 Grant 544.

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done so. It is for either of these to do this, and I conceive that after a mortgage has stood unimpeached for nineteen years, as is here the case, the Court will not listen to the objection as to its invalidity raised by a subsequent incumbrancer. He can investigate the amount due, but this question of validity is one entirely between the directors and the company or its shareholders, and cannot be raised by strangers to the transaction. On the grounds to which I have above referred the following authorities were cited:

Brice on *Ultra Vires*, pp. 472, 475, 477, 490, 491, 500, 504, 505, 509, 511, *Maunsell* v. *Midland Railway Company* (*a*), *Forrest* v. *Manchester Railway Company* (*b*), *Evans* v. *The Corporation of Avon* (*c*), *Ware* v. *Regent's Canal Company* (*d*), *Re Essex Brewery Company* (*e*), *Gordon* v. *Preston* (*f*), *Silver Bank* v. *North* (*g*), *Abbott's* Digest Law of Corporations 475.

Judgment.

The defendant *Whitlaw* urges that, even supposing the plaintiff had a charge on the premises in question, this has ceased to exist, as he now, as purchaser under a sale for taxes, is the absolute owner thereof.

The plaintiff impeaches the sale mainly on two grounds: First, because the property was not properly described in the advertisement at the time of the sale or in the certificate thereafter given; and second, because *Whitlaw*, at the time of the advertisement, sale, and giving of the certificate and deed, was Mayor of the Town of Paris, where the land in question is situate.

Whitlaw answers these objections, and in addition pleads section 155, of 32 Victoria chapter 36, under

(*a*) 1 H. & M. 130.
(*b*) 7 Jur. N. S. 130.
(*c*) 29 Bea. 144.
(*d*) 3 DeG. & J. 212, 228.
(*e*) 22 W. R. 891.
(*f*) 1 Watts R. 385.
(*g*) 4 Johns. Ch. R. 370.

1874. which he claims that, as more than two years have elapsed since the sale, it cannot now be impeached.

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The description used in the advertisement at the sale and in the certificate is simply as follows:— "Race Lands, Paris Hydraulic Company." No further specification of the locality, no statement of the quantity of land, was given until the conveyance to the purchaser was demanded. The conveyance purports to grant eleven acres one rood six perches and a quarter, together with the dam across the river in connection with said land, and all the water privileges, &c. appertaining thereto.

Two witnessess were examined on the question of the sufficiency of the description given in the advertisement. The one, the auctioneer, said, "I don't think I could have told what quantity of lands had been conveyed to me, according to description in advertisement. I was the auctioneer at the sale. Mr. *Penton* applied to me to know what I was selling. I referred him to Mr. *Boswell*, the treasurer. His reply was simply the race lands. * * * I knew where the lands lay. I would not have known the metes and bounds, but I knew where they lay."

Judgment.

Mr. *Penton* the other witness, testified as follows: "I reside in the neighborhood of Paris. * * * * I told the auctioneer that I held a mortgage on certain lands of the company, and I wished to know whether the sale was going to affect them. His reply was he knew nothing about it. * * * * There were certain inquiries made by other parties at time of sale. One was whether the dam was included. The auctioneer said he did not know. * * * * I never heard the lands of the company called race lands until I saw them advertised by that name."

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I think it is impossible on these facts to conclude either that the property intended to be sold was sufficiently indicated, or that if the locality could be ascertained, the subject matter of the sale was defined. If the advertisement stated that "the lands of the Paris Hydraulic Company, containing about eleven acres and situate at a certain point on the Grand River" were to be sold, I think it could be sustained, as it could be possible to ascertain and point out the lands to be disposed of. The rule "*id certum est quod certum reddi potest*," should in such a case apply, but here we have no such description. It is only the "race lands" that are being sold. There is no description as to place—the nature or quantity of the property is not defined. No person would conclude that under such a notice were to pass, not only the race lands, but all the rights connected with the dam, the right to retain or rebuild it, and also the right to the land other than that covered by the dam and race way. I think in these two respects the advertisement is defective: first, from it it is not possible to ascertain where the lands lie, and, second, if the locality were ascertained, it is impossible to say what premises were comprised in the advertisement. This appears to me to be fatal to the defendants' case. In order to the validity of the sale there must be a reasonable certainty as to the property being sold—that is wanting in this case, and therefore no sale of the premises in question has taken place.

Judgment.

It was held in *Knaggs* v. *Ledyard* (*a*), affirmed in appeal, that such a defect in the advertisement as is fatal to the sale is not cured by section 4 of 27 Victoria, chapter 19; and in *Booth* v. *Girdwood* (*b*), that section 156 of 29-30 Victoria, chapter 53, and section 155 of 32 Victoria, chapter 36, do not better the title of the person under such circumstances claiming under the tax title. *Williams* v. *McColl* (*c*), approves of these cases.

(*a*) 12 Gr. 320. (*b*) 32 Q. B. 33. (*c*) 23 C. P. 189.

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I am of opinion that here the tax sale was abortive, and that the defendant *Whitlaw* cannot claim the premises in question thereunder, as the sections which are relied on in his favor only apply where a sale has ctually take n place.

After reading *Ex parte Bennett* (*a*), *Massingberd* v. *Montague* (*b*), and *Re Cameron* (*c*), I am not satisfied that the defendant *Whitlaw* could purchase at the sale while occupying the position of Mayor of Paris. Under section 128 of the last mentioned Act a list in duplicate of the lands liable to be sold is to be submitted to him in order that he may authenticate the same and issue his warrant for the sale thereof. Under section 149, he, with the treasurer, is to prepare and execute a deed of the premises when sold. The duties here laid down may conflict with what would be his interest as an intending purchaser, and the Court seeks to take away the power of being dishonest by removing the temptation, and therefore wisely says in such cases, "the door is closed against your dealing with property in respect of which your duty and interest not only does, but even where it may conflict." It would have been well had the Legislature here set forth, as we find done in some similar enactments in the United States, the various officers of the municipalities disabled from buying at sales of property had under their direction.

Judgment.

I think the plaintiff is entitled to the usual decree in mortgage cases, with costs against *Whitlaw* up to the hearing.

(*a*) 10 Ves. 385. (*b*) 9 Grant 92. (*c*) 16 Grant 612.

AIREY v. MITCHELL. 1874.

Specific Performance—Interest.

When a bill is filed by a vendor to enforce the specific performance of a contract of sale, he is entitled to recover interest for a period of twenty years.

This was an appeal by the plaintiff from the report of the Master at London, on the ground that he had refused to allow to the plaintiff, on taking an account of the amount due, interest for a longer period than six years before the filing of the bill.

Mr. *Street*, for the appeal.

Mr. *Bayley*, contra.

The following cases were referred to *Toft* v. *Stephenson* (*b*), *Dart's* Vendors and Purchasers (*c*), *Brown's* Statute of Limitations (*d*), *Darby* on the Statute of Limitations (*e*), *Hodges* v. *Croydon Canal Company* (*f*), *Elvy* v. *Norwood* (*g*), *Edmunds* v. *Waugh* (*h*), *Du Vigier* v. *Lee* (*i*), *Rolfe* v. *Chester* (*j*), *Thomas* v. *Thomas* (*k*), *Hunter* v. *Nockholds* (*l*), *Shaw* v. *Johnson* (*m*), *Lewis* v. *Duncombe* (*n*), *Foster* v *McKenzie* (*o*).

Judgment.

BLAKE, V. C.—This is a bill filed by the plaintiff, the vendor, against the defendants, the children, widow, and administratrix of one *John Mitchell*, the vendee of the premises in question. Under the decree, directing a

(*b*) 7 Hare 1, 1 DeG. M. & G. 28; 5 DeG. M. & G. 735.
(*c*) 364-577.
(*d*) 396-526.
(*e*) 122,
(*f*) 3 Beav. 86.
(*g*) 5 DeG. 240.
(*h*) L. R. 1 Eq. 148.
(*i*) 2 Har. 326.
(*j*) 20 Beav. 610.
(*k*) 22 Beav. 341.
(*l*) 1 M. & G. 640-650.
(*m*) 7 Jur. N.S. 1005.
(*n*) 29 Beav. 175.
(*o*) 17 Beav. 413.

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reference as to the amount due, the Master has calculated interest for a period of six years before the date of the filing of the bill. Against this report the plaintiff has appealed. The plaintiff alleges (1) that because this is a bill for specific performance he is entitled to arrears of interest for a period of twenty years; and (2) that as the bill is one filed against the real representatives of the vendee, if the first ground of contest fails he would still, in order to prevent circuity of action, be entitled to recover the interest claimed in this suit. The plaintiff asks by his bill that the amount found due him be paid, and in default that the land, the subject of the contract, be sold and the proceeds applied towards payment of the amount due. He seeks a right consequent and dependant on the specific performance of the original contract, and demands that the money found due be made payable out of the land.

Judgment.

I should have thought the case was brought within section 19 of chapter 88 of the Consolidated Statutes of Upper Canada, and that no arrears of interest could be recovered for a period beyond six years. It is true in *Toft* v. *Stephenson* (*a*), interest was allowed for a period of twenty years, but that was an exceptional case. The title was not made to the property for many years. It was there held that the right of a vendor to receive his purchase money which is secured by his lien on the land sold does not accrue, within the meaning of the section in question, until the time for completion arrives or until the title is accepted, if that is subsequent to the time fixed for completion, and that the interest cannot be due until the purchase money is payable. It was there held that the case was not within the statute; but it is not an authority for the general proposition that in a suit for specific performance interest for twenty years can be recovered.

(*a*) 5 D. M. & G. 735.

1874.

Alrey v. Mitchell.

In the case of *The Great Western Railway Company* v. *Jones* (*a*), in this Court, it was held, that, "*primâ facie* where a purchaser takes possession he is liable to pay interest from the time of taking possession . . . . the liability is not limited to a period of six years, even as between subject and subject." I can find no express decision against this view of the effect of the Statute of Limitations, and I therefore am bound by it.

I am of opinion that the Master should have followed the conclusion arrived at in the case of *The Great Western Railway Company* v. *Jones*, although it did not accord with his view of the law, and I therefore allow the appeal. The plaintiff will add the costs of the appeal to his debt.

Judgment.

I think the guardian of the infants should also have his costs of the appeal, but they must be made payable after payment of the plaintiff's debt and costs, otherwise the plaintiff virtually would be paying them if the fund turned out insufficient. I think also that as here there was the covenant of the ancestor the case came within *Carroll* v. *Robertson* (*b*), and that on the second ground the plaintiff should succeed.

(*a*) 13 Gr. 355. (*b*) 15 Gr. 173.

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Rev. on appeal 22 Gr. 133

HART v. MCQUESTEN.

Mortgage—Merger.

A first mortgagee took from the mortgagor a release of the equity of redemption, the consideration therefor being expressed to be the amount due on the mortgage for principal and interest "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises * * * freed from the proviso of redemption;" and the mortgagor covenanted for further assurance and that he had done no act to incumber.

Held, that the effect of the transaction was to merge the mortgage, and that the mortgagee was bound to redeem the subsequent incumbrancers.

This was a suit by *Henry Hart* and *James Lang*, against *Calvin McQuesten*, *John Fisher*, *Julia Ann Dickerman* and *Patrick O'Connor*, the defendant *Julia Ann Dickerman* being the representative of *John Dickerman*, deceased, in his life time a partner with the defendants *McQuesten* and *Fisher*, and seeking, under the circumstances appearing in the judgment, the usual decree of foreclosure against the defendants other than *O'Connor*, who was the vendee of the plaintiffs.

Statement.

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

Mr. *V. McKenzie*, for the defendant *O'Connor*.

Mr. *Blake*, Q. C., for the other defendants.

On behalf of the plaintiffs, it was contended that the fact of the mortgagor having given a covenant that he had done no act to incumber, rendered it evident that the releasee should not pay off the second mortgage, but tended rather to shew that the intention was that the mortgagor should do so; the documents as also the surrounding circumstances, all concurred in establishing this; and when the Court is satisfied that the first mortgagee

should not pay off the second, it will decide against the merger: *Toulman* v. *Steere* (*a*), *Watts* v. *Symes* (*b*). 1874.

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In addition, our statute expressly provides that a mortgagee may take a release of the equity of redemption without merging his claim; what the Court is now to be satisfied of is, that it was not intended that the first mortgagee should satisfy the second, and the mere existence of subsequent incumbrances creates a presumption that it was not intended to merge. It may be that if it were shewn that it was the intention of all parties that the first mortgagee should pay, he will be compelled to do so without any express covenant to that effect. Here, if the first mortgagee was compelled to pay off the second mortgage, he could immediately sue the mortgagor for it, which would have so absurd an effect that we must assume the legislature could not have intended it.

Argument.

On behalf of the second incumbrancer, it was urged that there are two classes of persons affected by the Act in question; one, owners acquiring incumbrances; the other, incumbrancers acquiring the estate; the present case being one of the latter class. There is a material distinction as to the effect to be attributed to the fact of the acquisition of the equity of redemption when it is acquired by devise or descent, and where it is acquired by contract; when by contract the party acquiring the estate must shew with what intention it was acquired, if he desires to be exempted from the ordinary rule. Here, the releasee had notice of the *puisne* incumbrance, and in the absence of all evidence to the contrary, it will be assumed that he acquired the equity of redemption subject thereto; in other words he must shew that it was intended by both parties that the mortgagor was to discharge that. The effect of the release here was to

(*a*) 3 Mer. 110. (*b*) 1 D. M. & G. 240.

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discharge the debt, and without any evidence of contract that must be taken to have been the intention of both parties. The covenant against incumbrances has not the effect contended for by the plaintiffs, but must be taken as evidence that the mortgagee was content to rely on this covenant instead of agreeing with the mortgagor that he would discharge the incumbrance; and we may assume that if it had been the intention of the parties to keep the mortgage alive, they would have carried out that intention in writing; instead of which the party takes the covenant against incumbrances. In *Finlayson* v. *Mills* (*a*), this view was adopted, and it was held that the mortgage had been merged.

The other cases cited are mentioned in the judgment.

Judgment.

BLAKE, V. C.—On the 3rd of January, 1856, *Patrick Logan* mortgaged the premises in question to one *John Watt*, since deceased, whose estate is represented by the plaintiffs.

On the 20th of September, 1858, *Logan* mortgaged the same premises to certain parties now represented by the defendants, other than *O'Connor*. On the 20th of October, 1860, *Logan* executed a release of the equity of redemption in these premises to *John Watt* by a deed-poll in the words following:—

"To all to whom these presents shall come, *Patrick Logan*, in the annexed indenture of mortgage named, sends greeting: Whereas the said *Patrick Logan* hath agreed with *John Watt*, in the said annexed indenture also named, for the absolute sale of the inheritance of the land and premises in the said indenture mentioned to be granted and released to him for securing the sum of £330 10s. and interest; now these presents witness, that in pursuance of this agreement and in consideration of the sum of fifteen hundred dollars now due and

(*a*) 11 Gr. 218.

owing to the said *John Watt* for principal money and interest upon the within security, and in satisfaction thereof, and also in consideration of one dollar of lawful money of Canada, now paid by the said *John Watt* to the said *Patrick Logan*, the receipt whereof is hereby by him acknowledged; he, the said *Patrick Logan*, hath granted and released and by these presents doth grant and release unto the said *John Watt* and his heirs the proviso or agreement in the within written indenture contained, and all the estate, right, title, and interest which he, the said *Patrick Logan*, now hath or may claim at law or in equity of or in the said land and premises comprised in the said indenture of mortgage, and being composed of lots numbers 22 and 23 on the east side of Broadway, in the said town of Paris, to the intent that the said *John Watt* may hereafter hold and enjoy the said land and premises comprised in the said annexed indenture unto him the said *John Watt*, his heirs and assigns forever, to his only use, freed from the proviso for redemption as aforesaid. The said *Patrick Logan* covenants with the said *John Watt*, his heirs and assigns, that he has done no act to incumber the said premises, and that he will execute all such assurances of the said lands and premises as shall be requisite. In witness," &c.

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Judgment.

On the 18th of April, 1873, the plaintiffs sold the premises to the defendant *O'Connor*.

The plaintiffs ask that the defendants, other than *O'Connor*, may be compelled to redeem, and in default that they may be foreclosed.

The only question argued was, whether, under the circumstances, the mortgage of the defendants had gained priority over that of the plaintiffs or not. It was urged on behalf of the plaintiffs, that the effect of the release of the equity of redemption was not to create a merger, whereas the defendants contended that this release effectually discharged the plaintiffs' mortgage, and that the only decree that could be pronounced in their favour would be one for redemption. It was conceded, by the

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counsel for all parties, that the question of merger or no merger was now reduced to one of intention. There can be no doubt as to the operation of the instrument of release. It recites that *Patrick Logan* hath agreed with *John Watt* "for the absolute sale of the inheritance of the land and premises in the said indenture mentioned." It goes on to witness "that in pursuance of the agreement and in consideration of the sum of $1500 now due and owing to the said *John Watt*, for principal money and interest upon the within security and in satisfaction thereof . . . he, the said *Patrick Logan*, hath granted and released . . . the proviso or agreement in the within written indenture contained . . . to the intent that the said *John Watt* may hereafter hold and enjoy the said land . . . freed from the proviso for redemption as aforesaid." The instrument also contains on the part of *Patrick Logan* the ordinary covenant for further assurance, and that he hath done no act to incumber. The wording of the instrument is so plain that no room seems to be left, as in some of the cases, for the Court to draw an inference or conclusion that the mortgagee intended to preserve the debt, while taking a release of the equity of redemption;—we are not driven to consider the probabilities or likelihoods of the case. The instrument specifically negatives the intention of keeping alive this debt. In consideration of the discharge of the amount due on this mortgage, and "in satisfaction thereof," *Logan* released the land in question, to be thereafter held by *Watt*, freed from the proviso for redemption. The whole agreement is based, not on the preservation, but on the satisfaction of this mortgage debt. There is no testimony to controul the effect of this release. It is impossible for me, on the one hand, to say, that it is plain from the effect of this instrument that the debt is gone, and at the same time, from the same instrument, to deduce an intention that this debt was to be kept alive. The bargain of the parties seems clearly to have been that in consideration of the release

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the debt was to be extinguished, and the mortgagee protected himself from the effect of other incumbrances by accepting the covenant of the mortgagor. Under the Consolidated Statutes of Upper Canada, chapter 87, section 1, the mortgagee may take a release of the equity of redemption without thereby merging the mortgage debt, as against any subsequent mortgagee, but, while giving this permission, the Act does not deprive the mortgagor and mortgagee of the right of agreeing for a release of the equity of redemption, in satisfaction of the mortgage, and thereby discharging such debt. If there was no merger, then am I to consider the debt and the covenant of the mortgagor to pay it as still subsisting, and if so, how can I thus affect the mortgagor who is not before the Court, and revive this liability discharged fourteen years ago? If, on the other hand, the covenant cannot be revived, then how can the plaintiff ask the second mortgagee to redeem when, on redemption, owing to his act the second mortgagee would not be entitled to an assignment of the mortgage and the covenant, but would have to take an assignment of the interest of the first mortgagee without any personal remedy as against the mortgagor?

Judgment.

"I apprehend," says the late Vice-Chancellor *Esten*, "that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, the mortgagee acquiring the equity of redemption would be entitled, under the statute, to priority in respect of his mortgage over *puisne* incumbrancers. But the actual release of the mortgage is difficult to be got over. In the first place it is strong evidence of the intention of the parties that the mortgage should not be kept on foot. . . . Further, the mortgage is, or should be, in the possession of the mortgagor, and so the mortgagee is no longer the holder of it; and besides *Foley* was not, and

(a) *Buckley* v. *Wilson*, 8 Gr. 566-568.

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Wilson is not, in a position to carry out such a decree as is ordinarily made between first and second mortgagee and mortgagor if he were held entitled in priority to the plaintiff;—such a decree provides that upon redemption by the second mortgagee of the first, the first shall re-convey and deliver up all deeds and writings, &c. The second mortgagee would be entitled to an assignment and delivery of the first mortgage; but here the mortgagor would have it and be entitled to retain it; and the second mortgagee, after redeeming the first, would be deprived of his rights over against the mortgagor in respect of the mortgage which he had paid off. But under the statute the first mortgagee stands in the position of mortgagor or owner of the equity of redemption, being bound to redeem the second mortgagee, which he can only do by re-paying what he has received from him and paying off the *puisne* incumbrancer; or, in default, standing foreclosed. He may choose of course to stand foreclosed, retaining the amount of his mortgage in preference to redeeming. Should he do so the *puisne* incumbrancer who has redeemed him ought to be the holder of the mortgage which he has redeemed, for whatever be the rights as between the mortgagor and the first mortgagee purchasing the equity of redemption, the second mortgagee redeeming the first must have his full rights against the mortgagor, and it is obvious that he cannot have these rights when the mortgagor has in his hands the mortgage itself released."

Judgment.

In *Finlayson* v. *Mills* (*a*), there are two passages which distinctly sustain the position of the defendants; the one at page 223, "The words in the deed of the 1st of March, 1859, reciting that the conveyance to *Mills* was in satisfaction of his debt, and the last written words dispose of the question of intention, even if that were to govern to the full extent contended for by Mr.

(*a*) 11 Gr. 218.

1874.

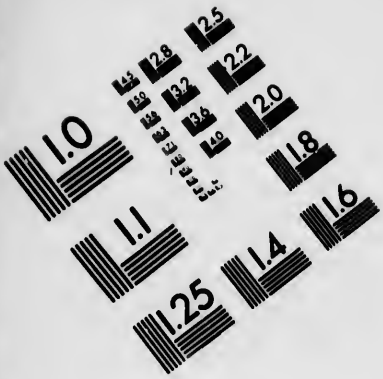
Hart v. McQuesten.

Blake. These words leave no doubt as to the contract of the parties, from which the intention must be gathered." Again, at page 232, "The law of the Court, both under the statute and independently of the statute, therefore, now is, that a mortgagee may take a release of the equity of redemption without merging his debt; but I think that in this case *Mills* has not done so; that, on the one hand we have no evidence whatever that he was not content to merge his debt in the estate which he was acquiring, and that, on the other hand, we cannot give the natural and fair effect to the express bargain between the parties, or to the intention which it manifests, without holding that the debt of *Mills* is extinguished, and that the plaintiff's claim is the only charge on the property." See also *Elliot* v. *Jayne* (*a*), *Beaty* v. *Gooderham* (*b*), *Barker* v. *Eccles* (*c*).

The only relief the plaintiffs are entitled to is the ordinary decree for redemption, which is the one I grant. Judgment.

The defendant *O'Connor* is, as well as the other defendants, entitled to costs as against the plaintiffs.

(*a*) 11 Gr. 412. (*b*) 13 Gr. 317.
(*c*) 17 Gr. 631; In Ap., 18 Gr. 440.



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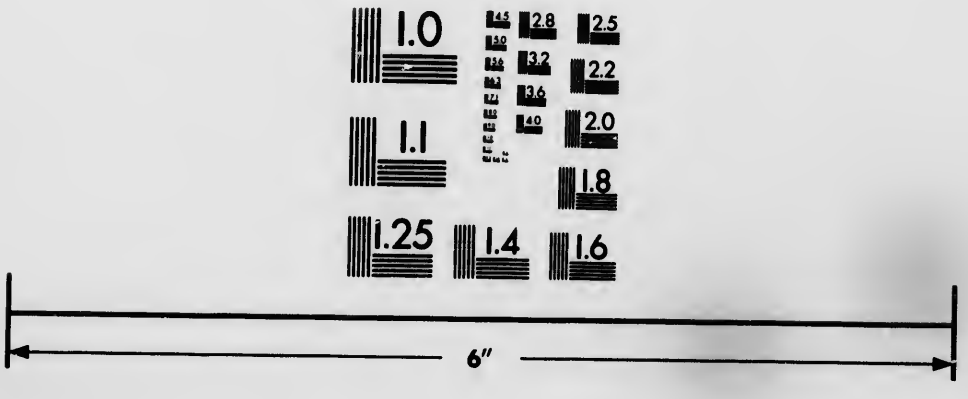

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1874.

RISK v. SLEEMAN.

Fraudulent preference—Pressure—Indigent debtors' Act.

A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied:

Held, that this was not such a preference as rendered the chattel mortgage void.

Statement.

This was a bill by *John Risk* against *George Sleeman* and *Denis Bunyan*, setting forth that *Bunyan* being in insolvent circumstances, of which *Sleeman* was aware, in order to give *Sleeman* a preference over *Bunyan's* other creditors, on the 9th of May, 1873, executed to *Sleeman* a chattel mortgage for $1,024.63, on all his property, goods and effects, payable by monthly instalments of $100 each, with interest, at 8 per cent; that plaintiff, on the 23rd of May aforesaid, obtained judgment and execution against *Bunyan* for $443, debt and costs; that *Sleeman* had advertised the property for sale, and in consequence the sheriff was unable to realize the amount of plaintiff's execution against *Bunyan*. The bill prayed an injunction restraining *Sleeman* from selling the goods; and that the chattel mortgage might be declared void as against plaintiff and the other creditors of *Bunyan*.

The defendant *Sleeman* answered, denying all fraudulent intention in obtaining the chattel mortgage, and alleging that the same was given to secure a claim of $624, for which plaintiff had instituted proceedings at law, together with the sum of $388, being the value of a stock of ale furnished to *Bunyan* to enable him to carry on his business of saloon keeper, and which defendant stipulated should be given to him by *Bunyan* before he would consent to furnish him with the stock.

1874.

Risk v. Sleeman.

The cause came on for hearing at Guelph, when the plaintiff as also both the defendants were examined as witnesses. The effect of their evidence was to shew that the chattel mortgage had been given under the circumstances set forth in the answer of *Sleeman*.

Mr. *Attorney-General Mowat* and Mr. *Hodgins*, Q.C., for the plaintiff.

Mr. *Guthrie* and Mr. *Watt*, for defendants.

BLAKE, V. C.—I have perused the evidence and papers in this cause again, and retain the opinion I was of at the hearing. I believe that *Sleeman*, in good faith, and honestly feeling that *Bunyan* would be enabled to carry on his business, made the advances of goods. The only persons pressing *Bunyan* were the plaintiff, *Sleeman*, and another creditor for a sum of $30. The whole debts amounted to between $1,800 and $2,000. The defendant *Bunyan* had been offered $2,000 for the property, and he wanted $2,500. He would not sell out for the amount offered; the plaintiff and *Sleeman* thought they would compel him to do so by bringing actions against him, which they consequently did. *Bunyan* could not carry on his business of saloon keeper without his stock of ale, and *Sleeman* refused to supply him without security. If he had pressed on his suit, all the probabilities are in favour of the proposition that he and the plaintiff would have been paid in full out of the proceeds of the sale of the property. At the solicitation of *Bunyan*, *Sleeman* supplied him with his stock of ale to the value of $388, and took a chattel mortgage payable in twelve monthly payments. The claim of the plaintiff was then $424, and *Bunyan* had $200 in cash which he might then have applied towards its satisfaction. By the action of *Sleeman*, the lease, which was forfeited if execution issued, and which constituted a valuable asset of *Bunyan*, was preserved, and a means was

Judgment.

1874.

Risk v. Sleeman.

devised whereby in all probability all the debts would have been paid. The plaintiff refused to recognize the right of *Sleeman* and *Bunyan* to make any such arrangement, and he continued his action at law, closed the saloon, sold out *Bunyan*, and deprived him of the power of continuing that business, to which alone the creditors could look for payment of their claims.

I am convinced of the honesty and truthfulness of *Deady* and *Sleeman* in the account they give of the transaction, and I find on their evidence that, in place of its being a scheme for the purpose of defeating or delaying the creditors of *Bunyan*, it was one devised for the purpose of paying them. and to enable the debtor to carry on the occupation, which, without his assistance, must have ceased.

Judgment.

If the matter were *res integra*, I should have much difficulty in concluding that, as circumstances have transpired,—as *Sleeman* gets his debt in full and the other creditors do not—the transaction was not within the Indigent Debtors' Act, but the cases clearly that where an arrangement is entered into, as was the present, to aid a debtor with the view of enabling him to discharge his obligations, the Court, being convinced of the *bona fides* of the transaction, will sustain it. This being my conclusion here, I dismiss the bill with costs.

1874.

HESSIN v. COPPIN.

Injunction—Practice—Damages

Where a plaintiff on obtaining an injunction enters into the usual undertaking to abide by such order as the Court may make as to damages, it is in the discretion of the Court to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for the defendant, the Court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained.

The facts of this case are fully stated on the refusal of the motion to continue the injunction, as reported, *ante* vol. xix., page 629.

Mr. *Boyd*, for the plaintiff, moved for an order to refer it to the Master to take an account of the damages sustained by the defendant *Chilman*, by reason of his having been prevented from using the machine erected in his premises by the defendant *Coppin*.

Mr. *Moss*, Q. C., contra.

Judgment.

BLAKE, V. C.—Where a plaintiff obtains an injunction on the usual undertaking, it is not, as of course, to give damages where the injunction is not continued, or is dissolved: *Bingly* v. *Marshall* (*a*), *Featherstone* v. *Smith* (*b*).

Here the motion for injunction was returnable on the 17th of December, 1872, then an undertaking was given. The motion for injunction was argued on the

(*a*) 11 W. R. 1018. (*b*) 20 Gr. 474.

1874. Hessin v. Coppin.

11th and 12th of February following, and on the 8th of March, 1873, the motion was refused. The only evidence before me is that used on the motion for injunction. From that I find that the defendant *Coppin*, while in the employment of the plaintiff, procured information which enabled him to manufacture a machine of great use in the business of a confectioner; that this information the plaintiff desired to keep secret; that both the defendants knew the plaintiff would not willingly let them have a machine similar to the one above mentioned; that with this knowledge *Chilman* procured *Coppin* to manufacture for him a machine similar to the one used by plaintiff, which he was about to use when the motion for injunction was made, and the undertaking not to use given.

Judgment.

As against *Coppin* I was prepared to have granted an injunction, as I considered he stole from his employer the knowledge that enabled him to make the machine in question; and as against *Chilman* I would have granted an injunction, as I was of opinion he acted in concert with *Coppin* in making use of the information surreptitiously obtained, but that there was nothing to prevent *Chilman* procuring from another the article he needed, the patent of the plaintiff not being valid. I do not think the conduct of the defendants presents so meritorious a state of facts as compels me to grant the inquiry asked.

I exercise the discretion which, under the authorities, appears to be vested in the Court in these cases, by refusing the application without costs.

STREET v. HALLETT. 1874.

Resulting trust.

A woman while living with a man to whom she believed herself to have been lawfully married, but who, it was afterwards discovered, was, at the time of the pretended marriage with her, a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name.

Held, that there was not any resulting trust in favour of the woman.

The bill in this case, filed 10th January, 1873, was by *Ann Maria Street* against *Luke Hallett*, *Emily Carter*, *Dorcas Hewlett*, and *Sarah Hallett*, real representatives of *John Chaffey Hallett*, deceased, and *James Street*, the husband of the plaintiff, praying, under the circumstances appearing in the judgment, that the defendants other than *Street* might be declared to be trustees of the premises in question for the plaintiff, and might be ordered to convey the same to her; and that they might be restrained from proceeding with the action of ejectment in the bill mentioned to turn her out of possession of the property of which she and her husband had been in undisturbed possession since the time of their marriage in 1854, during which period they had cultivated and greatly improved the premises. Statement.

The defendants, other than *Street*, answered, denying the material allegations of the bill, and claiming a right to hold the property freed from any claim of the plaintiff.

The cause came on to be heard at the sittings at St. Catharines.

Mr. *Moss*, Q. C., and Mr. *P. McCarthy*, for the plaintiff and defendant *Street*.

Mr. *Boyd* and Mr. *D. Chisholm*, for the other defendants.

1874.

Street v. Hallett.

BLAKE, V. C.—On the 8th of June, 1849, the plaintiff and one *John Chaffey Hallett* went through the ceremony of marriage in this Province. At this time *Hallett* was, unknown to the plaintiff, a married man, and his wife, by whom he had several children, defendants to this suit, was still living in England. The plaintiff and *Hallett* continued to live together, as man and wife, until the 17th of September, 1853, when *Hallett* died intestate. On the 8th of October, 1850, *Hallett* and the plaintiff determined that the land in question should be bought for $250 from one *Larkin* of Hamilton; $100 of the purchase money was then paid, and a bond was given, wherein it is recited that *Hallett* had agreed to buy and *Larkin* to sell; and it is covenanted that on payment of the $250, *Larkin* will convey to *Hallett*; five notes made by *Hallett* to secure the purchase money were, at the same time, given to *Larkin*. *Larkin* died on the 25th of August, 1852. On the 30th of October,

Judgment.

1871, the representatives of his estate conveyed the premises to the heirs of *Hallett*. In October, 1854, the plaintiff intermarried with the defendant *Street*.

The bill alleges that *Hallett* was without means, and that the plaintiff was possessed of property; and that she having formed the desire of acquiring the premises in question, they entered into negotiations which resulted in their purchase; that *Hallett* fraudulently concealed the fact of his previous marriage; that *Hallett* died before any further payments were made on the property; that *Hallett* was a mere trustee for the plaintiff in the purchase, and had no beneficial interest in the premises. The plaintiff and defendant *Street* have lived on and improved the premises since their marriage in 1854. The defendants deny that *Hallett* was without means, or that the plaintiff had anything to do with the purchase; they allege that the promissory notes, given to secure payment of the balance of the purchase money, were paid out of the profits of the land; that if any money

1874.

Street v. Hallett.

was contributed by plaintiff to *Hallett* to help to pay for this land, it was intended as a gift. The plaintiff in her examination says, she let *Hallett* take the bond for the purchase of the land in his own name, because he was an arbitrary man, and would have it in his name; that she knew *Hallett* had given his own notes for the purchase money; that she first heard of *Hallett's* former marriage after they went to live on the farm; that she went to pay and did pay the $100; that she sent the next payment by *Hallett*; that she got no receipts, but got the bond and notes as they were satisfied; that she had stock and $100 in cash when she married *Hallett*.

On these points, the witnesses examined corroborate the statement of the plaintiff. *Murphy* says, *Hallett* stated to him that he was down collecting the means his wife had left at Belleville; that he had purchased this lot with his wife's money; that he had no money of his own.

Judgment.

Wait states that *Hallett* told him he had never paid a dollar on the lot of his own money—it was all his wife's; that he had to go to the neighbourhood of Belleville where his wife had property to get something from it; that on *Hallett's* return, he let witness have some of the money he had received; that *Hallett* went to Belleville to get money to make his payments.

Sarah Schenk says, *Hallett* told her that he was going to the Bay of Quinte to sell his wife's property to get money to pay for the land. At another time he said he was going to Hamilton to make a payment on the land, as his wife had been at Belleville and sold some property to get money. He said he had sold some of his wife's property, and had made a payment on the land.

John Lynd says, that *Hallett* told him he paid for the lot with his wife's money; that he was going down to get her money.

1874.

Street v. Hallett.

There is no doubt that the plaintiff, before her marriage, was a saving, industrious woman, and had acquired some property; that she went to Belleville twice and *Hallett* once, to dispose of her stock; and that the two payments, made on this land during the lifetime of *Hallett*, were made almost, if not altogether, out of the moneys of the plaintiff.

The bond and notes given shew that the purchase was made by *Hallett* for himself. The only witness examined as to the terms of the purchase was the plaintiff, and it would be very unsafe for the Court to act, after the lapse of over 20 years, and the death of *Hallett*, on her unsupported testimony, even supposing she proved that the land was actually bought for her, and that it was through fraud or mistake that the bond was taken in the shape in which it appears. But giving full credit to the statement of the plaintiff, to what does it amount?

Judgment.

that she gave a sum of money to her husband to buy a piece of land; that when the purchase was effected, he insisted on the purchase being made in his own name; that she submitted to this and allowed the instrument taken to be drawn up indicating this to be, as in truth it was, the term of the purchase; that the notes were prepared evidencing the same state of facts; that after she was aware of the true state of matters, she still continued to reside on the property and pay the purchase money of it. The plaintiff, no doubt, desired that the purchase should be for her benefit, but on *Hallett's* insisting that this should not be, she allowed him to become the purchaser. It is impossible, therefore, to assert this purchase was to be for the benefit of the plaintiff. Against the wish of *Hallett*, she did not insist on this position, and she knowingly handed over her money, the property being so placed that at any time *Hallett* could part with it, without accounting to the plaintiff in respect thereof. If, in *Owen* v.

Kennedy (*a*), the money there paid, was considered as the money of the husband, I think that here it must be taken that the plaintiff allowed *Hallett* to have this money to effect this purchase; and that he must be treated as having purchased with money thus made his own, and that such purchase was for his own benefit. See also *Wilde* v. *Wilde* (*b*).

I am of opinion that the plaintiff knowingly allowed *Hallett* to become the purchaser of these premises; that she did not insist upon having any interest in them; and that at any time *Hallett* could have disposed of his interest under the bond without recognizing the plaintiff. I think not only is there no evidence to support the proposition that the purchase was for the plaintiff, but that the evidence of the plaintiff clearly negatives any such idea. Even in her examination she does not pretend, that when the bond was given there was any misapprehension in the matter on her part; she felt the importance of the bond being taken in her name; she does not aver that through any mistake, or under some promise from *Hallett*, she allowed the bond to be drawn otherwise, but then on *Hallett* insisting on the point she gave way and permitted the purchase to be his. There is no allegation that the bond was taken under any promise or arrangement whereby any benefit was to accrue to the wife, there is merely the one fact proved distinctly in connection with it, that at the time that the instrument was to be prepared, which was to determine whether the plaintiff or *Hallett* was to be the purchaser, then, notwithstanding that she supplied the purchase money and wanted to be recognized as purchaser, *Hallett* insisted on his being the purchaser, and she gave way and allowed him to assume that position. Doubtless the plaintiff would not have advanced the $100 had she known *Hallett* was not her husband. *Hallett*

Judgment.

(*a*) 20 Gr. 163.

(*b*) 20 Gr. 521.

1874.

Street v. Hallett.

might have had to abandon the purchase, or seek elsewhere for the means of completing it; but as a matter of fact, the plaintiff did then agree to allow this purchase for the benefit of *Hallett*, and she then devoted her $100 to this purpose. He obtained the $100 through deception, but I cannot see that this gives the plaintiff a right in respect of the land which *Hallett* chose to purchase with it.

This money he obtained from her by his fraudulent act. I do not see how I can give the plaintiff any relief: but owing to the improper acts of *Hallett* in connection with the transaction, in dismissing the bill, I do so without costs. If the plaintiff thinks she is entitled to any relief for the money she has paid on the property or her improvements, as to which I express no opinion, these points may be spoken to within the next ten days, otherwise the decree to be as above.

Judgment.

1874.

LAWRENCE V. ERRINGTON.

Sale of timber—Injunction—Statute of Frauds.

The owner of land by a memorandum in writing sold the timber thereon, and when the time verbally agreed upon for its removal was nearly expired, the vendor told his vendee that he might have another year within which to complete the cutting and removal of the timber.

Held, that the vendor was not at liberty afterwards to revoke such extension of time.

On a sale of timber, the land on which the same was situate was not mentioned in the memorandum evidencing the agreement, but the purchaser entered upon the land intended, and with the knowledge and acquiescence of the owner, continued to cut thereon for over a year:

Held, that this was sufficient, within the Statute of Frauds, to prevent the vendor afterwards disputing the right of the purchaser to cut the timber within the time limited for his so doing.

The position of a defendant resisting a claim, is more favorably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds.

Bill for injunction to restrain the cutting of timber. The cause came on to be heard at Barrie.

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

Mr. *Boyd*, for the defendant.

The facts are clearly stated in the judgment of,

BLAKE, V. C.—The plaintiff entered upon the premises set forth in the bill, and began to cut the timber thereon, in pursuance of a verbal agreement, which was shortly afterwards embodied in the following memorandum:— Judgment.

("$40)—Agreement between I, *Phillip Errington* and *James Lawrence*.—I, *Phillip Errington*, having purchased *James Lawrence's* timber, promise to pay

1874. him $5 cash, and $15 on the 13th October, and balance at the end of one month hence.

Lawrence v. Errington.

(Signed) { PHILIP ERRINGTON, JAMES LAWRENCE.

Thereafter and sometime in the month of July, 1872, the plaintiff, on his asking the defendant when he would have done cutting on the lot, was told that he would finish in a year. In the March following they met, and the defendant, alleging there would be a difficulty in removing the timber that season, was informed by the plaintiff that he might have another year to complete his cutting and removing the timber. Thereupon the defendant desisted from further work on the lot, and, on his recommencing, the plaintiff applied to this Court for an injunction, setting up an agreement which differed from the one in writing, alleging that the one set forth by the defendant was void under the Statute of Frauds, and that the license to cut for the additional year was a revocable one, which could be and was put an end to. The plaintiff called no witnesses. The defendant proved clearly that, under the agreement actually made between the parties, he was entitled to the timber cut, and in respect of which the plaintiff demands an injunction. The land on which the timber is situated, is not described in the agreement; but there is no question, in fact, as to the timber meant, and it was defined between the parties at the time, for the defendant entered on the land intended, and without interruption, and with the knowledge and acquiescence of the plaintiff, continued to cut thereon for over a year. The plaintiff, in his bill, alleges an agreement with the defendant as to certain timber on this very lot, and, on his insisting on his rights thereunder, the defendant comes forward and shews another agreement to have been the one really entered into between them, under which the plaintiff's case fails. I think that the defendant has, notwithstanding the requirements of the Statute of Frauds, shewn such a

Judgment.

state of facts, as, under the authorities, would warrant the Court in refusing to relieve the plaintiff. The act of the party defines the land. 1874. Lawrence v. Errington.

The position of a defendant resisting the claim of a plaintiff, is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds.

The defendant expressly limited his claim to the timber at present cut, and abandoned his rights, if any such he had, in respect of the premises for the future. In order to prevent further difficulties, the decree had better declare that the defendant is entitled to the timber already cut on the premises, and, with this declaration, let the bill be dismissed with costs. Judgment.

HEWARD v. JACKSON.

Easement—Right of way.

The nature of the enjoyment of an easement at the time of the grant thereof is the proper measure of enjoyment during the continuance of the grant.

A person purchased a piece of land with the right of way across the property of the grantor by a lane which at the time of the conversion was perfectly open where it entered the public highway:
Held, that a person claiming under the grantor could not subsequently put a gate across said lane, though avowedly placed there, not to exclude the plaintiff from the use of the right of way, but to preserve the lane from being trespassed on by the cattle of others.

The bill in this case was filed to restrain the defendant, *William W. Jackson*, from interfering with the plaintiff's right of way over a certain lane adjoining the premises of the defendant.

1874.

Heward v. Jackson.

Statement.

It appeared that in March, 1867, the plaintiff had purchased from the trustees of the estate of the late *John Thomson* about ten acres of land in the township of Orillia, together with "a right of way twenty feet in width along the north-westerly side of the brewery property to the westerly corner thereof, with access thereto in common with others by a road of not less than twenty feet in width across said lot;" that the defendant had in April, 1867, and April, 1870, leased from the *Thomson* estate other portions of the property, and in the lease of the later date the right of way was expressly reserved; and that since the date of such leases the plaintiff and defendant had used the road in common. The bill further alleged that the defendant had, since April, 1870, erected a gate and fence across the said road where the same enters the concession line, thereby obstructing such right of way, to the great inconvenience and annoyance of the plaintiff; and in the enclosure so formed the defendant had placed a large number of cattle, which obstructed the plaintiff's right of way and greatly interfered with the plaintiff's use thereof: and the bill stated that defendant claimed a right to close up the said right of way under his said leases.

The defendant answered the bill, insisting that he had the right to put up the gate in question for the purpose of preventing the cattle of the neighbouring residents from getting into the lane in question and from thence into the premises of the defendant; but he did not assert any right to exclude the plaintiff from the free and uninterrupted use of the right of way.

The cause came on to be heard at the Sittings at Barrie.

Mr. *Moss*, Q.C., and Mr. *Lount*, for the plaintiff.

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

1874.

Heward v. Jackson.

BLAKE, V. C.—I have, up to the present, been unable to procure the plan used at the examination of witnesses or all the deeds then put in.

As I cannot further delay the disposition of the case I have been obliged to consider it with the imperfect materials before me. From these it appears, that in 1867 the plaintiff purchased about ten acres of land from the representatives of one *Thomson*. The means of access to this lot was by a right of way along the north side of the adjoining property, known as the Brewery property, thence along a lane to the concession road. The lane to the brewery has been used for over thirty years. Where the lane met the concession line, there used to be a gate until about the year 1862, when it ceased to exist. In 1867 the plaintiff purchased; and, in her conveyance, are the following words:—"together with a right of way twenty feet in width along the north westerly side of said brewery property to the westerly corner thereof with access thereto in connection with others by a road not less than twenty feet in width across said lot."

Judgment.

The lane or road is fenced on both sides all the way, from the concession line to the lands of the defendant, where he has placed a gate. The defendant is the tenant of the brewery property, and he has recently placed a gate across the lane where it enters the concession, and of this the plaintiff complains, as being an interference with the right of way. At the time the plaintiff purchased, for five years previous and for seven years after, the lane was enjoyed without this gate. No reason now is shewn for its existence, as, the lane being fenced, a gate can be erected at some other point, whereby the premises of the defendant can be protected from the intrusion of cattle.

I have read the cases which were cited to me: *Akroyd*

1874. Howard v. Jackson.

v. *Smith* (*a*), *Skull* v. *Glenister* (*b*), *Hutton* v. *Hamboro* (*c*), *Wood* v. *Sutcliffe* (*d*), *Phillips* v. *Trebly* (*e*), *Watts* v. *Kelson* (*f*), *Hawkins* v. *Carbines* (*g*), *Fielder* v. *Bannister* (*h*), *Kidgill* v. *Moore* (*i*).

I think a reasonable rule to lay down would be, that the nature of the enjoyment had at the time of the grant of the easement should be the measure of enjoyment during the continuance of the grant. That the grant must be taken to give unfettered the right of way which existed at its date. Here, when the plaintiff purchased, there was no bar to the uninterrupted use of this lane; and I am of opinion that the erection of the gate in question is a nuisance, as it interrupts the free and open passage which before was enjoyed, and to which the plaintiff was entitled. In *James* v. *Hayward* (*k*) Sir *William Jones* says, "If a private man hath a way over the land of *J. S.* by prescriptive grant, *J. S.* cannot make a gate across the way," and although *Croke*, J., in that case says, "the law accounts not such petty troubles nuisances;" yet Mr. *Gale*, at p. 578, and Mr. *Angell*, at sec. 223, approve of the view taken by Sir *William Jones*. Here it is shewn, there were cattle continually in the lane, to protect herself from which the plaintiff was obliged to place a gate at the entrance into her premises. The erection now insisted on by the defendant causes a second interruption, which although not perhaps of much moment when walking, is a substantial discomfort when driving, and one to which I do not think the defendant can compel the plaintiff to submit.

Statement.

I think reason and authority are both in favor of the bill, the prayer of which I grant with costs.

(*a*) 10 C. B. 164. (*b*) 16 C. B. N. S. 81. (*c*) 2 F. & F. 218.
(*d*) 21 L. J. Ch. 253. (*e*) 8 Jur. N. S. 711. (*f*) L. R. 6 Ch. 166.
(*g*) 27 L. J. Ex. 44. (*h*) 8 Gr. 257. (*i*) 9 C. B 364.
(*k*) Sir W. Jones Rep. 221.

CURRIE v. GILLESPIE. 1874.

Fraudulent conveyance—Delay in suing.

Delay for seven years in suing *held* no objection to a party's right to set aside a deed as fraudulent against creditors, where the position of the parties to the impeached conveyance had not been materially altered by the delay; if that were shewn the Court has the power of modifying the relief to be given, so as not to wrong the parties; or it might, in its discretion, refuse to give any relief.

This was a bill by *Ann Jane Currie*, a judgment creditor of the defendant *Rennicks*, seeking to set aside a conveyance of land made by him to his step-father, the defendant *Gillespie*, about seven years before the bill was filed.

The evidence fully satisfied the Court that the conveyance in question had been made for the purpose of preventing the lands being seized by the creditors of *Rennicks*, the only question being, whether the lapse of time had not been so great as to preclude the plaintiff from a right to recover on the ground of laches.

Mr. *Moss*, Q.C., and Mr. *C. Moss*, for the plaintiff.

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

After taking time to look into the authorities,

BLAKE, V. C.—I am unable to come to the conclusion that the transaction impeached by this bill can be sustained. I do not think the step-father intended to buy, or the step-son to sell, the premises. They desired simply that the property should be so held as that *Rennicks* should have the benefit of it, and not the creditors. I am led to this conclusion from the unsatisfactory account given of the transaction by the parties to it. I must take the value of the land at the time of the conveyance to have been about $3,000. This being so, the pretended consideration, as made up by the Judgment.

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Currie v. Gillespie.

parties on their examination, was an inadequate one. The parties do not agree as to when and where the bargain was made, nor as to its nature, nor as to the mode of paying the $900, and satisfying the rent for the house garden, and potato patch. Then the account as to the renting of the premises, the payment of the taxes by *Rennicks*, and the hiring of the threshers by *Gillespie*, the silence as to the notes said to have been given for the $900, until the examination before the Court; the absence of any person to corroborate the story of their existence, the unsatisfactory account given of the settlement in November or December, 1873, which could not be excused, as some other of the statements may be, on account of the time that elapsed between their taking place and the examination of the defendants, all lead to the conclusion that, as between these parties, the property in question belongs to *Rennicks*, and that the arrangement made was a clumsy one, not intended to have any effect but to defraud the creditors that were pressing *Rennicks*. It is true that the plaintiff has abstained for seven years from taking any proceeding to impeach this conveyance, but I cannot find any authority for this being a defence to such a suit. Had the position of the parties been materially altered by the delay the Court might refuse relief, or so modify it as not to wrong the defendants; but as I do not find that *Gillespie* has paid any thing directly to *Rennicks* on the purchase money, (which would have gone far to convince me of the reality of the transaction), or that he has otherwise acted so as to prevent his being fully protected, I think the usual decree with costs must be made. *Gillespie* must pay the mortgage he created on the premises, and be paid the amount he advanced the Building Society. The one can be set off against the other, and a lien declared in favour of *Gillespie* for any balance due him, which can be satisfied when the premises are sold.

Judgment.

THE NATIONAL BANK OF ALBANY v. MOORE. 1874.

Composition deed—Trustees for creditors.

A trader, in insolvent circumstances, made an assignment of his property to several of his principal creditors in trust, for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept 20 per cent. of their demand, and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees re-assigned the property to the debtor on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs:

Held, that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to realize the amount of the composition agreed on; and as to this, if desired by the trustees, an inquiry by the Master was directed.

Hearing at Guelph.

Mr. *Cassels* and Mr. *Ball*, for the plaintiffs.

Mr. *Attorney General Mowat* and Mr. *Rae*, for the defendants.

The facts are clearly stated in the judgment.

BLAKE, V. C.—*James Hunter*, on the 16th of August, 1870, being indebted to one *Merrihew* in a sum of money, stated to be $3,782.64, made an assignment of his property to the defendants *Moore*, *Moscrip*, *Henderson*, *Scott*, and *Williamson*, for the benefit of his creditors. On the 7th of September following, *Merrihew* assigned this claim to the plaintiffs, the *Bank*. The trustees were notified of this claim and of the assignment, and the *Bank* since then have been treated as the owners of it. In January, 1871, *Hunter* became insolvent, and a meeting of his creditors was held, and on the 9th of January, a letter notifying the plaintiffs of this meeting was sent to them, to which they answered on the 14th, Judgment.

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saying it was received too late for them to be represented at the meeting, and asking what was contemplated, and what it was desirable for them to do. To this the solicitors answered on the 17th of January, that the creditors had agreed to take twenty cents in the dollar cash for the amount of their respective claims—that no better could be done, and asking whether a power of attorney should be sent to enable them to receive their dividend. On the 28th of January, the plaintiffs wrote saying they were prepared to accept the twenty cents on the claim and discharge the assignees, but that they were not prepared to discharge *Hunter* as to the remainder of the debt. On the 27th of January, the solicitors by a letter, which probably crossed that of the plaintiffs, again wrote and said the Canadian creditors had agreed to take twenty cents in the dollar, and to discharge *Hunter*; and asked whether this would be accepted by the plaintiffs. On the 17th of February, the solicitors informed the plaintiffs that they would soon receive the deed from New York for execution; and asking, upon its being signed by them, to forward it to another creditor. On the 28th of February, the plaintiffs wrote the solicitors that the deed of composition and discharge had been received, executed, and forwarded. On the 12th of April, the plaintiffs wrote inquiring why payment was not made to them. On the 17th, the solicitors replied that the money was in their hands to pay off the claims; that they expected to pay it out that week or the next, and that the delay was occasioned by the necessity of seeing the creditors individually. On the 12th of June, the plaintiffs again wrote for the money, and asked, that if not paid at once, the discharge should be cancelled. On the 21st of July, the solicitors wrote, saying, that the dividend of the plaintiffs on their claim would amount to $756.53; that there was only $300 odd said to be available for its payment, and asking them to accept that sum in full, in view of *Hunter's* ruined circumstances, and the advantages they had had in the way

Judgment.

1874.

The National Bank of Alban v. Moore.

of business from him. That offer was rejected, and the present bill filed.

It was objected that there was no formal assignment from *Merrihew* to the *Bank*, whereupon, at the hearing, he was added as co-plaintiff. About the time of the execution of the composition deed, the trustees reconveyed and handed over to *Hunter* all the property they had received from him. The composition deed has not been handed to me, and so I have taken for granted that it was, as stated in argument, an instrument whereby the creditors in consideration of payment, then acknowledged, of twenty cents in the dollar, of their respective claims, released *Hunter* from them.

Scott, one of the assignees, in his examination, says, "It was understood that Mr. *Durand* should do what was necessary for us; we acted on his advice—we acted through Mr. *Durand* who prepared the reconveyance. Our only legal advisers were Messrs. *Durand* & *Phillips*. Mr. *Durand* was present at the meeting. He was our legal adviser: * * We thought Mr. *Hunter* would pay the composition; we believed him when he said he would—we trusted to his word. * * The first agreement was, that on payment of the twenty cents in the dollar, the property was to be handed over."

Judgment.

Wilkinson, another of his trustees, says, "I sanctioned the handing back of the chattels. I presumed *Hunter* would pay the twenty cents. I had confidence in *Hunter*, and did not think I was running a risk in trusting to him. * * It is correct that the other creditors were to be instructed by Messrs. *Durand & Phillips* of what had taken place, to see whether or not they would come into the arrangement."

The facts of the case, as I find them, are, that *Hunter*, having transferred all his effects to trustees for the

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benefit of his creditors, through the solicitors, who have all along acted for him and the assignees, calls a meeting of his creditors to endeavour to effect some settlement of his affairs.

The plaintiffs, admitted as creditors, are notified of this meeting. These solicitors ask them after the meeting, whether they will accept, as did the other creditors, twenty cents in the dollar cash for their claim, and give a discharge. They answer that they will take this amount, and discharge the assignees. There is no pretence that these proceedings are compulsory. There is no intimation that the assignees are to hand over the property before payment of the composition. As *Wilkinson*, one of the trustees, says in his evidence, the solicitors were to notify the creditors to see whether they would come into the arrangement. The agreement to which the plaintiffs consented, they carry out. But the trustees in place of holding the property until the composition was paid,—instead of seeing that the cash offer made to the plaintiffs was complied with, hand over the estate: they, the principal creditors, receive their twenty cents in the dollar, and the plaintiffs receive nothing, and are asked to take ten cents in the dollar. The defendants accepted the trusts of the instrument of August, 1870; the correspondence between their solicitors and the plaintiffs shews the terms on which the plaintiffs were prepared to absolve them from their trusts, and I think they were guilty of a breach of trust when they handed over the property to the insolvent without seeing that the interests of the plaintiffs were protected. No doubt, these gentlemen, as they say, thought all would be right, and trusted to the honesty of *Hunter*. It may be that the same course of action on their part, which resulted in the payment to themselves of their dividends in full, would have, if followed in favor of the plaintiffs, resulted in procuring for them their amount.

Judgment.

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I think the plaintiffs are entitled as against the defendants, other than *Scrimgeour*, to a decree for the payment of the amount of their composition with interest and costs. As against *Scrimgeour*, the bill must be dismissed with costs. If the defendants contend that the debt claimed by the plaintiffs is not due, then there can be a reference to ascertain the amount; and if the defendants contend that their liability should be restricted by the actual value of the goods received from *Hunter*, at the time the composition deed was signed, the Master can, at the same time, inquire as to this. In the latter case further directions and costs will be reserved, except as against *Scrimgeour*, as to whom the bill may as well at once be dismissed with costs

Judgment.

GOULD v. CLOSE.

Bond for a deed--Chose in action—Equities.

A bond was executed for the conveyance of real estate, which, by the contrivance of the agent of the obligee, falsely stated that the purchase money agreed upon had been all paid to the obligor, which bond the obligee transferred to a *bona fide* assignee for value, who filed a bill to enforce the execution of a conveyance. The Court, however, following the rule that the assignee of a chose in action takes subject to all equities affecting the same, refused a decree except upon the terms of payment of such sum as might on taking an account be found due to the obligor in respect of the purchase money.

Bill by the assignee of bond for the conveyance of land, claiming that he was entitled thereto without payment of any portion of the purchase money under the circumstances mentioned in the judgment.

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

Mr. *Creasor*, for the defendant.

1874.

Gould v. Close.

BLAKE, V. C.—On the 17th of January, 1859, one *Andrew Close*, who was the locatee of the Crown of lot 29 in the third concession of Arran, died intestate, leaving several children, and, amongst them, his two sons *John* and *Andrew Close*, his heirs-at-law. Shortly after the death of their father these heirs entered into an arrangement whereby their interests in the property were vested in *John* who agreed to convey half of it to *Andrew*, on being paid certain sums of money, and he then gave a bond in fulfilment of this agreement.

On the 12th of November, 1872, on the allegation that this bond was defective, *John* executed another bond, which acknowledged the receipt of $1,000 the full consideration to be paid by *Andrew*, and whereby *John* bound himself to convey the east half of the lot to *Andrew* or his assigns. Thereupon this bond was for value assigned to the plaintiff who now holds it.

Judgment.

On the 26th of November, 1873, the patent of the lot issued to *John Close*.

There is no doubt that the consideration which *Andrew* was to pay has not been satisfied, and that this bond was obtained by such a fraudulent misrepresentation as to avoid it as between *John* and *Andrew*.

It is equally clear that the plaintiff took the assignment of the bond in good faith, and without any notice or knowledge of the fraud which was practised in obtaining it, and without any inquiry of the obligor. It was contended on the part of the plaintiff that, as he was a *bona fide* purchaser for value, without notice, he could claim under the bond, no matter what fraud may be shewn on the part of the obligee; and for the defendant that as the plaintiff was the assignee of a chose in action, he took it subject to all the equities between the parties to it.

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There seems now to be no doubt that the assignee of a chose in action takes it subject to all equities, and that the taking it subject to such equities amounts to this, that he takes it fixed with the rights and liabilities which existed in respect of it between the obligor and obligee. If the assignee did not desire to rest under such liability he ought to have made due inquiry, and not having done so, the loss, if any, must fall on him who having the duty to inquire cast upon him has not thought proper to do so. See *Mangles* v. *Dixon* (*a*), *Cator* v. *Burke* (*b*), *Turton* v. *Benson* (*c*), *Cockell* v. *Taylor* (*d*), *Graham* v. *Johnson* (*e*), *Athenæum Life Assurance Co.* v. *Pooley* (*f*), *Ryckman* v. *Canada Life Assurance Co.* (*g*), *Henderson* v. *Brown* (*h*).

I think the plaintiff entitled, on payment of the costs of the suit, and on payment of the amount properly to be allowed to *John Close* under his answer on an account to be taken by the Master at Owen Sound, to a conveyance of the east half of the lot, to secure the payment of the debt in respect of which the land was assigned to him.

Judgment.

(*a*) 8 H. L. 702
(*b*) 1 Bro. C. C. 434.
(*c*) 1 P. W. 496.
(*d*) 15 Bea. 103.
(*e*) L. R. 8 Eq. 36.
(*f*) 3 DeG. & J. 294.
(*g*) 17 Gr. 550.
(*h*) 18 Gr. 79.

1874.

Elliott v. McConnell.

Mortgage—Assignment—Equities.

The assignee of a mortgage, like the assignee of a promissory note (after maturity) or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument.

Statement.

The plaintiff, a judgment creditor of *John Robert McConnell* (since deceased), instituted the present suit to set aside, or receive payment out of, a certain mortgage theretofore made by one *Andrew McConnell* to the defendant *Dorinda McConnell*, wife of *John Robert McConnell*, and by her sold and assigned to the defendant *David Glass*, who, it was shewn, had in good faith and without notice of the claims of any creditor other than the plaintiff, completed his purchase; and he had only obtained notice of the plaintiff's claim by finding a certificate of *lis pendens* registered against the lands embraced in the mortgage, they having been the property of *John Robert McConnell*, after he had arranged and after he had paid part of the price agreed upon; such lands having been conveyed by *John Robert* to *Andrew McConnell*, who created the mortgage in question in favor of *Dorinda McConnell*, to secure part of the purchase money. *Glass*, upon ascertaining the amount due to the plaintiff, retained sufficient of his purchase money to pay the plaintiff. *John Robert McConnell* defended the suit, alleging fraud, but a decree having been pronounced in favor of the plaintiff, *Glass* immediately tendered the plaintiff's solicitor the amount of the plaintiff's claim, including interest and costs of this suit. This the solicitor refused to accept, as it appeared that there were other creditors who had claims against *John Robert McConnell*, and he therefore required *Glass* to pay and discharge those claims also.

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The minutes of decree were settled in accordance with this claim of the plaintiff, and a motion was thereupon made by the defendant *Glass*, to vary them in such a manner as to require him to pay the claim of the plaintiff only.

Mr. *Cassels*, contra.

STRONG, V. C.—This was a bill by a judgment creditor of *John Robert McConnell*, against *Dorinda McConnell*, his widow, and *Andrew McConnell* and *David Glass*, impeaching as fraudulent against the creditors of *John Robert McConnell*, a certain transaction whereby *Andrew McConnell* made a mortgage to *Dorinda McConnell*, which mortgage was afterwards assigned to Mr. *Glass*.

Judgment.

At the hearing, I determined that the transaction was void as against creditors as regards Mrs. *McConnell*, and that Mr. *Glass* as assignee of a mortgage took subject to all equities. Mr. *Glass* now moves to vary the minutes of decree settled by the Registrar in accordance with my judgment at the hearing, where Mr. *Glass* did not appear, by striking out the declaration in the decree that the assignment to him was void as against creditors, and the direction for an account of moneys received by him on account of the mortgage.

The first objection to this motion is, that it is virtually a re-hearing of the cause; the second answer to it is, that the decree is perfectly right. I determined on the evidence at the hearing, and I am not now going to review my reasons for the decision, that the mortgage to Mrs. *McConnell* was in fraud of her husband's creditors. There is a number of cases, of which I may mention the decision of the full Court in *Smart* v. *McEwan*, and my own decision in *Ryckman* v. *The Canada Life*

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Assurance Company (*a*), in which it has been determined that the assignee of a mortgage, like the assignee of a chose in action, stands in no better position than the assignor, the original creditor or mortgagee; and this, not merely as regards the debtor or mortgagor, but as regards all the world.

I think this is very clear, and at all events, as I have said, it received the express sanction of a majority of this Court in *Smart* v. *McEwan*. Acting upon it I must hold the decree perfectly right.

I directed Mr. *Glass* to pay the costs, not because I considered him involved in any transaction which he supposed or had any reason to suppose, was fraudulent, much less that he was himself guilty of any fraud on the creditors; but on the application of the ordinary rule, that the party who fails in a litigation must pay the costs. I have made a slight verbal alteration in the draft decree, striking out the declaration that the assignment to Mr. *Glass* was fraudulent.

Judgment.

The draft decree, slightly altered as I have mentioned, must therefore stand, and the costs of this motion must be paid by the defendant.*

(*a*) 17 Gr. 550.

* This motion was disposed of before V. C. STRONG retired from the Court of Chancery, but the judgment was mislaid and could not be reported at the time.

ALLAN v. THOMSON. 1874.

Will, construction of—Survivorship.

R. by her will bequeathed an annuity of $500 to her brother *J. A. W.*, and at his decease she gave and devised all the real esthte to which she might be entitled to her two nephews as tenants in common. The residue of her personal estate she gave and bequeathed to her executors in trust to pay out of the same the said annuity to *J. A. W.*, and to equally divido yearly between her brother *G. W.* and her sister *S. R. D.* or the survivor of them the surplus of interest and rents remaining after payment of the said annuity of $500 to *J. A. W.*, "and at his decease equally to divide share and share alike all moneys and securities for money in their hands between my brother *G. W.* and my sister *S. R. D.* or the survivor of them." After payment of all proper expenses of carrying out the will *S. R. D.* died in August, 1870, and *G. W.* died in September, 1873, by his will disposing of all his interest in the estate of his sister *R. W.*: *J. A. W.* was still living when a bill was filed by the executors of *G. W.* for a construction of the will of *R. W.*:

Held, that *G. W.* took the whole of the surplus income of *R. W.'s* estate beyond *J. A. W.'s* annuity.

Statement.

The bill in this case was filed by the executors of *George Worsley* against the executors of his sister *Rebecca Worsley*.

By the 4th clause of her will *Rebecca Worsley* provided as follows:—

"Being desirous of providing for the comfortable maintenance and support of my brother, *James Alfred Worsley*, during his lifetime, I give and bequeath unto him the clear yearly sum or annuity of $500, to be paid and allowed out of my real and personal estates, by my executrix and executors hereinafter named, in the following proportions, namely: Three hundred dollars per annum for his comfortable board, lodging, washing, and mending; one hundred and fifty dollars per annum for his decent and proper clothing, and for extras in case of sickness or infirmity; and fifty dollars per annum for his pocket money." By the 5th clause, that "at the

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decease of my brother *James Alfred Worsley* I do give and devise unto my nephews *Edward Ebbs* and *Worsley Ebbs* all the real estate of which I may die seized, possessed, or entitled to—to have and to hold unto them, their heirs and assigns for ever as tenants in common, and not as joint tenants;" and by the 6th clause, "the residue of my personal estate such as mortgages, bonds, notes of hand, securities for money and cash in hand, and all rents arising from my real estate I do give and bequeath unto my executrix and executors hereinafter named in trust to pay out of the same the said annuity or yearly allowance to my brother *James Alfred Worsley* during his life-time, and to equally divide yearly between my brother *George Worsley* and my sister *Sarah Reeve Daly* or the survivor of them, the surplus of interest and rents remaining after payment of the said annuity of $500 for my brother *James Alfred Worsley*, and at his decease to equally divide share and share alike all moneys and securities for money in their hands between my brother *George Worsley* and my sister *Sarah Reeve Daly*, or the survivor of them after payment of all proper and reasonable expenses incurred by my executors, or otherwise in carrying out the directions of this my will."

Statement.

James Alfred Worsley the annuitant still survives. *Sarah Reeve Daly* died in August, 1870, and *George Worsley* died in September, 1873—by his will bequeathing to his wife all his interest in his sister *Rebecca's* estate received during her life; and what might be received after her death he gave to his nephew, the Rev. *Edward Ebbs* and his cousins *Nancy Reeve* and *Ann Reeve* in equal shares.

From the death of *Rebecca* till the death of *Sarah Reeve Daly* the rents of the realty and the income of the personalty were put into one common fund and equally divided between her and *George Worsley*, after

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reserving to *James Alfred Worsley* the annuity set apart for him. And after the death of *Sarah Reeve Daly* the rents and income were intended to be, and the defendants claimed they were all paid to *George* until his death, after reserving the annuity for *James Alfred Worsley*. And there was a large surplus of income beyond what was necessary to provide such annuity.

The plaintiffs claimed (1) to be entitled to receive the annual surplus income of *Rebecca's* estate beyond the amount of *James Alfred Worsley's* annuity:—that the residue of personal estate vested in *George* on the death of his sister, *Sarah Reeve Daly*, and that the plaintiffs were entitled to it as executors of *George* except so much as was necessary to make up with the rents of the realty the annuity for *James*:—Or (2) if it did not so vest them that *Rebecca* died intestate as to one-half, and the plaintiffs, as executors of *George* who was one of her next of kin were entitled to a share.

The case came on by way of motion for decree.

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

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

PROUDFOOT, V. C.—This is the disposition of the residue of an estate, and the leaning of the Court is to favour vesting at the earliest period since intestacy may be the effect of postponing it. *Booth v. Booth* (*a*). Judgment.

The first question is to ascertain under the terms of this very obscure will to what time the survivorship refers in the 6th clause. There are several periods to which under the numerous cases on the subject it may be referred, it may refer to those surviving the testatrix,

(*a*) 4 Ves. 399.

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and the object of the gift be vested absolutely in those who survived her.; or it may refer to the death of the tenant for life, or the annuitant here; or it may refer to the fact of surviving the deceased, or to the longest liver of them; *White* v. *Baker* (*a*), and I think this last is the construction applicable to this will. It is plain that it did not refer to the death of the testatrix,—nor to the death of the annuitant, for payment was to be made to the survivor during his life.

Then, what *survived?* The clause purports to be a disposition of the residuary estate, and there is no disposal of the income or of the personalty after the death of *Sarah Reeve Daly* and *George Worsley*—the whole surplus is to go to the survivor unless the phrase "to equally divide yearly between *Sarah Reeve Daly* and *George Worsley* or the survivor of them," controls it.

Judgment.

It is impossible to give a literal interpretation to this language—the sum to be divided is the whole surplus, and there is no question *that* was to be divided between the brother and sister, and then without pause the same thing is to be divided between the survivor. Then to ascertain the intention, if we look at the general scope of the will, the testatrix meant *James* to be secured in his annuity, after his death the lands were to go to her nephews—the personalty to her brother and sister—there is no one else mentioned whom she desired to share her bounty,—and it would be a very strained construction to suppose she meant upon the death of one that the income and personalty should be divided equally between the survivor and the next of kin of whom the survivor would be one. The testatrix has either used the word *divide* in a peculiar sense, or she has omitted a word in the gift to the survivor. The obscurity would be removed by reading *give* instead of *divide*, or by

(*a*) 2 D. F. & J. 55.

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inserting the word *pay* before the survivor,—and either may be done in order to carry out the intention, without exceeding the proper function of the Court to *interpret*. *Abbott* v. *Middleton* (*a*), *Eden* v. *Wilson* (*b*). In *Key* v. *Key* (*c*), Sir *Knight Bruce*, L. J., adopts the rule, "'*In obscuris quod verisimilius*'; and as '*leges non ex verbis sed ex mente intelligendas*,' so of wills." I think the intention of the testatrix was to give the whole to the survivor.

It was suggested, however, that "survivor" had two significations in this will—that it meant not only the longest liver as to the personal estate, but as to the realty that the longest liver should survive the annuitant. There is authority no doubt for giving the same word different significations according to the nature of the property, as "die without issue" which means different things as applied to personal and to real estate. *Forth* v. *Chapman* (*d*), but that is for the purpose of giving effect to the presumed intention of the testator. But I do not find anything in this will to lead me to suppose the testatrix meant to benefit her nephews, to whom she has given the real estate after the death of the annuitant by giving them any portion of the rents accruing before that death—and therefore that she did not mean the surplus rents to be apportioned so that it should bear only a *pro rata* share of the annuity.

Judgment.

The decree will be in terms of the first paragraph of the prayer of the bill—Costs of all parties out of estate of *Rebecca*.

(*a*) 7 H. L. C. 68.
(*b*) 4 H. L. C. 284.
(*c*) 4 D. M. G. 73.
(*d*) 1 P. W. 663.

1874.

GILMOUR v. ROE.

Mortgage—Equity of redemption

A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where therefore a mortgagor created a lease of the mortgaged property, and gave an order for rent in advance to the mortgagee, to be, and which was, applied by him in discharge of other liabilities of the mortgegor, who afterwards transferred his equity of redemption to a *bona fide* assignee, without notice of such advance of rent:

Held, that the owner of the equity of redemption was entitled to have the amount of rent so advanced, applied in payment of the mortgage debt.

Statement.

This was a redemption suit in which the usual reference had been made to the Master to take the account between the parties. On proceedings in the Master's office, it appeared that on the 13th June, 1871, the owner of the land, one *Gilbert Gilmour*, had executed a mortgage to the defendants, *Roe Brothers*, to secure $919, and on the 2nd November following, the mortgagor leased the premises to *Peter Rogers*, for five or seven years, at the option of the lessee, from 1st December, 1871. On the 14th December, 1871, an agreement was entered into between *Gilbert Gilmour*, *Roe Brothers*, and *Rogers*, by which the mortgagor assigned to *Roe Brothers*, his interest as lessor to secure another debt of $250, and paid them on account; $125 received as six months' rent in advance; all future rent to go, first, in payment of the balance of the $250 debt; and second, of anything he might owe them for goods sold or money thereafter lent by them, and then in reduction of the mortgage debt. This instrument was not registered. On the 6th of February following, *Gilbert Gilmour* conveyed his equity of redemption to the plaintiff *Nancy Gilmour* who registered her conveyance on the 7th of December, 1871, *Gilmour* gave to the defendants an order for $125, being the rent to become due in June,

1872, the tenant, *Peter Rogers*, which he accepted on the 10th of the same month. 1874.

Gilmour v. Roe.

On the 13th June, 1873, the mortgage fell due, and on the same day, a tender was made to the mortgagee of $481, which being refused, this bill was filed on the day following.

On the 26th November, the decree was pronounced, and the Master's report was made on the 28th February, 1874. In taking the account, the defendants sought to apply the rents received by them in payment of the balance of the $250, and on account of other items against the mortgagor, and the surplus only on the mortgage debt, but the Master charged them as against the mortgage debt, with all rents received by them, except the first $125, paid them by *Gilbert Gilmour*. Being so charged, the Master found that a sufficient sum had been tendered in June, 1873. From this finding of the Master, *Roe Brothers*, appealed on the grounds, (1) that the Master should not have charged them with the $125 received in June, 1872, for which they held the acceptance of *Rogers*; (2) that the Master should have reported that there was a larger sum due the defendants than the amount tendered on the 13th of June, 1873.

Mr. *Bain*, for the appellant.

Mr. *Boyd*, for the respondent.

BLAKE, V. C.—I have perused the papers in this case, and am of opinion that the Master in Ordinary was correct in the conclusion at which he has arrived. When the property was conveyed to the plaintiff, on the 6th of February, 1872, she was entitled to the benefit of the lease thereof made on the 2nd of November, 1871. Prior to the Statute of Anne (*a*), the assignee of a Judgment.

(*a*) 4 Anne, chap. 16.

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Ollmour v. Roe.

reversion could not recover the rent until the tenants had attorned to him. That Statute, while taking away the necessity for attornment, expressly provided that "no tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee or grantee." But the case of *DeNicholls* v. *Saunders* (*a*), shews that in order to claim the protection of this clause of the Act, the payment of the rent must be in fulfilment of the obligation to pay rent imposed by the lease. In that case Mr. Justice *Willes* says, "There has been no such payment here, for payment of rent before it is due, is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent. The

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receipt of the rent could not be treated here as a discharge by the landlord, because by assigning the reversion before the rent was received by him he parted with the power of giving such a discharge. The plaintiff lent his money on a contract which was under an implied condition that the landlord should continue entitled to the rent at the time it became due, and able, therefore, then to give the plaintiff a valid discharge." See also *Moss* v. *Gallimore* (*b*).

Here, when the plaintiff purchased the equity of redemption, she took it subject to the lease then in existence, but she became entitled to the benefits accruing by virtue of that lease to the lessor. In order that a charge sought to be enforced as against her in respect of this lease should be effectual, the party making such claim should have placed on registry an instrument giving notice thereof. This has not been done in this

(*a*) L. R. 5 C. P. 589. (*b*) 1 Sm. L. C. 561.

case. The purchaser of the equity of redemption is protected by the registry laws, and I do not think she takes the lease subject to any equitable lien, charge, or interest in favour of the defendants, as this would seem to be cut out by the 68th section of 31 Victoria, chapter 20. 1874. Gilmour v. Roe.

I am of opinion that the sums received by the defendants on account of rent must be taken, as between them and the plaintiff, to have been paid to them as mortgagees, and therefore that credit therefor on their mortgage must be given by them, and, that the Master having so taken the account, this appeal must be dismissed with costs.

HARTRICK v. QUIGLEY.

Administration suit—Heir at law—Deficiency of estate—Costs.

Where in an administration suit instituted by a creditor of a deceased debtor, it is necessary to make the heir at law a party defendant, he is entitled to be paid his costs, as between solicitor and client in priority to all other claims, although the estate may be insufficient to pay the debts proved against it.

Hearing on further directions.

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

Mr. *Morphy*, for the defendant.

SPRAGGE, C.—The plaintiff in this suit is a creditor who has taken out letters of administration to the estate of an intestate. The defendant *William Quigley* is heir at law of the intestate, and is made defendant in that character, to a bill filed by the plaintiff for the administration of the estate. Judgment.

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The Master finds no personal estate. The real estate has been sold for a sum less than sufficient to satisfy the debts of the intestate. The question raised is, whether the heir at law is entitled to be paid his costs in priority to the costs of the administration suit and to the debts. It is the same point that was decided in *Tardrew* v. *Howell*, (*a*), where the Vice-Chancellor said: "When the heir at law is before the Court in an administration suit, and all the real estate is found to belong to the creditors, he is not here for any benefit to himself, but is only here to have the property taken from him which belongs to other people. He is in the position of a trustee who holds property which is clearly vested in him as heir at law, but which belongs to others. There is no distinction between a trustee and an heir at law in a case where the estate belongs wholly to the creditors. * * In the present case, the creditors having brought the heir here for their own purpose, he is entitled to his costs as between solicitor and client, and any costs, charges, and expenses, properly incurred in order to put the creditors in possession of the property which is theirs."

Judgment.

I was referred to some passages in the book of *Morgan* and *Davey* on Costs. I have referred to these passages, and find nothing in conflict with *Tardrew* v. *Howell*. On the contrary, that case together with *Humphrey* v. *Morse* (*b*), before *Lord Hardwicke*, is referred to for the proposition that an heir at law, where the real estate is exhausted by creditors, will be entitled to costs, and as between solicitor and client; being in the position of a trustee, whether he is plaintiff or defendant. It is obvious that if priority be refused to him, it is equivalent to an absolute refusal of costs, it would be giving him the mockery of an order for costs out of an exhausted fund.

(*a*) 2 Giff. 530.

(*b*) 2 Atk. 408.

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Plaintiff's counsel refer me also to a case of *Barnwell* v. *Iremonger* (*a*), but in that case the question was entirely different. There was a will, and both personal and real estate, and they were given upon different trusts, and the question was, out of what fund the costs should be paid. That case does not touch the question now before me.

I thought at the hearing that the rule established in *Tardrew* v. *Howell* must apply to this case; but desired, before deciding the point, to look at Messrs. *Morgan & Davey's* book, and the authorities there cited, and at *Barnwell* v. *Iremonger*. My opinion still is, that the heir at law is entitled, as to his costs, to the priority which he claims.

Judgment.

The costs of the application upon which this question was raised, are to be paid by the plaintiff.

SIMMERS v. ERB.

Practice—Correcting decree—Specific performance—Rescinding contract—Rents and profits—Re-delivering possession.

Where a decree is settled and issued in the absence of one of the parties, without providing for relief to which he is entitled, and which would have been given him if brought to the attention of the Court, the proper mode of having the error corrected is to move upon petition: it is not necessary to re-hear for that purpose.

Where upon the sale of lands the purchaser pays his purchase money, and is let into possession, but upon a reference it is found the vendor cannot make a good title, and the Court rescinds the contract, the purchaser is bound to re-deliver possession, on being repaid his purchase money, and if he insists on interest on the purchase money, he must submit to account for rents and profits.

In December, 1854, *George Clemens*, by written contract, sold the land in question to *Carl Hubner*, the

(*a*) 1 Dr. & S. 255.

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purchase money to be paid in five equal annual instalments, with interest, the conveyance not to be executed till all the payments were made, but in the meantime *Hubner* to be allowed to take possession and receive the rents and profits to his own use. *Hubner* accordingly took possession, and he and the plaintiff, who was his assignee, had remained in possession ever since. The purchase money was duly paid. *George Clemens* died, and *Erb* and *Hagey* were his executors. In 1872 the plaintiff applied to the defendants to shew a good title, which they refused, and thereupon this suit was instituted for specific performance; all the heirs of *George Clemens* being made parties, defendants. The executors answered, admitting the facts alleged in the bill, but claiming that the plaintiff had waived his right to have a title shewn, and had accepted the title by taking and remaining in possession so long; the answer also objected that the heirs were unnecessary parties under the statute of Ontario 32-33 Victoria, chapter 18, section 4. The cause came on by way of motion for decree, when *Strong*, V. C., made a decree for specific performance, with the usual reference as to title, holding that as by the terms of the contract the vendee had the right to take and keep possession, he could not be deemed to have accepted the title, or waived his right to have a good title shewn. He also held the suit properly constituted as to parties.

Statement.

The Master reported that a good title could not be made, and the cause came on for hearing on farther directions. In the absence of the defendants' counsel, a decree was made merely rescinding the contract, and ordering the executors to repay the purchase money and interest, and costs of suit. This decree was drawn up, entered, and issued in the absence of any one representing the defendants.

Mr. *Lash*, for the defendants, moved on petition to have proceedings stayed on this decree, and for a sup-

plemental decree upon matters not adjudicated upon, viz., that the plaintiff should be charged with an occupation rent, and should be ordered to deliver up possession of the land to the defendants.

Mr. *Fitzgerald*, Q. C., for the plaintiff, contended that no relief could be had upon petition, the decree having been entered and issued, and that the only remedy of the defendants was to re-hear the cause.

Mr. *Lash* relied on General Order 336, as explained by Order 7, and cited *Hughes* v. *Jones* (*a*), *Kline* v. *Kline* (*b*), *Turner* v. *Hodgson* (*c*), *Trevelyan* v. *Charter* (*d*), *Moffatt* v. *Hyde* (*e*).

BLAKE, V. C., after taking time to consider, held that the motion was properly made, and as the matters sought to be embodied in the supplemental decree had not been adjudicated upon, relief could be had on petition. The matter was then argued on the merits. Argument.

Mr. *Lash*, for the defendants. The plaintiff contends that as the report shews that the defendants have not a good title to the land, they have no right to interfere with his possession. Now no matter what title the defendants may have as against others, as against the plaintiff they are entitled to the possession of the land, as the plaintiff is estopped from denying their right to possession, he having received possession from them: *Delaney* v. *Fox* (*f*). Plaintiff is also estopped because he is tenant to the defendants: Doe *Newby* v. *Jackson* (*g*), Doe *Milburn* v. *Edgar* (*h*); see, also Doe *Hiatt* v. *Miller* (*i*). The right of the defendants to possession, under the

(*a*) 26 Beav. 24.
(*b*) 3 Chy. Ch. 79.
(*c*) 9 Beav. 265.
(*d*) 9 Beav. 140.
(*e*) 6 U. C. L. J. O. S. 94.
(*f*) 2 C. B. N. S. at 774.
(*g*) 1 B. & C. at 454.
(*h*) 2 Bing. N. C. 498, at p. 504.
(*i*) 5 C. & P. 595.

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circumstances, is clear, as plaintiff cannot have both possession and purchase money: *Fowler* v. *Ward* (*a*), *Niclolson* v. *Wordsworth* (*b*), *Tindall* v. *Cobham* (*c*). The plaintiff should pay an occupation rent, as the decree gives him interest, and he is not entitled to improvements: *Kilborn* v. *Workman* (*d*), *Gummerson* v. *Banting* (*e*), *Brunskill* v. *Clark* (*f*), *Carroll* v. *Robertson* (*g*), *Bevis* v. *Boulton* (*h*), *Dyer* v. *Hargrave* (*i*), *Neesom* v. *Clarkson* (*j*), *Parkinson* v. *Hanbury* (*k*). Under any circumstances the Court is not bound to decree re-payment of purchase money, and if the plaintiff asks for that, he must take it on such terms as the Court imposes, and the terms asked for by the defendants are but reasonable.

Mr. *Fitzgerald*, Q. C., contra. The report shews that the defendants have no title, and the plaintiff should not be ordered to give them land to which he has as much title as they. The defendants have no right to an occupation rent: the cases at law shew that clearly: see *Winterbottom* v. *Ingham* (*l*). The plaintiff should be allowed his improvements: *Gummerson* v. *Banting*; and is entitled to a reference as to damages on account of defendants' inability to perform the contract.

Judgment.

BLAKE, V.C.—The effect of the present decree is to give to the plaintiff his purchase money back, and eighteen years' interest, and to allow him to reap the benefit of eighteen years' occupation, or rents and profits. So far as I have been able to discover, there is not any case in which all the points raised in this case for decision are presented. Here we have possession taken by the

(*a*) 6 Jurist 547.
(*b*) 2 Swan. 365, at page 368.
(*c*) 2 M. & K. 385.
(*d*) 9 Grant 255.
(*e*) 18 Grant 516, at page 522.
(*f*) 9 Grant 430, at page 433.
(*g*) 15 Grant 173.
(*h*) 7 Grant 39.
(*i*) 10 Ves. 510.
(*j*) 2 Hare 163, 176.
(*k*) 2 DeG. J. & S. 450.
(*l*) 7 Q. B. 611.

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purchaser, the purchase money paid, and improvements made. The plaintiff here, the title having proved defective, insists upon a decree for the re-payment of the purchase money, but he is unwilling to take merely a rescission of the contract, and leave all parties to their remedies at law, as was done in *Gwilliam* v. *Stone* (*a*).

First, as to the claim for rents and profits, or occupation rent. If this is not allowed in favour of the defendants, the plaintiff would then be recovering back his purchase money with eighteen years' interest; and the defendants are left to their remedy, if any, at law. There, seemingly, no action lies: *Winterbottom* v. *Ingham* (*b*), *Kirtland* v. *Pounsett* (*c*). At all events, it is clear no arrears beyond six years can be recovered. Unless, therefore, I am bound to do so, I will not leave the defendants to an action. Mr. *Fry*, at page 388, says, "*Primâ facie* a purchaser taking possession must pay interest." It would seem to be the universal rule that the vendor receives interest, the purchaser the rents and profits, but not both interest and rents and profits. Even when a vendor has been guilty of fraud, and the transaction is for that reason set aside, there it has been held that he is entitled to charge the rent against the purchaser in possession: *Gibson* v. *D'Este* (*d*). So, also, where the title is defective, and a conveyance has been executed, relief will be granted only on the same terms: *Brunskill* v. *Clark* (*e*), *McRory* v. *Henderson* (*f*). The present is an *a fortiori* case, for here there is no fraud, merely mistake; and the purchaser need not have taken possession till the title had been investigated. As the purchaser cannot have both the rent and interest, and he has elected to take the interest, the occupation rent, or rents and profits, must, in my opinion, be allowed to the vendor.

Judgment.

(*a*) 14 Ves. 128.
(*b*) 7 A. & E. N. S. 611.
(*c*) 2 Taun. 145.
(*d*) 2 Y. & C. C. C. 542.
(*e*) 9 Gr. 430.
(*f*) 14 Gr. 271.

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As to ordering the delivery up of possession. I think it would work great injustice to the defendants to rescind the contract simply; leaving the plaintiff in possession, as this might in some cases take away, or greatly embarrass, the rights of the defendant.

Where the agreement for the sale of lands is entered into, *prima facie* the purchaser is entitled to the land, the vendor to the purchase money: and if the purchaser takes possession, the vendor can, as a general rule, insist upon payment of the purchase money. If, then, the purchaser, as here, insists upon obtaining back his purchase money, surely he must give up that which can only be obtained on its payment; in other words, both parties should be relegated to their original position. A purchaser cannot retain possession without payment of his purchase money; therefore when he comes and demands the purchase money, surely that which can only be obtained on its payment, the possession, should be given up: *Fry*, 388, 390, 391, *Smith* v. *Lloyd* (*a*), *Wickham* v. *Evered* (*b*), *Gibson* v. *Clarke* (*c*). In *King* v. *King* (*d*), a bill was allowed by a vendor against a purchaser where he remained in possession, and refused either to accept or abandon the contract; and in *Tindal* v. *Cobham* (*e*), a purchaser was ordered to give up possession in two months, or pay his purchase money. However we need not go further than our own Court for authority upon this point, for in *Winters* v *Sutton* (*f*), which was a bill by a purchaser against a vendor, it appeared that the vendor could not make a title, and the contract was rescinded, and possession was ordered to be delivered up to the vendor. In fact there is not, that I can discover, any reason against such a course, while there are many in favour of it. See also, *Phillips* v.

Judgment.

(*a*) 1 Madd. 83.
(*b*) 4 Madd. 53.
(*c*) 1 V. & B. 500.
(*d*) 1 M. & K. 442.
(*e*) 2 M. & K. 385.
(*f*) 12 Gr. 113.

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Preston (*a*). In *Birch* v. *Joy* (*b*) it was stated, "*A Court of Equity interposes only according to conscience,*" and here the Court being called upon to interfere, and doing so for the plaintiff, should work out all the rights of both parties depending on the matter the subject of the litigation. One of those rights clearly is, the vendor's right to the possession.

Kilborn v. *Workman* (*c*) shews the improvements cannot be allowed to the purchaser; he chose to take possession, and has continued it for eighteen years, and can continue to retain it if he pleases. The plaintiff objects that the rents and possession are not asked for by the defendants' answer; that, however, in my opinion, is not necessary, for they are the terms upon which alone the plaintiff is entitled to and can in my view obtain his decree.

Judgment.

The decree should allow to the plaintiff the sum of principal money paid, costs, taxes, and interest. To the defendant should be allowed the rents and profits, or an occupation rent. In taking the accounts in the Master's office, interest is to be allowed on all sums paid.

As to the costs of this motion. The defendants virtually succeed, and would seem to be entitled to them, but if they had attended at the hearing they would probably have presented this case and probably would have obtained the same relief that is now given. I therefore think there should be no costs to either party of the present motion.

(*a*) 14 Gr. 67.
(*b*) 3 H. L. Ca. 565, 598.
(*c*) 9 Gr. 255.

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The Provincial Insurance Company v. Reesor.

Mortgagee—Insurance—Assignment of security.

On a sale of real estate the vendor took back a mortgage for part of the purchase money, which was made according to the short form under the Statute, and contained the usual covenant on the part of the mortgagor to insure, but this, in the hurry of preparing the deeds, the mortgagor, who was a solicitor, omitted to fill up. It was proved, however, by both parties to the transaction that the mortgagor was to insure and was also to give a covenant for so doing. The vendor afterwards during the absence of the mortgagor insured the houses on the property in his own name, for the sum agreed upon, and charged the premium to the mortgagor, and the buildings being afterwards burnt down obtained, by process of law, payment from the insurance company of the amount of the policy.

Held, that the company had not, under the circumstances, any right to call upon the mortgagee to assign his mortgage to them: and

Whether, in any case and under any circumstances, in the absence of fraud, he would be bound to do so.—*Quære.*

Statement.

This was a suit by *The Provincial Assurance Company* against the Hon. *David Reesor* and *Alexander Mairs*, seeking to compel the first named defendant to assign to them a mortgage which his co-defendant had executed to him for $1000.

By the evidence taken in the cause it appeared that Mr. *Reesor* having agreed with *Mairs* for the sale of a lot of land with a dwelling house and outbuildings thereon, conveyed the same to him, taking back a mortgage for $1,000, being the amount of purchase money unpaid, it being part of the arrangement that *Mairs* should insure the buildings for $1,000, but in filling up a blank form of mortgage, which was in the short form under the Statute, *Mairs*, who was himself a solicitor, in the hurry of preparing the conveyances, had omitted to insert the *amount* for which the insurance against fire was to be effected. Shortly after this *Mairs* left this country for some time, and during his absence Mr.

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Reesor, being unable to sell the mortgage, as he desired to do, without the insurance having been effected, insured the property in his own name for the sum agreed upon, and charged to *Mairs* the amount paid for premiums, &c. Shortly afterwards the buildings were burned down, and in an action at law the Company had been compelled to pay Mr. *Reesor* the amount of the insurance money, and *Mairs* having settled with him for a small balance over and above the amount received from the Company, Mr. *Reesor* discharged the mortgage, and *Mairs* had since that erected buildings on the property of greater value than those destroyed.

Statement.

Mr. *Reesor* and Mr. *Mairs* were both examined as witnesses, the former stating that it was expressly agreed the premises should be insured by *Mairs*, and that the mortgage should contain a stipulation to that effect. *Mairs* corroborated this evidence substantially, and, as before stated, explained that it was through oversight that the sum agreed upon had not been inserted in the mortgage.

Mr. *Bain* and Mr. *Henry Duggan* for the plaintiffs. All the Company agreed to do was to insure *Reesor's* interest as mortgagee. In *Reesor* v. *The Provincial Insurance Company* (*a*), the Court held that they could not claim to have an assignment of the mortgage before payment of the insurance money, but here the money having been paid to *Reesor* he discharged the mortgage. We contend that there was not any agreement for insurance by *Mairs*, and it is rather unusual in any case for a party to insure for the full amount of the mortgage debt, and the mortgage itself bears out this view, there really being no covenant for insurance contained in it, and even, if on *Mairs* neglecting to insure, the Court would compel him to effect an insurance, no amount was agreed upon. Here the Company were

(*a*) 33 U. C. R. 357.

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Burton v. *The Gore District Mutual Insurance Company* (*a*), *Crawford* v. *The St. Lawrence Insurance Company* (*b*), *Mathewson* v. *The Western Assurance Company* (*c*), 2 *Lazarus* v. *The Commonwealth Insurance Company* (*d*), were referred to.

Mr. *Blake*, Q. C., Mr. *McMichael*, Q. C., and Mr. *A. Hoskin* for the defendants. A contract of insurance made with a person having only a limited interest is not such as entitles the Company to call for an assignment or transfer of his securities, but if the rule were different from what we contend for, the circumstances here would have taken the case out of the general rule. The policies issued by this Company provide for an assignment of a particular class of interests, and the maxim *expressio unius*, &c., applies. The only case in this country giving any countenance to the position taken by the plaintiffs is *Burton* v. *The Gore District Mutual Insurance Company*, and is strong to shew that the general rule of law is not as is contended for by the plaintiffs. In that case there was a fraudulent concealment of the second insurance effected by the owner, and it cannot in any view be taken as an authority for the general proposition contended for here—that on an insurance by a mortgagee, which results in a loss and payment to him of the amount insured, the Company will be entitled to call for an assignment of the mortgage security. Here the amount of premium charged by the Company for effecting an insurance for *Reesor* as mortgagee actually exceeded that which had been previously charged by the company on effecting an insurance of his interest as owner: the effect of this rule

Argument.

(*a*) 12 Gr. 167. (*b*) 8 U. C. R. 135.
(*c*) 10 L. C. R. 8. (*d*) 2 L. Ca. (Am.) at 825.

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would be that the Company would in many cases be paid premiums for no risk whatever, for no sooner would they be obliged to pay the mortgagee the amount of his insurance than they could turn round and call for an assignment of his security.

Reesor, under the circumstances, was bound to give credit for the money paid to him, and being thus paid was in a position to be compelled to discharge the mortgage. Besides, by the Imperial Statute 14 Geo. III. ch. 78, *Mairs* could have called upon the Insurance Company to expend the insurance money in rebuilding, and if the Company could then call on *Reesor* to assign his mortgage, he would, in fact, lose his debt altogether: *Suffolk Insurance Company* v. *Royden* (*a*), *Loud* v. *The Citizens' Insurance Company* (*b*), *Kernochan* v. *New York Bowery Fire Insurance Co.* (*c*), *King* v. *State Mutual Insurance Company* (*d*), *The Solicitors' Insurance Company* v. *Lamb* (*e*).

Judgment.

BLAKE, V. C.—The defendant, *Reesor*, being the owner of certain premises in the bill set forth, effected an insurance thereon with the plaintiffs, to the extent of $1000. Thereafter, he sold these premises to the defendant *Mairs*, who gave back a mortgage for $1000, to secure this amount of the purchase money. This mortgage, which is in the short form under the Act (*f*), contains the usual covenant for insurance, but the amount to be insured is left blank. I can see no reason for disbelieving the testimony of the defendants, *Reesor* and *Mairs*, corroborated as it is by the surrounding circumstances. From the facts proved before me, I think it is clear that by the agreement between *Reesor* and *Mairs*, the above mentioned mortgage was to contain a covenant for insurance on the part of *Mairs*, and that the amount of this insur-

(*a*) 9 Allen, 125.
(*b*) 2 Gray 221.
(*c*) 17 N. Y. 433.
(*d*) 7 Cush. 1.
(*e*) L. T. N. S. 702.
(*f*) 27 & 28 Vic., ch. 31.

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ance was to be that of the policy then in existence, and for which the mortgage was given, namely, $1000. Had *Mairs* refused to carry out the contract on which the property was sold to him, this Court would have compelled him to fulfil it, by making good the covenant inadvertently left incomplete in the mortgage; and it *Reesor* had effected an insurance on *Mairs'* default in doing so, he could, as mortgagee, have charged the premiums thus paid on his account against the mortgagor. Matters were in this state when *Reesor*, desiring to sell the mortgage, found the covenant for insurance was not filled in, and, on the proposed assignee objecting to take the mortgage without an insurance on the premises, and as *Mairs* was then absent from the province, *Reesor* effected an insurance to the extent of $1,000. I think it is clear from the evidence of *Reesor*, *Green*, the solicitor, and *Willis*, the agent of the plaintiffs in this transaction, that it was intended that this insurance should be one effected under the covenant in the mortgage, and that it should enure to the benefit of *Mairs*, to whom *Reesor* charged the premiums. The proposal for the insurance was made on the 2nd day of April, 1873, the policy issued on the 4th of the same month, and on the 13th thereof the premises were destroyed by fire. The Company have, under compulsion, paid the $1000 to *Reesor*, and by their bill demand an assignment of the mortgage. *Reesor* has given credit on the mortgage for the amount of the insurance money, and the balance remaining due after this credit having been paid by the mortgagor, he has discharged the mortgage.

Judgment

It was urged, on behalf of the plaintiffs, that the contract of insurance was merely one of indemnity; that the insured being indemnified by the insurer, the insurer was entitled to the usual rights of a surety, namely, to the assignment of his principal's securities, and that, therefore, in this case the Company could demand an

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assignment of the mortgage. This position was denied by the defendants, and, in addition, it was argued that, whatever may be the general rule, the particular circumstances of this case withdrew it from its operation. It is true that in some senses such a contract of insurance as the one in question may be called one of indemnity, but not, I am of opinion, in the sense intended by the plaintiffs. The Company is not in the position of a surety; it is a principal debtor; it does not insure the debt; it insures the building, and it does so in favor of the applicant here, because he has such an interest as the Company recognizes as giving the right to call for an insurance. The very terms of the contract here employed shew this:—"And the said Company do hereby promise and agree to make good unto the said assured &c., all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified."

Judgment.

In this sense, and in cases of a like nature, it is a contract of indemnity, that, where a partial loss occurs, the property is made good to a sum not exceeding the amount insured, nor the insurable interest of the holder of the policy.

Here *Reesor* insured, not the debt, but the buildings. He then occupied the position of mortgagee, and the Company admit that persons thus situated may effect insurances on the premises embraced in their securities. The Company, admitting that the interest disclosed by the applicant warrants the acceptance of the risk proposed, undertake it, and thereby they become liable to make good the amount of damage occasioned by fire on the premises to an amount not exceeding the risk accepted. If the mortgage constituted simply a right to recover satisfaction for a loss by fire, then the Company might, with some reason, say they guaranteed this claim, and thus became mere sureties to the mortgagee, but the

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covenant of the mortgagor, and a charge on the land are what the holders of these securities principally look to, and in addition to these means of making good the debt, the mortgagee chooses, by an independent arrangement, to protect the premises embraced in his mortgage, and which may, at any time, fall into his hands by foreclosure. I cannot see, there being no stipulation between the assured and the assurer to that effect, on what ground the insurer can base a right to the indemnity here asked for, on making good a loss which he has undertaken without qualification to assume. But suppose the general words to be found in such a case as *Burton* v. *The Gore District Mutual Insurance Company*, (*a*), were to be so read as to meet this case, and that, by an extension of the languge made use of in some of the authorities, the general rule is deduced from them that an Insurance Company, paying a loss by fire to an assured mortgagee, is, to the extent of this loss, entitled to some rights in respect of the mortgage, it is necessary to consider what those rights are. On no principle that I can discover could the assurer claim more than this: that in such cases he would have an equity to be subrogated to such rights as the insured had, in respect to the mortgage, after payment to him of the loss. It must be borne in mind in this case that there was no concealment of his position on the part of *Reesor*, no demand made by the Company which was met by a refusal, no inquiry as to whether, in case of the payment of the loss, there was anything to prevent the Company receiving an assignment of the mortgage. On the contrary, what took place between *Reesor*, *Willis*, and *Harvey*, and the fact of the full premium being paid, would naturally lead the Company to conclude that the insurance was being effected for the benefit of the owner of the premises.

Judgment.

As between *Reesor* and *Mairs*, when the insurance in question was effected, the premiums were chargeable

(*a*) 12 Gr. 167.

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against, and payable by *Mairs*, and the insurance money, when received, was to be credited on the mortgage. These premiums were charged to and paid by *Mairs*; the insurance money, when received, was credited on the the mortgage debt, which became extinguished, and therefore the mortgage could not be assigned to the Company. If it be granted then, that the Company has this right of subrogation, in the present case it is purely illusory, as no possible benefit could flow from the Court simply declaring this abstract right, where the position when attained gives no benefit to its possessor.

Judgment.

I think the only decree that can be made is to dismiss the bill with costs.

ROBERTSON v. SMITH, OGDEN v. ROBERTSON.

Parol evidence — Absolute deed—Statute of Frauds.

R. and *S.* became the purchasers of the estate, real and personal, of an insolvent debtor (*D.*), *S.* asserting in the presence of *R.* that he was purchasing for the benefit of *D.* The property was duly conveyed to the purchasers by an absolute deed of transfer, and *D.* was retained to manage the business, and continued to occupy the property, *S.* assuming the exclusive control of the financial part thereof and making all payments on account of the purchase: And after the liabilities of the estate had all been discharged, *R.* filed a bill claiming to have the surplus of the estate realized, and the proceeds divided between himself and *S.* and *D.*:

Held, that the transaction was one in which, owing to *D.'s* possession, notwithstanding the Statute of Frauds, parol evidence was receivable to shew that the purchase was intended for the benefit of *D.*, but *Blake*, V. C., being of opinion that the evidence was not of that clear and positive nature required in such cases, made a decree in favour of *R.*, which, on re-hearing, was affirmed by the full Court.

These two causes were heard together. In the first the bill was by *William Robertson* against *Thompson Smith*, *John Doty*, and *Edwy Joseph Ogden*, setting

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forth that the defendant *Doty* had, for some years prior to 1871, carried on the trade of an iron founder in Oakville, in the County of Halton, and possessed a large amount of plant and stock, and also owned a lot of land in Oakville, together with a dwelling thereon :that about the 27th of February in that year, *Doty* became embarrassed in his circumstances, and called a meeting of his creditors, which was held on that day, when he made an assignment, under the Insolvent Act of 1869, of all his estate and effects to one *R. S. Appelbe*, and at that meeting the plaintiff and defendant *Thompson Smith* became the purchaser of *Doty's* estate at fifty cents on the dollar of his indebtedness, and on that occasion a memorandum in writing was drawn up and signed by all the creditors then present, including the plaintiff and *Thompson Smith*, and onbehalf of several creditors who were not present—in all nineteen in number.

Statement.

The memorandum, as signed by the parties, was as follows: "We, *Thompson Smith* and *William Robertson*, do hereby offer for the estate of *John Doty* a sum equal to fifty cents in the dollar, payable in six, twelve, and eighteen months from this date; security to be the notes of the said *Robertson* indorsed by the said *Thompson Smith*. And we, the undersigned creditors, do hereby agree, on behalf of ourselves and our respective firms, that the said estate may be sold to the said *Smith & Robertson*, and that the assignee do call a meeting of the creditors for the confirmation thereof, and we further agree that the business of the said estate may be carried on by the said *Smith & Robertson* in the meantime as if the sale hereby contemplated had been already confirmed.

"The above mentioned fifty cents on the dollar is intended to mean fifty cents on the dollar of the indebtedness of the insolvent; the notes to be given to the respective creditors and all preferred claims paid in full.

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"And we further agree to discharge the said *John Doty* from all liability to us and our respective firms, and to sign all necessary papers to carry out the same on receipt of the said notes": the plaintiff and *Thompson Smith* became such purchasers for the price aforesaid to be secured by promissory notes signed by plaintiff and indorsed by *Thompson Smith*, the purchase being duly confirmed according to the provisions of said act. *R. S. Appelbe* assigned and transferred the estate, real and personal, of *Doty* to the plaintiff and *Thompson Smith*. Plaintiff and *Smith* thereupon proceeded to realize the estate, all of which (with the exception of some small accounts) had been got in, and the notes given by plaintiff and *Smith* had been all paid; that them oneys arising from the sale and realization of such property had been received by *Smith*, and the accounts chiefly kept by him; and the bill asserted, that after paying expenses there would be a surplus to divide between *Smith* and the plaintiff; that sometime after the said purchase *Smith* agreed that the defendant *Doty* should have the benefit of his (*Smith's*) interest therein, and *Doty* claimed the same; that the defendants pretended that the plaintiff also had purchased for the benefit of *Doty*, which plaintiff denied, and denied that there was any trust of the said premises, either by writing signed by him or any one authorized by him, and claimed the benefit of the Statute of Frauds; that the defendants *Smith* and *Doty* had conveyed their respective rights in the house and lands to the defendant *Ogden*. The prayer of the bill was that an account might be taken of the moneys arising from the sale and realization of the said joint estate and a distribution made thereof between the plaintiff and defendants *Smith* and *Doty*; that a sale or partition might be made of the land and dwelling; and that for these purposes the necessary directions and accounts might be made and taken."

Statement.

In the second named cause the bill was by *Ogden*

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against *Robertson*, *Smith*, and *Doty*, seeking to enforce specific performance of an agreement for sale of the land and house belonging to the estate of *Doty*, which agreement was in the following words: "Oakville, March 17, 1873.—Dr. *E. J. Ogden* buys of *Thompson Smith* the *Doty* property (one acre and buildings thereon), subject to a mortgage from *John Doty* to *Robert Smith*, with accrued interest thereon, payable on possession and on completion of title deed."

(Signed) JOHN DOTY, Agent.
" E. J. OGDEN.

The contention of *Smith*, *Doty*, and *Ogden*, was, that the estate, real as well as personal, though conveyed to *Robertson* and *Smith* jointly, was so conveyed for the purpose simply of repaying the defendant *Smith* the amount of money he was to advance in payment of the property, and subject to such payment for the benefit of *Doty*. *Robertson* denied this positively by his answer, and reiterated such denial on being examined as a witness at the hearing.

Argument.

Mr. *Attorney General Mowat* and Mr. *Maclennan*, Q.C., for *Robertson*.

Mr. *Moss*, Q. C, and Mr. *C. Moss*, for *Ogden*, *Smith*, and *Doty*. The only question discussed, aside from the credibility of the respective parties, was, that of the admissibility of the parol evidence to contradict the effect of the absolute deed from the assignee in insolvency to *Robertson* and *Smith*. As to this, it was contended on behalf of *Smith* and *Doty* that the latter having been allowed to remain in possession of the property after execution of the deed, was inconsistent therewith, and, being so, let in the parol evidence to explain the nature of and shew what the real transaction was.

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On the other hand it was contended that it being admitted on all hands that *Doty* was to be retained as the manager of the foundry business, and otherwise as agent of *Smith*, there was nothing inconsistent with the absolute character of the deed in *Doty* being allowed to retain possession, not only of the foundry, but of the dwelling-house in which he had formerly resided.

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

BLAKE, V. C.—On the 27th February, 1871, one *John Doty*, being in insolvent circumstances, caused a meeting of some of his creditors to be held, at which the following memorandum was, after much discussion, drawn up and signed by *Smith*, *Robertson*, and creditors of the insolvent. [The Vice-Chancellor here read most of the the memorandum above set forth.] Subsequently a formal deed of composition and discharge was executed by the insolvent, *Smith* and *Robertson*, and the requisite number of creditors; and in pursuance of the authority thereby vested in the official assignee, he thereafter assigned and conveyed the estate in question to *Smith* and *Robertson*. The insolvent was retained as agent to wind up the business; and that having been done *Robertson* claims absolutely one-half of what is left of the estate while *Smith* and *Doty* allege that *Doty* is entitled to the balance of the estate. The object of one of the suits brought is to compel *Robertson* to join in the conveyance of a portion of the real estate which *Doty* has sold; the object of the other is, to obtain an account of the dealings of *Smith* and *Doty* with the property since the insolvency. It is urged by *Robertson*, in answer to the claim of *Smith* and *Doty*, that he purchased the estate absolutely and upon no trust for, and with no understanding as to *Doty*, but that even if any such did exist, the Statute of Frauds forms a complete defence, as there is no

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memorandum in writing to evidence the alleged trust. In regard to this act, I have merely to repeat what I have already said in *Morley* v. *Davison* (*a*). In *Lincoln* v. *Wright* (*b*), the Lord Justice *Turner* makes use of this unmistakable language: "The principle of the Court is, that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was, that as between the plaintiff and *Wright* the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud." This view seems to coincide with that held by Lord *Eldon* and Sir *William Grant* in the cases to which I have referred, but the Court of Error and Appeal in this country, with these cases before it, have come to the conclusion that it is not prepared to treat the Statute of Frauds as a dead letter; although this ruling may be the means of preventing it from defeating a fraud in some particular cases. Notwithstanding, therefore, the general statement of opinion of Sir *George Turner* in *Lincoln* v. *Wright*; that of Sir *William James*, in *Haigh* v. *Kaye* (*c*); and the decision in *Booth* v. *Turle* (*d*); I consider I am still bound by the rule laid down in our Court. But while I do so, I think I must hold that the effect of the decisions is to open thus far the door to fraud and perjury. Whenever there is possession inconsistent with the terms of the instrument impeached, there the person impeaching it is at liberty, by parol evidence, to shew the true agreement between the parties. Here the possession by *Doty* of the premises in question was *primâ facie* a wrongful possession, and therefore he is entitled to establish, by oral testimony, the true agreement made between the parties. I have, therefore, to consider the whole case presented to me. Mr. *Appelbe*, the solicitor, says that the documents executed express the legal effect of the agreement made.

Judgment.

(*a*) 20 Gr. 102.
(*b*) 4 D. & J. 22.
(*c*) L. R. 7 Ch. 469.
(*d*) L. R. 16 Eq. 182.

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The persons present at the meeting, some sixteen of whom were examined, gave accounts of what took place, differing in almost a marvellous manner the one from the other. Some think that *Smith* bought the property; some that *Robertson*; and some that *Smith* and *Robertson* bought jointly; some that the purchase was for their own benefit; some for that of *Doty*. The evidence shews that little took place at the public meeting. I think there *Smith* simply made the offer which he states in his evidence; an offer from which *Robertson* implied that they were to buy together: that *Robertson* assented to this, and stated that *Smith* would have to pay, or see to, the notes to be given for payment. *Smith*, *Robertson*, *Chisholm*, *Hagaman*, and others, agree that this was all that then passed, and I think it is established, beyond a doubt, that, at this meeting, there was not anything that took place from which it could be inferred that *Doty* was to have any interest whatever in the purchase then about to be made. I am satisfied upon this point, whatever doubt I may have on other matters connected with the case.

Judgment.

It is true some most respectable gentlemen state they had no doubt the arrangement then made was for the benefit of *Doty*, but then it is to be remembered, that when the facts were brought out, on which this conclusion was based, it was found that they had an impression that *Smith* was going to make an arrangement beneficial to *Doty*, and whereby he would carry on the business; that the meeting was postponed in order to enable this to be done, and when they found *Smith* coming forward and making the offer he did, they coupled together *Doty's* offer to buy the estate at the former meeting, *Smith's* well known friendship for *Doty*—the fact that the offer was made to the meeting by *Smith*; and from these inferred that what *Doty* had desired was accomplished, and that the estate was going into the hands of *Smith*, or *Robertson*, or both, for the benefit of the

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insolvent. But even one of those who now speak most positively in *Doty's* favor, at the time of the meeting evidently had doubts upon the question. The witness *Young* states that he publicly said to *Smith* that he would make a good thing out of it. *Smith* answered that he would make nothing, that he was doing all for *Doty's* benefit. *Young* explains this now by saying he simply spoke to test whether or not *Smith* was really purchasing, as he thought he was. There were, no doubt, some remarks made which would lead to the conclusion that a benefit was to be reserved for *Doty;* but then it is to be remembered that *Smith's* friendly feeling was leading him to assist *Doty;* he made no secret of that. It is impossible to say to what extent witnesses have given their testimony based upon statements made at the second meeting, to what extent they have imported what took place at the prior meeting, to what extent they have applied the statements made by *Smith* as to his interest and his intention, so as to include *Robertson*, although his name was never mentioned. Some of the witnesses received one impression, some another; some speak with certainty as to the intention being that *Doty* should have an interest, others received the reverse impression. But when we look at the statements they recollect, the portions of the conversations they remember, the statements made by *Smith* himself of what took place, I can find nothing that leads me to the conclusion that aught happened at the meeting when the agreement was signed, from which it should be inferred that *Robertson* took the property clothed with any trust. *Smith* himself admits that would not have answered him, as he did not want to be controlled in a free exercise of his discretion in dealing with the property. If the parties were going to perform an act of benevolence they desired to be generous in their own way: this matter was to be voluntary. The obligation remained as it is termed imperfect, and therefore incapable of enforcement here, and I cannot make it obligatory. If the arrangement between the

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parties were otherwise, it is hard to conceive why the solicitor then present, and who drew up the agreement that was signed, and who avers that he was aware of the true arrangement made, did not take from *Smith* and *Robertson* a memorandum shewing the true terms on which they became purchasers.

But it is said, apart from what took place at the public meeting, *Doty* is entitled to relief, as before that the agreement was come to whereby he was to be given the interest he now claims. It is said the conversation in question took place in the hall of the hotel during an interval in the meeting. *Doty*, Dr. *Ogden* and *F. Doty* depose to the fact of seeing *Smith*, *Robertson* and *Doty* together in the hall, and *Doty* and Dr. *Ogden* depose to the arrangement insisted on by *Doty*. *Robertson* and *Smith* say this conversation never took place. They both aver that nothing was said about the arrangement until in the public meeting, when the proposal was openly made. Most of the creditors examined before me treat the proposal as one made at the meeting for the first time. The language used, the way in which the proposal was presented, and was then answered, as deposed to by so many, incline me to the opinion that I cannot find it established as a fact that any proposition was made to *Robertson* before that made openly. Many people were assembled together in the hotel, there was a good deal of moving about for several hours, and by some means there must have been, in the dark of the February afternoon, a mistake as to the people seen conversing, and as to the place and terms of the conversation. *Robertson*, at the time of the insolvency, was not on good terms with *Doty*; he thought he had been wrongly dealt with by him in a business transaction he had. No sufficient reason has been furnished for this man coming forward at this period to help *Doty*, and to run the risk which flowed from his giving promissory notes to the extent of about $15,000,

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unless he was to receive what profit might be derived from the estate turning out well. It is true *Robertson* signed for himself the composition notes, but, although he received $500 on general account, he did not demand or receive the amount of these notes, although all overdue. *Doty* remained in possession of the premises in question, but it was natural he should do so until the business of which he was appointed manager should be wound up. It is not unnatural either that *Robertson* should make no demand for an account, knowing that *Smith* was looking after the business. The case would have assumed a different aspect if *Robertson* alone was the assignee of the property; then it would have been almost impossible to reconcile some of the statements with the position which he takes, but, when it is considered that *Smith* intended to assist *Doty* in the transaction, the general statements of benefits to accrue to *Doty*, which he will in any event receive, lose much of their force.

Judgment.

The form of the composition deed cannot, that I see, assist *Doty's* case; it is an instrument drawn up between him and his creditors. *Smith* and *Robertson* are not, as purchasers of the estate, parties to it. It recites that the insolvent is to pay fifty cents in the dollar, secured by the promissory notes of *Smith* and *Robertson*; then, in consideration of these notes, the insolvent is discharged, and the assignee is authorized to assign the estate to the insolvent or his appointee. I would not have expected the deed to be otherwise worded. It was a matter simply between the insolvent and the creditors. The manner in which *Doty* had been able to procure these notes was nothing to them, and it was needless incumbering the deed with these matters.

I do not mean to say this case is free from suspicion; the circumstances to which I have referred, others which came out in evidence, and were commented upon at the hearing, have not satisfied me with the transaction impeached. But the evidence does not go further than that. Fraud

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is not to be assumed on doubtful evidence, the facts constituting it must be clearly and conclusively established, and circumstances of mere suspicion will not warrant the conclusion of fraud. I am unable to find from the evidence and circumstances that *Robertson* did not buy for his own benefit. I can find no sufficient motive for his doing otherwise, and I find that the case of Dr. *Ogden* fails, and must be dismissed with costs, and in the other suit a decree must be pronounced in favor of *Robertson*, for an account, with costs to the hearing.

The causes were re-heard at the instance of *Smith*, *Doty* and *Ogden*, before the full Court.*

Mr. *Blake*, Q.C., Mr. *Moss*, Q. C., and Mr. *C. Moss*, for the parties re-hearing.

Argument.

In addition to the points raised on the original hearing, it was urged that under the circumstances *Robertson* never having advanced any of the money to effect the purchase, there was a resulting trust in favour of the party making such advance: *Dyer* v. *Dyer* (*a*); and that in the state of facts here appearing the whole burden was cast upon *Robertson* of shewing that he took a beneficial interest in the estate. Here the proof is incontestable that the money furnished to effect the purchase came from the funds of *Smith* and *Doty*, or of *Doty* alone. The Court has said that the case is one of suspicion, but that the claim of *Smith* and *Doty* has not been clearly established; placing *Doty's* rights, however, at the very lowest, he must be deemed to be a mortgagor having a right to redeem on re-payment of such sum as may have been advanced, after the composition notes had been paid. Here both *Robertson* and *Smith* signed the deed of composition, and *Robertson*, it is proved,

* Composed of Spragge, C., Strong and Blake, V.CC.

(*a*) 1 W. & T. 184.

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received notes for the amount of the proposed composition of his claim against *Doty*.

Mr. *Maclennan*, Q.C., contra. The decree which has been pronounced by the learned Vice Chancellor is the only one which, under the circumstances, the Court could make. The Vice Chancellor came to the conclusion that under the Statute of Frauds parol evidence was admissible here, to shew the true nature of the agreement; but that the evidence failed to establish the claim set up. The occupation of *Doty*, it is contended, was not such as to let in the parol evidence, as it is only when the occupation of the party is inconsistent with any other state of affairs than the one alleged that possession has that effect. Here it is impossible that any such use can be attempted to be made of the possession retained by *Doty* under the circumstances shewn here to have existed.

Then it is contended that there was a resulting trust here in favour of *Smith*, but the contention of the other side, pushed to its full extent would go to shew that if two persons should enter into an agreement to make, and do make, a joint purchase of property, but the purchase money therefor is all paid by one of them, that one would have the right to assert that all the estate purchased belonged to him. The rule as to resulting trust only applies where the deed is taken by one person, and it is distinctly established that the purchase money is the money of another person.

Mr. *Moss*, in reply, referred, in addition to the cases mentioned in the judgment, to *Davies* v. *Otty* (*a*).

The judgment of the Court was delivered by

Sept. 2nd. Judgment.

SPRAGGE, C.—When these cases, which were heard together, came before my brother *Blake*, he held that

(*a*) 35 Beav. 208.

the possession held by *Doty* took the case out of the Statute of Frauds, and that parol evidence was admissible in proof of the case made by *Doty*, and by *Ogden* and *Smith*, and he [illegible] in his judgment discussed the leading points and many of the particulars of the evidence.

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At the rehearing the evidence was read to us and was commented upon by counsel. I have since read it carefully myself, and quite agree with my learned brother, that the persons present at the meeting to which most of the evidence relates, some sixteen of whom were examined as witnesses, gave accounts of what took place differing, in almost a marvellous manner, the one from the other. If we were to come to a conclusion upon the facts in issue from a mere reading of the depositions, I, for one, might hesitate as to whether the contention of *Robertson* or that of *Doty*, *Ogden*, and *Smith*, was the truthful one; but that is not our position upon rehearing. The Judge who heard the witnesses, and saw their demeanour, is necessarily more competent than we can be to judge of the weight due to their testimony. I think we laid down a sound principle in the case of *Day* v. *Brown* (*a*). It was a case of appeal from the Master upon a question of fact. And in delivering judgment in that case I remarked, "If upon an appeal involving the question of the weight to be attached to oral testimony, the Judge hearing the appeal should overrule the Master, he would run great risk of being in the wrong, and setting aside the judgment of the Master in a case where, from his superior means of forming a correct judgment, he would be the more likely to be right."

Judgment.

To support the contention of *Doty*, *Ogden*, and *Smith*, the evidence must go to the extent of proving that *Robertson* joined with *Smith* in making the purchase, not

(*a*) 18 Gr. 681.

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for his own benefit, but for the benefit of *Doty*. Some of the witnesses seem to have so understood what passed, but even those who go furthest in that direction, except perhaps *Doty* and *Ogden*, fall short of proving anything definite as an agreement. Those from whom the most explicit evidence upon that point was to be looked for—with the exceptions I have mentioned—fail to prove an agreement. *Smith* himself, *Chisholm* the chairman of the meeting, and *Appelbe*, who was assignee in Insolvency, secretary of the meeting, and acting professionally, all fall short of proving an agreement. I take what passed to have amounted to this: *Smith* felt a strong interest in *Doty*, and was very desirous that his creditors should be induced to make such terms as would enable him to serve him; and that he spoke of the arrangement that he proposed to the creditors as one that would be for the benefit of *Doty*, and I have no doubt that he intended, so far as he was concerned, that he should be benefited by it, and I think it probable that his motive in making the proposition that he did make, was the benefit of *Doty*. But this is a widely different thing from an agreement that the purchase should be on behalf of *Doty*. The terms in which *Smith* proposed to *Robertson* that they should make the purchase, implied that they were to purchase on their own behalf. The terms of the assignment to them import the same thing; and the absence of any agreement with *Doty* or any memorandum or any note made at the time are significant circumstances. Then *with whom* was there any agreement that the purchase should be on *Doty's* behalf, and on what occasion? Looking at all the evidence we cannot, I think, disagree with the Judge who heard the cause, as to the alleged meeting in the hall: we must discard it as a piece of evidence: then there is only what passed at the open meeting of the creditors. We do not find that there was there any agreement with *Doty* or any statement by *Smith* that he or *Robertson* had made an agreement with *Doty*—then was

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there any agreement with the creditors? There is no evidence that they or any of them made any stipulation on behalf of *Doty* or asked anything for him. It was not his interests but their own, that they were there to protect. It is intelligible that *Smith* should declare his good will towards *Doty*, and his good intentions towards him, especially when meeting an observation that he would be making a good thing of his purchase, and it is to be borne in mind that it was not a matter of indifference to *Doty* who should be the purchaser, for he might hope for employment at any rate, and perhaps further advantages from the good will of a friend, as *Smith* certainly was, and the knowledge of this might have its weight with some of his creditors. All this might be without any agreement on the part either of *Smith* or *Robertson* that their purchase should be a purchase on behalf of *Doty*. I think the most that can be said is, that *Doty's* expectations raised by the language of *Smith* at the meeting of creditors were disappointed. I need hardly say that it was necessary to prove an *agreement*, and an agreement by *Robertson;* that representations by *Smith*, and assuming that *Robertson* acquiesced in them, as to their motives and intentions for the benefit of *Doty*, are not sufficient.

Judgment.

I cannot say that I was favourably impressed with the evidence of *Robertson* from the mere reading of it, but my learned brother who heard his evidence given, is more competent than I can be to give to it its due weight. I think, however, that the evidence of *Robertson* is not necessary to his case. From the evidence of *Smith* himself I should say that we could not safely find that there was any agreement; and I think the case is fairly open to this observation—that it is so much within the mischief which the Statute of Frauds was intended to prevent that we ought to be able to say that a trust is clearly and satisfactorily established by the evidence before we fix these purchasers with a trust. There is in

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this a conflict of evidence, preponderating in the judgment of my learned brother against the establishment of the trust; and there is a piece of conduct on the part of *Robertson*, indicating his understanding that he ceased to be a creditor to be paid, and occupied the position of a purchaser. He cannot of course make evidence for himself by conduct or otherwise, but his conduct has been consistent; and I apprehend that *Smith* must also have regarded him as a purchaser, otherwise he would have paid him the composition paid to other creditors.

I cannot agree in the contention that the case comes within the doctrine of resulting trusts. In favour of whom would there be a resulting trust? The effect of the transaction, taking the agreement of 27th February, and the formal indenture of the same date together, was that the estate was sold to *Smith* and *Robertson*, the creditors accepting fifty cents in the dollar, secured by their notes, and discharging *Doty*. As between *Smith* and *Robertson* themselves it was agreed that *Smith* should meet the notes: the resulting trust, if any, would be as to the thing purchased and in favour of the person furnishing the money to make the purchase. It is clear there could be no resulting trust in favour of the creditors, nor in favour of *Doty*, for they furnished no purchase money. If any it would be in favour of *Smith*. But how would it be in favour of *Smith?* The thing to be dealt with is the nature of the transaction *at the time it took place;* and as to that we have evidence: there is no room for presumption; and if in fact the whole purchase money had been paid by *Smith* and the conveyance made to *Robertson*, so that *primâ facie* there would be a resulting trust, it would only be a presumption which would be capable of being rebutted by evidence of the real nature of the transaction, and that evidence we have.

Judgment.

I do not mean to say that the case is free from doubt upon the evidence; but I am satisfied that it is not a case in which the Court can, upon rehearing, properly reverse the judgment of the learned Judge before whom the cause was heard.

In my opinion the decree should be affirmed with costs.

McFarlane v. McDonald.

Insolvent Act—Fraudulent preference—Motive of debtor—Pressure.

M., being owner of a warehouse and agent for *T. & W.*, held for them a quantity of grain, which he refused to give up till paid $1,400 owed him by them. *T. & W.* were in insolvent circumstances, and *W.* had absconded. After several applications for payment, by *M.* to *T.*, the latter agreed to transfer to him his interest in a vessel in satisfaction of the debt. This was done by a bill of sale made on the 28th of November, 1872, which being irregular in form, another was executed on the 5th of December. *T. & W.* were declared insolvent on the 12th of December. The grain was given up by *M.* on the 28th of November, upon execution of the first bill of sale.

Held, that the sale of *T's.* interest in the vessel was not a fraudulent preference, and a bill filed by the assignee of *T.* to set it aside was dismissed with costs.

Statement.

The bill in this cause was filed by *Duncan McFarlane*, assignee in insolvency of the estate of *Jonathan R. Trompour*, against *Amos McDonald*, *Robert McDonald* and *James M. Hyatt*, and sought to impeach the sale and transfer by *Trompour* to *Robert McDonald* of his interest in the schooner *Gazelle*, as stated in the head note and judgment. The defendant *Amos McDonald* was made a party as part owner of the vessel, and *James M. Hyatt*, as assignee, by subsequent bill of sale, of the shares which *Trompour* had conveyed to *R. McDonald*, *Hyatt* having given back a mortgage on the vessel for part of the purchase money. The cause was heard at the sittings in Belleville, in the Spring of 1874.

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Mr. *Moss*, Q. C., and Mr. *C. Bell* for the plaintiff.

The evidence establishes beyond all question: 1. that at the time of the transfer of the schooner, *Trompour* and *Watson* were hopelessly insolvent, and we contend that the defendant *Robert McDonald* had ample notice, at the time he took the assignment, of the position in which they were; 2. that no valuable consideration was paid for the assignment; and, 3. that if it can be successfully contended that there was any consideration, it was, at most, merely an antecedent debt.

The answer shews merely a release of an interest, and the voluntary transfer of *Trompour's* share of the schooner for that release.

Argument.

Then, as to the case against *Hyatt*, we insist on a right clearly either to set aside the sale to him, altogether, or to obtain from *McDonald* the benefit of the mortgage given to him. Certainly the evidence of *Hyatt* shews the existence of a debt; but this we contend has been swollen considerably, in order to answer the defendant's claim. It is true it is shewn that there was a note for $400, and it would be well to consider how this sum is alleged to have been arrived at. *McDonald* says it was made up of 598 bushels of barley; *Trompour* states it to have been constituted of 300 bushels of barley and 200 bushels of peas. Then it is shewn that *McDonald* made no investigation as to the value of the vessel he was obtaining an assignment of.

Counsel also contended that there was no such pressure as would enable the Court to sustain the assignment of the vessel; that *Hyatt* was a farmer of small means, and not a person likely to have made a *bonâ fide* purchase of the vessel; that in fact all the defendants had associated themselves together in order to prevent the creditors of *McDonald* obtaining possession of the schooner.

Mr. *A. Diamond* and Mr. *J. C. Hamilton* for the defendants. 1874.

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The transaction here impeached was a real one. The object of *McDonald* was to obtain security for or payment of his claim; and, unless he did so, he had made up his mind not to give up possession of the grain in his possession. The obtaining of this grain was an object of some moment to *Trompour*, as he thought it would enable him to carry on his business. This was clearly such a case of pressure as relieved the matter from question under the Insolvent Act.

Archibald v. *Haldan* (*a*), *The Commercial Bank* v. *Wilson* (*b*), *The Merchants Bank of Canada* v. *Clarke* (*c*), *Gottwalls* v. *Mulholland* (*d*), *Totten* v. *Douglas* (*e*), *Campbell* v. *Barrie* (*f*), *Strachan* v. *Barton* (*g*), *Re Glass* (*h*), *The Royal Canadian Bank* v. *Kerr* (*i*), were referred to.

August 26.

BLAKE, V. C.—In 1872, *Trompour* and *Watson* were in partnership, as grain dealers, in the county of Prince Edward. *Watson* absconded from the Province on the 5th, and *Trompour* about the 24th of December, 1872. On the 10th of the same month, a writ of attachment in insolvency issued against the former, and on the 7th of January following a similar writ issued against the latter partner. On the 12th of February, 1873, the plaintiff was appointed official assignee of *Trompour*. *Trompour* and one *Amos McDonald* were, prior to the 28th of November, 1872, the registered owners of the schooner *Gazelle*, *McDonald* owning 21-64ths and *Trompour* 43-64ths. On the 5th of December the share of

Judgment.

(*a*) 31 U. C. R. 295.
(*b*) 3 E. & A. 267.
(*c*) 18 Gr. 594.
(*d*) Ib. 194.
(*e*) 18 Gr. 341.
(*f*) 31 U. C. R. 279.
(*g*) 11 Ex. 647.
(*h*) L. R. 2 Eq. 284.
(*i*) 17 Gr. 47.

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Trompour in this vessel was transferred to the defendant *R. McDonald*, who, on the same, day transferred it to the defendant *Hyatt*, who gave a mortgage to *R. McDonald*, securing $1,400 of the purchase money. The bill impeaches these transfers, and asks that the interest of *Trompour* in the vessel, or failing that, that the mortgage given back, may be made available for the creditors of *Trompour*. The defendant *R. McDonald*, on the 28th of November, 1872, was the owner of a warehouse in which were stored 2,500 bushels of rye, the property of *Trompour* and *Watson*. *R. McDonald* was then owed by this firm $1,400, a portion of which amount was made up of his charges connected with this and other grain for storage and otherwise; a portion of it for grain supplied to *Trompour* and *Watson*, and another part of a balance of account settled between the parties. At this time *Trompour* and *Watson* were insolvent. To the knowledge of *R. Macdonald*, their agent, their creditors were pressing them for payment. Under these circumstances, they demanded the grain stored in *R. McDonald's* warehouse, stating that if they had it they could raise sufficient on it to meet the immediate demands of their creditors. *R. McDonald* refused to give up the grain, alleging that it was the only security he had for the payment of the debt due him by the firm. More than once this demand was made, and finally *Trompour* offered his interest in the *Gazelle*, then worth about $1,600, if *R. McDonald* would give up the grain and give a receipt for the debt due by *Trompour* and *Watson*. To this *R. McDonald* consented, and a bill of sale was then, that is, on the 28th of November, 1872, executed by *Trompour* to *R. McDonald*, which was returned by the Custom House authorities as informal, owing to the fact that the vessel stood in the name of *Trompour* and *Amos McDonald*. The grain was in the meantime given up to *Trompour* and *Watson*, and on the 5th of December the impeached bill of sale was duly executed.

Judgment.

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At the hearing of the cause, I was of opinion that the circumstances under which the bill of sale was given took the case out of the effect of the Insolvent Act, as explained by the authorities. I since have perused *Newton* v. *The Ontario Bank* (*a*), *Campbell* v. *Barrie* (*b*), *Royal Canadian Bank* v. *Kerr* (*c*), *Payne* v. *Hendry* (*d*), and the cases therein referred to, more particularly *Re Craven* and *Marshall* (*e*), and *Ex parte Topham* (*f*), and remain of the opinion that as *R. McDonald* demanded payment of the debt due him, and, as the instrument impeached was executed on the express condition that the 2,500 bushels of rye should be given up, the transaction cannot be regarded as a voluntary one, and therefore, according to the decisions, it is not one "whereby such creditor obtains or will obtain an unjust preference over the other creditors," and therefore not invalid under the Act. The arrangement must be taken to be one entered into, on the one hand, to render available for the business of the firm certain property, and, on the other hand, to secure payment of a debt. I do not think it is material that *R. McDonald* claimed to hold the grain for certain sums, for which, it may be, he could not legally make it answer. He had a certain claim against it; he had possession of it. Time was of vast moment to the insolvents, and it might have proved better for them to satisfy this claim, even although they might be entitled to the rye before paying it in full, rather than wait the result of the determination of their strict rights by legal proceedings.

Judgment.

In *Re Craven* and *Marshall*, *Sir William James* says, "The principle is, that in order to constitute a fraudulent preference the act must be the spontaneous act of

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(*a*) 13 Gr. 662, in Ap. 15 Gr. 283.
(*b*) 31 Q. B. 279.
(*c*) 17 Gr. 47.
(*d*) 20 Gr. 142.
(*e*) L. R. 10 Eq. 648; 6 Ch. 70.
(*f*) L. R. 8 Ch. 614.

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the debtor, not *bonâ fide* originating in a demand or some other step of the creditor."

The following language of the Chief Judge in Bankruptcy, dealing with section 92 of the English Bankrupt Act of 1869, which is intended to meet the frauds attacked by section 89 of the Canadian Act, is approved of by Sir *George Mellish* in *Ex parte Topham*, who says: "So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favor of a creditor. The act of the debtor is alone to be considered; the object and purpose for which the payment is made can alone be inquired into; and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be completely investigated, yet if the act can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a Court of Law in holding that the payment is fraudulent or void."

Judgment.

The same Lord Justice, in *Ex parte Bolland* (*a*), says: "I do not think that it is necessary in this case to give any opinion whether the words, 'with the view of giving such creditor a preference over the other creditors,' have precisely the same meaning as the word 'voluntarily,' had before; but I rather think it would be found, if all the authorities were examined, that 'voluntarily' in the technical sense which it had under the old law, means practically the same thing as 'with the view of giving such creditor a preference over the other creditors.'"

(*a*) L. R. 7 Ch. 24.

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I must take it also, under the authorities, that the transaction is to be looked at, in considering the questions argued before me, as if carried out on the 28th of November. See *Re Craven* and *Marshall* (*a*), and *Ex parte Ingard* (*b*). Then the first instrument was executed; then the grain was handed over to *Trompour* and *Watson*, and from that time they became entitled to the rye, and *R. McDonald* to the interest in the *Gazelle*.

I think the bill must be dismissed with costs.

FINLAYSON v. ELLIOTT.

Incorporated company—Void lease—Liability for rent—Trustee and cestui que trust.

Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enters and holds thereunder he will be liable for all rents reserved thereby during the time he so holds: and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied; but, before the expiration of the term demised, the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment, the Court *held* them liable for the rent during the residue of the term which had since expired.

In such a case the property had been conveyed by the owner to the Bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings, and the Bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The Court, under the circumstances, made a decree for payment of the amount in favor of the party beneficially entitled.

Statement

This bill, filed in September, 1873, was by *Elizabeth Gale Finlayson*, wife of the defendant *Finlayson*, against *Andrew Elliott*, *James Hunt*, *George Stephens*,

(*a*) L. R. 6 Ch. 70. (*b*) L. R. 9 Ch. 271.

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The Bank of British North America and *Henry Moncrieff Finlayson*, setting forth that by deed of the 11th October, 1861, the Corporation of the Town of Brantford, under their corporate seal, leased to defendant *Finlayson* and one *John Nichol*, and their representatives, certain lands adjoining the Grand River Canal, together with the privilege and right of drawing water from the canal with which to propel machinery for the manufacture of woollen, cotton, or flax goods, for the term of thirteen years, from the 1st July, preceding: that by deed poll, dated in November following, *Nichol* assigned all his interest under the lease to the defendant *Finlayson*, who, by a similar deed, dated the 2nd November, 1864, conveyed all his interest to the defendants *The Bank*, by way of mortgage security for certain moneys then owing by him to *The Bank*; that by deed dated the 4th March, 1865, *The Corporation*, under their corporate seal, ratified and confirmed such transfer to *The Bank*, and enlarged the interest of *The Bank* for eight years, thus creating a lease for twenty-one years in all; and *The Bank* on the 28th of February, 1866, leased the premises to the defendants, *Hunt*, *Elliott*, and *Stephens*, for a term of five years, at an annual rent of $400, in which lease *The Corporation* and defendant *Finlayson* joined as parties for the purpose of ratifying the same; and the lessees thereupon entered into possession and so remained for the whole of the term.

Statement.

The bill further alleged that the defendants *Elliott*, *Hunt*, and *Stephens*, had paid to *The Bank* only $1,200 on account of the rent so reserved by the lease to them for the first three years of the term; and that they were still liable to pay the residue of such rent under the demise to them; but that the payment so made by them to *The Bank*, had paid off in full the claim of *The Bank* against *Finlayson*, and from thenceforward *The Bank* ceased to be beneficially interested in the sum so remaining due and unpaid for the two last years of the term;

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that by deed of the 22nd November, 1871, *The Bank*, at the request of defendant *Finlayson*, duly assigned and transferred the said premises to the plaintiff, to hold the same for all the unexpired residue of the term so demised to defendant *Finlayson*, under the first indenture of demise, and by virtue thereof the plaintiff became entitled to the reversion of the premises, and to receive the said arrears of rent due from *Elliott*, *Hunt*, and *Stephens*, which she had frequently requested them to pay to her, but which they refused to pay, although fully aware of all the matters set forth.

The bill also stated that plaintiff being unable to sue at law for such rent, had requested *The Bank* to do so, or to allow her to use their name in such proceeding at law; but this *The Bank* refused to do.

Statement.

The defendants *Elliott*, *Hunt*, and *Stephens*, answered, setting up the defence of the Statute of Frauds, and that the lease to them was not executed by *The Bank*, but by the local manager thereof, at Brantford; further that the buildings on the premises had been consumed by fire, and alleged that in error the lease did not contain provision for the rent ceasing in the event of fire; and *The Bank* having been paid the amount of insurance effected on the premises, which *The Bank* refused to expend in rebuilding the houses, the defendants assumed that the defendants *Finlayson* and *The Bank* no longer claimed that the defendants (the lessees,) were tenants thereof, and submitted that the right of the plaintiff, if any, should be enforced at law.

The Bank of British North America also answered alleging the assignment to the plaintiff, as stated in the bill, and disclaiming all further interest in the matter.

The other facts appear sufficiently in the judgment.

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The cause came on to be heard at the Spring Sittings of 1874, at Guelph.

Mr. *Cassels*, for the plaintiff.

The plaintiff did not accept the reassignment; *The Bank* must, therefore, be treated as trustees for the benefit of the plaintiff; they refuse to sue, and they refuse also to give any other instrument. The defendants have not pleaded abandonment of the lease, and even had they done so, it would be immaterial, as the casual conversation alleged to have occurred with the manager of *The Bank*, could not under any circumstances be looked upon as a legal surrender; they had left the premises before the fire, and the defendants are now estopped from disputing their liability to pay rent.

Argument.

Mr. *Guthrie*, for *The Bank*. Here, no relief is sought against *The Bank* except as to costs. The plaintiff does not ask to have the instrument modified or reformed.

The plaintiff accepted a reassignment, and there is an end of the matter so far as her rights are concerned, and *The Bank* disclaims.

Mr. *Hardy*, for the other defendants.

When lessees enter and occupy for the full term created by a lease which is either void or voidable, then the rents may be collected. The lease here is void under the statute: *Pitcairn* v. *Woodbury* (*a*), *Cardwell* v *Lucas*, (*b*). The notice shewn to have been given to the local manager of *The Bank* was a sufficient notice to quit. The lease being void, the covenants contained in it are

(*a*) 3 Ex. 4. (*b*) 2 M. & W. 111.

also void except for the time of actual occupation. Here, the lease being clearly void, *The Bank* could not assign it. 1864. Finlayson v. Elliott.

The water privilege in question here was an easement, and requires a deed to assign or convey it; and there never was a lease of this privilege. No claim is set up by the bill against the lessees as tenants from year to year, and no such claim can be set up now.

Counsel also contended that there was no assignment of the reversion to the plaintiff, and if the lessees took no interest under the lease, there was no reversion to assign; that *The Bank* took the assignment only as security, and held it only for a limited and specific purpose. Under all circumstances, Mr. *Finlayson* should have joined in the conveyances. The rent itself had not been assigned by the instrument which had been executed, and the assignment, it was submitted, was clearly subject to the *Elliott* lease; *Lofft* v. *Dennis* (*a*), *Woodfall*, L. & T. p. 140.

Proceedings to enforce payment of this rent, should have been taken at law in the name of *The Bank*.

BLAKE, V. C.—On the 11th of October, 18[illegible], the town of Brantford leased the premises in the bill mentioned to the defendant *Finlayson* and one *Nichol*, for thirteen years. In November, 1861, *Nichol* assigned his interest in the lease to *Finlayson*, and on the 2nd of November, 1864, *Finlayson* assigned the lease to the defendants *The Bank of British North America*, to secure his indebtedness to them. On the 4th of March, 1865, the town of Brantford duly confirmed this assign- August 26. Judgment.

(*a*) 1 E. & E. 474.

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ment, and extended the term granted by the original lease for eight years from its expiration. On the 28th of February, 1866, by an instrument to which *The Bank* the town, and the defendant *Finlayson* were parties, *The Bank*, with the approval of the town and *Finlayson*, leased the premises to the defendants, *Elliott*, *Hunt*, and *Stephens*, for five years, at an annual rent of $400. On the 22nd of November, 1871, *The Bank* having been repaid their advances, chiefly by the insurance money received on the destruction of the buildings on these premises, with the approval of the town, assigned the premises to the plaintiff for the residue of the term created.

The tenants paid the $400 for three of the five years; then the buildings on the premises being burned down, they refused to pay any further rent. The assignment to the plaintiff was not executed until after the rent accrued, and therefore she cannot sue at law, and comes into this Court, making *Finlayson* and *The Bank* parties defendants, along with the tenants *Elliott*, *Hunt*, and *Stephens*.

Judgment.

The lease to *Elliott*, *Hunt*, and *Stephens* was not executed by *The Bank*, but by the agent, without *The Bank's* seal; and the first ground of defence is, that rent can only be collected for the time the lessees occupied: that the lease is void under the Statute, and the plaintiff is without remedy: that, as the lease is void, the covenant to pay rent is void also.

In *Wood* v. *Tate* (*a*), Lord *Mansfield* says, "The lease then being void in consequence of the blunder in the mode of its execution, is not the plaintiff tenant from year to year? And half a year's rent being now due, have not the corporation a right to distrain for that

(*a*) 2 B. & P. ... R. 247-256.

rent? That appears to me to be the plain result of all the facts stated in the case."

In the *Ecclesiastical Commissioners* v. *Merral* (*a*), Chief Baron *Kelly* says, "It was contended that the agreement not being under seal the corporation was not bound, and there was therefore no consideration for the promise, on which, consequently, no action could be maintained. * * But if *Wood* v. *Tate* is well decided, there may be a binding contract to let and to take constituting a yearly tenancy, where the instrument under which the original letting took place was not under seal, and where, therefore, unless some equitable obligation were imposed constituting a consideration, no mutuality could exist. * * That case is therefore a clear authority to shew that when the landlord is a corporation, and the corporation have not executed under their common seal the instrument of demise, and are therefore not bound by it, yet if they allow the tenant to enter into possession, and both parties act as if there were a binding tenancy, then although neither party can maintain an action on the instrument itself, yet an implied obligation on the landlord arises to do every thing that is to be found in the instrument properly incidental to a tenancy from year to year, and a corresponding legal obligation on the tenant to pay the rent and perform such stipulations incidental to that kind of tenancy as the instrument purports to impose upon him." See also *Steevens Hospital* v. *Dyas* (*b*), and Mayor of *Stafford* v. *Till* (*c*).

Judgment.

It seems clear also from the case of Doe *d. Rigge* v. *Bell* (*d*) that, where a person is let into possession under a void lease, and pays any part of the annual rent therein expressed to be reserved, he thereby becomes a tenant

(*a*) L. R. 4 Ex. 162.
(*b*) 15 Ir. Ch. 405.
(*c*) 4 Bing. 75.
(*d*) 2 Sm. L. Ca. 98.

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from year to year upon the terms of such lease, so far as they are applicable to, and not inconsistent with, a yearly tenancy; and that such a tenancy will cease without any notice to quit at the end of the void term mentioned in the lease. In the present case, if the lease be void, by the entering into possession and payment of rent a tenancy from year to year was created between the parties. This might be terminated by a regular notice to quit. None such was given, and therefore, that tenancy that had existed between the parties continued until the expiration of the term mentioned in the lease, and the tenants, not having duly terminated the existing tenancy, are still responsible for two years' rent. The defendants do not plead an abandonment of the lease or term by the plaintiff. But, even if it were pleaded, the evidence does not sustain it. The casual conversation between Mr. *Robertson*, the then agent of *The Bank*, and the defendant *Elliott* cannot be considered a surrender, abandonment, or regular notice to quit.

Judgment.

There was some question raised as to who was the proper party to sue to recover the rent, but, as the *Bank*, *Finlayson* and the plaintiff, the assignee, are all before the Court this becomes immaterial.

I think the plaintiff is entitled to a decree for payment of the $800 and interest, with costs, including those of the defendant *The Bank*, as against the defendants *Elliott*, *Hunt*, and *Stephens*.

HOOVER v. SABOURIN. 1874.

Description of lands—Rejecting words of description.

The question was, as to the true boundary line between lots 26 and 27 in the 6th concession of Wainfleet, which the plaintiff contended should be 10 chains further east than where the defendant asserted it should be. The patent under which the defendant claimed described his land as commencing at the south-west angle of his lot, 26, and then running north "56 chains more or less to the lands granted to *David Bryant.*" It was shewn that taking the defendant's point of commencement this course would not reach *Bryant's* land, and that commencing at the point contended for by the plaintiff it would reach *Bryant's* land:

Held, (1.) That upon the evidence stated in the case—the original instructions to the surveyors, the field notes, character of land, &c.—the defendant was right in his contention. (2.) That the description in the patent under which defendant derived title was not sufficient alone to outweigh all the other facts in his favor, and that under the circumstances the words, "to the lands granted to *David Bryant*," should rather be rejected.

Statement.

The bill herein was filed on the 29th of November, 1873, by *Elias Hoover* against *Joseph Sabourin*, setting forth that the plaintiff was the owner in fee and in possession of lot No. 27, in the 6th concession of Wainfleet, by virtue of two conveyances, made respectively by *Henry L. Rose* and wife and *Peter Mustard* to the plaintiff, and executed respectively in the years 1864 and 1866; that defendant had since the 3rd November, 1873, up to the filing of the bill, continuously trespassed on the said lot by cutting and removing the timber thereon, and threatened to continue such trespassing, claiming that the portion of land on which he was so cutting belonged to him; and the bill prayed that defendant might be restrained from committing further waste, alleging that the same caused irreparable loss and damage to the plaintiff.

The defendant answered the bill, admitting the fact of cutting timber, but asserting title to that portion of the property on which the felling had taken place.

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The cause came on to be heard at St. Catherines, at the Spring Sittings, 1874, when the plaintiff was examined, and swore that he had known the premises in question for about forty years; that he had purchased in 1864, and in the spring and summer of 1865 had put up a fence on the east side of his lot, and the balance of the fence in the fall of 1866; that he knew the south-east corner of the lot, from which his fence was run, for about twenty-six years; that one *Robinson*, since deceased, first pointed out the corner to him, and it was then marked with a stake numbered on each side, so as to designate the number of the lots—with the letter R on the south side; there was a beech tree within a few feet of it marked on the four sides; also a birch near it marked in the same way.

Several other witnesses were examined, who proved distinctly the existence of the original surveyor's stake at the point contended for by the defendant. The other facts of the case and the evidence adduced appear in the judgment.

Argument.

Mr. *Moss*, Q. C., and Mr. *Hill*, for the plaintiff.

The plaintiff claims, under a patent issued in 1811 to one *Elizabeth Mustard*, which covers 200 acres, "more or less," the description of which commences at the south-east angle of lot 27—the plaintiff's lot,—and all the lines in the patent run "more or less." The defendant claims under conveyances derived from *Wm. Shaw*, the patentee, of the southerly portions of lots 24, 25 and 26, in the 6th concession; the starting point as to No. 26 being given as the south-west angle of lot 26 in front of 6th concession, so that in reality there is the same starting point for both lots, 26 and 27. The patent for *David Bryant's* land, issued in 1797, and the description, commences on the Welland River, and

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following the description mentioned in the *Bryant* patent, the distances there given bring you to defendant's lines; but, following the courses and distances in the *Shaw* patent, under which the defendant traces title, will not bring you to the *Bryant* lot; this, it was contended, evidenced, at all events, that the defendant cannot claim the piece of land in question, let who may be entitled to it.

For nearly twenty years the lumberers and others have always recognized "the *Hoover* line" as the correct boundary, and have been in the habit of working up to it; and the Court will attach some weight to this, as well as to the acts of the parties themselves.

Plaintiff and *Missiner* both prove the fact of having seen the old post, and *Wm. Robinson* proves the existence of the blazed line, which he says was to indicate the line of division between lots 26 and 27; and the witness *Hood* proves that he did really blaze the line in 1855.

Argument.

Mr. *J. A. Miller* for the defendant.

The evidence shews there were two independent surveys of different parts of the township: one by Mr. *Welch*, who surveyed the 7th concession; another by Mr. *Burwell*, of the 6th concession; and, therefore, we are not at liberty to refer to the first survey with the view of ascertaining any particulars respecting lots in the 6th concession. In cases where the original stakes cannot be found, a survey must be had under the statute.

The defendant is not a trespasser. It is shewn that one *Pugh*, a former owner, claimed this land as far back as 1855. Mr. *Lowe*, in his evidence, proves that at the time he speaks of, 1866, plaintiff admitted that there

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was an excess of land in lot 27, and that there was a dispute as to who was the party properly entitled to it.

The division line between lots 26 and 27 is what is termed a blind one, there being the same starting point for both lots, and the bush road is shewn by the evidence of *Lowe* and other witnesses, and it now appears that what was used as the bush road is situated a little to the west of the knoll, near which it is shewn, with very tolerable clearness, that the original stake had been planted.

There must be a mistake somewhere, as it is shewn there was only one blazed line and only one original stake, and the question now for the Court to decide is, simply where the land, intended to be granted by the patent under which defendant claims, is situate.

Argument.

The original line was run in 1829, and had become so obliterated, that in 1855 Mr. *Rice* says, in his evidence, they could not then discern it.

Mr. *Moss*, Q. C., in reply.

The property in question was fenced in during 1865 and 1866; in fact everything was done by plaintiff that could be reasonably required of him to indicate his possession, and the evidence shews that *Wiggins* ran his line where it was shewn the *Priestman* and *Robinson* line had always been.

S. G. Wiggins, in his evidence, says, "In 1824, my father went on to lots 24 and 25 in the 4th concession. In 1829 he ran a line through to the Welland River. We commenced at the sledge road, and continued it on through." That shews this was the true line, and the plaintiff's line agrees with the *Wiggins* line.

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August 26.

BLAKE, V. C.—The plaintiff is the owner of lot twenty seven, and the defendant of lot twenty six, in the sixth concession of Wainfleet. The plaintiff alleges that on the third of November, 1873, the defendant began to trespass on his lot by cutting down timber, and asks that he may be restrained. The defendant admits the cutting, but denies that it took place on the plaintiff's land, and thus the question of boundary is raised.

The plaintiff claims under a patent, the description of which commences at the south east angle of lot twenty-seven in front of the sixth concession, and the defendant under a patent the description of which commences at the south west angle of lot twenty-six in front of the sixth concession, so that we have in both cases the same starting point, in the one the south west angle of twenty-six in the other the south east angle of twenty-seven.

Judgment.

There is no doubt, that by the original instructions given for the survey of the township in question, the lots were to have a frontage of twenty chains, with a depth of one hundred chains, and an allowance of one chain at every second lot, and one chain between each concession. There is no doubt also, that when the original survey of the sixth concession was made, a line was run from the town line along the south or front of the sixth concession to lot thirty-two, and, in making this survey the surveyor engaged intended to give, and did give, to each of the lots, twenty-six and twenty-seven, the required frontage of twenty chains. It is clear that *Burwell*, who made the survey of the sixth concession, made an independent survey of it, and did not so place his lines as that they corresponded with those run by *Welch*, who had previously surveyed the river or seventh concession; so that if you prolong *Welch's* line between lots twenty-six and twenty-seven in the seventh or river concession, there will be a jog when you come to the sixth concession. It is this unfortunate discrepancy which has caused the

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difficulty in this case. Eighteen or nineteen years ago those engaged in lumbering, for the purpose of facilitating their operations, blazed a line, as the division between lots twenty-six and twenty-seven, through the seventh and sixth concessions. This line may give to lots twenty six and twenty-seven their true frontage in the seventh concession, but it gives to lot twenty-seven in the sixth concession a frontage of thirty chains in place of twenty. Most of the witnesses speak of seeing a stake on the north side of the sixth concession, somewhere between lots twenty-six and twenty-seven, and a certain tree there blazed to designate the corner of the lot. The difficulty of defining the true boundary between the properties would be increased, were it not for the character of the land forming the frontage of the lots. In the original notes of survey we find that Mr. *Burwell*, in speaking of the front of lot twenty-six, says it is "wet land—butter-wood, elm, basswood, and black ash." This is so general

Judgment.

that we have not the same advantage, from such a description, as we have in that of the next lot, the frontage of which is thus described, "sixteen chains good land, beech, maple and basswood to a dead run: one chain across sets to south east: three chains beech maple and basswood:" then comes a road. We should expect, continuing this line one chain, a stake which would form the south east angle of lot twenty-eight. Then, retracing the steps by which we arrived at this point, we should find, proceeding in an easterly direction one chain, a stake which would form the south west boundary of lot twenty-seven. Continuing on, for three chains, we should expect to find a dead run; continuing across that, we should find it a chain in w[illegible]lth, and then, proceeding for sixteen chains through good land, we should, on arriving at the end of these twenty chains, come to the wet land of lot twenty-six. The witnesses prove that the state of matters thus described and shewn on paper does actually exist on the land, and that, taking the above description of lot twenty-seven you can, with-

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out difficulty, go on the lot and, from its conformation, point it out. *Henry Lowe*, a Provincial Land Surveyor, employed by the plaintiff to make a survey for him, but called as a witness for the defendant, states that when he went on the lot, the plaintiff said there was an overplus of ten chains in lot twenty-seven.

This surveyor found what he took as an undisputed corner, between lots twenty-nine and thirty. The plaintiff was with him when he found the south east corner of twenty-eight, and when, measuring from this, twenty-one chains and five links, they found a tree so marked that the witness knew it to be what he calls a "witness" tree. This tree was on high ground and, to the east of it the ground quickly falls. So that, taking these defined points to the west of this lot, and chaining down to the east of lot twenty-seven, *Lowe* came to a marked beech tree where, according to the field notes and descriptions, the south-east angle of lot twenty-seven should be found. Then the old road running in a northerly direction through the fifth concession, which it was said came out about where the plaintiff's line runs, is much nearer, by the evidence of some of the plaintiff's witnesses, the point designated by the defendant than that of the plaintiff. The knoll, or rising ground, referred to by Mr. *Lowe* is spoken of by several of the witnesses. It is true that the blazed line, run some nineteen years since by Mr. *Hood*, a Provincial Land Surveyor, for Mr. *Rice*, a lumberman, is at the distance of thirty chains from the west side of lot twenty-seven, and that if that be taken as the true dividing line the contest of the plaintiff must succeed. But it is not pretended that this line was run from any point on the front of the sixth concession north. It commences doubtless at an undisputed original corner, not one intended to guide in the sixth concession, but one defined for the seventh, or river, concession. Looking at the original instructions to surveyors, the field notes, the character of the land, the stakes, tree,

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and blazes, all found to point to this same spot as being the south-east angle of lot twenty-seven, and the south-west angle of lot twenty-six, I have no doubt but that the plaintiff is in error when he seeks to have it removed ten chains further to the east, and that this erroneous contest on his part arises from the fact that he seeks to make the survey of the seventh concession controul the sixth concession.

It is said, however, that whatever might otherwise have been the finding as to the true boundary line, the patent of the defendant's lot so defines it, as that the place of commencement cannot be where the defendant insists it is. This patent describes this lot as follows: "Commencing in front of the said sixth concession in the limit between lots numbers twenty-six and twenty-seven, and at the south-west angle of the said lot number twenty-six; then north fifty-six chains more or less to the lands granted to *David Bryant;* then east twenty-one chains more or less to the eastern limit of the allowance for road between lots twenty-six and twenty-five; then," &c. There is no doubt, that if you commence at the defendant's point, and run north fifty-six chains, you will not reach "the lands granted to *David Bryant,*" but, if you commence at the plaintiff's point and so run you will strike the *Bryant* lot. Am I then to conclude that this one fact is to determine the starting point in the descriptions of lots twenty-six and twenty-seven; that it is sufficient to counterbalance all the evidence adduced by the defendant, and that the department abandoned the idea of giving these lots a uniform frontage of twenty chains, and allotted to twenty-seven thirty chains; or am I not rather still to adhere to the defendant's as being the true point of commencement, to stop after the words, "then north fifty-six chains more or less," and reject "to the lands granted to *David Bryant,*" and conclude that the department, unaware of the variation between the surveys of *Welch*

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and *Burwell*, concluded that the lines of twenty-six in the sixth concession ran up to those of twenty-six in the seventh, and therefore added such words as would appear naturally in the patent if this were the case? The Chief Justice of the Queen's Bench, in *Juson* v. *Reynolds* (*a*), says: "Courts of justice are always inclined to construe deeds so as to give effect to the intention of the parties, and where it appears from the instrument itself and the surrounding circumstances what that intent really was, they reject that which would be inconsistent with the true intent." As authority for the proposition, that a Court in construing a deed or patent is bound to look at such surrounding circumstances as that to which I have referred, see this case, and also *Doe dem. Gildersleeve* v. *Kennedy* (*b*), referred to therein. It is said the best way to expound a description, is to read it on the land. The next best thing to that, is to do as I here propose, namely, read it in the light of that evidence as to locality, and otherwise, given by the surveyor.

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In *Boardman* v. *Read & Ford's* lessees (*c*), *McLean*, J., says, "The entire description in the patent must be taken and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls of the patent, clearly appears to have been made through mistake, that does not make the patent void." "Words necessary to ascertain the premises must be retained, but words not necessary for that purpose may be rejected, if inconsistent with the others (*d*)." Except for the reference to the *Bryant* land in the patent I cannot say there would be any doubt in my mind as to the boundary between these lots. Taking into consideration the way in which, as I

(*a*) 34 U. C. R. 174, 195.
(*b*) 5 U. C. R. 402.
(*c*) 6 Peters 328, 345.
(*d*) Juson v. Reynolds, 34 U. C. R. at 199.

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believe, this reference came to be made, I think it out of the question that this one circumstance should countervail all those other matters which lead me to place the starting point where I have done.

I am of opinion that the contest of the plaintiff is unfounded, and that his bill must be dismissed with costs.

McDonell v. McDonell.

Specific performance—Misunderstanding.

The Court, when it is satisfied that there is a *bonâ fide* misunderstanding on the part of one of the parties to a contract as to the provisions of an agreement, will not decree specific performance of it.

This was a bill to enforce specific performance of an agreement entered into between the plaintiff and defendants, the nature and provisions of which are fully stated in the judgment.

The case came on for hearing at Woodstock, at the Autumn sittings, 1874.

Mr. *Moss*, Q. C., and Mr. *Wells*, for the plaintiff.

Argument.

It is admitted on all hands that unfortunately disputes had arisen between the several members of the family, in reference not so much to the right to cut timber over the 150 acres, as the manner of exercising such right; and therefore it was that the present agreement was entered into. This, it was shewn, was read over to the defendant, and the simple question now to be solved is, what was the agreement which the parties came to. It is certain there was no intention to give the twenty-five acres to the daughters. The rights previously existing between the parties were well understood, the daughters had, not under the lease, but under the deed, the right to cut over the 150 acres.

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If the defendant had not understood the agreement when executing it, it is improbable that Mr. *Ball*, a professional gentleman, would have witnessed the instrument. Here the son bargained for the interest of the father in the 125 acres, and he obtained it, and no case goes the length which the defendant desires here, of saying that, because a party has been disappointed as to the effects of the bargain, the Court will not enforce it, that is, where there is no pretence of fraud or deception in obtaining the execution of the contract.

Mr. *Boyd* and Mr. *Mathewson*, for defendant.

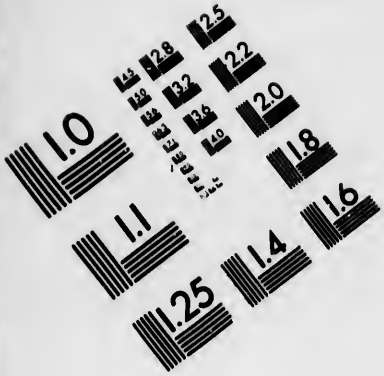
The evidence of Mr. *Ball*, Mr. *McCaughey*, and the defendant establishes the defendant's case, which is, that he intended that the right to cut timber on any portion of the lot, should cease. It may be that the plaintiff understood it in another sense; but, if one party to a contract understand it one way, and the other in another way, that is sufficient to induce the Court to refuse to enforce the agreement, leaving the parties to their rights at law. *Fry* on Contracts, 484; *Wycombe Railway Company* v. *Donnington*. (*a*)

Argument.

November 6.

BLAKE, V. C.—*Donald McDonell*, the plaintiff, the father of the defendant *Allan McDonell*, owned two hundred acres of land, one hundred and fifty of which he conveyed to the defendant, reserving to himself the right to cut timber thereon. The other fifty acres he conveyed to his daughters, and gave them the right which he had reserved, to cut the timber on the one hundred and fifty acres. Certain matters were then arranged between the defendant, the father and daughters, which were the subject of disputes between the parties. Two actions at law were brought in respect of them, and at the conclusion of the second trial, all matters in difference

(*a*) L. R. 1 Ch. 268.



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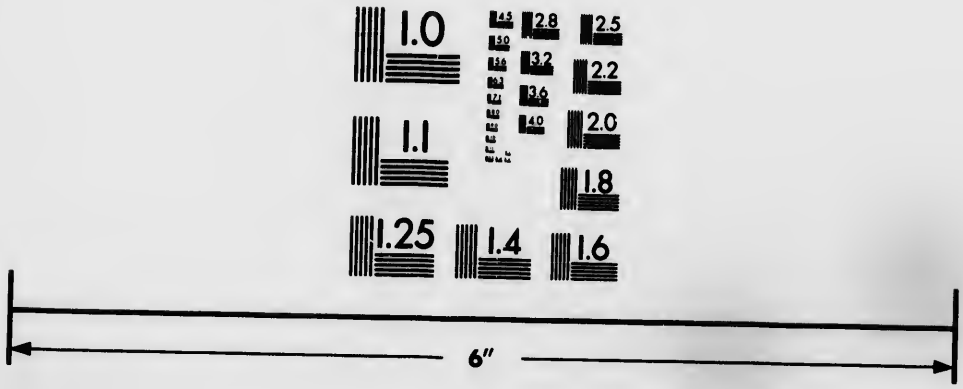

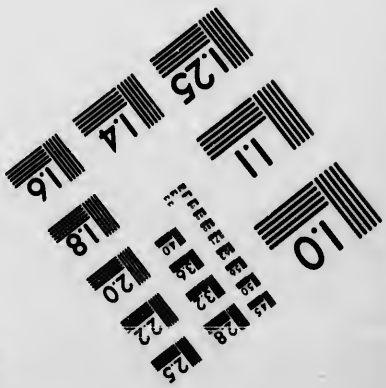

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were referred to Mr. *McCaughey* as arbitrator. The plaintiff, defendant, and *Margaret McDonell*, one of the daughters, met in the office of the arbitrator. The solicitors of the plaintiff and defendant were also then present. After some discussion an agreement was prepared and signed by the parties, without the intervention of the arbitrator, which contained, amongst other clauses, the following:—"The lease to be cancelled, and the girls to release their interest under it." There seems to be no doubt that as the defendant and the rest of the family had failed under their former agreement to live in peace, they then resolved to make such an arrangement as that the property would be enjoyed by them independently of one another. The defendant agreed to give up twenty-five acres of his land, and the father insisted that this should be so selected, from the rear fifty acres of the lot, as to give him as much wood land as possible. The defendant swore that when he gave up this twenty-five acres, and thus allowed his father and sisters seventy-five acres of the lot, and retained to himself the one hundred and twenty-five acres, he thought he was getting his share freed from the right to cut timber thereon; that the words "the lease to be cancelled and the girls to release their interest under it," meant a release of this right as to the timber, and that he would not have entered into the agreement did he not suppose this to be its construction, as the reserving this liberty as to the timber would still leave open the door to disputes amongst the family. The solicitor of the defendant corroborates this view. He says, by mistake the clause above referred to was inserted, and in place of giving a release of the interest of the girls under the lease, a release of all their interest in the one hundred and twenty-five acres was intended to have been given. As evidence of the truth of this assertion, the solicitor produces the papers prepared by him, on his return home, to carry out the proposed settlement, which shew his understanding of the matter then to have been the same as that of the defendant.

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There is no doubt from the evidence of the defendant, his solicitor, *Margaret McDonell*, and Mr. *McCaughey*, that in order to prevent a recurrence of the unfortunate family disputes which had taken place, the opinion of all present on the day of the settlement was, that the parties should divide the land, and the defendant and the rest of the family should live separately, and independent of each other. I am satisfied that the defendant and his solicitor had this in their mind when the negotiations were going on; that they thought the object they had in view could not be carried out, if the leave to cut over the one hundred and twenty-five acres was reserved, and therefore that it was thought better to give up the twenty-five acres of the best wooded land, of the fifty from which they were to be selected, rather than this cause of war should be continued.

Judgment.

The difficulty in these cases is not to apply the law pertinent to them, but to ascertain whether, as a matter of fact, a misapprehension did exist in the mind of the defendant, under which he entered into an agreement which would not have been otherwise concluded by him. I feel that the utmost caution must be exercised in distinguishing between a case where an actual misunderstanding or misapprehension did exist, and one where the defendant, simply rueing his bargain, seeks to prevent a decree for the performance of the contract being pronounced against him. In the former case it is against conscience to aid the plaintiff, and the Court remains neutral; in the latter, this Court holds the contract as binding on the parties as does a Court of law. Lord Justice *Knight Bruce* thus shortly puts the principle on which the Court acts in these cases: "It is sworn by the vendor's agent that this was his sense and understanding. It may appear singular, and may be the subject of observation, but it is sworn to, and this is a case of specific performance. It would be contrary to the rules of this Court to enforce specific performance against

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a defendant so swearing, and in fact so proving." *Wycombe Railway Company* v. *Donnington* (*a*). See also *Martin* v. *Pycroft*, (*b*), *Harris* v. *Pepperell*, (*c*), *Powell* v. *Smith*, (*d*), *Needler* v. *Campbell*, (*e*). I think the bill must be dismissed, but, following the above authorities, without costs.

I regret that the effect of this decree will be to throw the parties back to their original arrangement, and thus open the door to a continuance of their unfortunate disputes. I trust that they may have the good sense to discontinue that which causes these difficulties, and have no doubt, if they seek as earnestly to close the door of strife as hitherto they have attempted to open it, an amicable arrangement of matters may easily be arrived at.

In re Helliwell's Trusts.

Trustee—Appointing new trustees—Costs.

There is nothing anomalous in the position, nor is the [illegible]y incompatibility, in the creator of a trust being a trust[illegible]eof and seeing to the due execution of the trust.

A trust was created to two trustees and the survivor, and the executors and administrators of such survivor. The executors of the survivor, one of whom was the creator of the trust, proved his will. A petition, verified by affidavit, was afterwards presented by the executors, setting forth that at the time of proving the will they were not aware that they thereby became trustees of the trust estate, and one of them, the creator of the trust, swore that had he been aware that such would be the effect of proving the will, he would not have done so. The Court thought this a sufficient reason for appointing new trustees, and, under the circumstances, the adult *cestui que trust* consenting, ordered the trustees to be paid their costs of the application out of the estate.

Statement. This was a petition presented by *Thomas Taylor*, *George Taylor*, and *William Mills Morse*, setting forth

(*a*) L. R. 1 Ch. 268.
(*b*) 2 De. G. M. & G. 784.
(*c*) L. R. 5 Eq. 1.
(*d*) L. R. 14 Eq. 85.
(*e*) 17 Gr. 592.

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that under a deed of settlement of 12th October, 1867, and made between the petitioner *Morse* of the first part, and *John Taylor Morse* and *John Taylor* of the second part, it was recited that the petitioner *Morse* had become entitled, under the will of the late Rev. *John Pitman*, to certain messuages and premises therein more particularly described; and that by arrangement made between the petitioner *Morse* and the said *John Taylor Morse* and *Eliza Ann Helliwell*, formerly *Eliza Ann Morse*, brother and sister of the said *William M. Morse*, and *Elizabeth Morse* his mother, the petitioner *Morse* agreed to divide the proceeds of the sale of such property between himself and his said brother and sister; and the said indenture further recited that the said property had been sold for $38,800, of which one-fourth part was to be bequeathed or conveyed to or in trust for the said *Eliza Ann Helliwell*, and that in pursuance of the option given to the petitioner *Morse*, he had determined to and did assign and transfer her share of said fund to the said *John Taylor* and *John Taylor Morse* in trust for the said *Eliza Ann Helliwell* and her children, share and share alike, in default of appointment by the mother; that the deed contained no provision for the substitution of any trustee or trustees in the place of those named in the deed; that the said *John Taylor Morse* had died in 1868, leaving his co-trustee, *John Taylor*, who subsequently, and on the 13th May, 1871, also died, having first duly made and published his will, whereby he declared the said petitioners, *Thomas Taylor*, *George Taylor* and *William Mills Morse*, his executors, and on the 12th August, in the same year, they duly proved the said will, and probate thereof was granted to them.

Statement.

The petition further alleged, that the petitioners were not aware at the time that probate of the will of the said *John Taylor* was granted to them, and they accepted the same, that by so doing they became trustees under

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the said deed of settlement, and that the petitioner *Morse* would not have accepted the position of executor had he known that by so doing he would thereby become a trustee of a trust fund created by himself; and the petitioners prayed to be relieved from the burden of the trusteeship; that new trustees—named in the petition—might be appointed in their stead, and that they might be paid their costs out of the trust estate. The several statements in the petition were verified by affidavits.

Mr. *Tilt*, for the petitioners.

Mr. *Davidson*, for *Eliza Ann Helliwell*, consented to the prayer of the petition.

Judgment.

SPRAGGE, C.—This is an application under the trustee acts for the appointment of new trustees in place of the petitioners, one of whom is the creator of the trust. The trust was to two trustees and the survivor, and the executors and administrators of such survivor; and the petitioners are the executors of the survivor, and proved his will. There is no provision in the trust deed for the appointment of new trustees. The petitioners all state upon oath that they were not aware that the effect of proving the will of the surviving trustee would be to constitute them trustees; and one of them, *William Mills Morse*, who was the creator of the trust, adds, that if he had known that the effect of proving the will of the surviving trustee would be to make him a trustee, he would not have proved such will; and they all express their desire to be relieved from the trust. A statement of the position of the trust funds is appended to the petition, and verified by affidavit; and I have no reason to suppose that the petitioners have any indirect or improper motive in desiring to be relieved from the trust.

It was put in argument upon this application that the position of *William Mills Morse* is an anomalous one,

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that he is in effect his own trustee. I do not see this; or that there is any incompatibility in the creator of the trust seeing to the due execution of the trust.

The fact, however, of these gentlemen having got themselves into the position of trustee by a legal effect, that was a surprise upon them, is, I think, a sufficient reason for relieving them, if suitable persons can be found to take their place. It is proposed to appoint in their place the husband of the adult *cestui que trust*, the husband and wife living together in a place called Durand in the State of Illinois, and *William Barclay McMurrich*, of Toronto, Barrister.

I doubt the propriety of appointing the husband of the adult *cestui qui trust*, for two reasons, one, that the trust is to pay the annual proceeds of the estate—less an annuity of $100 to her mother—to the adult *cestui que trust* to her own separate use, and free from the debts and the control of her husband; the other that he is resident out of the jurisdiction of this Court. I think it would be proper to appoint some other person, and one resident within the jurisdiction. I observe that there is not among the papers the usual affidavit of the fitness of the persons proposed. Judgment.

The petitioners ask for the costs of this application to be paid out of the fund; and *Eliza Ann Helliwell*, the adult *cestui que trust*, who is represented upon it, assents to all that is prayed for.

If the petitioners had been trustees who had knowingly accepted the trust, and then from mere caprice or change of mind had come to this Court to be relieved, I should certainly relieve them only at their own expense if at all, but the circumstances under which this trust devolved upon them, without any mental assent on their part, makes their case essentially different; and besides,

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the cost of these proceedings are only the same as would have been incurred if they had not proved the will of the surviving trustee, or if from any other cause there had not been a successor to the trusteeship, for, the trust deed containing no provision for the appointment of new trustees, an application to this Court would have been necessary. There might indeed have been administrators with the will annexed who would have consented to act, but I do not think that a sufficient reason for refusing these costs. I think the case as to costs may fairly be put in this way. If the petitioners had been advised of the legal effect of proving the will of the surviving trustee, and while willing to be executors of that will, were unwilling to be trustees of this estate, and had forborne to prove the will pending an application to this Court, for the appointment of other trustees, I should say that the Court would appoint other trustees, and that the costs of the application would properly come out of the trust estate.

Judgment.

For these reasons I give the trustees the costs of this application; and I think another trustee should be proposed in place of the husband of the adult *cestui que trust*.

ARMSTRONG v. ARMSTRONG. 1874.

Dower—Election—Leasing.

A testator by his will gave to his widow 100 acres of land, which he expressed should "be my wife's portion during her natural life," and the balance of his real estate, fifty acres, he directed to be sold, and until sold that the same should be rented, "and the rent shall be given to my wife to assist her in keeping and supporting of herself and the children that may choose to reside with her": *Held*, that the widow was not entitled to her dower in the fifty acres and also to the provision made for her by the will; but that she was bound to elect.

Statement.

This was a bill, filed 24th March, 1873, and as amended was by *Eliza Jane Armstrong* and *Thomas James Armstrong* against *Robert J. Armstrong* and others, the executors and heirs-at-law of one *John Armstrong*, deceased, who died in October, 1869, after having duly made and published his will, but which did not contain any devise to any person of one portion of his real estate (fifty acres) in Mornington, purchased by him from the Crown, on which a part of the purchase money still remained unpaid, although he directed the same to be sold; and he devised to the plaintiff *Eliza Jane Armstrong* 100 acres in the same township for life, and after her decease the same to be equally divided amongst his heirs-at-law, and until sold the said fifty acres were to be leased and the rents and profits thereof paid to her for the support of herself and such of her children as might choose to reside with her.

The widow under these circumstances claimed to be entitled to her life estate in the 100 acres, and also to her dower in the fifty acres, which under the circumstances appearing in the bill (but which have no bearing on the present report,) it was found necessary to sell.

The cause came on for hearing at the Sittings of the Court at Stratford, in the autumn of 1873.

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Armstrong v. Armstrong.

Mr. *Idington*, for the plaintiffs.

Mr. *McCulloch* and Mr. *Smith*, for the defendants.

The cause stood over for the purpose of enabling counsel to furnish a memorandum of cases, which are mentioned in the judgment.

Sept. 2nd

SPRAGGE, C.—I retain the opinion which I expressed at the hearing, that the widow is put to her election.

I am referred to the case of *Fairweather* v. *Archibald* (*a*), decided by myself, as a decision in favour of the widow in this case. The cases are distinguishable. In this case there was a subsisting lease, and the will contains a direction for sale after the expiry of the lease and for the application of the rents during the term. I said in that case "Counsel read this as meaning the whole of the rent, not the rent after deducting the dowress's share in it; and if this is to be so read I agree that the widow must be put to her election; for the rule is, that if a testator has so devised any part of his real estate, that the widow's claim of dower is inconsistent with carrying into effect the testator's whole intention, as expressed in his will, she is put to her election;" and that rule applies in this case. In that case I followed a decision of Sir *Richard Kindersley* in *Gibson* v. *Gibson* (*b*).

Judgment.

It may be conceded that the direction to sell the fifty acres in order to the payment of legacies would not of itself be sufficient to put the widow to her election, but the will directs that this same fifty acres shall, until sold, be rented—*i. e.*, as I understand, shall be leased—and the will proceeds: "and the rent shall be given to my wife to assist her in keeping, and supporting of

(*a*) 15 Gr. 255.

(*b*) 1 Dr. 42, 57.

herself and the children that may choose to reside with her. Those unmarried only shall have share in this." This must be read as directing that the whole shall be leased, "the fifty acres shall be rented," and that the whole rental shall be applied in the manner thereby directed; and this is plainly inconsistent with the right of the wife to have a third set out by metes and bounds for her dower, and is so a clear and manifest indication of the intention of the testator that the widow should not have her dower in this land.

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Armstrong v. Armstrong

The point has been decided in several cases in England. In *Butcher* v. *Kemp* (*a*), the direction was to carry on the business, or to let the premises upon lease for the benefit of the testator's daughter. *Hall* v. *Hill* (*b*), is a case referred to by me in *Fairweather* v. *Archibald*. In *O'Hara* v. *Chaine* (*c*), also before Lord *St. Leonards* there was a devise to trustees to sell, and a power to lease from year to year such part as might remain unsold; and as to the latter, it was said by the learned Chancellor that the power of leasing was sufficient to show that the widow must elect. In all these cases the widow was put to her election, and the same point has been decided in the same way in *Grayson* v. *Deakin* (*d*), and in *Parker* v. *Sowerby* (*e*), first by *Sir Richard Kindersley*, and in appeal by the Lord Chancellor and the Lords Justices. In the latter case there was a power to lease, and also powers of management; but it is clear from the case that the Court did not consider the latter powers necessary in order to put the widow to her election; they are not even alluded to in the judgments of Lord *Cranworth* and Lord Justice *Knight Bruce*, and in the judgment of Lord Justice *Turner* they are not made the primary or even a principal ground of decision. He says, "He has given to the trus-

Judgment.

(*a*) 5 Mad. 51.
(*b*) 1 Dr. & W. 92.
(*c*) 1 J. & L. 662.
(*d*) 3 De. G. & S. 299.
(*e*) 4 D. M. & G. 321.

1874.

Armstrong v. Armstrong.

tees a power to lease; this power could not be exercised if the wife was entitled to dower. Such a right would be clearly inconsistent with the power."

Further, this will appears to me to contain in its language, as well as by the effect of its provisions, an indication of intention on the part of the testator that his widow should not have dower and also the provision made for her by his will. The language is, "the south half of lot number 16 in the 8th concession of Mornington, being one hundred acres, shall be my wife's portion during her natural life." The will deals with the fifty acres and the hundred acres and with no other land, and there is no residuary devise; and I gather from the pleadings and the evidence that the testator had no other property. The words, "shall be my wife's portion" are significant, and especially so under the circumstances. I take them to mean not

Judgment.

only that she was to have the hundred acres and not her dower in them only, but also that she was to have that and that only, as her portion. It is not necessary that a will should in so many words express that the provision made by it is in lieu of dower, but any language tantamount to it is sufficient. I refer upon this point to the judgment of Lord *Thurlow* in *Boynton* v. *Boynton* (*a*). What she seeks by her bill in addition to the hundred acres is dower in the fifty acres. I think it a clear case for putting the widow to her election.

The bill is dismissed with costs.

(*a*) 1 B. C. C. 447.

STEVENSON v. SEXSMITH. 1874.

Saw logs—Partnership—Sale by one partner.

Where a partner, desiring to retire from the business, agrees to sell out his interest in the joint property subject to the payment of all claims against the partnership; and a sale is effected by the remaining partner to a third party subject to such payment; the title which remains in the retiring partner until the payment of the debts of the firm is a legal, not a merely equitable right, and such as an execution against the remaining partner, for a private debt, will not affect.

S. & A. were in partnership as dealers in lumber, and had become involved to some extent, in consequence of which it was agreed that *A.* should sell out his interest to *S.* and retire from the business, leaving *S.* sole owner, who thereupon, and without anything having been paid to *A.*, entered into an agreement with the plaintiff for carrying on the same business as partners; the plaintiff agreeing that the first proceeds of the partnership sales should be employed in discharge of the claims against the firm of *S. & A.*, which the plaintiff alleged he thought were composed of $17,000 due to the banks. In reality a claim of about $8,000 was held by the brother of *S.*, who sued for and recovered judgment and execution, under which the sheriff seized and advertized the timber of the partnership for sale, whereupon the plaintiff filed a bill impeaching the *bona fides* of the judgment and seeking to restrain the sale on the ground, amongst others, of the peculiar value of the timber. The Court, however, being of opinion that the debt recovered was not fictitious, refused to interfere with the sale, but offered the plaintiff a reference to the Master for the purpose of procuring the production of certain papers—not produced at the hearing—to impeach the *bona fides* of the debt; the Master's report to be procured within fifteen days after their production: if the reference not taken, or if the Master's report were in favor of the *bona fides* of the claim, the bill to be dismissed with costs; but if the Master reported against the *bona fides* of the debt, further directions and costs were reserved, and the amount of the judgment with interest and costs was directed to be paid into Court—otherwise the execution of the process not to be interfered with.

Statement.

The bill in this case, which was by *John Stevenson*, lumber merchant, against *John Wesley Sexsmith*, *Thomas Sexsmith*, and *John Allen*, stated that on the 21st November, 1872, the plaintiff and *J. W. Sexsmith* entered into partnership, for the purpose and under the

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Stevenson v. Sexsmith.

terms and conditions set out in the of agreement duly executed by the parties on that day, which was as follows :—

"Articles of agreement made this twenty-first day of November, in the year of our Lord one thousand eight hundred and seventy-two, between *John Wesley Sexsmith*, of the one part, and *John Stevenson*, of Napanee, of the other part, witnesseth that whereas the said *John W. Sexsmith* has been engaged in the lumber business with one *John Allen*, and having purchased and become possessed of all the interest of the said *Allen* in the said business, including all contracts for timber; and for the further and better prosecution of the said business the said *Sexsmith* hereby agrees to sell and does sell unto the said *Stevenson* the one-half of the said business, including all the rights of the said *Allen*, consisting of cedar timber and other timber, as now held by the said *Sexsmith* and *Allen* on Salmon River, the tributaries thereof, or other places, with one-half interest in all contracts now existing for timber, at the rate and price of the actual cost thereof, and no more; a schedule of said property, as near as can be ascertained until actually measured, to be attached hereto. The payment of the said half interest, if not sooner made by the said *Stevenson*, shall be fully made out of the first sales of the said timber and first be applied to meet any sum due in bank or other ways by the said parties on account of said business or that may now be owing on it.

Statement.

"And the said *Sexsmith* and *Stevenson* further agree that they will continue to prosecute the said lumber business on the said Salmon River or other places as mutually may be agreed upon, for the space and term of seven years from this date, unless closed up sooner by a mutual agreement or either party giving to the other six months' notice in writing, in equal shares as co-partners.

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"The profits of said business to be equally divided, and all losses equally borne; and if during the said term either party should furnish and pay on account of said business more than his one-half share that he will be entitled to interest for such excess over his due share of payments. That both parties will assist in said business, but its general and active management will be by the said *Sexsmith*, in whose sole hand the business will be for the present conducted for the benefit of both parties; but both names may be used if desired, as *J. W. Sexsmith & Co.* Correct books of account shall be kept of all transactions, open at all times to both parties, and statements given. The said partners propose getting out railway ties, cedar posts, shingle and other timber; and in order to make the business successful, to buy and secure timber standing and lands in addition to those heretofore held by *Sexsmith & Allen*; and all such lands and timber thus secured by the said *Sexsmith* in his name while so acting shall be the property of the firm. All paper given on account of the said firm shall for the present be made and signed by the said *Sexsmith* and indorsed by the said *Stevenson* until the name of firm is used as aforesaid, all such paper to be regularly entered in books kept for that purpose, with books of account of all receipts and expenditure in behalf of said business. Neither party shall bind the other during the said term for anything not relating to the said business without mutual agreement. A division of profits to be fairly and equitably made at such times as the business will justify it, share and share alike. Neither party to draw funds from the business other ways."

Statement.

That plaintiff entered into such partnership agreement on the faith of the representations made by the defendants, set out in the agreement, that the defendant *J. W. Sexsmith* had acquired all the interes of his former partner, the defendant *John Allen*, in the business property and of the firm of *Sexsmith & Allen*, and that the partnership between them had been dissolved

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and was at an end: that the partnership between plaintiff and *Sexsmith* had subsisted from the date of said articles up to the filing of the bill on the 14th March, 1874, and notice of the intention to dissolve had been given by either party to the other: that amongst the assets formerly belonging to the firm of *Sexsmith & Allen*, and which was brought into the partnership business of the plaintiff and *Sexsmith* and became the property of the said partnership, was a large quantity of cedar and other timber on Salmon River, the tributaries thereof and other places, of the value of $26,000 and upwards, and which timber had continued in said river and its tributaries and other places, from the date of said agreement up to the filing of the bill, as the partnership property of and in the possession of the plaintiff and said *Sexsmith*, and their right thereto had not been questioned until on or about the 7th of February, 1874, when the defendants conceived the fraudulent scheme of asserting that the partnership between *Allen & Sexsmith* had never been dissolved, that said timber was the property of that firm, and by means of a judgment and execution to be collusively obtained by the defendant *Thomas Sexsmith* against the firm of *Sexsmith & Allen*, to seize and sell said timber as their property and to divide the proceeds of such sale between *John W. & Thomas Sexsmith;* in pursuance of which fraudulent scheme *Thomas Sexsmith* issued a writ of summons against *Sexsmith & Allen* on the said 7th of February, and served it on the 10th of the same month, on both *Sexsmith & Allen*, who both entered an appearance on the same day in person, and on the following day the declaration in the action was served; and on the 20th of the month judgment for want of a plea was signed against *Sexsmith & Allen* for $8,500 and upwards, and on the same day executions were issued against the defendants in said action, and placed in the hands of the sheriffs of Lennox and Addington and Hastings, and the sheriffs were instructed by the defendants to seize and sell the said timber as the property of *Sexsmith & Allen*.

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The bill alleged that such judgment was obtained by fraud and collusion, and was not obtained on a real debt of the firm of *Sexsmith & Allen*; that the said sheriffs had, respectively, seized portions of the said timber, which were advertised to be sold on the 14th and 18th of the said month of March, unless restrained by injunction.

The bill further stated that the defendant *Thomas Sexsmith*, asserted that even if the partnership of *Sexsmith & Allen* had been duly dissolved, there had not been any delivery of the timber to plaintiff and *J. W. Sexsmith*, and that he was therefore entitled to seize the same.

The bill further alleged that if the said firm were indebted to *Thomas Sexsmith* in any sum, the amount was very small, and much less than the sum for which judgment had been obtained; and if it should appear that he was entitled to seize, the judgment obtained by him should be reduced to the proper amount.

Statement.

The prayer of the bill was, that the judgment might be declared to be fraudulent and void; that the defendants might be restrained from proceeding to sell said timber, and that the timber might be declared to be the assets of the plaintiff and his partner, *John W. Sexsmith*; and an account of what, if anything, was due to *Thomas Sexsmith*.

It appeared that the plaintiff had, on the same 14th of March, filed another bill against *John Wesley Sexsmith*, *Alice Mary Sexsmith* his wife, and the said *Thomas Sexsmith*, setting forth, in addition to the facts above stated, that *J. W. Sexsmith*, in carrying on the partnership business with plaintiff, had purchased a parcel of land in the Village of Kimmerly-town in the County of Hastings, and had erected a saw mill thereon with the partnership funds of plaintiff and *J. W.*

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Sexsmith ; and, with a view of defrauding the plaintiff, had procured a deed of conveyance of such land to be made to the defendant *Alice Mary Sexsmith*, who, with her husband, had joined in executing a mortgage thereon for $8,000 to *Thomas Sexsmith*, who was well aware of the said land having been purchased and mill erected with funds of the partnership, and who in fact was a party to the fraudulent design to cheat the plaintiff. Under these circumstances the bill prayed a dissolution of the partnership between plaintiff and *J. W. Sexsmith;* that the conveyance to *Alice Mary Sexsmith* and the mortgage to *Thomas Sexsmith* might be declared void as against the plaintiff, or that the parties might be declared to hold the same in trust for the partnership

Statement.

The defendants, *John W. Sexsmith*, *Thomas Sexsmith* and *Allen* severally answered the bill, denying all fraudulent practices, and *Thomas Sexsmith* set forth a schedule of notes which he had become a party to for the accommodation of *Sexsmith & Allen*, which he had been obliged to retire, and for which the judgment had been obtained, amounting to $7,960 principal money. *Allen* set up that *John W. Sexsmith* had never purchased out his interest in the partnership which had existed between himself and *Sexsmith*, but that about the time and after the date of the agreement between plaintiff and *Sexsmith*, the latter had applied to him respecting the purchase of his (*Allen's*) interest, and he then entered into a verbal agreement to sell on payment of a small *bonus*, and on payment of all liabilities of the partnership of *Sexsmith & Allen*, and subject to such payment being duly made by *J. W. Sexsmith* and the plaintiff, or one of them; that the timber was never delivered to *Sexsmith* and plaintiff, nor had they paid the debts of his firm, but, on the contrary, the debt for which *Thomas Sexsmith* had recovered judgment and execution had been left unpaid, and that conse-

quently his interest in the assets still continued, though subject to such verbal agreement. 1874.

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The cause having been put at issue, came on for the examination of witnesses at Napanee. The evidence then taken, so far as material to the matter, is stated in the judgment.

The cause was subsequently (1st June) brought on for argument at Toronto.

Mr. Bethune for the plaintiff.

The effect of the transactions between these parties as detailed by themselves, was to effect a transfer of the interest of *Sexsmith & Allen* to *Sexsmith & Stevenson*. It is clear from all the surrounding circumstances, that it was the intention of *Allen* to retire and relinquish all interest in the partnership business, and anything he may now allege to the contrary must be received with a good deal of caution. The story which he now sets up as to the payment of a bonus by *Sexsmith*, is, to say the least of it, not very credible.

Statement.

It is perfectly evident, from the admitted facts on all hands, that the firm of *Sexsmith & Allen* was in very great embarrassment, and it is incredible that the new firm would agree to give what would be an equivalent for $3,000 for their interest. There can be no doubt that there was a good and effectual delivery of the timber so far as the interest of *J. W. Sexsmith* was concerned, if not of the share of *Allen;* therefore, if *Thomas Sexsmith* cannot be restrained from acting under the executions altogether, he can only sell whatever interest *Allen* may be entitled to in the assets.

This judgment is, at least, open to grave suspicion. It may be that the judgment debt is not wholly fictitious, but it is certainly a matter that should be the subject of inquiry.

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The chattels here are of peculiar value, and therefore the sale of them will be restrained till the true state of the account between the parties is ascertained.

Holroyd v. *Marshall* (*a*), *Lindley* on Partnership (*b*), were referred to.

Mr. Attorney-General *Mowat* and Mr. *Stephen Gibson* for the defendants.

Whatever counsel on the other side may now see fit to urge, there can be no doubt that the whole ground work of the bill was that the judgment recovered by *Thomas Sexsmith* was fictitious; throughout the whole bill we do not find a direct allegation that *Allen* did sell to *Sexsmith;* and the prayer is confined to, and founded on, an impeachment of the judgment as fraudulent. The bill contains no allegation as to the peculiar value of the property, and plaintiff cannot now urge that as a reason for the Court granting him relief. If it is contended that *Allen* joined in and was party to the sale, then he is entitled to receive payment for his interest; and a party coming into Equity for relief must do Equity. *John W. Sexsmith*, as a partner, could not dispose of the whole interest in the timber; it was all the visible and tangible property of the firm; and although he could sell his own interest, he could not dispose of his co-partner's; and here what is attempted to be done is to effect a sale of his partner's interest. It is true *Allen* gave his partner authority to sell his interest, but it was to be exercised only on the condition of payment of all the liabilities of the firm. Both *Allen* and *John W. Sexsmith* swear to this; and throughout the whole of the depositions in the cause, there is no evidence against their statements. If a representation by *Sexsmith* be relied on by plaintiff, the *onus* of proving this rests on him, and he does not shew

Argument.

(*a*) 10 H. L. 209. (*b*) Vol. 1, p. 676.

it. On the contrary, the evidence adduced by the defendants clearly establishes the opposite. On the whole, one cannot help being of opinion that the matter was an inchoate transaction. 1874. Stevenson v. Sexsmith.

If there remained any legal lien, it would be an interest seizable under execution; at all events it would be so if the debtor acquiesced in the proceedings by the sheriff; and *Stevenson's* own version of the transaction shews that he knew he was not obtaining the property free from any claim of the parties.

Laches on the part of *Allen* has also been suggested as a ground for the Court refusing to give weight to his present claim; but it does not appear that he ever had any reason to suppose that plaintiff assumed any position different from what he (*Allen*) supposed was the true one.

McGregor v. *Anderson* (*a*), *Langmead's* Trust (*b*), *Parke* v. *Riley* (*c*), *McMillan* v. *McSherry* (*d*), *Logan* v. *Lemesurier* (*e*), *Benjamin* on Sales (2 Ed.) pp. 235, 288, 663, were, amongst other authorities, referred to. Argument.

Mr. *Bethune*, in reply.

The presumption that a lien existed in favor of *Allen* is rebutted by the fact which has been established of the intended sale being effected in order to meet liabilities of *Sexsmith & Allen*, and to which *Allen* assented; and the plaintiff has never contended from the first that he had obtained the property otherwise than subject to the liability to apply certain of the proceeds thereof as agreed upon between him and *Sexsmith*. The defendants now resist the carrying out of this agreement, on the

(*a*) 6 Gr. 354.
(*b*) 20 Beav. 20.
(*c*) 3 E. & App. 215.
(*d*) 15 Gr. 133.
(*e*) 6 M. P. C. 116.

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Stevenson v Sexsmith.

ground also of improvidence. However, looking at all the circumstances of the case, and the financial position of the firm of *Sexsmith & Allen*, the arrangement which was made cannot justly be said to have been an improvident one.

June 24th.

Judgment.

SPRAGGE, C.—My conclusion upon the evidence is that, assuming a contract for valuable consideration proved, for the sale and transfer by *Allen* to *J. W. Sexsmith* of the interest of *Allen* in the partnership effects, which are the subject of the present suit, and assuming that there was such a delivery as from the nature of the chattels would ordinarily be made by one partner to another partner, the latter continuing the business, that still such assignment and transfer were conditional, the condition being that out of the proceeds of the sale of the partnership effects assigned, the debts of the partnership should be paid off; that *J. W. Sexsmith* received them upon that condition. I think upon the evidence the case of the plaintiff cannot be placed higher than I have assumed it to be. I am satisfied from the evidence of *J. W. Sexsmith*, as well as of *Allen*, that *Allen* did not make or agree to make to his partner an unconditional transfer of his interest in the partnership effects; but, assuming that the treaty ripened into a contract, and that there was such a delivery to *J. W. Sexsmith* as I have indicated, that *John W. Sexsmith* received these effects, impressed with the trust and upon the condition to which I have referred. The evidence leads me to the conclusion that the plaintiff knew that *J. W. Sexsmith* had acquired *Allen's* interest upon those terms. *J. W. Sexsmith*, in his evidence, says, (p. 14.): "I said (*i. e.*, to the plaintiff,) I had become possessed of *Allen's* interest if we paid up the liabilities, that that would be the end of it." In another passage he says: "I represented to plaintiff that I had become possessed of all the timber, upon the terms that we were to pay off all liabilities against *Sexsmith & Allen*." Further

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it appears from the plaintiff's own evidence that he knew enough to put him upon inquiry. "I heard there had been a partnership between *Sexsmith* and *Allen*. I thought it likely to be true. I asked *Sexsmith* if *Allen* had anything to do with the case. He said he had bought him out. There were no outstanding notes of *Sexsmith* and *Allen* to my knowledge at the time of my partnership. There were no liabilities in any other shape outstanding at the time of my partnership. I knew that *Sexsmith* owed $17,000 liabilities to the Bank, incurred, I think, about their business. I thought this was a debt they had incurred in getting down the timber * * * * I did not know anything about *Allen's* liabilities. I do not know when *J. W. Sexsmith* had bought *Allen* out. Until I had formed my partnership with *Wesley* I had not heard that he had bought out *Allen*. I say before entering into the agreement I asked if *Allen* had anything to do with it. He said he had bought out all *Allen's* interest. He did not say how long before the partnership arrangement he had bought out *Allen*. I saw no writing proving this * * * * * Nothing was said about the liabilities outstanding except to the bank. He told me about what he owed in the bank. I do not know if he said 'I' or 'we.' * * * * I heard that *Sexsmith* and *Allen* were engaged together in getting out the timber. * * * * * I understood from hearsay that when I entered into the agreement that *Allen* had some interest in the timber. * * * * I heard that *Sexsmith* and *Allen* had been operating together, that is why I referred in agreement to the timber held by *Sexsmith* and *Allen*. * * * The business mentioned in the agreement, and which I supposed I bought, is about $26,000 worth of timber, and some lands, timber lots, &c." There is also a clause in the articles of partnership between the plaintiff and *J. W. Sexsmith* that points in the same direction. It provides that the first sales of the timber should "first be applied to meet any sum due in

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bank or other ways by the said parties on account of said business, or that may now be owing on it." These last words, "or that may now be owing on it," appear to me clearly to refer to the liabilities of *Sexsmith & Allen*. I think the proper inference is that this provision was intended to carry out the terms upon which *J. W. Sexsmith* was to acquire *Allen's* interest. My conclusion is, that the plaintiff took with notice of the terms upon which *J. W. Sexsmith* was acquiring *Allen's* interest in the timber, though I incline to think, for a reason which I will explain presently, that it was not necessary to prove that the plaintiff had such notice.

Judgment.

If *J. W. Sexsmith* took the timber in question upon this condition, I apprehend that it was only a qualified *legal* right that passed to him, that it was not a merely equitable title that remained in *Allen*, but so much of his legal title as was not divested by his agreement with *J. W. Sexsmith*. If, for instance, there were an execution against *J. W. Sexsmith* for a private debt, it would not, I take it, affect the legal right of *Allen* in the chattels, but that a purchaser would take subject to the condition upon which *J. W. Sexsmith* took.

The execution in this case being in respect of the partnership liabilities of *Sexsmith & Allen* is a means of paying off those liabilities, and further the fulfilment of the condition upon which *J. W. Sexsmith* acquired any interest from *Allen*. It appears to me to follow that this execution being by a creditor of *Sexsmith & Allen* operates upon the legal title of both in these chattels. What its effect may be upon the title acquired by *Stevenson* under his articles of partnership with *J. W. Sexsmith* has not been argued before me. He has probably such an interest as would entitle him to pay off these liabilities, and hold these chattels free of them; but I cannot see that he has any interest that entitles him to prevent the interest in them that exists in *J. W. Sexsmith & Allen* from being taken in execution.

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If, upon *J. W. Sexsmith* acquiring from *Allen* his interest in these chattels, it was upon a trust, leaving only an equitable interest in *Allen*, there would still be a legal and beneficial interest in *J. W. Sexsmith* for an execution to operate upon, and I should see no reason for interfering with it at the instance of *Stevenson*, who has not, whatever may be the legal position of the parties, anything to complain of, provided the judgment of *Thomas Sexsmith* is for a true debt.

I have observed that, though I considered it established in fact that *Stevenson* had notice of the terms upon which *J. W. Sexsmith* acquired the interest of *Allen*, I did not think it necessary to prove it. The equity upon which he comes into Court to impeach the judgment of *Thomas Sexsmith* differs only from the Common Law right to impeach a judgment, in this, that he is not a party to the suit and therefore can only impeach it in this Court. Still it is an equity, and is in conflict with an equity which exists in *Allen*, to have the assets applied in payment of these liabilities. If *Stevenson* had acquired a right in these chattels without notice of this equity in *Allen* it could not avail him, because he would not be using it as a shield to defend his legal title, but he would be coming into Court to use his want of notice to assail an older equitable title.

Judgment.

Everything, in short, depends upon this, which is the real question upon the merits between the parties, whether the judgment recovered by *Thomas Sexsmith* was for a true debt. *Thomas Sexsmith* himself was subjected by Mr. *Bethune* to a rigid and searching examination. The other defendants were also examined, and the agents of the banks through which the paper was negociated, upon which the judgment was recovered, and the books of the banks were also examined. It is true that *every* cheque and retired note was not produced, but it did not appear

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to me that anything was *intentionally* withheld. So far as was shewn the debt recovered was not fictitious, nor for a larger amount than was really due. The investigation impressed me with the belief that the transaction was a true and honest one. The only question is, whether I should give the plaintiff a further opportunity of shewing it to be otherwise.

Judgment.

It is sometimes the case certainly that the production of a single paper of the nature of the one or two not produced at the hearing may shew a transaction apparently honest to be the reverse. I am disposed therefore not to conclude the matter against the plaintiff in the absence of those papers, but still I think it would not be proper after the investigation that has taken place to open the matter at large in the Master's Office. The course I think it proper to take is this, to refer it to the Master at Belleville to call for the papers mentioned in the evidence of *Thomas Sexsmith*, and not produced by him; and upon production thereof, or upon any evidence respecting the same, if their non-production be excused upon sufficient evidence, to report whether they tend to impeach the *bona fides* of the judgment in question. A convenient course would be for these papers to be produced in the office of the Master at Belleville, verified by the oath of *Thomas Sexsmith*; and it may be, (not improbably I think) that the plaintiff's solicitor will not think it necessary to prosecute the inquiry further. The Master's Report (in the event of the matter being further prosecuted) to be procured within fifteen days after such production and affidavit. If this inquiry is not taken, or not prosecuted, or if the Master's Report be in favor of the *bona fides* of the judgment the plaintiff's bill to be dismissed with costs; otherwise further directions and costs reserved. I do not think it proper, under the circumstances, to interfere with the sale by the Sheriff, if the Master, within the time limited, should report against the *bona fides* of the

judgment, the amount thereof, with interest and costs to be paid into Court; otherwise the execution of the process not to be interfered with. 1874. Stevenson v. Sexsmith.

McMillan v. McMillan.

Legatees refunding—Practice—Rights and liabilities of executors and trustees—Surrogate Act.

Executors, with a discretionary power to sell their testator's real estate, *held* not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into Court pending the suit, they were charged with interest.

Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim: In fact, according to the terms of the will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:

Held, that the executors were not responsible for any loss sustained by reason of the delay in selling.

The Master by his report found that the executors had paid to some of the children of the testator, all of whom were equally entitled under the will, different amounts, and to one of them nothing, the estate proving insufficient: *Held*, not a ground for appealing from the Master's report, but that the question, whether the executors were estopped from denying the sufficiency of the estate to make payment to all the children equally, or whether those paid were bound to refund, was one proper to be discussed on further directions.

The rule laid down in Thompson v. Freeman, ante vol. 15, p. 384, followed, and executors *held* entitled to compensation under the Surrogate Act (22 Vict., cap. 93), for services performed before the passing of the Act.

Statement.

This was a suit for the administration of the estate of *Daniel McMillan*, formerly of the township of Erin, in the county of Wellington, who died in 1849, leaving real and personal estate of considerable value. He had carried on business as a miller with his brother *Charles*

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McMillan, but the partnership had been dissolved some time before his decease. By his will he gave his executors a discretionary power to sell his real estate, and bequeathed the proceeds to his wife and family, without partiality, as long as she remained his widow; and afterwards, to the sole use of his children.

The testator's family continued to reside on his homestead farm for many years after his decease. The widow died in 1860. Besides the produce of the farm, the executors from time to time gave the widow and children various sums of money for their support and maintenance. They also allowed them to sell several village lots, in the village of Erin, and apply the proceeds to their own use, without keeping exact records of the transactions.

Statement.

The personal estate had all been administered before the passing of the Surrogate Act of the late province of Canada in 1858; and the executors delayed selling a valuable portion of the real estate till March, 1872, although it appeared that it had been unproductive, and that it could have been sold as well during the period of high prices from 1854 to 1857. The purchase money of this portion they kept in their own hands, without paying it into Court. Previously to this sale, the executors paid various sums of money, or transferred portions of the real estate, to all the testator's children, except the youngest, who was then under age.

The Master at Guelph, who took the accounts, did not charge the executors with any loss arising from their delay in selling the real estate, nor charge them with interest on the money retained in their hands, or with overpayments to the widow; and he allowed them a gross sum as compensation for administering the estate. From his report the plaintiffs appealed, on the grounds stated in the judgment.

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McMillan v. McMillan.

Mr. *McGregor* and Mr. *Boyd*, for the plaintiffs, contended that the executors had abused their discretion in delaying to sell a portion of the testator's real estate when prices were at the highest, and that they should have been charged with the loss. The executors had shewn that the widow would not bar her dower, and this was one reason for the delay. To this it was answered that the widow had no dower, as she took under the will. They further contended that the executors having paid certain of the legatees particular sums, they thereby admitted assets sufficient to pay the same amounts to the rest, and that they should be charged accordingly. They also contended that the Master should have charged the executors with interest on the money in their hands, as they had kept it, and had not paid it into Court; and that he should not have allowed them any compensation for services performed before the passing of the Surrogate Act.

Judgment.

Mr. *Dunbar* and Mr. *Merritt*, contra, contended that the executors had acted in good faith in not selling the real estate sooner; that they should not be charged with interest, as they had held the money subject to the order of the Court; and that they were fairly entitled to all that the Master had allowed them for their services, notwithstanding the Surrogate Act had not been passed till 1858.

The cases cited are mentioned in the judgment.

PROUDFOOT, V. C.—The decree referred it to the Master at Guelph to take the accounts of the estate of *Daniel McMillan*.

The plaintiffs appeal from the Master's report:

1st. Because he had not charged the executors and trustees with the loss arising from not selling lot 16, in the 9th concession of Erin, during the period of high prices, from 1854 to 1857.

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2nd. Because the executors having paid the other devisees $1,736 each, they are bound to pay a like sum to the plaintiff *John McMillan* one of the devisees.

3rd. I dismissed at the hearing of the appeal.

4th. Because the executors should have been charged with interest on certain money in their hands. This I allowed.

5th. Because the Master should have reported that the executors did not keep proper accounts, nor sell the lots in Erin in a proper manner, and he should have made them no allowance whatever.

6. Because the widow was not entitled to dower, and the Master has allowed too large a sum on account of payments or advances to her.

7th. I also dismissed at the hearing.

Judgment.

Daniel McMillan, the testator, died 17th December, 1849, having shortly before made his will, appointing his brothers, *Hugh* and *Charles*, and one *Donald McBain* his executors, "to do or execute all and every act which executors can legally do, and to them I hereby convey, transfer, and make over all my property, fixed and movable, of whatever description, to be disposed of as follows, that is to say: I give them a special discretionary power to realize, to the best of their judgment, as much for the property, if sold, as possible, and if not sold to lease the same, the proceeds of which property, after payment of my just and honest debts, I bequeath to my wife and family, without partiality, as long as my present wife remains my widow, and of the remains after that to the sole use and benefit of my children."

The widow died in November, 1860.

The lot in question was sold in three parcels, between 1866 and 1869, for sums aggregating $3,942, and evidence has been given to prove that a larger price could have been got for it, at different periods between the

death of the testator and the time of sale, particularly in the years 1854 to 1857, and 1861-'62. There is no pretence for impeaching the integrity of the executors, nor is there any charge that they have personally benefited by the delay in selling, but they are sought to be charged simply for not performing a duty imposed on them at the proper time. There were other lands besides the lot in question belonging to the estate. The power of the executors extends over the whole, and the will gave them a special discretionary power to realize, to the best of their judgment, as much for the property sold as possible. In the exercise of this discretion they seem to have thought it not wise, not beneficial, not expedient for the estate to dispose of this lot during the years from 1854 to 1857. Was it incumbent on them to do so? And can the Court render them liable for an unwise or an unfortunate exercise of their discretion, supposing it established that a loss has been sustained?

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A long list of cases collected in *Lewin* on Trusts, 439 (5th ed.), establishes that where a discretionary power is vested in trustees, the Court has no jurisdiction to interfere with the exercise of that discretion, provided their conduct be *bonâ fide*, and their determination is not influenced by improper motives. And if the exercise of it will not be interfered with, they cannot be made responsible for any loss that may have occurred.

Judgment.

I have, however, read over all the evidence given before the Master, and find, as might have been anticipated, a great difference of opinion as to the value of this lot twenty years ago, and I do not see so great a preponderance of evidence on behalf of the plaintiffs as to justify me in saying that the Master erred in not charging the defendants with any sum on this account. Besides, the value of opinion on such a question must depend greatly on the character, business, and means of knowledge of the witnesses, supposing them all to mean to be truthful, and, in that respect, the Master was in a far better position to judge than I am.

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There is no evidence of any offer to purchase having been made to the executors, so that there is no contemporaneous evidence of the general or particular opinion of value: the witnesses speak from recollection after a lapse of twenty years of what they would have thought the property then worth, not from any idea they had then formed in regard to this particular lot, but from what they have heard of purchases made about that time. And no fact can better exemplify the danger of relying on this kind of evidence than what appears in the evidence here. Several of the witnesses base their estimates on the price given by one *Cameron* in 1856 for a lot at a distance of four concessions, but *Cameron* himself is called, and he says he paid too much for the lot. Because a man eighteen years since made a bad bargain can be no reason why the executors should be liable to as great an extent.

Judgment.

In this connection, however, the sixth ground of appeal was also discussed, as it was said the executors did not sell because they supposed the widow to be entitled to dower, which she was not, and that she was averse to sell, and the executors thought it would be imprudent to sell subject to her dower. The executors took advice on the subject, and it seems were advised the widow had a right to dower. *Parker* v. *Sowerby* (*a*), *O'Hara* v. *Chaine* (*b*), and the cases cited there seem to shew that the power of leasing, though confined until a sale, does put the widow to her election, and that the executors were, therefore, erroneously advised. The question here, however, is only important in so far as the good faith of the executors is concerned. They honestly believed her to have a right to dower, that it would be disadvantageous to sell subject to it, and she was exceedingly averse to sell, and would not bar it. Though the executors may have exercised their discretion on false premises, in the absence of corrupt or dishonest conduct, it would be unjust and inequitable to make them respon-

(*a*) 4 D. M. G. 321. (*b*) 1 J. & L. 662.

sible for it. I do not mean to do anything at variance with the authorities cited which I will shortly notice. In *Walker* v. *Shore* (*a*), the trustees were directed to sell at such time and in such manner as they should think proper, to invest the money and pay the interest to *Jane Walker* for her life, and at her death to divide the principal among the children of *Thomas* and *Richard Walker*. Sir *William Grant* held that the trustees were not justified in postponing the sale indefinitely so as to prejudice the tenant for life. This rule may fairly be attributed to different persons being interested in the proceeds, one for life, others in remainder, while there would be little room for its application where the same persons are entitled both for life and in remainder. But the discretion in that case by no means comes up to the ample and full language of the present will, which gives the executors *a special discretionary power to realize to the best of their judgment*. The testator contemplates the property not being sold, and gives directions for leasing, not *till sale*, but *if not sold*. There is no absolute direction to sell at all, and after payment of his debts, sales would seem only to be intended to be made as might be required for the family.

Judgment.

In *Fry* v. *Fry* (*b*), the trust was *to sell as soon as convenient* after testator's decease, the interest payable to his wife during widowhood, and the principal to be divided on her death among his children. There was no discretion vested in the executors, and the persons entitled to the use for life and to the remainder were different.

In *Grayburn* v. *Clarkson* (*c*), the direction was to sell *with all convenient speed*. In *McKenzie* v. *Taylor* (*d*), to convert, *as soon as convenient, after his death*. In *Emes* v. *Emes* (*e*), and *Pattenden* v. *Hobson* (*f*), there seems to have been no time specified, when the ordinary rule of twelve months would apply, but in none was there

(*a*) 19 Ves., 387.
(*b*) 27 Beav. 144.
(*c*) L. R. 3 Cha. 605.
(*d*) 7 B. 467.
(*e*) 11 Grant 325.
(*f*) 32 L. J. Cha. 697, 17 Jur. 406.

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any such power as conferred by the will now in question, and so in *Devaynes* v. *Robinson* (*a*), it was to sell *as soon as might be after his decease.*

I dismiss this ground of appeal.

The next ground of appeal was because the devisees had not been paid equally—some paid $1736, one less, one more, and one nothing. It appears from the report that the sums paid to the children were:

To Charles	$1342.00
To Daniel	1736.00
To Malcolm	1816.50
To Hugh	1736.00
To Mary	1736.00
	$8366.50
And that the executors have on hand	1118.57
	$9485.07
Judgment. And deducting the allowance to the executors made by the Master, of	762.16
	$8722.91

which, divided among the six devisees, shews the share of each to be $1453.81, and that some have been overpaid. It was contended that the executors, having paid some a certain amount, were estopped from showing the estate insufficient. I do not think this subject can, in this case, be satisfactorily dealt with on appeal, and is more proper for further directions. This seems to have been the course adopted in *Nagle* v. *Springer* (not reported), where the Master's first report shewed, as here, payments of different amounts to the legatees. On further directions the Master was directed "to ascertain and state the shares of each of the said parties in the balance of the proceeds, and charge the parties properly chargeable and credit the executors with all sums paid by them to any of the parties on account or in respect of

(*a*) 24 Beav. 86.

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such shares, and ascertain the balance remaining in the hands of the executors and the balance, if any, coming to each or any of the parties. And if it should appear that any of the parties had received more than his proper share of such balance, it was ordered that he should pay the amount of excess to the executors forthwith after the Master had made his report."

The presumption arising from payment of legatees may be rebutted, and if it be shewn that the estate was not sufficient to bear such large payments, the amounts can be recalled from those who received them.

The question does not arise here between pecuniary and residuary legatees, or between pecuniary legatees among themselves, but the plaintiffs are legatees of the residue, the only legatees in the will, some of whom have been overpaid, and claiming to make the executors responsible for not paying all in the same ratio as the highest has been paid. I think it is incumbent on them under these circumstances, to show that the estate was sufficient to make payments to all of the larger sum. The rule is laid down in *Peterson* v. *Peterson* (*a*), which was cited: "The rule is, that if one of the residuary legatees has received only his share, the subsequent wasting of the assets by the executors will not entitle the other residuary legatees to call upon him to refund. The case, however, is materially altered if the executor has dissipated a portion of the assets before any residuary legatees call upon him to account: and it would seem the rule ought to be that what is available at that time should be equally divisible among the whole of the residuary legatees," *i. e.*, an equal distribution should be made of the estate as it stood at the time of the payment to the residuary legatees. *Fenwich* v. *Clarke* (*b*), is not adverse to this view. In that case there was a number of pecuniary legacies, some absolutely, others to

Judgment.

(*a*) L. R. 3 Eq. 111. (*b*) 6 L. T. N. S. 593, 4 D. F. J. 240.

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tenants for life with remainders over—the assets were sufficient for all. The executors paid the absolute legacies and deposited a sum of money in a bank, awaiting an investment. The bank failed, and the executors were not held responsible, nor the paid legatees bound to refund. The payment to them when made was rightful.

There is no proof here of any deficiency of the estate from any thing subsequent to the payments. Each was only entitled to an equal share of the estate, as it then stood; not to any specific sum, as in the case of a pecuniary legatee, but to an aliquot part of the residue. If the executors have allowed them to receive more than their share, and they themselves seek to administer the estate, I think they must show that the estate was sufficient to pay all the larger sum.

Judgment.

I overrule this exception, leaving the question of an order to refund, and of payment to infant, and of liability of executors, to be dealt with on further directions.

The fifth ground of appeal comprises several distinct grounds of exception to the report which ought to have been kept distinct, as it is difficult to deal with them when strung together. The first is, that the Master should have reported that the executors did not keep proper accounts; and in support of this it was said that the executors did not at first file proper accounts in the Master's office; that the personal estate, the rents and profits, and the proceeds of sales, were not distinguished. I do not think the executors responsible for the mode in which their accounts in the Master's office have been prepared, any further than that they are liable to have them corrected at their cost. It was the duty of the solicitor to see them put in proper shape, and the plaintiffs I suppose took care to have them corrected. None of the evidence was read to shew that the accounts were not properly kept, and it was stated without contradiction

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that there was no material discrepancy between the result of the Master's report and the accounts of the executors, that no surcharge was sustained, that no discharge was negatived. I have read over all the evidence, and see a statement that the accounts have not been very clearly kept. *Hugh*, one of the plaintiffs, says that he wrote the executors, asking for an explanation of how the accounts stood, and they handed him over a book, but he, after looking over a few pages, could make nothing out of it. He does not remember what he said to the executors, when he handed it back. This I think is the only evidence on the matter. It is no doubt the duty of executors and trustees to keep clear and distinct accounts of the property administered by them (*a*). But I do not know that it has ever been determined, where the accounts are in fact accurate, that the form of them has ever subjected executors to liability, unless the confusion has been designed, or has been such as to necessitate a suit. The bill in this case was certainly not caused by the confusion now complained of, but contained charges of misconduct against the executors in applying money of the estate to their own use. There is indeed a charge of not keeping proper accounts, but it is in connection with a charge of paying money on account of the estate which was never in fact paid, and a fair construction of it is, that the accounts were intended to be charged as improperly kept, because they contained improper charges. I have no information that *Hugh* was capable of understanding the accounts in any other shape; and if he could not understand them he ought to have required the executors to make out an intelligible statement. This he does not seem to have done. He did not complain to the executors of the accounts being unintelligible, nor in any way show his dissatisfaction with them. I cannot therefore say that in this respect the Master should have reported that the defendants did not keep proper accounts. It was the duty of the Master, at the request

Judgment.

(*a*) Lewin 491.

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of any of the parties, to report specially any matters that might affect the consideration of the costs of the suit. If he thought the accounts inaccurately or confusedly kept he should so have reported, or if otherwise he should also have reported it.

The second objection under this fifth exception is, that the executors did not sell the lots in Erin in a proper manner. It was said they allowed the widow and children to deal with these, to sell them, and to apply the proceeds for the maintenance of the family. As the executors alone had the power to sell, the conveyances were made by them, and they thus assumed the acts of the widow and children, whom they thus constituted their agents, and for whose acts I deem them responsible. They had an opportunity of ascertaining the propriety of the sales before executing the deeds; and this I do not find to be now questioned, or that they sold for too low a price, and I know of no principle to prevent them employing such agents. There was no delegation of the trust. The gravamen of the charge however is, that they permitted the proceeds to be applied to the maintenance of the family, which it is said was not authorized by the will. There is no express direction for maintenance. In *Chambers* on Infants, 253, it is said to be a duty incumbent on guardians, trustees, and executors, to maintain their wards, and infant *cestuis que trust* out of their property, and that if they do no more than what the Court would have directed, if it had been resorted to in the first instance, their acts would be approved. In *Carmichael* v. *Wilson* (*a*), Sir *A. Hart* says "The sound distinction is now settled that what the Court would have authorized an executor to do, he shall be supported in having done." And in *Umbleby* v. *Kirk* (*b*), where the testator had devised and bequeathed his real and personal estate, for the benefit of his six infant children, the executor had spent

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(*a*) 3 Moll. 80, 87.

(*b*), 1 Coop. N. R. 254.

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considerable sums for improvements, maintenance, and advancement, Lord *Cottenham* said that such an expenditure and outlay of the fund would be protected although not authorized by the terms of the will, provided it should turn out to be to the advantage of the objects of the trust by increasing the value of the property *or by affording them suitable support or advancement.* The amount allowed by the Master seems not unreasonable. He reports that he allowed to the executors for sums paid to the widow for the support and maintenance of herself and family $4503.38. It is said a mistake has occurred in engrossing the report and that this sum includes all payments made to the widow and since her death. But supposing it only to cover the lesser period, I have not materials to enable me to say it was wrong. The widow was entitled to one-seventh for herself, and the remainder allows $352 per annum for the eleven years the widow survived the testator, for the maintenance and support of six children, which does not seem an extravagant sum, even when coupled with the rent of the farm, if the executors have not been charged with it.

Judgment.

The last exception under this fifth ground of appeal is, that the Master should have made no allowance to the executors as compensation for services. The amount allowed is $727.16, and $35 disbursed by them for conveyancing, being not quite two-and-a-half per cent. on the amount received by them, ($29,749). The amount does not seem excessive. But it is contended, that the Act allowing compensation to executors, passed in 1858 (*a*), did not allow compensation for services performed before; that the commission accrues from time to time as services are performed; and that so much of the sum allowed as was applicable to past services should be deducted. The Act provides generally that the Judge of any Surrogate Court may allow to the executor acting under a will for

(*a*) 22 Vic. Ch. 93 Sec. 47.

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his care, &c., and the same shall be allowed to an executor in passing his accounts. It would seem that the executor was to have the allowance on passing any accounts, although the services may have been performed prior to the Act. This has been the construction adopted in many cases, *Thompson* v. *Freeman* (*a*), *Proudfoot* v. *Tiffany* (*b*), and I do not feel at liberty to depart from it.

No other reason was assigned against the allowance to the executors; and I apprehend that, according to the course of decision on this subject, it could not in this case have been successfully impeached. It has been held that an executor retaining money in his hands for which he was charged interest and rests in passing his accounts, is not a sufficient ground for depriving him either of commission or costs. *Gould* v. *Burritt* (*c*).

Judgment.

These grounds of appeal embraced in the fifth exception I therefore dismiss.

The sixth ground of appeal, that the widow was not entitled to dower, and that too large a sum was allowed on account of payments or advances to her, has already been considered under the first and fifth heads. The Master, I understand, has not held the widow entitled to dower, and has made no allowance to her on that ground. The payments and advances to her were for the support of the family, but it is said, that in addition to the sums credited to the executors on that account, the family had the profits of a farm which was worth $700 a year. This is supported by the evidence of *Hugh McMillan*, one of the plaintiffs, who speaks of what the farm was probably worth 18 or 20 years ago, when he was 16 years of age. He says "the profits of the farm should be about that time $700 a year." The time he is speaking of is

(*a*) 15 Grant. 384.
(*b*) Cited 11 Grant. 461
(*c*) 11 Grant. 523.

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when his brother *Charles* chiefly supported the family. His cross-examination is full of contradictions. He says, "I supported the family off and on after I took the store. I received the profits of the farm. I would say the proceeds of the farm at that time, if rightly dealt with, would have been sufficient to support the family;" and in the next sentence "the profits of the farm did not recompense me for supporting the family," and a little further on, "I might have received $500 out of the lots; this, with the proceeds of the farm, was insufficient to recompense me for the support of the family." *James Brown* says, "I think if the farm was properly managed and farmed it ought to have been sufficient to have kept the family, and have paid for the labor. I can't say what it would rent for about the time the family were living upon it. It wouldn't rent, in my opinion, for over $150 a year; I think it ought to be worth that." *J. S. Walker* says, on cross-examination, "I would think that the west half of 15 in the 10th concession (the lot in question) would rent during the years *Ferguson* was there for about $120 a year, may be it might have brought more." In his examination-in-chief he had said, "I have seen good crops on lot 15 in the 10th. After the testator's death, I would think the crops raised would support the family. They had one *Ferguson* employed to manage the farm, and had to pay him."

Judgment.

The executors are not chargeable with more than the rentable value of the farm; they were not bound to, and did not in fact work it, and make profits out of it. The difference is obvious between the proceeds of a farm and the rent. *Hugh's* evidence, contradictory as it is, is confined to the proceeds, and there is no evidence; that makes the rent more than $150.

I see no reason to disagree with the finding of the Master, and dismiss this appeal.

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The result is, that the 1st, 2nd, 3rd, 5th, 6th, 7th, are dismissed, the 4th allowed. For the purpose of costs, the 5th must be dealt with as containing three separate grounds of appeal, there will therefore be eight dismissed with costs; one allowed with costs.

WADDELL v. CORBETT.

Mortgage—Sale under power—Notice of agreement.

The owner of land conveyed the same, taking from the grantee a bond or agreement for payment of $30 a year, and the keep of a cow, which was to form a first charge or lien on the land. No part of this consideration was ever paid or performed. Before the bond or agreement was registered, the grantee mortgaged the property to a building society, who subsequently sold for the amount of this claim to a party who had notice of the effect of the bond.

Held, that the purchaser was liable to be redeemed on payment of what should be found due in respect of the mortgage to his vendors.

Statement.

This suit was by *Robert Waddell* of the township of Derby, farmer, against *James Corbett* and *Mary Waddell* wife of the plaintiff; setting forth that in April 1868, the plaintiff was seized in fee of 107 acres in that township, and on that day conveyed the same for a nominal consideration to one *James Reid*, who by bond dated 29th September, 1868. and registered on 10th July following, covenanted and agreed with the plaintiff, to pay to plaintiff and his wife, during their lives, or the life of the survivor, the yearly sum of $30; and further, that he would provide for plaintiff and his wife sufficient pasturage in summer and hay and straw in winter for the use of a cow, and would also keep and feed the same; the instrument providing that it should operate as a mortgage, and form a first lien or charge upon the premises; that nothing had been paid by *Reid* or any one on his behalf, and no part of the agreement had been kept or performed. The bill

claimed that there was due under said bond $400 for principal money and $50 for interest. 1874. Waddell v. Corbett.

The bill further stated that by deed dated 17th December, 1869; and registered 20th May, 1870, *The Western Canada Permanent Building and Savings Society*, under a power contained in a mortgage made to them by *Reid*, by private sale, sold and conveyed the premises to one *James Thomson*, for a nominal consideration of $900; being merely the amount due on their mortgage, the lands being actually worth $2000 at least: and that by subsequent transfers the lands became vested in the defendant *James Corbett*.

The bill charged all the intermediate grantees with notice *of the bond*, which was established in evidence, and prayed that the plaintiff might be declared entitled to enforce such bond, as a first charge upon the lands, or if not that he might be admitted to redeem. The other facts appear clearly in the judgment. Statement.

Mr. *VanKoughnet* for the plaintiff.

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

Counsel for the defendant relied mainly on impeaching the *bona fides* of the bond; alleging that it had been executed as an after thought, subsequently to *Reid's* departure for and when he was in the United States, and returned by him to this country; the signature of *Reid* and that of the subscribing witness to the execution being in inks of very different colors. The witness *Gavin Waddell*, a son of the plaintiff, however, swore that it was executed in his house in Derby, in 1868; and in explanation of the different inks said: "There was a little drop of ink in one bottle and *Reid* had difficulty in getting enough to sign and I then took another bottle; they were both on the desk in the Nov. 24th, 1873.

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room. I think this was the way of it. The bond was not sent to me signed from the States. My father and *Reid* brought it to my house. I can't say how long after the bond was signed my father took it to be registered.

The Court however thought the bond sufficiently, though not satisfactorily proved.

Feb. 25th.

BLAKE, V. C.—*Robert Waddell*, being the owner of the premises in question, on the 29th of April, 1868, sold and conveyed the same to *James Reid* the consideration for this conveyance was the payment of $30 a year, and the supplying pasture, hay and straw for a cow, for the plaintiff and his wife, and this was to form a first charge on the premises. The instrument to carry out this arrangement was not, however, executed until the 29th of September, 1868, and was not registered until the 10th of July following. In the meantime *Reid* had mortgaged to the Western Building Society the premises to secure repayment of $800, which mortgage was dated the 24th of August, 1868, and registered the 25th of the same month. The Building Society purported, under the power in the mortgage, on the 17th of December, 1869, to convey the premises to *Thomson*, who registered on the 20th of May, 1870; and on the 5th of August of the same year, by an instrument of that date, and registered in September following, *Thomson* purported to convey to *Mary Elliott*, who on the 20th of April, 1871, by a conveyance of that date, and registered the 22nd of March, 1872, purported to grant the premises to the Building Society.

Judgment.

The conveyances from the Building Society to *Thomson*, *Thomson* to *Elliot* and *Elliot* to the Building Society, were not produced, but it was admitted "that on the face of them they are absolute, and contain no reservation in respect, or mention, of the bond."

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On the 9th of December, 1871, the Building Society conveyed the premises to one *Heming*, who on the 14th of March following, conveyed to *George Corbett*; these instruments were both registered on the 22nd of March, 1872. On the 6th of June of the same year, *George Corbett* conveyed to *James Corbett*, the defendant, by an instrument of that date, and registered the 17th of the same month. On the 17th of September, 1870, a *lis pendens* in a suit of *Hemings* v. *The Building Society* and others, was registered.

The bill alleges that the defendant *Corbett* purchased, subject to the plaintiff's claim, who is entitled to payment, or else sale of the premises to raise the charge in his favor, or at all events that he ought to be allowed to redeem the defendant. The answer claims that the defendant is a purchaser for value without notice, but that in any case he has a first charge to the amount of the Building Society mortgage.

Judgment.

In April, 1869, *Reid* became insolvent, and *Heming* was, under the Acts then in force, appointed his official assignee. Thereafter, *Heming* filed a bill in this Court, praying that the sale to *Thomson* might be set aside, and that he, as representing the estate of *Reid*, might be allowed to redeem, on the ground that the sale was a scheme to defraud the creditors of the insolvent. The defendants to this bill were the Building Society, *Thomson*, and *Elliott*. The Society answered, stating that the conveyance to *Thomson* was executed through inadvertence on their part; that they never intended to do more than convey the legal estate, subject to the right to redeem, and that it would be a fraud in their vendee to insist on an absolute purchase of the premises.

Thomson answered, saying that he was a brother-in-law of *Waddell*, that he purchased subject to the charge in his favor, and that the $928 he paid, and this charge,

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form the consideration for, and the value of, the land; that he sold to his vendee simply to protect the interests of *Waddell*, and sold to her subject to the mortgage in his favor, which Mrs. *Elliott* agreed to assume.

Mrs. *Elliot*, in answering, says she is the mother-in-law of *Reid*, and purchased for the benefit of his wife, her daughter *Sarah Reid*. At the time of the purchase she knew of the charge in favor of *Waddell*. She knew it was given to secure the purchase money, and she purchased subject to it, so that, at this period, by admission of all parties interested, *Waddell's* right to a charge in place of being cut out had been preserved, and *Mary Elliott* admitted that she then held the premises subject to the plaintiff's claim. Thereupon, by arrangement, she conveys her interest to the Building Society, who then again held the land as mortgagees. The plaintiff's claim was still a subsisting one, and *Reid's* position, but for his insolvency, would have been that of owner of the equity of redemption subject to the payment of both the Building Society and the plaintiff. The bankruptcy takes place, and *Heming*, the assignee, steps into the position of *Reid*.

Judgment.

The instrument under which *Heming* claims from the Building Society, conveys to him "in his capacity of assignee * * * of *James Reid*." It is not executed under the power of sale in the mortgage, but as the recitals shew, in pursuance of an arrangement whereby the suit is to be settled; and, instead of using the words ordinarily employed in such an instrument, it conveys "all the estate, right, title, interest, claim, and demand, &c., in and out of the lands."

The question of merger or no merger appears now to be well settled as one of intention, and the presumption appears to be, where there is no evidence on the point, that the person intended that which is most for his

benefit. If, therefore, *Heming* had been a purchaser of these premises, I think I should feel bound, under the authorities, to find that he held them subject to the plaintiff's charge, but with the Building Society mortgage as a first and subsisting security in his favor. See *Finlayson* v. *Mills* (*a*), *Elliott* v. *Jayne* (*b*), and *Beaty* v. *Gooderham* (*c*).

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In case the mortgagor gets in his mortgages, the presumption is, that he thereby intends to pay them off. I do not think, however, that I can hold this to result from the act of an assignee in insolvency. In the absence of evidence, I must conclude he intended to do that which will most benefit the estate he represents; and I am of opinion that the effect of the conveyance to *Heming*, was to assign to him the interest of the Building Society as mortgagees; and that he held the premises with this mortgage in his favor, subject to be redeemed by the plaintiff. I have not lost sight of the fact that by its terms the claim of the plaintiff is made a first charge on the premises; but, as by the effect of the Registry law this priority was lost, I cannot find that the priority gained by the Building Society mortgage, was prejudiced when it came into the hands of the official assignee. If he had the right to take it and protect the estate by it, he took it, as a stranger, and it suffers no postponement in his hands. No authorities were cited in the case, and I have vainly looked for any to throw light on this branch of it.

Judgment.

I think the defendant *Corbett* had notice of the various matters to which I have referred. There was a *lis pendens* registered which gave him notice of the suit of *Heming* v. *The Building Society*, and the recitals in the conveyance from the Building Society to *Heming* shewed him that this suit resulted in the settlement,

(*a*) 11 Gr. 218. (*b*) 11 Gr. 412. (*c*) 13 Gr. 317.

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carried out by that deed. He knew, therefore, that the plaintiff's claim had not been extinguished; and that *Heming* held the premises subject to it.

I am of opinion, therefore, that, while on the one hand the claim of the plaintiff still forms a charge on the property, yet on the other hand, the Building Society mortgage is not merged nor has it lost its priority, but in the hands of the defendant *Corbett*, it can be set up as the first charge on the premises.

The proof of the plaintiff's bond was not at all satisfactory, but notwithstanding the difficulties about the different inks, the period of the swearing the affidavit the registration, and other matters alluded to by counsel, after a reperusal of the evidence, I think I am bound to hold it has been proved. As the defendant *Corbett* denied the plaintiff's right to redeem, he must pay the costs to the hearing.

Judgment.

The subsequent costs will be added to his claim. There will be first a redemption by the plaintiff; then by the defendant, unless the defendant at once says he will redeem the plaintiff, which, as the property seems of sufficient value, I presume he will do; this would save the expense of a further account and reference.

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Principal and Agent—Purchase by Agent—Parol agreement—Statute of Frauds.

A property being about to be sold by auction, in which the plaintiff had an interest as mortgagee, he, desiring to protect such interest, determined to buy in the property; but he, with others, desiring not to appear as purchaser, applied to defendant and agreed with him that he should attend at the auction and bid in the property in his own name; but in reality as the agent and on behalf of the plaintiff. He accordingly attended at the sale, and after the property had been first knocked down to the plaintiff became the purchaser and paid the deposit required by the conditions of sale; part of the amount being supplied by one of the persons with whom the plaintiff was interested in securing the property, and subsequently kept an acccount of his dealings with the property:

Held, that the agreement, though only parol, could be enforced, notwithstanding a defence had been set up under the Statute of Frauds.

Statement.

This was a bill by *Donald Wilson Ross*, against *Archibald Scott*, filed 14th July, 1874, setting forth that in December, 1873, the lands in question, being 100 acres in the township of Carrick, in the county of Bruce, were sold by public auction, pursuant to an order of this Court, in a suit of *The Canada Landed Credit Company* v. *James Daniel Parsill* and others; that prior to the sale the plaintiff had determined to become the purchaser of this land in order to protect his interests in the property, which he held as mortgagee subsequent to that of the vendors, in the event of the amount bid at such sale not being sufficient to pay off the amount found due him as an incumbrancer in that suit; and thereafter it was agreed that defendant should, for the sum of twenty dollars then paid to him, purchase the said land at the sale, but for, and as the agent, and on behalf of the plaintiff, though in the name of the defendant; and that he would convey the same to plaintiff at any time on payment of the amount which the defendant might have advanced; pursuant to which agreement defendant pur-

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chased the land in his own name, but as agent for plaintiff on the terms before mentioned; that afterwards portions of the land were sold by the defendant with the concurrence of plaintiff, which was asked for by the defendant. The bill further stated that the plaintiff had other means of accomplishing his object of purchasing the said lands, to which he would have resorted had the defendant not assented to the arrangement proposed by the plaintiff; and that the defendant threatened and intended, unless restrained, to sell the remainder of the lands, the defendant fraudulently asserting that the same were his own.

The prayer of the bill was, that defendant might be ordered to convey the residue of said lands to the plaintiff, who offered to pay any balance due defendant.

Statement.

The defendant answered the bill, denying unqualifiedly the existence of any such agreement as set forth in the bill, and alleged that the plaintiff was an undischarged insolvent; that if any such agreement had been made the benefit thereof belonged to his assignee in insolvency; and that at the date of the sale it was not competent for the plaintiff to make the agreement alleged by him; denied asking the plaintiff 's concurrence in any sales made by himself; and set up also the defence of the Statute of Frauds.

The cause came on for hearing at the Spring Sittings of 1874, at Walkerton, before Vice Chancellor *Blake*, when evidence was taken in the cause, which in the opinion of the Vice Chancellor, clearly established that the agreement set up by the plaintiff had been entered into between the plaintiff and defendant, and the only question then was, whether such agreement, being only by parol, could be allowed to prevail, notwithstanding the provisions of the Statute of Frauds.

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At the hearing a discharge from the creditors of the plaintiff was put in and proved, and the bill amended to set up that fact.

The other facts appear sufficiently in the judgment.

Mr. *Boyd*, for the plaintiff.

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

BLAKE, V. C.—At the conclusion of the argument of this case I found the facts in favor of the plaintiff. It was proved to my satisfaction that before the sale of the premises in question, in "*The Canada Landed Credit Company* v. *Parsill*," the defendant agreed to attend at such sale and buy them in for the plaintiff, and hold them until re-payment of the amount advanced either by sales of portions of the property or by direct payment by the plaintiff. The plaintiff was a subsequent mortgagee of the premises. This mortgage was for $2,200, and as to about $300 thereof he held the security as trustee for one *Rennie*. The plaintiff, *Rennie*, and one *Stewart*, the son-in-law of *Rennie*, called on the defendant about a week before this sale, and then an agreement was made whereby the defendant was to attend at the auction room and purchase in the property and hold it as security for the amount he might advance, and after re-payment, then for the plaintiff. The defendant was not able to pay the whole of the deposit, and it was arranged that *Stewart*, acting for the plaintiff and *Rennie*, should advance $50 of the amount needed. It was then settled also that the property should be bid in at $1,600, it being thought worth $2,000. All these parties attended the sale. The plaintiff, not thinking the defendant's bid was the last made, and believing that the property was about to be knocked down to a stranger, offered $1,600 and was declared the highest bidder. Thereupon the defendant signed the contract

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for sale, obtained from *Stewart* the balance to make up the deposit, paid it, and was declared the purchaser. The defendant has since then retained possession of the premises, and has kept an account of his dealings therewith. On the part of the plaintiff it was argued that where the bill states the defendant holds under an instrument which is apparently an absolute conveyance, but is, in reality, a mortgage, there the Statute of Frauds does not apply, and the plaintiff is at liberty, notwithstanding the terms of this enactment, to prove by parol the true agreement between the parties. I do not think the authorities which bind me warrant this conclusion. It is true that the late *V. C. Esten*, in *McGill* v. *McGlashan* (*a*), (decided in 1857), says, "This it has established as its own rule, to be observed until made void by higher authority, that parol evidence is admissible to shew that an absolute conveyance was intended as a security only: and we consider this proposition to have been affirmed by the language of the privy council in the case of *Greenshields* v. *Barnhart*." All that appears there, however, on this question is as follows: (*b*) "Upon the first point, *if it were necessary to decide it*, we should perhaps take further time for consideration: our impression is, that the evidence upon that subject is sufficient to establish the appellant's case." It is true that in *Le Targe* v. *De Tuyl* (*c*), *Papineau* v. *Gurd* (*d*), *McGill* v. *McGlashan*, *Bernard* v. *Walker* (*e*), *Watson* v. *James* (*f*), relief was granted to the plaintiff claiming to be mortgagor, and in the former of these cases, as in *Holmes* v. *Mathews*, *Greenshields* v. *Barnhart*, *Howland* v. *Stewart*, and *Bernard* v. *Walker*, the question has been much discussed. In the judgment of the late Mr. Justice *Burns*, delivering the judgment of the Court of Appeal, in

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(*a*) 6 Gr. 324.
(*b*) 3 Gr. 1.; 5 Gr. 93.
(*c*) 3 Gr. 369.
(*d*) 2 Gr. 512.
(*e*) 2 E. & A. 121
(*f*) 19 Gr. 355.

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Howland v. *Stewart*, there is the following passage: "We can discover no principle which applies to mortgage cases different from other cases, as to the reception of parol proofs, but in every case where parol evidence has been received there has been something independent of the parol evidence, to shew the transaction different from what the deed expresses before the proof is let in, and then the evidence is receivable for the purpose of explaining the transaction. The whole current of authority shews this to be so, and it at once explains the grounds on which equity acts, and proves that no conflict whatever exists between the two jurisdictions in the reception of such proof." This was the view of the Court of Appeal in 1850, and it remained the same in 1853. In that year *Mathews* v. *Holmes* (*a*) approved of *Le Targe* v. *Le Tuyl*, *Howland* v. *Stewart* and *Greenshields* v. *Barnhart*. *Bernard* v. *Walker* (*b*), decided in 1862, shews that the Court of Appeal continued to hold the same view. "Upon a review of the cases I have mentioned and the many English decisions which are cited in them, we must," says Sir *John Robinson*, delivering the judgment of the Court, "hold, I think, that the plaintiff in this case should not be allowed to redeem if he had nothing to rely upon but the verbal evidence of witnesses that the defendant *Bernard* had, either at the time of the deed of the 28th of October, 1851, being executed or afterwards, admitted that the deed was only taken as a security, and was not intended to operate as an absolute conveyance." The Chief Justice thereupon proceeds to deal with the circumstances proved in evidence, and concludes his consideration of them by saying (*c*), "Then parol evidence being thus let in, according to the principle constantly acted upon in such cases, we have," &c. It is true that *Lees* v. *Nuttall* (*d*), *Montacute* v. *Maxwell* (*e*), *Childers* v. *Childres* (*f*), *Lincoln* v. *Wright* (*g*),

Judgme

(*a*) 5 Gr. 1 & 108.
(*b*) 2 E. & A. 121
(*c*) p. 152.
(*d*) 1 R. & M. 53.
(*e*) 1 P. W. 618, 620.
(*f*) 1 De G. & J. 482.
(*g*) 4 De G. & J. 16.

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Heard v. *Pilley* (*a*), *Booth* v. *Turle* (*b*), *Jenkins* v. *Eldredge* (*c*), go far to weaken *Bartlett* v. *Pickersgill* (*d*), and, to my mind, seem to repeal very much the force of the statute, which the learned Judges disposing of them express a desire not to impair; but I do not think I can, with the above plain and distinct enunciation of the rule by the Court of Error and Appeal in this country, follow the decisions of Courts of inferior jurisdiction in England. The Privy Council there may, as our Superior Court does here, feel the necessity, so long as the Statute of Frauds appears on our statute book, of considering it a binding enactment and giving weight to its requirements, rather than refer to it only to override its provisions.

Judgment.

In the present case I think, although not without some doubt, that the circumstances warrant me in pronouncing a decree against the defendant. There is no doubt the property was sold for less than its value, that one of the parties to the alleged agreement paid to the defendant a portion of the deposit to enable him to complete his purchase, that the premises were originally knocked down to the plaintiff, and that the defendant has since, as he admitted, kept an account of his dealings with the premises. The result has been that the defendant has obtained the premises for less than otherwise he could have purchased them for, and that the plaintiff, an incumbrancer, has been defrauded of payment of his mortgage. I think the plaintiff is entitled to a decree against the defendant, with costs.

NOTE.—The case has since been re-heard, and now stands for judgment.

(*a*) 1 L. R. 4 Ch., 548.
(*b*) L. R. 16 Eq. 182.
(*c*) 3 Story, 181.
(*d*) 1 Eden, 515.

ORR v. ORR [In Appeal.*] 1874.

Specific performance—Parol agreement—Ejectment.

The father of the plaintiff died leaving a widow and nine children, the plaintiff, the eldest son being then 16 years old, and he continued to reside with and work for his mother on a farm which she owned, for about six years, when becoming dissatisfied with his position, he informed his mother thereof; and that he had determined to leave the farm and work for himself; whereupon, his mother urged him to remain, work the farm, and assist her in bringing up the family, and she would give him the south half of the farm, and the other half to a younger brother; on condition of the plaintiff supporting her during her life. The plaintiff, in consequence, remained with the family, and erected a brick dwelling on the south half of the farm, of which house he agreed to give and did give his mother a certain part for the use of herself and a grand daughter, whose mother had died some years previously. The brothers and sisters of the plaintiff were all aware that the plaintiff claimed under this alleged agreement or promise, and the south half of the lot was always designated as his. The plaintiff continued to fulfil the terms stipulated for until the death of his mother about seven years afterwards; but she died without having executed a deed to the plaintiff. Eighteen years afterwards a brother of the plaintiff having bought up the shares of four of the co-heirs, instituted proceedings in ejectment against the plaintiff, claiming to be absolutely entitled to five undivided ninths of the whole property. Thereupon the plaintiff filed a bill seeking to restrain such action, and to enforce a specific performance of the alleged agreement with the mother.

Held, on appeal, reversing the decree of the Court below, that what had occurred could not be treated as an agreement to convey, but was at most to be looked upon only as a promise or expectation held out by the mother to the son to induce him to remain with her, and as such, was not capable of being specifically enforced in equity.—[SPRAGGE, C., diss.]

Statement.

This was a suit instituted in the Court of Chancery to compel the specific performance of an alleged parol agreement for the conveyance to the plaintiff by the late *Catherine Orr*, of fifty acres of land in the township of Sidney.

[*PRESENT—DRAPER, C. J., RICHARDS, C. J., SPRAGGE, C., MORRISON and [illegible], JJ., STRONG† and BLAKE, V. CC.]

†Retired from the Court of Chancery before judgment was delivered, and therefore did not pronounce any opinion.

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The bill in the cause was filed on the 8th April, 1871, by *Samuel Orr*, against *Wm. Orr*, *John Wesley Orr*, *John Fanning* and *Susannah* his wife, and *Wesley Gordon* and *Mary Ann* his wife, defendants; the parties being sons and daughters (with the husbands of the latter) of *William Orr* deceased, who died in July, 1841, leaving a widow, four sons and five daughters. The widow owned the east half of lot 4, in the second concession of Sidney, one hundred acres. She continued in possession with her family. The plaintiff, who was the eldest son living, was sixteen in the April preceding his father's death; *John Wesley*, the next son, it would seem was about twelve, perhaps a little more, and the appellant about ten. The eldest daughter, having married, died about four years after her father's death, leaving one child, *Jane Anne Lott*, of whom the widow took charge. The family at first lived together, each one helping according to their age and strength. The plaintiff worked on the farm with such aid as his brothers *Wesley* and the appellant could give. He was the only one who could plough. *Wesley* was sent away to learn a trade, but not being strong enough, returned home. The appellant finally left home to learn a trade about five years after his father's death. During all this time, and until the plaintiff was twenty-two years old, the widow with her daughters did the household work, and she was to all appearance manager and owner.

Statement.

At that time (1847), the plaintiff being dissatisfied with his position, spoke on that subject to his mother. He stated what passed to this effect in his bill; he represented himself as having had full control of the farm ever since his father's death, and that he devoted the produce to the support of his mother, brothers, and sisters. He told his mother that he meant to leave, and she, to induce him to remain, "agreed with him" that if he remained and continued as theretofore to manage and control the said farm, and devote his time and

labour to the cultivation and working thereof, the front or south fifty acres thereof should belong to him, and she would give him the same. That he accepted the offer, devoted his whole time and attention to the cultivation of the farm, and the whole produce and profits were applied to the support of the widow and the family until her death in October, 1854. The bill further stated that immediately after her death, without having made any deed of the fifty acres to him, or making any other disposition thereof, he, "with the knowledge, acquiescence and consent of the defendants, who were all well aware of the making of the agreement, entered into the exclusive possession of the fifty acres, and made large improvements, and had resided thereon, and in addition to the other improvements, erected a brick dwelling house thereon at a cost of about $1,000.

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This suit arose from the fact that ten years or more from the death of the widow, some of her children and her granddaughter severally claiming to be entitled to an undivided portion of the one hundred acres above mentioned, sold their rights, and the appellant, for valuable consideration, purchased the same from the granddaughter, from two of the daughters, (their husbands joining,) and from the youngest son *Tobias Bleecker Orr*; and having obtained conveyances recovered in ejectment, and issued a writ of *hab. fac. pos.*

Statement.

The bill prayed specific performance of the agreement between the widow and the plaintiff; that the defendants might be ordered to convey the front fifty acres to him; and for an injunction against further proceedings in the ejectment: Or, if the Court should be of opinion that the agreement could not be specifically performed, that the land might be partitioned amongst the plaintiff and defendants, according to their several proportions; and in the event of partition, that the value of plaintiff's buildings and improvements, and the amounts

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expended by him in the administration of the estate, over and above the value of the personalty received by him, might be ascertained and allowed to him.

Amongst the exhibits put in was a deed dated September, 1858, made between *Samuel Orr* and *Tobias Bleecker*, whereby *Orr*, for £34.15, purported to convey to *Bleecker* all his interest in one undivided ninth part of the said half lot in fee; and by another exhibit proved in the cause, *Bleecker* acknowledged to have received such deed subject to re-conveyance, on payment within two years of the sum of £34.15, which it was asserted had never been repaid, and by another deed (of quit claim) proved at the hearing, *Tobias Bleecker* had assigned all his interest in one undivided ninth part to *William Orr* —the appellant.

Statement.

The other facts in the case, and the evidence adduced, are very fully stated in the several judgments on the present appeal.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Belleville on the 11th October, 1872, before the Chancellor, when a decree was pronounced in favor of the plaintiff, directing specific performance of the agreement set up by the bill, with costs as against *William Orr*.

From this decree the defendant *William Orr*, appealed on the following, amongst other, grounds:— (1) that the alleged agreement in the pleadings mentioned between *Catherine Orr* and the plaintiff was not proved; (2) that the said agreement, being if anything, an agreement to execute a will—a revocable instrument,—could not have been enforced against the said *Catherine Orr*, and could not be enforced against her real representatives; (3) that there was no evidence to show that the plaintiff was present at any conversations touching the said

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agreement between the said *Catherine Orr* and the witnesses, or any of them; (4) that the admissions of the said *Catherine Orr* relied upon by the plaintiff to prove the said agreement, were merely admissions of her intention to devise to the plaintiff a portion of the farm in question in case he conducted himself to her satisfaction and were not admissions of any agreement to do so; (5) that even if the alleged agreement had been made between the said *Catherine Orr* and the plaintiff, it was not shewn that he fulfilled his part of it in such a manner as to entitle him to a specific performance of it; (6) that the plaintiff's conduct after *Catherine Orr's* death, in purchasing the shares of other heirs and in mortgaging his own one-ninth share to *Tobias Bleecker*, and otherwise, was inconsistent with his present contention; (7) that the defendant *William Orr* was an innocent purchaser for value without notice of the said alleged agreement between the said *Catherine Orr* and the plaintiff, and without notice of the alleged agreement for redemption between the said plaintiff and *Tobias Bleecker*; (8) that there was no such part performance of the said alleged agreement as to take it out of the operation of the Statute of Frauds; (9) that the evidence of the plaintiff in his own behalf was not sufficiently corroborated by other evidence; and that the admission of such evidence at all was contrary to the spirit if not to the letter of the Evidence Act, 1869, and should, if admitted at all, not be relied upon without the strongest corroborative testimony; (10) that the alleged consideration for the said agreement was wholly inadequate, the plaintiff having enjoyed with the others the fruits of the united labors of the family, and the decree is on that account harsh and unjust; and (11) that the said alleged agreement was too vague and loose to be specifically enforced.

Statement.

In support of the decree, the respondent insisted, (1) that the agreement between the respondent and his mother was proved as alleged, and was enforcible against

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his said mother; (2) that even if the agreement between the respondent and his mother were that she should devise him the premises in question, as the appellant contended, yet such an agreement is in equity enforcible against heirs at law; (3) that even if the respondent made default in performing any of his obligations towards his mother, she alone was entitled to complain thereof, and she never did so, nor was any default by the respondent in issue in the suit; and, (4) that the learned Judge who heard the witnesses for the respondent (including the respondent himself) gave credence to the testimony, and, if believed, it was sufficient to establish the plaintiff's case.

Mr. *Blake*, Q. C., and Mr. *Wells*, for the appellant.

Mr. *Moss*, Q. C., and Mr. *G. Dickson*, for respondent.

The authorities cited are mentioned in the judgments.

Judgment.

DRAPER, C. J.—It will be observed that the bill does not assert that building the house was a part of the agreement with the widow. If it were not undeniably proved that the house was built in 1852, the statement as to the house and improvements might mean that they were made after the mother's death in 1854. As to the extent of the other improvements, the only statement of them given by the plaintiff is, "I have done a good "deal of ditching, and have cleared up land, and have "got the low land seeded;" and as according to the bill, the plaintiff has given up the whole of his time and labour to the cultivation and control of the farm, this does not add much strength to his claim.

But in giving his evidence in his own behalf in October, 1872, the plaintiff varies from his bill filed in April, 1871. He swears that he and his mother had a conversation at home before he built this house. "She

was to give me the front fifty acres for bringing the family up." This agrees with the bill. He proceeds, "I had no promise of anything. She told me the front fifty acres was mine. I was to build a house, and give her a room for herself. She said I was to go on and keep the family up, and the front fifty acres was mine; I was to keep her while she lived. I suppose that under that the fifty acres was mine." 1874. Orr v. Orr.

Taking the foregoing statement by itself, it represents the building the house and setting apart a room in it for his mother, to be part of the agreement that he should have the fifty acres. I do not think he meant this; but that in giving evidence, he confused the two things together; for if the whole formed but one consideration for the mother's alleged agreement, I cannot account for the omission of so material a part. This agreement, the plaintiff asserts, was made in 1847; the house was built in 1852. Now the plaintiff swears he paid his brother *Wesley* for four summers working on the brick yard. *Henry Lott* also worked on the brick yard the year it was opened, and he swore that the plaintiff sold the brick at the Trent that year. The appellant also worked one summer at the brick, and he, as the plaintiff proves, went to his trade five years after his father's death, and, as elsewhere stated, did not return home to live. The plaintiff admits he "got the pay for the bricks," and paid the man who laid the bricks. *John Wesley Orr* (called for appellant) swears that "the mason was paid in brick. I helped to make the brick. I was not paid by *Samuel;* I was never hired by him. The family were kept together until mother's death. We were clothed from the farm. All debts were paid from the place, and from the brick, by our joint exertions. I think we were free from debt until we began to make brick. I don't think it was managed rightly. The brick-yard was in *Samuel's* name." The appellant swears that "the price of the bricks went into the family Judgment.

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along with everything else," and that he thought there were not any shop accounts, except to pay for making bricks. And *Westfall*, who worked at *Orr's* in 1842, gives some support to this suggestion when he swears, that being hired by plaintiff in 1852, he worked on the brick-yard and helped to build the brick house; that *Samuel* paid him part in cash and part orders on *McCaulay's* store in Trenton; and that *Wesley* and he used to go together to *McCaulay's* and get things charged to *Samuel*, taking a pass-book.

This evidence seems to establish that the brick-making was begun at least four summers before the house was built, and probably earlier, as the plaintiff proves that the appellant worked one summer at the brick; and if that be so, and if, as sworn, he went to his trade five years after his father's death, the brick yard must have been opened before 1847. *Wesley's* denial of being hired, and his assertion that all debts were paid from the place and the brick, (the sale of which furnished a part of their means), by their joint exertions, is not weakened by the plaintiff's statement that after the mother's death he wanted *Wesley* to remain as they were, *i. e.*, working jointly as I understand; but *Wesley* refused, because (this is the plaintiff's assertion) he knew the debts were in plaintiff's name.

Judgment.

I am satisfied the building a house was not referred to in the conversation between the plaintiff and his mother in 1847. No doubt the mother wished to keep the plaintiff on; but *Wesley*, then eighteen, was, it may be assumed, equal to what the plaintiff was in 1841, and she had him to look to if the plaintiff left her. The title to the one hundred acres was hers, and I do not believe the brick yard was opened without her consent; and as furnishing an additional means of supporting the family, she most probably readily assented, though it is not proved when it was done. It must be noticed that

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Wesley sets up an agreement for the north fifty acres of a similar nature to that which the plaintiff asserts as to the south. He certainly continued to work with the plaintiff on the farm up to his mother's death, and received no greater return than his board and clothing. The deed of two acres of the north half is not shewn or represented to have been a part performance of any agreement; it seems to have been a gift, and strictly speaking was not proved. If *Wesley* is to be believed, he placed no reliance on his mother's promises, not thinking them binding on her; and his conduct after her death is not inconsistent with this assertion. He believed that she had the full power of disposition in her hands, and the assertion on her part of different and contradictory intentions, entertained by her, shews that she also thought so. According to the appellant's testimony, she offered him a part of the land if he would stay and work; and he heard her say that *Bleecker* should have a share of the land. *Henry Bleecker* swears she told him at one time she intended to give *Wesley* and *William* trades and five acres each off the rear end of the place. The time of this statement is not shewn; but about ten or twelve years before her death, when *Wesley* was unable to learn a trade, as the same witness says, she said she would give *Wesley* the rear, and *Samuel* the front half. This must have been before 1847. What she said was, "I intend to give them." Another witness says she said she intended to give, or had given, *Samuel* the south half and *Wesley* the north half; and this was in June before her death. She also said to this witness, *Samuel* was to support the family till they grew up, and keep her as long as she lived, for the place.

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Jerome Rupert was the only witness as to the origin of the agreement on which the plaintiff relies, and was the first witness examined. He stated he was fifty-two years old at the date of the examination (October, 1872),

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and when plaintiff was twenty-two must have been about twenty-seven years old. His first statement leading up towards the alleged agreement is, "I often said to plaintiff 'I did not know but we had better leave, as our mothers might give the properties to some of the other children.'" He spoke to his mother about it, and heard his mother say to Mrs. *Orr*, "Our boys are dissatisfied, and want part of the farms; they complain they have no votes," and added, she had determined to give the witness part of the farm. Mrs. *Orr* replied she would do the same by the plaintiff, and told the witness to get a lawyer to write the deeds, and she would give plaintiff a part of the farm. Dr. *Ham* came and wrote a deed for witness. For all that is stated, no deed was then, or at any other time, prepared for plaintiff; the witness says he thought there was, but he did not know of what part or of what quantity. Afterwards, (when not intimated,) Mrs. *Orr* was indebted to *Rupert's* mother, who sent him up to get some wood or the money. "Mrs. *Orr* said she would not let the wood go, as she thought *Sam* had no more wood than he wanted. She told me she had given *Wesley* the rear part of the farm, and to *Samuel* the front fifty acres." He then adds, "From the time of the bargain about the fifty acres, she kept the house and plaintiff did most of the work; he was the head of it. * * It was always spoken of in the family that the south half was *Samuel's* and the north half *Wesley's*." He also says, "all the money that was earned was by *Samuel* going to the shanties with the team," (which team was possibly the mother's, or belonged to the father's estate). "When he (plaintiff) was young, from the time he was seventeen to twenty-three about, he had a large family to support and stock to keep." But he could not assert that *Samuel* ever heard of the conversation between the two mothers; nor does the plaintiff pretend that he did. Neither did this witness know, or at least he has not said so, of any such conversation or agreement as that which the plaintiff

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sets up. And yet he speaks of a bargain about the fifty acres as if he had been cognizant of its existence. He never told plaintiff of the conversation he heard, and he does not say the plaintiff told him of the agreement. On the contrary, he always thought that the plaintiff and *Wesley* had deeds until the widow died.

I assume that this conversation between Mrs. *Rupert* and Mrs. *Orr* preceded the plaintiff's complaint to his mother (in 1847) that "he had no promise;" but if so and if it be also true that the subject of leaving their mothers (in order, it would seem, to extort a gift of some land) was often talked of between these young men, it is almost incredible, that *Rupert* never told his friend how *he* had succeeded; never asked if the latter had got anything; or that the plaintiff never told him of the agreement, or made any reference to the often mentioned subject of leaving. This omission, and the facility with which *Rupert* converts the conversation between the two mothers, at which the plaintiff was not present, into the "bargain about the fifty acres," and the lapse of time since that conversation (in 1847), lead me to think his recollection of it is not the sole foundation of his evidence. At all events, he does not allude to or corroborate, far less prove, the agreement asserted in the bill.

Judgment

In considering this evidence we must not forget that it relates to a verbal agreement said to have been made in 1847, and which was, so far as anything was required from the mother, or could be claimed by her, at an end in 1854. There is no writing shewing it, or part of it, which could be supplemented by parol evidence, neither is it aided by any written proof. The evidence given of what was "always understood" in the family or by the neighbours, does not point to an existing unfulfilled agreement; and unless it can avail for that purpose in some shape, it has no value at all.

Is, then, the agreement stated in the bill established?

1874. The only direct proof of it is given by the plaintiff himself.

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In the very recent case of *Hill* v. *Wilson*, (*a*) the plaintiff had given a promissory note to a Mr. *Wilson*, since deceased. After his death his executors recovered a judgment on the note against *Hill*, who filed a bill to restrain execution, and obtained a decree. On appeal, the judgment was reversed. *Mellish*, L. J., after discussing the facts proved, and referring to the plaintiff's own evidence, says, "The evidence of the alleged bargain depends exclusively on the evidence of Mr. *Hill* alone;" and after some further comment, he adds, "It appears to me that in the face of this it would be perfectly impossible for us to act upon Mr. *Stavely Hill's* evidence alone." And *James*, L. J., remarks on *Hill's* evidence, that it is "the parol evidence of the maker of a promissory note as to a conversation alleged to have taken place between himself and the person to whom the note was given, that person being dead." Even if such evidence be legally admissible for any purpose, "the interests of mankind, in my opinion, imperatively require that unless corroborated it should be wholly disregarded."

Judgment.

The two cases involve the same principle. In each, the party relying upon his own evidence sought to obtain a material advantage to himself by proving a conversation with the party from whom the benefit was to come as a voluntary act, after that person's death. The two cases may be thought distinguishable, since in the present case the plaintiff says he was to pay a consideration, by supporting his mother and the family; but it is to be remembered he was living in his mother's house and on his mother's land which he was working; and for all I see, the team was hers. At the same time, I do not doubt he was working with the reasonable belief that he

(*a*) L. R. 8 Ch. 888.

would share—even favorably—in respect of the other children, in her property after her death. 1874.

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The Statute of Ontario, 36 Vict., chap. 10, s. 6, contains the following provision as to such evidence: "In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." This Act was not passed for rather more than six months after the decree in this case was made, and the case of *Hill* v. *Wilson* was not decided in appeal for some three months still later. But it is a clear enunciation of a principle existing,—not by some recent British statute, but on the *a priori* ground of the general welfare and protection of the community, and on every ground applicable to the case in judgment. In view of the effect of the statute enabling parties to give evidence in their own behalf, our Legislature have deemed it wise to make a positive enactment; while the decision in England enables this Court to see that such was already the law; and I think it should not be construed as introducing a new principle, but as declaratory of the common law. The Act, however, does not define what is to be considered a corroboration, except by the words "*material evidence;*" that is as I take it, material to the issne to be sustained by the party to be corroborated; and such was the long established practice as to the testimony of a single witness who contradicted the answer; *Evans* v. *Bicknell* (*a*), *Cooth* v. *Jackson* (*b*), *Jordan* v. *Money* (*c*). Judgment.

In this the affirmative issue is on the plaintiff, to prove the contract stated in the bill; and unless the evidence

(*a*) 6 Ves. at p. 184. (*b*) Ib. 39. (*c*) 5 H. L. 185.

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other than his own tends to prove that contract, it is not corroborative; for if that evidence is as fairly consistent with a different arrangement, or with another state of things, the plaintiff fails. For example, to prove an intention to give will not prove a contract to convey upon a stipulated consideration. Nor would an assertion by the mother that she *had given*, however frequently repeated, amount to such a contract. In either of these cases there would be no *bargain* to convey, express or implied; and if not, I fail to see in either corroborative proof of the plaintiff's allegation or evidence. *Rupert's* statement that the plaintiff's mother said that she would execute a deed if it were written, besides its uncertainty as to quantity, evidently means that she was willing (as *Rupert's* mother had said she was) to give, as has already been noticed; and *Lott's* evidence that the plaintiff was to give her a room and was to have the front of the farm and *Wesley* the rear, might be deemed material to sus-

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tain the plaintiff's assertion, if it referred to the agreement relied on by the plaintiff, instead of being more corroborative of the arrangement stated by *Wesley* in his evidence. I do not question that statements of this nature were frequently made by the mother as her sons grew up, in the hope and with the intention of keeping them at home to work the farm.

Look at her position. Left, in 1841, a widow with nine children, the eldest just turned sixteen years of age, the youngest a few months old, with one hundred acres of land not all cleared, a dwelling house of some sort and a barn, and with some stock,—horses, cows, and hogs,—probably not very numerous. The plaintiff says, "We raised young stock from the cows father left." She kept the family together, all helping according to their age and strength, for six years. Then her eldest son tells her he is not satisfied; that he desires to leave, making, however, no proposal; for on his own showing the offer came from her. I do not for an instant doubt

that she tried to induce him to remain; that she spoke as *Wesley* swore in answer to the Court; that she calculated the place for her two sons if they continued and worked on the place, and behaved themselves; but this is not *the agreement* asserted by the plaintiff. A woman capable of carrying through the struggle of bringing up such a family, with such limited resources, must have been prudent, industrious, and careful. She may well have heard (for instances have been unhappily too frequent) how a parent, growing old, desirous of rest in his failing years, has been induced to make an absolute conveyance to a son, on the latter's undertaking to support him for the remnant of his life; and how cruelly his expectations have been disappointed. A prudent mother may have feared for herself, and even more for her younger children, if she gave up a large portion of her land,—the most valuable portion it would seem, as being in cultivation; and she may have used just such language as several of the witnesses state, to keep the plaintiff at home, intending to do him justice in the end; but not forgetting she had other children, and therefore carefully retaining the power in her own hands; and this is what I believe she intended throughout; and I think, setting aside the plaintiff's evidence, the general effect of the other testimony is at least consistent with this view. If this be so, the case of *Jordan* v. *Money* (*a*) is applicable, which determined that where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though between the time of its creation and that of his attempt to enforce he has made representations of his intention to abandon it. Nor will Equity interfere, even though the parties to whom these representations were made have acted upon them, and have in full belief of them entered into irrevocable engagements. To raise an equity in such a case, there must be a misrepresentation of existing facts and not of

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(*a*) 5 H. of L. 185.

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mere intention. The plaintiff must, therefore, fail, unless he has proved the agreement stated in the bill.

If the agreement was so well known in the family, so frequently talked of, why is it that there is not one of them called to support the plaintiff's case? At the mother's death, the plaintiff's brothers, *Wesley* and *Bleecker*, his sisters *Mary Ann* and *Caroline*, and his niece, *Jane Ann Lott*, were at home. At that time it would seem natural (the mother having died intestate) that their several claims and expectations would have been alluded to, if not fully discussed; and if the plaintiff then asserted sole ownership of the house, and the fifty acres on which it stood, some of the family must remember it; but none of them was called.

Judgment.

Some stress has been laid on the fact that the plaintiff went for several years to earn wages in the "shanties," and devoted his earnings to the support of the family; and by these means paid debts incurred by the family. There is some evidence as to such bills, which I have already noticed. *Rupert* says he was so employed as much as ten winters. *Henry Bleecker's* evidence shews that one-half that period must have elapsed before the making the alleged agreement, which representation is strengthened by the defendant's testimony.

It is scarcely necessary to refer to the plaintiff's possession. He does not pretend to have held it in his mother's life. After her death, passing without notice the cause of the rest of the family leaving, the plaintiff, as one of the heirs at law, had a right to be in possession as a joint tenant. The law would (no other right being established) connect the possession with that right, and not with an intention to oust the other heirs. His own act of mortgaging a ninth part of the inheritance in the hundred acres, is a clear indication of the true character of his possession, and (*valeat quantum*) a negation of

any agreement. Put at the highest, the possession was equivocal. I refer to *Cole* v. *White*, cited by Mr. *Mitford* in *Whitehead* v. *Brockhurst* (*a*), *Frame* v. *Dawson* (*b*). 1874. Orr v. Orr.

In *Nunn* v. *Fabian* (*c*) there was no doubt as to the terms of the parol agreement for a new lease, nor that they were sufficiently proved. The Lord Chancellor said that a payment of the increased rent took the case out of the statute. He held, also, that money laid out by the plaintiff in improvements not provided for in a written memorandum of the terms, was not to be considered as a part performance, though they were evidence of an agreement for a lease. But in our case, building the house is not part of the original agreement as the bill states it; and there are so many other considerations mingling in the whole transactions, that it is difficult to pronounce whether it was an act done in pursuance of any, or, at all events, of what agreement. No doubt the mother consented to it, and stipulated for an accommodation for herself; but it would, in my judgment, be a great stretch to deduce from such consent and stipulation an agreement to convey fifty acres of land. Judgment.

I have felt very much pressed with the consideration, that in determining that the plaintiff has failed to prove his case, I am in apparent conflict with the learned Chancellor, who heard and saw the witnesses; since in my opinion the case depends on the evidence more than on any question of law. I have more than once expressed my opinion of the advantage as to the determination of matters of fact possessed by those who have the opportunity of seeing the witnesses, and of considering in what respect "credence should be given to one class rather than the other, from the mode in which their

(*a*) 1 Bro. Ch. Ca. 409. (*b*) 14 Ves. 386.
(*c*) L. R. 1 Ch. 35, 11 Jur. N. S. 868.

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evidence has been given;" and I am always reluctant to join in reversing a decision on a matter of fact, where I have less favourable "means of ascertaining the real truth" than were possessed by the Judge below. I concur very fully in the view suggested in *The Alice* and the *Princess Alice* (*a*), that upon questions of fact Courts are most reluctant to come to a conclusion different from that of the Judge of the Court below, merely on a balance of testimony, the Judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses. But with every respect for those who differ from me, I do not think this case depends on a balance of testimony. For reasons given, and after an examination of, I fear, an inconvenient length, I think the case turns on the insufficiency of the evidence to prove the agreement alleged, and not upon the conflicting statements of witnesses respecting the same facts.

Judgment.

And on this ground this case is readily distinguishable from the authorities referred to. As in *Williams* v. *Williams* (*b*), cited by Mr. *Moss*, there was no doubt upon what the two brothers said and did; the question was whether it amounted to a building agreement or family arrangement.

In *Hammersley* v. *De Biel* (*c*), all the requisites of a binding contract were proved.

In *Maunsell* v. *White* (*d*), nothing could be more explicit than the written statement of an intention to devise certain estates, and the declaration that the will was executed. A marriage settlement was made by the expectant devisee on the faith of the written statement and declaration, and the marriage took place. The testator afterwards made a different disposition of the property, which was decided to be effectual.

(*a*) L. R. 2 P. C. 245.
(*b*) L. R. 2, Ch. 294.
(*c*) 12 Cl. & F. 45.
(*d*) 4 H. of L. 1039.

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Admitting that the case of *Freeman* v. *Freeman* (*a*), to which the Chancellor kindly referred me, is in the plaintiff's favour, and not doubting its correctness according to the law, where it was decided, it appears to me that the law, which it is our duty to administer, is unequivocably in favour of the defendant.

The case of *Jennings* v. *Robertson* (*b*) may be referred to, as it contains a summary of most of the leading cases as to the grounds on which a parol agreement is held to be taken out of the Statute of Frauds.

On the whole, I am of opinion (1) that apart from the plaintiff's own testimony, the agreement stated in the bill is not proved; and (2) that if proved it is within the Statute of Frauds, and cannot be enforced; for (3) the alleged part performance is equivocal, and attributable to other causes unconnected with the alleged agreement. Vide *Coles* v. *Pilkington*, Weekly notes, 21st November, 1874.

Judgment.

RICHARDS, C. J.—Whenever an attempt is made to set up a parol agreement between a parent and child as to the disposition of the property of the parent, I think the only safe rule to adopt in a country like this is, that the agreement shall be sustained by clear and satisfactory evidence. If such agreement is attempted to be enforced after the death of the parent, and the oath of the party desiring to support the agreement is offered for that purpose, his evidence must be sustained by satisfactory confirmatory proof. See section 6 of Statutes of Ontario, 36 Victoria, chapter 10; and *Hill* v. *Wilson*, (*c*) where *James*, L. J., lays down the doctrine that evidence of a plaintiff on his own behalf as to a bargain with a man since dead, ought, in the absence of corroboration, to be disregarded.

(*a*) 3 Am. Rep. 657. (*b*) 3 Grant 513
(*c*) L. R. 8 Ch. App. 889.

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The plaintiff's case here is, that his mother made an agreement with him to give him the front or south fifty acres of the farm, on which she lived, if he would continue to work and control the same for the benefit of herself and her family.

In his evidence, he said, "We had a conversation before I built the house, when I was 22 years old. She was to give me the front 50 acres for bringing the family up. I told her I did not feel satisfied with living as I was. She told me the front 50 was mine. I was to build a house and give her a room for herself. She said I was to go on and keep the family up; and the front 50 acres was mine. I was to keep her while she lived. I supposed under that, that the 50 acres were mine. I supported her while she lived. The rest of the family lived there till they married. She said I was to keep *William* in every day clothes while he learned his trade, and he was to have a horse, saddle, and bridle. This was talked over two years before he went to his trade. Mother was to have a room in the brick house. I was to take care of *Bleecker* and *Jane Arnott*."

Judgment.

On cross-examination, he said, "My mother told me she would give me the south half at any time I would get a deed drawn. A little before her death, she told me to get a deed drawn. About three weeks before mother's death, mother said she would sign a deed for the front fifty, and give more land for having paid the costs of the *Smith* suit."

The confirmatory evidence offered as to an agreement was: 1st. *Jerome Rupert*. He said, on this point, referring to a conversation between his mother and Mrs. *Orr*, when he was present. His mother said, "Our boys are dissatisfied, and want part of the farm; they complain they have no votes." She added, "she had determined to give me part of the farm. Mrs. *Orr*

replied, she would do the same by the plaintiff. Mrs. *Orr* told me to get a lawyer to write the deeds, and she would give the plaintiff a part of the farm. Dr. *Ham* came and wrote my deed in our house. *I think he wrote one for plaintiff too*," afterwards she told him "*she had given Wesley the rear part of the farm, and to Samuel the front fifty acres.* She fretted a good deal while *Samuel* was building a brick house on the south fifty, lest he should become involved; but she added he was to give her a room in the house," which she shewed him. He often heard her say that all she expected was, that *Samuel* would support her whilst she lived. It was always spoken of in the family that *the south half was Samuel's and the north half was Wesley's.* The neighbours spoke of it in the same way. I always thought *Samuel had a deed of it until his mother's death*; and also that *Wesley had a deed.*" *Henry Lott* said, that at the time he was working at the brick yard for *Samuel*, Mrs. *Orr* said that *Samuel* would take care of her and the child (*Lott's* daughter and her grand-daughter), and *Bleecker*; that he was to give them a room by themselves, and was to have the front of the farm, and *Wesley* the rear of it. On cross-examination, he said Mrs. *Orr* did not tell him she had made any agreement with *Samuel* about the land.

Judgment.

Henry Bleecker said Mrs. *Orr* said when it was found *Wesley* was unable to learn a trade, she would give *Bleecker* a trade, and *Wesley* the rear, and *Samuel* the front of the farm. On cross-examination, he said she did not speak of her will. He understood her she intended to dispose of her property in the way she mentioned. She did not mention any time at which she would dispose of it. She said, "I intend to give them."

Addi N. Stickles.—Had a conversation with Mrs. *Orr* in June, before she died. "She said she intended to give, or had given *Samuel* the south half, and *Wesley*

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the north half." He said he had heard her speaking of that a year or two before. "She said *Samuel* was to support the family till they grew up, and to keep her as long as she lived for the place. * * The south half was always called *Samuel's*. She told him she was to have the west part of the brick house. She said it was to be hers while she lived. * * I expected from what she said, that *Samuel* was to control the business, and she occupy her room for life."

Now, these witnesses speak of conversations that occurred some 18 or 20 years ago.

Rupert's evidence, taken as a whole, would scarcely be confirmatory of an agreement to convey. The first part refers to a deed from plaintiff's mother to him which he thinks was prepared. Why was not this deed executed? He said afterwards, she told him she had given *Wesley* the rear part and *Samuel* the front.

Judgment.

It was spoken of in the family and by the neighbours, that the south half was *Samuel's* and the north-half was *Wesley's*. He always thought *Samuel* had a deed until his mother's death; and also that *Wesley* had a deed.

Here the evidence as to *Wesley* having a right to the north half, seems quite as strong as *Samuel's* to the south.

Wesley, in his evidence, said, he "was to get the north and *Samuel* the south half, for working on the farm. Mother made that arrangement with us. We continued to work pursuant to that arrangement. We were to take care of mother. I performed my agreement. I did not feel any dependence in her promise for he said sometimes she would, and sometimes she would not; and it was only a word of mouth agreement. I never thought there was any contract between *Samuel* and mother, any

more than I had myself. I thought considerable of her promise at the time, but when she died without a will and without having deeded it to us, I thought we would have to buy the shares. I heard my mother tell *Samuel* within a year or six months of her death, that she would not give him a deed. I have heard her say to him she would sell it, and live on the money. I stayed and worked on the faith of these promises. I have heard her say she calculated the place for us if we continued and worked on the place and behaved ourselves. I never heard her say to *Samuel* he should have it. I have often heard her say if we behaved ourselves, he should have the south half and me the north half."

When *Wesley* wanted to build on his part, he got a deed from his mother, April 7th, 1851, of two acres of the north half. If it had been intended he should have a deed of the whole, why was it not then given?

No other member of the family is called to prove any agreement on the part of the mother. The evidence satisfies me that the mother really intended to give the north half to *Wesley*, and the south half to *Samuel*; but when it came to acting in the matter, she did not do any act which would shew her intention of parting with her property. We hear of a deed being drawn to convey the front half to *Samuel*, but we don't hear of its being executed. We hear of her intention of giving one half to *Wesley* and the other half to *Samuel*, but when *Wesley* gets a deed, it is only for two acres. Judgment.

Wesley, a person who was equally interested with *Samuel* in having an agreement proven, says he heard her say, "she calculated the place for us, if we continued and worked the place, and behaved ourselves."

Is not this view of the case consistent with the evidence, and with the undoubted facts; and is it not con-

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sistent with the recital in the deed, dated in September, 1858, about four years after his mother's death, in which he is described as one of the heirs of the late *Catherine Orr*, widow woman; and, whereby, in consideration of £34 15s. he conveyed all his interest at law or in equity, in the east-half of lot No. 4, in the second concession of Sydney, being composed of the undivided ninth part of the lot.

The possession and management of the different portions of the lot by *Samuel* and *Wesley* would not be at all inconsistent with the mother's intention to retain the right of ownership. She would naturally rely on the oldest son, and live with him if he were unmarried; and he would as naturally manage the affairs of the farm which he expected his mother would give him, and would likely be the owner of most of the personal property about the premises which were managed by him. The junior members of the family would naturally make the house where the mother was their home, but they would not be idlers. After arriving at the age of ten years, a child about a farm would probably do enough to pay its own way. Judging from the signatures to the depositions, none of them appear to have received much education. *Samuel* and *Wesley* sign as marksmen; and *William* says he can read and write a little.

Judgment.

Suppose a year before her death, *Samuel* had filed a bill against his mother for a specific performance of an agreement to convey the land to him on this evidence, with a denial on her part of any such agreement, but that all she had said or given them to understand was, that she intended the land for her sons, *Samuel* and *Wesley*, if they continued and worked the place and behaved themselves. A specific performance of such an agreement would not be decreed. Then was there an agreement to will it to them? Most of the parties who speak of Mrs. *Orr's* intention, speak of it as a present

agreement, as if she had given the boys the land and they had agreed to do something for it. 1874.

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It seems to me that all she did is reconcileable with her maintaining the ownership of the property, giving her sons all the freedom necessary for them to manage the property, but never intending to deprive herself of the ownership and of the security and protection which that would give her.

The erection of the brick house, does not seem to have been so entirely the work of *Samuel*. *Wesley* denies that he was paid anything for his working in the brick yard, and bricks were made and sold there before the house was built.

Having a room in the brick house by the mother for herself, no doubt in anticipation of her son's marriage, was not singular: until he married, surely his mother would be mistress of the house, though the son was master. We hear of no one else being mistress; and the arrangement that she should have a room in it in the event of her son's marrying, would not be, I apprehend, anything unusual. Judgment.

In the case of *Nunn* v. *Fabian* (*a*), where the Master of the Rolls had refused to decree the specific performance of an agreement in relation to a lease, the evidence of the agreement seems to have been much more complete than it is here; there, however, the Lord Chancellor, on appeal, did decree specific performance. His Lordship expressed his desire to refrain from extending the cases in which the Court gets over the Statute of Frauds. He there says: "The Court is bound to consider—first, whether there was a parol agreement, and if so, secondly, whether there has been part performance of it, and if there has been part performance of it, then it is the duty of the Court to act upon the established

(*a*) L. R. Ch. 35.

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principle, and to decree performance of the contract. He then proceeds: "The plaintiff's case is, that the agreement was made in the previous spring, although the lease was not settled till December. This is sworn to by the plaintiff: but I agree with the Master of the Rolls, that in such a case, the facts must be watched carefully to see what confirmation there is of the plaintiff's assertion. And in looking through the evidence with this view, the Court is particularly careful to see if there is any documents which confirm it." The evidence in that case, was a letter from the plaintiff to *Bruton* (who had deeded the premises to defendants on trust to sell), in which he said he would take the lease for twenty-one years, with a clause to purchase at the terms given, the period to extend as long as he could. The plaintiff alleged that it was verbally agreed that in consideration of the grant of the lease, the plaintiff would make certain alterations in the house, No. 60 Western Road, but the particulars of such alterations were not shewn by the evidence. *Bruton* called on his solicitor, *Faithfull*, and gave him instructions to prepare a lease. Mr. *Faithfull* indorsed on the letter the following memorandum: "*Nunn* is a confectioner, Nos. 59-60 Western Road, and No. 1 Castle street. Rent £130, payable quarterly. Time twenty-one years from 24th June. Purchase in ten years. Price £2,500. No. 59 and the back portion of No. 1, Castle Street is occupied by *Wymark*, at a rent of £50, payable quarterly as yearly tenant. The rest is in *Nunn*'s occupation; in case of fire the landlord to re-build." A draft was prepared on the terms mentioned in the memorandum on 24th June, and plaintiff accompanied *Bruton* to Mr. *Faithfull's* office, when the draft lease was read to him, and after some alterations were made in it, principally extending the period of purchase from ten to fourteen years, it was approved by all parties, and Mr. *Faithfull* was directed to have the lease engrossed for execution. In the meantime plaintiff had expended more than £100 in putting

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in a new shop front, and making other alterations in No. 60 Western Road, and he stated *Bruton* occasionally inspected the work, and approved of it while in progress. On 14th January, 1863, plaintiff paid *Bruton* £20, as the balance of the quarter's rent due at Michelmas, 1862. *Wymark* had previously paid *Bruton* £12 10s. for the quarter's rent on his holding, which with the £20 paid by plaintiff, made up £32 10s., being the amount of the quarter's rent of the whole premises at the rate of £130 a year, according to the terms of the proposed lease. The receipt given by *Bruton* was "Received the 14th January, 1863, of Mr. *J. Nunn*, the sum of £20 for balance of rent due 29th September last, for 60 Western Road, Brighton, *E. Bruton*." The lease was engrossed, and several appointments made to execute it, which failed in consequence of *Bruton's* engagements, and on 16th January *Bruton* made an appointment to meet him at Mr. *Faithfull's* on the following day, but on the afternoon of the same day *Bruton* died suddenly.

Judgment.

On bill being filed for specific performance the Master of the Rolls dismissed the bill, thinking there *was considerable difficulty with respect to the terms of the parol* agreement, having regard to the circumstance that the lease as engrossed was silent as to the alterations in the house.

The Lord Chancellor, however, was of opinion that the evidence shewed an agreement for a lease which was, in fact, prepared. He was of opinion that the alterations that were made, not being referred to in the lease were not evidence of part performance, but he considered the expenditure of so much money was strong evidence to shew that the plaintiff considered there was a lease, for he would not, as a yearly tenant, have expended so much money on improving a house unless he had some such agreement. He considered there was part performance

1874. Orr v. Orr. by the payment of the increased rent, and he decreed specific performance of the agreement by ordering the specific execution of the lease, and although the delay there was not great the Chancellor would not allow costs.

There the lease was intended to be executed on 17th January, 1863, but *Bruton* died on the 16th. The will was proved on 12th March, by the defendants. They refused to execute the lease, and offered the property for sale in October, but withdrew it on receipt of a notice from the plaintiff. In December, 1863, they again advertised the house for sale, and plaintiff filed his bill on 24th January.

Judgment. The observations of the Lord Chancellor in the case cited shew that if the parties here had been strangers, the building of the house would have been strong evidence to shew there was an agreement by which the plaintiff was to become the owner of the land on the faith of which he erected it. But if the circumstances of the case lead to the conclusion that it was the intention of the mother to leave it to him, and he confiding in her *intention*, not as a matter of agreement, but as an intention, built the house, it would not make the case any stronger. If he could be supposed to know the law he might reason thus: I am confident if my mother makes a will she will give me the fifty acres, and if she does not make a will I shall take one-ninth by inheritance, and the portion on which I build the house will be set apart as mine, it being well-known that I expected to own the whole when I built; that my mother intended to have given it to me although she may not have said to me, "if you will build the house, I will give you the land." Some parts of the evidence would rather shew that she was opposed to his building the house. She feared it would embarrass him.

On the whole, I think it will cause great and serious mischief through this country, (where so large a portion of

the population are farmers owning their own land), if it is understood that conversations in the family or amongst neighbors as to how the farm is to be divided when the father dies, are to be taken as constituting, a contract which can be enforced in Equity. 1874. Orr v. Orr.

The practical result would be that parents will be compelled, if they wish to preserve to themselves the control of their property, to deal with their children by written agreements, or to turn them out of their houses altogether; and that children, instead of relying on the affection and kindness of their parents to give what they consider right of their abundance to them, and acting so as to win their love and affection, will watch every expression used by a parent discussing his intentions as to disposing of his property amongst his family, and note it down as evidence of an agreement, and then compel the parent if living, or his heirs, if dead, to carry out an intention which, for very good reasons, might have been abandoned, and that within a short time after it had been formed. Judgment.

If children are not disposed to reside with their parents and give to them that comfort and assistance which their duty requires, trusting to the affection of the parent to bestow on them a share of their world's goods, then, if they wish to shew that an *agreement* has been made which is to bind the parent by force of law and not by the better feeling of affection, Courts ought to require that such agreements shall be established by the clearest evidence; and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind himself so that he cannot change that intention, it will be considered that all he means to say is, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that

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disposition of his property, if he finds his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views.

As a general rule, the people of this country, where real estate is bought and sold so readily, have the impression that they always own land in which the legal title is vested in them until they make a deed of it to some other person; and with the bulk of the people of this country the Statute of Frauds, as far as relates to transactions in relation to lands, has not been considered a nullity.

How far ought the plaintiff's delay in filing his bill to enforce the contract he alleges was made with his mother to operate against him? It makes it necessary to rely on the recollection of witnesses as to conversations which took place eighteen or twenty years ago, and, of course, unless those conversations are confirmed by other circumstances, cannot be considered very satisfactory as evidence affecting important rights.

Judgment.

It may be urged that the heirs-at-law ought to have asserted their claim sooner, that by their delay they lulled the plaintiff into security, and induced him to alter his position.

I suppose if he has made improvements, in ignorance of his defective title, he ought to be protected, but if he, knowing that his title required confirmation, chose to go on improving, is not he himself the party who causes his own injury, and has he not, by his delay, caused embarrassment to all parties concerned?

On the whole, I am clearly of opinion that the appeal should be allowed, and the decree of the Court below varied in the manner pointed out by his Lordship the Chief Justice of this Court.

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SPRAGGE C.—In this case the evidence was taken, and the cause heard before me, at the Autumn sittings of this Court in 1872. I gave judgment at the conclusion of the argument explaining at considerable length the view that I took of the law, and the facts of the case. I held the plaintiff entitled to specific performance of the agreement which he had in my judgment established in his favor, subject to a mortgage that he had made to one *Tobias Bleecker*. Since the argument of the appeal, I have carefully reconsidered the case, and am still of opinion that the plaintiff is entitled to a decree.

The plaintiff, who was examined on his own behalf, states his case briefly thus: after stating that his father died in 1841, leaving nine children, whom he names, and of whom he was the eldest son, being at the time some three months over sixteeen years old, he goes on to say: "We continued living on the place." It was the property of the mother, and consisted of 100 acres of land: "I had an agreement with her. We had a conversation at home before I built the brick house, when I was twenty two years old, she was to give me the front fifty acres for bringing the family up; I told her I did not feel satisfied with living as I was, I had no promise of anything, she told me the front fifty was mine, I was to build a house, and give her a room for herself, she said, I was to go on and keep the family up, and the front fifty acres was mine; I was to keep her while she lived. The rest of the family lived there till they married." He then speaks of a temporary arrangement in regard to one of the sons, *William*, which, he says, he fulfilled. The arrangement with his mother, he says, was often talked of in the family.

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It is not questioned, I believe: It is at any rate proved, that the plaintiff did all that which he says it was agreed between his mother and himself that he should do.

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He did continue upon the place; the family was brought up almost entirely through his labour and exertions; he did build the house; and did give his mother her own room in it; and he supported her as long as she lived.

If in fact such an agreement was made; and if in fact it was carried out by the plaintiff, I take it to be clear, as a matter of law, that it was binding upon the mother; and is binding upon those who take under her; and I do not understand that this is disputed. But it is said that the evidence does not establish with sufficient clearness that an actual agreement was entered into between the plaintiff and the mother; that there was anything more than an expressed intention on t' part of the mother to give him the fifty acres in q n. That is a question of fact, and I have to say that being present when the evidence was given, it satisfied my mind that an actual agreement was entered into.

Judgment.

Unless the evidence of the plaintiff is disbelieved, it is *certain* that an actual agreement was entered into. I agree that, as was said by Lord *Cranworth* in *Nunn* v. *Fabian*, where a parol contract is stated by a plaintiff himself, "the facts must be watched carefully to see what confirmation there is of the plaintiff's assertion." There is, however, no strict technical rule, applying to this case, to prevent a decree being founded on the uncorroborated evidence of a plaintiff, the statute requiring corroboration having been passed subsequently to the decree being made in this cause.

In this case, there appeared to me to be ample confirmation of the plaintiff's assertion, and but one circumstance, which I will advert to presently, to throw any doubt upon it. *Jerome Rupert*, a witness to whose evidence I give entire credence, and the plaintiff, were young men together, and were similarly situated, each being the eldest son of a widowed mother. They seem, as

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was natural, to have talked together about their situation and prospects. *Rupert* says, "My father was dead, and I was the eldest son. My mother and Mrs. *Orr* were very intimate. After Mr. *Orr's* death the boys worked on. None but plaintiff was old enough to plough. I often said to plaintiff that I didn't know but we had better leave, as our mothers might give the properties to some of the other children. I spoke to my mother about it. I was present at a conversation with my mother and Mrs. *Orr*, when my mother said to her, 'our boys are dissatisfied, and want part of the farms; they complain they have no votes,' &c. She added that she had determined to give me part of the farm. Mrs. *Orr* replied, that she would do the same by plaintiff. Mrs. *Orr* told me to get a lawyer to write the deeds, and she would give plaintiff a part of the farm. Dr. *Ham* came and wrote my deed in our house. I think he wrote one for plaintiff too."

Judgment.

Rupert then states a circumstance which is further confirmatory of the plaintiff's assertion: "Afterwards she was owing my mother, who sent me up to get some wood or the money. Mrs. *Orr* said she wouldn't let the wood go, as she thought *Sam* had no more wood than he wanted. She told me that she had given *Wesley* the rear part of the farm, and to *Samuel* the front fifty acres. She fretted a good deal while *Samuel* was building a brick house on the south fifty, lest he should become involved; but she added he was to give her a room in the house, and she shewed it to me. I have often heard her say, that all she expected was, that *Samuel* would support her while she lived. * * From the time of the bargain about the fifty acres, she kept the house and plaintiff did most of the work; he was at the head of it. The others, except *Wesley*, went to trades; young *William* and *Bleecker* went to trades." This witness inferred from what passed that there was "a bargain" between the mother and *Samuel*, the

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plaintiff, and adds, that he always thought that *Samuel* had a deed of the fifty acres in question until after the mother's death, and that another son, *Wesley*, had a deed of the other fifty acres.

It appears from the evidence that the mother's position and plans were these; after her husband's death she had this hundred acre farm, and had four sons and five daughters, the plaintiff, oldest son, the only one strong enough to plough. There was herself to be supported, and a numerous and young family to be brought up. The farm was insufficient for this, and it appears to have taxed to the utmost the resources and earnings of the plaintiff from the farm and from a number of years' labour at the "shanties" to accomplish his task. The mother's plan was, that her eldest son should take his father's place on the farm, and in the family, and that the three younger sons should learn trades. This was carried out, except as to one of them, *John Wesley*, who in consequence of the state of his health returned to the farm; and hence the change, that he should have the other fifty acres of the farm. In all other respects the plan to all appearance was carried out. It is obvious that this plan was a judicious one in the interests of the widow and her family. It is obvious too that it imposed a very onerous task upon the eldest son. These facts are material because they shew a state of circumstances in which such an arrangement as is asserted by the plaintiff to have been actually made, would in all probability have been made; and go far to negative the theory that the mother made no promise, but only held out to her son the expectation that if he performed the task imposed upon him she would *probably* give him half the farm. I believed *Rupert* when he said that he and the plaintiff talked of leaving because their mothers might give the properties to some of the other children; and I believed the plaintiff when he said, that he told his mother that he was not satisfied with living as he was, because he

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had no promise of anything; and I could not come to the conclusion, in face of all the evidence given, that he was content to remain, and execute his task, still without any promise. 1874. Orr v. Orr.

Further, the conduct and language of the mother appeared to me to indicate the existence of an agreement between herself and her son. Her answer to *Rupert*, when applied to for wood, is an instance of this. The terms in which she spoke of the house to be built, and of the house after it was built, is another instance. It was not that he was to have the house after her death, but that *she was to have a room in it until her death.* Then *Henry Lott*, a son-in-law, says, "My wife died at the end of three years, and Mrs. *Orr* took my child. One day Mrs. *Orr* said *Samuel* would take care of her and the child and *Bleecker*; that he was to give them a room by themselves, and was to have the front of the farm and *Wesley* the rear of it. * * No one else was present at my conversation with Mrs. *Orr*. Mrs. *Orr* lived on the place with *Samuel* till her death. * * Mrs. *Orr* did not tell me she had made any agreement with *Samuel* about the land." So also *Rupert*: "Mrs. *Orr* was complaining that she feared *Samuel* would be involved building the house, but all she cared for was that he should give her a good warm room in it, that *he had promised to do so.*" So also the witness *Stickles*: "She told me that she was to have the west part of the brick house, she said it was to be hers while she lived." Judgment.

I will refer to only two or three other passages in the evidence of the plaintiff's witnesses: *Henry Bleecker* says "The mother lived with *Samuel*, *William* was about fifteen when he went to a trade; he only worked what they could drive out of him, he never returned to work on the farm. The store accounts were kept in *Samuel's* name. The family traded on his account, and ran him in debt often. People outside always spoke of *Samuel*

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as doing the business." *Stickles* says, "She was intimate at our house. I had conversations with her in June before her death at her own place. She said she intended to give, or had given, *Samuel* the south half, and *Wesley* the north half. I had heard her speaking of this a year or two before. She said *Samuel* was to support the family till they grew up, and keep her as long as she lived, for the place. *Samuel* had worked it from his father's death, with the help of the children. * * The south half was called *Samuel's*. She told me that she was to have the west part of the brick house. She said it was to be hers while she lived. * * I expected from what she said that *Samuel* was to control the business, and she occupy her room for her lifetime * * The family was large, and contracted debts."

Judgment

John Wesley Orr was called for the defendant. I did not think his evidence very material for either party. He says, indeed, that he was to get the other fifty acres and that he performed his agreement, and adds: "I did not put any dependence on her promise, for she said sometimes she would, and sometimes she would not, and it was only a word of mouth arrangement." In another passage: "Mother was a very fretful woman, and very changeable."

John Wesley seemed to consider his position as identical with that of the plaintiff. In truth it was widely different. He did not change his position or his intended position as the plaintiff did, but went to a trade, and returned to his mother's family because, as he says, he was not strong enough; he built no house, nor provided any home for his mother, nor did he support the family. He might well regard what passed between his mother and himself, whatever it was, as not binding upon her and still the plaintiff be properly held to have established his case. I attached very little weight to the evidence of *Wesley* himself; and even if it were all

true, it would not displace the plaintiff's case. His interest, moreover, was all with the defendant, for he, like him, had purchased interests from the heirs of the mother.

There is evidence of some language used by the mother herself, which is more consistent with matters between herself and her son resting in intention only than with there being an actual agreement between them; but this may be accounted for by her temperament, that of a fretful changeable woman; they were, in my mind, altogether outweighed by the terms in which she is proved on various occasions to have spoken of the relations between the plaintiff and herself, particularly in regard to the house.

I thought at the hearing, and still think, that if the plaintiff's own evidence were out of the case, there would be much from which a jury or any judge of fact might find an agreement between the mother and son to the effect spoken of by the plaintiff and by *Rupert*, *Stickles*, and other witnesses. That there is much to corroborate the evidence of the plaintiff I have been unable myself to entertain a doubt. Judgment.

There was not, I think, one single circumstance occurring during the life time of the mother to militate against the plaintiff's case; but a circumstance occurred after her death to which a good deal of weight is attached by some of the learned Judges, from whom I have the misfortune to differ. I refer to the mortgage, for it was in legal effect a mortgage, made by the plaintiff in September 1858, to his uncle *Tobias Bleecker*, to secure the sum of £34 15*s*, and which is expressed to be of the interest of the plaintiff, being one undivided ninth part of the hundred acre lot. The question is not whether he was right in making such a mortgage, but whether his doing so is a circumstance of such weight, so irreconci-

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lable with the fact being that he had such an agreement with his mother as he alleges, as necessarily to outweigh his own oath and all the other evidence to which I have adverted, or, in other words, are we able to say that if his case be true he certainly would not have made such a mortgage.

In the first place it was a mortgage, not an absolute conveyance, it was for a small amount, and it is to be presumed that he meant to repay it, and indeed he swears that he did; then the shape of the mortgage was not his work but that of the legal adviser of the mortgagee, who said it was the only security that he had to give, and that it would do for the sum borrowed; further it was not even an admission that he had no other title, and if it had been it would not be anything more than an admission of law, not an admission of fact, and so not binding upon him. My inference was, and is, that the plaintiff's right as heir of his mother was looked upon by the conveyancer as *the* tangible security and that it would do well enough to answer a temporary purpose. The plaintiff had then been four years in possession since his mother's death, and cannot be taken by this act to have admitted that he had not all along been in possession under an agreement with his mother, The question is not whether it was not wrong, or even dishonest, in him to make a mortgage affecting the whole of the lot. It is simply whether his making it under the circumstances that he did make it, is irreconcilable with the existence of another fact; that fact being the alleged agreement with his mother. I grant that it is not without its weight as a piece of conduct, but I cannot go the length of saying that it ought to convince a judicial mind that the alleged agreement could have had no existence.

Judgment.

It is objected to the plaintiff's case that he has been very long in asserting his rights in this Court; but that

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was no fault of his. After his mother's death, which occurred in 1854, he was left in undisturbed possession, and so far as appears in unquestioned enjoyment until 1872, when ejectment for five undivided ninth parts was brought by *William*. He may well retort that the delay was not his, but that of *William*, and those whose shares as co-heirs *William* purchased, and who first asserted adverse claim, some seventeen or eighteen years after the mother's death. He may well have thought that his claim which certainly was known to them, was acquiesced in by them. He came into this Court at last when forced into it by *William's* attempted exercise of his legal right. I think there is nothing in this objection, and I find that it is not even raised by the answer.

I do not myself think that much weight is to be attached to the circumstance of the plaintiff not having obtained a deed from his mother, while *Rupert's* mother gave one to him and the plaintiff's mother gave to *Wesley* a deed of two acres only of the north half. If it had been the same mother that gave a deed to one and withheld it from the other, it would be a significant circumstance, but *Rupert's* mother may not have been the fretful, changeable woman that the plaintiff's mother is described to be. The latter may have purposely withheld a deed, though promised, in order to be more safe in exacting and enforcing from the plaintiff all that he had undertaken to perform, or it might have been mere delay; and we well know how things that ought to be done and against the doing of which no good reason exists, stand postponed from time to time. As to the conveyance of two acres only to *Wesley*, I have already explained how in my opinion his position was essentially different from that of the plaintiff. He might well be glad to receive anything that his mother chose to give him. There appears never to have been any talk of giving to the plaintiff a deed of less than the 50 acres.

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To summarize then very briefly the position of the plaintiff. He changed his position at the instance of the mother, and upon the faith of her promise, that if he would perform certain acts which she specified he should, for doing so, have certain land which was hers to give. He built a house in which she was to have certain rights; he worked a farm for the benefit of herself and her children and devoted all his other earnings to the same purpose, and he spent the best years of his life in the performance of the task enjoined upon him by his mother. It is surely not a case in which a Court should be astute to interpret what was said and done, as a loose arrangement at the will and sufferance of the person who, and whose family, were so largely benefited, He was in a position to dictate his own terms. Why should it be assumed that he was fatuous enough to place himself in a position where the labour of a lifetime would be at the mercy of the fretful, changeable woman that his mother is described to have been? If anything is to be assumed, it should rather be, that he acted as any rational being would have acted in such circumstances as he was placed in. It should hardly be assumed against evidence that he acted as only a fool would have acted, because *it is possible* that he might have so acted.

Judgment.

My own opinion is, that upon a bare reading of the evidence, a decree in favour of the plaintiff would be proper. But the case as it stands before this Court is open to other elements of consideration. This Court is sitting in review of the conclusions of the Judge who heard the cause, upon the question of fact, upon which he heard the evidence. The law upon which he proceeded is not questioned. I do not propose to refer to the many cases in which Appellate Courts have expressed their extreme unwillingness to find differently, upon questions of fact, from the Court appealed from, where the latter has had the advantage,—an advantage that can scarcely be overestimated—of seeing the witnesses,

of hearing them give their evidence, of observing their demeanour, and the thousand circumstances that go to the value or worthlessness of evidence, upon which it is simply impossible that any person merely reading evidence can form an accurate judgment. It is surely to be assumed that a Judge who has heard the witnesses, has attached its due weight, and not more than its due weight, to the evidence of the several witnesses; that he has properly held the evidence of one entitled to little weight, for lack of honesty or accuracy, or mental capacity; the evidence of another entitled to no weight at all, for some or all of these reasons; while he may give entire credence to the evidence of a third. He may be wrong certainly, but he is infinitely more likely to be right than any Judge merely reading the evidence, and who cannot know the relative value of the evidence of different witnesses. I am perfectly aware that these observations are trite; but they involve a principle that is sometimes lost sight of, and which it would be dangerous to impair. Judgment.

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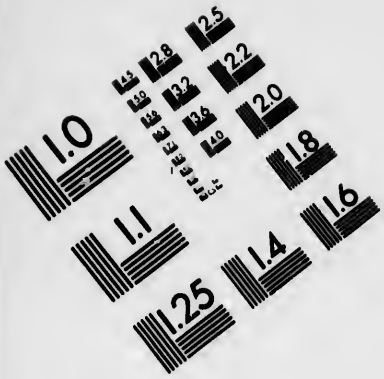
I concede that an Appellate Court *may* properly come to a different conclusion from the Court appealed from upon circumstances of conduct; but even upon conduct, the Appellate Court necessarily forms its judgment at a great disadvantage, because the Court appealed from may properly find in favour of a party against whom there are some suspicious circumstances; may justly think that they are outweighed by the other evidence in the case, of the value of which the Appellate Court can form but a very imperfect and possibly a very erroneous estimate.

I should prefer to have made these observations in a case in which I was not the Judge appealed from; but I think that I ought not for that reason to be deterred from making them if apposite, and in my opinion they are peculiarly apposite, to the case in judgment.



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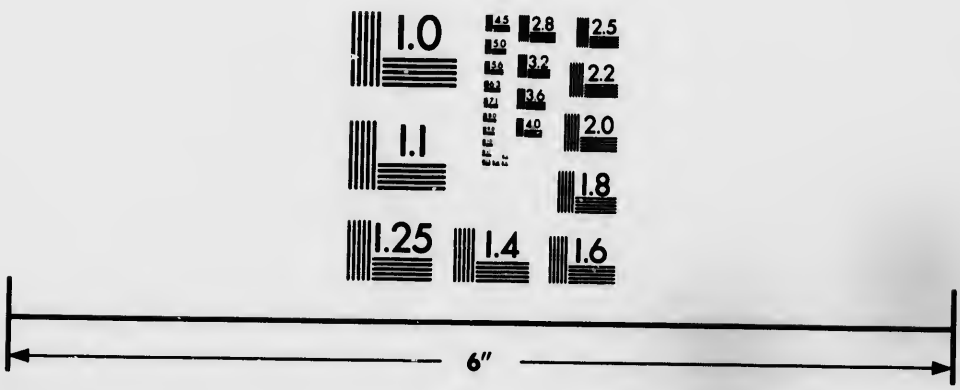

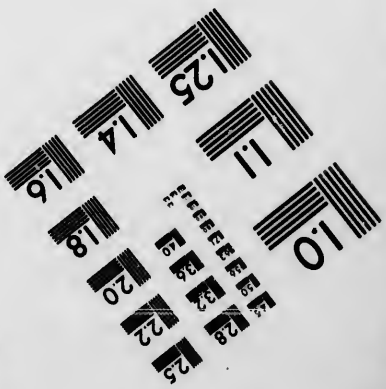

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I think that the decree in this case may be supported on the ground of parol agreement partly performed, or strictly in this case after the death of the mother fully performed; but it may, in my judgment, be supported also upon the ground that the mother having induced the plaintiff, by her representations, to change his position and to do the acts to which I have referred, it would be a fraud on her part if she had refused to make good her representation. Relief is placed upon that ground in the late case of *Freeman* v. *Freeman* (*a*) in the State of New York. The owner of a piece of land placed parties in possession, telling them that the property should be theirs for life; that he bought the place for a home for them, and as the report of the case says, gave it to them. They cleared a number of acres, built a house and made other improvements. The Court stayed ejectment brought by the owner, and decreed relief, observing that the ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practised upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract.

Judgment.

Nunn v. *Fabian* was decided by *Lord Cranworth* really upon the same ground. A landlord made a verbal agreement with his tenant to grant him a lease at an increased rent, with the option of purchase. Upon the faith of this the tenant made some improvements, which *Lord Cranworth* thought it evident would not have been made if he had nothing more than his original tenancy; and he said, "Now, I do not think we can exactly call this part performance; * * * but although it was not part performance, it is important as shewing that there

(*a*) 3 Am. 657.

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was an agreement for a lease. No yearly tenant would have spent that amount of money in improving the front of his house without some such agreement as is here alleged. It is certainly evidence that there was some agreement." The expenditure in that case was something over £100, and it was in putting in a new shop front to a confectioner's shop. It could have been only a matter of inference on the part of *Lord Cranworth* that a yearly tenant would not have spent £100 upon a new shop front; and in truth it is always a matter of inference in such cases, the inference being that it is the result of some agreement, and what that agreement is is shown by parol. I apprehend that the party seeking relief may show by parol all the circumstances under which the expenditure was made, as well as the expenditure itself, without proving the fact of the agreement itself; *e. g.*, in this case that the plaintiff had come of age and was about to leave; the conversation with *Rupert*, followed by the conversation between the two mothers; and that he remained and made improvements and did the several other acts relied upon in this case. If it is a just inference from all this that there was some agreement, then it is open to the party seeking relief to shew what the agreement was.

Judgment.

This seems to me to be clear ground upon which to proceed. It is said, indeed, in some cases, that cases of this nature are outside of the statute of frauds. It was so said by Sir *John Stuart* in *Loffus* v. *Maw* (*a*); but I do not think that it is necessary in this case to go outside of the statute.

In any view of the case, I agree that an agreement expressly proved, or reasonably to be inferred, is necessary to sustain the plaintiff's case.

(*a*) 3 Giff. 603.

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I have gone into this case at considerable length, for two reasons,—one, because I deem it of the greatest importance that the conclusion upon questions of fact of the Court that has heard the evidence should not be reversed, except for the most weighty reasons; the other, that I have felt unwilling that the plaintiff should lose his labour of a lifetime, which would pass by an adverse decree to the brother, to whose support and education he so largely contributed.

BLAKE, V. C.—The plaintiff alleges that in 1847, when he was twenty-one years of age, he intended to leave the premises in question; whereupon his mother, who was a widow, and the owner of the lot, asked him to remain and work for the benefit of himself and the other children; and she then promised that if he would do so, the front or south half of the lot would belong to him and she would give it to him; that he accepted this offer, worked as agreed; on the death of the mother in 1854, went into exclusive possession of the fifty acres, improved it, built a house on it, and continued in possession up to the filing of the bill. The plaintiff asks for a specific performance of this agreement.

Judgment.

The defendant *William Orr* claims to be the owner of five ninths of the whole lot. He denies the agreement alleged by the plaintiff, and asks for partition. The defendant *John Wesley Orr* claims, under an agreement alleged to have been made with his mother, the other fifty acres of the lot; or, in default of this, three ninths of the premises.

The evidence shews that the position of *Wesley* as to the north fifty acres, was, in respect of the promises of the mother, similar to that of the plaintiff in respect of the south fifty. The plaintiff himself says, "*Wesley* lived on the rear ever since her death. It was calculated for

him." *Henry Bleecker's* evidence is, "When *Wesley* was unable to learn a trade, she said she would give *Wesley* the rear and *Samuel* the front part of the farm." *Jerome Rupert* says, "She told me that she had given *Wesley* the rear part of the farm, and to *Samuel* the front fifty acres. * * * It was always spoken of in the family, that the south half was *Samuel's* and the other half *Wesley's*. * * * * I always thought *Samuel* had a deed of it till his mother's death, and also that *Wesley* had a deed." 1874. Orr v. Orr.

John Wesley, in his answer, says that about 1849 his mother agreed, in consideration of his work and labour, to give him a deed of the north fifty acres. He says the plaintiff had a somewhat similar agreement as to the south fifty acres.

This being so, any circumstance in the case that throws light on the position of the one, assists in forming an opinion as to that of the other. Judgment.

The documentary evidence consists of two instruments, —the one, a conveyance executed by the mother to *Wesley*, of two acres of the fifty acres he now claims; and the other, a conveyance from the plaintiff to *Bleecker* of a one-ninth share in the whole one hundred acres. Both these deeds militate against the claims made by the plaintiff and *Wesley*. The first was executed on the 7th of April, 1851, at a time when, according to the answer of *Wesley*, he was entitled to the whole fifty acres. If Mrs. *Orr* had really agreed two years before to give the half lot to *Wesley*, when application was made to her for a conveyance by *Wesley*, how is it that he, without question, accepts a conveyance of only two acres in place of the fifty, and makes no further request of his mother to carry out the alleged agreement? The second document was executed in September, 1858, at a time when, according to the statement of the

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plaintiff, he had no interest in the north half of the lot, and was absolutely entitled to the whole of the south half. It was to secure a loan of money; and by it the plaintiff, "as one of the heirs of the late *Catherine Orr*," conveys "all his estate," &c., in that parcel of land, "being composed of an undivided ninth part of the east half of lot four." That was not the interest the plaintiff then had, according to the story he now sets up. This deed was signed about four years after the death of the mother, and, as a piece of evidence, is entitled to much weight, in a case where the party is attempting by parol evidence of conversations that have taken place twenty years ago, to prove an interest in the land, which cannot be reconciled with the only paper he now produces in connection with the matter. The plaintiff says he made an agreement with his mother. The only evidence I can find bearing on this question is as follows: *William Orr*, in his examination on his answer, says he "helped to make brick on the farm for four years; the building of the house was a combined thing in the family. He does not know what became of the plaintiff's wages. He never heard his mother say she had given the north part to *Wesley;* she said she intended it for him. He heard his mother say she would give the front half to plaintiff and the rear half to *Wesley*; and she had said frequently she would not give it to him. She told him she intended they should pay the others their shares. She offered him one-third of the place at her death if he would stop. This was merely talk; all her offers were of the same nature; they were to induce the boys to take hold and work, and be steady. There was no definite understanding as to the division of the land. She could not control them, and she made these promises just to salt them along and get them to do as they ought."

Judgment.

Jerome Rupert.—"My mother and Mrs. *Orr* were very intimate. * * I often said to plaintiff that I

didn't know but we had better leave, as our mothers might give the properties to some of the other children. * * She told me that she had given *Wesley* the rear part of the farm and to *Samuel* the front fifty acres * * *Samuel* did most of the work; *Wesley* was next, and worked a good deal. * * It was always spoken of in the family that the south half was *Samuel's* and the north half *Wesley's*. * * I always thought *Samuel* had a deed of it till his mother's death, and also that *Wesley* had a deed. A good deal of land was cleared. *Wesley* helped *Samuel*. They raised a good deal,—about what they consumed in winter, hardly that. *Samuel* cleared up a good deal,—not more than they used for firewood. *Wesley* helped make the bricks."

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Henry Lott.—"Mrs. *Orr* did not tell me she had made an agreement with *Samuel* about the land. * * *Wesley* and *William* did what they could on it. * * They all lived together up to the time of the mother's death. * * The farm was not too well cultivated at the mother's death."

Judgment.

Henry Bleecker.—"Mrs. *Orr* told me at two different times she intended to give *Wesley* and *William* trades and fifty acres each off the rear end of the place. * * When *Wesley* was unable to learn a trade, she said she would give *Bleecker* a trade and give *Wesley* the rear and *Samuel* the front of the farm. * * Mrs. *Orr* did not speak of her will. I understood she intended to dispose of her property in way she told me. She said, I intend to give them."

Samuel Orr.—"I supposed under that, that the fifty acres was mine. * * This arrangement in the family was often talked of in the family. *William* often heard of it. The house was built in 1852. *Wesley* lived on the rear ever since her death. It was calculated for him. I understood "A" was a quit claim of one-ninth

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share of the land. * * *Fuller* laid the bricks on the house. I paid him in bricks. My mother told me she would give me the south half at any time that I would get a deed drawn."

Addi N. Stickles.—"She said she intended to give, or had given. * * *Wesley* worked some. He worked at the brick yard. She told me she was to have west part of brick house. The farm was run down when he (*Samuel*) got it, and he did not improve it. * * I don't know that he was as careful and saving as he might have been."

William Orr.—"My mother sent for me and promised me part of the farm if I would live at home. All the stock was raised from a mare and colt father left."

John Wesley Orr.—"The mason was paid in brick. I helped to make the brick. I was not paid by *Samuel;* I was not hired by him. All debts were paid from the place, and the brick, by our joint exertions. * * Mother was a very fretful woman, and very changeable. * * I did not put any dependence on her promise, for she said sometimes she would and sometimes she would not; and it was only a word of mouth arrangement. * * I never thought that there was a regular contract between *Samuel* and mother, not more than I had myself. * * I heard my mother tell *Samuel* within a year or six months of her death, that she would not give him a deed. I have heard her say to him that she would sell it and live on the money."

Judgment.

The plaintiff, in his examination, says, speaking of the alleged agreement, "I supposed, under that, that the fifty acres was mine." It is scarcely possible to believe this statement. *Rupert*, the plaintiff's first witness, speaks of a conversation had with the plaintiff about leasing in order to prevent the mother giving the property to others. The result in the *Rupert* case was,

that there the mother gave a deed to her son; but we find no such result in the *Orr* family flowing from this conversation. It is plain, however, from what took place then, that *Samuel* knew something more should be done in order to give him the land; that this was a matter of uneasiness to him; that his friend *Rupert* applied and got his deed; and yet we find no instrument given to him to evidence his ownership of the land he claims. He was not ignorant, also, of the position of his brother *Wesley*,—of his application to his mother, and of his being given a deed of only two acres. The plaintiff knew the necessity for a deed. It is not as if through thoughtlessness he allowed the matter to pass. But according to his story, he knew he was entitled to a deed, and he knew the need there was for obtaining it; and yet no deed is forthcoming. The son who, it is said, is in the same position as the plaintiff, when he applies for a conveyance, does not meet with such a reception as would warrant the plaintiff in applying. The mother obviously never intended to yield up her control over the premises, or to place the sons in such a position as that they could be independent of her; and with this knowledge they thought it wiser not to press their claims, but to leave the matter to the generosity of their mother. They have been disappointed in this. I do not think it any part of the duty of this Court to attempt to compel the carrying out of the merely honorary engagements of the mother.

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Judgment.

The Court should be very slow to act upon the statement of one of the parties to a supposed agreements after the death of the other party; and such corroborative evidence should be adduced as to satisfy the Court of the truth of the story told, which is, as here, to benefit so materially the person telling it. To my mind the circumstances detailed in evidence so far from corroborating the allegations in the bill negative them, and lead to the conclu-

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sion that, although apparently the plaintiff is a person worthy of credit, his case must be taken to be disproved. This is apart from the other difficulty in the plaintiff's way, arising from the uncertainty and ambiguity of the alleged agreement. I am unable to say whether he was to have half of the land or one-third of it, or whether five acres were to be taken off for each of the other children, or whether shares were to be given them by him in money. It must also be borne in mind that the plaintiff improved the premises but in one respect, that of the erection of the house; and that in assisting in doing this he was running but little risk. If the mother gave him the fifty acres he claims, he got the house; and if she died without doing so, in making partition, the portion of the land with this building would be allotted to him. As matters turn out, he will get the benefit of the expenditure made, and has received twenty years use of the fifty acres. The risk he ran

Judgment.

was small; and even not turning out in his favor, he is not left the loser by his dealings with the premises. Here, there was either a contract between the plaintiff and his mother, or there was not. There is no *tertium quid*. The only difficulty in the case is, to ascertain correctly this fact, "Did the mother represent that she then contemplated giving her son the land, or did she state that she would actually do it?" This latter statement, when acted on by the party to whom it is made, amounts to a contract between them; but the former in no way binds the promisor. In the former case she does not state that she will do that to which she is referring. She does not undertake that her intention will remain the same; she merely gives expression to her then feeling and intention, but in no way places the matter higher than a mere question of intention,—in no way undertakes to control that intention; in no way evidences any idea of giving up her dominion over the subject matter of their conversation; in fact, in no way binds herself to a dealing with the property; but on the

contrary, aims to keep, and keeps, complete control in respect thereof, and thus reserves that power over the members of her family which would frequently disappear if it were thought they had ceased to be dependent on the parent, and could claim, as a right, that which was intended to be reserved until the time arrived for the carrying out the intention, when, the mind remaining unchanged, its enjoyment would be accorded to the intended recipient.

If the present case is tested by the rule laid down in *Ramsden* v. *Dyson* (*a*), I think it fails. There, Lord *Cranworth* says, "But it will be observed, that to raise such an equity two things are required: first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. * * For if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights. * * If my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and building when the tenancy has determined. * * He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." Judgment.

In applying this case to the present, it may be asked first, did the plaintiff build on the belief he owned the property? and, second, did his mother know that he was

(*a*) L. R. 1 H. L. 129.

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building on that belief? How did the plaintiff become entitled? under what contract? when could he claim possession? when did he obtain the right to turn his mother out of possession? The rule laid down in *Pickard* v. *Sears* (*a*) is, "that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." But in *Jordan* v. *Money*, the Lord Chancellor says, as to that case, "I think that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. * * In the former case it is a contract; in the latter it is not." The judgment then proceeds, "In the first place, what I think a judge, in deciding upon this matter, has to satisfy himself upon is this,—looking to what is stated. * * Can you believe as a Judge, that this passed under such circumstances, that Mrs. *Jordan* understood herself to be entering into a positive contract; that on the one side the *Midnapore* property should be hers irrevocably; and that, on the other, she should never enforce the bond? I cannot believe that she so understood it." In this same case Lord *Brougham's* language is as follows: "In all these cases, therefore, there was a misrepresentation of facts. And the learned Master of the Rolls appears to consider that in this case there was a similar misrepresentation. In my opinion there was a misrepresentation by *Louisa Marnell*, of an intention as to her will; but of misrepresentation of fact there was none. She simply stated what was her intention; she did not misrepresent her intention; and I have no manner of doubt that, at the time she made the statement, she had the intention which it stated she professed."

Judgment.

(*a*) 6 A. & E. 469.

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The rule as laid down in *Jordan* v. *Money* is still the law on this subject; and so long as it is, a plaintiff, situated as the plaintiff is here, can scarcely hope to succeed in his suit. In *Hammersly* v. *DeBiel*, the other leading case on the same point, the facts were much more favorable to the plaintiff than in the present case, or in *Jordan* v. *Money*, or *Maunsell* v. *White*. There it was successfully insisted that there was a contract to leave a sum of money. It was not a mere representation, but part of a well considered arrangement. The expressions there used became obligatory when acted on. There was not merely the fact that "he intends," but he pointed out the form of the settlement, and the manner in which the arrangement was to be carried out.

Judgment.

In that case Lord *Brougham* says, "This is to be taken as an agreement within all the cases. * * (*a*) It is to be observed that this was an act of a very formal nature, and not a loose and casual arrangement. * * I agree that these are the things which are very commonly said when suitors come for a man's daughters, or nieces, or wards, or persons under their parental care, 'I will give so much, or I will settle so much; and, besides that, you will take into your account that she may be better off at my death.' That no doubt is very often said; but is it common to put it into writing? On the contrary, if a suitor were to say, 'will you have the goodness just to put the last part of your kind observation down into writing,' the old gentleman would say, 'oh no! I do not mean to bind myself.' But here he does bind himself; he does put it into writing in as formal a way as it is well possible to conceive. * * If another case were to arise to-morrow, in which a parent, instead of holding out a general and vague hope, *opes successionis* and nothing more, holds out a promise in distinct terms,

(*a*) 12 C. & F., at p. 84.

1874. I shall be of the same opinion probably that I am with respect to this case."

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Although Lord *St. Leonards* dissented from the judgment given in *Jordan* v. *Money*, on the facts proved in the case, yet his opinion is unfavorable to the plaintiff. He distinguishes *Maunsell* v. *White* (*a*) from *Hammersly* v. *DeBiel*, and in the former uses this language, "He made what was no doubt at the time a true representation of what he had done. It was argued upon as having been an inducement to the marriage. * * But how? Not as an engagement, which could not be revoked, but as on a statement made by a relation whose affection, if it remained what it then was, would give the nephew the property in accordance with that statement. That the representation was an inducement to the marriage, I am not disposed entirely to deny; but it was so only in the way I have stated."

Judgment.

The deduction from these cases and *Bold* v. *Hutchinson* (*b*) and *Kay* v. *Crook* (*c*), seems to be that where the representation is not of an existing fact, but of a mere intention, or where a promisor will not bind himself by a contract, but gives the other party to understand that he must rely solely on his honour for the fulfilment of his promise, the Court will not enforce the performance of the representation or promise. A representation which amounts to a mere expression of intention, must be distinguished from a representation which amounts to an engagement. As distinguished from the false representation of a fact, the representation as to a matter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not fraud at law, nor does it afford a ground for relief in equity. Applying this rule to the present case, I think the plaintiff's bill fails, and that there should be the usual

(*a*) 4 H. L. 1039. (*b*) 3 Sm. & G. 407. (*c*) 5 DeG. M. & G. 558.

decree for partition, and that the plaintiff should pay the costs up to the hearing, and the costs of the appeal. 1874.

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In dealing with the facts of the present case, I do not intend to interfere with the rule laid down in *Saunderson* v. *Brudett* (*a*). Wherever merely the uestion as to the credibility of one witness as against another, or of several witnesses as against others, is to be decided, there the finding of the Judge of first instance should be followed. But I do not think the rule should be extended. It is not reasonable that so great a responsibility should be ca[illegible]pon the shoulders of the Judge of first instance; nor is it right to deprive the party aggrieved of the opinions of the Judges of the Appellate Court in regard to questions of fact; and to substitute the conclusion of one Judge for that of six. In *Jordan* v. *Money*, the facts were fully considered, and the rule laid down in *Smith* v. *Kay* approved of. In *Grant* v. *Brown*, *Crawford* v. *Meldrum*, *Harvey* v. *Smith*, *Mathews* v. *Holmes*, and other cases, this Court considered the evidence in the Court below, and reversed the decrees there made on the facts, notwithstanding the advantages the Judges of first instance had in weighing the testimony laid before them. Judgment.

(*a*) 18 Gr. 417.

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LUNDY v. MARTIN.

Will, construction of—Legacies charged on real estate—Power of trustee and administratrix to mortgage—Property and Trusts Act (29 *Vic. ch.* 28.)

A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:

Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, 29 Vic. ch. 28, sec. 12, the widow had power to create the mortgage, and that the purchase at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed

Statement. The bill in this case was filed by *William Lundy* against *Philip S. Martin* and *Julia Caisse*, praying for payment of the amount of a mortgage created by the defendant *Julia Caisse*, and interest thereon, or in default a sale and an order for any deficiency against her, under the following circumstances:—

It appeared that on the 25th December, 1867, one *Leon Caisse*, deceased, made a will in the words following: "I will and bequeath to my children one hundred dollars each when of age, and the balance of my property to be placed in the hands of my wife during her lifetime, and to be divided among my children in proportion, according to her judgment, or at any time to give such a portion to each or either as she may think proper."

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Letters of administration, with the will annexed, were granted to the widow, and she took upon herself the execution of the trusts of the will; and, as the bill alleged, for the purpose of executing and satisfying the bequests contained in the will, she, as trustee and administratrix, made a mortgage to the plaintiff in fee simple of a certain portion of the real estate of the testator, to secure the sum of $500. This mortgage was dated 18th January, 1870.

One *Dumble* recovered a judgment against the widow for $154 "in her individual capacity," and the sheriff, under writ of *fi. fa.*, sold the equity of redemption of the widow in the same lands, and the defendant became the purchaser. The date of these proceedings was not stated.

Statement.

By deed of 24th October, 1872, the widow, as in execution of the trusts of the will, appointed the same parcel of land in fee simple to *Leon Caisse*, one of the children of the testator, and *Leon Caisse* conveyed the same in fee simple to the defendant.

The bill was filed to foreclose the defendant as purchaser of the widow's equity of redemption, and submitted that the mortgage was valid against the defendant.

The defendant's contention was, that the widow had not power under the will to mortgage the premises in question "in fee simple," and he relied upon the widow's appointment in favour of *Leon Caisse*, and the conveyance of the latter to him.

The case came on by way of motion for decree as against the defendant, *Martin*, and *pro confesso* against *Caisse*.

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

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For the plaintiff it was contended that the fee simple passed by the mortgage—at all events, the widow's life estate did; that under the will it must be taken that the fee simple passed to the widow in order to the carrying out of the trusts declared by the will. Under the words of the Property and Trusts Act, the mortgage must be held valid, and, being so, bound the estate in the hands o any subsequent purchaser, the question broadly is, what estate is necessary to have been given to the widow to enable her to carry out the will? The whole is in the nature of a trust, the property being really placed in her hands for the purpose of being disposed of as she should think proper.

Argument.

For the defendant it was argued that to authorize the mortgage the legacies must have been charged on the realty, which was not so under this will. By the will the whole estate is to be divided between the children, and the question really is, if she took any beneficial interest whatever; at all events, if she took any interest other than a mere naked power to distribute it was merely an estate for life. *Thorpe* v. *Owen* (*a*) is a clear authority for this position, and if furthermore passed to the widow than a life estate then the greatest estate she could grant was one for life. *Cole* v. *Turner* (*b*), *Mirehouse* v. *Scarfe* (*c*), *Humphreys* v. *Humphreys* (*d*), 1 *Jarman* on Wills, 76, were referred to.

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SPRAGGE, C. [after setting forth the will and the facts as above stated.]—The first question is whether the legacies to children are charged upon real estate. In *Cole* v. *Turner*, the testator gave an annuity and pecuniary legacies, and then devised "all the rest residue and remainder of his freehold, copyhold, and leasehold estates, and

(*a*) 2 Hare 607.
(*b*) 4 Russ. 376.
(*c*) 2 M. & C. 695.
(*d*) L. R. 4 Eq. 475.

certain personalty to his executors, in "fee, int rust for his four children named in the will, equally, share and share alike." Sir *John Leach* said: "The freehold, copyhold, and leasehold estates are not devised to the trustees, but the rest and residue of these estates, *i. e.*, what remains of these estates after some prior purpose is thereout satisfied. But what prior purpose could the testator here contemplate except the satisfaction of the annuity and the legacies previously given?" and he declared the annuity and legacies well charged upon the real estate.

In *Mirehouse* v. *Scarfe* (*a*), there was a direction to pay debts and legacies, and the will proceeded, "and all the rest and residue of my estate, both real and personal, lands, messuages, and tenements, I give unto *Mary Newton*, by her freely to be possessed at my decease." Lord *Cottenham* noticed that, in the gift of the residue, there was a blending of the real and personal estate, relieving the case from the question discussed in previous cases, as to whether words admitted to be sufficient to charge lands with debts ought to be held sufficient to charge them with legacies. He held the legacies charged upon real estate. Judgment.

In the case before me, the language is less technical, "the balance of my property;" this must mean the residue, and in using the general term "property", making no distinction between real and personal property, there was a blending of both. In my opinion the legacies are well charged upon the real estate.

I incline to the opinion that the wife took a beneficial interest under the will, not a mere naked power of appointment, and the case of *Thorpe* v. *Owen*, cited for the defendant, favors that view. But it is contended

(*a*) 2 M. & C. 695–707.

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that if she took a beneficial interest it was only for her life, and *Thorpe* v. *Owen* is cited to establish that position. If the Property and Trusts Act, 29 Vic. ch. 28, has the effect contended for by plaintiff's counsel, it does not seem to me to be material whether or not she had a beneficial interest for more than her life or any beneficial interest at all; *i.e.* if the money raised upon mortgage was not more than sufficient to satisfy the legacies; and upon that point there is the 16th section, which enacts that purchasers and mortgagees shall not be bound to inquire whether the powers conferred by the Act have been duly and correctly exercised. There is a similar provision in the English Act from which ours is taken. It is simply noticed by Lord *St. Leonards*, in his treatise on Real Property Acts, without any comment as to its legal effect.

Judgment.

I think the will operated as a devise to the wife of some estate, and made her a trustee, and that she took the real estate charged with the legacies. If so, whether the devise to her was in fee or for some lesser estate, she had power under section 13 of the Act, to mortgage real estate in fee for the purpose of raising money to pay off the legatees if the testator himself had an estate in fee.

I am not prepared to accede to the argument that, if the will gave her power to sell or to mortgage in fee, she must have had the fee to enable her to make a valid deed; Doe *Greatrex* v. *Homfray* (*a*), *Watson & Spence* v. *Pearson* (*b*), and *Hamilton* v. *Buckmaster* (*c*), referred to by me in *Pegley* v. *Atkinson* (*d*), are against that proposition. But, however, that may be, in my construction of the will, she took beneficially no more than a life estate; but under the Property and Trusts Act, she had power to make the mortgage that she did make.

(*a*) 6 A. & E. 266.
(*b*) 2 Ex. 581.
(*c*) L. R. 3 Eq. 323.
(*d*) 20 Gr. at 385.

Leon Caisse, by her appointment in his favour, would take, subject to the mortgage, and the defendant by his purchase from him united the rights of the purchaser at the sheriff's sale, if any, and the appointee under the will.

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The Decree will be, that the defendant is to redeem or be foreclosed; and whether he redeem or not, he is to pay such costs beyond those of an ordinary foreclosure suit, as have been occasioned by his resistance of the plaintiff's suit.

Judgment.

Aff. on appeal 23 Gr. 442

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WYLD v. LONDON, LIVERPOOL, AND GLOBE INSURANCE COMPANY.

Fire insurance.

The plaintiffs owned a stock of goods contained in a shop (No. 272) on the south side of King Street, in the city of Hamilton, and on the 9th of August applied to the local agent of the defendants to effect an insurance thereon against loss or damage by fire, when he accepted the risk and gave the usual interim receipt, subject to approval by the head office, but insuring the goods meanwhile. On the following day the plaintiffs notified the agent that they had cut openings in the second and third flats into the adjoining store (No. 273), and had removed part of their stock into these adjoining flats; whereupon the agent visited the premises, and examined the position thereof, which, with the exception of the openings already mentioned, were completely shut off one from the other. On viewing the premises, the agent told the plaintiffs that the risk had by such openings been increased, and that the premiums must be raised. The plaintiffs remarked that at any price their stock must be insured, and thereupon the agent addressed the head office in Canada, stating the fact that these cuttings had been made, and that in consequence he had told the plaintiffs the premium must be increased. In consequence of a communication from the head office, the agent subsequently issued an interim receipt, dated back to the 9th of August, for the full premium, and subsequently a policy was in due course transmitted to the defendant, on the face of which was written, "N.B.—There is an opening in the east end gable of above, through which communication is had with the adjoining house, which is occupied by one *O.* as a coal oil store," &c. During the currency of this policy the goods were destroyed by fire, when the company sought to evade payment of any loss in respect of the goods destroyed in the upper flats of No. 273, but the Court *held* that, by what had taken place, these flats had become for insurance purposes part of No. 272, and that the plaintiffs not having been guilty of any fraudulent conduct whatever, and not having concealed any fact from the company, they were entitled to have the policy so rectified as to enable them to recover the full amount of their loss to the extent covered by the policy.

Statement. The bill in this case was filed on the 26th September, 1873, by *Frederick Wyld* and *Henry William Darling* against *The Liverpool and London and Globe Insurance Company*, setting forth in detail the circumstances under which the plaintiff had effected an insurance with

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the defendants. Most of the leading facts in the case appear in the report of the Common Law trial at page 284, 33 U. C. R. It appeared that the plaintiffs applied on the 9th of August, 1871, to Mr. *Hooper*, the agent of the defendants, for an insurance on their stock contained in building No. 272, on the south side of King street, in the City of Hamilton; that $37.50, the premium demanded, was then paid, and the usual interim receipt issued, insuring meantime the plaintiffs, but subject to rejection by the defendants. Thereafter, the plaintiffs cut door-ways leading from the second and third flats of their warehouse, to the same flats of the adjoining building. (No. 273.) These flats were, in other respects, entirely cut off from the rest of this latter building. The plaintiffs on the day following, wrote to *Hooper*, notifying him that these two flats were added to the former premises, and that part of their stock was then in these new flats. On the same day, *Hooper* came to the premises, saw the openings, found some of the stock in the added premises, and told the plaintiffs that thereby the former risk was increased, and that the rate must be increased; subsequently to that, an additional cheque for $22.50 was paid by the plaintiffs to *Hooper*, and then another receipt was given for $60, being the whole amount of premium paid, which was dated 9th of August, 1871. Thereafter, the usual policy issued dated the same day. The prayer of the bill was that the policy so issued, and dated the 9th of August, 1871, might be amended by inserting therein appropriate words shewing that it was intended to and did cover the goods in the two upper flats of No. 273, and that the defendants might be restrained from pleading at law that the policy covered only the goods contained in No. 272; and that they might be ordered to strike out the pleas raising such defence.

Statement.

The cause was carried down for hearing at the sittings of the Court at Han[illegible]n in the Spring of 1874, when

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Mr. *Hooper* was examined as a witness for the plaintiffs, and swore that he thought the receipt and policy covered the stock in both buildings; that he always thought he was insuring the whole stock; that he thought he was covering the stock in both buildings, and so intended it. The plaintiff *Darling*, and his managing clerk, *Thomas John Jermyn*, swore that they informed *Hooper* that they must have the stock insured at any cost.

Statement.

George F. C. Smith, the resident Secretary and Director of the defendants in Canada, (at Montreal) was examined on the part of the defendants, and he corroborated the statement of the bill as to the duties and powers of the agent *Hooper* to grant interim receipts subject to approval or rejection by the Montreal office, but that he had no power to grant a policy of insurance; that when this application was made he knew nothing about the adjoining building. He said: "I dare say I knew it was a coal oil store, but I did not know of the openings between the buildings; the letter of the 29th of August was the first and only intimation of this change."

This letter, as stated in the case at law, was written by *Hooper* to Mr. *Smith*, in which he informs him that since sending in their application of the 9th of August, the assured had "cut an opening into the building adjoining on the east side, formerly occupied by *Williams' Canada Oil Company*. The lower portion is now occupied by one *Onyons* as a coal oil store," &c. Mr *Smith* further stated in evidence that he had made the memorandum on the policy as to the opening having been cut in the gable of the house (272) "for the express purpose of making it perfectly distinct and confining the risk to the house there mentioned," that is, mentioned in the policy.

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Mr. *Blake*, Q. C., and Mr. *E. Martin*, for the plaintiffs, contended that on the issuing of the receipt for $60 premium, the Company became contractors for an insurance on the whole of the stock, although partly in the old and partly in the new or added premises, and the effect of the policy was to continue this agreement. Here there was no declining of the risk, nor was there any notice given of a refusal to continue the insurance. The conduct of the company, in fact, amounted to an affirmance of the conditional agreement entered into by the plaintiffs with *Hooper*. The money was never refunded, and it would be attended with great danger to the community to allow companies to lie by until a loss occurred and then repudiate the acts of their agents. What passed between *Hooper* and the plaintiffs formed the contract between the parties. Under such circumstances the company cannot send up a policy receipt and be heard to say, "Although we do not decline the risk, still we send you such a policy as virtually alters the whole agreement." The plaintiffs have a right to be placed now in the same position as if the application for insurance contained all the information embraced in the letter of the plaintiffs notifying *Hooper* of the change in the premises. The agent was informed that the plaintiffs desired to insure all "their stock" and he assumed, on the part of his principals, the whole risk with notice of the position of the premises; and notice to the agent in such a case must be considered notice to the principal. The plaintiffs, in no view of the matter, can be held responsible for what *Hooper* told his employers—they can only be responsible for what they informed *Hooper* of.

Argument.

Mr. *Moss*, Q. C., and Mr. *Bruce*, for the defendants. This is a bill in reality to reform the contract entered into between the parties. To effect this the plaintiffs must shew a final agreement between the parties and a mutual mistake of both. Here there is no agreement

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between the plaintiffs and defendants; *Hooper's* power to bind the company being only conditional. There can be no dispute as to this, as the receipt shews what powers and authorities were assigned by the company to their local agents. The evidence here, as well as in the action at law, shews that an application had been sent in in July, 1871, for an insurance on the stock in No. 272 at 50c. in the $, but that was rejected and the interim receipt cancelled; but that still was for an insurance of stock in a store—a particular store; and the application on the 9th of August was in respect of goods in the same building. The only question that could arise was as to the building, none whatever could exist as to the stock. The letter of the 10th of August does not state that the plaintiffs desired to effect an insurance on the goods which had been removed from No. 272 to No. 273, and nothing definite was then done—no increased rate was then settled upon.

Argument.

The applicants must shew the statements made to be true. Here the company had not notice even by the letter, as the description of the building remained precisely the same, because the letter of the 10th of August does not assist in discovering that the intention was to insure goods in No. 273, and the letter of the 29th of August conveys no further information on that point; it merely states the fact of the openings having been made into the adjoining building used as a coal oil store; that *Hooper* had notified plaintiffs that their premium would have to be increased, he thought, to at least 1 per cent.; that the "Royal" and "Hartford" Companies had both agreed to this rate, and that "The British America" had an insurance on No. 273 in favour of Mr. *Onyons* at that rate. The company only took into consideration the increased danger to the risk by the openings having been made into the rooms immediately above the coal oil store, and the question really resolves itself into this, "What did the plaintiffs inform the company of?"

If everything material for the interests of the plaintiffs was not communicated to the company, it is the misfortune of the plaintiffs, and it can only be said in answer to any question of hardship that the plaintiffs should have read their policy, and they would have seen precisely what was insured—namely, a stock of dry goods, in a stone building, No. 272, from which openings had been recently made into No. 273. This is distinctly sworn to by Mr. *Smith* as being the object with which he made the memorandum on the face of the policy.

Mr. *Blake*, Q. C., in reply.—The bill in this case is based upon the contract made with *Hooper*, which really was never put an end to, and the defendants are estopped from saying that the policy issued after such arrangement is other than a consummation of that agreement. Then the letter of the 10th of August says in effect that the buildings had been made one. The language used is "that we have added two flats over Mr. Williams's store, next door to our former premises, and that part of our stock is now in these new flats." The stock, wherever it was, was insured, and it is only a question of where the goods comprised in such stock were situate;—that is merely a question of locality. If the agent did not communicate fully to his principals, their redress is against him—the company cannot make the plaintiffs responsible for the act of the agent; and again, there was difficulty in understanding the meaning of this policy; the agent himself swearing that he was under the impression that it carried out the agreement which he had entered into with the plaintiffs.

Argument.

In addition to the cases mentioned in the judgment, Counsel referred to and commented on *Hendrickson* v. *The Queen's Insurance Co.* (*a*), *Xenos* v. *Wickham* (*b*), *Rowe* v. *The London & Lancashire Fire Insurance Co.*

(*a*) 30 U. C. R. 108.

(*b*) L. R. 2 H. L. 296.

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(*a*), *Somers* v. *The Athenæum* (*b*), *Cumberland Valley Mutual Protection Co.* v. *Schell* (*c*), *Blakeley* v. *The Niagara District Mutual Insurance Co.* (*d*), *Laidlaw* v. *The Liverpool & London Insurance Co.* (*e*), *Foley* v. *Tabor* (*f*), *Smith* v. *Roe* (*g*), *Davies* v. *The Home District Mutual Insurance Co.* (*h*), *Beebe* v. *The Hartford Mutual Insurance Co.* (*i*), *People's Insurance Co.* v. *Spencer* (*j*).

BLAKE, V. C., [After stating the facts to the effect above set forth.]—There is no doubt whatever that, as between the plaintiffs and *Hooper*, the added flats were intended and thought to be part of building 272; and that, as between them, the receipt and policy given were intended and thought, as they stood, to cover the whole stock, whether in building 272 proper, or in that which was looked upon as an addition to it, and considered for the purposes of the insurance as a part of risk No. 272. As between these parties it is but necessary to take the statement of *Hooper* given on his examination in the cause, and no matter what may be the proper construction of the receipt or policy, the true agreement is there so plainly admitted, that it would be impossible to defeat the plaintiffs' claim by any allegation that the added flats were not covered. There is no pretence of any fraud, concealment, or impropriety on the part of the plaintiffs—all things were by them fairly disclosed to *Hooper*. In no way was he misled. He surveyed the premises for himself—satisfied himself as to the nature and position of the risk, and with his eyes open accepted it. This agent was the proper person to accept, on behalf of the defendants, the notice of the 10th of August. He had the power of modifying an

Judgment.

(*a*) 12 Gr. 311.
(*b*) 3 L. C. 61.
(*c*) 29 Penn St. 31.
(*d*) 16 Gr. 198.
(*e*) 13 Gr. 377.
(*f*) 2 F. & F. 663, 672.
(*g*) 1 L. J. U. C. N. S. 154.
(*h*) 3 E. & A. 269.
(*i*) 25 Conn. 51
(*j*) 53 Penn. 353.

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insurance or altering it, pending an application for insurance. He had, according to the evidence of Mr. *Smith*, the power to assent to the continuance of the insurance notwithstanding the change notified by the letter of the 10th of August. These notices, when served on *Hooper*, it was his duty to send to the Head Office of the defendants in Montreal. In notifying the defendants of the letter of the 10th of August, *Hooper*, in place of stating that a part of the goods was in these added flats, simply says, that the plaintiffs have cut an opening into the adjoining building, and that the rate should be increased on this account. The company charges the increased risk, and the plaintiffs pay it. Owing to the act of the agent in not writing fully to the Company, the present difficulty has arisen.

The usual rule is, that when one of two innocent persons must suffer by the fraud or negligence, or unauthorized act of a third person, he who clothed the third person with power to deceive or injure, must be the one to bear the loss. If either party must suffer by the act of the agent, it must be the party whose agent he is. These sensible observations applicable to this case, are made by Chief Justice *Woodward* in *The Columbia Insurance Company* v. *Cooper* (*a*): "No Company has a right to select and send out agents to solicit patronage and business for its benefit, and then to saddle their blunders upon its customers. If the assured combine with the agent to cheat the Company, we protect the Company; but if the assured have covenanted for nothing, and has been guilty of no misrepresentation, concealment, or fraud, the Company had better pay his loss than to attempt to make him responsible for the blunders of their own agents."

Judgment.

The tendency of the modern decisions seems to be to declare that the powers of the agent are *primâ facie* co-extensive with the business intrusted to his care, and

(*a*) 50 Penn. 331.

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will not be narrowed by limitations not communicated to the person with whom he deals.

Miller v. *The Mutual Benefit Life Insurance Company* (*a*), broadly lays it down that an Insurance Company transacting business through an agent having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent, when engaged in procuring an appli- and bound by his acts done at such time with respect thereto.

"If the agent makes a mistake as to the insurable interest, and sets it down so, the Company is estopped from denying that the interest is truly set down." *Atlantic* v. *Wright* (*b*).

Judgment.

"But insurers are not always dependent upon the representations of the insured, for the character of the risk, and they may make their contracts on their own knowledge of it; and then we do not look for representations, for they are entirely out of place. He, (the assured) is therefore not chargeable with an over estimate of the value of the property by the agent, unless he took some fraudulent part in it." *Cumberland Valley Insurance Company* v. *Schell*, (*c*).

In the *Woodbury Savings Bank* v. *Charter Oak Insurance Company* (*d*), the Court held that, in regard to whatever was incident to the business of procuring and forwarding applications, the agent could fairly be considered as representing the Company, and granted the relief sought.

In *Meadowcroft* v. *The Standard Fire Insurance Company* (*e*), proceedings were taken to recover the

(*a*) 31 Iowa 216. (*b*) 22 Ill. 46.
(*c*) 29 Penn. St. 31. (*d*) 31 Conn. 517. (*e*) 61 Penn. 91.

value of certain "pickers," insured, as contained in the first story of a four story building; as a matter of fact these pickers were in a one story building joining the four story building, and entered through a frame building and then through a large iron door. Chief Justice *Thompson*, in delivering the judgment of the Court, says, "It was not pretended on the trial, that there had been misrepresentations in regard to the location of the pickers. *Thompson*, who acted for the Company in taking the insurance, and for which he received a per centage from it, knew all about it. It is, therefore, perfectly evident that he regarded the picker room as part of the first story of the building, and acting for the Company in the matter, they are bound by his acts; after viewing the premises, in the absence of any fraud practised on him, situated as the room was, substantially a part of the first story of the main building, it was competent to cover the property in it by the assent of all parties, and not competent for either to refuse to be bound after doing so. * * * It was not very clearly shewn that the picker room was not a portion of the main building, and it could have been so held, for the parties so held it by treating it as such."

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Judgment.

"Knowledge in the agent by whom the insurance is agreed to be made, and who takes and fills out the application, of the existence of incumbrances upon the title, or of prior insurances, is knowledge on the part of the Company, * * * the Company is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent; and he having truly stated to the agent the real condition of the property, cannot be held to have made any misstatement or practised any concealment in reference to the Company." *Hodgkins* v. *Montgomery County Insurance Company* (*a*).

The following language is used in *Carter* v. *Boehm* (*b*),

(*a*) 34 Barb. 213.

(*b*) 3 Burr. 1905.

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"The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of."

Baron *Martin* ruled in *Pimm* v. *Lewis* (*a*), that the matter said to have been concealed was known to the Company, because "the mill had been used for years for the grinding of rice and chaff, and used publicly and openly; and the Company's officers resident in the neighbourhood, well knew the mill."

In *Davis* v. *The Scottish Provincial Ins. Co.* (*b*), the following language is used: "We think there is evidence that the Company, through their agent, did in fact know and had the means of knowing the nature of the plaintiff's business, and by what means and processes it was carried on, and there is not the slighest evidence of any concealment, or falsehood, or fraud having been practised by him towards the Company."

Judgment.

Sir *John Coleridge*, in giving his opinion in the Privy Council says, "Now, *Murray* was indeed their general agent; and had he merely made an unwise contract for them, or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these and many more supposable cases (collusion on the part of the person seeking to be insured, being out of the question), the Company would have been clearly bound; in all such supposed cases, he would have been acting within the scope of the authority which the Company held him out as possessing": *Montreal Insurance Company* v. *McGillivray* (*c*).

I think the authorities warrant the conclusion at which the Court of Queen's Bench arrived in the present case. They say, "The notice and knowledge in this case were the notice and knowledge of the defendants, for he, the

(*a*) 2 F. & F. 778. (*b*) 16 C. P. 176, 185, 189. (*c*) 13 Moo. at 124.

agent, was acting strictly within the line and scope of his duty on the occasion when he received the amendment to the application, and inspected the premises in pursuance of it."

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Here, the agent personally inspected the premises. He knew a portion of the goods, the subject of the insurance, was in the added flats. He accepts an insurance on the whole, whether in 272 proper, or the added flats. He designates the locality where the goods are stored, as No. 272. He accepts the increased premium because a portion of the stock is situated in the added flats. He would be, and his knowledge, as to all matters gained in the proper discharge of his duty as agent, being the knowledge of the Company, the Company is, estopped from now denying that the property insured was situated in No. 272.

Judgment.

I think the plaintiffs are entitled to a decree against the defendants with costs.

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CALVERT v. LINLEY.

Pleading—Demurrer—Parties—Rectifying deed—Volunteers—Laches.

Where a defendant demurs for want of parties, he should shew with sufficient precision the persons who ought to be parties, not necessarily by name, but in such a manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties.

By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder to her issue, but through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in the writ. The purchaser afterwards claimed the fee in the lands under the terms of the deed of gift and the conveyance from the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred on the ground that the plaintiffs had not shewn any interest in the land.

Held, the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified; and that their delay in filing the bill was not such as, under the circumstances, should deprive them of their right to relief on the ground of laches.

To such a bill it was considered that the grantor, in the deed of gift, was not a necessary party, but that the grantee must be made a party, as she had a right to insist that the deed had been correctly drawn, and the defendant had a right to have her before the Court in order to protect him from another suit.

Statement.

The bill in this case was filed in 1874, by *Rachel Emily Calvert*, *Anna Mary Flindling*, and *Robert Hopkins Calvert* against *Moses Linley* and *Enos Flindling*, the latter named defendant being a formal party only, setting forth that on the 25th May, 1853, *Absalom Smith*, and his wife *Anne Mary Smith*, in consideration of the natural love and affection they bore towards their daughter *Lydia Howell Calvert*, then the wife of *Caleb*

Calvert, granted thirty acres of land in the township of Nelson to her, her heirs and issue, to hold to her, her heirs and issue. 1874. Calvert v. Linley.

The Bill alleged that at the time of the execution of that deed, the real intention of the parties to it was, that the lands should be conveyed to *Lydia H. Calvert* for an estate for her natural life only, with a remainder in fee simple to her issue as tenants in common but through the want of skill of the person who prepared the deed, and who was not a professional man, as well as the ignorance of such matters on the part of the parties to the deed, it was by mistake prepared in the form in which it was executed.

It appeared that *Lydia H. Calvert* became a widow, and the plaintiffs were her children and the issue entitled to the remainder in the land.

Statement.

It further appeared that one *Stafford Smith* recovered judgment against *Lydia H. Calvert*, and in September, 1858, the sheriff sold her interest to the defendant *Linley* for $200, and the sheriff conveyed to him all the interest of the said *Lydia H. Calvert* in the said lands.

The 7th paragraph of the bill stated: "That at the time and place of the said sale, the said sheriff distinctly stated in the hearing of intending bidders, and in the presence and hearing of the defendant *Moses Linley*, that the interest of the said *Lydia Howell Calvert*, he was offering for sale, was only an estate in the said lands for her life, and the defendant *Moses Linley* became the purchaser in fact of only such life estate for the sum of $200, whereas at the time of the sale the fee of the lands was worth $1800, or thereabouts."

The bill further stated that after the sale *Linley* endeavoured to purchase from the plaintiffs their

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interest in the lands; and the plaintiffs alleged that *Linley* had, at the time of his purchase, full notice and knowledge that the interest of *Lydia H. Calvert* which he was purchasing was only an estate for life in reality.

And prayed to have the indenture to *Lydia H. Calvert* rectified, as also that from the sheriff to *Linley*.

The defendant *Linley* demurred, because the plaintiffs did not shew that they had nor how they had any interest in the lands mentioned in the bill, and that there were not proper parties to the said bill, nor any person or persons, party or parties thereto who represented all the persons interested in the matters to which the bill relates; and that the plaintiffs, especially after their laches, had not made a case to entitle them to relief.

Argument.

Mr. *R. Martin*, in support of the demurrer, contended that the plaintiffs, being volunteers, could not obtain any relief, citing *Rose* v. *Fox* (*a*). There having been an absolute conveyance to Mrs. *Calvert* in fee, the whole interest in the lands passed to the defendant under the sheriff's deed. It is not shewn that there was any bargain entered into between Mrs. *Calvert* and her parents, the bill merely alleges that the grantor intended to do differently from what he has done; for all that appears he may have changed his mind before putting his hand to the conveyance; and even the bill itself does not allege that there was any expressed intention of doing otherwise than he has done.

The notice stated to have been given at the sheriff's sale is not sufficient to fix the purchaser with notice of the facts relied on by the bill. It was merely stated by the sheriff that he was putting up and selling a life estate only.

DeHoghton v. *Money* (*b*), is a strong case to show

(*a*) 13 Gr. 683. (*b*) L. R. 2 Ch. 164.

how strictly a party will be held to his pleading, and *Livingstone* v. *Acre* (*a*), was a case between rival claimants. The Court will not in such a case interfere in favour of the volunteers; besides, in this case the great delay of the plaintiffs is fatal to them, they having lain by since 1858. 1874. Calvert v. Linley

Mr. *Ferguson*, contra. The demurrer here does not shew who should be made parties in addition to those already before the Court. The settlor has clearly no interest, and under any circumstances the sheriff would not be a proper party. *Fitzgibbon* v. *Duggan* (*b*), decides distinctly that the sheriff was at fault in not having stated what the interest was that he was there about to sell. It is stated in the bill that the defendant went to the plaintiffs after the sheriff's sale and proposed to buy their interests in the land, whatever they were; and it is also alleged that the plaintiffs have only lately become aware of any defect existing in the deed under which they claim; they knew, of course, that *Linley* had purchased the interest of their mother, and during her lifetime they were not interested in any way, they thought. As to the plaintiffs being volunteers, it seems clear that under the statements in this bill the plaintiffs are entitled to relief, as prayed against the defendants. Argument.

Mr. *R. Martin* in reply. *Tasker* v. *Small* (*c*), and *Townend* v. *Toker* (*d*), are cases to shew that these plaintiffs have no *locus standi* in Court. If this were a suit by the children against their mother, alleging that by a mistake in the conveyance to her she had taken a larger interest in the property than it was intended she should have, the children would have no *locus standi* against their mother because they are mere volunteers; and this objection applies with greater

(*a*) 5 Gr. 610.
(*b*) 11 Gr. 188.
(*c*) 3 M. & C. 63.
(*d*) 36 L. J. Ch. 608.

1874. force when the proceeding is against a person claiming under her.

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PROUDFOOT, V. C.—[After stating the facts as above.] I do not think the demurrer specifies with sufficient precision the persons who ought to be parties. Lord *Redesdale* (*a*), says, that it must shew who are the proper parties; not indeed by name, for that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill and enable him to amend by adding the proper parties.

The form is taken from Mr. *Lewis's* book on Equity Pleadings, but was probably copied there from some case in which the language of the demurrer, read with the statements in the Bill, pointed out who were the parties intended. In fact, the ground of demurrer thus stated is not applicable here, as it objects to the absence of those *who represent* all the persons interested, while the objection in reality is to the absence of those persons themselves.

Judgment.

The defendant demurs *ore tenus*, however, that the grantors, in the deed to Mrs. *Calvert*, and Mrs. *Calvert* herself, are necessary parties. I do not think the grantors are necessary parties, but that Mrs. *Calvert* is a necessary party. It is stated that the fee was vested in her, that her beneficial interest was only a life estate, and it is charged that only this life estate was sold to the defendant. It is obvious then that Mrs. *Calvert* ought to have an opportunity of shewing that there was no mistake, and that she herself is entitled to the remainder in fee; and the defendant is entitled to have her a party that he may be protected from another suit.

The principal questions discussed on the argument, however, were, whether the plaintiffs being volunteers had

(*a*) Pl. 208.

any *locus standi* for correcting the deed, and whether notice to the defendant was sufficiently charged. 1874.

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Had the object of the Bill been to compel a rectification of the deed by the grantors, so as to take out of them a larger or different estate from that actually conveyed, then the fact of the plaintiffs being volunteers would probably have been fatal to the suit. But that is not this case. No relief is sought against the grantors, the whole estate has passed from them, and the result of the suit can in no manner affect them. It is in substance a suit against a volunteer, (assuming for the moment that defendant had notice), like themselves, and I do not know of any rule that would prevent the plaintiffs from proving, if they are able, that they are entitled to an interest in the land.

In *Thompson* v. *Whitmore* (*a*), *Wood*, V. C., held that a volunteer was entitled to file a bill stating that trusts had been erroneously declared contrary to the intention of the parties, and on making out his case to have the error rectified, or ,as it was put by Mr. *Giffard arguendo*, if *A.* transfers a fund to trustees meaning it to be in trust for *B.*, a volunteer, and the declaration of trust is drawn, by mistake, in favor of *C.*, the Court would not carry back the fund by a resulting trust to *A.*, but would rectify the declaration of trust. In *Dickinson* v. *Burrell* (*b*), the Master of the Rolls held that, assuming a voluntary deed to be complete, *bonâ fide* and valid, and to be unaffected by any statutory disability, there was no distinction between such a deed and one executed for valuable consideration. Judgment.

Ross v *Fox* (*c*), which was cited in argument, is an instance of the familiar class of cases in which equity will not interfere in favor of a volunteer

(*a*) 1 J. & H. 268. (*b*) L. R. 1 Eq. 337. (*c*) 13 Grant 683.

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against a grantor or contractor, and had the allegation in the case now before me been that *Smith* and his wife had by the deed granted only a life estate when they intended to grant the fee, and sought to compel them to convey the fee, then *Ross* v. *Fox* would have been strictly applicable, but it has no application to the case made by this bill.

Livingstone v. *Acre* (*a*), which was also cited shews that purchasers for value cannot enforce actively as plaintiffs what might avail them as a defence, but gives no support to this demurrer.

It does not seem to me that the mistake alleged having occurred in stating the limitations in the deed, and not in an express declaration of trust, makes any material difference; and I hold, therefore, that this ground of demurrer fails.

Judgment.

It was argued, however, that the Court will not interfere against a purchaser for value without notice, and that the plaintiffs should therefore have charged such notice as would affect the conscience of the defendant, so as to render it unjust and inequitable in him to hold the estate.

I agree that, usually, the Court will not interfere against such a purchaser. But there is nothing in this bill to shew that the defendant is a purchaser without notice, and it is a defence which is not available to the defendant unless he sets it up in his answer: *Phillips* v. *Phillips* (*b*).

That defence may be set up in this case, and, therefore, it is not necessary to charge notice in the bill: *Fisher*

(*a*) 15 Grant 610.

(*b*) 4 D. F. J. 208.

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on mortgages, S. 1173, *Hughes* v. *Garner* (*a*.) The subject was discussed by *Strong*, V. C., in *Ryckman* v. *Canada Life Assurance Company* (*b*), in which he held that the case was not one to which such a defence was applicable, and proceeded: "But even if the subject of the impeached sale had been one to which the defence of purchase for value without notice was applicable the bill would not, in my judgment, have been demurrable on the ground of an omission to allege notice. A plaintiff is only bound to state in his bill that which he is required to prove, and *primâ facie* he is in no case held to prove notice: he is only called upon to do so when the defendant sets up the equitable defence of purchase for value, and then, as the plaintiff cannot give evidence of notice without having put it in issue, he must, if he has not originally alleged notice in his bill, amend for the purpose of introducing a charge of notice by way of replication or avoidance of the defence."

Judgment.

In this case I think the charge of notice is defective, but as it was not essential to the plaintiff's case, the statement in regard to it may be rejected as surplusage.

It was also argued that the plaintiffs' right could only be established by some instrument in writing, which should have been stated in the bill, and that they were barred by laches.

It is quite clear that *mistake* may be proved by parol evidence, whether the purpose of the suit be to rectify or rescind an agreement (*c*). And, although it may be quite true that the plaintiffs could have filed a bill in 1858, I do not think the delay, under the circumstances, so great as to bar their title to relief. Thus it has been

(*a*) 2 Y. & C. 329. (*b*) 17 Gr. 550.
(*c*) Kerr, on Fraud and Mistake, 347.

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held that a remainderman, desiring to set aside a sale for fraud, is not barred by laches if he wait until the death sf the tenant for life: *Bowen* v. *Evans* (*a*).

I, therefore, overrule the demurrer on record, and allow that *ore tenus*, for want of Mrs. *Calvert* as a party, No costs to either party. Liberty to amend.

Boulton v. Bethune.*

Specific performance—Title satisfactory to solicitor.

On the sale of a house and lot it was stipulated that the vendor should make out a good title to the satisfaction of the solicitors of the purchaser. It appeared that the original owner of the property had erected the house before any streets had been laid out. Subsequently a street was laid out, which at a point opposite the house was only sixty feet wide. Afterwards the owner of adjoining lands continued this street, but laid it out sixty-six feet wide.

Held, That the difficulty that might arise at a future date of proving the facts as to the laying out of the street was a sufficient ground to warrant the solicitors in refusing to certify as to the goodness of the title; and that in any event the solicitors, under the agreement which had been made, had, so long as they acted in good faith, an absolute power of rejecting the title, and were not in objecting to the title restricted to making only the usual objections to title.

Statement.

The bill in this case, filed 11th March, 1873, stated that the plaintiff executed to the defendant a lease of the premises in question, for a period of seven months from the 23rd October, 1872; that this instrument contained an agreement that, at or before the determination of the term created thereby, so soon as a satisfactory title to the lands in question was made by the plaintiff, the defend-

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* This case has been reported on re-hearing ante page 110. The present judgment should have been then printed, but it was not until recently received by the reporter.

(*a*) 1 J. & L. 2 65.

1874.

Boulton v. Bethune.

ant should purchase them for $4,000; that if a satisfactory title were made the term created by the lease should cease; that a good title had been made in every respect; that in January last the defendant's solicitors, being satisfied with the title, prepared a conveyance of the premises, which was executed ready to be delivered on payment of the purchase money; that the defendant, although applied to, refused to carry out the agreement for purchase; and the bill asked that performance of the contract might be enforced against the defendant by this Court.

The defendant answered that the terms of the agreement of purchase were as follows: "And it is hereby understood, contracted, and agreed by and between the parties to these presents, that at or before the determination of the term hereby conveyed, as soon as a title to the said lands and premises satisfactory to the solicitors of the said lessee can be afforded to the said lessee by the said lessor, that the said lessor shall sell and convey to the said lessee and the said lessee shall purchase from the said lessor the said lands, at the price of $4,000 in cash, and if such title can be given before the determination of the term hereby conveyed, then these presents shall be no longer of any force or effect; and if, upon the determination of the said term, no such title as aforesaid can be given, then the said contract of sale and purchase herein shall be wholly void; and it is hereby declared that time is of the essence of this contract;" that in January the plaintiff could not make out a title satisfactory to the defendant's solicitors, of which the plaintiff being made aware, the agreement was by mutual consent abandoned; that the plaintiff admitted his inability to make a better title; that the plaintiff had not made, and could not make, a title to the premises, and therefore the contract could not be enforced.

Statement.

The cause having been put at issue, was taken down

1874. for examination of witnesses and hearing at the sittings of the Court in November, 1873.

Boulton v. Bethune.

Mr. *Attorney-General Mowat*, for the plaintiff, contended that a mere arbitrary discretion of the solicitors of the defendant was not what was to govern the parties; but that, notwithstanding such stipulation, when all the parties were acting in good faith, the plaintiff was entitled to a reference. He referred, amongst other cases, to *Lord* v. *Stephens* (*a*).

Mr. *Bethune*, for the defendant.

BLAKE, V. C.—[After stating the facts as above. The bill, in short, alleges an agreement to purchase, an acceptance of title by the defendant, a tender of a conveyance and a refusal to complete. And the defendant answers: the title was never accepted; it was to have been made satisfactory to my solicitors, who have certified against it, and therefore I cannot be called upon to perform the agreement. The evidence does not establish the acceptance of the title by the solicitors of the defendant; what they did which may have been looked upon as such acceptance, when explained by Mr. *Francis*, simply amounts to the taking of certain proceedings in the way of perfecting the title and facilitating the closing of the matter, based upon the plaintiff being able to make out a good title. Some of the steps resulted from the desire of the plaintiff to remove, at the earliest moment, everything which might, when the title was accepted, cause delay in the payment of the purchase money. But although this point be found against the plaintiff, I think, if the contract were the ordinary one for sale and purchase, although the title has not been accepted, the plaintiff would be entitled to a reference to the Master, to ascertain whether or not such title had been made, withhi the time limited by the agreement.

Judgment.

(*a*) 1 Y. & C. 222.

1874.

Boulton v. Bethune.

I have therefore further to consider the effect of the stipulation upon which the defendant relies, as taking the case from the jurisdiction of this Court and leaving it with his solicitors. I am of opinion that the title must be made out to the satisfaction of the solicitors of the defendant. That is the contract of the parties, and can I now make for them an agreement, whereby another tribunal is to be selected, as the one to dispose of this question between them? The proposed purchaser may reasonably say, "I am prepared to purchase,—the title must be satisfactory, and as I do not desire the delays, difficulties, and expense which may result from a litigation, in case there be a difference between our solicitors on the question of title, I will guard myself against that, by insisting upon the term being inserted in our agreement that the sale shall not take place until a title to the said lands and premises, satisfactory to the solicitors of the said lessee, can be afforded by the said lessor." Some effect should be given to that which was the intention of the parties as evidenced by these words, which seem to say distinctly, "In place of asking for the ordinary protection of a good title, I desire to provide a special means for solving this question." Upon no principle that I can discover am I at liberty to disregard what the defendant stipulated for, and upon which he now relies, nor can I strike out of the agreement that which may have been a main inducement to him in making the agreement for this purchase. Doubtless this right must not be abused. The defendant and his solicitors must act in good faith, but doing so the Court cannot interfere with the conclusion that may be arrived at in respect of the title.

Judgment.

Here the solicitors to whom this title is to be satisfactory, shew the following reason for objecting to it:—"The premises are situate to the west of Beverley Street, on the south side of Charles Street.

1874.

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The proprietor who owned the property laid it out with streets; but, before doing so, the house in question, it is alleged, was built; opposite to this house the street is less than sixty feet wide; to the west of the house the street is sixty-six feet in width. Proceedings may be taken fifteen or twenty years hence, either in this Court, or the Common Law Courts, to have the street continued at the width of sixty-six feet throughout its whole length. The result of such proceedings being successful would be to cause the removal of a material part of the house in question. It may be, that at the present moment we can procure evidence to establish such a state of facts as would enable us to defeat any steps that may be taken to open out this street to a greater width than the sixty feet opposite the premises in question. But how, "say the solicitors," can we be sure that this evidence will be forthcoming years hence; and, with this uncertainty hanging over the title, we cannot run the risk of giving a certificate to our client, which would render us liable, in case this contingency should be determined against him." This is, in my opinion, a sufficient justification for not giving the required approval of the title. The plaintiff does not, by this bill, complain that the defendant withdrew from the agreement without giving him time to make out the title, and before the seven months had elapsed, nor does he ask for any relief on such ground; he simply alleges, not that a title satisfactory to the defendant's solicitors, but, that a good title, has been made. I find that such title as the defendant was entitled to call for was not made in March last, when the bill was filed, or even at the examination and hearing of the cause, and therefore that the plaintiff's case fails.

Judgment.

In *Lord* v. *Stephens* (*a*), cited for the plaintiff, the clause ran, "in case the title shall not be satisfactory to the said *Richard Stephens*, his heirs or assigns, or his

(*a*) Sugden's Vendors and Purchasers, 14th ed, p. 211, 317, and 654.

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Boulton v. Bethune.

or their counsel, these presents shall be void to all intents and purposes." It was, on behalf of the defendant resisting specific performance, argued that the agreement did not contain the usual stipulation, that the plaintiff should make a good title, but that in case the title should not be satisfactory to the defendant, the agreement should be void; to which the plaintiff replied, as to the concluding passage in the contract it clearly does not mean that the defendant shall be at liberty to take an absurd or capricious objection to the title. The Lord Chief Baron disposes of the point in the following words: "With respect to what has been said relative to the form of contract, I cannot construe it to mean that the contract shall be binding on one party and not on the other. I think it must mean that the contract shall be at an end in case there was a reasonable difficulty as to the title." But in that case the title was, virtually, to be made satisfactory to the party himself; in the present it is to be to the satisfaction of third persons, in whom apparently both have confidence. If the parties to a contract are at liberty to stipulate for its completion to the satisfaction of an architect or engineer, whose certificate is to be final, and the Court, as it does, holds them thereto unless fraud, which dissolves all such agreements, be shewn, I cannot see why a similar agreement may not be made when title to property is the subject of arrangement (*a*). Lord *St. Leonards's* opinion is: "A condition that if the counsel of the purchaser should be of opinion that a marketable title could not be made, the agreement should be cancelled, is a binding one." For this proposition he cites *Williams* v. *Edwards* (*b*). There the clause was: "If the counsel of the said *Francis Williams* shall be of opinion that a marketable title cannot be made by the time hereby appointed for the completion of the said purchase, this agreement shall be void and delivered up to be cancelled."

Judgment.

(*a*) 1 Y. & C. Ch. 222.

(*b*) 2 Sim. 78.

1874.

Boulton v. Bethune.

Its effect is thus disposed of by the Vice Chancellor: "The agreement was made on the 12th November, 1824: and this particular clause in the agreement I must take to be the contract both of the vendor and the purchaser. They might both think that it would be equally to their interest that the agreement should be put an end to, if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appears to be nothing unreasonable in that. There might be circumstances which might make it very proper for both parties to insert that term, and as it was the contract of both parties, this Court cannot make a new contract for them. The parties themselves have stipulated that in a given event, which happened, the agreement should be void. It appears to me therefore that * * the bill must be dismissed with costs"(*a*). If, where the word "counsel" appears in that case, you insert "solicitor," it is identical with the present. The selection of the solicitor of the purchaser in place of his counsel as the judge of the title, cannot affect the nature of the agreement. The vendor is here, as was the purchaser in *Williams* v. *Edwards*, asking to enforce an agreement which he himself has agreed should, under the circumstances that transpired, be void. The bill must he here, as it was there, dismissed with costs.

Judgment.

(*b*) See Ashton v. Wood, 3 Jur. N. S. 1164; 2 Dart's V. and P. 979; Northorpe v. Holgate, 1 Coll. 203.

1874.

Re Howey, McCallum v. Pugsley.

Real estate charged with support of widow—Subrogation of claim—Money expended in support of widow.

A testator left certain real estate which he authorized his executor, with the assent of his widow, to sell and apply the proceeds in her maintenance, and the balance to be distributed. *H.*, an adopted son of the testator, supported the widow for several years, but no sale of the lands was effected during her life. In a suit to administer the estate of the testator it was *held* that *H.* was entitled as a first charge on the real estate (there being no personalty) to be paid the amount expended in the maintenance of the widow; or, in other words, that he was entitled to be subrogated to the rights of the widow, and thereby would have had the power of calling upon the executor to exercise the authority given him to sell the real estate for payment of his claim.

This was a re-hearing, on the part of the plaintiffs, of an order pronounced by Vice-Chancellor *Strong*, on appeal from the Master's report.

Statement.

The suit was one for the administration of the estate of one *Robert Howey*, whose will, so far as concerned his real estate, was as follows:—

"I also give and devise to my said wife the full use of my homestead farm for her own use and benefit as long as she shall live, being the west half of lot number five, in the third concession of the aforesaid township of Walpole; and at the death of my said wife, I give and devise to *James Howey*, my adopted son, of the township of Walpole aforesaid, the west half of the west half of lot number five, in the township of Walpole aforesaid, and to his heirs and assigns forever. Also, the east half of the west half of the aforesaid lot number five I authorize my executors, if it be found necessary for my wife's good maintenance, (her consent being first had thereto), to sell and dispose thereof, and apply as much of the proceeds thereof to my wife's maintenance as will be necessary; and in case it be not found neces-

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sary before my wife's death, or otherwise not meeting her wish, then the same shall remain unsold until the death of my said wife, and then sold, and the proceeds or balance of said sale to be divided as follows." Then followed certain provisions in favour of some of the defendants, not necessary to refer to.

The testator's widow was infirm, bedridden, and afflicted with a loathsome disease; the rents of the farm were insufficient to support her, and the defendant, *James Howey*, supplied her with necessaries, medical attendance, &c., and he insisted that his claim in that respect constituted a charge upon the east half of the west half of said lot.

Statement.

The usual administration order was made, and in the Master's office the claim of the defendant *James Howey*, for the above necessaries, medical attendance, &c., was allowed at the sum of $640.50.

From the finding of the Master, the plaintiffs appealed, on the ground that the east half of the west half not having been sold during the widow's lifetime, and her consent to a sale not having been obtained in writing, the defendant *James Howey* had no charge upon the land in question. Their appeal was dismissed. Thereupon the plaintiffs re-heard the order pronounced by the Vice-Chancellor.

Mr. *Read*, Q. C., for plaintiffs. The maintenance in this case, if it was afforded, took place after the death of the testator, and there never was any application against the estate or the interest of the widow therein until after her decease. It is evident from the circumstances that *Howey* credited the widow alone and did not look to the estate of the testator for re-payment in any degree. The testator authorized a sale for the maintenance of the widow, but this it is submitted could

only take place during her lifetime, as it was to be effected at her instance or on her consent. [PROUDFOOT, V. C.—Suppose a person has a power of appointment, and, having such power, does not choose to exercise it, in such a case could not his creditor call upon him to do so. Here the testator did not leave the whole of these lands to the devisees, but left them burthened with the support of the widow; and now if the devisees obtain them freed from this charge they would be actually receiving more than the testator intended they should obtain.] *Howey* should have applied for an exercise of the power of sale during the lifetime of the widow, and have procured her consent to a sale: it is too late now to assert his claim against these lands.

Mr. *Wardrop*, for infants, in the same interest as the plaintiffs.

Argument.

Mr. *Hoskin*, Q. C., for defendant *James Howey*. There is no objection to the Master's finding as to the *quantum* of allowance, but broadly to any sum whatever being allowed to this defendant by way of compensation for all his care and trouble during several years of the widow's life, as well as the outlay in the care and maintenance of the widow, and which the evidence clearly proves was an extremely onerous task owing to her state of health. The intention of the testator, as clearly evidenced by the will, was to charge the lands with the support of the widow, and this defendant having seen fit to advance money for that purpose has a claim to be subrogated to her rights: *Deare* v. *Soutten* (*a*), *James* v. *Morris* (*b*), *Marlow* v. *Pitfield* (*c*), *Harris* v. *Lee* (*d*), and *Ex parte Williamson* (*e*) were referred to.

(*a*) L. R. 9 Eq. 151.
(*b*) 1 D. & S. 218.
(*c*) 1 P. W. 558.
(*d*) 1 P. W. 482.
(*e*) L. R. 5 Ch., at p. 313.

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BLAKE, V. C.—I am of opinion that in this will a prominent matter in the mind of the testator was, to provide for the support of his widow. In some way this was to be effected. The support was made a charge on the lot in question. If the annual proceeds were sufficient, well and good; but if not, the lot must be sold, and the other beneficiaries, who are interested in the estate only after the support of the widow, must suffer the consequence of the insufficiency of the estate to answer this demand, and the charges in their favor.

The claim here made is in respect of necessaries actually supplied to one standing peculiarly in need of them, and having a provision to answer them under the will.

I think, under the authorities cited to us, and referred to by my brother *Proudfoot*, the person so dealing with the widow is entitled to have his demand made good to him out of the provision made for her under the will.

Judgment.

I think the order made should be affirmed with costs.

PROUDFOOT, V. C.—On the 16th January, 1873, an order was made for the administration of the real and personal estate of *Robert Howey*, directing the usual accounts, and in addition, "an inquiry whether the defendant *James Howey* is entitled to any lien or charge, and if so for what amount, upon any and what part of the testator's real estate, for the maintenance and support of the testator's widow,"

Robert Howey, by will, appointed the defendant *Pugsley* his sole executor to pay all his just debts and funeral expenses, and the legacies given out of his estate. After payment of his debts and funeral expenses, he gave to his wife all his personal property, notes of hand, household furniture, and wearing apparel, to her

own use and benefit. He also gave and devised to his wife the full use of his house and farm for her own use and benefit as long as she should live, being the west half of lot number five, in the third concession of Walpole; and at the death of his wife he gave and devised to *James Howey*, his adopted son, the west half of the west half of said lot, and to his heirs and assigns forever. Also, the east half of the west half of the said lot he authorized his executor, "if it be found necessary for my wife's good maintenance, (her consent being first had thereto), to sell and dispose thereof, and apply so much of the proceeds thereof to my wife's maintenance as will be necessary; and in case it be not found necessary before my wife's death, or otherwise not meeting her wish, then the same shall remain unsold until the death of my said wife, and then sold and the proceeds or balance of said sale to be divided as follows": viz., $200 for the use of the cause of religion as professed by the Close Communion Baptist Church, &c., and the balance equally amongst the children of *Abraham Anderson*, and to *Sarah McCallum*, share and share alike. Judgment.

The testator died in September, 1866, his widow in April, 1871.

At the time of the testator's death, and till her own, the widow was suffering from a disagreeable and loathsome complaint, which rendered her very infirm, bodily and mentally, and she required constant care and attendance.

In 1867 and part of 1868 she resided with her sister, Mrs. *Bowman*, who was paid for her support by *James Howey*; and from about 1st October, 1868, she lived with *James Howey* till her death, except for a period of three months, when she lived with her brother, *James Ross*, who also was paid for her support by *James Howey*.

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Re Howey. McCallum v. Pugsley.

The Master has found that after giving credit for the rent of the farm devised to the widow for life, a sum of $640.50 is due to *James Howey* for such maintenance and support, and finds that he is entitled to a lien or charge upon the east half of the west half of said lot five for that amount.

The report was appealed from by the plaintiffs on several grounds: 1st. That *James Howey* should not have been allowed to rank as a creditor on the estate, as his claim was against the widow or her estate, and not a claim against the testator's estate, as the power given by the will to the executor was never exercised, and was for services rendered voluntarily, and as the income from the lands was insufficient for the maintenance. 3rd. That *James Howey* should not have been reported entitled to a lien on the land. The other grounds are not now of importance.

Judgment.

The appeal was dismissed with costs by *Strong*, V. C., and that order is now brought on for re-hearing.

The counsel for the appellants candidly admitted that the question of the necessity of the expenditure for maintenance, and the amount, being matters depending upon conflicting evidence produced before the Master, must be considered as concluded by the report.

The question discussed on the re-hearing was, whether the creditor of the widow could not call upon the executor to do what the widow might have called upon him to do.

I think the testator, by his will, gave to his wife an absolute right to maintenance, to be measured only by the necessity for it, and not dependent on the discretion of the executor.

As he had given her a life estate in the whole of the

land, it is obvious why he required her consent to any sale in her life time; but he evidently contemplated a sale taking place after her death for payment of maintenance previously incurred, as it is not the whole proceeds that are to be divided among the residuary legatees, but only the balance,—language which would be without meaning, unless construed in this manner.

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Re Howey, McCallum. v. Pugsley.

This is a case of a blended trust and power, where the trust is to be effected by the execution of the power, which is in that case imperative; and if the donee refuse to execute it, or die without having executed it, equity, on the general rule that the trust is the land, will carry the trust into execution at the expense of the remainderman (*a*).

The claim of *James Howey* is a most meritorious one. The widow, for a considerable period before her death, was quite helpless, and was incapable of expressing a wish so as to be intelligible to strangers. *James* spent considerable sums for her maintenance, and endeavoured to get her brother to keep her, which, after a three months' trial, he refused to do. There was no obligation on this adopted son greater than on the brother and sister to support the helpless invalid. But he seems to have done so, and provided all the care and attention requisite for her; and I think we may safely imply an assignment from the widow of her right under the will. This is no stronger implication than was made in *Jenner* v. *Warren* (*b*), where money was advanced to purchase necessaries for a deserted wife, and an assignment was implied from the tradesman furnishing the necessaries to the person advancing the money of the right of action against the husband. See also *Deare* v. *Soutten* (*c*), and Ex parte *Williamson* (*d*).

Judgment.

(*a*) *Sug.* on Powers, (7th Ed.), 2, 158.
(*b*) 3 D. F. & J. 45.
(*c*) L. R. 9 Eq. 151.
(*d*) L. R. 5 Ch. 313.

1874.

Re Howey McCallum, v. Pugsley.

Had I been unable to arrive at this conclusion, the appeal should have stood over to come on with the hearing on further directions; for it would be quite impossible to give to the residuary legatees the sum that has been found necessary for the maintenance of the widow; and so much of the proceeds of the sale as would cover that would then have been paid into Court, and a representative of the widow appointed, to whom the money might be paid to discharge this debt.

Judgment.

The order appealed from should, in my opinion, be affirmed with costs.

The CHANCELLOR concurred in the views expressed by the Vice-Chancellors.

Order affirmed with costs.

RE THIRKELL.—PERRIN v. WOOD.

Assignment of subsequently acquired chattels—Description and locality of property—Insolvency.

Although the rule at law is, that an instrument intended either to assign or charge chattels of which the assignor has not the possession, is imperfect without some subsequent act of the assignor, the same is not the case in equity, neither does it prevail in insolvency proceedings, where the Court is bound to work out the equities between the parties: therefore where on a sale by a partner of his interest in the partnership effects to his co-partner, and for the purpose of securing the amount due on such purchase, the purchaser *T.* executed a mortgage to the vendor on "all the stock in trade, consisting of drugs, chemicals, seeds, * * and in fact everything in stock or held by the late firm of *T. & P.* in connection with their business * * and now in possession of the said party of the first part [the purchaser] in or upon the shop and premises occupied by him on the north side of Kent street in * * and also any stock purchased hereafter by the said *W. J. T.*, and which may be in his possession upon said premises during the continuance of this security or any renewal thereof:" afterwards *T.* executed a renewal of this mortgage, describing the property substantially as above, and as

being in his possession on the date of the first mortgage, and "also any stock purchased by the said mortgagor thereafter and now in his possession; and also any stock purchased hereafter by the said mortgagor, and which may be in his possession, upon the said premises at any time during the continuance of this security or any renewal thereof."

1874.

Re Thirkell Perrin v. Wood.

Held (1.) that stock acquired by *T.* after the execution of such second mortgage, as well as that acquired by him after the date of the first and before the execution of the second mortgage, was bound by such second mortgage, and that the mortgagee was entitled to retain the same against the assignee in insolvency of the mortgagor: and (2.) that the property was sufficiently described in the mortgage both as to its nature and locality.

In this matter, a claim was put in by *Perrin* in insolvency, claiming the stock in trade of the insolvent by virtue of a chattel mortgage executed by the latter to *Perrin*, which claim was resisted by *Wood*, who was the assignee in insolvency of *Thirkell*. The facts are stated in the judgment of the County Court Judge of the County of Victoria, before whom the matter first came, which was as follows:

Statement.

"The plaintiff files his petition under section 50 of the Insolvent Act, to enforce his chattel mortgage upon the goods of the insolvent.

"It appears that the plaintiff and the insolvent, prior to February, 1873, carried on business in partnership as druggists in Lindsay; that on the first day of that month, plaintiff retired from the firm, and sold his interest in the business to the insolvent for $4,240, to secure which sum the insolvent gave him a chattel mortgage upon the stock in trade, &c., described as follows: 'All and singular the goods, chattels, furniture, and household stuff, stock in trade, particularly mentioned and described hereafter, that is to say, all the stock in trade, consisting of drugs, chemicals, seeds, medicines, bottles, furniture, shop-fixtures, and in fact everything in stock, or held by the late firm of *Thirkell & Perrin*, in connection with their business, and which property, goods, chattels,

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and effects are now in the possession of the said party of the first part, [the insolvent,] in, and upon the shop and premises occupied by him, on the north side of Kent street, in the town of Lindsay, in the County of Victoria; and also any stock purchased hereafter by the said *William J. Thirkell*, and which may be in his possession upon said premises, at any time during the continuance of this security or any renewal thereof.'

"This mortgage was duly filed, but through negligence was not renewed at the end of the year; the insolvent then, upon the ninth day of February, 1874, gave plaintiff another chattel mortgage for $2,160, being the balance unpaid upon the mortgage of February, 1873. The description of the chattels is a verbatim copy of that in the former mortgage.

Statement.

"This mortgage was not filed until the fifth day of March, and so was inoperative as against creditors. As it was the intention of the parties to include in this mortgage all the goods then in the shop, which it did not, it was treated as a nullity, and another mortgage was executed upon the 23rd day of March, 1874, and duly filed; the description of the chattels in this mortgage is as follows: 'All and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described; all the stock in trade, consisting of drugs, chemicals, seeds, medicines, bottles, furniture, shop-fixtures, and in fact everything in stock or held by the mortgagor and in his possession, on the 1st day of February, 1873, in and upon the shop and premises occupied by him on the north side of Kent street, in the town of Lindsay, in the County of Victoria; also, any stock purchased by the said mortgagor thereafter, and now in his possession; and, also, any stock purchased hereafter by the said mortgagor, and which may be in his possession, upon the said premises at any time during the continuance of this security or any renewal thereof.'

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"It is this mortgage that I am asked to enforce.

"For the defendant, it is urged: (1.) That the mortgagor was in fact insolvent when it was made; and that it is fraudulent and void as against creditors. (2.) That if the mortgage is good upon the first point, that it is bad in this—that it extends the time for payment of plaintiff's claim beyond that fixed by the first mortgage, and to this extent hinders and delays creditors. (3.) That the description of the property acquired by the mortgagor after the 1st day of February, 1873, is insufficient. (4.) That the mortgage could not convey after acquired chattels.

"I think that the plaintiff was in a position to enforce his claim on the 23rd March, under the first mortgage; the second mortgage was not a satisfaction of the first one. By mistake, property which both parties intended should be included was left out, and the plaintiff could have filed his bill to reform it, if the mortgagor had refused so to do, or he could have enforced his first mortgage and would not have been estopped by the second one from doing so. If this is so, he was in a position to press the mortgagor for a new mortgage, and he appears to have done so; and a security got in that way is, I think, a good security as against creditors, if thirty days elapse before the person making it goes into insolvency. I do not think that there is anything in the second objection. Statement.

"As to the third objection, if it is admitted that the word 'stock,' taken in the connection in which it stands, may fairly be assumed to be the stock in trade of a druggist, the question is, whether it is sufficiently described to comply with the statute. The words are: 'Any stock purchased by the said mortgagor thereafter, and now in his possession.' This is as nearly as possible the description given of the blacksmith's tools in

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Rose v. *Scott* (*a*). 'All the blacksmith's tools now in the possession of the said party of the first part," and that was held to be an insufficient description. I think that neither *Powell* v. *The Bank of Upper Canada* (*b*), nor *Fraser* v. *The Bank of Toronto* (*c*), reach this case. In both those cases the goods were scheduled and pretty well described as in certain apartments, although the houses in which the apartments were situated were not named; but here the property is not scheduled nor located. There is nothing by which the articles can be 'readily and easily known and distinguished.'

"The remaining question is as to the stock purchased subsequent to the execution of the mortgage; no such question can arise here as to the meaning of the word stock, as there did in *Wilson* v. *Kerr* (*d*). The only question is, can a bill of sale convey after-acquired chattels?

Statement.

"There are numerous cases in our own Common Law Courts, in which it is held that it cannot. In *Cummings* v. *Morgan* (*e*) the words of the judgment are, 'A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein.'"

"In this Court, however, the whole law must, I think, be administered. But even if this were a question in the County Court, I apprehend, that since the Administration of Justice Act, it would be my duty to inquire what would be the rule in equity. I think that this is clearly laid down in *Holroyd* v. *Marshall*, in the House of Lords, which I find reported in 33 L. J. N. S. 193, in which is laid down as applicable to such cases, the

(*a*) 17 U. C. R. 387.
(*b*) 11 U. C. C. P. 303.
(*c*) 19 U. C. R. 381.
(*d*) 17 U. C. R. 168.
(*e*) 12 U. C. R. 565.

principle that a vendor of an estate or chattel which he does not at the time possess, becomes a trustee for the vendee as soon as he acquires a title to the property; and that in equity the property is then the property of the vendee. 1874. Re Thirkell. Perrin v. Wood.

"The order will be, that the mortgage be enforced as to the property in the mortgagor's possession on the 1st of February, 1873, and as to the stock purchased after the date of the mortgage, but that it be not enforced as to the other stock."

The recitals in the mortgage were as follows :—

"Whereas, the said mortgagor did, by an indenture of mortgage, dated the 9th day of February, 1874, mortgage to the mortgagee certain goods and chattels therein named and described, for securing payment of the sum of $2,160, and it was intended that the goods and chattels mentioned in said mortgage should be all the goods and chattels mentioned and described in a certain chattel mortgage made by the mortgagor to the mortgagee, and bearing date the first day of February, 1873; and also any goods and chattels which might, since the date of the said last mentioned mortgage, or during the continuance of the renewal thereof, be in the occupation of the said mortgagor. Statement.

"And, whereas, the said goods and chattels were improperly described in the said firstly mentioned mortgage, and these presents are for the purpose of declaring what goods and chattels were intended to be included in the said firstly mentioned mortgage."

From the judgment of the County Court Judge, both parties—*Perrin* and *Wood*—appealed.

Mr. *Moss*, Q. C., for *Perrin*, the mortgagee:

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As to the second class of goods, the description is sufficient. The description is in effect the same as if it had read "all the goods in the store of the mortgagor at the date of the mortgage." Such a description has always been held sufficient: *Fraser* v. *The Bank of Toronto* (*a*); *Powell* v. *The Bank of Upper Canada* (*b*). But it is said that the place where this second class of goods was at the date of the mortgage, is not specified. The *locus* of the first class is given, and the second class being goods of the same nature, and stated to be in the mortgagor's possession, it does no violence to the instrument, to construe it as meaning that all the goods were in the store: *Mathers* v. *Lynch* (*c*).

As to the third class of goods, the case of *Holroyd* v. *Marshall*, (*d*) is conclusive.

Mr. *Ewart*, for the assignee:

Argument.

The mortgage of the 23rd March, 1874, is bad altogether as a mortgage for want of consideration. It recites that it was executed for the purpose of declaring what "goods and chattels were intended to be included in the said firstly mentioned mortgage." It, therefore, confirms the mortgage of the 9th of February, and can only have validity as throwing light upon the intentions of the parties in executing that instrument, and cannot operate as a new mortgage. There is no consideration for it, as a new mortgage; the first one not being, at the date of the second, overdue, and no additional time being given for payment. It is, therefore, as a mortgage wholly voluntary, and so void.

As to the description of the second class of goods, it can only be attempted to support it by contending that

(*a*) 19 U. C. R. 381.
(*b*) 11 U. C. C. P. 303.
(*c*) 28 U. C. R. 354.
(*d*) 33 L. J. N. S. 103.

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the words used are equivalent to "all the goods, &c., in the mortgagor's store, at the date of the mortgage." But the words are not so wide. If they were intended to have such a meaning, the latter words would have been used. The words are, "And also any stock *purchased* by the said mortgagor *thereafter*, and now in his possession." Any goods not *purchased* but come into the mortgagor's store in any other way, would not be covered. Any goods purchased *previous* to the 1st of February, 1873, and arrived after that date, are not covered.

In *Rose* v. *Scott*, it is said, "It may be that the numbers mentioned in the deed, were all that the mortgagor had of the kind, but it does not say so."

The description is also bad, because no locality is given to these goods. A distinction is made between the first class of goods, which are said to be in the store, and the second, which are merely in his possession.

Argument.

In *Rose* v. *Scott*, almost precisely the same words in reference to blacksmith's tools were used, and they were held to be insufficient. This case was not cited in *Powell* v. *The Bank of Upper Canada*, otherwise, as *Hagarty*, J., said, in *Sutherland* v. *Nixon* (*b*), it might have altered the decision.

Further, it is submitted that the words, "All the stock in the store of the mortgagor," would be insufficient. The statute requires such "sufficient and full description thereof that the same may be *thereby* readily and easily known and distinguished." The object of the statute is, as stated by *Robinson*, C. J., in *Rose* v. *Scott*, to enable *third parties* to ascertain what was intended to be assigned.

The true rule is laid down by *Draper*, C. J., in *Hutch-*

(*a*) 17 U. C. R. 385.

(*b*) 21 U. C. 633. R.

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ison v. *Roberts* (*a*), and it is submitted that this Court is free to adopt it. The two leading cases against it are *Powell* v. *The Bank of Upper Canada*, and *Fraser* v. *The Bank of Toronto*. These cases were before the two Common Law Courts respectively at the same time. Judgment was given first in *Fraser* v. *The Bank of Toronto*, after consultation with the Judges of the Common Pleas, and under the erroneous impression that the Judges of that Court had made up their minds to decide in favor of the mortgage; afterwards when judgment was given in *Powell* v. *The Bank of Upper Canada*, both *Richards* and *Hagarty*, JJ., expressly based their judgment on *Fraser* v. *The Bank of Toronto*, and intimated that but for that decision, their judgment would have been the other way. See also, Mr. Justice *Hagarty's* reference to this case in *Sutherland* v. *Nixon*. Other cases have followed these two, but the preponderance of independent opinion is against them. In favour of the rule laid down in these cases, is the opinion of *Robinson*, C. J., in *Ross* v. *Conger* (*b*), *Harris* v. *The Commercial Bank* (*c*), *Fraser* v. *The Bank of Toronto*, and *Rose* v. *Scott*; and of *Adam Wilson*, J., in *Mills* v. *King* (*d*), and *Mathers* v. *Lynch* (*e*), which two latter decisions, it is submitted, in effect repeal the statute. Against the rule, are the opinions of *Draper*, C. J., in *Hutchison* v. *Roberts*, and *Powell* v. *The Bank of Upper Canada*; of *Richards*, C. J., in *Powell* v. *The Bank of Upper Canada*, and *Hiscott* v. *Murray* (*f*); of *Hagarty*, C. J., in *Powell* v. *The Bank of Upper Canada*; and of *McLean*, C. J., in *Sutherland* v. *Nixon*.

Argument.

As to the third class of goods:—The case of *Holroyd* v. *Marshall*, is not applicable. There must always be a *novus actus*, where goods to be acquired are sold or

(*a*) 7 U. C. C. P. 475.
(*b*) 14 U. C. 525.
(*c*) 16 U. C. 444.
(*d*) 14 U. C. C. P. 223.
(*e*) 28 U. C. R. 354.
(*f*) 12 U.C. C. P. 315.

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mortgaged in order to bring them within the operation of the sale or mortgage. Here, nothing was done after the execution of the mortgage. The subsequent case of *Belding* v. *Reed*, is expressly in point (*a*).

BLAKE, V. C.—On the 1st of February, 1873, *Thirkell* gave a chattel mortgage to *Perrin*, on the chattels then on his premises in the town of Lindsay, and also on any stock thereafter purchased during the continuance of that security, or of any renewal of it, to secure the payment of $4,240. This mortgage was not renewed, and on the 9th of February, 1874, another chattel mortgage to secure $2,160 was given by *Thirkell* to *Perrin;* but this not being registered in due time, the chattel mortgage in question, dated the 23rd March, 1874, was given. The indenture was made "between *William J. Thirkell*, of the town of Lindsay, in the county of Victoria, druggist, hereinafter called the mortgagor, of the first part, and *Samuel Perrin*, of the same place, druggist, hereinafter called the mortgagee, of the second part," and covers "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described. All the stock in trade, consisting of drugs, chemicals, seeds, medicines, bottles, furniture, shop fixtures, and in fact everything in stock or held by the mortgagor, and in his possession on the 1st day of February, 1873, in and upon the shop and premises occupied by him on the north side of Kent street, in the town of Lindsay, in the county of Victoria; also, any stock purchased by the said mortgagor thereafter, and now in his possession; and also, any stock purchased hereafter by the said mortgagor, and which may be in his possession upon said premises at any time during the continuance of this security, or any renewal thereof." Section 6 of chapter 45 of the Consolidated Statutes of Upper Canada shews what these instruments

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(*a*) 3 H. & C. 955.

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should contain in order that the description may satisfy the requirements of the statute: "All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished." From the manner in which the chattel mortgage in question has been prepared, I should surmise that the mortgagee or mortgagor, giving instructions for its preparation, informed the solicitor that it was intended that all the goods on the premises at the date of the first mortgage, 1st of February, 1873, as also all the goods purchased since, and all the goods to be thereafter purchased, should be covered by it; and so the conveyancer followed, more literally than was necessary, the statement made to him, and gave the three divisions above referred to. There is no doubt, under the authorities, that the goods and chattels mentioned in the first paragraph are so described as to satisfy the Act. It is said, however, that those referred to in the second paragraph cannot pass, as the description is too vague. I do not agree in this proposition. It is necessary to look at the whole instrument in order to ascertain what the parties were contracting for, and, doing so, I do not feel the least doubt as to what the parties were dealing with, nor can I say there is the slightest difficulty in readily and easily distinguishing the same. The three classes of articles dealt with were; such as were possessed by *Thirkell* on the 1st of February, 1873; such as were possessed on the 23rd of March, 1874; and such as were possessed thereafter. Those in the first class are spoken of as "all the stock in trade consisting of, &c., in his possession, in and upon the shop and premises occupied by him." Those in the second class are spoken of as "any stock;" and seeing that *Thirkell* is described as a druggist, I think it does no violence to the instrument to read this as "any such stock," and thus define the goods the subject of the agreement. But the latter

Judgment.

words in this clause seem to me to remove any ambiguity that might otherwise have arisen; for this stock is described as "now in his possession;" surely the possession here referred to is that spoken of in the first paragraph,—the possession on his premises—the possession along with the other articles referred to—such a possession as could be usefully enjoyed in his business. I do not think any reasonable man, reading this description would come to any but the one conclusion, and that is, that while the first clause covered the articles on the premises on the 1st of February, 1873, the second clause covered those purchased afterwards and on the premises on the 23rd of March, 1874. To the extent that these goods are found on these premises, they are covered by this mortgage. I think that this, also, is the effect of the third paragraph. It is to be observed, that the covenants in the mortgage refer to the whole of these goods and chattels, putting them all, so far as locality and dealing with them is concerned, on the same footing, and shewing that no distinction exists as to the rights and remedies in respect of any of the three classes. I think that this instrument contains, so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what goods not covered by the instrument in question; and this, I take it, should be the test of the sufficiency or insufficiency of the description in question. In *Ross* v. *Conger* (*a*), the description was "all the stock and dry goods, hardware, crockery, groceries, and other goods, wares and merchandise, in the store and premises occupied by the mortgagor at, &c." This was held to satisfy the statute. In that case there might have been a serious difficulty in identifying

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(*a*) 14 U. C. R. 525.

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the goods intended to be covered by the mortgage,—for if the sheriff seized six months after the giving of the security, fresh goods might meantime have been purchased, and those liable to seizure could only be ascertained by a careful investigation of the old goods and invoices, and the later ones. In the present case, this serious difficulty is very much lessened, as it is intended even if the deed contains a power to seize, it must be exercised in order to render it effectual; that, without some intervening act, the possession remained in the assignor, and therefore the goods were liable to seizure under an execution issued against the mortgagor. To a certain extent, although I admit in a very modified manner, in *Holroyd* v. *Marshall*, there was *novus actus interveniens*, for the new machinery was annexed to the old. As, however, the jurisdiction in insolvency is both legal and equitable, it is not of so much moment to consider what the position of the parties may be at law, as whether such a claim is presented as would be entertained in this Court.

Judgment.

The general language used by Lord *Westbury* and Lord *Chelmsford*, in *Holroyd* v. *Marshall*, shews that without a "*novus actus*," after acquired property is considered as charged in favour of the mortgagee. The former says: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract; and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property

described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract."

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The language of the latter is, "At law, property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after acquired property, no interest is transferred even as between the parties themselves, unless possession is actually taken. In equity, it is not disputed that the moment the property comes into existence the agreement operates upon it." The rule laid down in *Story's* Equity Jurisprudence (*a*), is as follows: "But Courts of Equity will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual, or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative in *præsenti*, for that can only be of a thing in *esse*, but as a present contract, to take effect and attach as soon as the thing comes in *esse*." Mr. *Benjamin*, in his work on sales, p. 65, says, "It is well to observe that in equity, a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee."

Judgment.

The rule of the Court of Chancery is thus laid down by Sir *Richard Kindersley*, in *Reeve* v. *Whitmore* (*b*), "Does, then, this clause operate in equity as an assignment of the future property? It is quite clear that at law, a bill of sale of property at the time upon certain premises and purporting to include also property which at any future time may come upon the premises, operates

(*a*) Sec. 1040.

(*b*) 9 Jur. N. S. 243.

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nothing with regard to property not then upon the premises. And it is equally clear that in equity that rule is not adhered to; that if a person—*Simpson*, for example—having property upon the brickfield, and anticipating that he should thereafter have other property thereon, makes an assignment of all the property then upon, and which should thereafter come upon the brickfield, that assignment, although inoperative as to the future property at law, will, in equity, pass the interest in the future property. So with regard to a contract or agreement to assign—whatever the words are—whether they are words of assignment, agreement, or license—if, upon the context of the instrument you find the intention of the parties to have been to make an assignment, and to pass the equitable interest instanter, and independently of any act to be done by the party to whom the assignment is made, that will operate as an assignment in a Court of Equity. The Court of Equity does not confine itself to the rules of law upon this subject." When this case came before Lord *Westbury (a)*, on Appeal, he said, "I think this case has been rightly decided by the Vice Chancellor, when he declared that the instrument of May, 1859, did not operate or take effect as an equitable assignment of any clay, bricks, and so forth, which were not then on the brickfield. I think it did not, because I think there was no present existing contract that, immediately on the execution of the security, the mortgagee should have such right, title, and interest with respect to such future property. If there had been such a contract, it would have been an assignment and would have fallen within the principles explained by the House of Lords, in the case of *Holroyd* v. *Marshall*. I think there can be no doubt, on the authorities, that a mortgagee can effectually charge after acquired property; and that, although at law it may be necessary to have the *novus actus;* in equity,

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(a) 9 Jur. N. S. 1214.

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when the property comes into the possession of the mortgagor, it is at once operated upon by the instrument, and is effectually charged as against a subsequent assignee, or a judgment creditor. But there remains the further question, whether the goods in dispute were of a specific character so as to bring them within the rule laid down in *Holroyd* v. *Marshall*." Notwithstanding the opinion expressed in *Belding* v. *Read*, I think where a stock in trade is the subject of a mortgage, and after acquired stock is by the same instrument in terms charged, that the latter stock is covered by the instrument, although it be not referred to in any more specific terms. In *Hope* v. *Hayley* (*a*), the words were, "including all substituted consumable stores;" and Lord *Campbell* agreed that the clause was intended to be a transfer of goods to be afterwards acquired and substituted. *Crompton*, J., says: "Indeed I myself should go further, and should hold that the after acquired goods were made subject to the trusts, and that it would not have been competent to *Routledge* to say that the trusts should not be executed."

Judgment.

The agreement in *Brown* v. *Bateman* (*b*), was, that "All materials" which should have been brought upon the premises for the purpose of building, should be considered as attached to the premises, and should not be removed; and that in case of failure in proceeding with the completion of the house, the contractee was to be at liberty to enter upon the premises and take possession thereof with all the buildings thereon, and "all bricks and other building materials thereon" for his own use. As to the agreement, *Bovill*, C. J., says, "It is not necessary to say whether that clause creates an express legal interest in the landlord, because in my judgment it confers upon him a clear equitable right to the materials brought upon the premises for the purpose of being used

(*a*) 5 E. & B. 830.

(*b*) L. R. 2 C. P. 272.

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in their construction, without any actual interference on his part; and none of the cases cited, shew that such an equitable interest could not be created. That being so, the materials could not be liable to seizure under an execution against the builder."

Keating, J., says, "In *Reeve* v. *Whitmore*, Lord *Westbury*, with that clearness and perspicuity which so much distinguish him, explains the distinction between a mere power to seize and the creation of an interest which will give an equitable claim to a chattel. Applying that rule here, if the seventh clause gave *Holledge* a mere right to seize the materials in question, equity would not give effect to it; but if it created an interest in *Holledge's* favour, a Court of Equity would, (although a Court of Law would not hold the property to pass), consider it as an equitable charge."

Judgment.

"Whatever," says Mr. Justice *Smith*, "might be the legal effect of the contract, I think it created such an interest in the goods in equity in *Holledge* as was sufficient to prevent the sheriff from selling them under the execution against *Hargreaves*. * * * Is, then, the contract one which equity would enforce? I am clearly of opinion that it is. * * * Wherever there is a clear indication of intention to pass an interest, the Court will so construe the instrument as to give effect to that intention."

In *Reeve* v. *Whitmore*, the description of the property the subject of the agreement was no more specific than here. There it was, "the clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects and property, which may then be in, upon, or about the said premises." The Lord Chancellor found that this, so far as description of the goods is concerned, brought the case within *Holroyd* v. *Marshall;* and I think, therefore, that I must conclude that where goods are of a nature to be used

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along with, or in substitution for, goods actually in existence, and the subject of a mortgage, there such after acquired goods can be made subject to the mortgage; and so here, all the chattels mentioned in the chattel mortgage, and in existence when the mortgagee insisted on his charge, are covered by the instrument.

Mr. *Chitty*, in the last edition of his work on Contracts (*a*), seems to have laid down the rule with perfect accuracy: "And, although a contract which purports to transfer property which is not in existence, does not, in equity, operate as an immediate alienation; still if a vendor or mortgagor agrees to sell or mortgage specific property of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of Equity will, in this case, compel him to perform his contract; and the contract will, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired."

Judgment.

I think, under the circumstances, that the mortgagee and assignee should have their costs out of the estate, but if the parties are not satisfied with this, as the question of costs was not argued, it can be spoken to on settling the minutes of the order.

(*a*) 11th Am. Ed. 529.

1874.

AIREY v. MITCHELL.

Specific performance—Interest—Circuity of action—Costs.

Held, on rehearing, that in a suit for specific performance, even where the purchaser has taken possession of the premises, as a general rule, he is only liable for arrears of interest for a period of six years prior to the filing of the bill. Also *Held*, that where the purchaser dies, the rights of no incumbrancer intervening, the vendor is entitled to a charge on the land in the hands of the heirs for a period beyond the six years, in order to prevent circuity of action.

Where on a rehearing the decree was affirmed, but the Court was of opinion that the guardian of the infant defendants, who reheard, was justified in raising the question for the determination of the full Court, directed his costs to be paid out of the fund after satisfaction of the plaintiff's claim.

Dec. 11. This was a rehearing at the instance of the infant defendants of the decree reported *ante* page 239.

Argument. Mr. *Bayly*, for the infants. In *Du Vigier* v. *Lee* (*a*), the Vice Chancellor there held that interest could be recovered, by means of tacking. This decision, however, has been over-ruled by the cases of *Hughes* v. *Kelly*, (*b*), *Harrison* v. *Duignan* (*c*), *Hunter* v. *Nockolds* (*d*), *Shaw* v. *Johnston* (*e*); so far as the broad principle there enunciated is concerned. Here the property having descended to the children, subject to debts, it may be argued that they are bound to pay all those for which the estate is bound; but it is submitted that under the statute only six years' interest can be recovered. *Round* v. *Bell* (*f*), came before Lord *Romilly*, and is a decision precisely in point in favor of the defendants. In *Sinclair* v. *Jackson* (*g*), the decision of the Master was affirmed, he having refused to allow the plaintiff in a suit to foreclose more than six years' arrears of interest;

(*a*) 2 Hare 326.
(*b*) 3 Dr. & W. 482.
(*c*) 2 Dr. & W. 296.
(*d*) 1 M. & G. 640.
(*e*) 1 Dr. & S. 412.
(*f*) 30 Beav. 121.
(*g*) 17 Beav. 405.

although a distinction is there suggested where the suit is for redemption.

Mr. *Street*, contra. *Elvey* v. *Norwood* (*a*) is conclusive on the point as to the right of the plaintiff to recover all the interest claimed. The Statute restricting the allowance to six years only, does not apply to a case like the present *The Great Western Railway Co.* v. *Jones* (*b*), is a clear authority in favour of the plaintiff. He also referred to *Taylor* v. *Hargraves* (*c*), *Fisher* on Mortgages, 666–8.

The judgment of the Court was delivered by

BLAKE, V. C.—The section in question, is 19 of ch. 88, of the Consolidated Statutes Upper Canada. It is as follows:—"No arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent." The effect of this section would seem to be that where money is charged upon land, no interest thereon for more than six years could be recovered. The section does not say that the land shall not be charged for a period beyond the six years, but that where the land is charged, the recovery of the interest for a period beyond the six years shall be barred. It has been said that this was not the intention of the Legislature, but that it was intended to deal only with interest as a charge upon the land, and in consequence

Judgment.

(*a*) 5 Dr. & S. 240.
(*b*) 13 Gr. 355.
(*c*) 19 Gr. 271.

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of the effect of this statute 7 Wm. IV., ch. 3, sec. 3, which appears as section 7 of ch. 78 of the Consolidated Statutes of Upper Canada, was passed. These two sections are taken from the English enactments 3 & 4 Wm. IV. ch. 27, sec. 42; and 3 & 4 Wm. IV., ch. 42 sec. 3. The effect of the English and Canadian Acts is the same and the construction put on the former governs us in our consideration of the latter enactments. The cases of *Paget* v. *Foley*, (*a*), *Strachan* v. *Thomas* (*b*), *DuVigier* v. *Lee* (*c*), and *Hunter* v. *Nockolds* (*d*), shew that the earlier statute must be taken as applicable only to the land, the later as applicable only to the person; and the result of the authorities is that no more than six years' arrears of interest, in respect of a sum of money charged upon or payable out of land, can be recovered by suit; except in an action upon the covenant, in which case the limitation shall be 20 years. It makes no difference whether or not the vendee went into and remained in possession of the premises, the subject of the contract. The Legislature made provision in case of possession where mortgagees were interested in property, but did not extend this to cover the case of a vendor, who having the right to prosecute his claim for payment or for possession does not choose to do so. The Act speaks of the interest on "any sum of money charged upon or payable out of any land;" and I do not see on what principle the Court can make an exception, and say where the person to pay the money has gone into possession of the premises out of which it is payable, there the Act shall not apply; but where possession has not been taken the Act must be held to apply. It is for the Legislature to introduce such a rule, the Court has no power to make such an exception to the Act. The claim of the plaintiff as vendor is in respect of a sum of money charged upon and payable out of the land. By his bill

Judgment.

(*a*), 2 Bing. N. C. 679.
(*b*), 12 Ad. & El. 556.
(*c*), 2 Ha. 325.
(*d*), 1 M. & G. 640.

he asks for a specific performance or rescission. In either event he asks the Court to fix the amount which is to be paid by the defendants, in default of which payment the defendants lose the land. In other words, the land is to be charged with a certain sum of money, failure in payment of which results in its being lost to the defendants. I think in such a case whether the bill is filed by vendor or vendee, the price of the land is to be settled on the same terms. In dealing with a mortgage whether the bill be filed by mortgagee or mortgagor, the price of the equity of redemption is the same. In both of these classes of cases, unless there be some special circumstance to take them out of the general rule, the interest to be recovered is confined to a period of six years prior to the filing of the bill. I am of opinion that the first point raised must be found against the plaintiff.

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But it is further argued that in order to prevent circuity of action, here, the rights of no incumbrancer intervening, as against the heirs, the whole claim for interest should be allowed. The principle on which I think this claim must succeed, is, that these, as lands descended, are assets for the payment of the intestate's debts. Creditors have, as against lands thus situated, a general lien, *Kinderley* v. *Jervis* (*a*), which can be made available for satisfaction of their debts. The lands may pass into the hands of a purchaser for value, and thus be lost to the creditors; but so long as they remain with the heir, they are holden for the debts of the ancestor. The plaintiff is entitled to recover his principal money, and six years' interest against the covenantor, and to a charge on the land for that amount; but when the ancestor dies, and the land descends, it devolves, with this general lien in favour of this creditor, which he is entitled to make available, in order to

Judgment.

(*a*) 22 Beav. 1.

1874.

Alrey v. Mitchell.

the recovery of the interest beyond the six years: thus we get the double charge on the land, and in place of putting the plaintiff to other proceedings, to make it available, in order to prevent circuity of action, the Court allows both the claims to be worked out in the same suit; and thus, as here, the specific charge of the principal money, and six years' arrears, and the general lien or charge for the further arrears, can both be recovered in the one proceeding, by a process akin to that of tacking. See *Elvy* v. *Norwood* (*a*), *Roddam* v. *Morley* (*b*), *Rolfe* v. *Chester* (*c*), *Thomas* v. *Thomas* (*d*).

Judgment.

I think the order made should be affirmed. Under the circumstances, I cannot say the guardian was not justified in raising the questions discussed. It would be reasonable if the property realizes sufficient to leave a balance, after paying the plaintiff, to allow the defendants' costs of the rehearing to be paid thereout. The plaintiff is, of course, entitled to add his costs of the rehearing to his debt.

(*a*) 5 Dr. & S. 240.
(*b*) 1 DeG. & J. 1.
(*c*) 20 Beav. 610.
(*d*) 22 Beav. 314.

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Declaratory Act—Retrospective Act—27 Vic. cc. 13 & 15.

The Statute 27 Vic. ch. 13, (1863,) after reciting that doubts had arisen as to the meaning of the 257th, 258th and 259th sections of the C. L. P. A. enacted that "whenever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators or assigns, or persons having the equity of redemption,' were inserted immediately after such word 'mortgagor.'"

Held, that the enactment was a declaratory one; and where lands subject to a mortgage were sold by the sheriff under execution in a suit against the executors of the mortgagor, and conveyed by the sheriff to the purchaser in October, 1858, the Court held this sale validated by the statute, and that the heirs of the mortgagor could not impeach the same. [Proudfoot, V.C. dissenting.] And *Held*, (2), *Per Curiam*, that 27 Vic. ch. 15, did not affect the question.

Statement.

This was a bill by *Fergus Patrick McEvoy* and *James McEvoy* against the Reverend *Michael Clune*, surviving executor of the late Reverend *Fergus Patrick McEvoy* deceased (who died in January, 1856), the Reverend *Angus McDonell*, *David Brass*, *Samuel Graham*, and *John Graham*, setting forth that testator during his life time was seized in fee simple of 200 acres in Ops: that on the 22nd August, 1853, the testator created a mortgage on the said 200 acres, securing £50, which afterwards was assigned to one *Jane Patterson*, who had then recently reconveyed the premises to the plaintiffs; that judgment was after the death of the testator recovered against his executors, and execution issued thereon against lands, under which the Sheriff of Peterborough proceeded to sell, and did sell, the said 200 acres to the defendant *McDonell*, for £500, although worth double that amount, and on the 25th October, 1858, the sheriff conveyed the same to him: that in March, 1869, the defendant *McDonell* sold and conveyed to defendant *Brass* for about £1,500, and that *Brass* had subsequently contracted to sell the same to the defendants *Graham*: that plaintiffs were the heirs at law of the testator, and were at the time of his decease of very tender years, the

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elder having only attained the age of twenty-one years in December, 1873.

The prayer of the bill was, that the sale of the land to the defendant *McDonell* might be declared void and be set aside; that the same might be sold under the decree of this Court, and the proceeds applied in a due course of administration; and for further relief.

The defendants severally answered denying all improper conduct in connection with the sale by the sheriff; set up the defence of purchase for value without notice, and relying on the Statute 27 Vic. ch. 15, entitled "An Act respecting sales of land under execution against executors and administrators."

Statement.

The cause came on for hearing before *Proudfoot* V.C., at the sittings of the Court at Lindsay, in the autumn of 1874, when a decree was pronounced declaring the sale and conveyance by the sheriff void, and directing the administration of the testator's estate, with costs to be paid to the plaintiffs by the defendants other than *John Graham*, against whom the bill was dismissed without costs.

Dec. 12.

The defendants reheard the cause. The case turned wholly on the effect to be given to Statutes 27 Vic. chapters 13 and 15.

Mr. *Moss* Q. C., for the defendants.—The only question really in the case is whether the 27 Vic. ch. 13 is retrospective. It had been decided in *Lowell* v. *The Bank of Upper Canada* (a), that an equity of redemption could not be sold under an execution issued against the personal representative of the mortgagors, and chapter 15 of the same Parliament was passed to confirm sales which had been made of lands under writs against executors. In passing chapter 13 the object was not to pass a new Act,

(a) 10 Gr. 57.

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but simply to place a construction on certain clauses as to which it was alleged doubts had arisen. In effect this Act says that the clauses of the Common Law Procedure Act there mentioned, (257th, 258th, and 259th,) are to be read as if the words "his heirs, executors, administrators, or assigns, or person having the equity of redemption," had always been in the Act. No doubts were ever entertained as to the legality of sales of equities of redemption during the lifetime of the mortgagor, under these clauses; it was only that doubts had arisen as to the effect of such sales when had in suits against his executors. The enactment in fact was not new, it was only declaring what the former enactment had always been according to the views and intentions of the Legislature. There is no case that we have been able to find on an Act exactly like this, though there are some cases as to forfeitures.

Argument.

He referred to *Moon* v. *Durden* (*a*), *VanSittart* v. *Taylor* (*b*), *Stead* v. *Carey* (*c*), *Hodgkinson* v. *Wyatt* (*d*), *The Midland Railway Co.* v. *Pye* (*e*).

Mr. *Ewart*, contra. The rule of construction, where the intention of the Legislature is not clearly expressed, is, that if the statute relates to procedure it will be held to be retrospective, but otherwise if it affects vested rights. Here there is no clear expression. A comparison of *Moon* v. *Durden* (*f*), *Hitchcock* v. *Wray* (*g*), and *Gilmore* v. *Shooter* (*h*), in which statutes were held not to be retrospective; with *Kimbray* v. *Draper* (*i*), and *Wright* v. *Hale* (*j*), in which they were held to be retrospective, establishes the rule beyond question. This Statute does affect vested rights. Until it was passed the

(*a*) 2 Ex. 22.
(*b*) 4 E. & B. 910.
(*c*) 1 C. B. 496.
(*d*) 4 Q. B. 749.
(*e*) 10 C. B. N. S. 179.
(*f*) 3 Ex. 22.
(*g*) 6 A. & E. 942.
(*h*) 2 Mod. 310.
(*i*) L. R. 3 Q. B. 160.
(*j*) 30 L. J. Ex. 40.

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plaintiffs were the owners of the land; immediately after it passed (if it is retrospective) their ownership was vested in others. If the meaning of the statute is, that the Consolidated Statute should *always* have been read as it is provided it "shall" be read, then it declares that the decrees in *The Bank of Upper Canada* v. *Brough* (*a*), and other similar cases, are wrong. Why then does it not make provision for these and like cases? The absence of such a provision is an important element: *Moon* v. *Durden*. In *Gilmore* v. *Shooter*, where the language of the statute in question in that case exhibited far more clearly than the present statute does an intention to make it retrospective, the rule referred to was held to apply. The language used was, "That from and after the 24th day of June, 1677, *no action shall be brought* unless such agreement be in writing," &c. The action was brought after the statute upon a verbal agreement made before it was passed. The Court held the

Argument.

plaintiff entitled to recover, for it could "not be presumed that the Act had a retrospect to take away an action to which the plaintiff was then entitled."

In *Miller* v. *The Beaver Association*, (*b*), the second section of the statute was held not to be retrospective, and there is no reason why one section should be retrospective and the other not.

BLAKE, V. C.—The only point argued in this case was, whether the equity of redemption in the land in question passed under the sale and conveyance by the sheriff. This depends upon the correct construction of 27 Victoria, chapters 13 and 15. As to chapter 15, I think it is clear that it does not apply. That enactment was intended to meet an objection which was likely to be raised by the decision in the Privy Council, on a statute similar to our 5th Geo. II., on an appeal from New South Wales. Looking at the preamble, and

(*a*) 2 E. & A. 95. (*b*) 14 U. C. C. P. 399.

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reading this along with the other parts of the Act, and taking into consideration that chapter 13 deals with the sales of equities of redemption, I think chapter 15 must be taken to apply only to such interests as were in question in *Gardner* v. *Gardner*.

Then if the defendants cannot maintain the purchase under this statute, can they under chapter 13? The late V.C. *Esten*, in *Brough* v. *Bank of Upper Canada* (*a*), thought the effect of sections 257, 258, and 259, of the Common Law Procedure Act, pages 240 and 241, Consolidated Statutes of Upper Canada, was to give the rights to creditors and vendees explained by the Act in question. On appeal in the year 1862, the Vice Chancellor stood alone in this view. Thereupon in the year 1863, the late Chancellor *VanKoughnet* in *Lowell* v. *Bank of Upper Canada* followed, as he was bound, the decision in appeal. Thereafter, and in October, 1863, the enactment in question was passed.

Judgment.

In passing this statute the Legislature did not accept the manner in which the Court of Error and Appeal had explained these sections of the Common Law Procedure Act, as expressing the true meaning of the Act. It does not proceed to add some further remedy to that which already existed, but it acts upon the notion that the words employed covered the intention of Parliament: that a difference existed in the minds of the Judges as to the interpretation to be placed thereon; that it would be well to have this state of matters ended; and therefore it proceeds to give an authentic interpretation of the Act.

The preamble begins "Whereas doubts have arisen as to the meaning of the 257th, 258th, and 259th sections of the Common Law Procedure Act, being the 22nd chapter of the Consolidated Statutes for Upper Canada. Her Majesty enacts as follows:"—And what does it proceed

(*a*) 2 E. & A. 95.

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to enact? It does not pretend that it is necessary to add aught to the statute, in order that it may be effectual for the purposes intended. But as the marginal note informs us it simply tells, "How sections 257 and 258 of chapter 22 of Consolidated Statutes of Upper Canada, shall be construed." Then in order to solve the question of construction, (the Legislature conceiving, it was only one of construction and not of omission,) it proceeds "Whenever the word mortgagor occurs in the said sections it shall be read and construed as if the words 'his heirs, executors, administrators, or assigns, or person having the equity of redemption,' were inserted immediately after such word 'mortgagor.'" The Legislature does not treat the Act as defective. It does not add words to it, and express the object of their addition; it maintains the sufficiency of the Act for the purposes intended, and in order to remove the doubts which existed, it enacts that the statute shall be read and construed as if these words, which make plain the sense, were inserted therein. It does not admit the necessity of nor does it add these words, which are only used in order to expound that which is stated without them, to be the effect of the Act. It does not say the Act should be "hereafter" read and construed; nor does it lay down two modes of construction, the one for cases that may have arisen prior to a certain date, the other for those that may arise in the future, but for once and all a certain meaning is to be attributed to certain words theretofore used.

Judgment.

In section 2 of this Act, an entirely different mode of dealing is observed. There there is not merely a declaration, but an amendment: "Section 249 of the said Act, shall be amended by inserting after the word 'expiration' in the said section the words * * * and such words shall be *hereafter* read and construed as constituting part of the said Act." Here we have not merely a declaration but an amendment. There was here an omission; this the

Legislature recognized and remedied by the insertion of certain words. In doing so they admit the rule that an Act is not in general to be retrospective in its character, where by an alteration in it it may interfere with vested rights, and so insert the word "hereafter" in order to make it clear that its effect is not to be retroactive. 1874. McEvoy v. Clune.

There is no doubt that as a general rule statutes are not to be taken to apply to a past but a future state of circumstances. When the effect of an enactment is to take away a right, *primâ facie* it does not apply to existing rights; where it deals with procedure only *prima facie* it applies to all actions previous as well as future. But although there is no doubt of the rule that statutes are generally to be construed as prospective and intended to regulate the future conduct of persons, this will yield to the evident intention of the Legislature.

By the Interpretation Act, sub-section 28, section 6, chapter 5, Consolidated Statutes of Canada, "The preamble of every such Act as aforesaid shall be deemed a part thereof intended to assist in explaining the purport and object of the Act." I think the preamble to the Act in question assists materially in arriving at its true construction. Here the Legislature had the two courses to pursue; the one involved the admission that the Act did not meet a class of cases which it was conceived should be covered by it; and thereupon Parliament proceeds so to modify it as that it may be enlarged to carry out this view. In the other, Parliament maintains that the enactment contains all that is needed to carry out its view, explains what that view is, and declares that the Act shall be construed accordingly. The Legislature here chose to adopt the latter course. It refused to treat the law as other than it declared it to be, and it proceeded to make plain its meaning, not by alteration or addition but by declaring its true reading. As the Privy Council had not passed upon the Act, the Legislature, as it was entitled Judgment.

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to do, chose to consider the question of the construction of the Act as still open. We have the declaration of the Legislature that doubts have arisen as to the meaning of the enactment, and then forthwith it proceeds to solve them. In this kind of Legislation, Parliament assumes the exercise of judicial power, and undertakes to expound the proper manner of construing the law. But when this is done, it becomes an authentic interpretation of the Act, and in its own words, "it shall be read and construed" in the manner defined. The later Act, as it were, coalesces with the original enactment, and whenever it comes up for judicial exposition the Court must read the two as forming one rule relative to the subject matter dealt with by the statute, the effect of which has been expounded authoritatively by the highest Court in the Province. If any cases were to be withdrawn from the effect of this enactment they should have been specified in it; this not being so the unrestricted language applies to all cases on which the opinion of the Court is asked after its passage, and therefore includes the present. Parliament chooses thus to settle the law, and as thus settled the Court is bound to apply it. In my opinion the decree made should be reversed and the bill dismissed with costs.

Judgment.

SPRAGGE, C.—I agree entirely with the judgment of my brother *Blake;* and I feel that I cannot usefully add much to what he has said. He has given a history of the questions which have arisen upon the proper construction of the sections of the Common Law Procedure Act, which are the subjects of legislation in the Act of 1863, and of the decisons upon them; and we cannot fail to see that the Legislature has referred to these questions where it has said that doubts have arisen as to the meaning of these sections; and it is not, I apprehend, open to us to say that these doubts had not arisen, nor can we say that they had been finally set at rest: the state of the litigation being that they had received different interpretations

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in different Courts of the Province, and might yet be carried to the Privy Council. Such being the state of the question, it was within the competence of the Legislature to say which of the interpretations that the sections had received was the correct one; and the question that remains is, whether the Legislature has done so.

It appears to me that it *has* taken this office upon itself, and has expressed itself in language which is clear and unequivocal. It recites the existence of doubts, and takes upon itself the office of interpreter; it says in effect that the confining the remedy to cases where the writ against lands was upon a judgment against the mortgagor was a misinterpretation, and settles the meaning by prescribing how the sections are to be read and construed, "as if" the words "his heirs," &c., were inserted. Literally the words "his heirs, executors," &c., cannot be actually inserted unless by a manual alteration of the original text; but the sections are to be read and construed as if they were there. Can this be done without giving the same effect to the sections, as if those words actually formed part of the text of the Act?

Judgment.

I think there is nothing in the words importing a future act in "*shall be* read and construed," because the reading and construction itself must necessarily be after the act. It amounts to only this, those whose office it may be to read and construe, shall read and construe as if they found the words "his heirs" &c., in the Act.

I agree in the general principles laid down by my brother *Proudfoot*, as to the construction of Acts of Parliament, but this Act is not, as I read it, a retrospective Act, but a declaratory Act; there is not a word in the first section of the Act of 1863, that imports a *change* of the law by amendment or otherwise. In the 2nd section there is, as pointed out by my brother *Blake*, a difference in the language used, which shews that the Legislature was mindful of the difference between a declaration and an amendment of the law.

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I agree that the bill must be dismissed, and with costs.

PROUDFOOT, V. C.—Upon further consideration, I retain the opinion that the 27 Vic. ch. 13, is not retrospective.

The sale by the sheriff in this case of the equity of redemption, under a writ against the executors of the debtor, was perfected by deed, dated 25th October, 1858; and up to the time of the passing of that statute, in 1863, the plaintiffs had a right of action for the recovery of the property. Is there anything in the statute which compels us to hold that it took away that right of action—that it intended to deprive the plaintiffs of their inheritance—to legislate away their right to property?

Judgment.

The rule requiring statutes to be construed prospectively is not merely a rule of law, but a *great constitutional principle* (*a*), and where the effect of a statute having a retrospective operation would be to divest a right, to put an end to an action by plea, or anything of that sort, the Court should see clearly that the Legislature intended such a retrospective operation (*b*). The principle is this, that where you are dealing with a right of action, it will not be taken away by a statute passed subsequently (*c*). And in *Attorney-General* v. *Sillem* (*d*), Lord *Wensleydale* says: "There is no doubt of the justice of the rule laid down by Lord *Coke*, that enactments in a statute are generally to be construed to be prospective, and to regulate the future conduct of parties. But this rule of construction would yield to the intentions of the Legislature. It could not be supposed the Legislature meant to deprive a man of a vested right of action. This was laid down in *Moon* v. *Durden* (*e*),

(*a*) Per Pollock, C.B., in Wright v. Hale, 6 Jur. N.S. 1212, 6 H. & N. 227.
(*b*) Per Channell, B., Ib.
(*c*) Per Wilde, B., Ib.
(*d*) 10 H. L. C., 704, 763.
(*e*) 2 Ex. R. 22.

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But, on the other hand, it is clear that there is a material difference where an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and where it is dealing with mere procedure to recover those rights." In *Evans* v. *Williams* (*a*), *Kindersley*, V. C., says: "I think it is a broad principle of construction, that unless the Court sees a clear indication of intention in an Act of Parliament to legislate *ex post facto*, and to give to the Act the effect of depriving a man of a right which belonged to him at the time of passing of the Act, the Court will not give to the Act a retrospective operation."

In construing an Act of Parliament, the first thing which is to govern the Court is the simple wording of the section itself. If there be in that any doubt or difficulty, the Court is entitled to look, first, to the circumstances attending the passing of the Act; next to the preamble; and then to the whole purpose and scope of the construction of the various clauses in the Act (*b*). Judgment.

The Interpretation Act, enacting, that "The preamble of every such Act, as aforesaid, shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act," does not, in my opinion, vary these rules of construction. The preamble was always resorted to, if necessary, to explain the Act, and it receives no greater effect by this enactment, nor is its function any higher than before. If the Act is clear, we need not refer to the preamble at all; if not clear, and the preamble can make it so, then resort may be had to it.

Applying these principles to the statute in question, I find no obscurity nor ambiguity in the first section

(*a*) 2 Drew. & S. 324, 329.

(*b*) Per Wood, V.C., Cope v. Doherty, 4 Jur. N. S. 451; 4 K. & J. 367.

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requiring explanation. It is as plain and clear a prospective enactment as can well be penned. It enacts, that whenever the word mortgagor occurs in certain sections of the Common Law Procedure Act it shall be read and construed as if the words, his heirs, executors, administrators or assigns, or person having the equity of redemption, were inserted immediately after such word, mortgagor; and the equity of redemption shall be saleable, &c., &c.

But it is said the preamble is a part of the Act, and shows it was intended to have a retrospective operation, as the enactment is declaratory of the Common Law Procedure Act. I have said that I do not think it ought to be resorted to in the absence of some ambiguity or obscurity in the enactment. But if we do resort to it, I find nothing to show that the Act was intended to be a declaratory one. It is not so expressed. It only asserts

Judgment.

that doubts have arisen as to the meaning of certain sections of the Common Law Procedure Act, and then proceeds to enact. It does not state what the doubts were, nor that the enactment was passed to remove those doubts, but proceeds, in effect, to pass a new law —to amend the Act. And I can scarcely suppose that it meant to refer to the decision in *The Bank of Upper Canada* v. *Brough*, as only amounting to a doubt—a decision of the highest Court in the province, in which the late Sir *J. B. Robinson*, Chief Justice *Draper*, the the present Chief Justices *Richards* and *Hagarty*, Judges *McLean* and *Burns* concurred, the only dissentient being the late Vice Chancellor *Esten;* in which the parties seem to have acquiesced; which was followed by the late Chancellor *VanKoughnet*, in *Lowell* v. *Bank of Upper Canada*, without any sign of dissent, and subsequently by the whole Court of Chancery in *Beamish* v. *Pomeroy*. To speak of this *construction* of the Act as merely amounting to a doubt would be a sort of grim pleasantry, that would not be respectful to ascribe to

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the Legislature. That these doubts, whatever they were, had some connection with the first section of the statute, is probable, but what the connection was we do not know. That this is not hypercriticism is obvious from this consideration, that the preamble applies to the whole Act, and I have failed to discover what possible connection there can be between the doubts on the 257th, 258th, and 259th sections of the Common Law Procedure Act, and the 249th section of the same Act, which is amended by the second clause of the Act now in consideration. But the Legislature has said that this Act, including the second clause, was passed in consequence of these doubts; and if so, they could not have referred to the decision in *The Bank of Upper Canada* v. *Brough*.

Had the Legislature intended to confirm sales made under the circumstances of this case, it would doubtless have said so, as it did say with regard to other sales in chapter 15 of the same statutes.

Judgment.

The case cited of *Hitchcock* v. *Way* (*a*), seems to me to be a very good example of the manner in which such an Act should be construed. A number of Acts had rendered void notes, bills, bonds, &c., given for money won at play, so that even in the hands of innocent holders they could not be enforced. To remedy this the 5 & 6 William IV., chapter 41 was passed, which repealed so much of those Acts as rendered the securities void; but nevertheless, every note, &c., which would, by those Acts, have been absolutely void, shall be deemed, and taken to have been made for an illegal consideration, *and the said several Acts* shall have the same force and effect which they would respectively have had if, instead of enacting that any such note, &c., should be void, they had provided that every such note, &c., should be deemed to have been made for an ille-

(*a*) 6 A. & E. 943.

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gal consideration. Yet, notwithstanding such full and ample terms as these, much more full and ample than any in the statute now under consideration, it was held not to be retrospective.

This case is said to be distinguishable in this, that it was passed for conferring a new right, creating a new liability, and ought not, therefore, to be construed as affecting transactions entered into before it passed. I do not see how any greater hardship arises from applying that Act to the past, than in applying a statute practially confiscating property to the past.

Judgment.

But the next class of cases is not open to this objection, and yet the result was the same. The Imperial Mercantile Law Amendment Act, 19 & 20 Vic., ch. 97, sec. 14, enacted, in reference to the provisions of the Acts of 21 Jac. 1, ch. 16, sec. 3 (and other Acts), when there should be two or more co-contractors or co-debtors, no such co-contractor or co-debtor should lose the benefit of the said enactments by reason of payment by any other co-contractor or co-debtor. This, it will be observed, intended to relieve debtors from a liability imposed on them through partial payments by co-debtors,—and if any Act should be construed retrospectively, this, one would think, is that Act. And so *Kindersley*, V.C., thought in *Thompson* v. *Waithman* (*a*), and so he decided. This case was followed by the Queen's Bench, in *Jackson* v. *Wooley* (*b*), solely because the point had been so decided in *Thompson* v. *Waithman*, but it was reversed in the Exchequer Chamber (*c*). *Williams*, J., said, "The question is, whether there is anything in the terms of the enactment to prevent the operation of the ordinary rule. Before the statute was passed it was clear law that a payment made by one of two or more contractors was treated as a payment by him as agent for all the other co-contractors, and bound them, because,

(*a*) 3 Drew. 628. (*b*) 4 Jur. N. S. 409. (*c*) 4 Jur. N. S. 656.

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from the payment by one a promise of all co-contractors is implied. Therefore, before the statute was passed the plaintiff had acquired a vested right of action against the defendant. It requires words of no ordinary strength to deprive the plaintiff of his right of action, and none such have been pointed out." And *Martin*, B.: "At the time of passing the Act there was a clear right of action vested in the plaintiff against the defendant. The question is, whether there is anything in the statute to take it away." *Rolfe*, B., in *Moon* v. *Durden*, said, "The general rule on this subject is stated by Lord *Coke* in 2 Inst. 293, in his commentary on the Statute of Gloucester, '*nova constitutio futuris formam imponere debet non præteritis*,' and 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.' Applying that rule, in which I entirely concur, to this case, I see nothing from which to conclude that the Legislature intended to confiscate this right of action."

Judgment.

But on the rehearing it was earnestly urged that chapter 15 was wide enough to cover the sale in question, and confirmed it. I do not think it has any such effect.

For a long series of years our Courts had sanctioned sales of lands under the 5 Geo. II., ch. 7, upon judgments obtained in actions against personal representatives. A similar Act (54 Geo. III., ch. 15,) had been passed for New South Wales, and on the 7th July, 1863, a judgment was given in the Privy Council in *Bullen* v. *A'Beckett* (*b*), deciding, that to reach the land it was necessary for a creditor to proceed against the person in

(*a*) 2 Exch. 22, 27.

(*b*) 1 Moo. P. C. N. S. 223.

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whom the property was vested. This chapter 15 was immediately passed (15th October, 1863), reciting, that under the 5 Geo. II. our Courts had held that the title of the testator or intestate in real estate might be sold under a judgment and execution by a creditor of the testator or intestate, recovered against an executor or administrator, in the same manner and under the same process that the same could be seized and sold if the judgment and execution had been against the testator or intestate, if living; and many sales had taken place, and titles been acquired under such proceedings, and it was desirable to quiet the same; and enacting that (sec. 1), under the said Imperial statute the title and interest of a testator or intestate in real estate might be, and hereafter may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate against his executor or administrator, in the same manner, and under the same process, that the same could be sold under a judgment and execution against the deceased, if living. And (by sec. 2) that all such sales heretofore made, and titles given thereunder, are hereby declared to have passed and conveyed the title or interest of the testator or intestate in his real estate so sold and conveyed, *as against any objection that might be made on the ground that real estate could not be seized and sold in the manner aforesaid, under the said Act.*

Judgment.

It had also been long held by our Courts (*a*) that under the 5 Geo. II. an equity of redemption of an estate of inheritance could not be sold by the Sheriff under a common law process.

The object aimed at by chapter 15, was not to render new interests liable to execution, but to confirm sales of legal interests, in actions against the personal representatives. The recital plainly indicates this, and if the

(*a*) Simpson v. Smyth, 1 E. & A. 1.

enacting clauses are more general, they will be modified by the recital and the purview of the Act. I do not think they are more general; that the first clause referring to what might and may be done under the Imperial statute, refers only to such interests as the Courts have determined to be saleable under it; the concluding sentence of the section, that the land may be sold in the same manner and under the same process that the same could be sold under an execution against a living person, indicates the same thing, for no one has imagined, since *Simpson* v. *Smyth*, that an equity of redemption could be sold under 5 Geo. II. on an execution against a living person; and it was unnecessary to refer back and enlarge it so as to comprehend them, for this had already been provided for by the Common Law Procedure Act, and there is no indication of any intention to enlargo the provisions of that Act or to confirm any sales under it, as all that the Legislature contemplated in that direction had been accomplished by chapter 13, passed the same day. The 2nd section, which is the one chiefly relied on in this case, cannot be construed to comprehend an equity of redemption, as it only applies to *such sales*, that is sales of interests saleable under the 5 Geo. II., and confirms them only *as against any objection that may be made on the ground that real estate could not be sold in manner aforesaid under the said Act,—the manner aforesaid* being evidently the manner recited of sales in actions against personal representatives.

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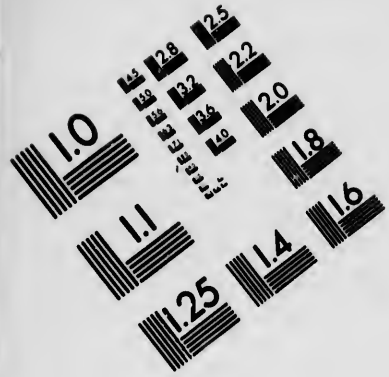
Judgment.

It is besides difficult to conceive that chapter 13 and chapter 15, can cover the same ground. It is improbable that the Legislature could have intended to do one and the same thing by these two Acts, passed for the purpose of correcting or explaining different Acts, which would be the result of holding that chapter 15 includes an equity of redemption; for chapter 13 provides that such an interest may be sold under an execution against the personal representatives.



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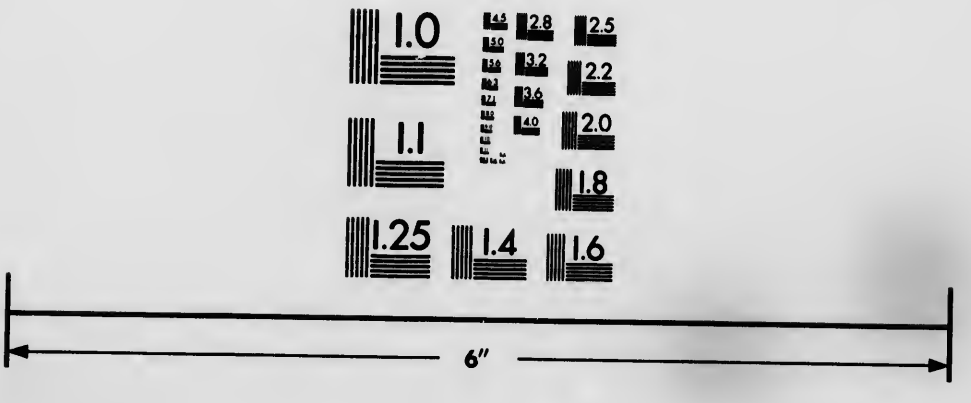

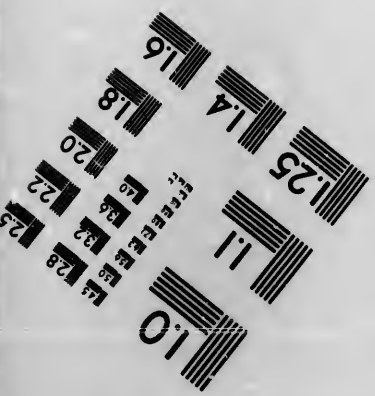

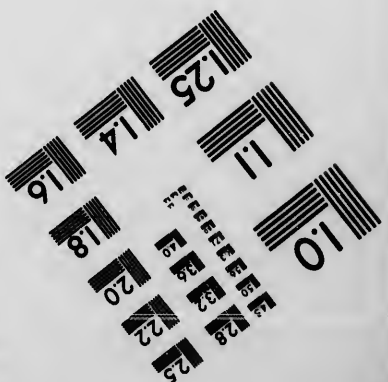

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But supposing the enacting clauses to be more general than the recitals, then the case of *Brett* v. *Brett* (*a*), approved of in *Emanuel* v. *Constable* (*b*), shews that although the preamble of a statute cannot control a clear and express enactment, yet the plain intent of the Legislature as expressed in the preamble, and the nature of the mischief which is sought to be remedied, may seem to give a definite and qualified meaning to indefinite and general terms. The statute in question there was the 25 Geo. II. chapter 6: An Act for avoiding doubts as to the attestation of wills and codicils.

It recited that the Statute of Frauds 29 Car. II. ch. 3, sec. 5, had enacted that devises of land should be in writing and attested by three or four credible witnesses, or else they should be void, and doubts had arisen who were to be deemed legal witnesses within the Act. It enacted that if any person should attest the execution of any will or codicil to whom any beneficial devise, legacy, estate, &c., affecting any real or personal estate should be thereby given such devise, legacy, &c., should be void so far only as concerns the person attesting, and he should be admitted as a witness. Sir *W. Grant*, in *Lees* v. *Summergill* (*c*), apparently influenced by erroneous information as to the practice at Doctor's Commons, had held that the enacting clause comprehended all wills; but in *Brett* v. *Brett* Sir *John Nichol*, and in *Emanuel* v. *Constable* Sir *John Leach*, decided otherwise: that the language, *any will or codicil*, must be restricted to *any such will or codicil* as referred to in the recital, the object being to correct an enactment referring to devises of lands, and wills of personalty requiring no attestation.

Judgment.

The recital in chapter 15, shewing clearly the matter intended to be remedied, it is unnecessary to carry the enacting clause beyond it.

(*a*) 3 Add. 210. (*b*) 3 Russ. 436. (*c*) 17 Ves. 510.

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I do not think any alteration should be made in the decree so as to relieve the defendants from costs.

The plaintiffs could have sustained their case either upon the question of law, or by establishing a fraudulent knowledge of the defendants. They placed both grounds in their bill, and at the hearing being satisfied they had established the facts necessary to have an adjudication on the legal question, they abstained from adducing evidence on the other point. This is not like the case of an attempt to prove fraud which failed. The defendants are rather in the position of persons who have placed themselves in a position inviting investigation. They have failed in sustaining their purchase of the property. This question of costs was not mentioned at the hearing, and the minutes were afterwards spoken to without objection as to this part of the decree, and I think it is too late to seek a correction for the first time at a rehearing.

Judgment.

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

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SKAE v. CHAPMAN.

Mortgage—Equity of redemption—Defence founded on subsequent dealings.

The principle on which an equity of redemption is founded is relief against forfeiture; and the equity is not to be allowed where the mortgagee has been guilty of no misconduct and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued.

Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds; but for seventeen years before the filing of a bill to redeem, sales and re-sales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected; some burnt down; new buildings put up; houses built for one purpose altered to suit other purposes; other changes and improvements thereon made; fields and commons being converted into sites for shops, hotels, a bank and other places of business, and into gardens and yards; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's cla[illegible] made defendants to the suit numbered nearly one hundred: [illegible]at redemption would be inequitable, and the bill was dismissed with costs.

The effect in such a case of the statute 36 Victoria, chapter 22, O., giving a lien for improvements, remarked upon.

Statement. The bill in this case, filed 9th February 1871, was by *Edward Enoch Skae* against *Henry Chapman*, *J. J. Caldwell Abbott*, and a large number of other persons who had become interested in the property in question as claiming under the said *Chapman* and *Abbott*, and praying under the circumstances set forth in the bill, and which are clearly stated in the judgment, to be allowed to redeem the defendants.

The defendants answered the bill setting up amongst other defences that of the Statute of Limitations; acquiescence by the plaintiff in the dealings with the property by the defendants *Chapman* and *Abbott*; a sale of the equity of redemption under common law process

by the sheriff, and also sales by mortgagees under powers of sale in their mortgages. 1874.

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The cause having been put at issue came on for the examination of witnesses and hearing, at the sittings of the Court at Toronto, in November, 1873.

Mr. *Blake*, Q. C., Mr. *Moss*, Q.C., and Mr. *Kennedy*, for the plaintiff.

Mr. *Attorney-General Mowat*, Mr. *Crooks*, Q. C., Mr. *C. S. Patterson*, Q. C., Mr. *Hoskin*, Q. C., Mr. *English*, Mr. *Bethune*, and Mr. *Farewell*, for the defendants.

In support of the bill it was contended that the plaintiff was entitled absolutely to redeem at any time within twenty years after default, and *Heward* v. *Wolfenden* (*a*), decides that a sale by the sheriff under the circumstances here appearing was inoperative. In answer to the defence of acquiescence set up, it was alleged that the plaintiff was absent from the Province when the sale took place, but the evidence of *Trigg* shews that the plaintiff, if he had any rights, never intended to relinquish or abandon them: that here it is shewn that the defendants, on the occasion of each purchase, thought they were buying a good title, and the Court will not assume that the plaintiff had any better information on the subject than themselves. Argument.

Counsel for the defendants submitted that the law of the Court was not such as compelled the Court to afford the plaintiff the relief asked. The estate of his ancestor had been wholly insufficient to pay the amount due, and if the relief sought were granted the plaintiff would be allowed to redeem on paying less than one-fourth of the sum due, as more than three-fourths of the debt had been lost by lapse of time; the Statute of Limitations now operating as a bar to any recovery by the creditor against his debtor's estate. It was erroneous to suppose that it was necessary that twenty years should elapse

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before the right to redeem could be lost, as in any case the Court has a discretion where the granting of the relief was inequitable and would work injustice to refuse it. *Hilton* v. *Wood* (*a*), *Muchall* v. *Banks* (*b*), *Moore* v. *Durden* (*c*), *Hodgkinson* v. *Wyatt* (*d*), *Ketchum* v. *Mighton* (*e*), *Pringle* v. *Allan* (*f*), Doe *Wilson* v. *Wessels* (*g*), *Gibson* v. *Doeg* (*h*), *Burke* v. *Lynch* (*i*), *Lake* v. *Thomas* (*j*), *Turly* v. *Williamson* (*k*), *Keyworth* v. *Thompson* (*l*), *Copp* v. *Holmes* (*m*), *The Bank of Upper Canada* v. *Brough* (*n*), *Miller* v. *The Beaver Mutual Fire Association* (*o*), *Williams* v. *Smith* (*p*) *Jackson* v. *Wooley* (*q*), *Wright* v. *Hale* (*r*), *Kimbray* v. *Draper* (*s*), *Wilte's* Peerage Case (*t*), *Donovan* v. *Bacon* (*u*), *Hyde* v. *Dallaway* (*v*), *Dickenson* v. *Burrell* (*w*), *Smith* v. *Blakey* (*x*), *Rawlins* v. *Rickards* (*y*), *Gladman* v. *Plumer* (*z*), *Sugden* on Powers, section 348, Lord *St. Leonards* Real Property Statutes, 118, were, amongst others, referred to.

Judgment.

SPRAGGE, C.—The first transaction out of which the questions in this case have arisen was a mortgage given by *Edward Skae*, the father of the plaintiff, to the Bank of Upper Canada, dated 20th February, 1840, and made to secure £557. He was then carrying on mercantile business in Oshawa, and continued to carry on such business until his death in June, 1848.

In and before that year he had become largely indebted

(*a*) L. R. 4 Eq. 432.
(*b*) 10 Gr. 26.
(*c*) 2 Ex. 23.
(*d*) 4 Q. B. 749.
(*e*) 14 U. C. R. 99.
(*f*) 18 U. C. R. 576.
(*g*) 5 O. S. 282.
(*h*) 2 H. & N., at p. 623.
(*i*) 2 B. & B. 426.
(*j*) 3 Ves. 17.
(*k*) 15 U. C. C. P. 538.
(*l*) 16 U. C. R. 178.
(*m*) 6 U. C. C. P. 373.
(*n*) 2 E. & A. 95.
(*o*) 14 U. C. C. P. 399.
(*p*) 4 H. & N. 559.
(*q*) 8 E. & B. 778.
(*r*) 6 H. & N. 227.
(*s*) L. R. 3 Q. B. 160.
(*t*) L. R. 4 E. & I. App. 126.
(*u*) 16 Gr. 472, note.
(*v*) 2 Hare 528.
(*w*) L. R. 1 Eq. 330.
(*x*) L. R. 2 Q. B. 326.
(*y*) 28 Beav. 335.
(*z*) 15 L. J. Q. B. 79.

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to *William Bradbury*, a merchant of Montreal, his debt to *Bradbury* amounting to about £12,000, and it appears from the evidence of Mr. *Abbott*, who had visited him in Oshawa in the previous year, that his available assets fell far short of the amount of the debt. They consisted in part of debts due to him from customers and in part of real estate.

In May, 1848, five different mortgages were given by *Skae* on different properties for different amounts, the aggregate being a trifle over £2,000. It had been agreed in September of the previous year that mortgages should be given, the amount thereof respectively to be not more than two-thirds of the value of the properties. Mr. *Abbott* is probably correct in his recollection that the values were settled and agreed upon between Mr. *Skae* and himself. This will help to account for the mortgages not being for the whole amount of the debt.

Judgment.

The then estimated value of the properties may be taken to have been somewhere about £3000. The mortgages appear to have been payable half in one year and the balance in two years with interest. *Skae* died in the following month, and it is not pretended that any of the mortgage money was paid.

A commission of bankruptcy was issued against *Bradbury* on the 31st of May, in the same year, and *Davidson & Young*, of Montreal, were appointed his assignees. On the 24th December, 1852, the mortgage of *Skae* to the Bank of Upper Canada, together with the judgment the Bank recovered against *Skae*, were assigned by the Bank to *Bradbury's* assignees; and by conveyance of 3rd of August, 1853, the assignees conveyed their interest in *Skae's* assets to the defendant *Chapman*. This was done under an order of the Court of Bankruptcy for the District of Montreal of 18th February, 1853, directing a sale by auction of the assets of *Bradbury* in lots;

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the claim of the estate of *Bradbury* upon the estate of *Skae*—being lot five—being purchased by the defendant *Chapman* for the sum of £1800 at such auction sale, which was held on the 16th of April, in the same year.

In the assignment made by the assignees to *Chapman* the mortgages from *Skae* to *Bradbury* and the mortgage from *Skae* to the Bank, assigned by the Bank to the assignees, are set out *seriatim*, and are expressed to be subject to the equity of redemption and all other rights and equities thereby created; a judgment recovered by the assignees against the executors of *Skae* for £2223 9*s.* 8*d.* is among the assets assigned to *Chapman*. I understand from the evidence of Mr. *Abbott* that he and *Chapman* were joint purchasers of the assets purchased in the name of the latter. He goes on to say that after such purchase "I think we had a sale effected by the sheriff; and Mr. *Chapman* became the purchaser of the equities of redemption, and I was then advised that we had an absolute title, no longer considering ourselves mere mortgagees of the property, and determined to sell; for which purpose we bought the property."

Judgment.

The first sheriff's sale was on the 18th of June, 1853. It was on a writ of *venditioni exponas* issued on the judgment recovered by the assignees: *Chapman* was the purchaser at the sum of £10. A second sheriff's sale on the same judgment took place on the 8th of October, in the same year, when *Chapman* was the purchaser at the sum of £291.

There was a third sale in 1857 by the sheriff of another county of lands which are not in question in this suit.

The first sheriff's sale included some land not covered by any of the mortgages. I do not find that there was any sale under execution issued upon the judgment recovered by the Bank. The two first suits were of Oshawa property, which it is sought to redeem in this suit.

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In January of the following year *Chapman* and *Abbott* proceeded to carry into effect the intention with which they had acquired, as they conceived, an absolute title to the property. They had an auction sale in the City of Toronto at which a large number of lots were sold, realizing between £3000 and £4000. The evidence shews that the property realized prices which were considered at the time to be very good. The purchasers, as appears from the evidence, purchased generally with a view to actual occupation and improvement; and proceeded, some of them at once, and others at various intervals, to put up buildings, and in that way between the sale in 1854 and the filing of the plaintiff's bill on 9th February, 1871, a good many thousand dollars have been expended.

Judgment.

The plaintiff's contention is that the equity of redemption is still subsisting; that the sheriff's sales of June and October, 1853, were inoperative, upon two grounds, one that the statute 12 Victoria chapter 73 only applied where the judgment is against the mortgagor himself, whereas in this case it was against his executors; the other that in each of these sheriff's sales, the lands sold consisted of a portion only of lands comprised in different mortgages, and therefore not saleable under the statute, as was decided by the late Chancellor, in *Heward* v. *Wolfenden* (*a*). The first ground has been set at rest, so far as this Court is concerned at least, by the recent judgment on rehearing of *McEvoy* v. *Clune* (*b*).

The other point was raised in *Heward* v. *Wolfenden*, and as I gather from the Chancellor's judgment raised for the first time upon the argument before him of the appeal from the Master's report, and was decided in 1868. Under the authority of that case, which has been followed in others, I must hold that the sheriff's sales of

(*a*) 14 Gr. 188.

(*b*) Ante p. 515.

1874. June and October, 1853, were inoperative to extinguish the equity of redemption.

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The equity of redemption, therefore, if extinguished at all, must have been extinguished by something that has been done or that has occurred subsequently to the sheriff's sales. The defendants rely upon the statute of limitations, upon conduct, and upon circumstances.

The age, habits, means of observation, and business capacity of the plaintiff are material elements in considering the question of conduct and circumstances.

In the year of the sheriff's sales of the Oshawa property the plaintiff would be, according to his own statement, twenty years of age. He says that he made his mother's residence in Oshawa his home until 1855 or 3, From other evidence it appears that, though not a constant resident in Oshawa during the whole time that the property has been occupied and improved by the purchasers from *Chapman* and *Abbott*, and those purchasing again from those purchasers, he was there from time to time and had ample opportunities of observing, and in fact could not have failed to observe the manner in which the various properties were being dealt with by the purchasers. During a portion of the time he was an insurance agent for four different companies, and his own recollection is, that among other business he took an insurance with one *Arkland*, as owner, upon a large building—the Commercial Hotel—built upon a portion of the property in question.

Judgment.

I will presently consider the question whether the plaintiff's claim can be resisted on the ground of fraud—an owner of land looking on while a stranger is improving his property, without notifying the stranger of his ownership—and I will notice upon that point a circumstance occurring at a later date than the first improve-

ments. For a number of years, certainly, all these purchasers, and *Chapman* and *Abbott* from whom they purchased, rested in the undoubting belief that the proceedings which had been taken were effectual to vest an absolute irredeemable title in *Chapman* and *Abbott*; and I have no doubt that for several years the plaintiff himself entertained the same belief and with just the same confidence; nor was there acquiescence in the proper sense of the term, on the part of the plaintiff, for though he had rights, he was wholly ignorant of them, and there could be no conscious acquiescence in other parties treating his property as their own, when he and they alike believed that property to be wholly and entirely theirs, and that he had no interest in it. 1874. Skae v. Chapman.

I do not think that there was any fraudulent lying by while improvements were being made; nor any acquiescence to disentitle the plaintiff of his right to redeem, unless at a later date which I will refer to presently. But there is another principle, upon which I have reflected a good deal, and which the more I have thought upon it the more strongly it has appeared to me to be applicable to such a case as this. When we look at the principle upon which the equity of redemption proceeds we find it to be, relief from legal forfeiture. In the books treating on relief in equity from forfeiture at law, we always find the equity to redeem a mortgage given as an illustration of the rule, and in the treatises on the law of mortgage the right or equity to redeem is placed upon the same principle. And so Mr. *Coote*, after in his introductory chapter saying that by the civil law "the debt was the principal, the security an incident and when the one ceased the others ceased also, and until sentence the ownership of the debtor was not displaced," and after referring to the rule of the common law, proceeds thus: (*a*) "It has been seen how decidedly opposed to this (the Judgment.

(*a*) Chap. 3.

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rule of the civil law) is the doctrine of forfeiture at common law. The absolute forfeiture of the estate whatever might be its value, on breach of the condition, was, in the eye of equity, a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our Courts of Equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the Common Law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at Common law; they could not, as they might have wished, in conformity to the principles of the Civil Law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage money; but, leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge." So also Mr. *Powell*, "An equity of redemption is defined by Sir *Matthew Hale* to be an equitable right inherent in the land." Mr. *Coventry*, in his note to this says, "an equity of redemption can be more appropriately illustrated than defined or described," and then after describing the forfeiture at law, if the money be not paid by the very day appointed, he goes on to say, "But here it is that Courts of Equity interpose and consider the real nature of the contract. They look to the actual value of the lands, and compare it with the sums borrowed, and if the estate be of greater value than the sum lent thereon they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses; for otherwise in strictness of law an estate worth £1000 might be forfeited for non-payment of £100 or a less sum. This reasonable advantage allowed to mortgagors is called the equity of redemption."

Judgment.

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The passages that I have quoted describe very well the origin and reason of the interposition of Courts of Equity, and probably in earlier times the Court would look at the actual value of the land and compare the value with the sum borrowed, and only interfere with the common law forfeiture where not to interfere would operate unjustly to the mortgagor. In time no doubt it came to be the regular practice of the Court to allow redemption in all cases, except where it was made to appear that it would work an injustice to the mortgagee.

What I have quoted is no doubt trite law, but it is necessary sometimes to go back to first principles. In this case they seem to me to shew that the equity is founded simply upon relief from forfeiture; and it is material to shew this, because the doctrine of equity in relation to relief from forfeiture ought to apply, and in my judgment does apply to the equity of redemption.

Judgment.

Upon this I will in the first place quote a passage from Mr. *Powell's* book (*a*), by Mr. *Powell* himself, "But although the power of redemption be an ancient right, which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet being a right originating in and in fact created by a Court of Equity, it is made subservient to their rules." Mr. *Powell* refers to the case of *Sayle* v. *Freeland* (*b*), where the Chancellor (I think Lord *Nottingham*) said, "A trust and equitable interest is a creature of their own, and therefore disposable by their rule."

It is a doctrine too well established to require the quotation of authorities to support it, that the Court will relieve from forfeiture only in cases where compensation can be made to the party having the legal right; and

(*a*) Page 386.

(*b*) 2 Vent. 350.

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will refuse relief where the Court has no means of measuring and ascertaining what would be compensation, and I think it may safely be added that the Court will refuse relief where there are countervailing equities on the side of the party who has the legal right. Mr. Justice *Story* puts it as "clearly established that Courts of Equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach" (*a*).

Judgment.

Generally the Court will only relieve where the default relieved against has been the non-payment of money, rent, purchase money, mortgage money, or the like. In *Hill* v. *Barclay* (*b*) Lord *Eldon* pointed out that relief even in such cases might be attended with great injustice. He said "The Court has certainly affected to justify that right, it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion that it places them as near as can be in the same situation as if the contract had been with the utmost precision specifically performed; yet the result of experience is that where a man having contracted to sell his estate is placed in this situation, that he cannot know whether he is to receive the price when it ought to be paid, the very circumstance that the condition is not performed at the time stipulated may prove his ruin notwithstanding all the Court can offer as compensation. * * Imperfect and unjust as the operation of the rule for giving relief in equity against a forfeiture for non payment of money must be in some cases, yet if the rule is established that payment with interest from the time is a compensation, that is an extremely simple rule for administering the equity."

Lord *Eldon's* language is in favor of the plaintiff's case to this extent, that although the default of the

(*a*) Sec. 1324. (*b*) 18 Ves. 56.

party to pay may operate hardly upon the party to receive, so that the payment of interest will not be a compensation to him, still if it is a settled rule that payment of interest is to be taken as a compensation the rule must be applied even in cases of individual hardship—a rule that he rather acquiesces in than approves of—and it is probably the only practicable rule in ordinary cases. But it does not touch the case of dealings that have taken place, or circumstances that have occurred, that may make it inequitable as between the pledger and the pledgee that the pledge should be restored.

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As I understand the judgment of Lord *Kingsdown*—then Mr. *Pemberton Leigh*—in *Smyth* v. *Simpson* (*a*) in the Privy Council, he intended to affirm the principle that a right to redeem might properly be denied to a mortgagor, under circumstances. The appeal involved the question whether the 11th section of the Chancery Act enabled the Court of Chancery to refuse redemption altogether, or only to say upon what terms redemption should be allowed. There had been in that case, as in this, a mistake as to the legal effect of a sale of an equity of redemption under common law process, and it was a much more palpable mistake than was made in this case, having been before the Act authorizing such sales. The learned Judge was combatting the notion that had been entertained by some of the Judges in the Court below, and had been urged in argument, that a right to redeem must continue to subsist for twenty years, unless put an end to by foreclosure or release. He points out the difference between the law in Canada before the passing of the Chancery Act and the law of England; and stating what is, in his judgment, the law in England, he gives it as a reason for the Court in Canada not only imposing terms, but in a proper case

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(*a*) 7 Moore P. C. 223.

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denying the right to redeem. His language is: "Now, the case has been argued as if there was a law in *England* by which a mortgage is absolutely redeemable after a period of twenty years, unless there has been a voluntary release of the equity of redemption on the part of the mortgagor. The law is no such thing. The law does not go beyond this, that if the mortgagee rely simply on the title acquired by possession, there being no dealing between the parties, as a bar to the right of the mortgagor to redeem, then the mortgagee must shew uninterrupted possession for the period of twenty years. The rule does not go beyond that. A dealing between the mortgagor and the mortgagee may take place, notwithstanding that interval, which might very easily alter that relation."

Judgment.

The learned Judge does in terms enunciate this as the law in England, and his language is very clear and emphatic. It is true that he speaks of "dealing between the parties," but the phrase may be attributed to the circumstance that in the case then in judgment there had been dealing between the parties. It is contended in this case that by "dealing" must be understood contract; but in that case there had been no contract, and the dealing consisted in a voluntary offer on the part of the holder of the mortgage to allow the mortgagor to redeem even after the sheriff's sale, a futile attempt to raise the mortgage money, and an abandonment of possession. I see no reason for restricting the sense of the word dealing to contract. My idea is, that Lord *Kingsdown* meant to correct what he conceived to be a prevalent error as to the real nature of the equity of redemption, and to affirm that it was a relief from common law forfeiture, just and equitable as a general rule, but not to be allowed where from the dealings of the parties it would be inequitable to the mortgagee to allow it.

It seems to me to flow, necessarily, from such being

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the nature and quality of the equity of redemption, that in no case can it be allowed where the mortgagee has been guilty of no improper conduct, and its allowance would work injustice to the mortgagee. The very foundation of relief against forfeiture is, that the party seeking relief would suffer injustice if it were denied to him; that is his equity. But what if there be a larger and stronger equity on the part of him against whom relief is sought? what if the granting of relief to the one would result in injustice to the other, that would more than outweigh what would be suffered by the party seeking it from its denial? It would surely be inconsistent with the plainest principles of equity, and I must add of natural justice, to grant relief in such a case. It would be a plain common sense answer to a person seeking relief, in such a case, to say, "You come asking relief from a forfeiture, the consequence of your own default; and your ground for relief is, that it would be inequitable to exact the forfeiture. I shew you that to *grant* you relief would be inequitable, and therefore you cannot have it."

Judgment.

Such a case as this could scarcely arise in England; and I have derived but little assistance from the cases. It has appeared to me that it could only be properly judged of by the rules and principles which I have endeavoured to explain. It does appear to me, after the best consideration that I have been able to give to the case, that those rules and principles apply to it. They would not apply certainly if there had been inequitable conduct on the part of the defendants. There is evidence of none. It cannot be said that they were guilty of wrong to the plaintiff in dealing with the property as they have dealt with it; or that they ought to have seen and known that the sheriff's sales were inoperative to extinguish the equity of redemption. It is certain from the evidence that they did not know it; and it can be no matter of surprise that they did not know it, for

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there was an Act of the Legislature expressly authorizing the sales of equities of redemption; and it was only from the reasoning of the late Chancellor, (the soundness of which I do not dispute), that any doubt was thrown on the validity of the sales. They were acquiesced in as valid by this plaintiff. Their being otherwise was a discovery, a new light; he found himself the inheritor of a right to redeem as he conceived. I look upon it, under all the circumstances, as a right *strictissimi juris*, without a particle of equity, unless the rules of this Court give it to him.

It has been contended for the plaintiff that the late Statute 36 Vic., ch. 22 O., enables this Court to make it a condition of redemption that all buildings and improvements placed upon this property should be paid for by the plaintiff, and in that way that compensation may be made to the defendants, and injustice to them avoided.

Judgment.

The Act is a just and salutary one, so far as it goes, and in an ordinary case may enable Courts to do justice; but it would fail utterly to enable the Court to do anything approaching to justice in a case like this. I have already stated shortly that buildings costing many thousand dollars have been put up upon the premises in question by the purchasers from *Chapman* and *Abbott*, and by others purchasing from them from time to time. There have been buildings, fires, re-buildings, alterations and improvements in buildings, conversions of buildings from one purpose to another, sales from one to another, converting fields and commons into sites for houses, shops, hotels, a bank and other places of business, yards and gardens,—in short, all that is ordinarily incident to a prosperous and growing town in Canada; and this was going on for some seventeen years before the plaintiff filed his bill, and going on with the cognizance of the plaintiff. I say with his cognizance, because though absent at times, he knew generally at least what was going on. The number of defendants now lacks but one of a hundred.

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The Act to which I am referred is styled "An Act for the protection of persons improving land under a mistake of title," and consists of one short clause, "In every case in which any person has made or may make lasting improvements on any land, under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvement." Supposing the Act to apply, as probably it does, a very little consideration will shew that such an allowance for improvements would be no compensation in a case like this. Under the Act, it is the present state of the property that is to be looked at: buildings perfectly suitable to the property in its then state, may have been put up ten or fifteen or twenty years ago, and the present enhancement of value thereby may not be half what they cost. Again, the plaintiff asks by his bill that the rents and profits of all these properties for all these years should be charged against the defendants; and if the equity of redemption is adjudged to be still subsisting, I do not see how this claim is to be denied. It would probably absorb the original mortgage debt and interest and the present value, computed as the Act directs, of most of the improvements.

Judgment.

But even if compensation could be made on a much larger scale; if those who have expended money could be reimbursed all they have expended, it would still fall very far short of real practical compensation. Where a man has expended his means, and time, and energies, and the best years of his life in a business, a mere reimbursement of moneys expended is no compensation; for these are matters admitting of no compensation.

I should say, too, that the principle of granting relief only where the party against whom relief is sought *can be reinstated* in his former position, applies with great force in a case like this. In the ordinary case of a

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mortgagor in default, the law assumes that payment of interest and reimbursement of expenses will reinstate the mortgagee; but it is perfectly obvious that no decree that the Court could make in this case, under the ordinary practice or under the statute, could reinstate the defendants. I should say, further, that if the Court had the most unlimited discretion as to the terms upon which it would allow redemption, it could not by *any* terms reinstate those claiming through the mortgagees in their position. There would still be an amount of loss and wrong inflicted upon the defendants for which no possible terms of redemption could compensate.

Judgment.

In my judgment it would be inequitable to decree redemption if there were nothing more in the case; but there is something more. At a period which the plaintiff fixes as the year 1859 or 1858 or 1860—the exact date is not very material—and which he says was the first time he was aware that he had any claim, (he uses the expression 'any interest' in another place) Mr. *Fairbanks*, a solicitor practising at or near Oshawa, and since deceased, called upon him to execute a deed, he being the eldest son of his father. He says he asked for information first, and that *Fairbanks* refused to give him any. *Fairbanks*, he says, wanted him to execute a deed of the whole property, and stated that "they" would pay him a sum if he would do it; he did not say what sum they would give. Shortly after this he called on Mr. *Abbott* in Montreal about his interest in the property, and told him that *Fairbanks* had wanted to get a deed from him, and he asked *Abbott* what he proposed to pay him, or to that effect, and *Abbott* said he would not give him a cent. Again, at a later period, after his return from California, which he states was in October, 1865, he was, he says, reminded of his interest in the property by a letter from his brother which he thinks he has destroyed.

What passed between *Fairbanks* and the plaintiff

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was notice to the plaintiff that he *might* have at least some interest in the property; and the plaintiff evidently so understood it; and it produced an impression upon him that lasted for several years; lasted, probably, until 1871, when it culminated in the filing of his bill. During that interval some very valuable buildings were put upon the property, and some of them under the eye of the plaintiff; he knew at any rate that the property was occupied by persons who were in the habit of dealing with it as their own in the belief that it was their own, and in that belief expending their money upon it; and he looked on at this without a word of notice or warning in any shape. One witness, indeed, *Trigg*, gives evidence of a conversation with the plaintiff in which he avowed that he knew that he had a claim to the property, but meant not to assert it until certain improvements which he expected to be made had been made. But independently of the evidence of *Trigg*, the plaintiff's own account of the notice that he had from *Fairbanks* is very much against him. It was a case of standing by and seeing improvements made, having reason to believe, or at least to suspect, that he had some interest in the property. His duty, under the circumstances, was a very plain one: it was either to abandon all claim at once and forever, or to investigate and ascertain what his claim was, to give prompt notice of it, and to prosecute it with dilligence. He did nothing of the kind; but left people to go on dealing with the property as before for ten years or more, and at length filed his bill, I am warranted in saying, just in order to save his claim being barred by the Statute of Limitations.

Judgment.

There is another aspect of the case which is also against the plaintiff, in this, at any rate, that his case is divested of the plea of hardship if redemption is denied to him. The amount of the mortgage was based upon the estimated value of the lands, and they were taken, it

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appears, at two-thirds of their value, leaving *Skae* still a debtor to *Bradbury* to the extent of several thousand pounds, somewhere about £10,000. This large debt has been barred by the Statute of Limitations. The value of *Skae's* assets was estimated so low as to bring only £1,800. If the mortgages had covered the whole debt, or if the assignees or *Chapman* had sued for the whole debt and recovered judgment so as to be a charge on the land, the equity of redemption would probably be valueless. If *Skae* had survived, and had waited until the large debt was barred by the Statute of Limitations, and then filed his bill to redeem, after the sale by common law process of his equity of redemption, it would be an unconscionable act; and it is an act of much the same character when done by his heir at law: he inherits a property which should have been burthened with this large debt of his ancestor, he now seeks the property without the burthen—the benefit but not *cum onere*. I do not mean to say that redemption should be refused to him for this reason if there were no other, but it divests his case of even the appearance of hardship.

Judgment.

I grant that hardships of much the same character that I have described may exist where parties come in assertion of a legal right, and that Courts of Law cannot do other than give effect to their legal rights, imposing no other terms than the Act of 1873 enables them to impose; but the case of this plaintiff coming into a Court of Equity for relief from a legal forfeiture, is essentially different, and is, in my judgment, open to all the considerations which I have pointed out.

Arkell v. *Wilson* (*a*), was a case to which the 11th sec. of the Chancery Act applied, but Sir *John Robinson* observed that if it were *not* within the Act, he should, he thought, still have declined to grant redemp-

(*a*) 7 Gr. 270.

tion under the circumstances of the case. The circumstances were much less strong against redemption in that case than in this. 1874.

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Lord *Kingsdown*, in concluding his judgment in *Smyth* v. *Simpson*, a case in many of its circumstances resembling this, said: "It appears to us, therefore, that under these circumstances there never was a case in which a Court was more fully justified in refusing the right of redemption," an observation that applies with quite as much force to the case before me.

It has not been necessary in the view that I take of the case to consider the questions raised as to the Statute of Limitations.

The bill is dismissed with costs. Judgment.

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DAVIS v. MCCAFFREY.

Testamentary guardian—Devise with condition—Custody of infant.

A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining 21 years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother; or in the event of the death of his mother, then that she should in like manner reside with his sister; and in the event of the death of his sister before the period named he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions he devised the estate to other parties. On a bill filed to obtain the construction of the will, the Court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a Court of Equity could afford no relief; and that the estate devised to the daughter, unless the conditions were complied with, would be forfeited.

A wife had obtained from the Court an order giving to her the custody of her infant daughter until she had attained the age of 12 years.

Held, that this did not prevent the father of the infant appointing testamentary guardians of the infant.

Statement. The bill in this case, filed 7th November, 1873, was by *Alice Davis*, widow, and *Margaret Buchanan Davis*, an infant, by her mother the said *Alice Davis*, her next friend, against *Charles McCaffrey*, *John H. Davis*, *Eliza Davis*, *Jane Orr*, and *Elizabeth Orr*, an infant, setting forth in effect that difficulties having arisen between *James Davis* and the plaintiff *Alice Davis*, his wife, as to the custody of their infant child, the plaintiff *Margaret Buchanan Davis*, on the 10th of June, 1870, a petition was presented to this Court by the mother, praying for the custody of the child. By an order made in that matter, dated the 23rd of February and the 22nd of March, 1871, it was declared that the mother was entitled to the custody of her daughter. That the infant had since remained with her mother under this order which had never been discharged; and that *James*

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Davis died in July, 1873, having in the same month duly made and published his last will and testament in the words following:—

"1. I devise and bequeath unto my niece *Lizzie Orr*, (who is the above named infant defendant), her heirs and assigns for ever, my real estate situate in the township of York, in the county of York, containing by admeasurement two acres of land, be the same more or less, being composed of the south part of lot number five of new survey of lot number thirteen, east of centre road, and which piece of land is more particularly described in a deed from *James Davis* to *William Davis*, bearing date the fourth day of August, in the year of our Lord one thousand eight hundred and fifty seven. I also devise and bequeath to my said niece, all my household furniture, goods and chattels, and ready money, which I may be possessed of at the time of my death.

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"2. I devise and bequeath to my trustees hereinafter named, (being the defendants *Charles McCaffrey* and *John H. Davis*), that certain messuage and premises situate on the west side of West Market Square, in the city of Toronto, being the part of the market block, in trust, to collect the rents of the said premises, and out of the proceeds thereof, in the first place, to pay the ground rent of the said premises and insurance, and in the next place to use sufficient of the said rents to maintain and educate my daughter, *Margaret Buchanan Davis*, (the above named infant plaintiff), subject to the restrictions hereinafter named, and the overplus I will and direct my said trustees to pay to my mother, (the defendant *Eliza Davis*), each and every year, for her support, until my daughter arrives at the age of eighteen years; but if my said mother should die before my said daughter arrives at the age of eighteen years, I will and bequeath my said trustees to pay the said

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"3. I will and direct that after my death that my said daughter be brought up under the care and protection, and to live with my said mother until she, my said daughter, arrives at the full age of twenty-one years or gets married; and if my said mother should die before my said daughter arrives at the age of twenty-one or gets married, then I direct that my said daughter shall live and be brought up with my sister *Jane Orr*, until either such event shall happen; and in the event of my said sister dying before my said daughter arrives at the age of twenty-one or gets married, I direct my trustees to place her in some respectable place other than the family of *Dr. Buchanan*, and pay for her board and education; but I will and direct that unless my said daughter be brought up under the care of my said mother and sister as aforesaid, that my said trustees are to give the whole of the rents and profits of the said house on West Market Square to my mother during her life, and after her death to my said sister *Jane Orr*, during her life, and after her death the rents and profits to be annually divided amongst the children of my said sister *Jane Orr*, then living, or to the survivor or survivors, and the last surviving one to have the said premises absolutely; but in the event of my said daughter coming to live with my said mother or sister, and not being able to live agreeably and happily with them, I direct my said trustees to place her under the care and protection of some respectable person other than the family of *Dr. Buchanan*, and pay for her board and education, and after she arrives at the age of

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eighteen to place the overplus, after paying for her board and education, out at interest, to accumulate until she gets married or arrives at the age of twenty-one years, and then to pay her such accumulation. 1874. Davis v. McCaffrey.

"4. I will and devise that in the event of my said daughter dying without leaving lawful issue living, that the rents and profits of the said premises are to be divided by said trustees amongst the children of my sister *Jane Orr*, or the survivor or survivors of them, and the last surviving one to have it absolutely.

"5. I will and bequeath to my said daughter my gold watch and chain, also my gold ring, upon the conditions mentioned in the third clause of this my will; and if my said daughter does not comply with the requests mentioned in the said third clause, I give and bequeath the said watch and chain, and gold ring, to my mother, and after her death to my said sister, to be disposed of as she thinks proper. I hereby release my sister *Jane Orr* from any sum or sums of money she may owe to me at my death. Statement.

"I hereby nominate and appoint *Charles McCaffrey*, of the city of Toronto, collector, and *John H. Davis*, of the same place, clerk in the post office, executors and trustees of this my last will and testament, and guardian of my said daughter during her minority."

The plaintiff claimed that the order of Court, above mentioned, continued in force, and that thereby the infant plaintiff was constituted a ward of Court, and that her mother was entitled thereunder to the custody of the infant until she attained the age of twelve years, or the order was varied: that the conditions of the will, whereby the custody of the said infant was given to the defendants *Eliza Davis* and *Jane Orr*, and the infant in the event of not complying with such condition,

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forfeited all rights and benefits under the will, were void as an attempt to interfere with the guardianship of the infant so in the custody of the Court, and that under the will and the circumstances above set forth, the infant plaintiff was absolutely entitled, for her own use, to all the estate, property, and effects, of the testator, except the specific devise in favour of the infant defendant. The bill, amongst other things, prayed that the several conditions and restrictions in the will, whereby the custody, by the plaintiff *Alice Davis*, of the infant under the said order, and the other terms thereof, are sought to be or are in effect interfered with, might be declared wholly null and void, and that the infant plaintiff might be declared entitled to all the rights and benefits conferred under the will, freed from the conditions attached thereto; that the trusts and dispositions of the will might be declared, the estate administered, and a proper sum allowed for the support of the infant.

Statement.

The defendants answered the bill, setting up that the trustees were prepared to carry out the provisions of the will of the testator upon the infant plaintiff submitting to the conditions, imposed thereby, of her residing with the defendant *Eliza Davis*; and insisted that the infant was not entitled to the provision made for her by the will, unless she submitted to the conditions thereof.

The cause was originally brought on by way of motion for decree.

Mr. *Crooks*, Q. C., for the plaintiff, referred, amongst other cases, to *Wilkinson* v. *Wilkinson* (*a*), *Re Graham* (*b*), *Seton* on Decrees, p. 717; *Sheppard's* Touchstone, p. 152: insisting that the conditions annexed to the devise in favour of the infant plaintiff, were improper

(*a*) L. R. 12 Eq. 604. (*b*) L. R. 10 Eq. 530.

and against public policy, and being so she was entitled to a declaration by the Court that the property so devised vested in her, freed from any such conditions. 1874. Davis v. McCaffrey.

Mr. *Tilt*, and Mr. *McArthur*, for the defendants, cited *Ward* v. *Ward* (*a*); *Re Leigh* (*b*).

BLAKE, V. C.—It is contended that the infant is entitled absolutely to the provision made for her by this will, and that the condition requiring her to live with her grandmother, or aunt, or in some respectable place other than the family of Dr. *Buchanan*, being against public policy, is void. The father, the natural guardian, has by statute the right to name a person to act as guardian of his child to whose care it shall be entrusted, unless by his misconduct he who is appointed shews himself unfitted for the trust. The father may disappoint the mother and other ancestors, of the guardianship by appointing a testamentary guardian under the statute. This is a right which is given by the Act, and therefore it can scarcely be said to be against the policy of the law, if the father exercises this right by naming another guardian, and depriving the mother of any control in respect of her children. It cannot be said that that which is not against the policy of the law is made so, because the father seeks further to enforce the right he has by certain stipulations or conditions inserted in his will. The law allows a father to name one to whose care his child is entrusted, on his death. The mother is not allowed, unless good cause be shewn, to interfere with the dealings of such person with her infant. It cannot be if the will goes on to state that which is the effect of such provision, namely, that the mother shall not have the control of the child, that it contains anything against public policy; nor can I see how this can be reasonably alleged if the father further enforces the stipulation Judgment.

(*a*) 11 Beav. 377.

(*b*) 5 Prac. Rep. 402.

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by stating that a legacy allowed the child shall cease and go over to others if she be brought up by the mother. If there is a hardship in the matter it is one which, I am thankful to say, seldom arises as the mother, on the death of the father, is generally admitted to be the most fit person to have the bringing up of her child; and it is caused, not by the insertion of the restrictions appearing in this will, but by the Act in question which allows the parent to do what is here objected to, that is, to oust the mother from the position of guardian of her child.

But the case is not one of first impression. The authorities shew that when a legacy is given, on condition that the guardian named by the testator shall have the care of the child, and that the legal guardian shall not interfere with the management and direction of the trustees thus appointed, the condition will be enforced. In *Colston* v. *Morris* (*a*), a sum of money was

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left to an infant with a direction that her education should be committed to trustees and a legacy to the father on condition of his not interfering in it. The father submitted that the condition or prohibition annexed to the legacy to him was, for want of a bequest over, to be considered as in *terrorem* only and void. But the Court held that the condition should be enforced by requiring an undertaking not to interfere with his daughter, without which the legacy to the father was not to be paid; see also *Potts* v. *Norton* (*b*). In *Lyons* v. *Blenkin* (*c*), *Mary Beatson* gave certain property to her grandchildren, and appointed one of her daughters, their aunt, the guardian of the children, their father being then living; years after the father applied for the custody and controul of the infants who meantime had been educated by the aunt, which application was refused, it being held that the right to educate had, in effect, been purchased, and the father had lost this right. In *Chambers* on

(*a*) Jac. n. 257. (*b*) N. 1, 2 P. Wm. 110. (*c*) Jac. 245.

infants at page 181 the effect of the authorities is thus stated; "In the case of a gift to an infant coupled with the appointment of guardians other than the legal guardians, or direction for the education of the infant in a particular manner, with the express provision that the gift shall be void, if the condition be not complied with, Equity can afford no relief, but the estate must be forfeited if the father or guardian refuse to surrender his legal rights."

In *Lyons* v. *Blenkin* Lord *Eldon* says (*a*), "There were I believe some cases in Lord *Northington's* time in which he considered that the Court would reserve power over a father, not only if he accepts a bounty given to himself, but if he avails himself of a bounty given for the maintenance of his children, which he must otherwise have provided at his own expense."

Judgment.

It is true that the mother has a right, by nature or nurture, to the custody of the person and care of the education of her child (*b*), but as the father may interfere with this right by an appointment in favour of some person else, so he may qualify the right he gives his wife, as in *Darcy* v. *Holderness* (*c*), where the father devised the guardianship of his child to his wife and "A," but if his wife should marry again they were to fix upon another guardian: she married again, and as "A" and she could not agree, it was held the choice devolved upon the Court.

But it is said in this case, the Court has named a guardian for the child and the testator will not be allowed to interfere with such appointment, or place any restriction such as that here attempted. I do not think that is the effect of the order in question. At page 39 of *Chambers* on Infants, this question is thus dealt with

(*a*) p. 257.

(*b*) Villareal v. Mellish, cited 2 P. Wm. 127.

(*c*) Cited 1 P. Wm. 703.

1874. Davis v. McCaffrey. "Where guardians already exist by Act of Parliament as testamentary guardians, or by nature, as in the case of parents, since the Court cannot absolutely and irrevocably remove such parties from the guardianship and cancel their authority, without leaving them any *locus penitentiæ*, so neither will it irrevocably appoint guardians in their room, but merely persons to act as such who may be called rather curators than guardians to protect the infants against some prejudice in the lifetime of the guardian." Lord Eldon's opinion (*a*), which was, that there cannot be a guardian of children whose father is alive, was also the opinion of Lord Chancellor *Hart* (*b*), who said that any other person, whom it may become necessary to appoint, is not the guardian, but rather a curator to take charge of the children to protect them against some prejudice during the father's life.

Judgment. Here, although the Court thought it proper, under the circumstances, to give the custody of the infant to the mother, it did not thereby take away the right the father possessed of appointing a testamentary guardian on his death, and, having this right, I think he was entitled to exercise it on the terms he has imposed. These guardians have here the ordinary rights in respect of this child that are possessed by a testamentary guardian.

I find that the infant is not entitled to the provision made for her under the will, except on the terms therein also specified.

As the question is one of construction of the will, I think the costs of all parties should be paid by the executors out of the estate.

It will be for the guardians to consider what applica-

(*a*) Ex parte Mountfort, 15 Ves. 445.
(*b*) Barry v. Barry, 1 Moll. 210.

tion it will be proper for them to make to the Court on this declaration of the true construction of the will. 1874.

Davis v. McCaffrey.

The plaintiffs thereupon reheard the cause.

The same counsel appeared for the respective parties.

The judgment of the Court was delivered by

SPRAGGE, C.—At the rehearing of this case Mr. *Crooks* conceded that the judgment of my brother *Blake*, at the hearing, was correct, unless a larger effect should be given to our statute respecting the custody of infants, than is given to it by his judgment. I will therefore, address myself chiefly to that point.

Judgment.

The statute of Charles, enabling the father to appoint a testamentary guardian, is, of course, in force in this province; and it is clear, I think, that the will in this case, though it does not name the trustees in terms as guardians, is, nevertheless, a sufficient appointment; the legal custody of the child is therefore, in this case, in the testamentary guardians, unless the order of this Court made on the application of the mother, in the spring of 1871, giving to her the custody of the infant, has the effect of intercepting the testamentary appointment.

I incline to think that it has not that effect. It was made as between the father and the mother, and by reason of the peculiar and unfortunate relations of the two parents. With the death of the father the special reason for it has ceased; and, apart from the will, the mother has become entitled to the custody of her child, in another right that of guardianship by nature, and for nurture. But here, again, the will of the father comes in *and supersedes* that right.

1874.

Davis v. McCaffrey.

It is, however, not material to consider whether the order of this Court continued in force after the death of the father, for the question is raised by this bill, whether the testamentary guardianship should, or should not, be sanctioned by this Court.

Under our statute I have no doubt that it is competent to the Court to commit the custody of this infant to the mother, from that of the testamentary guardians: though, as I incline to think, the Act is to be read, only until she attains the age of twelve years. But doing that would be taking the custody from the legal guardians; and it should only be done for cause. The Court would, moreover, in regard to the custody of the child, exercise its discretion in view of all the circumstances—the permanent interest of the infant being, necessarily, a paramount consideration.

Judgment.

In this case we have not only the appointment of testamentary guardians by the father in his will, but also in the same will a provision for the maintenance and education of the infant, with a gift over, in the event of, what all parties agree means, living with her mother. The provision is in express terms made subject to what the will calls "restrictions," which prescribe in what hands the care and custody of the child shall be:—in any event, they are to be other than the care and custody of the mother. It looks like a harsh and cruel provision; but the father had the *power*, in disposing of his property, to clog it with that condition; and in such a case, as my brother *Blake* has shewn in his judgment, a Court of Equity can afford no relief; the estate will be forfeited if the condition be not complied with.

The question then comes to this, whether it is for the interest—the permanent interest I mean—of the infant, that she should have the benefit of this provision, or forego it for the sake of living, perhaps only tempo-

rarily, with her mother. But really, no question is made upon this; but the only contention is, that the condition of the provision is void as against the policy of the law. I should not be at all sorry if I could come to that conclusion, but I find no warrant for it: our statute, as I read it, does not touch the question, and the authorities are all the other way.

I think the order of my brother *Blake* must be affirmed.

No cross relief is prayed as to the custody of the infant. It will be for the testamentary guardians if so advised to make application; and on the other hand, the mother may apply for access to her child under the same statute, upon which the order was made giving to her the custody of the child.

Judgment.

I may add, that the condition imposed by the will, ought, in my opinion, to be carried out in the kindliest spirit possible, so that both mother and child may feel, as little as may be, the restriction upon their intercourse; and that their mutual affection may not be impaired. The mother of the infant, and the mother of the testator, if they are wise, will cultivate kindly relations between themselves. The will contains a provision which evinces a wise forethought in the testator, that in the event of his daughter not being able "to live agreeably and happily" with his mother or sister, as the case may be, the trustees are to place her under the care and protection of some respectable person, the family of the mother excepted.

The two mothers may, with or without the intervention of the trustees, be able to agree upon a scheme for the care of the child, and the access of her mother which may render the restrictions imposed by the will, as it certainly ought to be made, as little painful as possible; and for this they may apply for the sanction of the Court, if they find it desirable.

1874.

PROUDFOOT v. AUSTIN.

Sale for taxes—Sheriff's deed—Proof of taxes due—32 Vic. ch. 36, sec. 155.

Where in order to sustain a party's case it is necessary to prove title under a sheriff's deed for taxes, he must shew that an actual sale did take place, and that at the time of the sale under which he claims, there were some taxes due, notwithstanding the time limited by the 155th section of 32 Vic. ch. 36, for questioning the deed has elapsed.

Statement.

This suit was instituted by *Frederick Proudfoot* on the 19th September, 1873, against *James Austin* and others, setting forth that by means of certain conveyances in the bill mentioned, the plaintiff in 1871, became entitled in fee to 95 acres in Orillia; and before accepting the conveyance or paying his purchase money, the plaintiff had searched the title to the premises, and there found no deed or instrument in any way affecting or impairing the title of his vendor, and thereupon on the 8th January, 1872, registered the deed to himself; that the said lands were wholly uncultivated, and plaintiff had since paid all taxes thereon, and had thus taken possession and exercised acts of ownership, so far as the same was capable of being taken possession of

The bill further alleged that a plan had since been registered in the Registry office, which affected prejudicially the rights of the plaintiff, and that some lots had been sold according to said plan by the sheriff for taxes, the titles to which had become vested in the several defendants; that such registered plan and the deeds by the sheriff to the defendants as purchasers for taxes, formed a cloud on the title of the plaintiff; and that being in possession, plaintiff was unable at law to test the validity of the registration of the said plan and of the deeds by the sheriff for taxes. The bill prayed a declaration that the plan and registration thereof, were illegal and ought to be cancelled; or if that were allowed to

1874.

Proudfoot v. Austin.

stand, a declaration that the deeds to the several defendants were void, and should be cancelled.

At the hearing, it was proved that the plaintiff derived title through *William Proudfoot*, whose title was under a sheriff's deed to him as purchaser at a sale for taxes—and the question was then raised, whether it was necessary in order to establish the title of *William Proudfoot*, to do more than produce the deed from the sheriff. At the close of the case, the Court expressed the opinion that the registration of the plan ought to be set aside, but reserved the question as to what was necessary to establish the proof of Mr. *Proudfoot's* title.

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

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

Fraser v. *West* (*a*), *Hamilton* v. *Eggleton* (*b*), *Knaggs* v. *Ledyard* (*c*), *Errington* v. *Dumble* (*d*), *Booth* v. *Girdwood* (*e*), *Williams* v. *McCall* (*f*), *Hall* v. *Hill* (*g*), *Rowe* v. *McNeill* (*h*), *McAdie* v. *Corby* (*i*), *Paterson* v. *Todd* (*j*), *Cotter* v. *Sutherland* (*k*), *Hurd* v. *Billington* (*l*), *Buchanan* v. *Campbell* (*m*), *Connor* v. *McPherson* (*n*), were referred to.

Judgment.

BLAKE, V. C.—At the hearing of the cause, I disposed of the various questions raised, with but one exception, and that is, whether the plaintiff need, in order to sustain his case, do anything more than prove the conveyance from the sheriff, given on the sale for taxes, under which he claims. I am of opinion that section

(*a*) 21 U. C C. P. 161.
(*b*) 22 U. C. C. P. 536.
(*c*) 12 Gr. 320.
(*d*) 8 U. C. C. P. 65.
(*e*) 32 U. C. R. 23.
(*f*) 23 U. C. C. P. 189.
(*g*) 22 U. C. R. 578, S. C. 2 E. & A. 569.
(*h*) 13 U. C. C. P. 189.
(*i*) 30 U. C. R. 349.
(*j*) 24 U. C. R. 296.
(*k*) 18 U. C. C. P. 357.
(*l*) 6 Gr. 145.
(*m*) 14 Gr. 163.
(*n*) 18 Gr. 607.

1874. Proudfoot v. Austin.

155 of 32 Victoria, chapter 36, only applies where there was an arrear of taxes at the time of sale; and where there has been an actual sale. I think, therefore, that here the plaintiff should have shewn that at the time of the sale there were some taxes due, and that an actual sale did take place.

Judgment.

On proof of these facts, I think he is entitled to the decree which he asks.

GRANT v. EDDY.

Pleading—Demurrer—Want of Equity.

Under the present system of pleading, it is the duty of the Court on perusing a pleading with a view of ascertaining whether or not it is sufficient on demurrer, to put a fair and reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used; and if as a whole it presents a case entitling the plaintiff to relief to allow it to stand, and if even there be some statements which if taken alone would render the case ambiguous yet these should be taken in connection with the remainder of the pleading so as to make, where practicable, a consistent story entitling the party to relief.

A pleader when dealing with facts peculiarly within the knowledge of the opposite party is not required to be as precise and particular as if the pleading were in respect of matters known to both.

Where a bill alleged with sufficient certainty enough to shew, if true, the relation of trustee and *cestui que trust* to exist between the plaintiff and defendants the Court, although portions of the bill did not come up to the requirement in this respect, overruled a demurrer for want of equity.

The order allowing a demurrer for want of jurisdiction, (reported *ante* page 45), affirmed on rehearing.

This was a rehearing, at the instance of the defendant *Eddy*, of the order over-ruling a demurrer as reported *ante* page 45 where the pleadings are sufficiently stated.

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Grant v. Eddy.

Mr. *Moss*, Q. C., for *Eddy*. The demurrer in this case is on two grounds: want of equity and want of jurisdiction. As bearing on the first ground the bill does not allege that there is any deed giving to the plaintiff any claim upon the parties or interest in the property assigned; it is true there is an allegation which refers to a notarial instrument, which instrument again speaks of the existence of a deed of agreement: but there is not anything stated to shew that plaintiff has any interest in, or any right in respect of, the property in question. As to the second ground of demurrer, the bill itself shews that the property was, and is, situate out of the Province beyond the jurisdiction of the Court and the contract in respect of it was executed, and the trusts of the deed are to be performed, out of the country. The settlor himself is out of the jurisdiction, and no portion of the property is shewn to have been brought at any time within the Province. Again, where a defendant is a foreigner and resident out of the jurisdiction, the Court will not exercise any jurisdiction over him *Cookney* v. *Anderson* (*a*).

Argument.

Mr. *Boyd* and Mr. *Cassels*, contra. Were not called upon to argue the point of jurisdiction. As to the want of equity it was urged that the 6th, 8th, 9th and 15th paragraphs of the bill sufficiently alleged a trust having been created in which plaintiff was shewn to have an interest sufficient to entitle him to call upon the defendants for an account, therefore the demurrer was improper and the order over-ruling it must be affirmed with costs. In addition to the cases cited on the original argument *Drummond* v. *Drummond* (*b*), *Innes* v. *Mitchell* (*c*), *MacLean* v. *Dawson* (*d*), *Paget* v. *Ede* (*e*), *Re Edwards* (*f*), *Story's* Conflict of Laws, sec 539; *Lewis's* Eq. Pleading, pp. 115-6, were referred to.

(*a*), 31 Beav. 45b.
(*b*) L R. 2 Ch. 32.
(*c*) 1 Deg. & J. 423.
(*d*) 4 Deg. & J. 150.
(*e*) 118 Eq.
(*f*) L. R. 8 Ch. 289.

1874.

Grant. v. Eddy.

SPRAGGE, C.—At the rehearing of this case, we felt so clear upon the question of jurisdiction, that we did not think it necessary to call upon the learned counsel for the plaintiff, to argue the point. I have since referred to the authorities and have read the judgment of my brother *Blake*, upon the argument of the demurrer, in which I entirely concur; he has indeed gone so fully into the law on that point that I do not think that I can profitably add anything to what he has said.

As to the demurrer for want of equity, all that it was necessary for the bill to allege was, such facts as would shew the existence of the relation of trustee and *cestui que trust*, between the plaintiff and the defendants other than *Eddy*. I grant that he must allege these facts with reasonable certainty. There are portions of the Bill that do not seem to come up to this requirement; but enough is alleged, and with sufficient certainty to shew, if true, the relation that I have indicated between the parties.

Judgment.

The original agreement between the plaintiff and *Eddy*, is stated positively; so is the delivery of logs under it; so is the inability of *Eddy* to meet his engagements, and his being in a state of insolvency, and about to make an assignment under the Insolvent Acts; also that a notarial instrument pursuant to the laws of Quebec, was entered into between *Eddy* and certain parties made defendants as trustees, in which it was recited that a certain agreement had been entered into between *Eddy* and certain of his creditors by which he assigned certain property to trustees, for the management of his estate (with some exceptions) and the liquidation of his debts. So far there is no actual averment of the existence of the agreement recited in the notarial instrument, nor is it alleged that the notarial instrument was executed in the Province of Quebec. In the latter part of the same paragraph, the 6th, and in the 7th paragraph it is assumed

that there was such an instrument and such a deed or agreement as is therein recited, but no allegation other than such as I have mentioned.

The 8th paragraph however, goes a step further. It alleges that "*Kelty*, *Bate*, and *Eastwood*, accepted the trusts mentioned in the said notarial document as above set forth, and undertook and entered upon the execution thereof as such trustees;" *Eddy* entering upon certain duties as manager, which it was provided that he should discharge. Now this is, to take it at its lowest, an allegation that *Kelty*, *Bate*, and *Eastwood* undertook the trusts mentioned in a document, and entered upon their execution as trustees, the provisions of that document having been previously referred to without, I assume, having been sufficiently alleged, and I think it must be conceded that so far the Bill does not allege anything that shews that the plaintiff was an object of the trust, for it does not allege that the plaintiff was a creditor, only that he had delivered logs, and then under circumstances alleged, discontinued their delivery. A later paragraph, the 16th, does indeed allege that the plaintiff was entitled to rank as a creditor in respect of the delivery of those logs; a very indirect way of alleging that he was a creditor.

Judgment.

All this may be regarded as introductory to the agreement entered into on the 22nd of August, 1873, which is as follows.

"Ottawa, 22nd August 1873.

"Messrs LYON & REMON, *Ottawa*.

"GENTLEMEN.—

"With reference to my contract with Mr. *Allan Grant* I have merely to reiterate what I previously stated, both to Mr. *Grant* and to your Mr. *Lyon*, viz; that any discrepancies or errors that there may be in any accounts heretofore rendered by me will, immediately on discovery,

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be rectified, and any balance that may be coming to Mr. *Grant* after delivery of logs, and making up and adjusting of accounts, will be paid, in accordance with terms at three, four, and five months by paper, made by me as manager, with the consent and concurrence of my trustees.

Without prejudice

Very truly yours.

(Signed) E. B. EDDY."

"We consent and concur in within.

"D. S. EASTWOOD, as trustee.

"A. C. KELTY, as trustee.

"CHAS. T. BATE, as trustee."

This in the bill is preceded by this allegation :—

"That afterwards and while the defendant *Eddy* was manager as before stated, for the said other defendants *Bate* and *Eastwood* and the said *Kelty* as such trustees, he, the defendant *Eddy*, addressed to Messrs. *Lyon & Remon*, who were then acting as solicitors for, and on behalf of, the plaintiff, a letter in the words and figures following namely :"—

Judgment.

Then in the 11th paragraph it is stated, "that the plaintiff accepted the terms of the said letter, and the proposals and terms therein and in the consent and concurrence of the said trustees indorsed thereon, and signed by the said trustees as above stated, contained, and thereupon delivered to the defendant *Eddy*, as such manager as aforesaid, the balance of logs and timber required to fulfil on the plaintiff's part the agreement of the 12th day of October in the year of our Lord 1871, above mentioned."

The bill does thus, as it appears to me, state such facts as if true, as upon demurrer they must be taken to be, shew the relation of trustee and *cestui que trust* to have existed between the parties.

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The Bill is certainly not to be commended as a piece of pleading, but still less is the demurrer to be commended, for the object of the Bill, and the grounds upon which relief is sought sufficiently appear upon it, to have made it perfectly safe for the defendants to answer and set up such defence as they may have.

I have had the advantage of seeing the judgment of my Brother *Blake*, upon the sufficiency of the pleadings, and agree with the observations that he makes. In a case which was before me some 12 or 15 years ago, but which I do not find reported, I had to consider what was the proper reading and construction of a bill in equity, and I came to the conclusion that where the object of the bill is sufficiently apparent, and one reading of it would defeat that object while another would without straining the words out of their ordinary meaning, effectuate it, the latter reading should be adopted; as it is to be inferred that they are used in a sense that would effectuate, not in one that would defeat, the case of the party using them. It was urged of course, I think it was by Mr., now Mr. Justice, *Gwynne*, that where the language used in a pleading is ambiguous, it must be taken most strongly against the pleader, but I thought I found authority for the position that I took, and I felt no doubt that it was in accordance with reason.

Judgment.

BLAKE, V. C.—The bill states that by an agreement dated the 12th of October, 1871, the plaintiff entered into an agreement with the defendant *Eddy*, whereby he was to furnish him with certain timber to be paid for as therein specified; that certain timber was supplied, but as *Eddy* was about to make an assignment under the Insolvent Acts, the plaintiff refrained from delivering the balance thereof. That by a notarial document dated the 24th of July, 1873, entered into before a duly appointed notary, it appears that there appeared before this notary the defendants *Eddy*, *Kelty*, *Bate*, and *Eastwood*, and

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declared unto the said notary that in accordance with a deed of agreement, made and executed under private seal, on the 12th of July, between *Eddy* and the majority of his creditors; he had ceded, assigned transferred and made over, and the said indenture did cede, assign, transfer and make over, unto the said trustees all his estate set forth in schedules, to the notarial instrument, to be held by the said trustees in trust to pay salaries, expenses, &c., and in the second place to pay debts, &c., then due or to become due in the carrying on the business and after payment to reconvey the residue to *Eddy*: and the parties to the agreement, covenanted to let *Eddy* manage the business, and with the consent of the trustees, to sell the lumber, purchase supplies, &c.; that the trustees might advance money to carry on the business; that the trustees accepted the trusts mentioned in the notarial document as above set forth and entered upon their duties as trustees; that afterwards *Eddy* and the trustees agreed that any balance due the plaintiff after delivery of the logs, would be paid by paper made by *Eddy* as manager with the consent and concurrence of the trustees; that the plaintiff thereupon delivered the balance of the logs required to fulfil the agreement of October, 1871, and these logs were used by the defendants in their management and conduct of the trust estate; that the defendants have refused to adjust the accounts relating to these matters, or to settle with the plaintiff or to pay for the logs. The bill asks that the accounts between the parties may be taken, t at the amount found due the plaintiff may be declared a charge on the trust property and that the defendants may be declared personally liable to pay the plaintiff what shall be found due. I think on these allegations the plaintiff is entitled to succeed in his demand of an account of what is due him under both of the agreements set forth in the bill. For years past this Court has in regard to pleadings as in other matters looked to the substance rather than to the form; and sec. 49 of the Administration of Justice Act of 1873, enacts that which theretofore had

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been aimed at by the procedure here sanctioned and adopted. This clause lays down "No proceeding either at law or in equity shall be defeated by any formal objection." On the argument of the case of *Foot* v. *Bessant* (*a*), Baron *Alderson* said, "The present inclination of my opinion is, that I must take the statement in the bill most strongly against the pleader." He reserved his judgment and on giving it afterwards used the following language: "There is no doubt that in pleadings, both at law and in equity, the plaintiff must state such a case as, if true, will necessarily entitle him to the relief which he seeks, and it is not sufficient that it may or may not entitle him to the relief . . . Now two senses may reasonably be put on the expression 'demised,' and if so why am I necessarily bound to put that construction upon it which it is obvious the plaintiff never intended should be put upon it, because such a construction would make the suit erroneous? Besides, the defendant is in no manner prejudiced by the statement, for he might easily have raised the question . . . Taking all the allegations in the bill together, I think I ought to read the expression 'demised' as if it had been 'demised by parol,' adopting that construction as the most natural, and at all events, as the most reasonable, because it will give effect to the whole bill taken together, whilst the contrary construction would render the bill altogether erroneous."

Judgment.

In *Redway* v. *McAndrew* (*b*), *Blackburn* J., says "We must look at the declaration as on general demurrer, and see what it may reasonably be taken to mean;" again "This is saying that the declartion is bad, because though it is quite clear what the plaintiff meant, it is possible to imagine cases which his words do not hit," and in the same case *Archbold*, J., says, "I think the declaration is good . . . On general demurrer it is not necessary that the fact should appear on the face of the declaration by necessary intendment but only by reason-

(*a*) 3 Y. & C. 320, 325.

(*b*) 22 W. R. 60.

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able intendment . . . Taking the whole declaration that is what is meant, and that is what is reasonably to be inferred from the words."

In *Murphy* v. *Glass* (*a*), Lord *Chelmsford* who delivered the judgment of the Court, thus deals with the question of pleading, "It was urged that to make the plea good it should have been expressly averred that no more of the purchase money was due than the amount secured by the bills, and that in the absence of an express averment it must by the rule of pleading be taken against the defendant that the fact was otherwise. But this rule does not apply to the pleading of matters which are peculiarly within the knowledge of the opposite party *Hobson* v. *Middleton* (*b*); and with reference to this equitable plea, it may be observed that the same exception to the rule that pleadings are to be taken most strongly against the party pleading is recognized in Courts of Equity: see *Mitford* on Pleading, 5th edition, pp. 45, 347 . . . The plaintiffs were at liberty in this case to reply and avoid the plea on equitable grounds, but they chose to demur and thus leave the allegations in the plea without denial or qualification. Every fair and reasonable intendment therefore, ought to be made in support of the plea so far as it relates to matters peculiarly within the knowledge of the plaintiffs."

Judgment.

I am of opinion that now in perusing a pleading to ascertain whether or not it is sufficient on demurrer it is the duty of the Court,—(1). To put a fair and reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used, and if as a whole it presents a case entitling the plaintiff to relief, to allow it to stand. (2). That even although there be some statements which if taken alone would render the case ambiguous yet these should be taken in connection with the remainder of the pleading so as to

(*a*) 17 W. R. 592. (*b*) 6 B. & C. 295.

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make, where practicable, a consistent story entitling the party to relief. (3). That where the pleader is dealing with facts peculiarly within the knowledge of the opposite party, the same preciseness and particularity are not required as would be, were the pleading dealing with matters known to both.

The technical system of pleading, formerly in vogue, with its extreme accuracy, precision, and casting out of immaterial issues, possessed many advantages amongst professional gentlemen well versed in its mysteries; but when you had, as it frequently happened, the learner pitted against the learned, and the education of the former was literally carried on at the expense of the client, whose rights were pleaded into such a maze that he was obliged to give them up, it became necessary to abandon the higher standard of pleading, and to bring it down to the comprehension of those who had not thought it worth their while to devote years to its study.

Judgment.

No doubt a great general benefit has thus been obtained but the evil that formerly existed will be replaced by the difficulty of defining the proper limit, between too great certainty on the one hand, and too great uncertainty on the other. I think that the bill in the present suit makes out with all the particularity that should be required, a case which the defendant should rather meet by answer than be allowed to defend by demurrer, and therefore that the order made should be affirmed with costs.

PROUDFOOT, V.C., concurred.

Per Curiam: Order overruling demurrer affirmed with costs.

Aff. on appeal 23 Gr. 81

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STAUNTON v. THE WESTERN ASSURANCE CO.

Insurance—Renewal—Payment of premium.

Where the clerk of an insurance company left a receipt for renewal premium duly signed at the office of a policy holder, who desired to renew the insurance, the messenger declining to receive the money from the person in charge, and it appeared that the company had in hand money belonging to the insured: that the receipt was never demanded back, and that the insured relied on the renewal as having been effected:

Held, that after a loss it was too late for the company to set up that the premium had not been paid, even though their clerk may not have been authorized by his instructions to leave the receipt.—[SPRAGGE, C., dubitante.]

The bill in this cause was filed 14th October, 1872, by *Moses Staunton* against *The Western Assurance Company*, seeking to compel payment by the *Company* of the sum of $5000 covered by a policy (No. 33,191), issued by the defendants in favor of the plaintiff.

Statement.

The facts appearing on the pleadings and evidence were briefly that the plaintiff had borrowed $16,000 of the defendants, and then had borrowed $4,000 as a further charge upon the mortgage of certain leasehold premises held by the plaintiff under a lease from the City of Toronto. The mortgage contained a clause providing for insuring the mortgaged premises in the usual form and authorizing the defendants to insure if the plaintiffs omitted to do so. In February 1872, there were current the following policies, all of which were effected under the insurance clause in the mortgage or as having been transferred to the defendants as collateral security for the mortgage debt, viz.:—

One in the Lancashire office for $6,500; one in the British America office for $5,000; One (being No. 33,191), in the defendants' office for $5,000, on goods; and a second one being (No. 39,295,) in the defendants' office for $5,000—On goods and on buildings.

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Policy No. 33,191 had been granted on the 6th April, 1870, and had been renewed for one year, from 6th April, 1871. It appeared that a fire had occurred in these and other premises in the month of February, 1872, the losses at which, had been adjusted as follows:— Loss on No. 33,191, $531; which was paid to the plaintiff. Loss on 39,295, $2,000; which was retained by defendants; and on the risk in the Lancashire office $212.77; which amount was subject to the order of the plaintiffs but not paid over until August. While this state of things existed another fire occurred in May, 1872.

On 20th April Mr. *Haldan*, who was the managing director of the defendants' company, had written a letter signed by himself and the officers of the other companies liable to make good the loss sustained by the February fire, offering to pay $8000 or rebuild. This offer had not been accepted when the fire of May took place. The position of parties at this time was that there had been a loss on the policy No. 39,295 to a considerable amount which had not been paid to the plaintiff, and the defendants had a right to receive $212.77 from the Lancashire Company; and the policy No. 33,191 was in their hands as a collateral security and which, as will be seen by the dates, expired on 6th April. Mr. *Jarvis*, an insurance broker acting for *Staunton* gave evidence that on that day he went to defendants' office and saw Mr. *Kenny*, a clerk of the defendants who was the proper officer to renew, for the purpose of renewing this policy when he was informed by *Kenny* that they would not renew under 2½ per cent; (1½, having been the previous premium), and that they would not renew the risk through him; that is they would not pay commission. *Jarvis* in his evidence swore that he said as to the premium, "All right, we will give it to you." *Jarvis* also swore that the same evening he saw Mr. *Haldan* in a street railway car, and spoke to him

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about the matter; that *Haldan* told him they could not renew through him, but *that they would of course keep the policy up for their own benefit.* *Jarvis* also stated that he the next morning saw *Albert Staunton*, plaintiff's son, and communicated to him that the defendants wanted 2½ per cent., to which *Albert Staunton* replied he would give it, and altered his memorandum book accordingly. Mr. *Jarvis* also told *Albert Staunton* that *Haldan* had said they would keep the policy up for their own benefit.

On the 13th April, according to the evidence of Mr. *Kenny* called for the defendants, or some day early in May, according to the evidence of Mr. *Baxter*, plaintiff's book-keeper, *Kenny* took to the wholesale office of the plaintiff, and left with Mr. *Baxter*, the book-keeper, a receipt in the words following:—

Statement.

"Western Assurance Company. Home Office, Toronto, 6th April, 1872, $125; Renewal Receipt No. 16,700, Received from *Moses Staunton*, Esq., of Toronto, the sum of $125 on $ assured by the *Western Assurance Company*, under policy No. 33,191 which is hereby continued in force for one year from the 6th day of April, 1873; *F. Lovelace*, Secretary, per *S. S. Kenny.*" And on the left hand corner was written a memorandum "Assigned to *Western Assurance Co.*," the same being on the common printed form used by the Company filled up in the usual manner.

What took place between *Baxter* and *Kenny* on this occasion was differently related by those two witnesses. *Baxter* swore *Kenny* handed him the receipt and that he, *Baxter* thereon, after looking at it and seeing what it was, asked him "Do you want the money for this?" to which *Kenny* replied, "That's all right, Mr. *Staunton* will understand about it," and then left without saying more. *Baxter* swore he put the receipt on a file on which he put papers for plaintiff's personal attention,

and brought it to plaintiff's notice the same day when he came in. He further stated that he had financial control though nothing to do with the insurance business and that if *Kenny* had said he wanted the money he would have procured a cheque for him for the amount.

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Mr. *Kenny's* account differed wholly from this, he swore he gave the receipt to *Baxter*, and told him that it was a receipt for an insurance which was due on 6th April; that *Baxter* said *Staunton* was not in, and that he did not know anything about it, and that *Baxter* requested him to leave the receipt, and said if it was to be renewed he would send a cheque or the money; and that he accordingly left the receipt without any voucher for it; and that he forgot all about it until after the fire.

Mr. *Haldan* was also examined as a witness, and in the course of his evidence he swore, "I recollect seeing Mr. *Jarvis* in the street railway car, and his talking to me about this renewal; this was after I had determined to increase the rate. Mr. *Jarvis* said he had been in the office about the renewal; and on this I told him that we would not renew the policy for less than 2½. I may have told Mr. *Jarvis* that we would not give him a commission;" this witness denied having told *Jarvis* that the company would renew for their own benefit; he also stated that he recollected "giving Mr. *Kenny* instructions not to renew unless 2½ per cent was paid; Mr. *Kenny* had no instructions to renew it unless he received the money; of course I expected the money to be paid; I heard no more of it afterwards until after the fire. Mr. *Kenny* was not authorized to say that Mr. *Staunton* would not be expected to pay the premium or anything of that kind. I have no recollection of having stated to Mr. *Jarvis*, in the cars, that *Staunton* had borrowed money from the Company; and I have no perfect recollection of thinking it of any consequence to the Company that this policy had not been renewed. It was *Kenny's* duty to look

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after this premium as it was a large one. I can't say it was the course of the office to send out clerks to collect premiums."

The cause came on for hearing at the sittings of the Court in Toronto, in the Spring of 1874.

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

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

After taking time to consider *Strong*, V.C., before whom the case was heard, pronounced a decree in favor of the plaintiff with costs.

The defendants thereupon reheard the cause when the same counsel appeared for the parties respectively. For the defendant it was urged that the proceedings should have been taken at law not in this Court; that all *Kenny* had authority to do was, to receive from plaintiff the sum of $125 and on receipt thereof to hand over the renewal receipt. *Acey* v. *Fernie* (*a*), *Henry* v. *The Agricultural Assurance Co.* (*b*), *Montreal Insurance Co.* v. *McGillivray* (*c*), *Chase* v. *The Hamilton Mutual Insurance Co.* (*d*).

Argument.

The $212, referred to, when the case was disposed of in the Court below, as coming from the *Lancashire* company, was not present to the mind of either party carrying on the proceedings for renewal; and to make that a sufficient payment of the premium it must be shewn that it was arranged that the money should be applied in that manner.

On behalf of the plaintiff it was contended that the suit was to some extent one for redemption. Then here the policy had been assigned and therefore plaintiff could not

(*a*) 7 M. & W. 151. (*b*) 11 Gr. 125.
(*c*) 13 Moo. P. C. and particularly at pages 119 and 122.
(*d*) 22 Barb. 527.

sue at law. In the next place the policy was for one year only, and the renewal receipt was in effect a new contract.

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Here it is shewn that at the time of this receipt being issued a sum of $212 was due by the *Lancashire Company*, and this was going to the defendants and could have been obtained by them at any time after the adjustment of the loss; and besides $2000 were actually due to the plaintiff by the defendants as their own portion of that loss; a sum enormously in excess of what was required to disburse on renewing the policy. All that is necessary for the plaintiff to do, to entitle him to recover, is to shew that the defendants are estopped from alleging that there was not a binding contract between the parties. *Knights* v. *Wiffen* (*a*), *Smith* v. *Commercial Union Insurance Co.* (*b*).

Judgment

SPRAGGE, C.—There is a material difference in the accounts given by *Baxter* and by *Kenny* respectively as to what occurred upon the occasion of the receipt for premium of insurance being carried by *Kenny* to the office of the plaintiff, and its being left there with *Baxter*. My brother *Strong* says that he believed the account given by *Baxter* in preference to that given by *Kenny*, and we must, therefore, assume *Baxter's* account to be substantially correct.

There is a good deal in favour of the position that the Company assumed that the plaintiff would renew direct with the Company without the intervention of *Jarvis*, and paying the increased rate, which *Jarvis* was informed the Company would require: the sending the receipt by the hands of *Kenny* is cogent evidence of this. After what had passed between *Jarvis* and *Kenny*, and *Jarvis* and *Haldan*, they might reasonably conclude that the plaintiff would so renew. Nor is the receipt being left without actual payment of the money strange in

(*a*), L. R. 5 Q. B. 660. (*b*), 33 U. C. R. 69.

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presence of the fact that the Company had in hand moneys of the plaintiff which they might have applied in payment of the premium, and I apprehend it would not have been an act in excess of authority by *Kenny*, who says it was part of his business to see to the renewal of city policies, if he had made such application of the moneys in hand. If *Kenny* was ostensible agent, his receiving private instructions would make no difference if he did receive them. But I do not see upon the evidence that he did receive any private instructions as to the receipt of the money in cash being a condition of his leaving the receipt.

It is still difficult to see why the premium was not paid in cash. The son, *Albert Staunton*, who attended to the insurance business, expected it to be paid in cash, and was not in fact aware of the Company having any moneys of the plaintiff in their hands, and he was not informed by *Baxter* of the receipt having been left. Then the plaintiff himself, though informed of it, was not informed of it until after the second fire. This appears upon his own deposition. We cannot, therefore, say that the plaintiff changed his position upon the faith of any representation by the Company to be gathered from that receipt.

Judgment.

The real value and weight of that receipt, in my mind, consists in this, that it confirms the evidence of *Jarvis* as to what passed between him and *Haldan*, and what he communicated to *Albert Staunton*, more particularly as to the declaration by Mr. *Haldan* that the Company would renew for their own benefit. It appears that the receipt was taken to the plaintiff's office by *Kenny*, by direction of Mr. *Haldan*. Was it because the Company intended to renew for their own benefit? It might be so; but this is rather negatived by the evidence of *Haldan*, that he expected, of course, that the money would be paid, *i.e.*, the premium, by the plaintiff. It may, how-

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ever, admit of this explanation, that the Company wished and expected that *Staunton* himself should renew, but that the Company would, at any rate, for its own protection, keep the policy on foot, and the receipt may have been sent in order to its being retained by *Staunton* as an insurance by himself, the Company having the right to charge the premium against him. I do not understand from the evidence that *Jarvis* informed *Albert Staunton* that he had effected a renewal; but the contrary, for he says that after informing him of what had passed, his connection with the matter dropped, and he had nothing more to do with it. *Albert Staunton*, it is true, assented to the increased rate, and made an entry in his book indicating the amount; and as he says that the policy was in force until the 6th of April, 1873, I cannot understand how it was to be in force until that date, without something more to be done by him or the plaintiff.

Judgment.

Jarvis had not, nor did he understand that he had, taken upon himself to agree to the increased rate, for *Albert* himself says that *Jarvis* came, as he understood, to *consult* him about it. He assented to it no doubt, but was that assent communicated to the Company. If it was, it does not appear how. The preparing and sending of the receipt is some evidence of it. Is it sufficient? I doubt if it is, looking at all the evidence. I have said *Jarvis* had not taken upon himself to agree to the increased rate. It is true, that *Jarvis* says that, upon *Kenny* mentioning the increased rate, he said, "all right, we will give it you;" but upon this *Kenny* said, and as *Jarvis* says, said *again*, "I cannot renew it with you, I must see Mr. *Haldan*.

If I could see that the plaintiff or *Albert*, his son, had been led by the Company to believe that the insurance *had been* renewed, I should agree unreservedly with my learned brothers; and I should do so if I could see that

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the plaintiff was led by the Company to believe that they would do so, and had in consequence abstained from doing so. The statement attributed to Mr. *Haldan* by *Jarvis*, that the Company would of course renew for their own protection, does not amount to an undertaking, especially when taken in connection with his refusal of *Jarvis's* agency in the matter, and taking it to be proved that this declared intention of Mr. *Haldan*, was communicated to *Albert Staunton*, it did not influence him to do, or to abstain from doing anything, for he says he supposed the premium would be paid in cash, and did not know that the Company held any money belonging to his father.

Judgment.

The plaintiff's case must rest upon this, that *Jarvis* was instructed to renew, and was at liberty to do so at any rate he might think advisable; that *Jarvis* informed *Albert Staunton* that the rate required was 2½, and that *Albert* agreed to it; that on the following day after seeing *Haldan*, he informed *Albert* that *Haldan* had told him the policy would be continued; upon which *Albert* made the noting already spoken of. *Albert* adds in his evidence, "I took no further steps as to the policy, as from what Mr. *Jarvis* had stated to me, I considered the policy was in force." I find it difficult to understand how he could properly consider that the policy was in force, for the premium was not paid, and he says himself that he expected it to be paid in cash.

There remain these two facts, that the Company had in hand money of the plaintiff which they might have applied in the renewal of this policy; and the sending of the receipt with what amounts to a message, which, however, was not delivered in time to be of any avail. The message is, however, material as a piece of evidence, and what passed is material as conduct. *Kenny* is asked by *Baxter* if he wants the money "for this;" the answer is, "that's all right, Mr. *Staunton* will understand

about it." This may be interpreted as meaning, "the money is not required, Mr. *Staunton* will understand why." It is evidence, some evidence at least, of the existence of a reason not then explained, why the money was not required; viz., that the Company had money in hand which they intended to apply on this renewal; and what passed is material as to conduct in this, that *Baxter* would have procured the money and have paid it, but for what was said in regard to it by *Kenny*.

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It appears to me that these two facts are all upon which the decree in this case can be supported; and I confess that looking at the other evidence to which I have referred, I have serious doubts whether they are sufficient. They are doubts which prevent my assenting entirely to the judgment of my learned brothers.

BLAKE, V. C.—I have perused the evidence and the report of the proceedings before the learned Judge by whom the case was originally heard, and I concur in the result at which he has arrived. *Kenny*, the clerk of the defendants, was entrusted with the receipt in question, He states that it was part of his business to see to the renewal of city policies. Mr. *Haldan*, the manager of the Company, says it was *Kenny's* duty to look after this premium as it was a large one. He takes this receipt to the office of the plaintiff. There are funds of the plaintiff within the control of the defendants, and when the plaintiff's clerk offered the $125 mentioned in the receipt, *Kenny* answered that it was all right, that Mr. *Staunton* understood all about it. Mr. *Jarvis* says Mr. *Albert Staunton* instructed him to renew the insurance, and that Mr. *Haldan* stated to him that *Staunton* owed them money and that of course they would keep up the policy for their benefit. *Albert Staunton* stated that *Jarvis* had liberty to effect the insurance at any rate, which he thought would be desirable, and that he agreed to the increased rate. I think

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both the Company and *Kenny* gave the plaintiff to understand that the insurance was renewed at the increased rate. It is not necessary to consider what the position of the parties would be in the ordinary case of assured and assurer; for here, the defendants, owing to their position of mortgagees, with the covenant which enabled them to insure and charge the plaintiff with the premiums, are placed in a peculiar position, and may thus bring themselves under a liability from which they would otherwise be free. I think that where a clerk leaves the office of his employer with a receipt which he is on certain terms empowered to give up to a person desiring to renew an insurance, and where the Company have money of the person seeking insurance under their controul, and where the premium is offered to the clerk, and by him refused and the receipt is left, and no demand is made for its return, and the person holding it, relies upon it as an insurance, there, even although private instructions may have been given to the clerk, which he did not disclose, by which he was instructed not to leave the receipt without payment in cash, (which, however, is not established on the evidence here), in such a case the Company must bear the consequences of the neglect of their clerk, in not making known this as a term of the renewal, and their own neglect in not demanding back the receipt when their instructions were not complied with. The plaintiff and those representing him, were entitled to conclude from the acts of the defendants and their agent, that he was insured to the extent of the $5,000 in dispute, and they are estopped from denying a liability incurred under the circumstances of the present case. I think the decree should be affirmed with costs.

Judgment.

PROUDFOOT, V. C., concurred fully in the judgment of *Blake*, V. C.

Per Curian—Decree affirmed with costs. [SPRAGGE, C., *dubitante*.]

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Re Bishoprick.

Settled Estates Act—Exchange of lands—Infant cestui que *trust—Con. Stat. U. C. ch.* 12.

The Settled Estates Acts do not authorize the Court in sanctioning an exchange of the lands of an infant *cestui que* trust; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the Court may order the same to be carried out under the provisions of sec. 50 of ch. 12 Con. Stat. U. C.

Statement.

One *Mark Bishoprick*, being seised in fee of certain lands in the city of Ottawa, by indenture dated 19th August 18[illegible], granted the same to *Henry Bishoprick* upon certain trusts during the life of the grantor and after his death to hold the said lands to the use of his widow, *Maria Bishoprick*, during her natural life and widowhood; and upon the death or marriage of the said widow to the use of *Julia S. Bishoprick*, and said *Henry Bishoprick* respectively during their natural lives, and after their death, to the use of the children or child of the said *Henry Bishoprick*, by his wife the said *Julia S. Bishoprick;* who, being a son or sons, should attain twenty-one years; or being daughters or a daughter, should attain that age or marry; to be divided equally; and if there should be but one such child, the whole to be in trust for that one child in fee, with a limitation over to a son of the said *Henry Bishoprick* by a former marriage in the event of the fee simple not vesting in any such child.

Soon after the creation of the trust, the settlor died; leaving him surviving his widow (*Maria Bishoprick*), the said *Julia S. Bishoprick*, and *Henry Bishoprick*, and *Celinda Davis Bishoprick*, the only child of said *Henry* and *Julia S. Bishoprick*, an infant of about three years old. The settled property was in the shape of an acute angled triangle, one of the sides of which formed the frontage on Maria Street; and the buildings erected

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thereon were dependent for ground for back premises, yards, &c., on part of the *By* estate, which bounded the settled property in the rear; the settled property not having sufficient depth to furnish this accommodation.

This part of the *By* estate having been sold, and the purchaser threatening to deprive the parties interested in the *Bishoprick* property of the land theretofore used by them, which would have rendered the houses uninhabitable, it was agreed between the trustee and the purchaser to exchange part of the *Bishoprick* settled estate, which being of no depth was not of much value to the estate, for part of the *By* estate, so as to obtain a depth such as is usual in building lots for the balance of the settled property.

An application was accordingly made by the widow, the tenant for life, by petition under the Settled Estates Acts (*a*), for an order sanctioning this exchange. All adult parties consented to the application and it was admitted by the guardian for the infant that the proposed exchange would be very beneficial to the infant.

Mr. *Hoyles* appeared for petitioner and all adult parties interested under the settlement.

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

Judgment.

BLAKE, V. C.—I do not think this application can be granted under the Settled Estates Acts. The wording of these statutes does not extend to exchanges of property, and I can find no authority which would warrant me in giving thereto the effect that I have been asked. It is evident that what is sought is very much for the benefit of the infant. In the lifetime of the father, the property in question was utilised by leasing the adjacent premises; without such additional property a great part

(*a*) Imp. Stats. 19 & 20 Vic. ch. 120; 21 & 22 Vic. ch. 77; and 27 & 28 Vic. ch. 45.

of that of the infant is almost, if not entirely, valueless. The fee simple of the premises which used to be leased by the father of the infant, has now passed into the hands of an aunt, and she is willing, on obtaining a small portion of the property of the infant, to give her a considerable piece of property, which will increase very much the value of the infant's estate, and enable her to enjoy the premises in the manner in which they were used by the father. There is no doubt that if an arrangement of the kind be not carried out, the property of the infant will be greatly depreciated in value. If the title to the adjacent premises had not changed since the death of the testator, and they could still be rented for the benefit of the infant, or if the offer made for exchange was not so advantageous, or if the loss of the opportunity for purchasing would not so obviously prejudice her estate, I should have a difficulty in bringing the case within cap. 12, sec. 50, of the Con. Stat. Under the circumstances presented to me, I think I may fairly say, "a part of the property * * is exposed to * * depreciation." Great latitude is given as to the cause for which the Court may interfere; it may do so when called upon for certain specified matters "or any other cause." The power of the Court to act on such a state of facts is not limited, for it is at liberty to make "other disposition of the same or of any part thereof."

Judgment.

An application may be made under the Act specified. The material already before me may be used in those proceedings, but they will have to be so supplemented that all that is necessary to be before the Court under cap. 12, may be furnished to me.

The application can be renewed before me on any day.

Subsequently the application was made as suggested by the Vice-Chancellor, when, on the evidence then adduced, a conditional order for the carrying out of the proposed arrangement was made.

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The Cornish Silver Mining Co. v. Bull.

Incorporated company—Demurrer.

Where an incorporated company files a bill using a name other than that mentioned in the Act of incorporation, the bill is liable to a demurrer for want of equity.

Statement. The bill in this case was filed for the purpose of winding up the affairs of the Company and for further relief. The defendants demurred for want of equity.

Mr. *J. A. Boyd*, for the demurrer, pointed out that no relief could be given on this bill, as the plaintiffs had sued in a name not given by the Statute, which was the "Cornish Silver Mining Company of Canada."

Mr. *Bethune*, contra.

Judgment. Blake, V. C.—There is no such company as the *Cornish Silver Mining Company*. By the act of incorporation the name is the *Cornish Silver Mining Company of Canada*. There is no room for the argument that the name used in this suit is the name gained by reputation, and therefore, the one which the Company are entitled to use in their various transactions. The Company have just been formed, and so no time has elapsed within which, by reputation, the name could have been gained, and even if it had, it is not pleaded that the *Company* are thus entitled to use a name other than that awarded them by their act of incorporation. The objection is rightly taken by demurrer, so far as the form of objection is concerned. The plaintiffs complain that the demurrer is frivolous and raises a mere technical matter for the consideration of the Court. They however had an opportunity of removing it, under the practice of the Court, by amendment, at a mere nominal expense and they chose rather than adopt this course to allow the question to be argued. I do

not think the Administration of Justice Act, cited in favor of the plaintiffs in any way assists them. It cannot be the intention of this Act to sow broadcast the seeds of carelessness and inaccuracy. No injustice is worked against the plaintiffs by the order I propose to make, but they receive simply a slight punishment for first making a stupid blunder and thereafter appearing before the Court and attempting to maintain their position. On the plaintiffs taking out the order made, and paying the demurring defendants $12, costs of the demurrer within ten days, let them have leave to amend; in default, let the demurrer be allowed with costs.

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Judgment.

CANADA LANDED CREDIT CO. v. MCALLISTER.

Insolvency—Execution creditors—Parties—Practice.

A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding in the Master's office it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency:

Held, on appeal from the ruling of the Master, that it was proper to add such creditors as parties in his office.

Under a decree in a mortgage suit against the assignee of an insolvent, the plaintiffs' solicitor applied to the Master to add, as parties defendants, several persons who had writs of execution against the insolvent in the hands of the sheriff at the date of the assignment in insolvency. A difference of opinion being known to exist among the Masters as to whether, under the provisions of the 32 and 33 Vic., chapter 16, such persons are proper parties or not, the Master declined to make them parties, and gave a certificate of his having done so, in order that the question might be brought before the Court.

Statement.

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Canada Landed Credit Co. v. McAllister.

Mr. *Hoskin*, Q. C., appealed from the Master's ruling.

BLAKE, V. C.—It seems clear that, under sec. 13, ch. 18, of 29 Vic., a creditor had a lien under the circumstances stated in the Master's certificate for his costs of suit (*a*). I am not at all clear that the effect of secs. 10, 29, 42, 59, and 116 of the Insolvent Act of 1869 is not to place creditors in the same position in this respect as they occupied under the Acts of 1864-65. In *Davidson* v. *Perry* (*b*) it was not argued that there was a lien for the costs.

Judgment.

I think under the circumstances it will be better to add the creditors, when they can have an opportunity of discussing the question. I do not think it should be determined behind their backs.

McMILLAN v. McMILLAN.

Specific performance—Devise subject to annuities—Devise charged with payment of debts.

Wher lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but they will not where there is also a charge of debts: where therefore a testator devised to his daughter all his "real and personal estate of every description, subject to the payment of my just debts, and on condition that my son *M.* be supported and taken care of as hitherto by her, to have and to hold the said real and personal property on the condition aforesaid to her, her heirs and assigns forever," and appointed her sole executrix.

Held, that the devisee could make a good title freed from the charge for the support of the son *M.*

This was a bill for specific performance, and in answer to the claim of the plaintiff, (the vendor) the defendant,

(*a*) Re *Heyden*, 29 U. C. R. 262.
(*b*) 23 U. C. C. P. 346.

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McMillan v. McMillan.

who resisted the performance of the agreement, alleged as follows in his answer: "I submit that the said plaintiff and my said co-defendant have not a good title to the said lands in themselves, inasmuch as the said plaintiff claims title under a devise from the late *Dennis O'Brian* and my said co-defendant, the said *Duncan McMillan*, is interested solely as the husband of the said plaintiff; and the will of the said late *Dennis O'Brian*, under which the said plaintiff claims title as aforesaid, contains a clause that the said plaintiff shall have all the real and personal estate of every description of the said late *Dennis O'Brian*, subject to the condition that the testator's son *Michael O'Brian* be supported and taken care of by the said plaintiff as theretofore; and the said *Michael O'Brian* is an idiot and still living, and I am advised and verily believe that the condition as to the maintenance of the said *Michael O'Brian* above referred to creates a lien on the said lands in his favour, and that during his life the plaintiff and my said co-defendant cannot convey the said lands free and clear of all incumbrances." The material portions of the will in question were "I give, devise, and bequeath to my daughter *Mary O'Brian* all my real and personal estate of every description, subject to the payment of my just debts and on condition that my son *Michael* be supported and taken care of as hitherto by her, to have and to hold the said real and personal property on the condition aforesaid to her, her heirs and assigns forever; and I appoint her, the said *Mary*, my sole executor."

Argument.

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

Mr. *Maclennan*, Q. C., for the plaintiff, referred to *Johnson* v. *Kennett* (*a*), *Forbes* v. *Peacock* (*b*), *Wright* v. *Wilkin* (*c*), *Sugden's* V. & P. 661, *Dart* vol. 2 pp. 546, 550, 569, *Lewin* on Trusts 435-9.

(*a*) 3 M. & K. 624.

(*b*) 1 Ph. 717.

(*c*) 1 B. & S. 332.

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McMillan v. McMillan.

The defendant did not appear.

After looking into the authorities—

BLAKE, V. C.—[After stating the facts as above set forth.] Having answered the bill the defendant failed to attend on the hearing of the cause and urge his reasons for concluding that the plaintiff is unable to make a title to the premises in question. I have therefore been obliged to consider the question raised without the benefit of argument on behalf of the person resisting performance of the contract. There is no allegation that the debts of the testator are paid, nor is there any statement that the plaintiff is not proceeding for the purpose ofs atisfying them out of the proceeds of the sales of the property. The only means the plaintiff may have to satisfy the obligations cast upon her, by the will, may be by sale of the premises devised to her, and the Court will not take for granted without even a suggestion to that effect, by the defendant, that the sale in question is being carried out for purposes other than the accomplishment of those required by the will. I am of opinion that upon the pleadings and will, the plaintiff can make a title to the land in question and that the reasons set up by the purchaser are not sufficient to disentitle the plaintiff to the decree for which she asks. Where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser, because it was the very purpose of making the lands a fund for that payment that it should be a constant and subsisting fund: *Elliot* v. *Merryman* (*a*). But this is not the rule if there be also a charge of debts: *Page* v. *Adam* (*b*). See also, *Jenkins* v. *Hiles* (*c*), *Johnson* v. *Kennett* (*d*),

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(*a*) Barn. 78.
(*b*) 4 Bea. 264.
(*c*) 6 Ves. 654.
(*d*) 3 M. & K. 624.

Forbes v. *Peacock* (*a*), *Stroughill* v. *Anstey* (*b*), *Doran* v. *Wiltshire* (*c*), 1 W. & T. L. Ca. 51.

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It is clear the plaintiff, under the will, received power to dispose of the estate devised, and that under our Act (*d*) the purchaser was not bound to see to the appropriation of the purchase money. The power to sell, receive the purchase money, and effectually discharge the purchaser, upon its receipt, is apparently in as full force as at the time of the death of the testator. The onus is upon the defendant to establish that this power has ceased to exist, and in failing to do so, he is bound to accept the title which the plaintiff offers him as devisee and trustee under the will in question.

Judgment.

(*a*) 1 Ph. 717.
(*b*) 1 DeG. M. & G. 635, 659.
(*c*) 3 Swan. 699.
(*d*) Con. Stat. U. C. ch. 90, sec. 9.

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THE ATTORNEY-GENERAL v. BOULTON.

Dedication—Original boundaries.

The proprietors of a park lot adjoining the city of Toronto laid off lots on a street, which was only partially opened up on the ground, giving to each lot a depth of 120 feet from the eastern boundary of such park lot. Some years afterwards the street was opened to its full length, when it was discovered that, as the fences were then placed thereon, some of the lots on the part last opened up would not have the depth stipulated for, and an information was thereupon filed, on the relation of an owner of one of these lots, to compel the removal of the fences. On a survey being made pursuant to the Statute, and also as ascertained by producing the lines of that part of the street which had been opened and in use for 30 years, it was shewn that the fence did not encroach on the street, and that any apparent reduction there might be in the depth of the lots must have been caused by the removal of the boundary fence between the park lot in question and the adjoining one. Under these circumstances the Court dismissed the information with costs.

In such a case the owners had done some grading on a part of the property, intending it as a continuation of a street which had been already opened up and travelled for upwards of thirty years:

Held, that this was not such an act as amounted to dedication of the street in such a manner as bound the owner to its exact position, and even if it could be so treated it did not extend to that portion of the street which was not actually opened up and used.

Statement.

The information was against *John Boulton*, *John Hillyard Cameron*, *John Cayley*, and *Robert Benjamin Blake*, which had been the subject of demurrer for want of equity, as appears by the report thereof *ante*, volume xx p. 402.

After the decision there reported, the information was amended so as to remedy the defect there pointed out, and where the ground of complaint is sufficiently stated.

The defendants answered the bill, denying any encroachment on the soil or ground of William Henry

street as stated in the information; and the cause having been put at issue was brought on for the examination of witnesses and hearing, at the sittings of the Court in Toronto.

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Mr. *Passmore*, a surveyor, was examined on behalf of the relator, and stated that he first knew William Henry street, as a street, in the spring of 1869, and then observed some grading on it; was then requested to make a survey of a lot, and ascertained, as he considered the eastern limit of this street, taking the descriptions in some earlier deeds from the proprietors in order to do so. After that he noticed the street had been graded and considered it preferable to take the graded street as shewing where the street was intended to be, and took this as an act of dedication, and fixed the lot he was surveying from it; adopting the grading as the line of the street, although he had never before considered William Henry street or its position; and that owners of property on the street had adopted the line as located by him as the true line of the street, and built according to it. This witness's evidence shewed that on that part of the street where the relator's property was situated there were not any fences or grading done on the street; that he had never run out the line between the park lots twelve and thirteen, and that at the south end of the relator's property a fence was run across William Henry street. The relator himself proved that he had put up this fence in 1861 by permission of Mr. *Cayley*, one of the parties having a beneficial interest in the property, and that at the time of putting it up William Henry street was graded up to the south end of the cricket ground fence, which was some distance to the north of his cross fence; that about 1868 he had removed this fence.

Statement.

Mr. *Barber*, a witness called by the defendants, proved that he had known the property called the

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"Cricket Ground," on park lot 13, from the time it was taken possession of in 1840; that Mr. *J. B. Robinson's* property was to the east of it; and that his fence was at one time moved to the westward thirteen or fourteen feet, extending from the northern corner of his property to College street. This witness proved that about 1861 or 1863 a furrow had been run with a plough on William Henry street, south of the cricket ground, but no such furrow was run on the cricket ground, and remembered seeing the furrow spoken of as recently as 1869, and nothing was apparent but that furrow—no grading; it was a pasture field, and no street was laid out on it; he remembered the furrow on one side only, but would not say there was or was not a second one, and that the furrow, he thought, was made for the purpose of draining, and the land adjoining the cricket ground on the south was occupied by the relator as a pasture field.

Statement.

William Henry Boulton, one of the executors of his mother's will, proved that he had never authorized the running of any streets in the place complained of; that in 1840 he had the boundary betwen park lots twelve and thirteen run and put up a fence on that line. The intention of the family was, to open up William Henry street from Queen to College street according to a plan prepared by his father, but it had not been laid out in any other way.

Mr. *Cayley*, who was interested in the property, proved that about 1861 or 1862 he had built a fence along the north side of Baldwin street (which is situated to the south of the point in dispute) and on reaching William Henry street turned it to the north. On the ground now called William Henry street he had a furrow dug for the purpose of a drain, parallel with the fence on William Henry street, for some distance, and that it then crossed in an easterly direction the ground which was afterwards occupied by the relator, but that he (Mr.

Cayley) took no pains to grade it. On the north this part of the so-called street was stopped by the cricket ground and on the south by the fence of Mr. *Gamble*, and subsequently it was enclosed as stated by the relator in his evidence. The object in making the enclosure was to form a field which could be rented, and which the witness subsequently did rent. 1874. Attorney General v. Boulton.

The other points in the evidence appear in the judgment.

Mr. *Snelling* and Mr. *Wardrop*, for the relator, contended that parties were justified in adopting the existing fences between lots twelve and thirteeen as the true boundary; no other line was ever known. Mr. *Passmore's* survey gives to the defendants 603 feet between William Henry and Beverley streets, which is what apparently they are entitled to have there. All the lands have been laid out on the faith of this division fence being the true division line. Mr. *Cayley's* intention as to constructing his fence cannot affect the rights of the relator. William Henry street was intended to be sixty feet wide, and if it is now made of that width by throwing the proprietors on the east side back, they will actually lose twenty-five feet of their land; while the Boulton estate will gain that much. As to the grading shewn to have been done on William Henry street, the evidence of the relator is distinct on the point, while that of Mr. *Cayley*, Mr. *Barber*, and Mr. *Boulton* is anything but clear. The owners of the lands affected by this street are all purchasers from the *Boulton* estate and have all concurred in having William Henry street as it originally stood, and no alteration of this line was ever attempted by the *Boulton* family until 1871, which change, if carried out, will deprive all these purchasers of a portion of their lands, as they cannot go to the owners of lot twelve, and insist on a removal of the existing division Argument.

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fence; indeed it is not suggested that they have any right to do so.

Mr. *Maclennan*, Q. C., for the defendants. It is admitted that William Henry street was intended to be, and must now be laid out of the width of sixty feet, but the question in dispute is, where that street is now to be located—whether according to the old supposed division lines or according to the true lines as established by actual survey under the provisions of the Act of Parliament (*a*). Of course if the existing fence of Mr. *Robinson* is held to govern, the 180 feet required to form the street and the lots, will run into the cricket ground five feet. If, however, you start at the true boundary between twelve and thirteen the owners of the lots in question will actually obtain more than their stipulated quantity. It is claimed, however, that the road or street has been by acts dedicated, but the acts shewn do not amount to a dedication, and the Court will not enlarge those acts. It is clearly shewn that nothing was done but some ditching with a view to drainage—no grading on the road, no travel on it—in fact the property was not thrown open to the public. There are two methods of determining where the street really should be: one by continuing William Henry street through from Queen street, the other by making an actual survey, both of which have been done, and prove that instead of giving the owners of lots less, they have actually more than the quantities conveyed to them, between William Henry street and the true division fence between these adjoining park lots.

Argument.

Regina v. *Hunt* (*b*), *Manary* v. *Dash* (*c*), *Bell* v. *Howard* (*d*), *Wideman* v. *Bruel* (*e*), *Taylor* v. *Croft* (*f*), were referred to.

(*a*) Consol. Stat. Can. ch. 77, sec. 84.
(*b*) 16 U. C. C. P. 145.
(*c*) 23 U. C. R. 580.
(*d*) 6 Ib. 292.
(*e*) 7 U. C. C. P. 134.
(*f*) 30 U. C. R. 573.

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BLAKE, V. C.—The information alleges that the defendants have enclosed a portion of William Henry street with a fence, and it asks that they be restrained from thus interfering with a public highway of the City of Toronto. It is admitted that the public are entitled to a street sixty feet in width, called William Henry street, but it is denied that the fence encroaches thereon. The real question before me for decision is, where William Henry street properly runs. It is not disputed that it was intended that it should run in a northerly direction from Queen street, parallel to and at the distance of 120 feet west from the division line between park lots 12 and 13. Messrs. *Wadsworth & Unwin*, both surveyors, who were examined before the Court, in two ways ascertained whether or not the fence in question was built on this street. They first found, in the manner prescribed by the statute, the true division line between lots 12 and 13; and they then ran the street in question, and found that, so far from the fence of the defendants extending into the street, that allowing 120 feet west from lot 12, and then allowing 60 feet for the street, the fence did not come to within some feet of the road. They next ascertained the lines of this street from Queen street north to the Grange road, which had been opened for over thirty years; and they then continued these same lines north to College street, and still found much the same result, as that given by their former survey. I am satisfied that what the *Boulton* family, who were the original owners of park lot 13, intended to give, was a street 60 feet in width, running parallel to the line dividing their lot from the adjoining one, lot 12, belonging to the *Powell* family; and that a street run in that fashion, would be to the east of the fence objected to. But it is said, by acts a street has been dedicated, so that wherever the true line may be in fact, the defendants are bound to conform to those boundaries which have thus been settled. Dedication, however, is a question of intention. There must be the

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animus dedicandi in order to the establishment of such a right. Here, any such intention was denied by Messrs. *Cayley & Boulton*, the persons who could properly have dedicated. Certain acts were spoken of by some of the witnesses; but as to these, it may be said, when they are explained by the evidence of Messrs. *Cayley*, *Boulton*, and *Barber*, first, dedication could not from them be taken as established; and second, even if it could, they do not amount to more than evidence of intention to dedicate a road, without binding the persons dedicating to its exact position, nor do they at all extend to that part of the street which is opposite to the fence in question. Even if these acts do amount to the dedication of a specified piece of land as a street, it could scarcely be contended that its boundaries at a point north of the place to which the so called acts of dedication extend should be thereby defined. If the work done on the street is to control the way in which it is to run at points other than those where the acts relied on are to be found, it would seem more reasonable, where there have been these improvements at different parts, giving lines that do not correspond with each other or with the division between the lots, to make the road, where unmarked, conform to the street as first laid out, rather than to another part of it laid out at a more recent period. On the question of dedication, see *City* of *Toronto* v. *McGill* (*a*), *Dunlop* v. *York* (*b*).

Judgment.

The true cause of difficulty appears to be, that those persons owning land on the eastern side of this street, if they run back to the fence now placed to separate this lot from lot 12, find they have not the depth of 120 feet in their lots. But this arises, not from the street being placed too much to the east, but that this division fence has been placed too far to the west. It is in evidence that the fence in the rear of these lots for many years ran up to within about 209 feet of College street,

(*a*) 7 Gr. 462. (*b*) 16 Gr. 216, 220.

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where there was a "jog" to the west, of about 14 or 15 feet; and then the fence ran again north, until it met the cross street. Not many years since the 209 feet of the rear fence was advanced these 14 or 15 feet, until it met the northerly portion, and the whole fence was run on this line. These 14 or 15 feet were taken off these lots; and I think the owners of this property will find that their cause of complaint arises on this score, and not from any act of the defendants. It is also in evidence that running down this fence about 370 f[illegible] from College street, another "jog," of about three feet six inches, there occurred. I cannot, on this state of facts, find that the purchasers of property were justified in taking the existing fence as the dividing line between lots 12 and 13, and in saying they are entitled to 120 feet from this fence, and to have the street thrown so far to the west, as will give them this number of feet, and compel those on the west side of the street to supply whatever may be wanting of the 60 feet. Even, if the rear fence had been in existence for many years unchanged, I doubt that this alone, without evidence that the grantors intended this as the given starting point for their conveyances, would have justified me in acceding to the contention of *The Attorney General;* but when we have the facts as to the alteration in the line of the fence within the past ten or twelve years, it is out of the question I can, on the evidence before me, hold that the street is to be run so as to conform to a fence, where it would result in, at least, these two "jogs;" and that I should do so in order to give to the owners of property on its east side, land to make up for that which they appear to have lost by allowing their neighbours to hold adversely to them.

Judgment.

I did not feel any doubt as to what my decision should be at the close of the argument, but I deferred judgment, as I was informed the case of *The Attorney General* v. *Calder* disposed of the same question as that

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now before me. I have read the pleadings and evidence in that case, and concur entirely in the view that an injunction should have been there granted. There, nothing more was ordered by the Vice-Chancellor. The parties afterwards chose to take a consent decree, making the injunction perpetual. There, the evidence that the existing fence formed the division line between lots 12 and 13, seemed plain. The facts upon which, chiefly, I come to a conclusion against this being the limit from which the 120 feet are to be calculated, were not then before the Court. If we look at the survey recently made, which defines the true boundaries of William Henry street; or if we continue the lines north of the southerly portion of the street, as they have been run for over thirty years; or if we take as a guide the old fence on the westerly side of the street, they all shew that the fence in question does not encroach on William Henry street. This fact thus found, cannot be displaced by the circumstances relied on in support of the informant's case.

Judgment.

In finding, therefore, as I do in favour of the defendants, I do not overrule anything decided in the *Attorney-General* v. *Calder*, where the evidence which here leads me to a conclusion in favour of the defendants, was wanting.

The information must be dismissed with costs.

TAYLOR v. BRODIE. 1874.

Administration suit—Distribution of assets.

By the statute 29 Vic. ch. 28, sec. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors *pari passu*, and without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors and execution to be issued, under which they were paid nearly in full, when by applying to the Court in that action the proper distribution of the estate would have been ordered, the Court charged her, in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the Court, and to this extent they were held entitled to recover their costs.

Statement.

This was an administration suit instituted by *John Taylor* and *Samuel Wilson*, plaintiffs, against *Phœbe Ann Brodie*, defendant, to obtain administration of the estate of *Robert Brodie*, deceased. It appeared that *Robert Brodie* died on the 28th of December, 1873, leaving his wife executrix and *William Read*, her son-in-law, executor of his will. On the 28th of April, 1874, *Read* renounced, and on the 29th of April the defendant *Phœbe Ann Brodie*, the widow, applied for probate, which was granted to her on the 5th May following. On the 30th April *Simpson* and *Read* sued out a writ which was served on the executrix on the 1st of May, and judgment entered up and execution issued on the 21st of May, and on the 30th of the same month the sheriff made $974.45 out of the goods of the deceased under this writ. On the 2nd of May a notice of motion for the administration of the estate was served on the widow and *Read*, the latter of whom was co-plaintiff in the common law action, and on the 8th of June the usual order was granted. In these proceedings the creditors of the deceased proved claims amounting to $1832.55, including $313.23, a balance due *Simpson*

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and *Read*. The only assets of the estate were $262.94 due by the executrix, and household furniture and book debts amounting to $212.15. As there was a deficiency of assets, the plaintiffs claimed that the executrix should only have been allowed the ratable proportion going to *Simpson* and *Read*, in place of the amount actually received by them, and that she should be charged in her accounts with the difference. The Master allowed these creditors to retain the amounts received by them, and to prove for the balance still due them, and refused to make any charge against the executrix in respect thereof.

On the cause coming on for further directions,

Mr. *J. A. Boyd*, for the plaintiffs, asked that, under the circumstances appearing in the report, the surplus over and above their ratable proportion of the estate should be charged against *Simpson* and *Read*, and that they should be ordered to refund the amount.

He referred to *Wilson* v. *Paul* (*a*), *The Bank of British North America* v. *Mallory* (*b*), *Doner* v. *Ross* (*c*).

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

Mr. *J. C. Hamilton*, for *Simpson* and *Read*, referred to *In re Williams* (*d*).

Judgment.

BLAKE, V. C. [after stating the facts as above].—The question argued before me depends on the construction of sec. 28 of 29 Vic. ch. 28. The English Act 32 and 33 Vic. ch. 46, differs no doubt from the Canadian statute, but the decision in *Re Williams* (*e*), under the latter Act, militates against the contest of the plaintiffs

(*a*) 8 Sim. 63.
(*b*) 19 Gr. 231.
(*c*) L. R. 15 Eq. 270.
(*d*) L. R. 15 Eq. 270.
(*e*) L. R. 15 Eq. 270.

here. There the Vice Chancellor says, "I can find nothing in the statute to take away that reward for diligence which a creditor is supposed to earn by being first to take proceedings, after the death of the debtor, against the executors which gives him priority, if his proceedings ripen into a judgment, over all creditors of equal degree, even if they obtain judgment the next day." Our statute says, "debts * * * shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another." I do not think I should be giving full effect to these words, if I held that the creditor who recovers judgment against the representative of the deceased thereby gains a preference or priority; on the contrary, I should be defeating this equitable provision by encouraging an immediate race on the part of the creditors for the recovery of judgment and a consequent waste of the estate in place of its ratable disposition. If time were given to the executrix, she could, under section 27 of the Act in question, have safely distributed the assets of the deceased after giving the prescribed notice. If, on the other hand, this opportunity was not afforded her, then on application to this Court, an order would formerly have been made for the admininstration of the estate, and for the restraining such proceedings as would have interfered with the ratable disposition of the assets. This threw upon the representative of the estate the burden of applying to the Court for its administration, but since the 1st of January 1874, and consequently at the time the action at law in question was commenced, the defendant being sued, had only to lay before the Court, in which the action was pending, the true state of matters, when such an order would have been made as would have relieved her, and would have caused the distribution of the estate contemplated by the Act to have been made. Where an executrix does not choose to adopt this course, but allows judgment to be entered against her, without raising any defence, on which assets of the estate, to a

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greater extent than, on a due administration, would be found going to the judgment creditor, are taken by him, then I think she must be made liable to the extent that such creditor is overpaid. The executrix undertakes the duty of seeing that the assets shall be properly administered. To the extent that this may be done she is not responsible, but where assets belonging to the estate and subject to her protection are dealt with otherwise than in a due course of administration, she is liable for such a misappropriation of the funds. She accepted the office of protecting these funds and seeing to their due application, and she is responsible where, having the means of preventing it, she allows them to drift into other channels. The creditors here are accordingly entitled to charge the executrix with the money received from the sheriff by *Simpson* and *Read* in excess of the amount that would be coming to them on a due administration of the estate. The executrix is entitled to an order over against these creditors for the amount they have received in excess of the sum properly coming to them. *Simpson* and *Read* should be allowed only the costs of proving their claim at the amount at which I now allow it. All the other costs they must pay to the other parties to the suit. The plaintiffs are entitled to their costs of suit, and so is the executrix, as in any event the administration was necessary. The matter will have to go back to the Master to settle the amounts payable and to tax the costs, and let the amounts found due be paid without further order. The executrix is at once to pay into Court $26[illegible], found due by her.

Judgment.

The question of the effect of the section of the Act which I have discussed was considered in *The Bank of British North America* v. *Mallory* (*a*), *Doner* v. *Ross* (*b*), *Willis* v. *Willis* (*c*), *Parsons* v. *Gooding* (*d*).

(*a*) 17 Gr. 102.
(*b*) 19 Gr. 229.
(*c*) 20 Gr. 396.
(*d*) 33 U. C. R. 499.

YOUNG v. WILSON. 1874.

Easement—Mill race—Dominant and servient tenement.

The order pronounced, ante 144, affirmed on rehearing.—[SPRAGGE, C. dissenting.

Rehearing at the instance of the plaintiff.

The same counsel appeared for the parties respectively.

In addition to the cases cited on the original appeal *Townsend* v. *Campernoun* (*a*), and *Carling* v. *Willis* (*b*), were referred to.

SPRAGGE, C.—The first thing to be looked at is, I think, the position of the parties on the sale by *Tiffany* to *Wilson*.

The sale was of the whole 275 acres. For purchase money not paid *Tiffany* would have had his vendor's lien for the whole, if mortgage given for the whole, or if no mortgage was given. Judgment.

Taking a mortgage on part, that part on which the easement is now claimed, the residue was left unincumbered. It then stood thus: *Wilson*, purchaser of the whole, and owner of the whole, subject to an incumbrance upon part—*i. e.* the part subject to an incumbrance.

So far there was not, I think, any severance—none by *Tiffany*, who sold the whole to *Wilson*, who thereupon became sole owner—was there at that time a dominant and a servient tenement. Could there be without a severance: Has there been any severance since by *Wilson?* He is still equitable owner of the whole premises. The present position of the land is, that *Wilson* is owner, and has given separate mortgages of

(*a*) 1 Y. & J. 447 (*b*) 7 Allen 364.

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two different portions to different persons to secure two different debts. He is still equitable owner.

It is not a case of an owner selling one parcel and reserving another, except in the sense of a mortgage being a sale *pro tanto*.

It continued to be, in a proper sense, one parcel, used by one owner for his own purposes.

A portion of this one parcel of land was pledged for the payment of the purchase money.

Concede that the portion so pledged is necessary for the enjoyment of the other part in the same way as it had been used heretofore, does the doctrine of dominant and servient tenement apply? It is a pledge only, and to be redeemed.

Judgment.

Is it, in any proper sense, an "easement?"

In the cases in the books there has been an actual alienation, intended to be permanent, and the easement is said to arise by implied grant.

Must it not be by *necessary* implication that the vendor of the land must have intended to grant, or to reserve, as the case may be, that which is essential to its enjoyment, as previously used? In the case of a sale he parts with property absolutely, in the case of a mortgage he only puts it in peril. Is it a necessary implication that he could not have intended to put it in peril, knowing that he could redeem? The implication in this case would have to be that the defendant *Wilson* having purchased the whole property from *Tiffany*, and giving him a mortgage on the land containing this water-course for the purchase money, leaving *Wilson* the mill-site itself unincumbered, intended to reserve out

See Goddard, p. 76.

of it this *quasi* easement, and that *Tiffany* assented to this, that *Tiffany* knew, must, or ought to have known, that *Wilson* intended this. If *Tiffany* were then making a sale to *Wilson* of the mill-site, only reserving the premises mortgaged, this might be a very reasonable implication; but the case is essentially different. *Tiffany* might even have consented upon the necessity which existed for *Wilson* having this *quasi* easement as enhancing his security, might have reckoned upon the certainty almost of *Wilson* redeeming his mortgage, because it embraced property that was very necessary to him. He was foregoing a part of his ordinary right as a vendor. It should be a very clear case indeed to make him part, by implication, with a portion of the security which, in *terms*, was given to him by the mortgage.

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Apart from the circumstance of this being a case of mortgage, and not a case of sale, I should have agreed with my brother *Proudfoot* that the weight of authority is in favour of an implied reservation of a *quasi* easement, though the reasoning of Lord *Westbury*, in *Suffield* v. *Brown(a)*, is strongly against it, and his view of the law is entirely concurred in by Lord *Chelmsford*, in *Crossley* v. *Lightowler (b)*.

Judgment.

It is observable that none of the cases which we find on this subject are cases of mortgage; and looking at the elements which go to constitute an easement, they appear to me inapplicable to a case of mortgage.

Where, as in this case, there has been always unity of seisin and of possession, there could not, before the mortgage by *Wilson* to *Tiffany* at any rate, be an easement in the strict technical sense of the term. There were not two tenements; not even two tenements used together by the same owner, no dominant and servient

(*a*) 4 D. J. & S. 185. (*b*) 2 L. R. Ch. 486.

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tenement so as to constitute what is sometimes called a *quasi* easement, which, upon being severed, would constitute an easement, properly and technically so called in the servient, in favour of the dominant tenement. I concede, that upon sale to a stranger, of that which was mortgaged to *Tiffany*, there would, upon the authorities, be created the relation of servient and dominant tenement. I am only saying, at present, that before the date of the mortgage to *Tiffany* there was in no sense, a dominant and servient tenement.

Without severance there cannot be two tenements, therefore not a dominant and servient tenement; and I now quote from Mr. *Goddard's* book (*a*): "As it is essential to the existence of an easement that there shall be two tenements—a dominant tenement, to which the right is appurtenant, and a servient tenement, in or over which that right is enjoyed—so it is also essantial that those tenements shall be distinct properties; that is, that they shall belong to different persons. This is a point," Mr. *Goddard* goes on to say, "which scarcely needs demonstration, for it is obvious, that if two tenements belong to one individual, he has a right, as owner, to use each in whatever manner he finds most convenient to himself, and he may make the one tenement servient to the other, simply because it is his own." Here the case is put of two tenements, in illustration of the rule stated, that more is required to constitute an easement, viz.: that they must belong to different persons.

Judgment.

My difficulty, in the first place, here is a legal technical one; that what have been called, in this case, a dominant and servient tenement, did not, and do not, belong to different persons. The seisin and possession, from the time of the conveyance from *Tiffany* to *Wilson*, have been in *Wilson*, and the user has been in *Wil-*

(*a*) Page 8.

son. There has been no severance; and severance is essential to an easement. The title has all along been in *Wilson*. His having created a mortgage or mortgages does not make it otherwise. The existence of mortgages or of other incumbrances are not questions of title, but of conveyance: *Townsend* v. *Campernown* (*a*). So, also, his right of user is that of an owner subject only to the interference of this Court in the event of its being to the prejudice of any, in whose favour he has created an incumbrance upon it.

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My other difficulty is one that I have already touched upon, the absence of that necessary implication in the case of a mortgage which arises in the case of an absolute conveyance. In the latter an intent in the minds of both grantor and grantee may be implied, because the enjoyment of the property in the way that it has been enjoyed would be impaired, unless the mode of enjoyment were continued: and so the servient tenement and the title to it, and the possession of it pass to the grantee, only subject to an easement, which is seen to be necessary; but in the case of a mortgage, beneficial title and possession and enjoyment remain with the mortgagor. He gives a pledge for the payment of money—it is the intention of both parties that he will pay it. It cannot lie in the mortgagor's mouth to say that default is to be presumed; that there is an implied provision in his favour for the event of default—an implied reservation out of the thing granted by way of a security upon that event. The parties may, if they think fit, make a provision for such an event, or an express exception out of the thing granted; but in the absence of stipulation, I cannot see my way to implying a grant or reservation, inasmuch as performance, not breach, must be presumed to have been in the contemplation of the parties.

Judgment.

(*a*) 1 Y. & J. 449.

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This doctrine of creating an easement by implication has, in my opinion, been carried quite far enough. I am unwilling to carry it further, by applying it to a class of subjects to which, hitherto, it has not been applied.

I think the distinction between absolute conveyances and mortgages in this respect is not a fanciful one, but there are sound reasons for the distinction.

Judgment.

BLAKE, V. C.—Apart from authority, I should have thought that where a person owns a property, and sells a portion of it on which there is an easement claimed to be used in connection with the portion of the premises retained, but which never, anterior to the sale, owing to unity of possession, had a legal existence, there the easement could not be insisted on as against the vendee. If the vendor, selling first the so-called servient tenement, does not reserve the right which he then possessed, it would seem reasonable that his vendee should take for granted that he intended to convey to him the premises freed from any such right. The grantee should reasonably be allowed to stand upon the conveyance which he accepts from the grantor, which evidences what was intended to pass, and which, not containing any reservation, should not be altered to the detriment of one party and the advantage of the other. The *quasi* servient tenement being sold first, the vendee thereof is justified in concluding that the purchase money to be received, or the intention to effect otherwise the object attained through the easement, or some other cause, weighs with the vendor to such an extent as that he assents to the disposition of the premises freed from this burden, and that the deed given, negativing a reservation, is to be relied on as evidence of this determination of the former owner. The grantee bargains for, and buys an estate in fee simple. He is entitled to a fee simple in the lands, and I do not think it reasonable that this estate should be clogged with restrictions or

reservations, subject to which the grantee did not agree to take the premises, apparently given him by the deed If, in place of granting the estate, with all rights, easements, &c., the grantor had reserved them to himself, he would seem to be placed in the position now claimed for him; but when he not only grants the land, but makes use of general words employed, as it were to shew no possible right in respect thereof is left to him, I cannot understand how a Court can award to him a right in the land conveyed, detrimental to the grantee. The description in the other parts of his deed shews him what he is to take both as to quantity and estate, and I think on this he should be allowed to rely, and that he should not be compelled to permit his premises to be subject to certain rights never contracted for, and which involve the continual entering upon his premises, and a dealing therewith in a manner to which an owner may most justly object.

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The weight of authority, however, seems against this view, and one is led to the conclusion that the rule must now be taken to be that, whether the dominant or servient tenement be first sold, in the case at all events, of a continuous and apparent user, a reservation of the easement must be implied in favour of the dominant tenement.

Judgment.

The Lords Justices, in appeal, and the House of Lords (*a*) have sanctioned this doctrine, and the opinions of other Judges must give way to the finding of these higher Courts.

It does not seem to me, however, necessary, in the present case, to attempt to weigh the various conflicting authorities cited to us, and to determine whether those in favour of an implied grant or reservation do or do

(*a*) Pyer v. Carter, 1 H. & N. 916; Watts v. Kelson, L. R. 6 Ch. 166; Ewart v. Cochrane, 4 MacQ. 117.

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not turn the scale, as the conduct of the parties appears to be decisive of the question argued before us.

The defendant *Wilson* owned both of the premises in question; and being about to give a mortgage thereon to *Dean Tiffany*, the mill premises are excepted therefrom. Paragraph 13, of the Master's Report of the 15th Oct., 1867, shews the then position of the property, and the reasons for not including in the mortgage the mill premises. "Also, that on the said other premises being part of lot No. 4, in the broken front concession of the Township of Delaware, are a grist mill and other valuable improvements which the said defendant, the Hon. *Adam Wilson*, caused to be erected at his own cost since he purchased the said land from the said *Dean Tiffany;* also, that the stream of water which supplies the said mill, runs through a portion of the mortgaged premises, and that there has been a road for means of access to, and egress from the mill down through the said mortgaged premises to the mill, appurtenant to the mill premises, since the mill-race has existed, between thirty and forty years past; and at the request of the solicitor for the defendant, the Hon. *Adam Wilson*, I find, as a special circumstance, that there was a saw-mill on the mill premises at the time the said defendant was about to have erected the flouring mill, since built by him; and that the said premises were, at his request, left out of the mortgage for the express purpose of excepting the mill premises from its effect. That the mill-dam is on the mortgaged lands, and it would not be possible to supply water to the mill, if the dam was on the mill premises. That the dam is necessarily on the other part of the lot, and that the mill-site had been originally purchased by the said *Dean Tiffany*, embracing the site on which the dam is constructed, and it has always been considered a right appurtenant to the mill, which could not be supplied with water from any other source," so that on the bargain between *Wilson* and *Tiffany*, for the mortgage

Judgment.

the mill premises were excluded, and thereupon *Wilson* expended a large sum of money on the excepted property. This expenditure might not have taken place,—and the mill property, and it may be that adjoining it, have been enhanced in value in consequence of it,—except for this reservation, and it is out of the question that *Tiffany*, after allowing this property to be excluded from the mortgage, in order that the mill might be built, and knowing that the mill, when built, would be useless, unless the easement, which had been previously used in connection with the mill formerly there, were enjoyed by *Wilson*; and, after it has been so enjoyed for over seventeen years, can now demand that this easement be extinguished to the destruction of the mill premises, the building of which he sanctioned. On the principle laid down in the Court of Appeal, in *Heenan* v. *Dewar* (*a*), and *English* v. *Hendry* (*b*), *Tiffany* is now estopped from such an act. The Master's Report has been allowed to stand with this finding, which remains there to be made available by the person in whose favour it has been arrived at; and with the facts there disclosed, proved against *Tiffany*, there can be no ground for the contention that the mill property can be deprived of this easement. I have dealt with the question as one between *Wilson* and *Tiffany*, as the law is now so well settled that the assignee of a chose in action stands in no better position than the assignor, and therefore the plaintiff here can claim no greater rights than can the original mortgagee.

Same effect

Judgment.

Mr. *Campbell*, the counsel for the party rehearing, stated that he could not find that it made any difference that the conveyances here were mortgages or conditional sales of the land, in place of absolute sales, and he argued the appeal on the basis that the same rule applied to each of these classes of cases. I think he was correct in this conclusion. If, in the case of an

(*a*) 18 Gr. 438. (*b*) *Ib.* 119.

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absolute sale of the easterly portion of the premises by *Wilson* to *Tiffany* a reservation of an easement in favour of the grantor of the remaining or easterly portion would be implied, I am of opinion that this would be *a fortiori* in case of a conditional sale of such premises. In each case the owner of the land is, under the authorities, dealing with the land as it actually exists; the words of grant, in the case of the absolute sale, are no larger than in the case of the conditional alienation. The reason of implying the reservation is the necessity of the easement to the remaining premises. If, in case of a person agreeing for the absolute purchase of premises, he takes them as they are in fact, and not as they may appear to be in the conveyance, and that this qualification exists in favour of a vendor, in order that the value or enjoyment of his other property may not be lessened or interfered with, I do not see on what principle, where the same words are found in an instrument, a greater estate or interest can be held to pass thereunder in the same premises, because it is only on a certain condition that the premises go absolutely from the grantor. I take it, that in either case what is dealt with is a piece of land on which the grantor has a dam; that in either case the grantee, seeing this dam, knows that the premises, the subject of the contract, cannot, without some express stipulation, be so used as to impair the use of this means of enjoying the other premises: that lately the ordinary instrument used in conveying property, this right is by implication reserved, and that because the grantor, by the intrument, reserves another means of preventing this enjoyment being impaired, namely, the payment of a sum of money, he does not lose the right which the words of the instrument do not take from him.

Judgment.

On the whole, I think the order made must be affirmed with costs.

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PROUDFOOT, V. C.—I retain the opinion expressed by me at the hearing. I think the decree may also be supported on the ground stated by my brother *Blake*, that the plaintiffs, being assignees of the mortgage to *Tiffany*, are bound by all the equities affecting it in his hands; and that *Tiffany*, by his arrangements with *Wilson*, was precluded from interfering with the use of the mill-race.

I am unable to concur in the view of the Chancellor that the conveyances by *Wilson* being mortgages make a difference in the principles applicable to the reservation of such an easement. The legal title passed by the mortgage, and all the incidents attending that title, must be considered as passing with it. The counsel for the plaintiff expressly abandoned any argument on that ground, candidly stating that he could not rely on any such distinction, and we have not had the benefit of any discussion of the question by the counsel for the defendant.

Judgment.

I think, also, that when *Wilson* mortgaged to *Tiffany* he conveyed to him an estate which might ripen into an absolute one for default of payment; and on his title being perfected by foreclosure or sale under the mortgage, it becomes absolute from the date of the security by relation. Default has been made, and the present proceeding is to enforce a sale, and convey to a purchaser a title as from the date of the mortgage. This liability, to have the title ultimately alienated absolutely, must be taken to have been in the contemplation of the parties, as much as the right to redeem. And upon the facts in this case it is clear that the intention of the parties was that a mill should exist, to which this race was necessary, and it was an apparent and continuous change in the condition of the tenement.

1874.

PHILLIPS v. YARWOOD.

Will, construction of—Contribution—Hotchpot.

A testator devised a property to three granddaughters, as tenants in common in equal shares, and then devised to one another property in severalty, adding, "provided always * * that the said last-mentioned property so solely devised to my said granddaughter *Alicia* shall be valued by my executors hereinafter named or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three granddaughters, in proportion to the value which my said executors or the survivor of them shall put upon said first-mentioned land; and in case I shall sell any or all of said first-mentioned lands, or that after my decease my said three grandchildren shall sell the same, then and in that case the value aforesaid of the said residence and premises, hereinbefore devised to my said granddaughter *Alicia*, shall be deducted from her one-third proportion of the proceeds of the sales of the said first-mentioned land":

Held, (reversing the decision of PROUDFOOT, V. C.) that the above clause did not constitute a hotchpot clause; that the rents of the land devised in severalty were not to be accounted for by *Alice*, but that she was only entitled to the same proportion of the rents of the land held in common as she was entitled to the land itself after deducting the value of the land specifically devised to her."—[PROUDFOOT, V.C., diss.]

Statement. The parties to this suit had consented to a decree, with the exception of the distribution of the rents of the lands embraced in the clause set forth in the head-note. The plaintiff claimed to be entitled to the rents of the land devised in severalty and one-third of the rents of the land devised in common, without any abatement; the defendants claimed that the plaintiff was bound to submit to a deduction in proportion to the value of the land devised in severalty, and suggested that the proper mode of so doing would be to bring in the rents and profits of the land held in severalty, and each of the parties were to be entitled to the third only after such contribution.

The case came on by way of motion for decree before *Proudfoot*, V. C., who made a decree in favour of the defendants' contention.

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Phillips v. Yarwood.

The plaintiffs reheard.

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

Mr. *Rae*, for the defendant.

SPRAGGE, C.—The devise is of all of a certain parcel of land, east half of lot seven, first concession of Thurlow, of which the husband of the testatrix died seized, and is with an exception to be mentioned presently to her three granddaughters, whom she names as tenants in common in equal shares. The exception is of a dwelling house and appurtenances (part of the same lot), and which she devises in severalty to one of the three granddaughters in fee. Then follows this provision:—"Provided always, and it is my will and desire, and I do order and direct that the said last mentioned property so solely devised to my said granddaughter *Alicia F. Dougall*, shall be valued by my executors hereinafter named, or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three grandchildren, in proportion to the value which my said executors or the survivor of them shall put upon said first mentioned land; and in case I shall sell any or all of said first mentioned lands, or that after my death my said three grandchildren shall sell the same, then, and in that case, the value aforesaid of the said residence and premises hereinbefore devised to my said granddaughter *Alicia F. Dougall*, shall be deducted from her one-third proportion of the proceeds of the sales of the said first mentioned land." Judgment.

The land has not been sold, and there has been no valuation by the executors. This bill is filed for partition.

The decree declares the three granddaughters entitled each to one share of the land devised in common, and

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entitled to the rents in the same proportion as the land. It refers it to the Master to ascertain the amount of the shares according to the foregoing declaration, and to make partition, and allow owelty, or to sell and divide the proceeds as he may find advantageous; and it directs the Master to take into account, in making the division thereby directed, the rents of the property devised in common, and by whom received. So far there is no question. Then follows this direction, which is objected to on the part of Miss *Dougall*: "And to take an account of the rents received by Miss *Dougall* for, or to set an occupation rent on the property specifically devised to her, and deduct two-thirds of it from her share of the rents of that devised in common."

Judgment.

I take it to be clear that the other two granddaughters cannot claim directly from Miss *Dougall* an account of the rents of the parcel devised to her in severalty; but I suppose the argument is, that she is entitled to less than one-third of the rents of the parcel devised in common, on the ground that upon partition or sale the value of the parcel devised in severalty was to be deducted from her share, whereby her share would be reduced *pro tanto* below the shares of the other tenants in common, and no doubt, if partition or sale had been made, such would have been the result.

I do not think, however, that this direction in the decree carries out that idea. It assumes that the relative values and the relative *annual* values are the same. They may be substantially different. The rents received or the annual occupation value of the parcel devised in severalty may be as large or larger than the rental or annual value of the parcel devised in common. Miss *Dougall* had a clear right to the exclusive possession and the whole rents and profits of the parcel devised to her. I cannot understand how she can be compellable to account for any portion of them to the devisees in

common with her, of another parcel of land; and if she were bound to account, the measure of her accounting, directed by the decree, proceeds, as it seems to me for the reason I have given, upon an erroneous principle. But I think it clear that she is not bound to account at all. 1874. Phillips v. Yarwood.

Whether she is entitled to a full one-third share of the rents of the parcel devised in common is another question, and I do not understand the decree, apart from the direction objected to, to give her a one-third share, for after providing for the deduction from the one-third share of Miss *Dougall* of the value of the land specifically devised to her, it declares the parties entitled to the rents *in the same proportion as the land*.

This appears to me to be just, and I see no objection to it in principle, and it is, moreover, easily carried out.

Judgment.

BLAKE, V. C.—Miss *Dougall* demanding, as co-plaintiff, an account of the rents of the premises in question, is entitled to it. Her interest in the property to be partitioned is, to my mind, correctly stated in the decree. I think she is interested in the rents to the same extent as she is in the property itself. With this declaration, I am of opinion it should have been referred to the Master to take the account asked for. The last clause in the decree should, I think, be struck out.

PROUDFOOT, V. C.—The testatrix devised land to her three granddaughters, *Phillips*, *Dougall*, and *Yarwood*, as tenants in common in equal shares; she also devised a distinct piece of land to Miss *Dougall*; and she provided that the lands should be valued, and the value of the separate parcel given to Miss *Dougall* was to be deducted from her one-third of that devised in common. Thus far the will made no provision disposing of so much of Miss *Dougall's* one-third as was equivalent to

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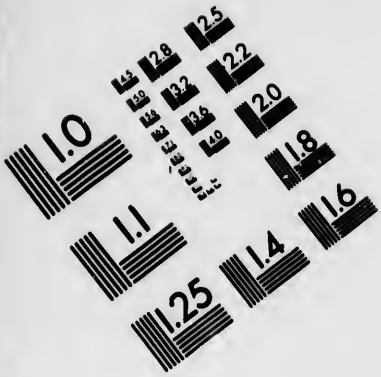

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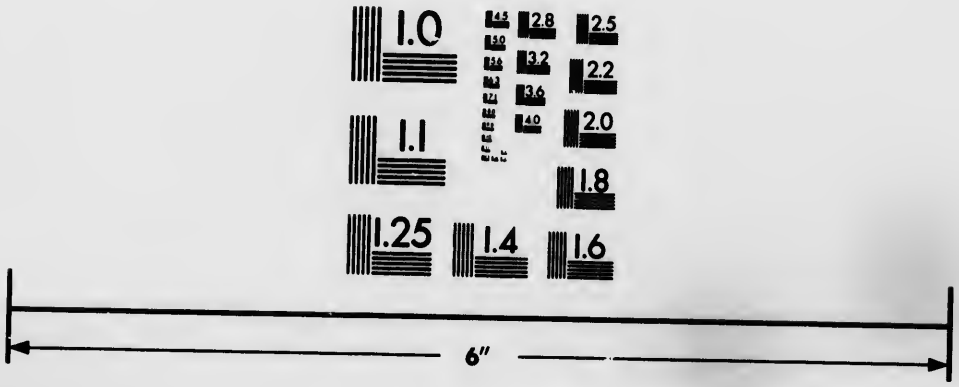

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her separate piece; but the residuary devise covers it and passes it in equal shares to the same three devisees.

The land devised to the three has been rented by them.

The bill seeks for a partition and for an account of the rents and profits.

This devise, in effect, forms a very complete hotchpot clause, as Miss *Dougall*, before she can get a share of the land given in common, must deduct the value of that given in severalty, which is neither more nor less than bringing it into hotchpot. If we suppose the land given to the three as tenants in common to be worth $1,500, and that given to Miss *Dougall* to be worth $500, the share of the other two in the former would be one-third each of $2,000, or $666.66, and Miss *Dougall's* share would be the value of her own piece, $500, and one-third of its equivalent in value of the lands in common, or one-third of $500=$166.66, thus giving each of the three $666.66.

Judgment.

Then, if for the purpose of obtaining a division of the land devised in common, that given in severalty must be united with it, it would seem to follow that to make a proper division of the rents and proceeds the same course must be followed. If the devisee of the several parcel desires to share in the rents of that given in common, it is but equitable that she should account for the rents of the several parcels. This is not affected by the absence of any mention of the rents in the will, for it is an equity flowing from the relations of the parties to the property, created by the will; nor is it any answer to say that the defendant might have had the valuation made before, for this was equally open to Miss *Dougall*, and the defendant is not asking an account of the rents, she is passive, and only asks that a fair account be taken. The object of the testatrix, as deduci-

ble from the provisions in regard to these devisees, was to give Miss *Dougall* a specific portion of the property, but not to give her more in value than the others had —to maintain a perfect equality between them. This equality cannot be maintained unless Miss *Dougall*, having suffered the lands to remain unapportioned, account for the rents of the property given to her until the time of division.

ALDWELL V. ALDWELL.

Posthumous child—Residuary estate.

A testator by his will gave to each of his children (naming them) $200 a year until twelve, and thereafter $400 a year until eighteen in case of daughters; and twenty-one in case of sons. After his death his widow gave birth to a son, and on a petition being presented to the Court on his behalf, he was ordered to be allowed the same amount as the other sons out of his contingent share of the residue of the estate which the testator directed to be divided amongst *all* his children on the youngest attaining twenty-one: it appearing that the share of the infant in such would be ample to pay the allowance named.

This was a suit for (amongst other objects) winding up the partnership business of *Aldwell & Gossage*, and administering the estate of the testator *John Armstrong Aldwell*. The testator had by his will directed the sum of $200 a year, to be paid to each of the children until attaining the age of twelve years, and after that $400 a year; in the case of daughters until they attained eighteen, and in the case of sons until they attained twenty-one, and on the youngest child attaining twenty-one he directed that the whole of his estate then undisposed of should be divided amongst his children "then living."

Statement.

After the death of the testator his widow gave birth to a son, and the present application was made on his

1874.

Aldwell v. Aldwell.

behalf for an allowance to him of the same sums annually as directed by the will to be paid to the other children of the testator.

Mr. *English*, for the widow and posthumous child.

Mr. *Hoskin*, Q.C., for the other infants.

Mr. *Bain*, for the trustee.

BLAKE, V. C.—I have read the authorities cited to me, and the case of *Stewart* v. *Glasgow* (*a*), *Matchwick* v. *Cock* (*b*), and *Freemantle* v. *Taylor* (*c*). Not without much doubt, I have come to the conclusion that I am warranted in allowing the after-born child $200 a year until twelve, and thereafter $400 a year for his maintenance. I think he is embraced in the residuary clause, and as there will be an ample fund to answer all the demands on the estate, and out of his contingent interest in the residue of the estate to provide above allowance, and as, meantime, there is no object to which, under the will, the produce of this part of the estate is made applicable, I think it cannot be better employed than in fitting this child of the testator to take his place with his brothers and sisters. I accordingly order that this allowance be made him.

Judgment.

I stated at the argument the manner in which I thought the funds should be invested.

The costs of this application should be paid to all parties out of the estate of the testator.

(*a*) 15 Gr. 653. (*b*) 3 Ves. 609. (*c*) 15 Ves. 363.

1874.

In Re Mason and Scott.

Trustees and executors—Submission to arbitration—Assets.

Trustees of real estate created a lease thereof, and verbally agreed to make certain improvements on the property, without which agreement the lessee would not have accepted the lease, but the improvements never were made. During the currency of the term two of the trustees (who were also executors under the will) resigned, and others were appointed in their stead. Subsequently the lessee advanced a claim for damages by reason of the non-fulfilment of the covenant as to improvements, when an arrangement was made, between the trustees and the tenant, for a surrender to them of the remainder of the term, which was done and a reference was agreed upon for determining the value of such surrender, the claim for damages by the lessee, and all other matters in difference by arbitration:

Held, that by such submission the trustees became personally bound to pay the sum awarded against them, and that by their submission to arbitration without saving the question of assets they were precluded from afterwards asserting that they had not assets.

Held, also, [affirming the order pronounced *ante* page 166,] that the stipulation as to improvements, upon which the lease was accepted, could be proved by parol. Under such circumstances the question would still remain open whether the trustees could on passing their accounts claim the sum so awarded against that estate which they represented.

This was a rehearing by the trustees of the order reported *ante* page 166, where the facts are fully stated. Statement.

Mr. *Blake*, Q. C., for the trustees, contended, that as the lease stipulated that the lessee was to maintain and keep the mill-dam and mill-race in good repair, &c., but nothing was said in it as to building a dam, it was a strong circumstance in favor of their contention that such agreement never formed any condition as to the acceptance of the lease; and further, that the trustees had not power so to encrate the estate, and if not then the estate cannot now be chargeable.

Mr. *Ferguson* and Mr. *Bain*, contra.

1874.

Mason v. Scott.

SPRAGGE, C.—There were trustees and executors appointed by the will of *Murphy*, and new trustees appointed by the Court, one of the old retained, and two new appointed.

The lease to *Scott* was granted by the *old trustees*.

The arbitration was between Scott and the *new trustees*.

The new trustees, as well as *Scott*, were bound by the recitals in the submission to arbitration.

The new, as well as the old, trustees are styled executors and trustees throughout; this is erroneous as to the new trustees, none of whom are named in the will.

Judgment.

The submission to arbitration is only a part of the agreement between the parties. The agreement recited the lease from the old trustees to *Scott* of 8th June, 1871. The claim of *Scott* that those trustees undertook to build a dam, and that *Scott* claimed damages on account of its not being done. That the new trustees denied liability in respect thereof, and claimed arrears of rent, and damages for breach of covenants contained in the lease. So far, it is a statement of the matters in difference between the parties. It then goes on to witness "that *Scott* did thereby surrender the lease to the new trustees, who accepted the same for the residue of the term; and that *Scott* delivered to them immediate possession of the demised premises." Then follows a reference to arbitration of the said claims, and the value of the surrender of the term, in view of the improvements made by *Scott*, and of the delivery of possession, and of all other matters in difference.

The arbitrator finds that *Scott* did break the covenants contained in the lease, and was in arrears for rent,

the covenant being for the making of certain repairs and improvements, and he fixes the amount to be paid by *Scott* to the trustees. He finds, on the other hand, that the trustees should pay to *Scott* a sum named as the value of the surrender of the term in view of improvements. The sums are equal in amount, and he directs them to be set off.

1874.

Mason v. Scott.

As to the claim of *Scott* first recited, that the old trustees agreed to build a dam. The case, at page four of the brief, gives a narrative of what preceded the actual execution of the lease from the old trustees to *Scott*, and states, *inter alia*, that the trustees agreed to build a dam. The case then states that evidence was offered to the arbitrator on behalf of *Scott;* that oral evidence and documents not under seal were tendered to prove the alleged agreement in regard to building the dam, and that counsel for the trustees objected to its reception. That the arbitrator received the evidence subject to the objection; and he finds, as a fact, that the old trustees did verbally undertake, promise, and agree with *Scott* that they would, within a reasonable time after the execution of the lease, erect and build "a good and substantial dam," &c. And the case states that such dam was in fact required to make the water privilege available, and that without it, it is practically valueless.

Judgment.

The case, then, at page six of the brief, states in substance that the lease was prepared in its present form on the understanding and agreement that the dam was to be built by the then trustees, and kept in repair by *Scott*. That "there is no evidence of any actual words used by way of promise or agreement of the nature aforesaid at the time of the actual execution or delivery of said lease;" but that the same was executed and accepted by all the parties on the "faith, agreement, and understanding" that such dam should be built, and that but for this

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faith, agreement, and understanding the lease would not have been executed or accepted.

Upon this the arbitrator, at page seven of the brief, propounds two questions for the opinion of the Court:

1st. "Under the circumstances aforesaid, could the existence of an agreement of the nature referred to in the third paragraph of the case hereby stated be established by oral evidence or by documents not under seal?

2nd. "If the evidence so received was admissible, are the said *John James Mason*, *Daniel S. Murphy*, and *Charles R. Murray*, executors and trustees as aforesaid, liable for the breach of the said agreement so made by the said *Joseph R. Cherrier*, *James Stevenson*, and *Daniel S. Murphy*, executors and trustees as aforesaid?"

Judgment.

If these two questions are answered in the affirmative the arbitrator awards that the trustees, parties to the reference, do pay to *Scott* the sum of $2,400, "as, and for the damages incurred by the said *James Scott* by reason of the breach of said agreement." The case informs us that the evidence offered, and provisionally received, to establish the agreement to build the dam, was oral, and that the agreement was made before, and not at the time of the execution of the lease. We are not called upon to say whether such agreement could be established "by documents not under seal."

My brother *Proudfoot* answered both these questions in the affirmative.

But for a late case, which I will refer to presently, I should have felt great difficulty in answering the first of these questions in the affirmative. The general rule

certainly is that oral evidence is inadmissible when it conflicts with the terms of a written instrument, simply because, as Mr. *Addison* puts it, "The written agreement furnishes better evidence than the oral testimony. * * The rule," Mr. *Addison* goes on to say, "has its foundation in the general rules of evidence, and was a rule of the Common Law before the Statute of Frauds and Perjuries was in being."

Where, indeed, there has been some agreement between the parties which makes it inequitable that the terms of an agreement should be enforced that may be matter of equitable defence by equitable plea, or formerly by bill.

The case of *Smith* v. *East India Co.* (*a*) carried the rule a step further; but still is referrible to the same principle. The plaintiff, *Smith*, had given his bond for the payment of cotton purchased from the company, and for the freight; and if the company had sued for the freight, the letter which the plaintiff received when he gave the bond, being evidence of a contemporaneous agreement that he should not be charged the freight, would have been a good equitable defence to an action for the freight. The company sold the return cargo, and in accounting for the proceeds of the sale charged *Smith* with the freight. It was a case of an agent accounting to a principal, and on the argument no question was made except as to the company being bound by the acts of its servants in dealing with *Smith*. *Smith* brought his action for the amount retained for freight, and filed his bill to restrain the company from setting up the bond.

Judgment.

He might, instead of taking the course he did, have filed his bill for an account, in which case the whole equity would have been open to him, and the same

(*a*) 16 Sim. 76.

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equity was held to be open to him when suing his agent at law.

It differs from the case now in judgment in this, that the contemporaneous agreement (parol, though in writing) was not itself made the foundation of any claim. It was used, virtually, to resist a claim. It was the accident of the plaintiff's money having got into the hands of the East India Company that made him an actor at all. They could resist the payment of that money only by setting up the bond, and the agreement made it inequitable to set it up. It was money had and received that was the foundation of the action, not the agreement that was evidenced by the letter.

Judgment.

The recent case of *Morgan* v. *Griffith* (*a*), in the Court of Exchequer, does, however, go much further than *Smith* v. *The East India Co.*, in favour of the admissibility of the evidence in question. The case came first before the County Court, where an action was brought by the plaintiff, a farmer and cattle dealer. The head note describes sufficiently the facts and the point in the case, the respondent being the plaintiff, and the appellant the defendant in the County Court.

"The respondent agreed to hire of the appellant certain grass land on the terms of a lease, which was to be signed at some future time. The respondent having entered on the land, found it was overrun with rabbits, and on the lease being presented to him for signature declined to sign it unless the appellant would promise to destroy the rabbits. The appellant refused to put a term in the lease binding him to do so, but agreed by parol that he would destroy them. The respondent thereupon signed the lease, which provided, among other things, that the tenant should not shoot, hunt, or

(*a*) L. R. 6 Ex., 70.

sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow the landlord or friends, at any time, to hunt, shoot, or sport on the land. Afterwards, the rabbits not having been destroyed by the appellant, the respondent sued him in the County Court for the damage done by them, to the grass and crops on the land demised. The Judge, on the trial, admitted evidence of the parol agreement, and asked the jury to say whether it had been made, and whether the lease had been signed on the faith of it. They found for the respondent on both points."

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Upon the appeal, counsel for the plaintiff at law were not called upon. Sir *Fitzroy Kelly* said: "All that is possible has been said on behalf of the defendant, but it has failed to convince me. I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease, and a Court of Equity would not have compelled him to do so, or only on the terms of the defendant performing his undertaking. The decision of the County Court Judge must therefore be affirmed."

Judgment.

Mr. Baron *Pigott* was of the same opinion. He said: "The verbal agreement in this case, although it does affect the mode of enjoyment of the land demised, is, I think, purely collateral to the lease. It was on the basis of its being performed that the lease was signed by plaintiff, and it does not appear to me to contain any terms which conflict with the written document."

I had, I confess, some difficulty in arriving at the conclusion that the agreement in this case was collateral to the written lease, but it is so in the same sense as the agreement in *Morgan* v. *Griffith*, and certainly in this

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case as in that, the Court could not have compelled the execution of the lease unless the thing stipulated for had been done; or only on the terms of its being done.

My opinion is, that the first question of the arbitrator should be answered in the affirmative.

The second question is, as I read it, whether the trustees, parties to the arbitration, are personally liable to pay *Scott* the sum awarded in the event of the first question being answered in the affirmative. I think that they are, though not for the reason that may seem to be implied by the form in which the question is put.

It is not that any liability devolves upon them by reason of the breach of the agreement, made by the old trustees with *Scott*; but that they entered into an agreement with *Scott* whereby they obtained from *Scott* a surrender to themselves of the lease made by the former trustees, and a delivery to themselves of the premises demised; and whereby, also, mutual claims between *Scott* and themselves were referred to arbitration, the claim by *Scott* being the agreement by the old trustees to build a dam, and damages sustained by him by breach of that agreement. The submission to arbitration recited that the trustees, parties to the submission, "denied all liability in respect thereof," and on their part claimed to be paid the rent reserved by the lease in full; and what was referred to arbitration were "the said claims," and the value of the surrender of the term, and of the delivery of possession, and all other matters in difference.

Judgment.

It was not a provisional reference in case they had assets; and it is admitted that they had, as trustees, sufficient assets to meet this liability. The weight of authority is in favour of the personal liability of an executor referring to arbitration questions between the

estate that he represents and a third person, unless he qualifies his submission by saving the question of assets. In *Robson* v. ——— (*a*) Lord *Eldon* said: "If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission."

In *Riddell* v. *Sutton* (*b*), *Best*, C. J., referring to *Robson* v. ———, said that it "Contains all the good sense that bears on the subject; if a reference be submitted to by an executor, and he does not protest in the first instance that he has no assets, he should not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbitration to no purpose. The arbitration should be placed on the same footing as an action, in which, if an executor omit to plead that he is without assets, he cannot afterwards set up that ground of defence." In this case the reason for holding the trustees personally liable is infinitely stronger than that given by Chief Justice *Best*, for not only would the opposite party, *Scott*, have been put to the expense of an arbitration to no purpose, but he surrendered his lease, and gave up immediate possession, with his improvements; and it being part of the agreement—not of the award, but of the agreement—that he should do so, I should require no authority to convince me that a personal responsibility by the trustees was intended by all the parties to the submission. Upon the question of personal responsibility, I refer, also, to *Worthington* v. *Barlow* (*c*), and to *In re Wansborough Wansborough* v. *Dyer* (*d*), which was the case of the trustees of an insolvent debtor. In *Robson* v. ———, the party against whom the award was made, was an assignee in bank-

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(*a*) 2 Rose, 50.
(*b*) 5 Bing. 206.
(*c*) 7 T. R. 453.
(*d*) 2 Chit. Rep., 40.

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ruptcy. The rule, therefore, is not confined to personal representatives, but is applied, as the reason applies, to any person acting in a representative capacity, who submits to arbitration questions between third persons and the estate that he represents, and who may have assets to answer the claims submitted to arbitration.

It is a rule founded in good sense; but if such were not the *general* rule, the necessary intendment from the whole agreement of which the submission to arbitration forms a part, is, in my judgment, that all parties to it, the trustees, as well as *Scott*, should be personally liable upon the award. There is nothing, I think, in the trustees, parties to this agreement, being styled therein executors and trustees. The whole agreement was in respect of matters in which the estate of which they were trustees was interested, and this sufficiently accounts for their being so styled. The circumstance of their being so styled does not of itself indicate a qualification of their liability, and there is nothing else; but there is much the other way, as I have already intimated.

Judgment.

I think that we have nothing whatever to say as between the trustees and the estate that they represent. The answering these two questions in the affirmative does not onerate the estate. When the trustees claim this sum against the estate, and any one interested in resisting it, thinks proper to do so, then, but not before, the question may arise, whether the sum awarded is properly chargeable against the estate, or against the old trustees, or against any one. The present question is only between the parties to the submission.

While agreeing that these two questions have been properly answered by my brother *Proudfoot*, I confess, I do not like the terms in which the order has been drawn up. It is drawn up as a direct affirmative of

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the question in the terms in which the question is put; and so affirms, in so many words, that the new trustees are liable for the breach of the agreement made by the old trustees. I think it would be more proper that the order should say, that by the agreement between them (the new trustees and *Scott*), of the 9th of March, 1874, they made themselves liable to pay such sum as should be awarded by the arbitrator as compensation for damages sustained by *Scott*, by reason of the breach by the old trustees of the agreement made by them with *Scott*; and if a more direct answer to the second question of the arbitrator is necessary, it might be added, "and so the said (the new trustees) are, in the opinion of this court, liable for the breach," &c.

Judgment.

BLAKE, V. C.—In the lease in question *Cherrier*, *Stevenson*, and *Murphy* entered into the covenant therein, making themselves personally liable. They did not contract so as to exonerate themselves, and, to cast upon the estate they represent a liability in respect of the subject matter of their covenant. The case stated by the arbitrator shews that the three gentlemen above named, "executors and trustees of the last will and testament of *D. S. Murphy*," leased the premises to *James Scott*, and that they undertook to build a dam across the stream on the premises, and that this lease was prepared on the understanding and agreement that a dam of the nature aforesaid was to be built as aforesaid: "that the said lease was executed, delivered, and accepted by all the parties thereto, on the faith, agreement and understanding that a good, substantial dam of the nature and character aforesaid would be built as aforesaid, and but for this faith, agreement, and understanding the said lease would not have been executed or accepted." The first question asked is as follows:—"Under the circumstances aforesaid could the existence of an agreement of the nature referred to in the third paragraph of the case hereby stated be established by oral evidence or

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by documents not under seal." I think there can be no question that if a lease under seal be executed "on the faith, agreement, and understanding" above mentioned, and that this condition be expressed in a document not under seal, such an agreement can be proved, and will controul the instrument under seal, so as to make this a condition, on which the lease is to go into operation. *Smith* v. *East India Company* (*a*), *Lewis* v. *Robison* (*b*), and *Morgan* v. *Griffith* (*c*). As the covenant in the lease did not bind the estate, but the trustees personally, so this agreement, as to the building the dam, having been entered into in the same manner, is binding on the trustees, but only onerates the estate in that indirect manner in which estates may be charged in favor of a covenantee, where the accounts, between the estate and the trustees, shew a sum of money available for the answering the liability under which the estate may be in respect of such covenant.

Judgment.

In the special case we find the following statement:— "*James Scott*, in consideration of the covenants and agreements thereinafter contained, did by the said agreement, surrender and yield up to the said *John James Mason*, *Daniel S. Murphy*, and *Charles R. Murray*, executors and trustees as aforesaid, and who are the parties of the first part to said agreement, and who accepted thereof, the said indenture of lease for the residue of said term yet to come and unexpired, and did deliver to the said parties of the first part immediate possession of the said demised lands and premises; and it was further witnessed that the said *James Scott* and the said *John James Mason*, *Daniel S. Murphy*, and *Charles R. Murray*, executors and trustees as aforesaid, did mutually agree to refer the said claims and the value of the surrender of the said term, in view of the substantial and permanent improvements made by the said *James Scott*

(*a*) 16 Sim. (*b*) 18 Gr. 395. (*c*) L. R. 6 Ex.

upon the said lands and premises, and the immediate delivery of possession thereof, and all other matters in difference between them to the award, &c."

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Under this reference to arbitration, it was not for the arbitrator merely to decide what the position of the parties might be under the lease alone, but such full powers were given to him as would enable him to modify the lease, should the facts of the case warrant it, or, if there were matters collateral to the lease, to take them into consideration, and to deal as fully therewith as if the appropriate steps had been taken at law or in equity to work out the various rights of the parties.

I am of opinion, under the circumstances, that there was a liability as between the original lessors and *Scott* in respect of the non-building of the dam, and that the damages in respect thereof, assessed by the arbitrator at $2,500, can be recovered by the lessee. I am further of opinion that, up to the 9th of March, 1874, on the facts stated before us, there was no liability on the part of the new trustees in respect of the above matters, and the only liability of the estate was that indirect liability which I have before referred to. But at this date, by their own act, the present trustees appear to me to have undertaken a liability which they were not previously under. When I speak of the present trustees and the original trustees, I speak of them as a body. *Daniel S. Murphy* appears always to have been liable, as he was an original trustee, and has continued to act up to the present.

Judgment.

But when matters were in that condition, these three men accepted from the tenant a surrender of this lease, and he then yielded up to them possession of the premises, on the agreement that the claims to which I have referred, and being in respect of the non-building of this dam, the permanent improvements, and the

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value of the term surrendered, on the one side, and arrears of rent and damages for non-performance of the covenants of the lease, on the other, should be referred to arbitration. When the present trustees accepted a surrender of the lease on these terms, they then made themselves responsible for the burdens which the lease entailed, as well as entitled themselves, representing the estate, to the benefits to be derived from it. One of these burdens was that connected with the dam; and I do not see on what principle they can be absolved from the charges arising from the breach of this agreement on which the lease was granted. This liability of the trustees is a personal liability, for it is not enough that gentlemen should describe themselves as "trustees and executors" when dealing with others, in respect of the matters of the estate which they represent, in order thereby to cast upon it a liability for the covenants and undertakings which they give, and absolve themselves therefrom. The instrument must shew, that it is intended that the estate be made liable, and that the trustees do not give their personal obligation, in order that the trustees be relieved therefrom. In many cases contracts are entered into, between persons occupying a fiduciary capacity and third parties, on the personal responsibility of such trustee, which would not be entertained if the estate, in place of its representative, were to be looked to for a fulfilment of the agreement.

Judgment.

So, when trustees enter into a submission to arbitration, they make themselves personally liable. In order to prevent this result they should, in express terms, take care to exclude in the submission the construction of any personal liability. Here, I find that these three trustees, by their action in respect of the lease, have made themselves personally liable to the lessee for the damages by the arbitrator found coming to him, and, by the terms of the submission, such amount must be by them paid

irrespective of the estate. In passing their accounts, they will be allowed whatever portion of this amount the estate is properly responsible for. 1874. Mason v. Scott.

The point on which I have disposed of this case was not raised by the respondent: I think, therefore, that the appellant, who has had no opportunity of combating the views which I have expressed, should have an opportunity of doing so, if he desire it; if not, the order made should be affirmed with costs.

MATTHEWS v. MEARS.

Mortgage of land subject to charge—Covenants by mortgagor against incumbrances—Foreclosure—Effect of subsequent assignment of charge to mortgagor—Proceedings by mortgagor to enforce charge—Redemption by annuitant.

M., the owner of lands subject to a mortgage in favor of *S. & B.*, and to a charge for an annuity, mortgaged them to *S. & B.* with covenants for title, right to convey, freedom from incumbrances, and for further assurance. *S. & B.* took proceedings upon their several mortgages, and ultimately *M.* was foreclosed, but the person entitled to the annuity was not made a party to the cause. Subsequently *M.* became the assignee of the annuity, and instituted proceedings against the defendants, who were purchasers from *S. & B.* It appeared that the whole of the land subject to the annuity was not covered by the mortgage from *M.* to *S. & B.*

Held, (1), that as to the other portion of the lands covered by the mortgage, *M.* being bound by the covenant to pay off the annuity, the Court would not enforce it in *M's* favor against such portion; but *held*, (2), that this would not prevent the charge being enforced, the effect being only to postpone the charge of the annuity, as against such portion of the lands, to the mortgage given by *M.*, and that *M.* was entitled to redeem in order to make the charge available to this extent.

Semble, that if the lands covered by the annuity and the mortgage from *M.* were identical, the Court would not enforce the charge in favor of *M.*

This suit as originally constituted was brought by *Agnes Matthews* against *Martha E. Mears* and *Robert* Statement.

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Henry Mears, alleging that an annuity of $100 per annum in favor of the plaintiff had been charged upon the lands mentioned in the bill by one *Henry Mears*, a former owner, and that large arrears had accrued, and praying payment thereof and in default a sale of the lands.

The defendant *Martha E. Mears* answered the bill, setting up in substance that, prior to the creation of the charge of the said annuity, *Henry Mears* had created a mortgage upon the land in favor of one *Prince*, by whom it was assigned to *Stephens & Beatty*, and who had taken proceedings in this Court to foreclose the said mortgage, resulting in a final order of foreclosure, and that *Stephens & Beatty* had subsequently sold to the defendant *Martha E. Mears*.

Statement.

After answer the plaintiff *Agnes Matthews*, by an instrument dated the 23rd of July, 1873, assigned all her right, title, and interest in the lands and in the annuity to the present plaintiff *Margaret Mears*, and subsequently died.

After her death the present plaintiff obtained the common order to revive the suit in her name as plaintiff, and the cause came on for examination of witnesses and hearing before *Blake*, *V. C.*, at the sittings at Sandwich, in the Autumn of 1874.

At the hearing it appeared that during the foreclosure proceedings no notice had been taken of the annuity, and *Agnes Matthews* had not been made a party to the proceedings. It further appeared that after the creation of the charge of the annuity *Henry Mears* conveyed the lands, subject thereto and to the mortgage to *Prince*, to *Margaret Mears*, and that *Margaret Mears* had further mortgaged the lands to *Stephens & Beatty* who then held the *Prince* mortgage, and that she had been

foreclosed by *Stephens & Beatty* as to both mortgages, and it was alleged that in the latter mortgage she had entered into full covenants for title, for right to convey, for freedom from incumbrances and for further assurance; and it was contended, by the defendant *Martha E. Mears*, that the giving of this latter mortgage, with such covenants, precluded and estopped the present plaintiff from seeking to enforce payment of the annuity against the lands.

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This defence had not been raised by the answer, and the original mortgage from the present plaintiff *Margaret Mears* to *Stephens & Beatty* could not be found, having been lost or destroyed.

The defendants counsel applied for leave to set up this defence, and it was arranged that the case should be treated as if the defendant had raised the defence either by motion to set aside the order of revivor, or in a supplemental answer; and the further hearing of the cause was adjourned to Toronto, to enable the defendant *Martha E. Mears* to prove the loss and contents of the mortgage from the present plaintiff.

Statement.

The cause came on at Toronto before the same learned Judge, when the loss and contents of the mortgage were established.

Mr. *Crickmore* and Mr. *C. Crickmore* for the present plaintiff.

Mr. *C. Moss* for the defendants.

The following authorities were, amongst others, referred to, and commented on by counsel: *Ogilvie* v. *Foljambe* (*a*), *Lampon* v. *Corke* (*b*), *Otter* v. Lord *Vaux*

(*a*) 3 Mer. 53.

(*b*) 5 B. & Al. 606.

1874. (*a*), *Tripp* v. *Griffin* (*b*), *Lockwood* v. *Sturdevant* (*c*), *Dart* on Vendors, p. 719; *Snell's* Equity, p. 184.

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BLAKE, V. C.—*Henry Mears* being the owner in fee simple of the premises in question, mortgaged the same to *Col. Prince*. Thereafter he created, on the same premises, the charge in question in favour of *Agnes Matthews*, and subsequently he conveyed all his interest in a portion of the property to *Margaret Mears*, and in the remainder to *Wm. Mears*. The interest conveyed to *Margaret Mears* she mortgaged to Messrs. *Stephen & Beatty* by an instrument in which there were the usual covenants for title, &c. *Stephen & Beatty* became the assignees of the *Prince* mortgage, and filed a bill to foreclose both these mortgages, making *Margaret Mears* and *Wm. Mears* defendants. By some unaccountable mistake *Agnes Matthews*, the holder of the aforesaid charge, which is sought to be enforced in this suit, was not made a party to these foreclosure proceedings, and her security has not been foreclosed. *Stephen & Beatty* claimed, by virtue of this foreclosure suit, to be the absolute owners of the premises embraced in their securities, and sold them to the present defendants. Afterwards, the before mentioned *Margaret Mears* became the assignee of the charge in question, which, by the present bill, she is seeking to enforce. The defendants claim that, under the covenant in the mortgage given by *Margaret Mears* to *Stephen & Beatty*, she is bound to remove this charge: that, on proceedings being taken against her, she would be compelled to do so, or make good the amount thereof, and, that this being so, the Court will not allow her to make any use of it to the detriment of them or their vendees. But, if we take for granted that the mortgage, by foreclosure and subsequent sale of the mortgaged premises, is not extinguished; that the

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(*a*) 2 K. & J. 650, and 6 DeG. M. & G. 638.
(*b*) 5 U. C. L. J. 117. (*c*) 6 Conn. 373.

land is not taken as satisfaction of the mortgage debt and covenants, although it is irrevocably gone beyond the controul of the mortgagee; that this covenant runs with the land, and in the hands of the vendee of the mortgagee, who, by foreclosure, has obtained the land embraced in the security, it can be made available, there yet remains the question, in what position has the party entering into this covenant been placed, under the circumstances of this case? At the time that *Margaret Mears* was made a party to the foreclosure suit she was not assignee of this charge. The owner of it was not before the Court. It was left outstanding in the hands of the then holder, and is yet a subsisting claim against the land, unless extinguished by its coming into the hands of *Margaret Mears*. But it is out of the question to say that a person can be foreclosed in respect of an interest he did not possess at the time of the foreclosure proceedings, and that a charge can be extinguished when the person representing it is passed over unheeded in the proceedings taken to work out a foreclosure. If this charge were now in the hands of the original chargee, no answer has been suggested to a demand made by her for the raising it out of the lands in question. But it is said "how can the Court enforce a claim in favor of one whose duty it is to pay it off?" I do not at present see the answer to that proposition if the mortgage to *Stephen & Beatty*, given by *Margaret Mears*, covered all the premises embraced in the charge in her favor. As a matter of fact, it does not do so. The first mortgage and the charge cover the same premises, but the latter mortgage omits a portion thereof. The persons now seeking to prevent the establishment of this encumbrance on the property, cannot stand in a better position than they would if they were now bringing before the Court *Margaret Mears* as assignee of it, and asking to have her rights determined. It would then be found that the *Prince* mortgage was the first claim on the

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whole of the premises: next, apparently, would come the claim in question; but as to this, it would be successfully urged that, under the covenant given by her on her mortgage, she, as the holder of it, could not establish it as against her covenantee. But this would not prevent the proof of the charge. It would only prevent its proof to the detriment of the mortgagees. As to the land covered by the charge and not covered by the mortgage, the former could be proved, and the present assignee of this charge has a perfect right so to establish her claim that she would have the power to redeem, and, redeeming, she fulfils by the payment of the mortgage all that the mortgagees can demand of her, and retains her charge to be enforced as against the premises. The proof would then be as follows:—1st. The *Prince* mortgage; 2nd. the *Stephen & Beatty* mortgage; and 3rd. this charge. I therefore come to the conclusion that, even in the hands of *Margaret Mears*, this charge is, to the extent above intimated, enforcible, and that she is entitled to redeem the defendants in order to make it available. The costs will be borne as in redemption suits, where the right to redeem has been disputed. There must be a reference to the Master to take the accounts and inquiries necessary to the working out of this decree. *Wm. Mears* and any other person, properly a party to such inquiry, can be added by the Master.

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TO THE

PRINCIPAL MATTERS.

ABSOLUTE DEED.

R. and *S.* became the purchasers of the estate, real and personal, of an insolvent debtor (*D.*) *S.* asserting in the presence of *R.* that he was purchasing for the benefit of *D.* The property was duly conveyed to the purchasers by an absolute deed of transfer, and *D.* was retained to manage the business, and continued to occupy the property, *S.* assuming the exclusive control of the financial part thereof and making all payments on account of the purchase; and after the liabilities of the estate had all been discharged, *R.* filed a bill claiming to have the surplus of the estate realized, and the proceeds divided between himself and *S.* and *D.*:

Held, that the transaction was one in which, owing to D's possession, notwithstanding the Statute of Frauds, parol evidence was receivable to shew that the purchase was intended for the benefit of *D.*, but *Blake*, V. C., being of opinion that the evidence was not of that clear and positive nature required in such cases, made a decree in favour of *R.*, which, on rehearing, was affirmed by the full Court.

Robertson v. Smith, Ogden v. Robertson, 303.

ADMINISTRATRIX AND TRUSTEE.

[POWER OF, TO MORTGAGE.]

See "Will," &c., 6.

ADMINISTRATION OF JUSTICE ACT.

Since the passing of the Administration of Justice Act of 1873 (36 Vic. ch. 8) this Court will not, at the instance of a defendant in an action at law, entertain a bill to restrain such action, on the ground that the defendant has an equitable defence thereto; the power given by that Act to the Common Law Courts being to enable them to do complete justice between the parties.

Kennedy v. Bown, 95.

ADMINISTRATION SUIT.

1. Where in an administration suit instituted by a creditor of a deceased debtor, it is necessary to make the heir at law a party defendant, he is entitled to be paid his costs, as between solicitor and client in priority to all other claims, although the estate may be insufficient to pay the debts proved against it.

Hartrick v. Quigley, 287.

2. By the statute 29 Vic. ch. 28, sec. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors *pari passu*, and without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors, and execution to be issued, under which they were paid nearly in full, when by applying to the Court in that action the proper distribution of the estate would have been ordered, the Court charged her, in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their own claim at the amount allowed by the Court, and to this extent they were held entitled to recover their costs.

Taylor v. Brodie, 607.

AGREEMENT, NOTICE OF.

See "Power, sale under."

ALIMONY.

The parties to an alimony suit consented to a decree whereby the defendant was ordered forthwith to "pay the plaintiff the sum of $75, and all disbursements in the suit as between solicitor and client, including sheriff's fees on executions; such disbursements to be taxed and allowed by the Master of this Court":

Held, that in proceeding under this decree the Master had properly allowed to the plaintiff a sum of $50 paid by the plaintiff to her solicitors, they being also counsel, for counsel fee on the examination and hearing of the cause.

Bucke v. Bucke, 77.

ANSWER, LEAVE TO FILE.

See "Demurrer," 1.

APPEAL FROM MASTER.

1. Where a reference was made to a local Master, who had prior to his appointment been the counsel of one of the litigants, neither party objecting to his taking the reference, and on the contrary, the Master certified that he acted in the reference at the pressing instance of both parties; the Court *held* the other party, against whom the Master reported, could not raise that objection on an appeal from the report, having taken the chance of the Master finding in his favour.

Cotter v. Cotter, 159.

2. The plaintiff appealed from the report of the Master stating eleven objections thereto. On the argument he abandoned one; two were found in his favour, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the Court, instead of giving one set of costs to the plaintiff and another to the defendants, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff.

Ferguson v. Frontenac, 188.

APPOINTING NEW TRUSTEES.

A trust was created to two trustees and the survivor, and the executors and administrators of such survivor. The executors of the survivor, one of whom was the creator of the trust, proved his will. A petition, verified by affidavit, was afterwards presented by the executors, setting forth that at the time of proving the will they were not aware that they thereby became trustees of the trust estate, and one of them, the creator of the trust, swore that had he been aware that such would be the effect of proving the will, he would not have done so. The Court thought this a sufficient reason for appointing new trustees, and, under the circumstances, the adult *cestui qui trust* consenting, ordered the trustees to be paid their costs of the application out of the estate.

In re Helliwell's Trusts, 346.

APPRAISAL.

See "Executors," 1.

ARBITRATION.

On the treaty for the lease of a mill property, between the executors and trustees of the deceased owner and an intending

lessee, the executors and trustees expressly agreed that they would rebuild a dam upon the premises, and the rebuilding of which was a condition on which the lease was entered into, and without which the lessee would not have executed it; subsequently, two of the executors and trustees resigned, and others were appointed in their stead:

Held, that the agreement which had been made could be established by parol, and that the same was binding on the estate of the testator.

In re Mason and Scott, 166.

ASSETS.

[ADMISSION OF.]

See "Trusts," &c., 2.

[DISTRIBUTION OF.]

See "Administration Suit," 2.

ASSIGNMENT.

J. W. B., a widower, was locatee of the Crown, and agreed with his son *J. B.* to assign his interest in the land on condition of his son's making certain payments, and performing certain services for the father, which were all duly made and performed; and afterwards the patent was issued in the name of *J. B.*, by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements, without any claim by the father except for his support under the agreement made between the father and son. After the father's death the widow filed a bill for dower in the premises, but the Court *held*, that even admitting that the grant of land was to, and was by the Government meant to be to the father, that he could be treated only as a trustee for the son, and dismissed the bill with costs.

Burns v. Burns, 7.

See also "Insolvency," 1.
"Insurance," 1.

ASSIGNMENT, *Pendente Lite.*

An order of revivor is the appropriate proceeding in all cases of assignment *pendente lite*.

Matthews v Mears, 99.

BOND FOR A DEED.

See "Chose in Action," I.

BOUNDARIES, ORIGINAL.

See "Dedication."

BOUNDARY BY AGREEMENT.

The plaintiff and defendant were owners of adjoining lots in the township of Vaughan. An Act of the Legislature of Canada (23 Victoria, chapter 102), had been passed providing for a new survey of the township; and, according to a survey made under the provisions of that Act, a strip of land containing about two acres and three-tenths, occupied by the defendant, it was alleged, belonged to the plaintiff. On that strip there had recently been standing, nine pine trees, seven of which the defendant had cut down. It appeared that some years before 1851 a fence from the front or easterly side of these lots, for a distance of abont 60 or 70 rods, had been put up and was then standing on the supposed division line between the two lots: and also another fence running from the rear or westerly side of the lots to a distance of about 25 or 30 rods, leaving a space of about 600 yards in the centre unenclosed; but the parties respectively in occupation of the lots had always used the land on either side of the supposed line as belonging to them, up till about the year 1858, when the father of the plaintiff and the then owner of the defendant's lot procured a survey to be made and a fence to be erected on the division line then laid out, which was paid for jointly by them, and which corresponded with a line which had been run and blazed by the same surveyor in 1851. The plaintiff, in 1873, filed a bill seeking to restrain the further cutting of timber, and for a declaration that the strip in question was his property.

Held, *per curiam*, that there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations, even if the survey made and fence erected in 1858 were not sufficient acts to compel the parties to abide by that line as the true boundary; BLAKE, V. C., being of opinion that they were. SPRAGGE, C., *dubitante* as to the parties being bound under the Statute of Limitations; but, being clear that the matter in dispute was too insignificant to call for the interference of this Court by injunction, he concurred in dismissing the bill with costs.

Held, also, that the Statute of 1860, directing a survey of the township to be made, had not the effect of creating any new

right or title, as between parties who had been in undisturbed possession for the statutable period of twenty years before action or suit brought.

Bernard v. Gibson, 195.

CHATTELS, ASSIGNMENT OF SUBSEQUENTLY ACQUIRED.

See "Insolvency," 1.

CHOSE IN ACTION.

A bond was executed for the conveyance of real estate, which by the contrivance of the agent of the obligee, falsely stated that the purchase money agreed upon had been all paid to the obligor, which bond the obligee transferred to a *bona fide* assignee for value, who filed a bill to enforce the execution of a conveyance. The Court, however, following the rule that the assignee of a chose in action takes subject to all equities affecting the same, refused a decree except upon the terms of payment of such sum as might, on taking an account, be found due to the obligor in respect of the purchase money.

Gould v. Close, 273.

See also "Mortgage," &c. 4.

CIRCUITY OF ACTION.

See "Specific Performance," 6.

COMMISSION.

See "Executors," 6.

COMPOSITION DEED,

A trader, in insolvent circumstances, made an assignment of his property to several of his principal creditors in trust, for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept 20 per cent. of their demand. and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees reassigned the property to the debtor on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs:

Held, that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been

assigned to them by the debtor was sufficient to realize the amount of the composition agreed on; and as to this, if desired by the trustees, an inquiry by the Master was ditected.

The National Bank of Albany v. Moore, 269.

CONSENT DECREE.

See "Alimony."

CONTRADICTORY EVIDENCE.

Where on a reference to the Master the plaintiff swore that he never received the amount of a legacy to which he was entitled, and the defendant swore that he had paid all but $80, and a witness called by the plaintiff proved an admission by the defendant that the whole legacy was due, but the Master having reported that this witness was not to be relied on, the Court, in view of all the circumstances, refused to disturb the Master's finding.

Cotter v. Cotter, 159.

See also "Mortgage," &c., 1.

CONTRIBUTION.

See "Will," 7.

CONVEYANCE BY INFANT.

A married woman, while yet under 21 years of age, but representing herself to be of full age, conveyed land to a *bona fide* purchaser for value and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trnstee for her, and he subsequently sold the land, and his vendee (the same day) created a mortgage thereon.

Held, that the married woman, notwithstanding her non-age, was bound by her representations as to her being of age; and that the other parties having acquired their interests with full knowledge of the existence of the deed by her to the purchaser and after the registration thereof took subject to all the rights of the purchaser; and the Court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them; and *quære*, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith.

Bennetto v. Holden, 222.

CORRECTING DECREE.

Where a decree is settled and issued in the absence of one of the parties, without providing for relief to which he is entitled, and which would have been given him if brought to the attention of the Court, the proper mode of having the error corrected is to move upon petition: it is not necessary to rehear for that purpose.

Simmers v. Erb, 289.

COSTS.

Where on a rehearing the decree was affirmed, but the Court was of opinion that the guardian of the infant defendants, who reheard, was justified in raising the question for the determination of the full Court, directed his costs to be paid out of the fund after satisfaction of the plaintiff's claim.

Airey v. Mitchell, 510.

See also "Administration Suit."
"Alimony."
"Appeal from Master," 2.
"Appointing New Trustees."
"Executors," 1.
"Will," 2.

COUNSEL FEES.

See "Alimony."

COVENANTS BY MORTGAGOR AGAINST INCUMBRANCES.

See "Foreclosure."

CREDITORS.

See "Fraudulent Conveyance," 1.

DAMAGES.

See "Injunction."
"Lands taken for Railway."

DECLARATORY ACT.

The Statute 27 Vic. ch. 13, (1863,) after reciting that doubts had arisen as to the meaning of the 257th, 258th and 259th sections of the C. L. P. A. enacted that "whenever the word

'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators or assigns, or persons having the equity of redemption,' were inserted immediately after such word 'mortgagor:'"

Held, that the enactment was a declaratory one; and where lands subject to a mortgage were sold by the sheriff under execution in a suit against the executors of the mortgagor, and conveyed by the sheriff to the purchaser in October, 1858, the Court held this sale validated by the statute, and that the heirs of the mortgagor could not impeach the same. [PROUDFOOT, V. C. dissenting.] And *Held*, (2), *Per Curiam*, that 27 Vic. ch. 15, did not affect the question.

McEvoy v. Clune, 515.

DEDICATION.

1. The proprietors of a park lot adjoining the city of Toronto laid off lots on a street, which was only partially opened up on the ground, giving to each lot a depth of 120 feet from the eastern boundary of such park lot. Some years afterwards the street was opened to its full length, when it was discovered that, as the fences were then placed thereon, some of the lots on the part last opened up would not have the depth stipulated for, and an information was thereupon filed, on the relation of an owner of one of these lots, to compel the removal of the fences. On a survey being made pursuant to the statute, and also as ascertained by producing the lines of that part of the street which had been opened, and in use for 30 years, it was shewn that the fence did not encroach on the street, and that any apparent reduction there might be in the depth of the lots must have been caused by the removal of the boundary fence between he park lot in question and the adjoining one. Under these circumstances the Court dismissed the information with costs.

The Attorney-General v. Boulton, 598.

2. In such a case the owners had done some grading on a part of the property, intending it as a continuation of a street which had been already opened up and travelled for upwards of thirty years: *Held*, that this was not such an act as amounted to a dedication of the street in such a manner as bound the owner to its exact position, and even if it could be so treated, it did not extend to that portion of the street which was not actually opened up and used. *Ib.*

DEED ABSOLUTE IN FORM.

See "Redemption Suit."

DEED, VARYING OR SETTING ASIDE.

See "Misrepresentation."

DEFAULT—WILFUL.

See "Mortgage," &c., 3.

DEFICIENCY OF ESTATE.

See "Administration Suit."

DELAY IN MOVING.

See "Opening Publication."

DELAY IN SUING.

See "Fraudulent Conveyance," 2.

DEMURRER.

1. A bill was filed in this Court for the purpose of administering an estate in the Province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties to the suit, other than the debtor who resided in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as a manager for the trustees; and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of the want of jurisdiction. The Court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings.

Grant v. Eddy, 45.

2. Where a bill was filed to restrain the issue of debentures by a Municipal Council, but did not allege that the Warden was individually acting in the matter, or taking any step otherwise than as the officer of the Council, and under the by-law; the Court, on demurrer, held that he was not a necessary or proper party to the suit.

West Gwillimbury v. Simcoe, 68.

3. To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as

against creditors, the husband was made a party defendant:

Held, on demurrer, that since the passing of the Married Women's Property Act, 1872, the husband was not a necessary or proper party.

Semble, that such a dealing on the part of a married woman was a "tort," within the meaning of the above Act, for which she could be proceeded against as if unmarried.

McFarlane v. Murphy, 80.

4. Where a bill alleged with sufficient certainty enough to shew, if true, the relation of trustee and *cestui que trust* to exist between the plaintiff and defendants the Court, although portions of the bill did not come up to the requirements in this respect, overruled a demurrer for want of equity.

Grant v. Eddy, 568.

The order allowing a demurrer for want of jurisdiction, (reported *ante* page 45), affirmed on rehearing. *Ib.*

5. Where an incorporated company files a bill using a name other than that mentioned in the Act of incorporation, the bill is liable to a demurrer for want of equity.

The Cornish Silver Mining Co. v. Bull, 592.

See also "Pleading," 1.

DESCRIPTION AND LOCALITY OF PROPERTY.

See "Insolvency, 1."

DESCRIPTION, MISTAKE IN.

The owner of two town lots, 25 and 26, sold a portion of 26 to one *P.*, but by mistake the description in the deed was such as at law to pass the whole lot; he subsequently sold lot 25 and all that part of lot 26 not sold to *P.* to the plaintiff, and the deed thereof was duly registered; subsequently to the registration of this deed the defendant obtained a conveyance from *P.*, the description of the land being the same as that in the deed to *P.*:

Held, that the registration of the plaintiff's deed was notice to the defendant of the plaintiff's claim to that part of lot 26 not sold to *P.*, and that the plaintiff was entitled to a reconveyance thereof.

Haynes v. Gillen, 15.

See also "Description of Lands."

DESCRIPTION OF LANDS.

The question was, as to the true boundary line between lots 26 and 27, in the 6th concession of Wainfleet, which the plaintiff contended should be 10 chains further east than where the defendant asserted it should be. The patent under which the defendant claimed described his land as commencing at the south-west angle of his lot, 26, and then running north "56 chains more or less to the lands granted to *David Bryant.*" It was shewn that taking the defendant's point of commencement this course would not reach *Bryant's* land, and that commencing at the point contended for by the plaintiff it would reach *Bryant's* land:

Held, (1.) That upon the evidence stated in the case—the original instructions to the surveyors, the field notes, character of land, &c.—the defendant was right in his contention. (2.) That the description in the patent under which defendant derived title was not sufficient alone to outweigh all the other facts in his favor, and that under the circumstances the words, "to the lands granted to *David Bryant*," should rather be rejected.

Hoover v. Sabourin, 333.

DEVISE—CHARGED WITH PAYMENT OF DEBTS.

See "Specific Performance," 7.

SUBJECT TO ANNUITIES.

See "Specific Performance," 7.

DEVISE WITH CONDITION.

A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining 21 years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother; or in the event of the death of his mother, then that she should in like manner reside with his sister; and in the event of the death of his sister before the period named, he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions he devised the estate to other parties. On a bill filed to obtain the construction of the will, the Court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a Court of Equity could afford no relief; and that the estate devised to the daughter, unless the conditions were complied with, would be forfeited.

Davis v. McCaffrey, 554.

DIRECTORS OF INCORPORATED COMPANY.

Where a vote of the Shareholders of an incorporated company had authorized the Directors to raise money on the security of the Company's lands, and one of the Directors afterwards, by arrangement with the other Directors, advanced money for the use of the Company and took a mortgage on their lands, it was held, that a third party who subsequently became the purchaser of the mortgaged estate, could not resist the claim of the mortgagee, on the ground that a mortgage to a director was invalid.

Greenstreet v. Paris, 229.

DISBURSEMENTS.

See "Alimony."

DISTRIBUTION OF ASSETS.

See "Administration Suit," 2.

———————, PERIOD OF.

See "Will," 1.

DIVISION FENCES.

See "Boundary by Agreement."

DOMINANT AND SERVIENT TENEMENT.

See "Easement," 1.

DOWER.

See "Bill," 4.
"Leasing."

EASEMENT.

1. *T.*, being owner of 275 acres of land, caused a mill dam and race to be constructed and a mill to be erected thereon. For 30 or 40 years this mill, or others built on its site run by water power only, had existed, and were run by the water passing from a natural stream through the race. *T.* sold to *W.* the whole property, taking back a mortgage for part of the purchase money, on that part of the land through which the race

ran, and on which the mill dam was situated, excepting, however, the mill site. It was shewn that the mill could not be supplied with water power otherwise than by the race running through the mortgaged premises. *T.* afterwards assigned the mortgage to the plaintiff, and *W.* mortgaged the mill and mill site to *D.*

Held, that the right to use the dam and mill race was a necessary, continuous, and permanent easement, and could not be destroyed by the plaintiff, although the servient parcel had been first conveyed without any express reservation of such easement.

Young v. Wilson, 144.
Affirmed on Rehearing, 611.

2. The nature of the enjoyment of an easement at the time of the grant thereof is the proper measure of enjoyment during the continuance of the grant.

Heward v. Jackson, 263.

ELECTION.

See "Leasing." 1.
"Will," &c., 4.

EMBLEMENTS.

See "Executors."

EQUITABLE DEFENCE.

See "Administration of Justice Act."

EQUITIES.

See "Chose in Action."
"Mortgage," &c., 4.

EQUITY OF REDEMPTION.

1. The principle on which an equity of redemption is founded is relief against forfeiture; and the equity is not to be allowed where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued.

Skae v. Chapman, 534.

2. Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds; but for seventeen years before the filing of a bill to redeem, sales and re-sales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected; some burnt down; new buildings put up; houses built for one purpose altered to suit other purposes; other changes and improvements thereon made; fields and commons being converted into sites for shops, hotels, a bank, and other places of business, and into gardens and yards; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim and made defendants to the suit numbered nearly one hundred:

Held, that redemption would be inequitable, and the bill was dismissed with costs. *Ib.*

3. The effect in such a case of the statute 36 Vic. chap. 22, (O.), giving a lien for improvements, remarked upon. *Ib.*

See also "Mortgage," &c., 5.

EXCHANGE OF LAND.

See "Settled Estates Acts."

EXECUTION CREDITORS.

See "Insolvency," 2.

EXECUTORS.

1. The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the Master's report, charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the Court ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857: the lapse of time not being considered sufficient to bar the right to interest.

Cudney v. Cudney, 153.

2. A testator had sown a quantity of grain, which was in the ground after his decease; one of the next of kin sought to charge the executors with the value thereof, but the land on which it was having been devised to the widow for life, it was *held* on appeal that she, and not the executors, were entitled to the emblements. *Ib.*

3. Executors with a discretionary power to sell their testator's real estate, *held* not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into Court pending the suit, they were charged with interest.

McMillan v. McMillan, 369.

4. Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim: In fact, according to the terms of the will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:

Held, that the executors were not responsible for any loss sustained by reason of the delay in selling. *Ib.*

5. The Master by his report found that the executors had paid to some of the children of the testator, all of whom were equally entitled under the will, different amounts, and to one of them nothing, the estate proving insufficient:

Held, not a ground for appealing from the Master's report, but that the question, whether the executors were estopped from denying the sufficiency of the estate to make payment to all the children equally, or whether those paid were bound to refund, was one proper to be discused on further directions. *Ib.*

6. The rule laid down in *Thompson* v. *Freeman*, *ante* vol. 15, p. 384, followed, and executors *held* entitled to compensation under the Surrogate Act (22 Vic., cap. 93), for services performed before the passing of the Act. *Ib.*

FELONY.

See "Fraudulent Conveyance," 1.

FIRE INSURANCE.

The plaintiffs owned a stock of goods contained in a shop (No. 272) on the south side of King Street, in the city of Hamilton, and on the 9th of August applied to the local agent

of the defendants to effect an insurance thereon against loss or damage by fire, when he accepted the risk and gave the usual interim receipt, subject to approval by the head office, but insuring the goods meanwhile. On the following day the plaintiffs notified the agent that they had cut openings in the second and third flats into the adjoining store (No. 273), and had removed part of their stock in these adjoining flats; whereupon the agent visited the premises, and examined the position thereof, which, with the exception of the openings already mentioned, were completely shut off one from the other. On viewing the premises, the agent told the plaintiffs that the risk had by such openings been increased, and that the premiums must be raised. The plaintiffs remarked that at any price their stock must be insured, and thereupon the agent addressed the head office in Canada, stating the fact that these cuttings had been made, and that in consequence he had told the plaintiffs the premium must be increased. In consequence of a communication from the head office, the agent subsequently issued an interim receipt, dated back to the 9th of August, for the full premium, and subsequently a policy was in due course transmitted to the defendant, on the face of which was written, "N. B.—There is an opening in the east end gable of above, through which communication is had with the adjoining house, which is occupied by one *O.* as a coal oil store," &c. During the currency of this policy the goods were destroyed by fire, when the company sought to evade the payment of any loss in respect of the goods destroyed in the upper flats of No. 273, but the Court *held* that, by what had taken place, these flats had become for insurance purposes part of No. 272, and that the plaintiffs not having been guilty of any fraudulent conduct whatever, and not having concealed any fact from the company, they were entitled to have the policy so rectified as to enable them to recover the full amount of their loss to the extent covered by the policy.

Wyld v. The London, Liverpool, and Globe Insurance Company, 458.

FORECLOSURE.

M., the owner of lands subject to a mortgage in favour of *S. & B.*, and to a charge for an annuity, mortgaged them to *S. & B.* with covenants for title, right to convey, freedom from incumbrances, and for further assurance. *S. & B.* took proceedings upon their several mortgages, and ultimately *M.* was foreclosed, but the person entitled to the annuity was not made a party to the cause. Subsequently *M.* became the assignee of the annuity, and instituted proceedings against the defendants, who were purchasers from *S. & B.* It appeared that the

whole of the land subject to the annuity was not covered by the mortgage from *M.* to *S.* & *B.*

Held (1), that as to the other portion of the lands covered by the mortgage, *M.* being bound by the covenant to pay off the annuity, the Court would not enforce it in *M.'s* favour against such portion; but *held* (2), that this would not prevent the charge being enforced, the effect being only to postpone the charge of the annuity, as against such portion of the lands, to the mortgage given by *M.*, and that *M.* was entitled to redeem in order to make the charge available to this extent.

Semble, that if the lands covered by the annuity and the mortgage from *M.* were identical, the Court would not enforce the charge in favor of *M.*

Matthews v. Mears, 643.

FRAUDS, STATUTE OF.

The position of a defendant resisting a claim, is more favorably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds.

Lawrence v. Errington, 261.

See also "Absolute Deed."
"Principal and Agent."
"Sale of Timber," 2.

FRAUDULENT CONVEYANCE.

1. The person upon whom a robbery has been committed is, even before conviction, entitled to be considered as a creditor of the party committing the robbery, although the remedy for the recovery of the amount may be suspended until after conviction; where therefore a person had feloniously possessed himself of certain securities, and invested a portion of the money realized therefrom in the purchase of real estate, the conveyance of which he procured to be made to his wife, in order to its being preserved in the event of proceedings being taken by the party robbed, the Court, on a bill filed by a subsequent creditor, declared the conveyance void as against creditors, under the 13th Elizabeth, ch. 5.

Reid v. Kennedy, 86

2. Delay for seven years in suing *held* no objection to a party's right to set aside a deed as fraudulent against creditors, where the position of the parties to the impeached conveyance had not been materially altered by the delay; if that were

shewn the Court has the power of modifying the relief to be given, so as not to wrong the parties; or it might, in its discretion, refuse to give any relief.

Currie v. Gillespie, 267.

FRAUDULENT PREFERENCE.

A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied:

Held, that this was not such a preference as rendered the chattel mortgage void.

Risk v. Sleemin, 250.

See also "Insolvent Act."

HEIR AT LAW.

See "Administration Suit, 1."

HOTCHPOT.

See "Will," 7.

HUSBAND AND WIFE.

See "Demurrer," 3.

IMPROVEMENTS, LIEN FOR.

See "Equity of Redemption," 3.

INCORPORATED COMPANY.

See "Demurrer," 6.
"Void Lease."

INFANT.

See "Conveyance by Infant."
"Settled Estates Acts."
"Testamentary Guardian."

INJUNCTION.

Where a plaintiff on obtaining an injunction enters into the usual undertaking to abide by such order as the Court may make as to damages, it is in the discretion of the Court to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for the defendant, the Court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained.

Hessin v. Coppin, 253.

See also "Sale of Timber."

INSOLVENCY.

1. Although the rule at law is, that an instrument intended either to assign or charge chattels of which the assignor has not the possession, is imperfect without some subsequent act of the assignor, the same is not the case in equity; neither does it prevail in insolvency proceedings, where the Court is bound to work out the equities between the parties: therefore where on a sale by a partner of his interest in the partnership effects to his co-partner, and for the purpose of securing the amount due on such purchase, the purchaser *T.* executed a mortgage to the vendor "on all the stock in trade, consisting of drugs, chemicals, seeds, * * and in fact everything in stock or held by the late firm of *T. & P.* in connection with their business * * and now in possession of the said party of the first part (the purchaser) in or upon the shop and premises occupied by him on the north side of Kent street in * * and also any stock purchased hereafter by the said *W. J. T.*, and which may be in his possession upon said premises during the continuance of this security or any renewal thereof:" afterwards *T.* executed a renewal of this mortgage, describing the property substantially as above, and as being in his possession on the date of the first mortgage, and "also any stock purchased by the said mortgagor thereafter and now in his possession; and also any stock purchased hereafter by the said mortgagor, and which may be in his possession, upon the said premises at any time during the continuance of this security or any renewal thereof."

Held, that stock acquired by *T.* after the execution of such second mortgage, as well as that acquired by him after

the date of the first and before the execution of the second mortgage, was bound by such second mortgage, and that the mortgagee was entitled to retain the same against the assignee in insolvency of the mortgagor: and (2.) that the property was sufficiently described in the mortgage both as to its nature and locality.

Re Thirkell-- Perrin v. Wood, 492.

2. A suit was instituted upon a mortgage against the asignee in insolvency of the mortgagor, and on proceeding in the Master's office it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency.

Held, on appeal from the ruling of the Master, that it was proper to add such creditors as parties in his office.

Canada Landed Credit Co. v. McAllister, 598.

INSOLVENT ACT.

M., being owner of a warehouse and agent for *T. & W.*, held for them a quantity of grain, which he refused to give up till paid $1,400 owed him by them. *T. & W.* were in insolvent circumstances, and *W.* had absconded. After several applications for payment, by *M.* to *T.*, the latter agreed to transfer to him his interest in a vessel in satisfaction of the debt. This was done by a bill of sale made on the 28th of November, 1872, which being irregular in form, another was executed on the 5th of December. *T. & W.* were declared insolvent on the 12th of December. The grain was given up by *M.* on the 28th of November, upon the execution of the first bill of sale.

Held, that the sale of *T.*'s interest in the vessel was not a fraudulent preference, and a bill filed by the assignee of *T.* to set it aside was dismissed with costs.

McFarlane v. McDonald, 319.

INSUFFICIENT DESCRIPTION.

See "Tax Sales."

INSURANCE.

1. On a sale of real estate the vendor took back a mortgage for part of the purchase money, which was made according to the short form under the Statute, and contained the usual covenant on the part of the mortgagor to insure, but this, in the hurry of preparing the deeds, the mortgagor, who was a solicitor, omitted to fill up. It was proved, however, by both parties

to the transaction, that the mortgagor was to insure, and was also to give a covenant for so doiug. The vendor afterwards during the absence of the mortgagor insured the houses on the property in his own name, for the sum agreed upon, and charged the premium to the mortgagor, and the buildings being afterwards burned down obtained, by process of law, payment from the insurance company of the amount of the policy.

Held, that the company had not, under the circumstances, any right to call upon the mortgagee to assign his mortgage to them: and

Whether, in any case under the circumstances, in the absence of fraud, he would be bound to do so.—*Quære.*

The Provincial Insurance Co. v. Reesor, 286.

2. Where the clerk of an insurance company left a receipt for renewal premium duly signed at the office of a policy holder, who desired to renew the insurance, the messenger declining to receive the money from the person in charge, and it appeared that the company had in hand money belonging to the insured: that the receipt was never demanded back, and that the insured relied on the renewal as having been effected:

Held, that after a loss it was too late for the company to set up that the preminm had not been paid, even though their clerk may not have been authorized by his instructions to leave the receipt.—[SPRAGGE, C., dubitante.]

Staunton v. The Western Assurance Co., 296

See also "Fire Insurance."

INTEREST.

See "Specific Performance," I, 6.

INTERLOCUTORY INJUNCTION.

The office of an interlocutory injunction is simply to retain matters in *statu quo*; where, therefore, the railway track of the Niagara Falls Suspension Bridge had been declared to be a public highway, and that an agreement that the same should be used by one railway exclusively was *ultra vires* the charter of the bridge company, *The Erie and Niagara Falls Railway Company* moved to restrain *The Great Western Railway Company*, with whom such illegal agreement had been made, from preventing *The Erie and Niagara Railway Company* from crossing the lands of *The Great Western Railway Company* in order to obtain access to the bridge; and it was shewn that the latter company were not *actively* interfering to prevent the approach

being obtained, but were simply passive: the Court, on interlocutory motion, refused the injunction, although of opinion that, at the hearing, the relief should be granted.

The Erie & Niagara Railway Company v. The Great Western Railway Company, 171.

JUDGMENT CREDITORS.

While the law respecting the registration of judgments was in force, two judgment creditors registered their judgments; the second in point of time proceeded with a suit in this Court to enforce his lien, the other did not, although he had also filed a bill in time, but he proved his claim in the Master's office in the suit instituted by the other creditor, and who in that proceeding had sued out a sequestration, under which proceedings had been taken to obtain payment of his claim:

Held, on re-hearing, (affirming the judgment reported *ante*, vol. 5, p. 185), that the creditor who had first registered had not by refraining from proceeding with his suit lost the priority obtained by him, by virtue of his prior registration: that to enforce such claim it was not, under the circumstances, necessary for him to revive his own suit in this Court, which had abated meantime by reason of the death of some of the parties; and that the plaintiff in the suit in which he had proved his claim, having sued out a writ of sequestration, under which the sheriff had acted, had not the effect of changing the rights of the parties under their registered judgments.

Myers v. Myers, 214.

JURISDICTION.

See "Demurrer," 1, 5.

LACHES.

See "Rectifying Deed," 1.

LANDS INJURIOUSLY AFFECTED.

See "Lands taken for Railway."

LANDS TAKEN FOR RAILWAY.

Instead of proceeding under the statute to ascertain the amount to be paid to the owner of lands taken for the purposes of a railway, the parties consented to a decree referring it to

the Master to ascertain and settle the amount payable by the Company "for compensation or damages for the land * * *taken or to be taken*" by the company; the Master to have all the powers of an arbitrator, under chapter 66, C. S. C., but to act as Master, with a right to either party to appeal.

Held, that under this reference the Master had no authority to award compensation to the owner for the severence of one portion of the property from the other, or on account of access to a spring being obstructed, nor for increased risk of fire to the premises of the owner, nor for lands injuriously affected in any way but not taken.

Cummins v. The Credit Valley Railway Co., 162.

LEASING.

A testator by his will gave to his widow 100 acres of land, which he expressed should "be my wife's portion during her natural life," and the balance of his real estate, fifty acres, he directed to be sold, and until sold that the same should be rented, "and the rent shall be given to my wife to assist her in keeping and supporting of herself and the children that may choose to reside with her": *Held*, that the widow was not entitled to her dower in the fifty acres and also to the provision made for her by the will; but that she was bound to elect.

Armstrong v. Armstrong, 351.

LEGACIES CHARGED ON REAL ESTATE.

See "Will," &c., 6.

LEGATEES REFUNDING.

See "Executors," 5.

LIABILITY FOR RENT.

See "Void Lease."

LIEN FOR IMPROVEMENTS.

See "Equity of Redemption," 3.

LIMITATIONS, STATUTE OF.

See "Boundary by Agreement."
"Mortgage," &c., 2.

MAINTENANCE.

See "Posthumous child."

MARRIED WOMEN'S PROPERTY ACT, 1872.

See "Demurrer," 3.

MERGER.

A first mortgagee took from the mortgagor a release of the equity of redemption, the consideration thereof being expressed to be the amount due on the mortgage for principal and interest "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises * * * freed from the proviso of redemption;" and the mortgagor covenanted for further assurance and that he had done no act to incumber.

Held, that the effect of the transaction was to merge the mortgage, and that the mortgagee was bound to redeem the subsequent incumbrancers.

Hart v. McQuesten, 242.

MILL RACE.

See "Easement," 1.

MISREPRESENTATION.

1. The rule is that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach and does not choose to do so, he will not, on the facts turning out to be different from what they were represented, be entitled to any relief.

Coates v. Bacon, 21.

2. On the negociation for a lease of real estate in the City of Toronto, the intended lessee asked the intended lessor, who had owned, occupied, and paid the taxes assessed on the proposed leasehold premises for several years, what the taxes would be on the property, and the intended lessor answered they were about $70 or $76, but that he could not tell exactly as he had never separated them from his personal assessment:—the fact being that for some years the owner had been paying nearly

double that amount. The intending lessee, however, accepted the owner's statement and executed the lease without making any reference to the Chamberlain's office, where the exact amount rated on the premises could have been ascertained. The Court, under the circumstances, refused any relief to the lessee on the ground of misrepresentation.

Coates v. Bacon, 21.

MISTAKE IN DESCRIPTION.

See "Description."

MISUNDERSTANDING.

See "Specific Performance," 3.

MONEY.

EXPENDED IN SUPPORT OF WIDOW.

See "Widow."

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. In 1859 a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with *M.*, who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought and had for years been under the impression, that the whole claim under the assignment had been paid: that the plaintiff *M.* was not interested in this note and that the same had, through oversight, not been delivered up. The attorney who had acted for *M.* having sworn that this note was the one in which *M.* was interested, and that it had never been paid, the Court, in view of the fact that the mortgage and note were both found in the hands of the assignee and that no demand during so many years had been made for their discharge, pronounced the usual decree in favor of the plaintiffs.

Scatcherd v. Kiely, 30.

2. A suit of foreclosure or for the sale of mortgaged premises in default of payment is not a suit for the recovery of land, but is a proceeding for a recovery of money due upon land within section 24 of chapter 88 of the Consolidated Statutes of Upper Canada: where therefore, a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will

comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever loaned to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was *held* sufficient to take the case out of the statute.

Barwick v. Barwick, 39.

3. Although the rule is, that when a mortgagee enters into possession, he does so for the purpose of recovering both his principal and interest; and the estate, in the view of a Court of Equity, is a security only for the money due on the mortgage, and the Court requires him to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor, who is in equity the party entitled to it; still he will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same.

Merriam v. Cronk, 60.

4. The assignee of a mortgage, like the assignee of a promissory note (after maturity) or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument.

Elliott v. McConnell, 276.

5. A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where, therefore, a mortgagor created a lease of the mortgaged property, and gave an order for rent in advance to the mortgagee, to be, and which was applied by him in discharge of other liabilities of the mortgagor who afterwards transferred his equity of redemption to a *bona fide* assignee, without notice of such advance of rent:

Held, that the owner of the equity of redemption was entitled to have the amount of rent so advanced, applied in payment of the mortgage debt.

Gilmour v. Roe, 284.

See also "Equity of Redemption," 1, 2.
"Foreclosure."
"Insurance," 1.
"Merger."
"Power, Sale under."
"Redemption Suit."
"Tacking."

MOTIVE OF DEBTOR.

See "Insolvent Act."

MUNICIPAL CORPORATIONS.

A municipal corporation, although it has, under the statute, full powers conferred upon it of opening, making or stopping up roads, streets and other communications, is not at liberty to place obstructions thereon whilst retained as roads or streets. Where, therefore, it was shewn that the corporation of the town of Cornwall was constructing a weigh scales on a corner of the principal street in the town, which would have caused a special injury to the plaintiff, who kept a store at such corner, the Court, at the instance of the plaintiff, restrained the construction on the ground of nuisance.

Cline v. Cornwall, 129.

MUNICIPAL OFFICERS.

See "Demurrer," 2.
"Tax Sale," 3.

NOTICE.

See "Description."
"Power, Sale under."

NUISANCE.

See "Municipal Corporations."

OBJECTION TO MASTER ACTING.

See "Appeal from Master," 1.

OPENING PUBLICATION.

It is incumbent on the Court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance, should be imposed upon parties; where, therefore, a defendant did not appear at the hearing of the cause, and a decree was pronounced in favour of the plaintiffs, and three months afterwards the defendant applied to open publication, so as to let in proof of a document of the existence of which he was

aware, and a copy of which he had in his possession, the Court, under the circumstances, refused the application with costs.

Colonial Trusts v. Cameron, 70.

ORDER OF REVIVOR.

See "Assignment Pendente Lite."

ORIGINAL BOUNDARIES.

See "Dedication," 1.

PAROL AGREEMENT.

See "Principal and Agent," 1.
"Specific Performance," 4.

PAROL EVIDENCE.

See "Arbitration."
"Absolute Deed."

PARTIES.

See "Demurrer," 2.
"Insolvency," 2.
"Pleading," 1.
"Rectifying Deed," 2.

PARTNERSHIP.

1. Where a partner, desiring to retire from the business, agrees to sell out his interest in the joint property subject to the payment of all claims against the partnership; and a sale is effected by the remaining partner to a third party subject to such payment; the title which remains in the retiring partner until the payment of the debts of the firm is a legal, not a merely equitable right, and such as an execution against the remaining partner, for a private debt, will not affect.

Stevenson v. Sexsmith, 355.

2. *S. & A.* were in partnership as dealers in lumber, and had become involved to some extent, in consequence of which it was agreed that *A.* should sell out his interest to *S.* and retire from the business, leaving *S.* sole owner, who thereupon,

and without anything having been paid to *A*, entered into an agreement with the plaintiff agreeing that the first proceeds of the partnership sales should be employed in discharge of the claims against the firm of *S. & A.*, which the plaintiff alleged he thought were composed of $17.000 due to the banks. In reality a claim of about $8,000 was held by the brother of *S.*, who sued for and recovered judgment and execution, under which the sheriff seized and advertised the timber of the partnership for sale, whereupon the plaintiff filed a bill impeaching the *bona fides* of the judgment and seeking to restrain the sale on the ground, amongst others, of the peculiar value of the timber. The Court, however, being of opinion that the debt recovered was not fictitious, refused to interfere with the sale, but offered the plaintiff a reference to the Master for the purpose of procuring the production of certain papers—not produced at the hearing—to impeach the *bona fides* of the debt; the Master's report to be procured within fifteen days after their production: if the reference not taken, or if the Master's report were in favour of the *bona fides* of the claim, the bill to be dismissed with costs; but if the Master reported against the *bona fides* of the debt, further directions and costs were reserved, and the amount of the judgment with interest and costs was directed to be paid into Court—otherwise the execution of the process not to be interfered with.

Stevenson v. Sexsmith, 355.

PARTY TO A CAUSE.

Where a bill is filed and a defendant served with a copy thereof, he thereby becomes a party to the cause; appearance by the defendant, or by the plaintiff for the defendant, having been abolished by the General Order (6) of 1868.

Myers v. Myers, 214.

PLEADING.

1. Where a defendant demurs for want of parties, he should shew with sufficient precision the persons who ought to be parties, not necessarily by name, but in such a manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties.

Calvert v. Linley, 470.

2. Under the present system of pleading, it is the duty of the Court on perusing a pleading with a view of ascertaining whether or not it is sufficient on demurrer, to put a fair and

reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used; and if as a whole it presents a case entitling the plaintiff to relief to allow it to stand, and if even there be some statements which if taken alone would render the case ambiguous, yet these should be taken in connection with the remainder of the pleading so as to make, where practicable, a consistent story entitling the party to relief.

Grant v. Eddy, 568.

3. A pleader when dealing with facts peculiarly within the knowledge of the opposite party is not required to be as precise and particular as if the pleading were in respect of matters known to both. *Ib.*

POSTHUMOUS CHILD.

A testator by his will gave to each of his children (naming them) $200 a year until twelve, and thereafter $400 a year until eighteen in case of daughters; and twenty-one in case of sons. After his death his widow gave birth to a son, and on a petition being presented to the Court on his behalf, he was ordered to be allowed the same amount as the other sons out of his contingent share of the residue of the estate which the testator directed to be divided amongst *all* his children on the youngest attaining twenty-one: it appearing that the share of the infant in such would be ample to pay the allowance named.

Aldwell v. Aldwell, 627.

POWER, SALE UNDER.

The owner of land conveyed the same, taking from the grantee a bond or agreement for payment of $30 a year, and the keep of a cow, which was to form a first charge or lien on the land. No part of this consideration was ever paid or performed. Before the bond or agreement was registered, the grantee mortgaged the property to a building society, who subsequently sold for the amount of their claim to a party who had notice of the effect of the bond.

Held, that the purchaser was liable to be redeemed on payment of what should be found due in respect of the mortgage to his vendors.

Waddell v. Corbett, 384.

PRACTICE.

See "Assignment pendente lite."
"Correcting Decree."
"Executors," 5.
"Injunction."
"Insolvency," 2.
"Opening Publication."
"Party to a cause."
"Redemption Suit."
"Will," 1.

PREMIUM.

See "Insurance," 2.

PRESSURE.

See "Fraudulent Preference."
"Insolvent Act."

PRINCIPAL AND AGENT.

A property being about to be sold by auction, in which the plaintiff had an interest as mortgagee, he, desiring to protect such interest, determined to buy in the property; but he, with others, desiring not to appear as purchaser, applied to defendant and agreed with him that he should attend at the auction and bid in the property in his own name; but in reality as the agent and on behalf of the plaintiff. He accordingly attended at the sale, and, after the property had first been knocked down to the plaintiff, became the purchaser and paid the deposit required by the conditions of sale—part of the amount being supplied by one of the persons with whom the plaintiff was interested in securing the property—and subsequently kept an account of his dealings with the property:

Held, that the agreement, though only parol, could be enforced, notwithstanding a defence had been set up under the Statute of Frauds.

Ross v. Scott, 391.

[Affirmed on re-hearing.]

PROPERTY, DESCRIPTION AND LOCALITY OF.

See "Insolvency," 1.

PROPERTY AND TRUSTS ACT.

(29 Vic. Ch. 28.)
See "Will," 6.

PURCHASE BY AGENT.

See "Principal and Agent."

REAL ESTATE.

CHARGED WITH SUPPORT OF WIDOW.

See "Widow."

RECTIFYING DEED.

1. By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder to her issue, but through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in the writ. The purchaser afterwards claimed the fee in the lands under the terms of the deed of gift and conveyance from the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred on the ground that the plaintiffs had not shewn any interest in the land:

Held, that the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified; and that their delay in filing the bill was not such as, under the circumstances, should deprive them of their right to relief on the ground of laches.

Calvert v. Linley. 470.

2. To such a bill it was considered that the grantor, in the deed of gift, was not a necessary party, but that the grantee must be made a party, as she had a right to insist that the deed had been correctly drawn, and the defendant had a right to have her before the Court in order to protect him from another suit. *Ib.*

RE-DELIVERING POSSESSION.

See "Specific Performance," 2.

REDEMPTION SUIT.

In a suit to declare a deed absolute in form to be a mortgage, and to restrain an action of ejectment against the plaintiff, it appeared that at the date of the commencement of the action the plaintiff was in arrear of payments of interest to the defendant upon the agreement entered into between them when the deed was given :

Held, that the plaintiff was not entitled to six months for payment of the arrears and costs.

Dornyn v. Fralick, 191.

REDEMPTION BY AN ANNUITANT.

See "Foreclosure."

REGISTRATION OF JUDGMENTS.

See "Judgment Creditors."

REGISTRY ACT.

See "Description."

REGISTRY LAWS.

See "Conveyance by Infant."

REJECTING WORDS OF DESCRIPTION.

See "Description of Lands."

RENEWAL.

See "Insurance," 2.

RENTS IN ADVANCE.

See "Mortgage," &c., 5.

RENTS AND PROFITS.

See "Mortgage," &c., 3.
"Specific Performance," 2.

RESCINDING CONTRACT.

See "Specific Performance," 2.

RESIDUARY ESTATE.

See "Posthumous Child."

RESULTING TRUST.

A woman while living with a man to whom she believed herself to have been lawfully married, but who, it was afterwards discovered, was, at the time of the pretended marriage with her, a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name:

Held, that there was not any resulting trust in favour of the woman.

Street v. Hallett, 255.

RETROSPECTIVE ACT.

See "Declaratory Act."

REVIVOR, ORDER OF.

See "Assignment *Pendente lite*."

RIGHT OF WAY.

A person purchased a piece of land with the right of way across the property of the grantor by a lane which at the time of the conveyance was perfectly open where it entered the public highway:

Held, that a person claiming under the grantor could not subsequently put a gate across said lane, though avowedly placed there, not to exclude the plaintiff from the use of the right of way, but to preserve the lane from being trespassed on by the cattle of others.

Heward v. Jackson, 263.

SALE BY ONE PARTNER.

See "Partnership," 1.

SALE OF TIMBER.

1. The owner of land by a memorandum in writing sold the timber thereon, and when the time verbally agreed upon for its removal was nearly expired, the vendor told his vendee that he

might have another year within which to complete the cutting and removal of the timber:

Held, that the vendor was not at liberty afterwards to revoke such extension of time.

Lawrence v. Errington, 261.

2. On a sale of timber, the land on which the same was situate was not mentioned in the memorandum evidencing the agreement, but the purchaser entered upon the land intended, and with the knowledge and acquiescence of the owner, continued to cut thereon for over a year:

Held, that this was sufficient, within the Statute of Frauds, to prevent the vendor afterwards disputing the right of the purchaser to cut the timber within the time limited for his so doing. *Ib.*

SAW LOGS.

See "Partnership," 2.

SEQUESTRATION.

A writ of sequestration, whether upon *mesne* or final process, is not in any sense an execution against lands, but is simply a means of compelling obedience to the orders of the Court.

Meyers v. Meyers, 214.

SETTING ASIDE OR VARYING DEED.

See "Misrepresentation."

SETTLED ESTATES ACTS.

The Settled Estates Acts do not authorize the Court in sanctioning an exchange of the lands of an infant *cestui que* trust; and when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the Court may order the same to be carried out under the provisions of sec. 50 of ch. 12 Con. Stat. U. C.

Re Bishoprick, 589.

SHERIFF'S DEED.

See "Tax Sales," 4.

SHEWING TITLE.

See "Vendor and Purchaser."

SMALLNESS OF INTEREST.

See "Boundary by Agreement."

SPECIAL CASE.

See "Arbitration."

SPECIFIC PERFORMANCE.

1. When a bill is filed by a vendor to enforce the specific performance of a contract of sale, he is entitled to recover interest for a period of twenty years.

Airey v. Mitchell, 239.

Decree, under the special circumstances, affirmed on re-hearing, 510.

2. Where upon the sale of lands the purchaser pays his purchase money, and is let into possession, but upon a reference it is found the vendor cannot make a good title, and the Court rescinds the contract, the purchaser is bound to re-deliver possession, on being repaid his purchase money, and if he insists on interest on the purchase money, he must submit to account for rents and profits.

Simmers v. Erb, 289.

3. The Court, when it is satisfied that there is a *bona fide* misunderstanding on the part of one of the parties to a contract as to the provisions of an agreement, will not decree specific performance of it.

McDonell v. McDonell, 342.

4. The father of the plaintiff died leaving a widow and nine children, the plaintiff, the eldest son, being then 16 years old, and he continued to reside with and work for his mother on a farm which she owned, for about six years, when becoming dissatisfied with his position, he informed his mother thereof, and that he had determined to leave the farm and work for himself; whereupon, his mother urged him to remain, work the farm, and assist her in bringing up the family, and she would give him the south half of the farm, and the other half to a younger brother; on condition of the plaintiff supporting her during her life. The plaintiff, in consequence, remained with the family, and erected a brick dwelling on the south half of

the farm, of which house he agreed to give and did give his mother a certain part for the use of herself and a grand daughter, whose mother had died some years previously. The brothers and sisters of the plaintiff were all well aware that the plaintiff claimed under this alleged agreement or promise, and the south half of the lot was always designated as his. The plaintiff continued to fulfil the terms stipulated for until the death of his mother about seven years afterwards; but she died without having executed a deed to the plaintiff. Eighteen years afterwards, a brother of the plaintiff having bought up the shares of four of the co-heirs, instituted proceedings in ejectment against the plaintiff, claiming to be absolutely entitled to five undivided ninths of the whole property. Thereupon the plaintiff filed a bill seeking to restrain such action, and to enforce a specific performance of the alleged agreement with the mother:

Held, on appeal, reversing the decree of the Court below, that what had occurred could not be treated as an agreement to convey, but was at most to be looked upon only as a promise or expectation held out by the mother to the son to induce him to remain with her, and as such, was not capable of being specifically enforced in equity.—[SPRAGGE, C., diss.]

Orr v. Orr, (in Appeal,) 397.

5. On the sale of a house and lot it was stipulated that the vendor should make out a good title to the satisfaction of the solicitors of the purchaser. It appeared that the original owner of the property had erected the house before any streets had been laid out. Subsequently a street was laid out, which at a point opposite the house was only sixty feet wide. Afterwards the owner of adjoining lands continued this street, but laid it out sixty-six feet wide.

Held, that the difficulty that might arise at a future date of proving the facts as to the laying out of the street was a sufficient ground to warrant the solicitors in refusing to certify as to the goodness of the title; and that in any event the solicitors, under the agreement which had been made, had, so long as they acted in good faith, an absolute power of rejecting the title, and were not, in objecting to the title, restricted to making only the usual objections to title.

Boulton v. Bethune, 478.

6. *Held*, on rehearing, that in a suit for specific performance, even where the purchaser has taken possession of the premises, as a general rule, he is only liable for arrears of interest for a period of six years prior to the filing of the bill. Also *Held*, that where the purchaser dies, the rights of no incumbrancer intervening, the vendor is entitled to a charge on the land in

the hands of the heirs for a period beyond the six years, in order to prevent circuity of action.

Airey v. Mitchell, 510.

7. Where lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but they will not where there is also a charge of debts: where therefore a testator devised to his daughter all his "real and personal estate of every description, subject to the payment of my just debts, and on condition that my son *M.* be supported and taken care of as hitherto by her, to have and to hold the said real and personal property on the condition aforesaid to her, her heirs and assigns forever," and appointed her sole executrix.

Held, that the devisee could make a good title freed from the charge for the support of the son *M.*

McMillan v. McMillan, 594.

STATUTES.

27 Victoria, chaps. 13 & 15.
See "Declaratory Act."
32 Victoria, ch. 36, sec. 155.
See "Tax Sales," 2, 4.
Con. Stat. U. C. ch. 12.
See "Settled Estates Acts."

SUBMISSION TO ARBITRATION.

See "Trusts," &c., 2.

SUBROGATION OF CLAIM.

See "Widow."

SUBSEQUENT CONVEYANCE.

See "Conveyance by Infant."

SUBSEQUENT DEALINGS, DEFENCE FOUNDED ON.

See "Equity of Redemption."

SUBSEQUENTLY ACQUIRED CHATTELS.

ASSIGNMENT OF.

See "Insolvency," 1.

SURROGATE ACT.

See "Executors," 6.

SURVIVORSHIP.

See "Will," 5.

TACKING.

A treasurer gave to the municipality a mortgage to secure the moneys of the municipality coming to his hands. On taking an account in a suit to redeem, it was *held* that the municipality were not at liberty to tack a simple contract debt due to them by the plaintiff before the execution of the mortgage.

Ferguson v. Frontenac, 188.

TAXES DUE, PROOF OF.

See "Tax Sales," 4.

TAX SALES.

1. In advertising lands for sale for taxes they were described as "Race lands, Paris Hydraulic Company," no further specification of the locality or quantity to be sold being given:
Held, that the description was insufficient and the sale void.

Greenstreet v. Paris, 229.

2. The Statute 32 Victoria. chapter 26, section 155, limiting the time for bringing suits for setting aside a sale for taxes, applies only where an actual, though irregular, sale of lands has been effected. *Ib.*

3. *Semble*, that the mayor of a town or city cannot purchase at a tax sale of lands in his municipality. *Ib.*

4. Where in order to sustain a party's case it is necessary to prove title under a sheriff's deed for taxes, he must shew that an actual sale did take place, and that at the time of the sale under which he claims, there were some taxes due, notwithstanding the time limited by the 165th section of 32 Vic. ch. 36, for questioning the deed has elapsed.

Proudfoot v. Austin, 566.

TESTAMENTARY GUARDIANS.

A wife obtained from the Court an order giving to her the custody of her infant daughter until she had attained the age of 12 years.

Held, that this did not prevent the father of the infant appointing testamentary guardians of the infant.

Davis v. McCaffrey, 554.

TIMBER, SALE OF.

See "Sale of Timber," 1, 2.

TIME FOR PAYMENT OF OVERDUE INSTALMENTS.

See "Redemption Suit."

TITLE, SHEWING.

See "Specific Performance," 5.
"Vendor and Purchaser."

TRUSTEES FOR CREDITORS.

See "Composition Deed."

TRUSTS, TRUSTEE AND CESTUI QUE TRUST.

1. There is nothing anomalous in the position of, nor is there any incompatibility in, the creator of a trust being a trustee thereof, and seeing to the execution of the trust.

In Re Helliwell's Trusts, 346.

2. Trustees of real estate created a lease thereof, and verbally agreed to make certain improvements on the property, without which agreement the lessee would not have accepted the lease, but the improvements never were made. During the currency of the term two of the trustees (who were also executors under the will) resigned, and others were appointed in their stead. Subsequently the lessee advanced a claim for damages by reason of the non-fulfilment of the covenant as to improvements, when an arrangement was made, between the trustees and the tenant, for a surrender to them of the remainder of the term, which was done, and a reference was agreed upon for determining the value of such surrender, the claim

for damages by the lessee, and all other matters in difference by arbitration :

Held, that by such submission the trustees became personally bound to pay the sum awarded against them, and that by their submission to arbitration without saving the question of assets they were precluded from afterwards asserting that they had not assets.

Held, also [affirming the order pronounced *ante*, page 166,], that the stipulation as to improvements, upon which the lease was accepted, could be proved by parol. Under such circumstances the question would still remain open whether the trustees could, on passing their accounts, claim the sum so awarded against the estate which they represented.

In re Mason and Scott, 629.

See also "Appointing new Trustees."
"Assignment."
"Directors of Incorporated Company."
"Executors," 3, 4, 5,
"Void Lease."
"Will," &c., 6.

VENDOR AND PURCHASER.

By an agreement between a vendor and purchaser, it was agreed by and between the parties, that so soon as a title to the lands and premises, satisfactory to the solicitors of the vendee could be afforded him, the vendee should purchase the said land at the price of $4,000 cash.

Held, that in the absence of *mala fides*, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for a specific performance of the agreement.

Boulton v. Bethune, 110.

VESTED INTEREST.

See "Will," 2, 3.

VOID LEASE.

1. Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enters and holds thereunder he will be liable for all rents reserved thereby during the time he so holds: and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied, but, before the expiration of the term demised, the

buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment, the Court *held* them liable for the rent during the residue of the term which had since expired.

Finlayson v. Elliott, 325.

2. In such a case the property had been conveyed by the owner to the bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings and the bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The Court, under the circumstances, made a decree for payment of the amount in favor of the party beneficially entitled. *Ib.*

VOLUNTEERS.

See "Rectifying Deed."

WANT OF EQUITY.

See "Demurrer," 5.

WANT OF JURISDICTION.

See "Demurrer," 5.

WIDOW.

[REAL ESTATE CHARGED WITH SUPPORT OF.]

A testator left certain real estate which he authorized his executor, with the assent of his widow, to sell and apply the proceeds in her maintenance, and the balance to be distributed. *H.*, an adopted son of the testator, supported the widow for several years, but no sale of the lands was effected during her life. In a suit to administer the estate of the testator it was *held* that *H.* was entitled as a first charge on the real estate (there being no personalty) to be paid the amount expended in the maintenance of the widow; or, in other words, that he was entitled to be subrogated to the rights of the widow, and thereby would have had the power of calling upon the executor to exercise the authority given him to sell the real estate for payment of his claim.

Re Howey. McCallum v. Pugsley, 485.

WILFUL DEFAULT.

See "Mortgage," &c., 3.

WILL, CONSTRUCTION OF.

1. A testator directed his executors, as soon as provision was made for the payment of the annuities given by his will, and upon payment of his debts, funeral and testamentary expenses to divide, with all convenient speed, the residue of his estate among the persons mentioned in the will; and the executors after having invested a sufficient sum to meet the annuities, and having paid the debts, funeral and testamentary expenses, divided a portion of the residue of the estate amongst the persons entitled to receive the same; but before the balance of the residue was divided one of the persons entitled to share therein died:

Held, that the share of the deceased vested at the time when under the will the distribution should have been made, and that the executors could not postpone the period of distribution, but that it was a question of fact whether the executors could with all convenient speed after making the payments and provisions directed by the will, have divided the residue of the estate before the death had occurred; and the Court directed a reference to ascertain this fact before it would determine to whom the balance of the share of the deceased person should go.

Jarvis v. Crawford, 1.

2. A testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays, for the maintenance and support of herself and six infant children, and gave certain parts of his estate to his children, to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of 21. One of the sons sold the portion devised to him, and the widow joined in the deed to the purchasers, which declared that the widow had put her son in possession of the lands. The only executor beside the widow, who proved the will, was absent from the Province, and gave no consent to the sale. Less than two months after the sale the purchaser sold the estate at an advanced price to one *T.*, having in the interval created a mortgage thereon, and shortly afterwards the son died; and thereupon a bill was filed by the executor and the infant children against the purchasers and their vendee, *T.*, and also the widow, seeking to

set aside the conveyance on the ground that the same was obtained by the purchasers fraudulently, when the son and his mother were both in a state of intoxication, produced and brought about by the purchasers; and that their vendee, *T.*, was affected with notice, as the want of consent of the executor should have put him on inquiry. The evidence, however, negatived the fact of intoxication on the part of the son, but showed great mental incapacity on the part of the widow, and the Court, although unable to set aside the transaction, refused the purchasers their costs on account of their conduct in the matter.

Held, also, that under the will of the testator the property was subject, as a first charge thereon, to make good any deficiency there might be in the amounts derived from other properties, to afford a proper sum for the maintenance of the infants; and a reference was directed to the Master to ascertain the proper sum to be allowed, also what had been received on account thereof; and as T had resisted the right of the plaintiffs to this account, although he shewed himself to be a purchaser for value without notice, the Court refused him costs also.

Collingwood v. Collingwood, 102.

3. A testator devised all his lands to trustees, and after providing for certain events, directed that, "immediately thereafter, or as soon thereafter as my trustees can conveniently, they, my said trustees, or the survivors or survivor of them, shall, with all care and to the best of their knowledge and ability, divide all the rest, residue, and remainder of my real and personal estate into three equal portions; and do, and shall, by proper deed, declaration, or other instrument in writing, under their hands and seals, convey and assure," to each of his three sons one of such portions, to be held "by my said sons severally, as fully as I myself could and would have done had I been then living and in like estate." A subsequent clause of the will was as follows: "And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without issue and without having acquired a vested interest in my said estate, that the share or shares of him or them so dying, shall go and belong to the survivors or survivor of my said sons hereinbefore named. * * And I do hereby further direct and declare, that my will is, that if any of my said sons shall die without having acquired a vested interest in my estate aforesaid, and leaving issue, such issue shall be entitled, if only one child, to the whole; and, if more than one child, then equally—of the share or portion of his father or their father so deceased, under this my will, as fully and effectually in all respects as if his, her, or their father had lived and received the same:"

Held, (1) that the dying without issue here mentioned, must be construed as dying without children; (2) that the "vesting" referred to meant a vesting in interest and not a vesting in possession; and, (3) that the children of a son who died, after the testator, took under their father, and not directly under the will of the testator,

Stinson v. Stinson, 116.

4. A testator devised all his real and personal estate to trustees, with full power "of leasing, incumbering, and selling the same," as in their opinion might be advisable, and at a certain period to convey the same to his children or child then surviving. By a codicil he directed all his personal property to be equally divided between his three daughters and his widow.

Held, that the widow was, under the terms of the will, bound to elect between the provision for her by the will and her dower.

Patrick v. Shaver, 123.

5. *R.* by her will bequeathed an annuity of $500 to her brother *J. A. W.*, and at his decease she gave and devised all the real estate to which she might be entitled to her two nephews as tenants in common. The residue of her personal estate she gave and bequeathed to her executors in trust to pay out of the same the said annuity to *J. A. W.*, and to equally divide yearly between her brother *G. W.*, and her sister *S. R. D.* or the survivor of them the surplus of interest and rents remaining after payment of the said annuity of $500 to *J. A. W.*, "and at his decease equally to divide share and share alike all moneys and securities for money in their hands between my brother *G. W.* and my sister *S. R. D.* or the survivor of them," after payment of all proper expenses of carrying out the will. *S. R. D.* died in August, 1870, and *G. W.*, died in September, 1873, by his will disposing of all his interest in the estate of his sister *R. W.*: *J. A. W.* was still living when a bill was filed by the executors of *G. W.* for a construction of the will of *R. W.*:

Held, that *G. W.* took the whole of the surplus income of *R. W.'s* estate beyond *J. A. W.'s* annuity.

Allan v. Thomson, 279.

6. A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real

estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:

Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, (29 Vic. ch. 28, sec. 12,) the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed.

Lundy v. Martin, 452.

7. A testatrix devised a property to three granddaughters, as tenants in common in equal shares, and then devised to one another property in severalty, adding, "provided always * * that the said last-mentioned property so solely devised to my said granddaughter *Alicia* shall be valued by my executors hereinafter named, or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three granddaughters, in proportion to the value which my said executors or the survivor of them shall put upon said first-mentioned land; and in case I shall sell any or all of said first-mentioned lands, or that after my decease my said three grandchildren shall sell the same, then and in that case the value aforesaid of the said residence and premises, hereinbefore devised to my said granddaughter *Alicia*, shall be deducted from her one-third portion of the proceeds of the sales of the said first-mentioned land:"

Held, (reversing the decision of PROUDFOOT, V. C.) that the above clause did not constitute a hotchpot clause; that the rents of the land devised in severalty were not to be accounted for by *Alicia*, but that she was only entitled to the same proportion of the rents of the land held in common as she was entitled to of the land itself after deducting the value of the land specifically devised to her.—PROUDFOOT, V. C., diss.

Phillips v. Yarwood, 622.

doubt that there are expressions in that case which go to shew that the Judges of the Court of Exchequer did not think *Holroyd* v. *Marshall* went so far as sometimes it has been considered to have done.

1874.

Re Thirkell. Perrin. v. Wood.

Pollock, C. B., says, "The law has long been settled that a person cannot, by deed, however solemn, assign that which is not in him; in other words, that there cannot be a prophetic conveyance." *Martin*, B., says, "Now, although I am disposed to think that the words 'hereafter to be' are a mere nullity, I will assume that the parties, by using these words, intended to assign what, at law, is not assignable, viz., property which the bankrupt might afterwards acquire. That, however, according to the principle laid down in *Holroyd* v. *Marshall*, would give the defendant no equitable estate in such property; but he would have a mere executory right under the contract, in respect of which no bill would lie for specific performance. * * * There, as I read the judgments of the Lord Chancellor and Lord *Chelmsford*, the property in dispute, which was new machinery, by being brought into the mill and affixed to the old machinery, was sufficiently ear-marked to have entitled the mortgagee to file a bill for specific performance." *Bramwell* and *Channell*, BB., agree in this view.

Judgment.

In *Holroyd* v. *Marshall*, it was argued in the Court below, and held by Lord *Campbell*, that as the creditor under the mortgage had not perfected his title, "*interveniente novo actu*," the judgment creditor was to be preferred; that, until possession taken, there was only a *jus ad rem*, and the property remained in the judgment debtor; that before the doing of some subsequent act, the mortgage gives an equitable interest as between assignor and assignee, but a legal interest subsequently acquired, *bonâ fide*, before possession taken by the equitable assignee, must prevail; that a bill of sale in the

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form there used, as far as non-existing goods are concerned, is only executory.

The question at law, in the cases that I have seen, has been, in whom is the possession? The Court asks, was there property actual or potential? and holds that, even if the deed contains a power to seize, it must be exercised in order to render it effectual; that without some intervening act, the possession remained in the assignor, and therefore the goods were liable to seizure under an execution issued against the mortgagor. To a certain extent, although I admit in a very modified manner, in *Holroyd* v. *Marshall*, there was *novus actus interveniens*, for the new machinery was annexed to the old.

As, however, the jurisdiction in insolvency is both legal and equitable, it is not of so much moment to consider what the position of the parties may be at law, as whether such a claim is presented as would be entertained in this Court.

Judgment.

The general language used by Lord *Westbury* and Lord *Chelmsford*, in *Holroyd* v. *Marshall*, shews that without a "*novus actus*," after acquired property is considerer as charged in favour of the mortgagee. The former says: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract; and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, arsumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property

words in this clause seem to me to remove any ambiguity that might otherwise have arisen; for this stock is described as "now in his possession;" surely the possession here referred to is that spoken of in the first paragraph,—the possession on his premises—the possession along with the other articles referred to—such a possession as could be usefully enjoyed in his business. 1874. Re Thirkell. Perrin v. Wood.

I do not think any reasonable man, reading this description would come to any but the one conclusion, and that is, that while the first clause covered the articles on the premises on the 1st of February, 1873, the second clause covered those purchased afterwards and on the premises on the 23rd of March, 1874. To the extent that these goods are found on these premises, they are covered by this mortgage. I think that this, also, is the effect of the third paragraph.

It is to be observed, that the covenants in the mortgage refer to the whole of these goods and chattels, putting them all, so far as locality and dealing with them is concerned, on the same footing, and shewing that no distinction exists as to the rights and remedies in respect of any of the three classes. Judgment.

I think that this instrument contains, so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what goods not covered by the instrument in question; and this, I take it, should be the test of the sufficiency or insufficiency of the description in question.

In *Ross* v. *Conger* (*a*), the description was "all the

(*a*) 14 U. C. R. 525.

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stock and dry goods, hardware, crockery, groceries, and other goods, wares, and merchandize, in the store and premises occupied by the mortgagor at, &c." This was held to satisfy the statute. In that case there might have been a serious difficulty in identifying the goods intended to be covered by the mortgage,—for if the sheriff seized six months after the giving of the security, fresh goods might meantime have been purchased, and those liable to seizure could only be ascertained by a careful investigation of the old goods and invoices, and the later ones. In the present case, this serious difficulty is very much lessened, as it is intended by the instrument in question to cover the past, present, and future goods.

Judgment.

In *Powell* v. *The Bank of Upper Canada* (*a*), it was thought reasonable to look at the description of the assignor, in order to define the locality of the apartments in which was a part of the furniture otherwise undefined. In *Mathers* v. *Lynch* (*b*), the description ran, "And also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last, that is to say: sixteen pieces of tweed;" and there it was held that these goods might be taken as described to be in the store.

McMartin v. *McDougall* (*c*) shews, that notwithstanding the existence of the mortgage of the 9th of February, 1874, the mortgage in question could, even at law, be enforced.

But it is further argued that, so far as the after acquired goods are concerned, the mortgagee can have no claim on them; and the case of *Belding* v. *Read* (*d*) is quoted as an authority for this position. There is no

(*a*) 11 C. P. 303.
(*b*) 28 U. C.
(*c*) 10 U. C. 399.
(*d*) 3 H. & C. 955.

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