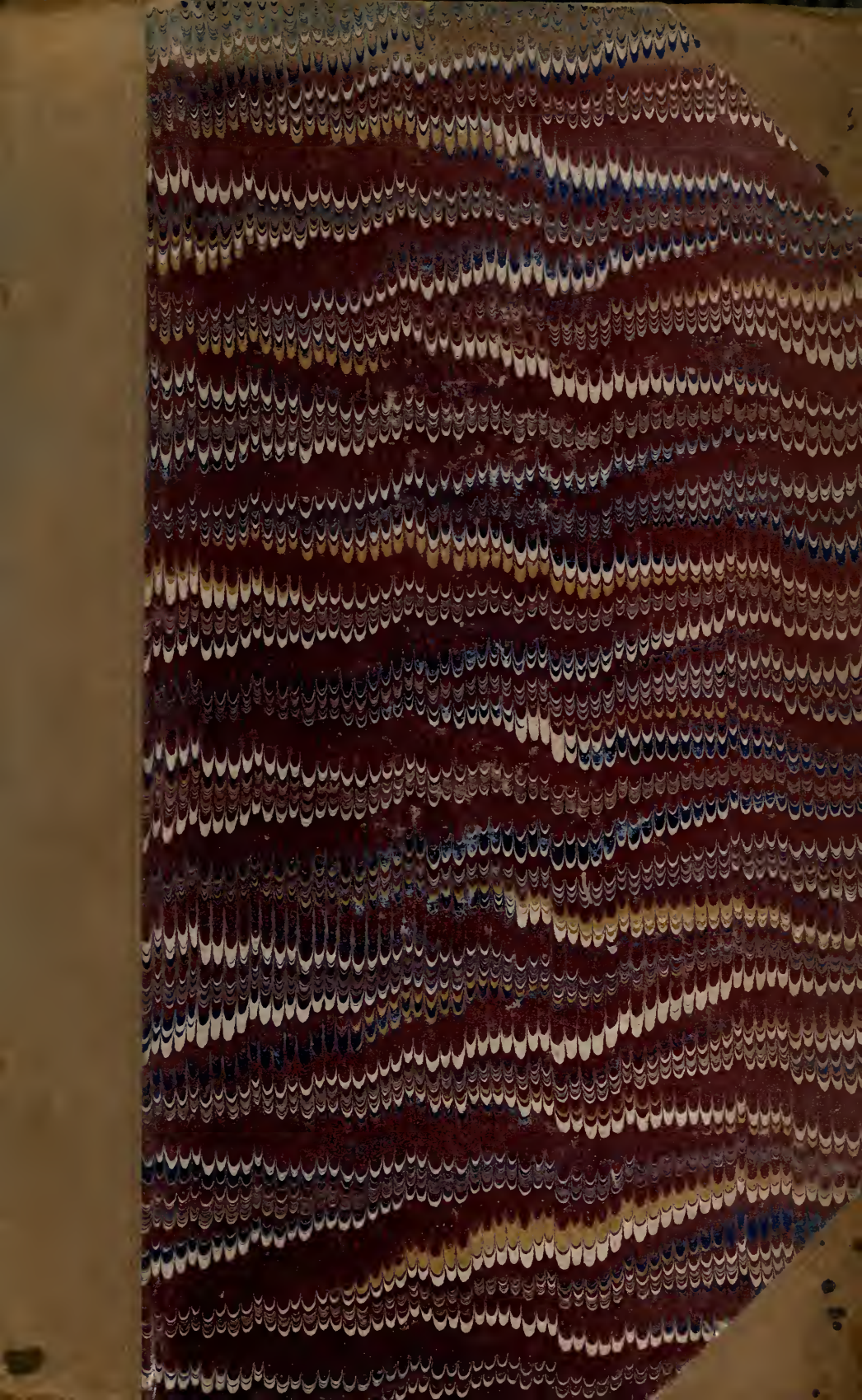

# LEADING CASES

IN

# MODERN EQUITY.

BY

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WITH NOTES AND AMERICAN CASES,

BY

FRANKLIN S. DICKSON.



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# PREFACE.

The object which I have had in view in writing this book is to illustrate, by means of leading cases, the doctrines of "modern equity." That great judge, Sir George Jessel, in his celebrated judgment in *In re Hallett's Estate*, *Knatchbull* v. *Hallett* (13 Ch. Div. 696, 710), which has been selected as the first of the leading cases in the present volume, pointed out that the moment the fiduciary relation was established between the parties, that moment the "modern doctrines of equity" applied. "I intentionally," the judgment proceeds, "say modern rules, because it must not be forgotten that the rules of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. Take such things as these—the separate use of a married woman, the restraint on alienation. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence, and therefore in cases of this kind the older precedents in Equity are of very little value. The doctrines are progressive, refined, altered and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases."

To this it may be added, that the great changes which have been introduced by recent statutes and orders into the principles and practice of Equity have still further diminished the value of the "older precedents," and in many cases have rendered them practically obsolete. Thus, to cite only two illustrations from among several which might be mentioned. Even since 1879, when the late Master of the Rolls delivered his judgment *re Hallet's Estate*, the old principles of the law as to restraint on anticipation (see p. 230) have been greatly modified by the Conveyancing Act, 1881. Within the last few years the whole practice as to administration (see p. 320 *et. seq.*) has been revolutionized by the orders under the Judicature Act.

Reasons such as these would seem amply sufficient to justify the appearance of a new volume dealing professedly with "modern

Equity." Thus far as to the substance of the work. A word now as to its form. The form of leading cases has been selected as best calculated to interest the reader, and impress the modern doctrines on the minds alike of students and practitioners.

The cases dealing with the same classes of subjects have been to some extent grouped together. Thus the first five cases illustrate the doctrine of trusts: two are concerned with charities; three deal with the law relating to partnership; the great case of *Speight* v. *Gaunt* is followed by four others on the position of trustees; *Dymond* v. *Croft* and the six succeeding cases have been selected to explain and illustrate the present state of the law with regard to mortgages. The very recent remarkable decision of the Court of Appeal in *In re Corsellis* is followed by two others in which the relations subsisting between solicitors and their clients have been made the subject of judicial consideration. Among isolated cases of special importance may be mentioned *Reid* v. *Reid* and *In re Jones*, under which the Married Women's Property Act and the Settled Land Acts will be found considered, with summaries of the principal decisions, and *Leslie* v. *French*, under which the leading points of the law of Life Insurance are noticed. The last thirteen cases are devoted to Practice, ending with Injunction, and a brief review of the principal cases which have been decided in recent years on that important subject.

In the Table of Cases prefixed, reference has been made not only to the authorised Law Reports, but also to the Weekly Reporter, Law Times, and Law Journal, the reports being referred to when the decisions are of the Court of Appeal as Ch. Div., Q. B. Div., and when of a Court of First Instance as Ch. D., Q. B. D.

I desire to express my warmest acknowledgments to Mr. James Pickup and Mr. John Marsh Dixon, of 6 Stone Buildings, Lincoln's Inn, for their most valuable assistance throughout the whole of this book, and also to Mr. William Tucker and Mr. J. W. Blagg for friendly aid rendered in respect of portions of it, and to submit my work to the favourable consideration of the profession to which I have the honour to belong.

THOMAS BRETT.

LINCOLN'S INN,
*July*, 1887.

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45 & 46 Vict. c. 38 (*Settled Land Act*, 1882) 37, 44, 149, 150, 151, 152, 153, 154, 155, 156, 234
————, c. 39 (*Conveyancing Act*, 1882) . . . 137, 229, 240, 241
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————, c. 50 (*Municipal Corporation Act*) . . . . . 11
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————, c. 61 (*Bills of Exchange Act*, 1882) . . . . . 124
45 & 46 Vict. c. 75 (*Married Women's Property Act*, 1882) 11, 142, 143, 144, 145, 146, 147, 148, 224, 232, 233, 250
46 & 47 Vict. c. 52 (*Bankruptcy Act*, 1883) . . . . . 11, 18, 158, 221
————, c. 57 (*Patents, Designs and Trade Marks Act*, 1883) . . . . . 329
47 & 48 Vict. c. 18 (*Settled Land Act*, 1884) . . . . . 151, 152, 153
49 & 50 Vict. c. 27 (*Guardianship of Infants Act*, 1886) . . . 277, 278, 279, 280

# LEADING CASES IN MODERN EQUITY. [★1]

## *Following Trust Fund.*

*In re* **HALLETT, KNATCHBULL** *v.* **HALLETT.**

(13 CH. DIV. 693.)

Principle. *Property held by a person in a fiduciary relation may be followed as long as it can be traced.*[1]

*When a person holding money in a fiduciary character mixes it with his own,*[2] *and draws out of the mixed fund, the Court presumes that he is first drawing out of his own money.*

Summary of facts. A solicitor had bonds of the value between £2100 and £2200 belonging to a client in his possion. He improperly sold them and paid the pro-

[1] This is constantly done by our courts for the protection of the the *cestui que trust* (*a*).

This rule applies to purchases by an agent appointed to buy (*b*), an executor (*c*), the committee of a lunatic (*d*), a guardian (*e*), a trustee (*f*), also trustees of a corporation (*g*), a partner (*h*), a mortgagor (*k*), or a husband buying with funds of the wife's separate estate (*m*).

The rule applies to assignments, to deposits in bank and all cases where the property of the beneficiary can be traced in spite of any transmutation of form or change of possession. Milligan's App., 1 Norris, 389, and Story's Eq., Sec. 1258 & Sec. 1359.

[2] In this case a resulting trust arises for the benefit of the *cestui*

(*a*) Perry on Trusts, S. 127.
(*b*) Eshleman *v.* Lewis, 13 Wright (Pa.), 419.
(*c*) Claussen *v.* La Franz, 1 Clarke, 226.
(*d*) Reid *v.* Fitch, 11 Barb. S. C. 399.
(*e*) Oliver *v.* Piatt, 3 Howard, 401.
(*f*) Harrisburg Bank *v.* Tyler, 3 W. & S. 373.
(*g*) Methodist Church *v.* Wood, 5 Hamm. 283.
(*h*) Pugh *v.* Currie, 5 Ala. 446.
(*k*) McLarren *v.* Brewer, 51 Maine, 402.
(*m*) Resor *v.* Resor, 9 Ind. 347, and Baron *v.* Baron, 24 Vt. 375.

ceeds to his general balance at his bankers, and drew cheques for his own purposes. He afterwards paid other moneys of his own into the account, and at his death there was over £3000 standing to his credit. It was held by the Court of Appeal that the client had a right "to follow the money," and was entitled to a charge on the £3000.

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Modern doctrine of equity.

[★2]

In this extremely important case, the report of which extends to considerably over fifty pages, Jessel, M.R., stated in a most elaborate manner, and with great distinctness, "the modern doctrine of equity," ★ with regard to property disposed of by persons in a fiduciary position, which was, as he said, a very clear and well-established doctrine, despite the previous decision in *Ex parte Dale & Co.* (11 Ch. D. 772). In that case a banking company, who had been employed by Dale & Co. as agents to collect money due on "average orders," and remit it to their employers, received the money and placed it with the other cash in the bank, and then informed their employers that it had been remitted. Before the money was actually remitted, the bank went into liquidation. The liquidator was willing to pay the amount of a specific cheque for £170, which remained in the bank at the time of the liquidation, and the question was as to a sum of money which had been mixed up with the general cash of the bank. Fry, J., came reluctantly to the conclusion that he was bound by a long series of decisions, commencing with *Whitecomb* v. *Jacob* (1 Salk. 160), to which we shall presently refer more at length, and by several *dicta* scattered through subsequent decisions on similar subjects, to decide against the claim of Dale & Co. All these cases were carefully reviewed by Jessel, M.R., who as the result of the consideration, declared in his judgment that the principle laid down in the decision in *Ex parte Dale & Co.* could not now be considered as law. The general rule with regard to following trust property has been frequently understood as if limited to the case of trustees in the ordinary acceptation of the term, in the proposition that the *cestui que trust* can follow the trust property "so long as the metamorphoses can be traced"

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*que trust* who will take the entire fund unless the trustee establishes how much money of the mixed fund was his and how much belonged to the *cestui que*. The rule on the subject of confusion of goods regulates this. Hill on Trustees, 148, School *v.* Kirwin, 25 Ill. 73; Thompson's App., 10 Harris (Pa.), 16.

(see the authorities on this subject collected in Lewin on Trusts, 8th ed. 892. See *Ex parte Cooke, In re Strachan* (4 Ch. Div. 123), following *Taylor* v. *Plumer* (3 M. & S. 562). The law, however, as it may be considered to be settled by the judgment in *In re Hallett* requires a much more elaborate statement and falls within the following propositions :— Law as settled by *In re Hallett.*

1. Where property has been rightfully disposed of by a person in a fiduciary relation, the *cestui que trust* (using that term in the broad sense, corresponding to the enlargement of the term trustee, which we shall presently notice), may take the proceeds of the sale if he can identify them.[3]

2. If the sale was wrongful, the *cestui que trust* can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if he can identify them.

There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds.[4]

Next had to be considered the case where the proceeds of the sale cannot be identified in the form of money. This may happen in two ways : (*a.*) The trustee may have bought land, or purchased chattels exclusively with trust money, or (*b.*) the proceeds of the sale may have been invested by the trustee, or person in a fiduciary relation, along with moneys of his own. Two further cases thus arise :—

3. Where the purchase is made exclusively out of trust money. In this case the beneficial owner is entitled to elect either to take the ★ property purchased, [ ★ 3 ] or to hold it as security for the amount of the trust money laid out in the purchase, or as it is generally expressed, he is entitled at his election, either to take the property or to have a charge on it for the amount of the trust money.

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[3] And a purchaser from a trustee for sale must see that the purchase money is properly applied ; this arises under the general doctrine of *notice.*

[4] If a trust property is sold, it must be for the benefit of the *cestui que trust* and unless it inures to his advantage it is a fraud upon the trust and any person who takes the property where there has been a fraud upon the *cestui que trust* having received notice of the trust cannot hold it as being discharged from the right of the *cestui que trust.*

If, however, the trust is of a general or uncertain nature, the purchaser need not see to the application of the purchase money. Clyde *v.* Simpson, 4 Ohio, N. S. 445; Elliott *v.* Merryman, 1 Lead. Cas. Eq. 59 and notes.

4. Where the trust money has been mixed with the trustee's own money.[5] In this case the beneficial owner is entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase, and that charge is quite independent of the amount laid out by the trustee.[6]

The Master of the Rolls then pointed out, that there was no distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or any body else in a fiduciary position.[7] "The moment you establish the fiduciary relation, the modern rules of equity as regards following trust money apply."[8]

5. The fifth case is where the person in a fiduciary relation is practically a pure bailee, where the money instead of being invested in the purchase of land or goods, is simply mixed with other moneys of the trustee (including under that term every person in a fiduciary relation). "Does it," asked Jessel, M.R., "make any difference according to the modern doctrine of Equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was one thousand sovereigns and the trustee put them into a bag and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag, could anybody suppose that a judge in Equity would find any difficulty in saying that the *cestui que trust* has a right to take a thousand sovereigns out of that bag? I do not like to call it a charge of 1000 sovereigns on the 1001 sovereigns, but this is the effect of it." The same principle, he went on to say, would apply if the trustee, instead of putting the money into a bag, carried it to his bankers, lent it without security, lent it on a promissory note or on a bond. In these cases the *cestui que trust* would have a charge for the amount of the trust money, on the balance in the bank, on the promissory note, or on the bond. "There is no difficulty then in following out the rules of Equity, and in deciding that in the case of a mere bailee you can follow the money."[9]

[5] Russell *v.* Jackson, 10 Hare, 209; Kip *v.* Bank of New York, 10 Johns. 65; Commonwealth *v.* McAlister, 4 Casey, 480; McLarren *v.* Brewer, 51 Maine, 402.

[6] In America the general rule is that there is a resulting trust in favor of the *cestui que trust.* Wallace *v.* McCullough, 1 Rich. Eq. 426; Day *v.* Roth, 18 N. Y. 456; Wallace *v.* Duffield, 2 S. & R. 530; Bispham's Eq. 4th Ed. § 86; Hill on Trustees, 4th Am. Ed. 148 note.

[7] See cases cited under note number one.

[8] See preface to this work by the author.

[9] The same rules that exist between the trustee and the *cestui que trust* apply to all persons who occupy a fiduciary or quasi-fi-

The subsequent portion of the judgment of Jessel, M.R., is occupied with a review of the authorities beginning with the old dictum in *Whitecomb* v. *Jacob*, decided in the reign of Queen Anne (1 Salk. 160), to which we previously referred, and ending with *Pennell* v. *Deffell* (4 D. M. & G. 772), and *Frith* v. *Cartland* (2 H. & M. 417). In *Whitecomb* v. *Jacob*, the judge, speaking of the rights of one who employs a factor and entrusts him with the disposal of merchandise, lays down two propositions, first, that there is an equity to follow the proceeds attaching to the case of a factor, as well as to that of a trustee, and second, employing a phrase which has passed into considerable currency, "but if the factor have money, it shall be looked upon as the factor's estate; for, in regard that 'money has no ear-mark,' Equity cannot follow, that in behalf of him that employed ★ the factor." With regard to this [★ 4] statement of the law, Jessel, M.R., in the leading case said that the first proposition was true, but that the second, at any rate at the present day, could not be supported, and that the authorities established that, "there is no distinction and never was a distinction between a person occupying one fiduciary position or another fiduciary position, as to the right of the beneficial owner to follow the trust fund." Review of authorities.

Thesiger, L.J., in delivering judgment in the leading case, after alluding to the fact that though there were certain *dicta* of an opposite character to be found here and there in the books, a reference to the case of *Ex parte Cooke* (4 Ch. Div. 123) would shew that the principles which had been applied for some time in equity had been made perfectly plain, even to the mind of a common law judge, summed up the law on this subject in the form of a "very simple," though at the same time "very wide and general proposition"; that wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody, or for the purpose of being disposed of for the benefit of the person

duciary relation to each other such as executors or administrators, agents (*a*), bailees, religious advisers, husband and wife (*b*), directors of a corporation. But a sale of stock by a stockholder to a director is not within the rule as applicable to dealings between persons in confidential relations. Carpenter *v.* Danforth, 52 Barb. 581; Spering's Appeal, 21 P. F. Sm. 11; Watt's Appeal, 28 Id. 392.

(*a*) When the relation of principal and agent has terminated and a general settlement is made actual fraud must be proved in order to disturb it. Courtright *v.* Barnes, 2 McCrary, 532.

(*b*) Darlington's App. 5 Norris, 512.

intrusting the chattel; then either the chattel itself or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel may have been mixed and confounded in a mass of the like material.

Contest between *cestuis que trust.*

A further point decided in *In re Hallett* (13 Ch. Div. 696) by the Court of first instance, was that where moneys belonging to two *cestuis que trust* have been paid by a trustee into his own account at his bankers, and there is a contest as to priority between the *cestuis que trust*, the rule in *Clayton's case* (1 Mer. 572) applies, and accordingly the sum first paid in is held to have been first drawn out.

*Thorndike v. Hunt.*

In the well-known case of *Thorndike* v. *Hunt* (3 De G. & J. 563), Hunt was trustee of two different trusts. He applied funds of the first trust to his own use, and then, procuring a power of attorney from his co-trustee in the second trust, he replaced the deficiency in the first trust fund by a transfer into that fund of a part of the funds of the second trust. A suit was brought in respect of breaches of trust in the first trust, and the trustees of that trust transferred the sum thus replaced into Court. It was held that the transfer into Court was a transfer for valuable consideration without notice, and that consequently the *cestuis que trust* under the second trust could not follow the trust fund. "There was," said Knight Bruce, L.J., "a debt due from the trustees; they were called upon to pay it, and if it had not been paid, they would have been liable to execution. If the fund had not been transferred into Court, the property might have been obtained from them by other means." [10]

The principle of *Thorndike* v. *Hunt* (*ubi supra*) was lately followed by the Court of Appeal in *Taylor* v. *Blakelock* (32 Ch. D. 560), which was described in the judgment of the Court of first instance as a "case of considerable nicety, and one of those painful cases in [★5] which ★ as between two innocent persons, a loss having been sustained, the Court had to decide upon whom

[10] Between equal equities the law will prevail, for if two persons have each an equally good equitable right and but one of them has the legal title to the subject in controversy, Equity will not interfere, and a court of law will give it to the holder of the legal title. A purchaser for value without notice of any prior equitable right or title, obtains the legal estate at the time of his purchase and he will be entitled to priority both in equity and at law. See note to Basset *v.* Nosworthy, 2 Lead. Cas. Eq. 5.

that loss should fall." One Carter was a co-trustee with Taylor of a will, and also co-trustee with Blakelock of a settlement. He misappropriated a considerable sum of the settlement fund, and then applied an equal portion of Metropolitan Stock belonging to the will fund in the purchase of Caledonian Stock in the joint names of himself and Blakelock. Carter died insolvent, and Taylor then commenced an action against Blakelock to have the Caledonian Stock transferred to him. There was no dispute of fact. Both parties were quite innocent of Carter's fraud, and neither Blakelock nor his *cestuis que trust* had any notice that the stock was purchased with part of the will fund. The Court of Appeal decided that Taylor had no right to "follow the trust fund," [11] as Blakelock must be treated as a purchaser for value with the legal right. "The term purchaser for value," said Bowen, L.J., "is a well-known expression to the law. By the common law of this country the payment of an existing debt is a payment for valuable consideration.[12] That was always the common law before the reign of Queen Elizabeth as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilised country; and many of the commercial instruments which the law recognises have no other consideration whatever than a pre-existing debt." It was contended that the stock in question was a chose in action, and that consequently the rule that one who takes an assignment of a chose in action takes it subject to all existing equities applied.[13] On this subject, Cotton, L.J., observed, "that the rule only applied to choses in action not transferable at law; [14] that it was here un-

[11] The *cestui que trust* under the settlement has just as strong an equity to retain the fund as the beneficiaries under the will had to follow it and as the trustee under the settlement had the legal title this is enough to create a preference in his favor. See Snell's Eq. 18, 19.

[12] As to what constitutes a valuable consideration see Russell *v.* Buch, 11 Vt. 166; Bailey *v.* Adams, 10 N. H. 162; Sidwell *v.* Evans, 1 P. & W. 383; Hare on Contracts, 206; Wimer *v.* Worth, 104; Pa. 317; 100 U. S. 246; R. R. Co. *v.* Nat. Bank, 102 U. S. 29, 37 Ills. 333.

[13] As to whether an assignee of a *chose in action* takes it subject to the equities existing between all the original parties or only subject to the equities of the party bound by its obligation, i.e., the debtor, and not to those of prior assignments, there are differences of opinions. See Bush *v.* Lathrop, 22 N. Y. 535; Row *v.* Dawson, 3 Lead. Cas. Eq. 372; *contra* Taylor *v.* Gitt, 10 Barr. 428; Murry *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441.

[14] At common law there could be no valid sale unless the thing

necessary to decide the question, and he declined to decide it, whether the stock was a chose in action within the meaning of the rule, because here Blakelock was the only person who had the legal title."

Trust for a fraudulent purpose.

The fact however that a fund is impressed with a trust and clearly "ear-marked" will be of no avail if the trust in question is for a fraudulent purpose.[15] *In re Great Berlin Steamboat Company* (26 Ch. Div. 616). In that case Boden placed money to the credit of the company at their bankers, for the purpose of enabling them to have a fictitious balance of a creditable amount, in case inquiries were made. It was agreed that the money was not to be used by the company for general purposes, but that they were to be trustees for Boden. Part of the money was drawn out with Boden's consent, and when the company went into liquidation there was still a balance. Cotton, L.J., in delivering judgment, said:—"I think it the just result of the evidence that the balance now in dispute is ear-marked as part of the money which the appellant advanced. Then the appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance [★6] at their bankers if ★ inquiries are made—a purpose which is admitted to be fraudulent." Boden's claim for payment to him of the balance in question was accordingly disallowed.

In *Collins* v. *Stimson* (11 Q. B. D. 142) Wilson paid into the bank a sum of money which he had obtained by a sale of his goods in fraud of his creditors, and shortly afterwards became a bankrupt. He then entered into a contract in an assumed name for the purchase of land, and paid a deposit to the defendant, the auctioneer, by a cheque on the bank. Neither the vendor nor the defendant had any notice of the fraud. The judgment *In re Hallett* (*ubi supra*) was regarded as conclusive on the law, and it was held that the money was sufficiently "ear-marked," but that the bankrupt's trustee was not entitled to recover, as the money had been received *bonâ fide* by the defendant.[16] See also

to be sold was in *rerum natura*, and under the immediate control of the vendor. Coke Litt. 214 a; Cassedy *v.* Jackson, 45 Miss. 402.

[15] Equity will not uphold a trust for the purposes of violating the law. Bispham's Eq. 4th Ed. Sec. 56; Baker *v.* Williamson, 4 Barr. 456; Perry on Trusts, Sec. 21.

[16] A *bonâ fide* purchaser, without notice, for a valuable consideration, will be protected even though he claim under a grantor

*New Zealand and Australian Land Co.* v. *Watson* (7 Q. B. Div. 374, 383).

Money advanced for specific purpose.

In *Gilbert* v. *Gonard* (33 W. R. 302; 54 L. J. Ch. 439) the plaintiff had lent the defendant a sum of money for the express purpose of its being specially and exclusively applied towards making up the purchase-money for a manufactory,[17] and the defendant paid the money into his bank, and applied it for his own purposes, and on his subsequently becoming bankrupt, it was held that the plaintiff, who had traced so much of the moneys as remained in the bank was entitled to recover from the trustee in bankruptcy. The ground on which this decision was based was that there was a duty cast upon and undertaken by the person receiving the loan to apply it in a particular way. "I do not," said North, J., "know any case, and no case has been referred to precisely like this, a duty undertaken by a person receiving the loan to apply it in a particular way; and in deciding as I do, on what seems to me a new combination of facts, I consider I am not in the slightest degree extending the law—in fact, I have no power to do so, and I disdain doing it. I am merely applying well known principles of law to the combination of facts with which I have to deal."

Trustee drawing out money.

In considering the second great question involved in the leading case, viz. whether Hallett's drawings were to be considered as coming first out of his own moneys or first out of the trust funds, the Court laid down the broad principle expressed in the maxim *allegans suam turpitudinem non est audiendus*, which was, they said, thoroughly established in the law of all civilized countries, that when a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. This they illustrated by the cases, that a man who has a right of entry cannot say that he is a trespasser—one who sells as agent cannot deny agency—a lessor professing to grant a lease under a power cannot say that he has no such power. The judgment then proceeded as follows:—"When we come to apply that principle to the case

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who has obtained the property by fraud, which would as between the original parties, render its acquisition invalid and a transaction tainted with fraud is not absolutely void but only voidable. See Lindsley *v.* Ferguson, 49 N. Y. 625; Negley *v.* Lindsay, 17 P. F. Sm. 228.

[17] Contracts to build. Stuyvesant *v.* The Mayor, 11 Paige, 414, to compromise a suit, to receive certain goods in payment of a debt (Very *v.* Levy, 13 How. 346) may be decreed to be specifically performed.

of a trustee who has blended trust moneys with his own it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he [★7] ★ had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money and that he misappropriated it, and left his own £100 in the bag. It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money. His money was there and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers."[18]

Debtors Acts.

The fourth section of the *Debtors Act*, 1869, 32 & 33 Vict. cap. 62, which abolishes arrest or imprisonment for making default in payment of a sum of money, contains six exceptions, *i.e.* cases where the power of the Court still continues, among which there are (3) Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession, or under his control, while by sect. 1 of the *Debtors Act*, 1878, 41 & 42 Vict. cap. 54, a discretion is conferred upon the Court in cases of this description.[19] See *Middleton* v. *Chi-*

[18] A trustee is not liable for the failure of a bank where the trust funds have been deposited if he has allowed them to remain there only a reasonable time, Swinfen *v.* Id. (No. 5) 29 Beav. 211.

The trustee should make the deposit in the name of the trust estate and not to his own credit, and if he mixes the funds with his own he will be liable. McAllister *v.* Comm., 4 Casey, 486; Kip *v.* The Bank of New York, 10 Johns. 65; De Jarnette *v.* Id., 41 Ala. 709; School, &c., *v.* Kirwin, 25 Ill. 73; Bispham's Eq. 4th Ed. Sec. 139; Luken's Appeal, 7 W. & S. 48; Royer's Appeal, 1 Jones (Pa.), 36.

[19] Where proper cause is shown the Court will remove a trustee. Hill on Trustees, 4th Am. Ed. 298. He is bound to render proper accounts when summoned to do so, he is also entitled to come into Court for advice and assistance. Dill *v.* Wisner, 88 N.Y. 160.

*chester* (L. R. 6 Ch. 156); *Evans* v. *Bear* (L. R. 10 Ch. 76); *Marris* v. *Ingram* (13 Ch. D. 338); *Esdaile* v. *Visser* (13 Ch. Div. 421); *Holroyde* v. *Garnett* (20 Ch. D. 532).

In *Crowther* v. *Ellgood* (34 Ch. Div. 691) it was held that the case of an auctioneer who had made default in payment of the sum of money produced by the sale of goods entrusted to him for sale, and which he had been ordered to pay, fell within the exception as to persons in a fiduciary relation under sect. 4 of the *Debtors Act*, 1869, and that he was liable to attachment.

Banker and customer.

In *Martin* v. *Rocke, Eyton & Co.* (34 W. R. 253) an auctioneer had paid into his general account with the defendants' bank a large sum of money arising from the sale by auction of the plaintiff's cattle. It was the auctioneer's practice after sales, to pay the vendors of cattle with his own cheques after deducting his commissions and the amount due from them if they were also purchasers. The bankers, who had notice of the source from which the money was derived and of the purposes to which it was intended to apply it, appropriated the sum so paid in to discharge an overdraft on the auctioneer's account. It was held that as the relation between banker and customer is that of debtor and creditor only, the principle of *In re Hallett* (*ubi supra*) did not apply, and that the plaintiff could not recover from the bank. [20]

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## ★ *Declaration of Trust.* [★8]

### RICHARDS *v.* DELBRIDGE.

(L. R. 18 Eq. 11.)

Principle.

*In order to render a voluntary gift or settlement valid, there must be what amounts to either (1) a complete transfer of the property beneficially or in trust, or (2) a valid declaration of trust.*[1]

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Summary of facts.

John Delbridge was possessed of a mill held under a lease, and also of certain plant, machinery, and

[20] For a sketch of the doctrine of equitable assets see Benson *v.* Le Roy, 4 Johns. Ch. 651.

[1] There have been numerous cases upon the subject of volun-

stock in trade belonging to it, and shortly before his death he indorsed on the lease and signed the following memorandum :—

"7th March, 1873.

"This deed and all thereto belonging I give to Edward Benetto Richards from this time forth, with all the stock in trade."

"John Delbridge."

Richards was an infant at the time of the execution of the memorandum, and Delbridge delivered the lease to the infant's mother on his behalf.

Held, that there was no valid declaration of trust of the property in favour of E. B. Richards.

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Creation of voluntary trust.

The law with regard to the creation of voluntary trusts, on which there had been previously some conflict of authority (p. 13), was summed up by Jessel, M.R., in the leading case, p. 14. "A man may transfer his property without valuable consideration in one of two ways, he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it, beneficially or on trust, as the case may be, or the legal owner of the property may by one or other of the modes recognised as amounting to a [★9] valid declaration of trust constitute ★ himself a trustee, and without an actual transfer of the legal title, may so

tary trusts. When a person is possessed of the legal title of the subject matter he may create a valid trust in any one of the following ways, by declaration, saying that he holds the property in trust, by a declaration saying that he holds the legal title in trust for another person, or by transferring the legal title to a third person for the benefit of the *cestui que trust*. Lloyd *v.* Brooks, 34 Md. 33.

The proper steps must be taken in order to make a valid transfer of the legal title to the intended trustee; a mere mention will not be sufficient. Swan *v.* Frick, 34 Md. 143. See the case of Donalson *v.* Id., 1 Kay, 711, it being an authority upon the subject of the creation of voluntary trusts by a declaration that the settlor makes himself a trustee. In cases of this kind no assignment of the legal title is necessary. While no particular form of words is necessary to create a trust yet the words must indicate with sufficient certainty a purpose to create the trust. Fisher *v.* Fields, 10 Johns. 495; Porter *v.* Bank of Rutland, 19 Vt. 410; Norman *v.* Burnett, 25 Miss. 183; Carpenter *v.* Cushman, 105 Mass. 419. And if any other person than the settlor is constituted a trustee there must be a proper transfer of the subject matter. See Dickerson's Appeal, 19 W. N. of C. 121.

deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person.[2] It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning, for however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." [3]

In the oft-quoted case of *Milroy* v. *Lord* (4 D. F. & J. 264), Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, proceeded as follows in words which, according to Jessel, M. R., in the leading case, contain the whole law upon the subject. "The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes.[4] If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." [5]

Husband and wife.

In *Baddeley* v. *Baddeley* (9 Ch. D. 113), a husband, after reciting in a deed poll that he was beneficially entitled to the ground-rents thereby intended to be settled, assigned them to his wife as though she were a single woman, and it was held that this amounted to a declaration of trust, and the Court ordered it to be carried into effect.[6] This case, however, was doubted in *In re Breton, Breton* v. *Woollven* (17 Ch. D. 416). In

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[2] Sheet's Estate, 2 P. F. Sm. 266; Lewin on Trusts, 108 note (*z*). Neither will the use of the words "trust" and "trustee" necessarily create a trust. See Richardson *v.* Inglesby, 13 Rich. Eq. 59; Freedley's Appeal, 10 P. F. Sm. 344; Seldon's Appeal, 31 Conn. 548. But the absence of these words from the trust instrument is however to be taken notice of. Gorden *v.* Green, 10 Ga. 534; Porter *v.* Bank of Rutland, 19 Vt. 410.

[3] Any words which show that the donee was intended to take beneficially will answer the purpose. Day *v.* Roth, 18 N. Y. 453; Pierce *v.* McKeehan, 3 W. & S. 283.

[4] Formalities are of minor importance since if the transaction cannot be effectual as a trust executed, it may be enforced in equity as a contract. Lewin on Trusts, 154 (Text Book Series); Baldwin *v.* Humphries, 44 N. Y. 609, and Taylor *v.* Pownall, 10 Leigh, 183.

[5] Bond *v.* Bunting, 28 P. F. Sm. 210. See opinion of Judge Hare.

[6] Vance *v.* Nogle, 20 P. F. Sm. 79; Freeman *v.* Id., 9 Mo. 772; Baron *v.* Id., 24 Vt. 375; Trenton Banking Co. *v.* Woodruff, 1 Green, 117.

that case a husband wrote and signed three papers and handed them to his wife, by which he purported to give her certain furniture, plate and other articles. He afterwards made his will, and after certain dispositions of his property which had nothing to do with the articles in question, he gave the residue of his estate to his wife for life, with remainder to other persons. V.-C. Hall reviewed the previous authorities, and decided that the furniture, &c., did not belong to the wife absolutely, but formed part of the husband's estate. He was very sorry so to decide, because it was a monstrous state of the law that prevented effect being given to such a gift. The law was laid down in *Milroy* v. *Lord* (*supra*) that it must be plainly shewn that it was the purpose of the settlement or the intention of the settlor to constitute himself a trustee.[7] "In the present case," said Hall, V.-C., "it is clear that it was not so intended. It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, 'I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want to be involved in a trust of that kind or in any trust.'" This case was distinguished in *In re Whittaker*, *Whittaker* v. *Whittaker* (21 Ch. D. 657), where a gift by a husband to his wife of a piano if she would learn to play upon it, was held
[★ 10] to be good, the piano being ★ regarded as not an article of furniture, but like a gift of a brooch or ring for personal use, and as the wife had complied with the condition she was held to be entitled to the benefit of the gift.

When once a trust is executed in favor of volunteers it cannot be broken[8] (*Paul* v. *Paul*, 20 Ch. Div. 743), but so long as the matter rests in intention, and the transfer is incomplete, there is a *locus pœnitentiæ*:[9] *In re Sykes* (2 J. & H. 415).

With regard to assignments on trust, two classes of

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[7] If a settlor designs to effect a valid settlement in a certain mode, but the settlement fails to take effect by reason of an incomplete disposition, it cannot take effect in another mode, not intended by the settlor. Bispham's Eq. 4th Ed. Sec. 67.

[8] Andrews *v.* Hobson, 23 Ala. 219; Greenfield's Estate, 2 Harris (Pa.), 489.

[9] When a party comes into equity to raise an interest by way of trust there must be a valuable or meritorous consideration; and a mere voluntary covenant to convey will not be enforced. See Appeal of Waynesburg College, 1 Amerman (Pa.), 130, following Trough's Est., 25 P. F. Sm. 115.

cases of some difficulty arise (1) where the property is of a legal interest incapable of legal transfer;[10] (2) where the property is an equitable interest.[11] The first class of cases is now of less importance, as by sect. 25, sub-sect. 6, of the *Judicature Act:*—Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. See *In re King* (14 Ch. D. 179), the authority of which is doubted by Lewin (p. 71). Assignments on trust.

The law as to the latter class of cases may be considered as settled by *Sloane* v. *Cadogan* (Appendix to Sug. Vend. and Purch.), *Kekewich* v. *Manning* (1 De G. M. & J. 176), and *Donaldson* v. *Donaldson* (1 Kay, 711). "Suppose," said Knight Bruce, L.J., in *Kekewich* v. *Manning*, "stock or money to be legally vested in A. as a trustee for B., for life, and subject to B.'s interest, for C. absolutely: surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?" The principles to be collected from this class of cases with regard to voluntary transfers are that the settlor must do all he can, but that as soon as that is done a binding trust is created; and see on this subject Lewin, 8th ed. pp. 67 *et seq.*

It was held in *Hall* v. *Hall* (L. R. 8 Ch. 430) that the mere absence of a power of revocation, even if the attention of the settlor was not called to that absence, does not make a voluntary settlement invalid but that Power of revocation.

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[10] Debts and legal *choses in action* are now transferrable at law and questions under this head rarely occur. Appeal of Elliott's Executor's, 50 Pa. State Reports, 75.

[11] Lewin on Trusts, 158 (Text Book Series).

these are merely circumstances to be taken into account.[12] See further on the subject *Henry* v. *Armstrong* (18 Ch. D. 668), where the principle was laid down as follows:—"The law is that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside especially if he comes a long time afterwards—he must prove some substantial reason why ★ the deed should be set aside."[13] See also *James* v. *Couchman* (29 Ch. D. 212).

[★11]

In the recent case of *Green* v. *Paterson* (32 Ch. Div. 95) the Court of Appeal proceeded "on the well-known rule that although a voluntary settlement, if perfected, will be enforced by the Court, yet if it is not perfcted, and there is anything to be done in order to give effect to it, the Court will not interfere, although it will do so in all cases where the settlement is one which the parties claiming execution of it can say is for valuable consideration as regards them."[14]

It should be borne in mind that almost any consideration will be sufficient to induce the Court not to treat a settlement as voluntary. See *Hewison* v. *Negus* (16 Beav. 594); *Townsend* v. *Toker* (L. R. 1 Ch. 446); *Bayspoole* v. *Collins* (L.R. 6 Ch. 228); *Teasdale* v. *Braithwaite* (5 Ch. Div. 630); *In re Foster and Lister* (6 Ch. D. 87). But see *Shurmur* v. *Sedgwick*, *Crossfield* v. *Shurmur* (24 Ch. D. 597), where it was held that the settlement was voluntary; and for an elaborate discussion of the subject of voluntary settlements see Davidson, 3rd ed. vol. iii. pt. i. p. 668.

Who may be trustees.

An important question may here be conveniently discussed, viz. who may be trustees:—[15]

Aliens.

Aliens may be trustees, as now by 33 & 34 Vict. c.

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[12] Where the intention appears to have been to make an irrevocable gift, equity will not interfere to disturb the gift.

[13] Where there is no power of revocation in the instrument creating the trust it is *primâ facie* evidence of mistake. Russell's Appeal, 25 P. F. Sm. 269; Miskey's Appeal, 107 Pa. St. Repts. 628; Garnesly *v.* Mundy, 24 N. J. Eq. 243; Cooke *v.* Lamotte, 15 Bead. 234.

[14] Lewell *v.* Roberts, 115 Mass. 272; Dennison *v.* Goehring, 7 Barr, 175.

[15] Infants, married women and bankrupts, may be trustees; a corporation may also be a trustee, the United States, and each of the States of the Union. Levy *v.* Levy, 33 N. Y. 97, and Shoemaker *v.* Commissioners, 36 Ind. 176. While any reasonable being may be a trustee it does not follow that they all can exercise or perform the duties of a trustee, the question then, is rather who can perform or execute a trust. Perry on Trusts, Sec. 39.

14, they can take, hold, acquire, and dispose of real and personal property in this country, but if domiciled abroad they are not subject to the jurisdiction of the Court.[16]

Bankrupts. Bankrupts may be appointed trustees,[17] but bankruptcy is a ground for removal of a trustee (*In re Barker's Trusts*, 1 Ch. D. 43; *In re Adams' Trust*, 12 Ch. D. 634), and when a receiving order is made against a trustee in bankruptcy he vacates his offices (46 & 47 Vict. c. 52 (*Bankruptcy Act*, 1883), sect. 85).

Corporations. Corporations under the old law could not be seised to a use, because, as Mr. Lewin quaintly puts it, "It was gravely observed it had no soul, and how then could any confidence be reposed in it?" But now by the *Municipal Corporation Act*, 1882 (45 & 46 Vict. c. 50), it is expressly provided by sects. 133 and 134 that bodies corporate of boroughs in certain cases may be treated for all intents and purposes as trustees.[18]

Bank of England. The Bank of England cannot be made a trustee.

National Debt Commissioners and Savings Banks. By 45 & 46 Vict. c. 51 (the *Government Annuities Act*, 1882), sect. 8, the National Debt Commissioners and Savings Banks are not to enter any notice of any trust "express, implied, or constructive," except trusts recognised by law in relation to deposits in savings banks, and trusts provided by any Act relating to the property of married women.

Married Women. A married woman may be a trustee,[19] (and see sect. 18 of the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), under which a married woman trustee can sue or be sued without her husband, and *Docwra* v. *Faith* (29 Ch. D. 693); but it is not expedient that she should be appointed. The Court formerly declined to appoint a *feme* ★ *sole* trustee, but in the case of *In re* [★ 12] *Campbell's Trusts* (31 Beav. 176) a *feme sole* who was in all other respects unexceptionable, was proposed as trustee, and the then Master of the Rolls, Sir John Romilly, after consulting the other judges made an

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[16] An alien can take and hold real estate till office found, though he cannot do so by act of law, *e. g.*, by descent. Orr *v.* Hodgson, 4 Wheaton, 453; Smith *v.* Zoner, 4 Ala. 99.

[17] Perry on Trusts, Sec. 49; Shyrock *v.* Waggoner, 28 Pa. St. 431.

[18] A corporation which has but an artificial existence may be a trustee for the purposes germane to the object of its corporate life. See Girard *v.* Phila., 7 Wallace, 1. The great difficulty to be encountered here, as in England, is enforcing a decree of a Court against the sovereign power. New *v.* Bonaker, L. R. 4 Eq. 655; Hill on Trustees. 50.

[19] Lewin, 113 (Text Book Series).

order appointing her one of the trustees.[20] In the case of *In re Berkley* (L. R. 9 Ch. 720) a married lady who was a relation of the *cestui que trust* was appointed a trustee, as no other suitable person could be found who was willing to undertake the office.

Infants.

An infant ought not to be appointed a trustee.[21]

*Cestui que trusts* and relatives.

*Cestui que trusts* and relatives ought not to be appointed, but as there is often great difficulty in obtaining proper trustees, the Court occasionally relaxes its rule in this respect.[22]

Conveyancing Act, 1881 & 1882.

Sections 31–38 of the *Conveyancing Act*, 1881, contain important provisions with regard to the appointment of new trustees, &c. Sect. 34 contains a novel provision enabling "a vesting declaration" to be made, by means of which (1) in case of an appointment of a new trustee by the appointor, and (2) in the case of a trustee retiring under sect. 32 by all the parties to the deed, the trust property shall be shifted from A. to B. without any conveyances by a simple declaration of intention (see Clerke & Brett on the *Conveyancing Act*, 1881, p. 134).

Sect. 5 of the *Conveyancing Act*, 1882, provides that "On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property.

Under this section new trustees were appointed to act in conjunction with a sole continuing trustee of a will in relation to a distinct part of the trust property: *In re Paine's Trust* (28 Ch. D. 725); and in *In re Hetherington's Trusts* (34 Ch. D. 211) separate sets of trustees were appointed for different parts of the property, though in a certain event the trusts might coalesce.

Statute of Frauds.

Before the *Statute of Frauds* (29 Car. II. c. 3), trusts of every species of property were averrable, *i. e.*, they might be created or traneferred by parol, but now the 7th section of the *Statute of Frauds* provides that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested

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[20] There is nothing, so far as relates to her legal judgment and capacity, to prevent her being appointed a trustee. People *v.* Webster, 10 Wend. 551. In suits relating to the trust property she must join her husband. Still *v.* Ruby, 35 Pa. St. 373.

[21] An infant labors under greater difficulties than a *feme covert* for a *feme* has the capacity, though she cannot in all cases exercise it freely; but an infant is said to want capacity. Lewin, 118 (Text Book Series).

[22] There is no legal objection to the appointment of either a *cestui que trust* or a relative.

and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." It was held in *Kronheim* v. *Johnson* (7 Ch. D. 60), following *Tierney* v. *Wood* (19 Beav. 330), that the person who is by law enabled to declare a trust is the beneficial owner only. The next section, the 8th, excepts all trusts arising or resulting by implication or construction of law, or transferred or extinguished by act or operation of law. And sect. 9 provides that all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same or by his last will.

The statute applies to freeholds, copyholds, and leaseholds, but not to personalty,[23] *McFadden* v. *Jenkyns* (1 Phillips, 153.)

★ It is to be noticed that the statute says "evidenced or proved by some writing," and accordingly the requirements of the statute are satisfied if the trust can be manifested and proved by any subsequent acknowledgment by the trustee as by an express declaration, a memorandum, a letter, an affidavit, or by a recital in a bond or deed, and the trust, however late the proof, operates retrospectively from the time of its creation.[24] Lewin on Trusts (8th ed. p. 56), and see *Middleton* v. *Pollock* (4 Ch. D. 49). [★ 13]

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## *Precatory Trusts.*

*In re* ADAMS AND THE KENSINGTON VESTRY.

(27 Ch. Div. 394.)

Principle. *The current of decisions with regard to precatory trusts is now changed. The Court will not allow a precatory trust to be raised where the testator shews an intention to leave property absolutely.*[1]

A testator gave "all his real and personal estate

[23] The statute applies to chattels real as well as to freehold estates, Skett *v.* Whitmore, Freem. 280, but does not extend to mere personal rights concerning land. Perry on Trusts, Sec. 86.

[24] For an account of the provisions of the statutes of the several States of the Union upon this subject, see notes to 1 Jarman on Wills, p. 113, 144, (4th American Ed).

[1] A testamentary gift accompanied by words of entreaty or re-

Summary of facts.

and effects wheresoever and whatsoever" "unto and to the absolute use of his wife, her heirs, executors, administrators and assigns, "in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will after her decease." The Court of Appeal decided, affirming the decision of Pearson, J., that the widow took an absolute interest in the property, "unfettered by any trust in favour of the children."[2]

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The decision of the Court of Appeal in this case may be considered as finally settling the conflict between the older and the modern authorities on the subject of "Precatory Trusts."

Effect of the old cases.

The effect of the old cases was that when property was given absolutely to any person accompanied by words of recommendation, entreaty, request, hope, or wish (like the *peto*, *rogo*, *volo*, *mando*, *fidei tuæ* [★14] ★*committo*, by which *fidei-commissa* were created by the Roman Law, Justinian, Instit. 2. 24. 3.), such words were held to create a precatory trust in favour of other persons, if the words used were upon the whole to be construed as imperative, and if the subject of the recommendation or wish, &c., and the object or person intended to be benefited were certain.

The rule on this subject is thus expressed in Jarman on Wills, vol. i. p. 396, 4th ed.:—"If there is a total absence of explicit direction as to the quantum to be given, or as to the objects to be selected by the donee of the property, then the Court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire or request, instead of the formal words usual for the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the

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commendation or expressing a wish or confidence, will be construed as creating an absolute trust, which the first taker of the gift will not be permitted to defeat. Loring *v.* Id., 100 Mass. 340; Erickson *v.* Willard, 1 N. H. 217; Mcree's Adm. *v.* Means, 34 Ala. 349. But in Connecticut and Pennsylvania, the rule above is regarded with disfavor. See Gilbert *v.* Chapin, 19 Conn. 351, and Pennock's Estate, 8 Harris (Pa.), 268–280; Paisley's Appeal, 20 P. F. Sm. 153. A frequent case of implied trust arises where a testator employs words precatory, or recommending or expressing a belief. Bohon *v.* Barret, 79 Ky. 378; Handley *v.* Rightson, 60 Md. 198.

[2] The same kind of a case has been decided the other way in Warner *v.* Bates, 98 Mass. 274.

part of the testator, for the guidance of the donee in the distribution of the property; the testator placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion."

The reason of the law on this point is well expressed in the judgment of the *Mussoorie Bank* v. *Raynor* (7 App. Cas. 321): "If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to shew that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words."

The old cases on the doctrine of precatory trusts will be found collected in Jarman, 4th ed. vol. i. pp. 385 *et seq.*, and see for the expressions which have been held to create and to fail to create precatory trusts, pp. 387 *et seq.*, and Theobald on Wills, 3rd ed. p. 355, and see Lewin on Trusts, 8th ed. pp. 130 *et seq.*

Leaning of the Court in modern cases.

In modern decisions however the leaning of the Court has been distinctly against the establishment of precatory trusts. In *Lambe* v. *Eames* (L. R. 6 Ch. 597,) where the gift was to the testator's widow to be "at her disposal in any way she might think best for the benefit of herself and family," the Court of Appeal held that the widow took absolutely. In this case (as stated in one of the judgments in the leading case, 27 Ch. Div. p. 411), the late Lord Justice James had the courage "to stem the tide." "The question," he said, "was whether those words create any trust affecting the property. In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been ★a very cruel kindness indeed. I am satis- [★15] fied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied

that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise." [3]

In *Stead* v. *Mellor* (5 Ch. D. 225) the testator gave the residue of his property in trust for such of his two nieces as should be living at his decease, his desire being that they should distribute such residue "as they thought would be most agreeable to his wishes." It was held, that the nieces took the residue for their own benefit. *Lambe* v. *Eames* (*ubi supra*) was also expressly followed in *In re Hutchinson and Tenant* (8 Ch. D. 540), where a testator gave all his real and personal estate to his wife absolutely, "with full power for her to dispose of the same as she might think fit for the benefit of his family, having full confidence that she would do so." It was held that the words were not intended to impose any obligation on the widow, but that they were merely an expression of the testator's wishes and belief as distinguished from an obligation, and accordingly that the property passed to her absolutely. In the case of the *Mussoorie Bank* v. *Raynor* (7 App. Cas. 321), a man gave his widow the whole of his real and personal property, feeling confident that she would act justly to their children, and divide the same whenever occasion required it of her. The Privy Council, in deciding in favour of the widow, expressed the opinion that "the current of decisions now prevalent for many years in the Court of Chancery shews that the doctrine of precatory trusts is not to be extended."

In *In re Moore*, *Moore* v. *Roche* (34 W. R. 343), the testator made a bequest in the following terms:—"I bequeath to my brother £4000 in trust for my sisters on condition that they will support Maria Moore, at the demise of either or any of the sisters, the survivor or survivors to receive the increased income procured thereby. They are hereby enjoined to take care of my nephew John Cahill as may seem best in the future." There was no residuary gift in the will. It was held that the sisters took absolutely as joint tenants, subject to the condition of supporting Maria Moore, but that there was no trust, precatory or other, in favour of John Cahill.[4]

[3] *Primâ facie* precatory words ought to be considered as imperative and to exclude any discretion on the part of the first taker, and the general rule is that the *intention* as gathered from the whole will, must govern. Spooner *v.* Lovejoy, 108 Mass 533; Biddle's Appeal, 30 P. F. Sm. 258.

[4] The construction of the words never turns upon their grammatical import.

With regard to the law on this subject as settled by the modern authorities, Cotton, L.J., in his judgment in the leading case, made the following important observations:—"I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shews that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true ★ construction of [★ 16] the will, a trust imposed on her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will." To this Lindley, L.J., after quoting from the judgment in *Mussoorie Bank* v. *Raynor* the passage cited above, added: "I am very glad to say that the current has changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." [5]

[5] When the testator "recommends" the trustees to do something, as to employ a receiver, the rule has been laid down that though a recommendation may in some cases amount to a *direction*, yet the term "recommend" is *flexible*, and if from the whole will it appears that the testator intended it as a mere *recommendation* and nothing more, the trustees can act otherwise, i. e., not employ the receiver, and will not act inconsistently with any *positive* provision of the will. See Second Church *v.* Desbrow, 52 Pa. St. 219, and Knott *v.* Cottee, 2 Phill. 192.

In a precatory trust whether the language of the testator is to be deemed imperative, or subject to the discretion of the donee, is considered by the best authorities to depend upon the general terms of the will, upon the certainty of the subject matter and upon the certainty of the object. Bispham's Eq. Sec. 73, Lines *v.* Darden, 5 Fla. 51, and notes to Harding *v.* Glyn, 2 Lead. Cas. Eq. 950, and notes (4th English ed).

## *Trusts for Creditors.*

### JOHNS *v.* JAMES.

(8 Ch. Div. 744.)

Principle.

*A trust deed by which property is conveyed for the benefit of creditors does not of itself create a trust for any of the creditors.*[1]

Summary of facts.

Meyrick, who owed Johns £3500, conveyed his property to James, and gave him a power of attorney to collect all his assets, and James was then to stand possessed of the moneys to be received and got in on trust to pay all debts due to Johns. Meyrick became bankrupt. James collected his assets, but did not pay Johns' debt. Johns then commenced an action against James claiming an account, and that the estate might be administered, and the debts of himself and other creditors satisfied.[2] The Court of Appeal decided on demurrer that the action was not maintainable.

*Garrard v. Lord Lauderdale.*

[★ 17]

In this case the Court confirmed and acted on the principle established by *Garrard* v. *Lord Lauderdale* (3 Sim. 1), affirmed on appeal (2 Russ. & My. 451). "It is too late now," said the Lords Justices in ★ delivering judgment (8 Ch. Div. pp. 748, 753), "to repeat the doubts which were expressed by Vice-Chancellor Knight Bruce as to the original propriety of the decision in *Garrard* v. *Lord Lauderdale*, which we are not disposed to share, though no doubt some observations were made in 1845 by Vice-Chancellor Knight

[1] If a trust deed is created for the payment of debts generally, and a bill is filed by *one* of the creditors to enforce the payment of his debt, it can be accomplished only by a general execution of the trust, and a decree will direct the payment of *all* the debts. Bryant *v.* Russell, 23 Pick. 523; Russell *v.* Tasker, 4 Barb. 233; Haughton *v.* Davis, 23 Me. 28; McDougald *v.* Dougherty, 11 Ga. 570.

[2] In Ohio and New York, under the Rev. Sts., a creditor first filing a bill for the purpose of enforcing his claim is entitled to priority. See Cornog *v.* White, 2 Paige, 567; Burrall *v.* Leslie, 6 Paige, 445; and Atkinson *v.* Jordan, Wright, 247.

Bruce, and in 1849 by Vice-Chancellor Wigram, indicating disapproval of that case. Thirty years have elapsed since the last of those *dicta* was pronounced; and *Wallwyn* v. *Coutts* (3 Mer. 707), *Garrard* v. *Lord Lauderdale*, and *Acton* v. *Woodgate* (2 My. & K. 492) have ever since been recognised and acted upon, and they were distinctly recognised and spoken of with approbation in the House of Lords by the Lord Chancellor and Lord Cranworth, in the year 1858, in the case of *Montifiore* v. *Browne* (7 H. L. C. 241)."

In the celebrated case of *Garrard* v. *Lord Lauderdale* (*ubi supra*) there was an assignment of certain personal property to trustees in trust to sell, and after satisfying certain claims and charges in a prescribed order, to divide the proceeds among the scheduled creditors.[3] These creditors were neither parties nor privies to the deed.[4] The contents of the deed were, however, communicated to them by a circular, though the plaintiff in the present action did not admit the receipt of it, and had not refrained from suing, but had actually proved his debt against the estate. It was held that the assignment was a private arrangement for the convenience of the debtor, and that there was no trust for the benefit of the creditors.[5]

In the leading case (8 Ch. Div. 749) James, L.J., said that the case of *Garrard* v. *Lord Lauderdale* proceeded upon the plainest notions of common sense. "It is quite obvious," he said, "that a man in pecuniary difficulties, having a great number of debts which he could not meet, might put his property in the hands of certain persons to realise and pay the creditors in the best way they could. It was held in *Garrard* v. *Lord Lauderdale* that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power of attorney for them to realize all his property and relieve him from the difficulties he was in. If it were sup-

[3] A trust may be created for the payment of a single or particular debt. Cooper *v.* Whitney, 3 Hill, 95. Or for a number of debts specified in a schedule. Watson *v.* Bagaley, 12 Pa. St. 164.

[4] Where a trust is created for the benefit of third persons without their knowledge they may, as soon as they have notice of the fact, affirm the trust, and a court of equity will enforce the performance of it. Weston *v.* Barker, 12 Johns. Rep. 281, and 4 Kent's Com. 307, where Chan. Kent reviews Garrard *v.* Lauderdale.

[5] The legal estate passes to, and vests in the trustees in an assignment for the benefit of creditors. Brook *v.* Marbury, 11 Wheaton, 97; Gray *v.* Hill, 10 S. & R. 436; Nicoll *v.* Mumford, 4 Johns. Ch. 529.

posed that such a deed as that created an absolute irrevocable trust in favour of every one of the persons who happened at the time to be a creditor, the result might at any time be very often monstrous. It would give him no opportunity of settling an action, no opportunity of getting any food for himself or his family the next day, or redeeming property pledged." It was further pointed out in the same judgment that the result of holding that such a deed created an absolute trust in favour of every creditor would be that the unfortunate trustee might be liable to a thousand actions, for he could not stop any of them till a judgment was made in favour of all the creditors.[6]

Principle of decisions.

The principle on which these decisions are based, is that the deed in question is considered as a mandate, just as when a man gives his servant money with directions to pay a debt, that does not of itself create any right in favour of the creditor. The right to the direction ★ of the money is the right of the person who has put the money in the hands of the agent.

[★ 18]

Circumstances which may create trust for creditors.

Circumstances may, however, as is pointed out in the judgment in the leading case, have occurred or may exist which makes the assignment a trust in favour of some person or persons. "If the creditor," said James, L.J., "has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, or a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person.[7] The person to whom he communicates it has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made." See *Clegg* v. *Rees* (L. R. 7 Ch. 71), where *Garrard* v. *Lord Lauderdale* is discussed and distinguished. And see further on the subject of trust deeds for creditors being rendered irrevocable, in Lewin on Trusts, 8th edition, pp. 515 *et seq.*, where the authorities are collected and an observation of Lord St. Leonards quoted from *Browne* v. *Cavendish* (1 Jon. & Lat. 606) that he should be sorry to have it understood that a man may create a trust for creditors,

[6] Reynolds *v.* Bank of Va., 6 Gratt, 174; Fisher *v.* Worth, 1 Busbee Eq. (N. Ca.) 63.

[7] The assent of an absent person to an assignment is to be presumed, unless his dissent be expressed. De Forrest *v.* Bacon, 2 Conn. 633; North *v.* Turner, 9 S. & R. 244.

communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power.

In *In re Meredith, Meredith* v. *Facey* (29 Ch. D. 745), it was held, following *Watson* v. *Knight* (19 Beav. 369), that incumbrancers who had claimed priority over a creditor's deed, and failed in their contention, ought not to be allowed afterwards to execute and take the benefit of the deed; and see *Henderson* v. *Rothschild* (35 W. R. 485).

Act of bankruptcy.

It must be remembered that by sect. 4 of the *Bankruptcy Act*, 1883, a debtor commits an act of bankruptcy (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; or (*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.[8] By sect. 6, 1 (*c*) a creditor is not entitled to present a petition of bankruptcy unless within three months after the act of bankruptcy on which the petition is grounded.

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## ★*Executory Trusts.* [★ 19]

### SACKVILLE-WEST *v.* VISCOUNT HOLMESDALE.

(L. R. 4 H. L. 543.)

Principle.

*In construing executory trusts the Court exercises a large authority in subordinating the language to the intent.*[1]

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Summary of facts.

The Countess Amherst by a codicil to her will gave her freehold estates at Knole, and certain leaseholds and copyholds and furniture, plate, fixtures

[8] If there is a *bonâ fide* assignment to trustees for the benefit of creditors their assent is not necessary, and if the arrangement is for their benefit their assent is presumed. Rankin *v.* Duryer, 21 Ala. 392; Weston *v.* Barker, 12 Johns. 281; Brooks *v.* Marbury, 11 Wheaton, 78; Stewart *v.* Hall, 3 B. Mon. 218. But if the assignment is made direct to the creditors, without the intervention of trustees, their assent is necessary. Tompkins *v.* Wheeler, 16 Peters, 106.

[1] When, therefore, the formal instrument, by which the minute is to be carried out, comes to be drawn, a court of equity will

and chattels at Knole, to trustees in trust to settle them in a course of settlement to correspond as nearly as might be practicable with the limitations of the barony of Buckhurst, in such manner and form as the trustees should think proper, or as their counsel should advise. The limitations of the letters patent of the barony of Buckhurst after the decease of the Countess de la Warr (who died before the appeal was heard in the House of Lords) were to Reginald Windsor Sackville-West, her second surviving son, and "the heirs male of his body," and in default of such issue the peerage was to go to the third, fourth, and fifth sons of the Countess de la Warr successively, and the heirs male of their bodies, with a shifting clause by which in certain events the barony was to go over. The House of Lords decided that the estates ought to be limited in a course of strict settlement to the second and other younger sons of the Countess de la Warr for their respective lives without impeachment of waste, with remainder to their sons successively in tail male in the order mentioned in the letters patent creating the barony, and that the copyholds, lease-
[★20] holds, and chattels ★ were to go in a similar manner so far as the rules of law and equity would allow, and that the settlement ought to contain powers of jointuring and of charging portions.

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In this case, as Lord Cairns said, in delivering judgment, p. 577, the law on the subject was so completely settled that no principle or rule was in controversy, the only question was "as to the proper construction of an imperfect and inartistic codicil." The codicil to Lady Amherst's will, said another of the Law Lords, creates an "executory trust." [2] The object of the testatrix was

see that a settlement is made which will in due form of legal conveyancing effectuate the intention of the creator of the trust. Yarnall's Appeal, 20 P. F. Sm. 340; Neves *v.* Scott, 9 How. 211; Wood *v.* Burnham, 6 Paige, 513. As to what is sufficient evidence of intention the authorities are not altogether uniform. See Glenorchy *v.* Bosville, 1 Lead. Cas. Eq. 20 and notes.

[2] For definition of an executory trust, see 1 Lewin, 21.

to annex as far as she could "alienable" hereditaments and other property to an "inalienable" Barony, to attach the property by an apt and formal method of law to the new Peerage, so as to make it a provision for the Peerage. The settlement, it is to be observed, was to be made to correspond, so far as might be practicable, with the limitations of the Barony. "To correspond," said Lord Cairns, "does not mean to be identical with, but to harmonize with, or to be suitable to, and the words 'so far as they may be practicable' are to be read as a recognition of the difference which must always exist in substance between the limitation of a dignity and the limitation of property of any and every tenure. Lord Westbury, after stating the general principle which is stated above, that "in construing words creating an executory trust, a Court exercises a large authority in subordinating the language to the intent," proceeded as follows:—"It is plain, from the whole of the codicil, that the general and leading intent of the testatrix was to make provision for the support and maintenance of the dignity; and it would be mere mockery of this intent and purpose if the estates were settled so that they would at once become the absolute property of Reginald to the disherison of all subsequent possessors of the dignity under the letters patent." The question therefore to be determined was whether, to use the words of Lord St. Leonards in *Egerton* v. *Earl Brownlow* (4 H. L. C. 210), "the testatrix has been her own conveyancer, whether she has left it to the Court to make out from general expressions what her intention is, or has so defined that intention that you have nothing to do but to take the limitations she has given you, and to convert them into legal estates."[3]

Trusts, according to the old distinction established, as Lord Hardwicke said in *Bagshaw* v. *Spencer* (2 Atkins, 582), by the case of *Lord Glenorchy* v. *Bosville* (Cas. *tempore* Talbot, 3), decided more than 150 years ago (1733), are either "executed" or "executory."

A trust is said to be executed where the limitations of the equitable interest are complete and final.[4] See Lewin on Trusts, 8th ed. pp. 111 *et seq.*, where the subject is carefully discussed and the history of the distinctions between executed and executory trusts, and

Executed trust.

[3] Tillinghast *v.* Coggeshall, 7 R. I. 383.

[4] In an executed trust the instrument must be interpreted according to the rules of law, which are very generally the same, both for equitable and for legal estates although by such interpretation the intention may be defeated. Bispham's Eq. Sec. 57.

between executory trusts arising in marriage articles and wills (at first somewhat doubtful, but now absolutely settled) is elaborately stated. ★ In the case of marriage articles the Court will presume from the nature of the instrument an intention to settle the property, while no such presumption is made in the case of a will.[5] Opposed to the executed trust is the "executory" trust arising either under marriage articles or wills, that is to say, "not a trust which remains to be executed, for in this sense all trusts are executory at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testator" (per Lord Cairns in the leading case, p. 571).[6] A trust is said to be executory or directory where the objects take not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested.[7] (Jarman on Wills, 4th ed. vol. ii. p. 344.) The origin of the rule, Lord Hatherley tells us in the leading case, p. 553, may be traced to the desire to obviate the consequence of the extremely technical doctrine of the rule in *Shelley's Case*.[8] This arose principally under marriage articles where an estate was limited to the husband for life with a subsequent remainder to his heirs, or the heirs of his body, which limitation, if literally introduced into the settlement, would under the rule in *Shelley's Case* confer an estate of inheritance on the husband, and so enable him to defeat the very object of the settlement. In marriage articles, said Lord Westbury (L. R. 4 H. L. p. 565), containing an agreement that his estate shall be settled on the intended husband for life, and then on the heirs of his body, a Court of Equity discerns an intention that the issue shall take as purchasers, and it refuses, therefore, to give to the words "heirs of the body" their proper effect and meaning at common law,

[★ 21]

Executory trust.

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[5] Sweetapple *v.* Bindon, 2 Vern. 536.

[6] A trust *executed*, says Lewin page 202 (Text Book Series), is where limitations of the equitable interest are complete and final; in the *executory* trust, the limitations of the equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period. Cushing *v.* Blake, 30 N. J. Eq. 689; Wood *v.* Burnham, 6 Paige, 518.

[7] Neves *v.* Scott, 9 Howard, 197; Green *v.* Rumph, 2 Hill's Eq. 101; Gause *v.* Hale, 2 Ired Eq. 241.

[8] Dennison *v.* Goehring, 7 Barr. 177; Noble *v.* Andrews, 37 Conn. 346.

but directs a settlement on the first and other sons in tail. In this case, the words "heirs of the body" are neither informal nor imperfect, but their legal effect is overruled by the intention. (See *Cogan* v. *Duffield*, 2 Ch. Div. 44.)

Even in the case of a will however, if the intention to settle the property is on the face of the will, the Court will give effect to it.[9] This is well illustrated by the two old cases of *Sweetapple* v. *Bindon* (2 Vern. 536) and *Papillon* v. *Voice* (2 P. Wms. 471), in the latter of which the Court held that a direct devise of land created an estate tail, but that a gift of money to trustees to be laid out in land and settled on nearly the same trusts was to be treated as executory and limited in strict settlement.

Words which create executory trusts.

The following (amongst other) forms of expression have been held sufficient to create executory trusts in wills, viz. Instructions to trustees to settle property in moieties between two sons, and to take "special care in such settlement that it should never be in the power of either son to dock the entail of the estate given to him during his life:" *Leonard* v. *Earl of Sussex* (2 Vern. 526). Directions that the heirs of the body or issue should take "in succession or priority of birth, or that the settlement should be made" as counsel should advise or "as executors should think fit"[10] (*White* v. *Carter* (2 Eden, 366), *Bastard* v. *Proby* ★ (2 Cox, 6)), [★ 22] "to convey, assign, and assure to the use of my son J. F. and the heirs of his body lawfully issuing, in such manner and form and subject to such limitations and restrictions as that if J. F. should happen to die without lawful issue, then that the property might descend after his death unencumbered." *Thompson* v. *Fisher* (L. R. 10 Eq. 207); and see the subject fully discussed in Jarman on Wills, 4th edit. vol. ii. pp. 346 *et seq.*[11]

A singular application of the doctrine of executory

[9] If a conveyance be drawn in such a way that B. will take but a life estate, and the parties intended to be described by the word "heirs" will take as purchasers in remainder. Saunders *v.* Edwards, 2 Jon. Eq. 134; Porter *v.* Doby, 2 Rich. Eq. 49; Perry on Trusts, Sec. 359.

[10] "Heirs of the body" and "issue" are far from synonymous expressions. Lewin, 212 (Text Book Series), and Yarnall's Appeal, 70 Pa. St. 340, and Kleppner *v.* Laverty, Id. 70.

[11] There is no difference between the rules applicable to marriage articles and those in regard to wills, further than this, viz. that in the former instruments *res ipsa loquitur*, the occasion itself testifies what the paramount object of the parties must have been. Bispham's Eq. 4th Ed. Sec. 57. The case under consideration contains a full discussion of the law on this point.

*Miles v. Harford.*

trusts arose in *Miles* v. *Harford* (12 Ch. D. 691). There a testator being desirous to found four families divided his freehold property into four estates. He began with the first son and the first estate, and went through them all on the same principle by devising an estate to each of his four eldest sons, with limitations in strict settlement to the son's issue, and then with remainder to another son and his issue. There was also what is called a "shifting clause" by which in certain events the limitations of the Cardiganshire estate in favour of one of the sons and his family were to cease He then bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, "regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond to the uses of the Cardiganshire freeholds," being the part which was left to his fourth son and his issue male, with remainder to his fifth son and his issue male in strict settlement.

Jessel, M.R., held that even if he were to assume the shifting clause to be bad for remoteness (and he held it was not on the ground that it was divisible), it ought to be modified by the Court so as to be free from any such objection, and to carry out the testator's intention. It was, he said, a case of a trust "executory" or "executive," where a conveyance had been directed to be executed by a testator, where, instead of expressing exactly what he meant, that is, filling up the terms of the trust, he told his trustees to do their best to carry out his intention. The settlor in fact had not put into words the precise nature of the limitations, but had said to his trustees in effect, "These are my intentions, do your best to carry them out," and then it was the business of the trustees to get the advice of competent lawyers and mould the trusts according to the testator's intentions.[12]

Construction of real estate wills.

It may be noticed in passing that in this case, Jessel, M.R., laid down the important principle that in "real estate wills" the Court had not the same liberty as regards construing a will according to its meaning, as in the case of what are commonly called "personal estate wills," the reason being that land in this country is held by title, and that the very complicated and curious law affecting real estates depends almost entirely on judicial decisions as to the construction of particular instruments.

[12] An executory trust is settled and carried into effect according to the intentions of the settlor. McElroy *v.* Id., 113 Mass. 509.

The subject of the leading case was very recently considered in *In re Johnson, Cockerell* v. *Earl of Essex* (26 Ch. D. 538). In that case the testatrix, by a codicil which raised a number of other legal points, made two separate gifts which well illustrate the cases in which executory trusts are held by the Courts to be or not to be created. Executory trust when and when not created.

★ 1. She bequeathed to the Right Hon. Algernon Capel, sixth Earl of Essex, and to his successors, all her plate, and also bequeathed her leasehold residence to the same person and his successors "to be enjoyed with and to go with the title." [★ 23]

2. She then bequeathed all her household furniture, paintings, books, china, and the whole contents of her house, to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the said Earl of Essex and his successors to be held and settled as heirlooms, and to go with the title.

It was held that the plate and leasehold house passed absolutely as the words "to be enjoyed and go with the title" were insufficient to create an executory trust; but that the second gift to the trustees of the contents of the house must be treated as an executory trust, and accordingly a settlement was directed, the terms of which were directed to be settled at Chambers. [13]

See as to form of settlement and generally as to the law on this subject, Davidson's Precedents, 3rd ed. vol. iii. pt. i. pp. 195, 329, 602, 662 *et seq.*

[13] Technical terms are not necessary but if they are used they are to be taken in their legal and technical sense. Lewin 200, (Text Book Series).

## *Charity.*

### *The Cy-près Doctrine.*

### *In re* CAMPDEN CHARITIES.

(18 Ch. Div. 310.)

Principle.

*The cy-près doctrine is applied to charitable gifts when from lapse of time and change of circumstances it is no longer beneficial to carry out the intention of the donor in the exact mode which he has directed.* [1]

*The Court will not interfere with a scheme settled by the Charity Commissioners unless the Commissioners have exceeded their jurisdiction or the scheme contains something wrong in principle or wrong in law.* [2]

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Summary of facts.

The charitable gifts which came under the consideration of the Court in this case consisted of (1) £200 left by the will of Viscount Campden in the

[1] In such a case the court will apply the gift as nearly as possible in conformity to the general intention of the testator. Bartlet *v.* King, 12 Mass. 543, and for a very clear statement of the law upon the subject, see opinion of Mr. Justice Gray in Jackson *v.* Phillips, 14 Allen, 539.

[2] In Jackson *v.* Phillips (*supra*) the doctrine is thus given: Where a gift is made to a trustee for charitable purposes the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. See further, Attorney-General *v.* Ironmonger's Co., C. R. and P. H. 208. The doctrine as above stated is approved in all the States where the doctrine that indefiniteness of the object is no objection to a trust, provided it is a charity. Paschal *v.* Acklin, 27 Texas, 173; Johnson *v.* Mayne, 4 Clarke (Iowa), 180; Dickson *v.* Montgomery, 1 Swan. (Tenn.) 348; Pickering *v.* Shotwell, 10 Barr. 27; Potter *v.* Thornton, 7 R. I. 252; Walker *v.* Id., 25 Ga. 420; Bascom *v.* Albertson, 34 N. Y. 584; Umrey's Exr's. *v.* Wood, 1 Ohio St. N. S. 160; Preacher's Society *v.* Rich, 45 Maine, 552.

year 1629 for ★ the benefit of the poor of Kensing- [★ 24]
ton, "as the trustees for the time being should think fit to establish for ever." (2) £200 left in 1643 by the will of Viscountess Campden to purchase lands of the clear annual value of £10, "one half of which should be applied from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of Kensington and the other half thereof should be applied yearly for ever to put forth one poor boy or more being of the said parish to be apprenticed. The said £5 due to the poor to be paid to them half yearly for ever at Ladyday and Michaelmas in the church or porch thereof." (3) Two acres of land conveyed to trustees in 1651 by an unknown donor supposed to have been Oliver Cromwell and known as "Cromwell's Gift," with regard to which there was no evidence what the founder's intention was, and it had been for years applied as part of the other charities. The parish of Kensington had increased enormously in proportions, and the total rents of the charity estates were about £3600, of which £2200 belonged to Lady Campden's Charity.

The trustees had for a considerable time been applying the charity funds in a manner which, though beneficial, was yet not in accordance with the directions in Lady Campden's will. The Charity Commissioners prepared a draft scheme for the administration of the Charities, by which they appropriated the income to a variety of objects, among which were the relief of poor deserving objects, subscriptions to hospitals within the parish, educational and other charitable purposes. Some of the parishioners objected to the scheme, but the Court of Appeal reversed the decision of Hall, V. C., and subject to certain alterations in minor points, confirmed the scheme and ordered it to be carried into effect.[3]

[3] Where the charitable purposes specified by the testator do not exhaust the whole of the income from the fund and it ap-

[★ 25] Principle.

★ The principle upon which the Court proceeds in applying the doctrine of *cy-près*, *i.e.* following as nearly as possible the intention of the donor, was thus laid down by Lord Eldon in the oft-quoted case of *Moggridge* v. *Thackwell* (7 Ves. 69): that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity, but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes though the formal intention as to the mode cannot be accomplished. See Jarman on Wills, 4th ed. vol. 1, p. 243; Tudor on Charitable Trusts, 2nd ed. p. 260.

The judge before whom the leading case was brought in the first instance, (18 Ch. Div. 318, 321,) considered that the scheme settled by the Charity Commissioners ought not to be sanctioned by the Court, and he accordingly remitted it for reconsideration and remodelling. The principal ground on which he based his decision was that the scheme of the Charity Commissioners did not conform to the sound construction of the founder's declared trusts; and this objection he held to be peculiarly fatal in the present case, where in his opinion the usage had been conformable to what the Court considered to be the correct construction of the trusts. The Court of Appeal in reversing this decision proceeded on the principle that the circumstances of the case had altered so much that anything like a rigid adherence to the words of the testatrix's will would altogether defeat "the principal object which she had in view as distinguished from the means by which she wished that object to be carried out." The increase in the value of the property had been enormous, but the change in the whole circumstances and condition "of the parish of Kensington" had been so infinitely greater that it required some exercise of the imagination to adequately realize it. "The then village of Kensington was a small village about a mile and a half from Hyde Park Corner, and in old documents it is called a village.

"Now it is what we know it, a suburb of London,

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pears from the will that the testator intended that all of the income should be applied to charitable purposes the trustee may so apply it. But if it appears to have been his intention that only a certain amount should be applied to the charity then as to the surplus a resulting trust will arise in favour of the heir or next of kin. Hill on Trustees, 129.

very thickly inhabited with many thousands of people, and containing a large number of houses of great magnitude and value inhabited by wealthy people. The whole of the circumstances of the place have changed. That which was a provision for the poor inhabitants of a village is now a provision for the numerous inhabitants of this large town or part of a town."

"Again," the judgment continues, "circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed, but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, the habits have become obsolete, and have fallen into disuse, which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-près* doctrine, if there is nothing to prevent its application."

★ The Court of Appeal then proceeded to consider [★ 26] the mode in which the testatrix had directed the fund to be applied. One moiety was to be applied in "doles," but that which might have been reasonable enough more than 200 years ago, when 50 shillings were to be given half-yearly among a few poor people in a small parish, would be intolerable on a large scale in a large town like Kensington. "Was it," asked Jessel, M.R., "the intention of the testatrix? Here again I should say emphatically, No. Could she have intended to distribute 500 sovereigns every half year among the poor of a large town like Kensington. There was no such idea in her mind. It seems to me, when you consider the change in the amount of money and the change in the surrounding circumstances, you cannot impute to the testatrix an intention to distribute this large sum in the way I have mentioned.

"The other moiety was to be used for the purpose of apprenticing one or more boys of the parish. Here it is to be remembered that under the 5th Eliz. it was part of the law of the land that no one could exercise a trade without being apprenticed. All that legislation has been repealed—so that the case falls within the principle laid down by Lord Westbury in *Clephane* v. *Lord Provost of Edinburgh* (L. R. 1 H. L. 417), where the means to the end required a change, the end (that of educating the poor of the parish so as to enable them to obtain a living) being kept in view."

"To confine," said James, L.J., "the application of that charity in the present state of things, in the present state of feeling, and the present state of the law to those persons only among the poor of Kensington whose children would be willing to become apprentices to tradesmen or otherwise, and to exclude from the charity all that other mass of poor people who have got the same claim, and who do not now find it beneficial for their children to be put out as apprentices, would be, in fact, to exclude from the charity the great majority of that class of poor who it is obvious to my mind Lady Campden contemplated as recipients of the benefit of the charity, and in doing that we should be in truth defeating the spirit of Lady Campden's gift by following strictly the letter, when that letter has become inapplicable."

Principles on which scheme set aside.

In discussing the principles on which the Court should act when asked to set aside or remodel a scheme settled by the Charity Commissioners, Jessel, M.R., said: "This is a scheme settled by a competent authority, the Charity Commissioners, persons not only of great, but of special experience in these matters, and persons intrusted with the supervision of these matters as a separate body by the Legislature for that very reason. It would not be, in my opinion, sufficient for a judge to say he thought some detail might well be different, or that if he himself had originally settled the scheme he should have put in some others than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong either by disobeying those rules of law which govern them, as well as they govern Courts of justice, [★ 27] or else that there has been some slip or gross ★ miscarriage which calls for the intervention of the Court to set aside and remodel the scheme."

No degrees in *cy-près*.

It was pointed out in the leading case (18 Ch. Div. 333) that there are no degrees in *cy-près*—no such thing as more or less *cy-près* in the question of jurisdiction in dealing with a fund under change of circumstances.

Gift to charity.

Where there is a gift to such charitable institutions as the testator shall by codicil appoint, and he makes no codicil, there is a clear gift to charity, and nothing less than clear words will take it away. *Mills* v. *Farmer* (1 Mer. 55); *Moggridge* v. *Thackwell* (*ubi supra*); *Pocock* v. *Attorney-General* (3 Ch. Div. 342).[4]

[4] A gift for "charity" or for "charitable purposes" without adding more is a good charitable bequest, also a gift to a charit-

Where lands, or the rent of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir-at-law.[5]

The reason of this rule was criticised by Lord Hardwicke and Lord Eldon, both of whom admitted that it was so firmly established as not now to be shaken. The rule however does not apply if a man gives an estate to trustees, and takes notice that the payments are less than the amount of the rents. In this case there would either be a resulting trust, or the surplus would belong to the person who takes the estate. (1 Jarman on Wills, 4th ed. 573, where the authorities, beginning with *Thetford School Case* (8 Co. R. 130) and ending with the leading case of *The Attorney-General* v. *The Wardens, &c., of the Wax Chandler's Co.* (L. R. 4 H. L. 1), are collected).[6]

In *Mayor of Lyons* v. *Advocate General of Bengal* (1 App. Cas. 91) the principle was stated to be that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse.[7]

In this case it was held that where there is a general charitable intention the *cy-près* doctrine will be applied upon the failure of a specific charitable bequest, whether the residue be given to a charity or not, unless a direction can be implied that the bequest, if it fails, shall fall into the residue; that no general rule can be laid down that the *cy-près* doctrine is always displaced where the residuary bequest is to charity, *ex. gr.* where the charitable object of the residuary clause is so limited

able association although no charitable use is designated. Evangelical Association's Appeal, 11 Casey, 316.

[5] Jackson *v.* Phillips (*supra*), City of Phila. *v.* Girard's Heirs, 9 Wright, 28.

[6] The surplus will also be appropriated to the charity. 2 Redfield on Wills, 796, Girard *v.* Phila., 7 Wal. 1.

[7] This doctrine seems to be free from objection; it is also true that the *cy-près* doctrine has in many cases throughout the United States been regarded with considerable disfavor. See Fontain *v.* Ravenal, 17 Howard, 369; White *v.* Fisk, 22 Conn. 31; Carter *v.* Balfour, 19 Ala. 814; Grimes *v.* Harmon, 35 Ind. 198; Venable *v.* Coffman, 2 W. Va. 310, while the tendancy was the other in Loering *v.* Marsh, 6 Wallace, 337; Academy *v.* Clemins, 50 Mo. 167; Gillman *v.* Hamilton, 16 Ill. 231.

in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cy-près* doctrine to be established at all, to withhold the application of it in instances of this kind.

In *In re Ovey, Broadbent* v. *Barrow* (29 Ch. D. 560), where a legacy had been left to an opthalmic hospital [ ★ 28 ] which had ceased to exist at ★ the time of the testator's death, it was held that the testator had no general intention of benefiting blind persons, but that his sole intention was to benefit a particular hospital if it were in existence and capable of receiving his bounty, and that accordingly the legacy lapsed.

In *In re White's Trusts* (33 Ch. D. 449) the legacy was to a company to build almshouses for the benefit of certain poor persons indicated, when a proper site could be obtained. No site had been obtained and there was no reasonable prospect of obtaining one, and there was no income obtainable to maintain the almshouses. It was held that the fund was a lapsed legacy and fell into the residue.[8]

In *Pease* v. *Pattinson* (32 Ch. D. 154) the Court declined to apply the *cy-près* doctrine to the Hartley Colliery Fund, which was raised by voluntary subscriptions and vested in trustees for the relief of the sufferers by the Hartley Colliery accident and their families. In *Spiller* v. *Maude* (32 Ch. D. 185, n.) Jessel, M. R., considered that no distinction could be drawn between the portion of the funds of the York Theatrical Fund Society arising from voluntary subscriptions and that arising from the contributions of members, and that the whole must be applied *cy-près*.

In *Biscoe* v. *Jackson* (35 W. R. 152) a testator directed £10,000 to be applied as to £4000 in the establishment of a Soup Kitchen and Cottage Hospital for the parish of Shoreditch "in such a manner as not to violate the Mortmain Acts," and as to £6000 and any unrequired residue for the salaries of a nurse and surgeon and for the necessities and benefit of the hospital. It was found impossible to apply any part of the money, as land in mortmain could not be obtained for the build-

[8] If upon the failure of a specific charitable bequest it appears that the testator's intention was that the fund was to pass into the residuary estate it will be upheld.

ings contemplated by the testator. The Court held there was a general charitable intention, that the trusts should be executed *cy-près*, and directed a scheme to be settled.

As to mixing two charity funds, see *Lord Provost of Edinburgh* v. *Lord Advocate* (L. R. 4 App. Cas. 823).

Payment of fund without scheme.

Ordinarily, says Mr. Tudor (Charitable Trusts, p. 257, n.), when the Court of Chancery is in possession of a fund given to a charity either with or without the interposition of individual trustees, it will not part with such fund until a scheme is settled for its administration. Where however a fund is given to a corporation or a treasurer or officer of a charitable institution in England for a charitable purpose (unless upon different trusts from those of the general funds of the institution), the Court of Chancery will order it to be paid to the corporation, &c., without the settlement of a scheme.

This subject was recently considered in *In re Lea*, *Lea* v. *Cooke* (34 Ch. D. 528), where a legacy had been bequeathed "for the spread of the gospel" to General Booth, who was the general superintendent, with absolute control of a religious unincorporated society. The Court held that it was clear that the testator intended to trust General Booth with the application of the legacy in furthering the objects of the society, that no distinction was to be made between capital and income, and that the legacy ought to be paid to him without a scheme.

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## ★ *Charity.* [★29]

*The Mortmain Act.*

### ATTREE *v.* HAWE.

(9 Ch. Div. 337.)

Principle.

*Railway debenture stock is not an interest in land within the meaning of the Mortmain Act,*[1] *and may be given by will for charitable purposes.*

Summary of facts.

A testator left debenture stock in several railway companies created under the *Companies Clauses Act*,

[1] The statutes of the Mortmain Act have not been adopted in the United States.

1863, to certain corporations for charitable purposes. The Court of Appeal decided that the legacies were valid.

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Conflict of authority settled.

The immediate question before the Court of Appeal in this case was whether a gift of railway debenture stock to a charity was valid. On this subject there had been a direct conflict of authority (see the previous cases collected in the argument), and in the present case the Court of Appeal overruled the decisions in *Ashton* v. *Lord Langdale* (4 De G. & Sm. 402) and *Chandler* v. *Howell* (4 Ch. D. 651). In order to decide the point before it, the Court of Appeal found it necessary to go back to first principles, and to refer to the Act itself as well as the decisions upon it, and their judgment contains a most valuable exposition of the law upon the subject.

The policy of the *Mortmain Act* (9 Geo. II. cap. 36) is indicated in its preamble as follows :—

"Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing and dying persons or by other persons to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs."

"It had from the earliest times," said James, L.J., "been the policy of the Common Law as interpreted by the judges to discourage the inalienability of land, and this altogether irrespective of the peculiar mischiefs supposed to arise from the vesting of lands in mortmain which deprived the Sovereign and the lords of the [★ 30] profitable incidents of feudal ★ tenures, and this policy in more modern times approved itself to the legislature. It was deemed in itself a mischief that land should be rendered inalienable, and the legislature found the mischief was being mischievously increased in one particular way, that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification) and to be posthumously benevolent at the expense of their lawful

heirs. And this was the mischief and sole mischief which the legislature set itself to prevent, viz., to prevent the increase of inalienable land through the weakness of or practices upon dying persons, or through posthumous charity. And upon examination of the enactments, it will be found that the Act is in entire consistency with the recital. In the Act there is no prohibition of gifts of land by deed *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property."

Railway debentures.

Passing on from the general policy of the *Mortmain Act* to the particular question before him, Lord Justice James at first considered the nature of railway debentures, and his observations on this point have always been considered as indicating his opinion that railway debentures are not within the prohibition of the *Mortmain Act.* The nature of these securities had been carefully considered in previous decisions, and particularly in the celebrated decision of *Gardner* v. *London, Chatham and Dover Railway Company* (L. R. 2 Ch. 201). A debenture holder could not take or touch the soil of the lands required and used for the actual working of the railway, nor the soil of any surplus lands which had been acquired, but were not required for actual use, nor the rolling stock, nor could he by himself or his receiver get the management of the line, nor do anything in derogation of the authority of the statutory managers who could not delegate to any one else their powers, nor shift their responsibility. Dealing then with the subject of debenture stock, which seemed he said to be so called on the *lucus a non lucendo* principle, because it is anything but a debenture, the Lord Justice said that in the case of debenture stock there is no debt except as to the annual interest, the capital cannot be called in and cannot be paid off. It is a right to a perpetual annuity payable out of the concern. There is no conveyance or assignment of anything to the stockholder or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of England. It is nothing but preference stock with a special preference, "the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest

Debenture stock.

[★31] in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or ★ hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is."

Jurisdiction as to charities

The Court of Chancery, as was laid down, had an inherent jurisdiction with regard to charities generally[2] (*Incorporated Society* v. *Richards*, 1 D. & War. 258, 308; *Attorney-General* v. *St. John's Hospital, Bedford*, 2 De G. J. & S. 621), and one of the subjects specially assigned to the Chancery Division is "the execution of trusts charitable." The subject of charities is indeed essentially a creation of statute. Charities are controlled by statute (1) in their very definition, (2) with regard to dispositions of property for their benefit, (3) with regard to their regulation and control.

Charities a creation of statute.

What are charites.

(1) What are charities? The Court (9 Ves. 405) regards all objects as charitable which are (*a*) expressly enumerated in the old statute of charitable uses (43 Eliz. c. 4), or which are (*b*) deemed by analogy within its spirit of intendment. The charitable objects enumerated (*a*) by the statute of Elizabeth are as follows: "Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, repair of bridges, ports, havens, causeways, churches, sea-banks and highways, education and preferment of orphans, relief, stock or maintenance for houses of correction, marriages of poor maids, supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, relief or redemption of prisoners or captives; aid or ease of any poor inhabitant concerning payments of fifteens, setting out of soldiers, and other taxes."[3]

Among those objects which have been regarded (*b*) by analogy as within the equity of the statute, may be mentioned gifts in aid of poverty and education, religion, and for all beneficial public works, *e.g.* improving towns, paying off the National Debt, Royal Humane Society, &c., &c., and see the cases collected in Tudor's Real Property Cases, 3rd ed. pp. 535 *et seq.*

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[2] The jurisdiction of the Court of Chancery in cases of charitable trusts does not depend upon the statute of 43 Elizabeth c. 4, but exists independently of it. Videl *v.* Girard's Ex'trs, 2 Howard, 128.

[3] The statute of 43 Elizabeth was intended to collect and arrange the charitable uses rather than to create them. For examples of charitable uses see Evangelical Association's Appeal, 11 Casey, 316; Adve *v.* Smith, 44 Com. 60; Babb *v.* Reed, 5 Rawle, 151.

(2.) Dispositions in favour of charities. These are controlled by a series of Acts of which the principal are 9 Geo. II. c. 36 (commonly, though improperly, called the *Mortmain Act*), considered in the leading case, 24 Vict. c. 9, 27 Vict. c. 13, and 31 & 32 Vict. c. 44, all of which will be found considered in the notes to *Corbyn* v. *French*, in Tudor's Real Property Cases, 3rd ed. p. 545, and see Williams on Real Property, 16th ed. p. 87. Dispositions in favour of charities.

The *Mortmain Act* has received a very strict interpretation, and not only have gifts of land by will, whether freehold, copyhold, or leasehold, been held void, but also gifts of rents and profits, growing crops, money secured by mortgage or charge of land, money to arise from the sale of land even if the conversion has been directed by a former instrument; gifts of money to be laid out in the purchase of land; gifts of arrears of rent however have been held to be good. See Tudor's Real Property Cases, 3rd ed. p. 553; Tudor's Charitable Trusts, 2nd ed. p. 65; Seton on Decrees, 4th ed. p. 593.

In *Ashworth* v. *Munn* (15 Ch. Div. 363), where the testator gave his ★ interest in the proceeds of the sale [★ 32] of real estate which was held as partnership property to a charity (see as to the conversion of partnership property, *post*, p. 200), the bequest was held to be void. James, L.J. (after qualifying (p. 369) certain expressions which he had employed in *Attree* v. *Hawe*), pointed out that though the partnership property was converted as between the real and personal representatives of the testator, it yet, unlike a share in a joint stock company, fell under the provisions of the *Statute of Mortmain*, and said that "if such a bequest was held valid, it would govern the case of a partner who by reason of the insolvency of his partners was really and substantially the sole owner of the partnership assets including the freeholds."

It was held in *In re Christmas*, *Martin* v. *Lacon* (33 Ch. Div. 332) that a bond by Harbour Commissioners in the form prescribed by their Act was not within the *Mortmain Act*.

Gifts to charities are also invalid which come within the converse case expressly embraced by the Act, of money directed to be laid out in land. In *In re Cox*, *Cox* v. *Davie* (7 Ch. D. 204), a bequest of money to a municipal corporation for the erection and endowment of a dispensary was held invalid, though the Corporation already held land in mortmain available for the purposes of the bequest. In this case it was laid down Money to be laid out in land.

that the rule to be collected from the cases, and in particular *Philpott* v. *St. George's Hospital* (6 H. L. C. 338) and *Pratt* v. *Harvey* (L. R. 12 Eq. 544) was that either the land must be so indicated as that you can say that it is not within the *Statute of Mortmain*, or the direction must be that you must not lay out the amount of the legacy upon any other land than that which is already in mortmain.

In *In re Hedgman*, *Morley* v. *Croxon* (8 Ch. D. 156), a bequest of money to trustees[4] to be applied in "supporting or founding" schools for poor children in a particular parish where a school already existed for the prescribed purpose, was held good as an alternative trust, *i.e.* it was to be read not as a trust to "support and found," but literally, and as a gift to support did not imply the purchase of land or a house, it was not obnoxious to the statute.

In *In re Watts*, *Cornford* v. *Elliott* (29 Ch. Div. 947), the decisions in *Attree* v. *Hawe* and *Ashworth* v. *Munn*, *ubi supra*, were considered. A testator was entitled to £800 secured by mortgage of the interests under a marriage settlement, part of which was invested on pure personalty, and part under a power in the settlement on mortgage of real estate. He bequeathed to charities "such part of his residuary estate as could by law be so bequeathed." It was held, following *Brook* v. *Badley* (L. R. 3 Ch. 672), that the £800 was an interest "in land within the meaning of the *Mortmain Act*, and that there could not be any apportionment so as to make part of the fund available for the charity." The whole mortgage debt is charged on realty as well as on pure personalty, and what the appellant asks us to do is not to apportion, but to marshal. Where a sum of
[★33] money is given which is ★ charged both on land and personalty, so that the whole is recoverable out of the land, I think there ought not to be an apportionment in order to take the bequest out of the statute. As to marshalling in favour of a charity, see *post*, p. 224.[5]

It has been held that a trust for keeping up family

[4] A gift for a charity generally must be made to trustees, and in this way the mischief of turning the court into a trustee for a general charity is avoided. McGirr *v.* Aaron, 1 Penna. 49. The trust will not however be suffered to fail for want of a trustee. Perry on Trusts, Sec. 722.

[5] As a general rule assets will not be marshalled in favor of a charity for a court of equity will not set up a rule in equity contrary to the common rules of the court, for the purpose of supporting a bequest which is contrary to law. Note to Aldrich *v.* Coop, 2 Lead. Cas. Eq. 103 (4th English Ed.)

tombs is void, but a trust for keeping in repair a painted window or monument in a church (this being considered for the benefit of the public) is valid. Lewin on Trusts, 8th ed. p. 106. In *In re Vaughan*, *Vaughan* v. *Thomas* (33 Ch. D. 187), the authorities are discussed, and the following are stated to be charitable objects: the repair of a parsonage, the repair of a church, the repair of ornaments of a church.[6]

A gift not exceeding £500 to repair a churchyard is good under the *Church Building Act* (43 Geo. III. c. 108), but a legacy to keep a family vault in repair does not fall within this statute. *In re Vaughan* (*ubi supra*).

It must be remembered that the *cy-près doctrine*, as to which see *ante*, does not apply to bequests which are made void by the *Mortmain Act*, p. 23, and therefore a bequest of money to be laid out in land is not executed *cy-près*, *i.e.* applied to an allowed charitable purpose, but an express gift over, in case the charitable gift cannot by law take effect, is valid. Jarman on Wills, 4th ed. vol. i. p. 250.

Statutes relating to charities.

(3.) "As to the statutory control and regulation of charities." The principal statutes coming under this head are *Sir Samuel Romilly's Act* (52 Geo. III. c. 101), which enables relief to be given in simple cases, questions of construction, matters involving internal regulations of charities, &c.; and the *Charitable Trusts Acts*, 1853 to 1869 (16 & 17 Vict c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110).

Sect. 17 of the *Charitable Trusts Act*, 1853, provides that:—Before any proceeding (not being an application in any suit or matter actually pending) for relief, order, or direction as to any charity, or its property or income, can be commenced, presented, or taken, by any person, he must give notice of it in writing to the Board (of Charity Commissioners), fully stating its nature and purpose.

It was held in *Glen* v. *Gregg* (21 Ch. Div. 513), observing on *Attorney-General* v. *Sydney Sussex College* (15 W. R. 162), (quoted in the notes, p. 514), that an action to remove a minister of a building registered as a place of religious worship, and for administering its trust-deed, did not require the Commissioners' sanction. In *Benthall* v. *Earl of Kilmorey* (25 Ch. Div. 39), a resident medical officer brought an action against the committee of an hospital to obtain a declaration that he

[6] Decamp *v.* Dobbins, 29 N. J. Eq. 36.

was entitled to hold his office during good behaviour, and to restrain them from ejecting him; and the Court of Appeal held that if the action had any other object than to prevent the exclusion of the plaintiff, it required the Commissioners' certificate, and see *Brittain* v. *Overton* (25 Ch. D. 41, n ).

Under these Acts orders of the Charity Commissioners can be enforced by the Chancery Division as if the
[★ 34] offending party were ★ guilty of a contempt of court. Order LV. of the Rules of the Supreme Court, rr. 13 and 14, prescribes that applications under sect. 28 of the Act of 1853 are to be made by summons, and restricts appeals, unless by leave where the gross annual income has not been declared to exceed £100. Order LXV. rr. 24 and 25, regulate the fees payable in respect of such proceedings.

## *Equitable Waste.*

### BAKER *v.* SEBRIGHT.

(13 CH. D. 179.)

Principle.

*The principle upon which the Court interferes with a tenant for life, in respect of equitable waste, is that he is "using his powers unfairly," "making an unconscientious use of his powers."*[1]

Summary of facts.

Sir John G. Sebright, the equitable tenant for life without impeachment of waste of the Beechwood Estate had cut down a large amount of timber, part of which was "ornamental" and part of which had been planted or left for ornament or shelter, and applied the proceeds to his own use. It appeared that all the trees so cut were injurious to or impeded the growth of other adjoining trees, so that their removal was "essential for the purposes of ornament and protection or shelter," and

[1] If the matters are trifles the court will not interfere. The ingredient of malice does not appear to be necessary to constitute equitable waste; such waste may be committed although no bad motive exists. Hawley *v.* Clowes, 2 Johns. Ch. 122.

also "that no trees planted or left standing by any predecessor of the Beechwood Estate for protection or shelter had been cut by the defendant. It was held that Sir J. Sebright was entitled to retain the proceeds of the timber cut.

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The doctrine of equitable waste was spoken of by Lord James Turner in *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504 (cited in the leading ★ case) as "an encroachment" on the legal rights of the tenant for life, but in the leading case it is more appropriately spoken of as an interference.[2] "I do not," said Sir George Jessel, "admire that term 'encroachment,' because almost all the doctrines of Equity were interference with a legal right, and that term is rather a term opprobrium when it ought to be a term of praise. The interference of Courts of Equity with legal rights was for the improvement of the law and the furtherance of justice, and therefore to say that a doctrine of Equity is an 'encroachment' on a legal right is simply to censure the whole doctrine of Equity." [★ 35]

Tenant for life unimpeachable for waste.

An admirable statement of the grounds upon which the Court of Equity interferes to prevent a tenant for life unimpeachable for waste from committing "equitable waste" may be collected from the judgment of Sir George Jessel in the leading case, 13 Ch. D. pp. 184 & 186. Courts of Equity restrained a legal tenant for life unimpeachable for waste from committing those kinds of waste which are called equitable waste on the ground that where the testator (or settlor) gave these powers to the tenant for life, he intended them to be used fairly. Accordingly the tenant for life was restrained, because though he had legal powers he was not using them fairly, he was making an unconscientious use of his powers, and abusing them so as to destroy the subject of the settlement.[3] The tenant for life was not allowed, as in the case of *Varne* v. *Lord Barnard* (2 Vernon, 738), to take off the roof of Raby Castle to

[2] "Equitable waste arises where a particular estate is granted without impeachment of waste, but the particular tenant exercises his power in an unconscientious manner." Bispham's Eq. 4th Ed. Sec. 434.

[3] A Court of Chancery goes to greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction to be liberally exercised in the prevention of irreparable injury and depends on much latitude of discretion in the court. Kane *v.* Vanderburgh, 1 Johns. Ch. 4, and Watson *v.* Hunter, 5 Johns, Ch. 169.

spite the remainderman, nor to cut down ornamental timber so as to destroy the amenity or beauty of the estate. But beyond that the Court of Equity did not interfere with the tenant for life, even though he obtained a profit when he was not acting unconscientiously, but only doing what the settlor himself would have done with a view to preserve the beauty of the estate.

In the present case the Court considered that the tenant for life was entitled to the proceeds of the timber, as he had only done what the Court itself would have ordered to be done. The intention of the testator was that not all the ornamental timber but as much of it as possible should be preserved consistently with allowing the natural growth of the trees so far as they would not destroy one another. No Court of Equity or any other Court could control the operations of nature, and therefore the Court could not say that the whole of the ornamental timber should be preserved when the trees were growing so thickly as to destroy one another, but what it could do and what it does do, is to preserve it as far as possible.[4]

The Master of the Rolls, however, pointed out that if the remainderman had come to the Court before the tenant for life had cut the timber he might have been entitled to an "injunction." Before the tenant for life cuts ornamental timber, it may be that the remainderman has a right to the protection of the Court of Equity to prevent his doing it improperly.[5] The tenant for life may say—I do not intend to cut anything but what can properly be cut, but the remainderman can say—If you once cut down any of these ornamental
[★ 36] trees I cannot ★ put them up again, it may be an irremediable mischief, and on the ground that the Court interferes to prevent irremediable mischief it may be that when a tenant for life begins to cut ornamental timber, the Court will only allow him to cut under its direction and supervision as in other cases of administration.[6] It is not a question merely of his intending to do right, for however good his intentions, the Court

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[4] It is proper for the tenant for life to cut timber for the purpose of clearing the land. Lynn's Appeal, 7 Casey, 44 ; Drown *v.* Smith, 52 Me. 141; Keeler *v.* Eastman, 11 Vt. 293.

[5] The tenant for life is entitled to reasonable estovers for necessary repairs, agricultural implements and firewood. Bispham's Eq., 4th ed. Sec. 432.

[6] A court of equity may grant an injunction under special circumstances. Kerr on Injunctions, 252.

will see in carrying out the trusts of the will or settlement that right is done.[7]

Tenent for life impeachable for waste.

The power of a tenant subject to impeachment of waste with regard to timber is very carefully considered in *Honywood* v. *Honywood* (L. R. 18 Eq. 306). The principle upon which the law proceeds is that the tenant for life may not cut timber "except on timber estates" or fruit trees, but that he is entitled to the crop. The question of what is timber depends first on the law of England, secondly on the special custom of the locality (see p. 309, where the law as to timber is elaborately stated). The next question is what can the tenant for life cut? The tenant for life can cut all that is not timber with certain exceptions. He cannot cut ornamental trees, and he cannot destroy "germins," as the old law calls them, or stools of underwood, and he cannot destroy trees planted for the protection of banks and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees that are not timber, with again an exception that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits waste, as he prevents the growth of the timber. Then again, there is a qualification that he may cut down oak, ash, and elm under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation.

Property in timber.

The third question is in whom is the property vested? If the timber is timber properly so called, that is oak, ash, and elm over twenty years old, unless in exceptional cases, the property in the timber cut down either by the tenant for life or anybody else or blown down by a storm belongs at law to the owner of the first vested estate of inheritance.

To this there are two exceptions, (1) where the remainderman, the owner of the first vested estate of inheritance has colluded with the tenant for life to induce the tenant for life to cut down timber, and then Equity interferes and will not allow him to get the benefit of his own wrong. There is again (2) a second equitable exception, and that is this: that where timber is decaying or for any special reason it is proper to cut it down, and the tenant for life in a suit properly consti-

[7] Acts which even increase the value of the estate may amount waste. Such waste is called meliorating waste. Kane *v.* Vanderburgh (*supra*).

tuted to which the remainderman or the owner of the vested estate of inheritance is a party gets an Order of the Court to have it cut down, there the Court disposes of the proceeds on equitable principles and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance who can take the money.

Proceeds of sale.

[★37] ★ With regard to trees not timber either from their nature or because they are not old enough or because they are too old, Sir George Jessel expressed an opinion that "the property is in the tenant for life, but that if he cut them down wrongfully, and committed waste, equity would probably say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down, though he was not aware that the exact point had been ever decided.

Ornamental timber.

The term "ornamental timber" has received a very liberal interpretation, and includes everything planted as left by the settlor for ornament, and the tenant for life impeachable for waste may be restrained although the mansion house has been pulled down. (Seton on Decrees, pp. 190 *et seq.*, where the authorities are collected. Kerr on Injunctions, 2nd ed. p. 93.)

The Court cannot determine what is ornamental timber, that being merely a matter of taste; and what was planted for ornament must be considered as ornamental. *Lord Mahon* v. *Lord Stanhope* (3 Madd. 423, n.); *Coffin* v. *Coffin* (Jac. 70).

In *Lowndes* v. *Norton* (6 Ch. D. 139) timber had been cut "not otherwise than in due course of management" by the equitable tenant for life, who was principally interested, the proceeds had been paid into Court, and the income paid to her, and it was held on her death that the next tenant for life being without impeachment of waste was entitled to the *corpus* of the fund. Now the subject of the cutting and sale of timber by a tenant for life of settled estate is specially dealt with by the *Settled Land Act*, 1882, so that *Lowndes* v. *Norton* would appear to be no longer law. Sect. 35 of the *Settled Land Act*, 1882, provides:

*Settled Land Act*, 1882.

(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement

or an Order of the Court, may cut and sell that timber, or any part thereof.

(2) Three-fourth part of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

It may also be noticed that "planting" (which is no longer confined, as in the *Settled Estates Act*, 1877, to planting for shelter) is enumered among the authorized improvements to which capital trust money may be applied under sect. 25, while sect. 28 (sub sect. 2) declares that the tenant for life or any of his successors as aforesaid shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act. See as to waste, timber, &c., when infants are entitled, sect. 42 of the *Conveyancing Act*, 1881.

In *In re Harrison, Harrison & Harrison* (28 Ch. Div. 220) an estate, part of which consisted of larch plantations was settled as personalty, and a very great number of the trees had been blown down by extraordinary gales. The Court proceeded on the principle of "struggling to ★ prevent accident from interfering with the [★ 38] rights of parties," and decided that the proceeds of the larch trees blown down by the gale did not belong to the equitable tenant for life but must be invested, and fixed an annual sum to be paid to the tenant for life out of the income, and, if necessary, the capital of the invested fund; subject to the right of the trustees to have recourse to the fund in order to replant the plantations.

In *In re Ainslie, Swinburn* v. *Ainslie* (30 Ch. Div. 485), the Court of Appeal decided, on the principle *quid-quid plantatur solo, solo cedit*, that if a tree was attached to the soil it was real estate, and if severed, personalty; and that the degree of attachment or severance was a question of fact in the case of each particular tree.

Ameliorating waste.

The subject of ameliorating waste, that is waste which so far from doing injury to the inheritance improves the inheritance, was considered in *Doherty* v. *Allman* (3 App. Cas. 709). There a lessee considered that it would be beneficial to convert certain store buildings which had fallen into disrepair into dwelling-houses, which would much increase their value, and was proceeding to so convert them. The lessor commenced

proceedings to restrain, alleging waste, but the Court declined to interfere by injunction.[8]

Permissive waste.

It was held in *Powys* v. *Blagraves* (4 De G.M. & G. 448) that the Court will not interfere by injunction to prevent mere permissive waste.[9] The subject of permissive waste in cases where an express duty to repair is imposed by the instrument which creates the trust upon the tenant was considered in *Woodhouse* v. *Walker* (5 Q. B. D. 404).

Mines and quarries.

The question of opening and working mines and quarries by a tenant for life impeachable for waste was considered in *Elias* v. *Snowdon Slate Quarries Co.* (4 App. Cas. 454), where the law was stated to be, that the fact that a mine or quarry had been opened for a restricted or definite purpose does not give a right to work for commercial profit, but when the mine or quarry is once opened the sinking of a new pit in the same vein or the breaking ground in a new place in the same rock is not necessarily the opening of a new mine or a new quarry (pp. 465, 466).

*Judicature Act*, 1873.

Sect. 25 of the *Judicature Act*, 1873, sub-sect. 3, provides that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." The result of the authorities as to the legal position of a tenant for life unimpeachable of waste with which equity interferes in case of equitable waste on the principles just stated is thus summed up in Tudor Real Property Cases 3d edit. (p. 112): "He may fell timber,[10] open new mines or pits, and will have full property in the produce, as will also be the case where timber trees or timber parcel of a house are blown down; his interest however does not arise until the severance takes place." And the effect [★ 39] of the above ★ provisions in the Judicature Act would seem to be that the instrument creating the estate may confer upon the tenant for life a power of committing equitable waste from which he would be restrained if

[8] The court will not generally interfere to prevent meliorating waste. Kerr on Injunctions.

[9] Where the tenant for life allows buildings to decay by neglecting to repair them, there is generally no remedy in equity, but in certain cases an injunction may issue. Cannon *v.* Barry, 59 Miss. 289.

[10] The tenant for life cannot cut down more timber than is necessary for the enjoyment of his estate. Livingstone *v.* Reynolds, 26 Wend. 115.

the estate was only given in the ordinary form without impeachment of waste. On the other hand, in the absence of the expression of such intention the tenant for life has no longer any legal right to commit "equitable waste." It has been pointed out, Trower's Prevalence of Equity, p. 76, that tenancies for years and in tail after possibility of issue extinct, are not within the provisions of this section, though probably brought within it by the operation of sect. 25, sub-sect. 11, of the *Judicature Act*, 1873, providing that when there is a variance between the rules of law and equity, the rules of equity shall prevail.[11]

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## *Penalties and Forfeitures.*

### WALLIS *v.* SMITH.

(21 Ch. Div. 243.)

Principle.

*The Court in deciding whether a sum of money payable on breach of a condition is to be treated as a penalty or as liquidated damages,*[1] *proceeds on the principle that the primary object is to ascertain the intention of the parties,*[2] *but in ascertaining that intention the Court will have regard to what it sees to be the consequences, and to the principles (summed up in the leading case in four propositions) established by decided cases.*

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Summary of facts.

Wallis contracted to sell an estate to Smith for £70,000 which was to be gradually expended by Smith in building on the estate. £5000 was to be deposited in part payment of the £70,000, and £500 of the deposit was to paid on the execution of the

[11] A devisee of a contingent remainder cannot maintain an action for damages in the nature of waste. Sager, Guardian *v.* Galloway, 3 Amerman (Pa.), 500.

[1] Equity will relieve against a penalty but not against stipulated or liquidated damages. Skinner *v.* Dayton, 2 Johns. Ch. 526.

[2] Streeper *v.* Williams, 12 Wright (Pa.), 454; Chase *v.* Allen, 13 Gray, 45.

contract. Among many stipulations of various degrees of importance it was agreed that if Smith should commit any substantial breach of the contract in not diligently carrying out the works, or in
[★ 40] ★not performing any of its provisions, the £5000 or the unpaid balance of it, should be forfeited "as liquidated damages."

Smith neither paid the £500 nor performed any part of the contract. Held, by the Court of Appeal, that Wallis was entitled to enforce the payment of the £5000 as liquidated damages.

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In this case Jessel, M.R., elaborately reviewed the authorities bearing on the question whether a sum stipulated to be paid on the breach of a condition in a contract is to be treated as a "penalty," against which the Court will grant relief, or as "liquidated damages," which the Court will enforce. The result of the cases on the subject, which were divided into four groups, is summed up as follows:—

Penalty.

I. "Where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations,[3] all or some of which are, or one of which is for the payment of a sum of money of less amount," the sum stipulated to be paid is treated as penalty, only the actual damage can be recovered, the Court will not sever the stipulations. If any one of the stipulations is for the payment of a sum of money of less amount than the penalty named, then the proviso is bad. This proposition is established by a series of decisions beginning for this purpose with *Astley* v. *Weldon* (2 B. & P. 346), including *Kemble* v. *Farren* (6 Bing. 141), (a case of the greatest importance, and always treated as a leading authority on the subject) and ending with the decision of the Court of Appeal in *In re Newman* (4 Ch. Div. 724).[4]

Doubtful cases.

II. The law is doubtful with regard to cases "where the amount of damages is not ascertainable[5] *per se*, but

[3] The use of the words "stipulated damages" will not determine the rule to be applied, that depends upon the nature of the contract. See Morris *v.* McCoy, 7 Nevada, 399; Hamaker *v.* Schroers, 49 Mo. 406.

[4] Accident was the origin of the jurisdiction of chancery upon the subject of penalties but now the jurisdiction embraces all questions as to penalties. 1 Spencer's Eq. 629, etc.

[5] Rogan *v.* Walker, 1 Wis. 527.

where the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small—where it is not absolutely necessary that they should be small, but it is so near to a necessity, having regard to the probabilities of the case, that the Court will presume it to be so." With regard to this class of cases, which lie on the borderland between the cases falling under class I. and those falling under class III., Jessel, M.R., pointed out that there were *dicta* in the reported cases on both sides, and that consequently the matter was open for discussion. These cases, he said, fell within "the principle, if principle it be, of a large sum being a penalty for non-payment of a smaller sum," but they also fall within the principle of the cases in class III.

III. Where the damages for the breach of each stipulation are unascertainable or not readily ascertainable, but the stipulations may be of greater or less importance, or of equal importance—*i.e.* of varying importance, as it is expressed in another portion of the judgment, ★the sum stipulated to be paid has always been [★41] treated as liquidated damages. The decisions are uniform on the point, though there are certain *dicta* in the reported cases to the contrary. Liquidated damages.

IV. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, the bargain of the parties is to be carried out, and the sum is to be treated as liquidated damages.[6] Liquidated damages.

The Master of the Rolls then applied these principles to the case before him, which he said was characterized by the following circumstances: (1) There was no ascertainable definite sum of a less amount than the sum named payable under it as a single condition; it consequently did not fall under the first group of cases. (2) It was not a case in which one or more of the stipulations could be treated as of trifling importance; it consequently did not fall within the *dicta* in group II. (3) It was a case in which the stipulations varied in importance, and the damages were substantial; he therefore held that the sum stipulated was to be treated as liquidated damages.

"I have always thought," said Jessel, M. R., "and still think, that it is of the utmost importance as re-

[6] The Plank Road Company *v.* Murray, 15 Ill. 337; Robinson *v.* Loomis, 1 P. F. Sm. 78; The People *v.* The Supreme Court of N. Y., 19 Wend. 104.

gards contracts between adults—persons not under disability, and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties;[7] that they should not overrule any clearly-expressed intention on the ground that judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions,[8] but they are exceptions of a legislative character."

In the recent case *Lord Elphinstone* v. *Monkland Iron Co.* (11 App. Cas. 332), where the decision of the Scotch Court was reversed, the principle was laid down by the House of Lords that:—When one lump sum is made payable by way of compensation on the occurrence of one or more or of all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification, but where the payments stipulated are made proportionate to the extent to which the contractors may fail to "implement" or fulfil their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages. It is satisfactory to observe, with regard to the decisions of the English Courts on the subject of penalties, that one of the Law Lords cited with approval the *dictum* of Lord Bramwell in *Betts* v. *Burch* (4 H. & N. 511), and *In re Newman* (4 Ch. Div. 734), that "by some good fortune the Courts have in the majority of cases gone right without knowing why they did so."

Forfeiture of deposit.

The law on the subject of forfeiture of deposit was very carefully considered in *Howe* v. *Smith* (27 Ch. Div. 89). In that case on a sale of real estate the purchaser paid a sum of money which was stated in the contract to be paid as a deposit, and in part payment of the

[★42]

★purchase-money. It was also agreed that the purchaser should pay the balance of the purchase-money on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. The purchaser did not pay his purchase-money though an extended time was granted to him, the vendor re-sold the property at the original

[7] A man cannot escape from the specific performance of an agreement by electing to pay the penalty for the breach. Brown *v.* Bellow, 4 Pick. 179; Canal Co. *v.* Sansom, 1 Binney, 70.

[8] See Williams *v.* Green, 14 Ark. 315; Pearson *v.* Williams, 26 Wend. 630.

price. It was held, distinguishing the previous case of *Palmer* v. *Temple* (9 Ad. & E. 508), where the clause was different, as it provided that if either vendor or purchaser made default a certain sum should be paid by way of liquidated damages, that as the purchaser had failed to perform his contract in a reasonable time he had no right to a return of the deposit.[9] In this case the previous cases are reviewed, and, it is pointed out that there is comparatively little authority on the subject in equity cases,[10] which is accounted for by the fact that the question of a return of deposit is essentially a common law claim, and has seldom arisen in equity except in bankruptcy matters.[11]

"In order to enable the vendor to forfeit the deposit there must be Acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract, the purchaser must have lost his right to specific performance in equity and his right to sue for damages at law." [12] (27 Ch. Div. pp. 95 and 103.) See further on the subject of deposits, *Depree* v. *Bedborough* (4 Giff. 479); *Lethbridge* v. *Kirkman* (25 L. J. Q. B. 89); *Ex parte Barrett* (L. R. 10 Ch. 512); *Thomas* v. *Brown* (1 Q. B. D. 714); and see also Clerke & Humphry's Sales of Land, pp. 109 *et seq.* *Howe* v *Smith* has very recently been followed in *Soper* v. *Arnold* (35 Ch. D. 384).

Relief against forfeiture.

The principle of relief against forfeiture has been repeatedly recognized and controlled by the legislature. The *Common Law Procedure Act*, 1852 (superseding 4 Geo. II. c. 28, which was repealed by the *Statutory Revision Act*, 30 & 31 Vict. c. 59), regulates the procedure in ejectment for non-payment of rent by providing that "In case the lessee or his assignee, or other person claiming or deriving under the lease, shall permit and suffer judgment to be recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six

[9] Equity will not generally grant relief in cases of forfeiture growing out of a breach of any specific act. Reeves *v.* Toulman, 25 Ala. 452.

[10] Equity will not lend its aid to actively enforce a forfeiture. Warner *v.* Bennett, 31 Conn. 468; Smith *v.* Jewitt, 40 N. H. 534.

[11] Oil Creek R. R. Co. *v.* Atlantic and Great Western R. R. Co., 7 P. F. Sm. 65; Gordon *v.* Lowell, 21 Me. 251; Beecher *v.* Id., 43 Conn. 556.

[12] Brown *v.* Vandergift, 30 P. F. Sm. 142.

months after such execution executed, the lessee, his assignee, &c., shall be barred and foreclosed from all relief or remedy in law or equity." This is supplemented by the *Common Law Procedure Act*, 1860 (23 & 24 Vict. c. 126), sect. 1, which provides "in the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise as in the Court of Chancery." [13]

[★43] ★These enactments, the effect of which has been expressly preserved by the *Conveyancing Act* (44 & 45 Vict. c. 41, sect. 14, sub-sect. 8), have been recently considered in *Croft* v. *London and County Banking Co.* (14 Q. B. Div. 347), where it was held that when the plaintiff had obtained judgment upon forfeiture for non-payment of rent but without costs, the defendant might obtain relief without any costs except those of the summons for relief.

Relief against forfeiture of leases.

The 14th section of the *Conveyancing Act*, which came into operation 1st January, 1882, confers upon the Court a very important power of relieving against the forfeiture of leases. By sub-sect. 9 it is retrospective and cannot be excluded by any stipulation to the contrary. The section provides, sub-sect. 1, that a right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

Sub-sect. 2. Where a lessor is proceeding by action or otherwise to enforce such right of entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this

[13] See last case cited.

section, and to all the other circumstances, thinks fit, and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

Sub-sect. 3 gives very extensive meanings for the purposes of the section to the terms "lease," "lessee," and "lessor," (but note here that the section does not apply when the tenancy is only under an agreement and no rent has been paid, *Coatsworthy* v. *Johnson*, 55 L. J. Q. B. 220); by sub-sect. 4 the section is to apply even though the proviso of re-entry or forfeiture is inserted in the lease "in pursuance of the direction of any Act of Parliament," while by sub-sect. 5 a lease "limited to continue" until breach of covenant is to take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach. It must, however, be borne in mind that by sub-sect. 6 the section is not to extend:—

(1.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased, or to a condition for forfeiture on the bankruptcy of the lessee (see *Ex parte* ★ *Gould, In re Walker*, 13 Q. B. D. 454), or on the [★ 44] taking in execution of the lessee's interest; or,

(2.) In case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

The following cases have been decided upon this section:—

In *Quilter* v. *Mapleson* (9 Q. B. Div. 672) the Court relieved under this section in respect of breaches of a covenant which had been committed before the Act came into operation.

In *North London Land Co.* v. *Jacques* (32 W. R. 283) it was held that the giving of an intelligible notice stating the particulars required by sub-sect. 1, and apprising the lessee of the intention of the lessor to enforce his rights is a condition precedent to the right to claim a forfeiture. It was, said the Court, the intention of the legislature that there should be reasonable compensation, or that the covenant should be performed that has been broken, so that the lessor may be in the same position as he would have been if the breach had not taken place.

It was held, however, that this provision does not apply to a case of forfeiture for rent, *Scott* v. *Matthew Brown & Company* (51 L. T. 746), and by parity of reason it would seem also to have no application to covenants for breach of which relief cannot be granted under the section.

Sect. 51 of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), declares that any clause of forfeiture "purporting or attempting" to forbid the exercise of any powers under the Act as far as it purports or attempts, or is intended to have, or would or might have the operation aforesaid, shall be deemed to be void; and sect. 52 provides that notwithstanding anything in a settlement, the exercise by a tenant-for-life of any power under this Act shall not occasion a forfeiture.

*Settled Land Act*, 1882.

Sect. 51 was considered in *In re Paget's Settled Estates* (30 Ch. D. 161). In that case there was a "residence clause" by which not only a life estate, but a power of appointment amongst children, was made conditional on residence for not less than three months in the year on some part of the testator's estate, and in default of compliance the estate was to go over. It was held that the condition was void, and that the tenant for life was entitled to exercise the power of sale, and receive the income of the proceeds.

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## ★ *Partition.*

### PEMBERTON *v.* BARNES.

(L. R. 6 Ch. 685.)

Principle.

*Section 4 of the Partition Act*, 1868, *is imperative, and when the parties entitled to a moiety or upwards desire a sale,*[1] *the Court must order it unless some good reason is shown to the contrary, or unless the persons objecting offer, under sect. 5, to purchase the shares of the parties desiring the sale, when the Court has a discretion to authorize the purchase.*[2]

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Summary of facts.

The Tring Park Estate, which formed the princi-

[1] Persons who have limited estates may become parties to a bill for partition and the estates of such parties only may be divided; or, if it is deemed desirable, the parties in remainder or reversion may be brought in, and the decree will then be binding upon them, and the whole estate may be divided. Dake *v.* Hague, 11 Out. (Pa.) 67.

[2] The method of making a partition in equity is by first ascer-

pal subject of this suit, consisted of a mansion-house of great antiquity and historical interest, and 3600 acres of land, of which about 300 formed a deer park, together with manorial rights extending over thirty square miles of country. The plaintiffs, who were entitled to one moiety of the estate, filed their bill against the trustees of the estate and Dr. and Mrs. Barnes, who were entitled to the other moiety, claiming a sale of the property, or in the alternative, a partition. There was the uncontradicted evidence of two eminent land agents that the Tring Park Estate was peculiarly well adapted for the establishment of a nobleman or gentleman of large fortune, that if sold as a whole it would realize a much larger price than if sold in moieties, that it could not be satisfactorily partitioned, and that if it were put in one lot a "fancy price" would be obtained; but the defendants Dr. and Mrs. Barnes objected to the estate being sold in order that the plaintiffs might obtain a fancy price, and denied that a sale would be more beneficial than a partition.

★ Malins, V.C., held that the plaintiffs were not entitled to a sale against the wish of the defendants, but Lord Hatherly, L.C., being of opinion that no "real good plain cause" had been shewn against a sale, reversed the decision of the Vice-Chancellor and ordered a sale, with liberty to the defendants to bid. [★46]

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Jurisdiction.

In 1833 the common law writ of partition was abolished by 3 & 4 Wm. IV. c. 27, and the Court of Chancery obtained exclusive jurisdiction with regard to partition. The Court, however, had no jurisdiction as to copyholds (though specific performance of an agreement for partition of copyholds might have been en-

taining the rights of the several persons interested, and then issuing a commission to make the partition required. If the proportion to which the different parties are entitled appear upon the pleadings, no reference to a master to ascertain them is necessary; otherwise, such a reference will be ordered. Bispham's Eq. Sec. 490, Daniels' Chancery Practice, 1121.

forced, *Bolton* v. *Ward* (4 Hare, 530)), until 1841, when jurisdiction was conferred by 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94). It was a well-es-

Old law.

tablished principle that partition was a matter of right, and that inconvenience, however great, was no objection.[3] The only sort of tenure, Lord Coke said, that could not be the subject of partition was a castle, that being necessary for the defence of the realm. This sometimes led to very absurd results, as in the case mentioned in the argument in *Turner* v. *Morgan* (8 Vesey, 143), where the partition of a house was carried into effect by building up a wall in the middle,[4] and in *Turner* v. *Morgan* itself (*ubi supra*), where defendant objected on the ground that the Commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and all the conveniences in the yard. Lord Eldon at once overruled the objection. In this case his Lordship, though out of mercy to the parties he allowed the case to stand over, experienced nothing of his usual difficulty in coming to a decision. He had, he said, no doubt what was to be done (and see *Parker* v. *Gerard* and *Warner* v. *Baynes* (Amb. 236–589), where all objections of a utilitarian character were overruled by the Court of Chancery and partition decreed). Now all these cases of hardship are removed by the *Partition Acts* of 1868 and 1876. Sect. 3 of the *Partition Act*, 1868, gives the Court power in a partition suit to direct a sale and distribution of the proceeds (with all necessary or proper consequential directions) instead of a partition at the request of any party interested, notwithstanding the dissent or disability of any others of them, if the Court is satisfied that a sale and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property by reason of (1) the nature of the property to which the suit relates ; (2) the number of the parties interested or presumptively interested therein ; (3) the absence of disability of some of the parties interested ; or (4) of any other circumstances.[5] See *Sykes* v. *Schofield* (14 Ch. D. 629), where the form of judgment is given, and the practice as to actions commenced in District Registries laid down, and note

*Partition Act*, 1868.

[3] To invoke the equitable remedy in the form of partition is a matter of right and not of grace. Howey *v.* Goings, 13 Ill. 95; Wright *v.* Marsh, 2 Greene (Iowa), 94.

[4] Wood *v.* Little, 35 Maine, 107; Scoville *v.* Kennedy, 14 Conn. 339; Smith *v.* Id., 10 Paige, 470.

[5] The court will generally make such a partition as will best preserve the value of the property. Daniels' Ch. Prac. 1130.

that a person ★ entitled in remainder or reversion can- [★ 47]
not commence an action for partition [6] *Evans* v. *Bagshawe*, L. R. 5 Ch. 340), that proceedings on behalf of a lunatic are irregular (*Halfhide* v. *Robinson* L. R. 9 Ch. 373); and see as to partition where property is in mortgage [7] *Waite* v. *Bingley* (21 Ch. D. 674). By sect. 1 of the *Partition Act*, 1876, an action for partition is to include an action for sale and distribution of the proceeds.

Sect. 4, which was made the subject of an extremely careful consideration in the leading case, provides that in a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property, [8] and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

In the leading case Lord Hatherley explained the principle on which this section is based as follows:— "The scope of the enactment appears to me to be this: there being reasons which may induce some of the part owners to wish for a partition, and others to wish for a sale and a division of the proceeds, the Legislature says that if the votes are equally divided, one half of the persons interested in the property desiring a sale, and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the Court shall be bound to give them a sale wholly irrespective of the 3rd section. But still there is a certain discretion left to the Court so that the Court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable." And see *Wilkinson*

[6] Persons who have limited estates may become parties to a bill for partition, and the estates of such parties only may be divided, or the parties in remainder or reversion may be brought in, and the decree will then be binding upon them, and the whole estate may be be divided. Duke *v.* Hague, 11 Out. (Pa.), 67.

[7] Mortgagees of tenants in common are not proper parties to a bill for partition. Long's Appeal, 27 P. F. Sm. 151; Thruston *v.* Minke, 32 Md. 571.

[8] In most of the United States the Courts of Equity have power to order a sale in partition. Agar *v.* Fairfax, 2 Lead. Cas. Eq. 4th American Ed., note.

v. *Joberns* (L. R. 16 Eq. 14) and *Rowe* v. *Gray* (5 Ch. D. 263).

In *In re Dyer*, *Dyer* v. *Paynter* (33 W. R. 806), the plaintiff, who was entitled to one-sixth of the property, asked for a sale; but this application was opposed by the majority of the parties interested, whose shares practically amounted to four-sixths. The property in question was in various parts of the country, and there was evidence that the time was a favourable one for sale; that there was no prospect of the property increasing in value, but some probability of its diminishing. The judge before whom the case originally came refused to order a sale, and the Court of Appeal declined to interfere with his decision.

In *Porter* v. *Lopes* (7 Ch. D. 358) the estate consisted of a freehold mansion-house and one hundred and eighty-five acres, of which some fifty-eight formed the site of the mansion-house, grounds, and park. The property was surrounded by a larger estate, of which the plaintiff was tenant-for-life. The plaintiff and defendant were entitled in equal moieties, and the plaintiff asked for a partition by which the mansion-house and part of the contiguous land should be allotted to him. He offered to pay such a sum as might be necessary for equality of partition, and he alleged that the
[ ★48 ] value of the property would be ★ depreciated if it were severed from the larger estate. The defendant claimed that the property should be sold, and himself offered to purchase the mansion-house and adjacent lands. It was held by the Court that there was no good reason against a sale, and a sale was accordingly ordered.

Jessel, M. R., pointed out that the effect of section 4 of the *Partition Act*, 1868, was that the defendant had an absolute right to a sale unless the Court saw some good reason against a sale. He then proceeded to state some reasons which might be conclusive against a sale. The property might be of a peculiar description so as not to be actually saleable, or, at the time when the sale was asked for, might be temporarily very much depreciated in value, *ex. gr.* in a case where there were two ironworks of equal value and one party desired a partition and the other a sale, and at that time the furnaces were out of blast, the Court would not order a sale.

Again, the nature of the property might be a good reason why the Court should not direct a sale. It might be a mere dependance on another property almost valueless except in connection with that property, *ex. gr.* a

portion of a room or a portion of a warehouse which might be of great value to the owner, but of very little value to anybody else.

An argument of some general interest was also urged against a sale in this particular instance. It was said that the mansion-house was part of an old family property, and that there was therefore a certain *pretium affectionis* with which the Court ought not to interfere. This however was answered by the two considerations, first, that the ancestral wishes of the family need not be considered, as the ancestor himself, had he been so minded, might have kept the property together, and, secondly, that so far as *pretium affectionis* was concerned, there was no reason why the Court should incline to the plaintiff rather than the defendant, as both were large landowners in the neighbourhood.

Another reason which weighed heavily against the plaintiff was that it was impossible to partition the property in the way he suggested so as to give him the mansion-house and the fifty-eight acres of land, because a large sum would in that case be required to be paid for equality of partition.[9]

Trust for sale.

In *Biggs* v. *Peacock* (20 Ch. D. 200; 22 Ch. Div. 284) a testator devised real estate to trustees on trust to sell at their discretion, and invest the proceeds for the benefit of his widow for life, and then for his children. All of the children attained vested interests, and were *sui juris*. The widow and three of the children brought an action for partition, the other three children and the surviving trustee (other than the widow) objected that the Court had no jurisdiction to order a partition, as the trust for sale under the testator's will was still subsisting. It was decided that there was no jurisdiction to order a partition, as the trustees had a trust for sale and not a mere power, although, as the Court pointed out, all the parties, being of age and *sui juris*, might have called upon the trustees to convey the estate to them, yet ★ none of them had a right, in opposition to the others, to insist upon partition, which would be dealing with the property as if it were real estate; and see *Swaine* v. *Denby* (14 Ch. D. 326); *Taylor* v. *Grange* (15 Ch. D. 165).

[★ 49]

Power of sale.

In *Boyd* v. *Allen* (24 Ch. D. 622) real estate had been devised to trustees upon trust for a number of persons as tenants in common. The will contained a power of

[9] The Courts have the power to award *owelty* in partition; this is a sum of money given for the purpose of equalizing the shares. Smith *v.* Smith, 10 Paige, 470.

sale which the trustees were willing to exercise, and in an action for partition by one of the beneficiaries it was contended that the Court had no jurisdiction to interfere with the discretionary power of the trustees. The Court, however, overruled the objection, and ordered a partition.

The right to partition, it said, being one of the incidents to the property in an undivided share, was not taken away by a discretionary power of sale given to the trustees. It was added, however, that a different view of the case might have been taken if the action had been brought vexatiously, or when the trustees were about to exercise their power.

Sect. 5 *Partition Act*, 1868.

Sect. 5 provides in effect that in every case of an action for partition (whether a sale would or would not be more beneficial to the parties than a partition), if any party, whether owning more or less than a moiety, requests a sale, the Court shall have a discretion to order a sale, unless the parties opposing are willing to take his share at a valuation (per Lord Blackurn, *Pitt* v. *Jones* (5 App. Cas. 659). This section was considered in the leading case, and in *Drinkwater* v. *Ratcliffe* (L. R. 20 Eq. 528), *Williams* v. *Games* (L. R. 10 Ch. 204), and by the House of Lords in *Pitt* v. *Jones* (*ubi supra*), where the previous authorities are reviewed. In that case the owners of three-sixteenths of a property sought to have a sale, the owners of thirteen-sixteenths objected and offered to purchase the shares of the others at a valuation. The Court of Appeal were of opinion that by reason of the number of the parties interested, and the nature of the property, there ought to be a sale, and the majority of the House of Lords (Lord Hatherley dissenting) affirmed their decision. It was pointed out that sects. 3, 4 and 5, though to be construed together, are independent enactments, and Lord Blackburn said that the meaning would have been more obvious had sects. 5 and 3 changed places. The meaning of sect. 5 he took to be that if a party presses for a sale, and the Court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common law right to a partition [10]

[10] Where the defendants are desirous that there shall be no partition of their several shares, the partition may be confined

Sect. 6 enables the Court to allow parties interested to bid on terms.

Sect. 7 extends sect. 30 of the *Trustee Act*, 1850 (enabling the Court to declare parties to be trustees), to cases where the Court directs a sale, and this power is not limited to persons under disability.[11] *Beckett* v. *Sutton* (19 Ch. D. 646).

[★50] ★Sect. 8 incorporates sects. 23, 24 and 25 of the *Settled Estates Act*, 1856 (19 & 20 Vict. c. 120) as to the proceeds of sale. See *In re Barker* (17 Ch Div. 241), *Mordaunt* v. *Benwell* (19 Ch. D. 302); and see as to a judgment for partition operating as a conversion, *post*, p. 197. It was held in *Strugnell* v. *Strugnell* (27 Ch. D. 258), that where some of the beneficiaries are not *sui juris* and the trustees have no power of sale under their trust deed, the Court cannot order a sale out of Court.

*Partition Act*, 1876.

Great difficulties have arisen in the practice with regard to the service of proceedings upon persons interested in the property, the *Partition Act*, 1876 (39 & 40 Vict. c. 17), section 3, specifies the grounds upon which service of notice of the judgment on the hearing may be dispensed with, viz. the impossibility of effecting services on all the persons requiring to be served by the *Partition Act*, 1868, or of serving them except at an expense disproportionate to the value of the property; and elaborate provisions are made in the next section, sect. 4, for cases where orders thus dispensing with service are made, and see as to the practice, *Phillips* v. *Andrews* (35 W. R. 266); the form of judgment in such a case is considered in *Pragnell* v. *Batten* (16 Ch. D. 360), where it was held that the Court ought not, in the absence of some of the parties interested, to preface its judgment with an expression of opinion that sale will be more beneficial than division. Order xvi. r. 40, of the rules of the Supreme Court, 1883, enables the Court to direct notice of judgment to be served in partition actions with the same effect as in administration actions.

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to the aliquot share of the complainant. Bispham's Eq. 4th Ed. Sec. 489.

[11] The lands of a decedent were sold by order of court in proceedings in partition and purchased by the husband of one of the heirs entitled to participate, who paid the purchase money except such portions as his wife was entitled to receive; this she released to the Master, who made a deed to the husband alone; it was held that a trust resulted in favor of the wife to the extent of her interest in said real estate. Bigley *v.* Jones, 4 Amerman (Pa.), 510.

Sect. 6 of the *Partition Act*, 1876, provides that a request for sale may be made by a married woman, infant, or person under disability. The request for sale by a married woman ought to be made by counsel instructed by a solicitor, formally authorised and requested so to do (*Grange* v. *White*, 18 Ch. D. 612, following *Wallace* v. *Greenwood* (16 Ch. D. 362), where *Crookes* v. *Whitworth* (10 Ch. D. 289) was dissented from). The request for sale by an infant may be made by his next friend or guardian *ad litem*, but will not be granted unless it is for his benefit (*Rimington* v. *Hartley*, 14 Ch. D. 630).

In *Leigh* v. *Dickeson* (12 Q. B. D. 194; 15 Q. B. Div. 60) the plaintiff was tenant in common of three-fourths of the property, and the defendant, who was lessee of the premises, purchased the interest in the remaining fourth. The plaintiff brought his action for use and occupation, and the question was, whether the defendant could counter-claim for money expended in reasonable and necessary repairs of the property. It was held that the plaintiff was entitled to recover, and that the defendant had no right of counter claim, his only remedy being in an action for partition.[12]

Costs.

Section 10 of the *Partition Act*, 1868, enables the Court to make such order as it thinks just respecting costs up to the time of the hearing. The general rule, as established by *Cannon* v. *Johnson* (L. R. 11 Eq. 90) and *Ball* v. *Kemp-Welch* (14 Ch. D. 512), is that the costs should be borne rateably by the parties in pro-
[★51] portion to their ★ interests as declared by the judgment. The Court however has a discretion on this point.

The costs of a partition action can only be taxed between solicitor and client by the consent of the parties, and in absence of such consent only party and party costs will be allowed (*Ball* v. *Kemp-Welch*, *ubi supra*); and see the cases collected in Seton on Decrees, 4th ed. p. 1018.

[12] A court of chancery will order an account where one joint owner appears to have received more than his share of the profits or rents. Leach *v.* Beattie, 33 Vt. 195. And in proper cases by decreeing an allowance for money expended in improvement. Dean *v.* O'Meara, 47 Ill. 120; Green *v.* Putnam, 1 Barb. (S. C.) 500; Hall *v.* Piddock, 6 C. E. Green, 314.

## *Merger of Charges.*

### ADAMS *v.* ANGELL.

(5 Ch. Div. 634.)

Principle.

*The question whether a charge which is paid off is merged depends on intention express or implied.*[1]

Summary of facts.

Angell mortgaged property first to Adams and then to Newsom. Adams obtained judgment for foreclosure against Angell and Newsom, and subsequently entered into an arrangement with Angell's trustee in bankruptcy by which, in consideration of £1380 retained by Adams in full satisfaction of his debt, and of £20 paid to the trustee, the mortgaged property was assigned to Adams, "subject to aforesaid claim" of Newsom. It appeared that the amount due to Adams was the full value of the property, and there was a correspondence between Adam's solicitors and the trustee in bankruptcy shewing an intention to keep the first mortgage alive. The Court of Appeal decided that there was no merger of Adams's mortgage.[2]

The general principles on which the Courts of equity have proceeded with regard to the question, whether charges which have been paid off are to be considered

[1] It is a settled rule of law, that where the legal and equitable title to land becomes vested in the same person the equitable title will merge into the legal title and further than this, the owner of the land also becomes the owner of the mortgage, the two titles will not generally remain alive and distinct but the title as mortgagee will merge and be swallowed up in the title as owner. Washburn on Real Property, Book 1, Chap. 16, Sec. 6. This is not an inflexible rule however, for it might in certain cases work great hardships for it is in certain cases beneficial for the owner that the mortgage be kept alive. See Cook *v.* Brightly, 10 Wright (Pa.), 439 ; Evans *v.* Kimball, 1 Allen, 240.

[2] A mortgage does not necessarily merge or become extinct by being united in the same person with the fee. When a person

as extinguished, are very fully stated in the judgment in the leading case.

[★52] ★In a Court of Equity, said Jessel, M.R., it has always been held that the mere fact of a charge having been paid off, does not decide the question whether it is extinguished.[3]

He then pointed out that two classes of cases required to be considered, (1) where the charge is paid off by a person having a limited interest, as it is called – *e.g.* an interest less than an estate of inheritance, of which the common case is a tenant for life; (2) where the charge is paid off by a tenant in tail or in fee. With regard to the first class of cases, the rule is, that if a charge is paid off by the limited owner, without any expression of his intention, he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit.[4]

On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it.[5] If there is no reason for keeping it alive then, especially in the case of an owner in fee, in the absence of any declaration of his intention, equity will destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. A charge may be expressly preserved. In the case of a purchase the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any.[6] If, with-

becomes entitled to an estate subject to the charge and keep up the charge. The question in such case is upon the intention, actual or presumed, of the persons in whom the estates are united. Bryan's Appeal, 1 Amerman (Pa.), 81.

[3] Equity will interpose and keep the two titles alive and distinct unless there is a direct intention in favor of the merger or an intention can be presumed from the fact that the merger would be for the advantage of the owner. Pike *v.* Gleason, 60 Iowa, 150; Hutchins *v.* Carlton, 19 N. H. 487; Moore *v.* Bank, 8 Watts, 138.

[4] If two estates come into the hands of the same person by operation of law and not by act of the parties, there will be no merger unless both the estates are held in the same right. A term held by the heir as executor of his ancestor, will not merge in the inheritance descending upon him. Coke Litt. 338 b. Challis on Law of Real Property, 65 (Text Book Series).

[5] Loomer *v.* Wheelwright, 3 Sand. Ch. 157; Den *v.* Brown, 2 Dutch, 196; Van Nest *v.* Latson, 19 Barb. (S. C.) 604.

[6] Evans *v.* Kimball, 1 Allen, 240.

out going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot and protects him. If no intention is expressed or implied, as in the leading case, then according to *Toulmin* v. *Steere* (3 Mer. 210) the incumbrance which is paid off is merged and the subsequent incumbrancers let in.[7]

In *Chambers* v. *Kingham* (10 Ch. D. 743), the law with regard to mergers in equity was considered with reference to a term of years. Chambers, acting as administrator for his father, granted an underlease of a term of years which belonged to him as administrator. Soon after the under lessee assigned all the residue of the term which had been thus granted to him to Chambers. The question was, whether the term was merged. The Court, in deciding that there was no merger in the present case, stated the general rule to be that where one of the interests is held *en autre droit*, no merger takes place.[8] I am bound, the judgment continued, to assume that the lease was well granted, and was for the benefit of the estate of which Robert Chambers the son was administrator; and if so, the extinction of that term, and with it the extinction of the right to the rent and to the performance of the covenants which were incident to that term, would be an injury to the estate, as it would deprive the estate of the benefit which it ★ was [★ 53] to derive from the lease. Of course, the judgment then pointed out that "if there were any circumstances which shewed that the lease had been improperly created, or that the assignment had been improperly taken by the administrator, a right would arise to the persons interested in the estate to set the transaction aside, or to claim the benefit of the lease in which the son had become interested. Such circumstances might have constituted the son a constructive trustee; but as no circumstances of the sort were shewn, the presumption was bound to be against merger."

In *Bell* v. *Sunderland Building Society* (24 Ch. D. 618), the trustee in bankruptcy of the mortgagor had purchased from the first mortgagee certain property which had been twice mortgaged, and the question was,

[7] Perry on Trusts, Sec. 347; Spence's Equity, 879, 880.

[8] At law, two estates cannot merge if either one of these estates is held *en autre droit*. Challis, Real Property, 67 Text Book Series.

how the rights of the second mortgagee (of whom no mention had been made in the deed of purchase) were affected by the transaction. It was held that the first mortgage was not extinguished, and that the right of the second mortgagee to redeem was also unaffected.

The doctrine of the Court of Equity as to merger has been elevated into peculiar importance by the provision in the 25th sect. of the *Judicature Act*, 1873, sub-sect. 4, that "there shall not, after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished by equity;" as well as by the general provision in sub-sect. 11 of the same section, that in cases of conflict the rules of equity shall prevail. And see Williams on Executors (8th edit. 647, *et seq.*), where it is pointed out that the effect of these enactments has been to render a great deal of the old learning on the subject obsolete.

See generally as to merger, notes to *Forbes* v. *Moffatt*, Tudor's Real Property Cases, 3rd ed. p. 943. The doctrine of *Toulmin* v. *Steere* (*ubi supra*), as pointed out at p. 964, would seem to be somewhat doubtful; see further on the subject of merger, *Watts* v. *Symes* (1 De G. M. & G. 240); *Otter* v. *Vaux* (2 K. & J. 650); *Hayden* v. *Kirkpatrick* (34 Beav. 645) (in all of which it was held there was no merger); *Belaney* v. *Belaney* (L. R. 2 Ch. 138), *Stevens* v. *Mid-Hants Railway Co.* (L. R. 8 Ch. 1064); and as to merger of lease in reversion *Lord Dynevor* v. *Tennant* (33 Ch. Div. 420).[9]

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[★54] ★*Charges of Companies.*

*In re* SOUTH DURHAM IRON COMPANY. SMITH'S CASE.

(11 Ch. Div. 579.)

*The principle that an unregistered mortgage or charge given by a joint stock company to a director or person standing in a fiduciary relation to the company cannot be enforced by him, depends upon a personal disqualification which will not be extended to the prejudice of the innocent.*

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Smith, the managing partner of the firm of Tay-

[9] William A. Springer's Appeal, 1 Amerman (Pa.), 274.

lor Smith Brothers, and a director of the South Durham Iron Co., Limited, advanced to the company £6000 out of the firm's money. Warrants for iron were deposited with him as security, but no entry whatever with regard to the security was made in the company's register of mortgages. The company went into liquidation, and the Court of Appeal held that Taylor Smith Brothers were entitled to avail themselves of the security.

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Section 43 of the Companies Act, 1862, requires every limited company under that Act to keep a register of and enter therein, all mortgages and charges specially affecting property of the company, with a short description of the property mortgaged or charged, the amount of the charge created, and the names of the mortgagee or persons entitled to such charges. A penalty not exceeding fifty pounds is imposed on "every director, manager, or other officer" of the company who "knowingly and wilfully authorizes or permits" the omission of such an entry in the register. *Companies Act*, 1862, s. 43.

In *In re International Pulp and Paper Company, Knowles' Mortgage* (6 Ch. D. 556), Sir George Jessel pointed out that the Act inflicted a penalty, a distinct and precise penalty and nothing else, that it was a well-known principle that when an Act of Parliament imposes a penalty on the doing or omitting to do a particular thing, that is the ★ only penalty, and that he considered that if the invalidation of the mortgage had been the penalty intended to be imposed, the Act would have said so. The Court, however, on this subject, to some extent assumed legislative action, and the general principle upon which they have proceeded in dealing with cases arising under this section is thus stated in the judgments of the Court of Appeal in the leading case. [★ 55 ]

"I understand," said Lord Bramwell, "the principle of the authorities to be, that where there is a director or officer of the company whose duty it is to see that mortgages or charges are registered, and he has a mortgage or charge which is not registered, there is a personal disability on his part which prevents him setting up that mortgage or charge."

The case by which this principle is established, or supposed to be established, is much discussed and

much criticised in the decision of the Court of Appeal in 1868 in *In re Patent Bread Machinery Co., Ex parte Valpy & Chaplin* (L. R. 7 Ch. 289). There a solicitor not usually employed by the company was employed to act in a particular matter, and on his requiring security for costs the company gave him a charge which was never registered. The Court of Appeal held the charge was invalid. James, L.J., said every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the legislature, and I am of opinion that the failure of the appellant to do so is fatal to his case. It makes no difference that he was not the regular solicitor of the company, he acted as their solicitor in this matter, it was therefore his duty to see that so far as this particular transaction was concerned, the register was properly kept.

Who, then, are they who have been considered by the Courts as in a fiduciary position to a company within the meaning of this Act?

Directors.

The case of directors themselves was considered in *In re Wynn Hall Coal Co., Ex parte North and South Wales Bank* (L. R. 10 Eq. 515), where it was decided that they ought not to be allowed to set up an unregistered charge against the general creditors. The object of the section, said the Court, is, that a person who is about to have any dealings with a limited company may go and inspect the register of mortgages and charges; if he finds the property of the company heavily encumbered, he will probably not have any dealings with them, but if he finds no mortgage or charge registered, he deals with the company as the owners of unincumbered property.

It cannot be permitted that directors, who get a charge on the property of the company, and omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors.

Bankers.

In *In re Native Iron Ore Co.*, (2 Ch. D. 345). it was held that a debenture given to directors which had been registered, omitting that which was regarded by the Court as the essence of the transaction, viz., a description of the property intended to be charged, was invalid.

In *In re General Provident Assurance Co.* (L. R. 14 Eq. 507), it was held that bankers were not bound to [★ 56] see that the formalities ★ required by the articles of association upon the execution of mortgage deeds were complied with and their securities were valid.

Shareholders holding debentures were held to be in a similar position, as they had no control over the books, and no duty to perform as to registration. *In re General South American Co.* (2 Ch. Div. 337). Share-holders.

In *In re Borough of Hackney Newspaper Co.* (3 Ch. D. 669) a company had mortgaged property to two of its directors, who instructed their secretary to register the mortgage, and furnished him with the necessary particulars, but he subsequently refused to do so. Jessel, M.R., decided that the directors had done all they could. That they had not "knowingly and wilfully authorized or permitted the omission of the entry on the registry, and accordingly the charge was not invalid."

In *In re International Pulp and Paper Co., Knowles' Mortgage* (6 Ch. D. 556), a company had mortgaged freehold and leasehold property to Knowle, one of its directors, who afterwards sub-mortgaged to Haworth, a stranger. The company never kept any register of mortgages or charges, and consequently neither of the securities in question was ever registered. In this case Sir George Jessel, confessing his inability to form any notion of the principle upon which the cases of *Ex parte Valpy & Chaplin* (*ubi supra*) and *In re Native Iron Ore Co.* (2 Ch. D. 343) were decided, and declining to extend it in any way, gave judgment in favour of the validity of the charge. The *Companies Act*, he said, imposed a penalty "not exceeding £50," but here he was asked, on the authority of the decision of the Court of Appeal, to practically impose a penalty of £17,500, by holding that the penalty for omission to register was to be the loss of the security. Principle not extended.

He then (p. 561) proceeded as follows:—"If there is any principle at all in those decisions (*Ex parte Valpy & Chaplin* and *In re Native Iron Ore Co.* (*ubi supra*)), it is not that want of registration makes the mortgage void—Lord Justice James in *Ex parte Valpy & Chaplin*, admits that it does not—but that there is some personal equity against a director or officer of a company which prevents him from setting up such a mortgage himself; but as I understand, that principle, if it exists at all, does not apply to any person claiming through a director or officer, but only to the director or officer himself. In this case the director was in reality nothing more than a bare trustee, having submortgaged to Haworth. Why Haworth should have his security destroyed because Knowle omitted to have his mortgage registered, I am at a loss to understand.

Haworth was neither a director nor an officer of the company, and the Court of Appeal has decided that it is only a director or officer who cannot set up an unregistered mortgage against the creditors of the company. The cases referred to are therefore not applicable to Haworth."

In the leading case (11 Ch. Div. 579) the same judge expressed a similar disinclination to extend in any way the principle of *Ex parte Valpy & Chaplin.*

"Is not there," he asked, "a principle of equity that [★ 57] you shall not ★ extend a personal disqualification to the prejudice of the innocent? I have always considered that equity sets itself most emphatically against forfeitures and penalties being imposed unless they are imposed in the most direct and unequivocal manner, and I have always considered it to be a principle of equity that where there is a personal equity attaching to a man in relation to property, it is not, as a rule, to affect innocent parties." In this case the loan to the company was by one of its own directors, who was also a partner in the firm advancing the money, and the argument of inconvenience derived from the consequences which might arise if a loan made by one of a partnership or company were to be invalidated by reason of the non-registration arising from default of a director or partner is thus forcibly stated in the same judgment "If one of those companies were to lend money to an incorporated company with limited liability, and it turned out that one of their shareholders was one of the directors of the borrowing company, it would appear very unjust that a man who held perhaps a one-hundred-thousandth part of the property of the lending company should, by his omission as manager or managing partner of the borrowing company, destroy the security in the hands of the lending company. The same question would arise in the case of joint stock companies formed under the Act of 1862 if the lender company had a director who happened to be also a director in the borrowing company, but the rule would not apply to a shareholder, for a shareholder in these incorporated companies has no share in the management. This argument from convenience is not to be forgotten, and it makes me the more prepared to hold with the Vice-Chancellor that the decisions with regard to personal disqualifications are not to be extended to cases of partnership."

In Buckley's Companies Acts, p. 148, a variety of other possible "puzzles" are suggested, and the learned

author expresses a doubt whether in any case which can in any reasonable manner be distinguished from the earlier cases, the principle of those cases will be applied. This observation would seem to be most abundantly justified by the latest authorities on the subject, which we shall now proceed to notice.

Recent decisions.

In the recent case of *In re The Dublin Drapery Co., Limited, Ex parte Cox and others* (13 L. R. (Ir.) Ch. D. 174), the previous authorities on the subject were considered, and it was held that when the regular solicitors of the company, who had no authority or power to make or compel entries, had done their duty, communicating to the directors the necessity and the obligation they were under to keep a register, they were free from any such "personal equity" as in *Ex parte Valpy & Chaplin* (*ubi supra*), which would invalidate securities given to them. The same case is also an authority for the proposition that if securities tranferable by delivery (and *semble* any securities) have been properly registered when originally issued, subsequent transfers need not be registered. The moment, said the Master of the Rolls, the amount of it, and of the name of the party to whom ★ it is issued is registered, [★ 58] that moment everything which is required by the 43rd section has been done.

In *In re Underbank Mills Company* (31 Ch. D. 226), a company in 1874 gave a mortgage for seven years to a partnership consisting of three persons, of whom two were directors of the company. It was never registered, and in 1876 the non-director partner assigned his interest to the other two. In 1881 an arrangement was entered into to continue the mortgage for another seven years, and the attention of the directors having been drawn to the fact that the mortgage ought to be registered, the secretary made a proper entry in a book which was marked "Register of Transfers." The Court decided that the mortgage was sufficiently registered, as the registration did not require to be made in a separate volume; that it was entitled to the same priority as if a new mortgage had been executed in 1881; and further, that even if there had been no registration the mortgage would have been valid, as it had been originally made to partners, one of whom was not a director. "I am glad," said Pearson, J., "to find that the Court of Appeal has not carried the doctrine of the earlier cases on this subject any further, and I do not desire to extend it to any state of circumstances which is not covered by previous decisions."

Debentures and mortgages.

The subject of debentures and mortgages created by joint stock companies has been recently considered in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (29 Ch. D. 715), where the previous authorities are reviewed. In that case it was decided that a mortgage on specific property had priority over the "floating security" of debentures. See *In re Colonial Trusts Corporation, Ex parte Bradshaw* (15 Ch. D. 465), where the mortgage purported to charge the undertaking, hereditaments and effects of the company. And see *Ross* v. *Army and Navy Hotel Company* (34 Ch. Div. 43), where "a covering deed" was held to create an equitable charge.

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[★59]

## ★ *Investment Trust.*

### SMITH *v.* ANDERSON.

(15 Ch. Div. 247.)

Principle.

*A trust investment association consisting of more than twenty persons formed for the purpose of contributing funds to be invested and managed by trustees for the benefit of the association does not require registration under section 4 of the Companies Act*, 1862.

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Summary of facts.

The Submarine Cables Trust was constituted by a deed between six trustees and a covenantee "for and on behalf of all the holders for the time being of the certificates thereinafter mentioned." A number of persons had subscribed for the purchase by the trustees of shares in certain submarine telegraph companies, and each subscriber of £90 received a certificate for £100 nominal and a "coupon of reversion." The trustees were to apply the annual proceeds of the securities after payment of expenses in payment of interest on the nominal amount of the certificates, and apply the surplus in redeeming the certificates. The trustees had also a power exercisable only in certain events, to sell any of the shares, and the proceeds were to be applied in the

same manner as the surplus income, unless the trustees by an unanimous resolution, confirmed by the certificate holders at a specially convened meeting, determined to reinvest in similar securities. As soon as all the certificates were redeemed the securities were to be realised and the net proceeds divided proportionally among the holders for the time being of the coupons of reversion. The certificate holders were more than twenty in number, and an ★ action [★ 60] was brought by one of them on behalf of all the rest, alleging that the association was illegal and claiming to have the funds distributed proportionally among the certificate holders. The Court of Appeal (reversing the decision of Jessel, M. R.) dismissed the action.

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In this case the Court of Appeal reversed the decision of Sir George Jessel and disapproved of his previous decision in *Sykes* v. *Beaden* (11 Ch. D. 170), and held that the association in question not requiring registration under the *Companies Act* was consequently legal, and that an action to wind it up could not be maintained.

The 4th section of the *Companies Act*, 1862, on which the question turned, provides that no company, association, or partnership, unless it be formed for the purpose of carrying on the business of banking or is "formed in pursuance of some other Act of Parliament or of letters patent, consisting of more than twenty persons, shall be formed after the commencement of this Act, 2nd November, 1862, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof (*a*) unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

*Companies Act*, 1862, s. 4.

The Court of Appeal first considered the general aim and scope of this enactment. It was, they said, intended "to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies so that persons dealing with them did not

Aim of the Act.

know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed." They then pointed out the essential distinction, between a company or association and an ordinary partnership. "An ordinary partnership," said Lord Justice James, "is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of new partnership, and with the intention that so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership." (See further on the differences between partnerships ★ and joint stock companies the celebrated judgment of the same judge in *Baird's Case* (L. R. 5 Ch. 25).

Distinction between company and partnership.

[★61]

In the present case the management of the affairs of the association was vested in trustees, and here it became necessary to consider the broad and essential distinction founded on the very nature of things between the position of a director and that of a trustee. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. (See as to the personal liability of directors, Buckley on the Companies Acts, pp. 444 *et seq.*, and *West London Commercial Bank, Limited*, v. *Kitson* (13 Q. B. Div. 360), where directors were held personally

Distinction between director and trustee.

liable on an acceptance, on the ground of having falsely represented that they had authority to accept on behalf of the company.

Supposing, then, said the Court of Appeal, that what is to be done here is to be done by the trustees, is what the trustees are to do under this deed the carrying on a business? On this point they held that nothing that was to be done under this deed by the trustees came within the ordinary meaning of "business" any more than what is done by the trustees of a marriage settlement who have large properties vested in them and who have very extensive powers of disposing of the investments, changing the investments and selling them, and reinvesting in other investments according to their discretion and judgment, with or without the consent of the *cestuis que trust* could be said to constitute a business. The deed in question was merely a trust deed of property for investment, the investment being spread over a number of different securities so as to enable persons who choose to invest their money in this way to avail themselves, in the words of James, L.J., of "the doctrine of averages," (that is to say) that if a large number of different independent securities of a hazardous description were held together the loss upon some would be compensated by the gain on the others, so that a tolerably uniform average rate of interest would be obtained. The Court took care to point out that if the real object of the deed was that the trustees should speculate in investments even though confirmed in the particular class of investments specified, the case would have stood in a very different position. Here, however, there was nothing of that sort.

The trustees were not to enter upon a series of acts which if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered ★ into their [★62] hands in specified securities with power to vary those securities, but only in certain events and under special circumstances, and not for the purpose of obtaining gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares, buying and selling whenever in their opinion the terms of the market might make it advisable. That was not their business. There was no reason why when they had once made an investment it should under ordinary circumstances ever be changed. Consequently the primary and substantial object of their associating together was not for the purpose of

carrying on a business which if successful would result in the acquisition of gain.

Land society.

In *Wigfield* v. *Potter* (45 L. T. N.S. 612) an unregistered freehold land society had for its objects to purchase an estate, subdivide it into allotments, and then offer the allotments by auction to its members. The Divisional Court decided (following the leading case of *Smith* v. *Anderson*) that the society was legal. Grove, J., in delivering judgment, said: "The sole question here is whether this society is an association for the purpose of carrying on a business that has for its object the acquisition of gain, and I am of opinion that it is not such an association. I read the word 'business' in the usual sense in which we use it when speaking in an ordinary way, as trafficking and having for an object the acquisition of gain by buying and selling, and I think it was so used in the case of *Smith* v. *Anderson*." The judge then expressed an opinion that had this been a society for the purprse of buying and selling at a profit, or buying large pieces of land and then breaking them up into plots and selling them at a profit, that would have been a carrying on of business within the meaning of the section, but this did not appear to be the object of the society. "I do not mean to say," he continued, "that they might not have made a profit, but it does not appear to me that there is any contemplation here that the purpose of the society was to make a profit. In one sense it may be said that they made a profit, inasmuch as they might get the land at a less price, but that is not to my mind carrying on a business within the meaning of the Act, but merely an advantage obtained in acquiring for themselves what they wanted to acquire"

In *Crowther* v. *Thorley* (32 W. R. 330) an unregistered land society was held to be legal, though the trustees were carrying on a business for the acquisition of gain, the Court considering that the business was carried on by them as trustees and not as agents of the society.

Loan society.

It was held, on the other hand, in *In re Thomas*, *Ex parte Poppleton* (14 Q. B. D. 379), distinguishing *Crowther* v. *Thorley* (*ubi supra*), that a loan society which had originally consisted of only seven persons subsequently increased to over twenty, required registration, although its business was carried on and managed by a committee of seven members of the society as its agents.

In *In re Padstow Total Loss, &c., Assurance Associa-*

*tion* (20 Ch. Div. 137), in which Brett, L.J., in page 148, retracted some observations made in *Smith* v. *Anderson* with regard to mutual insurance companies, ★ the Court of Appeal decided that a mutual marine insurance association which had not been registered under the *Companies Acts* could not be recognized by the Court as having any legal existence, and could not consequently be wound up under the *Companies Acts.*

Mutual Marine Insurance Company. [★ 63]

The two points which had to be decided were: first, whether it was a company carrying on business ? secondly, whether its object was the acquisition of gain ? The first point was decided in the affirmative on the ground that the members guaranteed the making up of losses, that the society was intended to go on from year to year and last for many years, and that it was governed by a committee who managed the affairs on behalf of all the members. The second point was also decided in the affirmative, that though the object of the association was not the acquisition of gain by the association itself, still its object was the gain of the individual members.

In *Jennings* v. *Hammond* (9 Q. B. D. 225), a number of persons exceeding twenty had formed themselves into a society, the object of which was to raise a fund for the purpose of making advances to members; the fund was put up for auction periodically among the members, and the highest bidder received the amount on loan. It was held that this society required registration. "It is true that the business of the association is not to lend money generally, but primarily at least only to members of the association, but *In re Padstow Total Loss, &c., Assurance Association* (*supra*) shews that that makes no difference. Those members of the association who are anxious to obtain loans will bid against one another for the money which is put up for sale in accordance with the rules, and the purchase money will be the source of gain to the individual shareholders. The association is therefore one which is forbidden by the 4th section of the *Companies Act.*"

In *Shaw* v. *Benson* (11 Q. B. Div. 563), the question was whether a trustee of an unregistered loan society consisting of more than twenty members, one of the objects of which was to lend money to its shareholders, could recover on a promissory note which he held as security for moneys advanced by the society. The Court of Appeal held that the society was illegal for want of registration. and that as the trustee could not

stand in a better position than the society, he could not recover.

In *In re Siddall* (29 Ch. Div. 1) the question whether a freehold land society, being an association of more than twenty persons formed for the purpose of purchasing land, was illegal, came before the Court of Appeal in a somewhat singular manner. The point involved was whether one of the trustees having become a lunatic, the Court could lend its assistance by making an order vesting the property in new trustees, and thus the legality of the association came to be considered. The Court decided, following the authority of *Crowther* v. *Thorley* (*ubi supra*), that the association did not require registration.

Certificate of incorporation.

Sect. 18 of the *Companies Act*, 1862, provides that a certificate of the incorporation of any company, given by the registrar, shall be ★ conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

[★64]

It is, however, of no avail with regard to the question whether the company was authorized to be registered: *In re Northumberland and Durham District Banking Co.* (2 De G. & J. 371); *In re Hercules Insurance Co.* (L. R. 11 Eq. 321).

Non-registration of Companies formed before and after the Act of 1862.

With regard to companies formed before the Act, the certificate of incorporation given at any time is to be conclusive evidence that all the requisitions in respect of legislation have been complied with, that the company is authorized to be registered under the Act as a limited or unlimited company, and as to the date of incorporation. Companies formed after the commencement of the Act, and required to register under this section, are, unless registered, illegal; companies formed *before* the commencement of the Act, and required by sect. 209 to register under it, are not illegal, unless registered, but, until registration, are subject to the penalties imposed by sect. 210. Buckley's Companies Acts, p. 4.

## *Mistake of Law.*

### ROGERS *v.* INGHAM.

(3 Ch. Div. 351.)

*The Court will not relieve against a payment of money under mistake of law unless there be some equitable ground which renders it inequitable that the party who received the money should retain it.*[1]

An executor took the opinion of counsel with regard to the construction of a will, and was advised that a legatee was not entitled to certain interest which had been paid to her. The legatee also took the opinion of her counsel, which was to the same effect. The executor then divided the estate in accordance with these opinions. Two years afterwards the legatee commenced an action submitting another construction of the will and claiming repayment on that basis, but it was held that such an action could not be maintained.[2]

★ The judgments of the late Lord Justices James and Mellish in this case contain probably the best statement which is to be found in any of the books of the principles upon which the Courts proceed in relieving or declining to relieve on the ground of mistake of law. The Court of Appeal upheld the decision of the late Vice-Chancellor Hall, to the effect that it was too late in the day to consider the question whether a proper [★65]

[1] The general rule both of the common law and in equity is that a mistake of law is no ground for relief. Mellish *v.* Robertson, 25 Vt. 603; Chaplin *v.* Laytin, 18 Wend. 407; Peters *v.* Florence, 2 Wright (Pa.), 94; Goltra *v.* Sansack, 53 Ill. 456; Glenn *v.* Statler, 42 Id. 107. A mistake in regard to individual rights may in certain cases be redressed. Matlock *v.* Glover, 63 Texas, 231.

[2] Hunt *v.* Rousmainer's Executors, 8 Wheaton, 174.

construction had been put upon the will, and that the plaintiff could not be relieved on the ground that there was a common mistake of law.[3]

"No authority whatever," said Lord Justice James, "has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another with perfect knowledge of all the facts common to both merely because it was said that the claim to the money was not well founded in point of law.[4] Of course cases of that kind must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded.

"No doubt there are some cases which have been relied on in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court, but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever and no equity to supervene by reason of the conduct of either of the parties."

Cases where repayment has been ordered.

Lord Justice James then considered the cases cited in argument on which money had been ordered to be repaid. In the old case of *Bingham* v. *Bingham* (1 Ves. Sen. 126), a man was held entitled to get back money which he had paid by mistake for a conveyance of land which was really his own. With regard to the case of *Davis* v. *Morier* (2 Coll. 303), where a trustee had by mistake retained trust money in his possession, and the Court, considering that this might be a case for some relief, had ordered an inquiry into all the circumstances, Lord Justice James observed as follows: "That is the nearest case that I have been able to find to the case now before us, but that case is far from establishing the proposition contended for, viz. that the Court would grant relief if it could be shewn that the money was paid under a mistake of law. If that proposition were true in respect of this case it must be true in respect of any case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and

[3] If the mistake is encouraged or induced by misrepresentation of the other party then equity will grant relief. Whelan's Appeal, 20 P. F. Sm. 425, Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Hardigree *v.* Mitchum, 51 Ala. 154.

[4] Money paid under a mistake of law cannot be recovered. Haven *v.* Foster, 9 Pick. 112; R. R. Co. *v.* Soutter, 13 Wallace, 524; Pinkham *v.* Gear, 3 N. H. 163; Ege *v.* Kontz, 3 Barr. 109.

evil in cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them have knowledge of all the facts and having given a release. The thing has never been done, and it is not a thing which in my opinion is to be encouraged. Where people have a knowledge of all the facts and take advice, and whether they get proper advice or not, the money is divided and the business is ★ settled it is not for the good of mankind [★ 66] that it should be reopened by one of the parties saying: You have received your money by mistake. I acquiesced in your receipt of it under that mistake, and therefore I ask you to give it to me back." To this Lord Justice Mellish added that he had no doubt that, as laid out in the case of *Stone* v. *Godfrey* (to which we shall immediately refer), the Court had power to relieve against mistakes of law if there was any equitable ground which made it, under the particular facts of the case, inequitable that the party who received the money should retain it.

Erroneous legal advice.

In *Stone* v. *Godfrey* (5 De G. M. & G. 76) the plaintiff had been advised by counsel that he was not tenant by the curtesy, and acting upon that advice he concurred with his daughter (then an infant) in a partition suit. The advice was subsequently ascertained to be erroneous, and the father commenced an action to be relieved on the ground of mistake. The Court considered that he was barred by his own conduct and laches, but both of the Lords Justices rested their judgments upon that alone: and L. J. Turner expressly said, that he felt no doubt that the Court had power to relieve against mistakes in law as well as against mistakes in fact. (Per Lord Hatherley, then V. C. Wood, *Re Saxon Life Assurance Society* (2 J. & H. 408–412)). In *Re Saxon Life Assurance Society, ubi supra* (affirmed on appeal, but on different grounds, 1 De G. J. & S. 29), an arrangement had been carried out by which one insurance company purchased the business, received the assets, and undertook the liabilities of another insurance company, and a creditor of the latter company, believing the arrangement to be valid, cancelled a certain security which he held from the first company and accepted in lieu of it the security of the second. There was a common mistake of law in the transaction, and it was subsequently discovered that the arrangement was void. The creditor then claimed successfully to be ad-

mitted to his former rights against the first company. Lord Hatherley (then Sir W. Page Wood) in delivering judgment in his favour, said: "A question has sometimes arisen how far this Court can interfere to rectify a mistake in law; but, having regard to all the authorities, and especially to *Stone* v. *Godfrey*, I have no doubt of the jurisdiction." See as to payments made by executors *bonâ fide* under a mistake of law, *In re Hulkes*, *Powell* v. *Hulkes* (33 Ch. D. 552), where it was held that under the circumstances of the case the executors were not liable for interest. It must be borne in mind that the Court in applying the maxim *ignorantia juris neminem excusat*, in relieving against mistakes of law, draws a distinction between *jus* in the sense of law and *jus* in the sense of private right or title.[5] *Cooper* v. *Phibbs* (L. R. 2 H. L. 149); *Earl Beauchamp* v. *Winn* (*post*, pp. 68, 71). The result of the authorities would seem to be that with regard to mistakes of law in the ordinary sense of the term there is no relief unless there be a fiduciary relation or some equity by reason of the conduct of one of the parties.[6]

Payment by an executor under mistake of law.

Payment under mistake to officer of the Court.

Trustee in bankruptcy.

[★ 67] The Court, however, feels no such difficulty in affording relief where by mistake of law money has been paid to its own officer. In *Ex parte* ★ *James*, *In re Condon* (L. R. 9 Ch. 609) a trustee in bankruptcy was ordered to repay money. Lord Justice James in delivering judgment said: "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."[7]

The principle of *Ex parte James* (*ubi supra*), which was characterised by Lord Esher in *Ex parte Simmonds* (16 Q. B. Div. 308) "as a good, a righteous, and a wholesome principle," was extended in the latter case,

[5] Kerr on Mistake and Fraud, Bump's Ed. 398.

[6] Chaplin *v.* Laytin, 18 Wendell, 407, Hoover *v.* Reilly, 2 Abb. U. S. 471; Hampton *v.* Nicholson, 8 C. E. Green, 427.

[7] A Court of Chancery will sometimes grant relief in cases where the law is confessed by doubtful and ignorance may be supposed to exist. Reservoir Co. *v.* Chase, 14 Conn. 123, Martin *v.* N. Y. S. & C. R. R. 36, N. J. Eq. 109.

and the rule was laid down that a trustee in bankruptcy who has received money paid him by mistake will be ordered to refund it not only out of money in his hands, but will also be ordered to repay it out of other moneys afterwards coming to his hands applicable to the payment of dividends to the creditors.

"The Court," said Lord Esher, "will direct its officer to do that which any high-minded man will do, not to take advantage of the mistake of the law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of the Court of Common Law the Court would order him to repay it so soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it." In *In re Brown, Dixon* v. *Brown* (32 Ch. D. 597), where trust money in the hands of a trustee had been paid to his trustee in liquidation by mistake of law, it was held, on the analogy of *Ex parte James* and *Ex parte Simmonds* (*ubi supra*), that the Chancery Division had power to order him to refund it. On this point the Judge expressed himself as follows: "I have no doubt or hesitation in saying that a Court of the Chancery Division does not consider itself bound to act on principles less honest than the Court of Bankruptcy; and if this money was really paid to the trustee in the liquidation in mistake of law, I have no hesitation in saying that he must repay it, and if any order of the Court of Bankruptcy were necessary for that purpose, I presume the Court would make such order."

See as to repayment of money borrowed under a mistake of law, *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (29 Ch. Div. 902, 910).

[★68] ★ *Mistake of Fact*

## COOPER *v.* PHIBBS.

(L. R. 2 H. L. 149.)

Principle. *Where a contract is entered into bonâ fide under a mutual mistake of fact, either party is entitled to be relieved from it.*[1]

Summary of facts. Phibbs, acting as trustee for the daughters of Edward Joshua Cooper, agreed to grant a lease of a salmon fishery to Edward Cooper for three years. Both parties were in complete ignorance of the true state of facts, which was that Edward Cooper was entitled as tenant for life to the salmon fishery, and that the daughters of Edward Joshua Cooper had no beneficial interest whatever in it. The House of Lords decided that the agreement must be set aside, but that the personal representatives of Edward Joshua Cooper were entitled to a lien on the fishery for money which had been expended by him for its benefit and improvement.

The facts in this remarkable case are somewhat complicated. The former tenant for life having become a lunatic and application having been made in his lifetime for Parliamentary powers to improve and develop the salmon fishery, an Act for those purposes was passed shortly after his decease. The Act recited that the fishery in question had descended to and was vested in Edward Joshua Cooper as heir-at-law of the lunatic. As a matter of fact Edward Joshua Cooper was only entitled to the fishery under a settlement which gave him a life interest with remainder to his heirs male,

[1] In Ludington *v.* Ford, 33 Mich. 123, the Supreme Court said that a mistake in order to be relieved must be an error on both sides. "The mistake of fact, in order to be relieved must be one that is mutual, material and not indueed by negligence." Bispham's Eq. 4th Ed. 191; Paulinson *v.* Van Iderstine, 28 N. J. Eq. 306.

and as he died without male issue, the fishery, under the settlement, devolved upon Edward Cooper and his heirs male. The result, as stated in the judgment of the Law Lords (pp. 164, 170), was that when Edward Cooper entered into the agreement to take the lease, he agreed to take a lease of what was in truth his own property, "the parties dealt with one another under a mutual mistake as to their respective rights. Edward Cooper did not suppose that he was, what in truth he was, tenant for life of the ★ fishery. The other parties [★ 69] acted upon the impression given to them by their father, Edward Joshua Cooper, that he was the owner of the fishery, and that the fishery had descended to them."

"In such a state of things," said Lord Westbury, "there can be no doubt of the rule of a Court of Equity with regard to the dealing with that agreement. It is said, '*Ignorantia juris haud excusat;*' but in that maxim the '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

The House of Lords accordingly, reversing the decision of the Court below, set aside the agreement, but in so doing they proceeded upon the principle that it is the duty of a Court of Equity to deal with the whole of the subject matter, and once for all to dispose of the rights and interests of the parties concerned. The expenditure upon the property, they held, constituted a lien, a charge in the nature of a mortgage charge.

Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge,[2] *per* Fry. J., *Willmot* v. *Barber* (15 Ch. D. 96, 106).

In connection with the subject of mistake it becomes necessary to consider the subject of "Ratification,[3] set- Rectification.

[2] If however, the mistake is the result of the person's own negligence equity will not grant relief. Lewis *v.* Id., 5 Oregon, 169; Smith *v.* Wheeler, 58 Iowa, 659; Susquehanna Mut. Fire Ins. Co. *v.* Swank, 102 Pa. St. 17.

[3] If the intention is erroneously expressed in the instrument the proper relief is secured by correction, and if the intention is founded on error rescission is the proper remedy. Hurd *v.* Hall, 12 Wis. 112.

ing aside and cancellation of deeds or other written instruments," which is by sect. 34 of the *Judicature Act*, 1873, specially assigned to the Chancery Division.

Remedies in cases of mistake.

It was held in *Paget* v. *Marshall* (28 Ch. D. 255) that in cases of mutual mistake the remedy is rectification. In cases of unilateral mistake the remedy is rescission of the contract, but the Court may, instead of rescinding the contract, give the defendant an option of taking what the plaintiff intended to give him. In this case the Court decided that the plaintiff was not entitled to any costs because he made a mistake, and that the defendant, on the other hand, should not be allowed any costs, because his opposition had been unreasonable, unjust, and unlawful.

In *Caird* v. *Moss* (33 Ch. Div. 22) the Court of Appeal dismissed an action to have an agreement rectified.[4] The ground on which they proceeded was that the agreement had been already worked out and the fund distributed under a judgment in the Palatine Court. They held, however, that there was no estoppel of the cause of action on the ground of *res judicata* as the question of rectification had not been before the Palatine Court.

In *Tucker* v. *Bennett* (34 Ch. D. 754), where there was a marriage settlement drawn up without any reference to the intended wife, who had not been informed of its terms, containing a covenant to settle after-acquired property on the wife for life, after her decease [★70] ★on the issue of the marriage, and in default of issue on her next of kin as if she had died intestate and without having been married. The Court rectified the settlement by giving her a power of appointment by will, in the event of her dying in the lifetime of her husband, over the after-acquired property and an absolute property in the event of her surviving.

Practice.

The usual practice, which was followed in this case, is to endorse the rectifying order of the Court on the instrument rectified.

It was held in *Olley* v. *Fisher* (34 Ch. D. 367) (citing Fry on Specific Performance, 2nd ed. pl. 799) that the Court has, since the *Judicature Act*, jurisdiction in every case in which the *Statute of Frauds* is not a bar,

[4] Where mistakes have been corrected in equity by "correction," see Mills *v.* Lockwood, 42 Ill. 111; Hamilton *v.* Asslin, 14 S. & R. 448; Loss *v.* Obry, 7 C. E. Green, 52; Waterman *v.* Dutton, 6 Wis. 265; Glass *v.* Hulbert, 102 Mass. 34; Rigsbee *v.* Tress, 21 Ind. 227; Hathaway *v.* Brady, 23 Cal. 475; Scales *v.* Ashbrook, 1 Metcalfe (Ky.), 358.

to rectify a written agreement upon parol evidence of mistake, and to order specific performance of the rectified agreement in the same action. See *Pearson* v. *Pearson* (27 Ch. Div. 145, 148, 149), where parol evidence was admitted on a counter-claim for rectification.

The jurisdiction of the Court to rectify a settlement[5] is not excluded by the fact of its having been enrolled under the *Fines and Recoveries Act* (3 & 4 Wm. IV. c. 74), *Hall Dare* v. *Hall Dare* (31 Ch. Div. 251.)

Setting aside release.

The question whether a release could be set aside on the ground of a mistake[6] was much discussed in *In re Garnett, Gandy* v. *Macauley* (31 Ch. D. 1). Two ladies who were entitled to quarter shares in a residuary personal estate, valued at the time of passing the residuary account at £42,000, executed a release to the trustee of the will in consideration of the receipt of £10,500 each. The residuary estate consisted principally of stocks and shares, which had greatly increased in value and one quarter share of which was at the time of the release worth much more than £10,500. The release had been drawn up by the trustee's solicitor, and the ladies had had no independent advice. It was held that the release was invalid and must be set aside. And see *Turner* v. *Turner* (14 Ch. D. 829), where it was laid down that general words in a release are limited always to that thing which was especially in the contemplation of the parties at the time when the release was given, but that a dispute that had not emerged, or a question which had not at all arisen, could not be considered as bound and concluded by the anticipatory words of a general release.[7]

The principles on which the Court proceeds in enforcing or declining to enforce specific performance in cases of mistake were carefully considered in *Tamplin* v. *James* (15 Ch. Div. 217). In that case, property consisting of an inn and saddler's shop was offered for sale. It was accurately described in the particulars of sale as consisting of closes numbered on the tithe map, and correct plans were exhibited in the sale-room. The

[5] Where there is error in a settlement, and anything is given in consequence of such error or mistake, equity will relieve. Barnett *v.* Id., 6 J. Marsh, 499. See however, Bispham *v.* Price, 15 How. (U.S.) 162.

[6] See Glenn *v.* Statier, 42 Iowa, 110; also, Snyder *v.* Ives, 42 Id. 162.

[7] Kerr on Fraud and Mistake, 296, says: "The right to impeach a transaction on the ground of fraud may be lost by confirmation, by release, by acquiescence or by delay."

purchasers bought in the mistaken belief that the property included two pieces of garden ground which had for many years been occupied with the inn and shop. The Court of Appeal held, affirming the decision of the Court below, that the purchaser could not resist specific performance on the ground of mistake.

James, L.J., in delivering judgment in *Tamplin* v. *James* (*ubi sup.*), said that the majority of the cases [★ 71] in which the defendant had escaped ★ from specific performance by reason of a mistake to which the plaintiff had not contributed were cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and where it was therefore unreasonable to hold him to it, and intimated an opinion that the Courts had gone too far in such cases, see *Malins* v. *Freeman* (2 Keen, 25), where the Court refused to order specific performance of a purchase at an auction where the purchaser had mistaken the lot, and cases collected in Fry on Specific Performance, 2nd ed. p. 326). "If," he said, "a man will not take reasonable care to ascertain what he is buying, he must take the consequence. . . . It is not enough for a purchaser to swear 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all;' or, 'I thought it contained 100 acres, and it only contains 80.' It would open the door to fraud if such a defence was to be allowed."

The following passage from the judgment in *Swaisland* v. *Dearsley* (29 Beavan, 430) was cited in this case with approval as containing a correct statement of the law. "The principle on which the Court proceeds in cases of mistake is this—if it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him.[8] If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about."

Principle on which the Court acts.

A leading case on the subject of relief on the ground of mistake is *Beauchamp* v. *Winn* (L. R. 6 H. L. 223).

Relief on ground of mistake.

[8] Adams' Equity, page 85, and James *v.* State Bank, 17 Ala. 67; Yancy *v.* Green, 6 Dana, 444; Morss *v.* Elmendorf, 11 Paige, 277.

In this case the House of Lords stated the law to be that where in the making of an agreement between two parties there has been a mutual mistake as to their rights occasioning an injury to one of them, the Court is disposed to grant relief, and will not, if a clear case is established, decline to grant relief merely because on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition. Acquiescence in what has been done will not "operate as an equitable estoppel," to use the phrase employed by Lord Chelmsford, p. 235, or, in other words, will not be a bar to relief where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he has permitted to be enjoyed.

Money paid under mistake of fact.

The question of the recovery of money which had been paid under mistake of fact, was very recently discussed in a case in the Privy Council, *The Colonial Bank* v. *The Exchange Bank of Yarmouth, Nova Scotia* (11 App. Cas. 84). The Colonial Bank was under instructions to remit a sum of money to a bank at Halifax, but their agent being misled by certain ambiguous instructions the money came ★ into the possession of [★ 72] a wrong bank, who claimed it in reduction of Rogers' account with them. The Privy Council held, reversing the decision of the Nova Scotian Court, that the plaintiffs had such an interest in the fund as entitled them to recover. "When," the Privy Council said, "the defendants were told that a mistake was made, an equity was fastened upon them not to alter the position of the fund until the mistake could be repaired, and on the 19th of May, 1879, when they knew exactly how the mistake was made, and how in the opinion of all parties to the transaction they could repair it, they were bound to repair it."[9] And see *Durrant* v. *The Ecclesiastical Commissioners* (6 Q. B. D. 234), where it was held that the plaintiff was not disentitled to recover on the ground of laches.[10]

In the recent case of *Daniell* v. *Sinclair* (6 App. Cas.

[9] Throughout the United States it appears to be settled that money paid under a mistake of law cannot be recovered. Bank of United States *v.* Daniel, 12 Peters, 32.

[10] Ordinarily in equity the statute of limitation is a good plea in bar. Neely's Appeal, 4 Norris, 490; Kane *v.* Bloodgood, 7 Johns. Ch. 90; but in cases of fraud no lapse of time will be a bar to the injured party provided he did not know of the fraud. Cock *v.* Van Etten, 12 Min. 522; Michoud *v.* Girod, 4 How. 561.

181, 190), where the previous authorities are considered, the Court stated, citing the observations of Lord Chelmsford in *Beauchamp* v. *Winn* (*ubi supra*), that the line between mistakes in law and mistakes in fact had not been so clearly drawn in equity as in the cases decided by the Common Law Courts.

## *Test of Partnership.*

### WALKER *v.* HIRSCH.

(27 Ch. Div. 460.)

Principle.

*An agreement to share profits and bear losses in certain proportions is* primâ facie *evidence of partnership*[1] *as between the contracting parties themselves, but such an agreement is not conclusive, and the question of partnership as between the parties must in each case depend upon their intention as expressed in the agreement.*[2]

Summary of facts.

Walker, who had been previously a clerk in the employment of Hirsch & Co., entered into an agree-

[1] Where there is an agreement to share in the profits and losses of a business it shows an intention to create a partnership unless such evidence of intention is controlled by stipulations or interpreted by conduct inconsistent with it. If the goods or the money wherewith to buy them are contributed by all and are joined as a common stock, and are to be used or disposed of for the joint benefit, with an agreement to divide the profit and loss this will constitute a partnership. Chapman *v.* Wilson, 1 Rob. (Va.) 267; Laffan *v.* Naglee, 9 Cal. 662; Somerby *v.* Buntin, 118 Mass. 279; Meaher *v.* Cox, 37 Ala. 201; Morse *v.* Richmond, 97 Ill. 306; Cumpston *v.* McNair, 1 Wendell, 457; Choteau *v.* Raitt, 20 Ohio, 132; Smith *v.* Small, 54 Barb. 223. If one person furnishes the money for the enterprise and the other gives his services and under an agreement they are to divide the profit and loss it is a partnership. Sprout *v.* Crowley, 30 Wis. 187; Kuhn *v.* Newman, 49 Iowa, 424; Pierce *v.* Shippe, 90 Ill. 371; Clark *v.* Girdley, 49 Cal. 105; Tyler *v.* Scott, 45 Vt. 261; Marsh *v.* Russell, 66 N. Y. 288; Cole *v.* Moxley, 12 W. Va. 730.

[2] If other circumstances aside from the agreement to share profit and loss show that no partnership was intended or created they will control. See Dwinel *v.* Stone, 30 Me. 384; Clifton *v.* Howard, 89 Mo. 192; Fawcett *v.* Osborn, 32 Ill. 411; Monroe *v.* Greenhoe, 54 Mich. 9; Snell *v.* De Land, 43 Ill. 323; Osbrey *v.* Reimer, 51 N. Y. 630; Edwards *v.* Tracy, 62 Pa. St. 380; Farrand *v.* Gleason, 56 Vt. 623.

ment with them under which he was to be paid a fixed salary, and was to receive one-eighth share of the net profits and bear one-eighth share of the losses of the business as shewn by the books when balanced. Walker was to leave £1500 in the business during the continuance of the ★ agreement, [★ 73] which could be determined by four months' notice. Walker continued to act in the same manner as before in the business of the firm. The name of the firm was not altered. Walker was never introduced to anyone as a partner, never signed any bills for the firm, and when he signed letters, signed them in his own name for Hirsch & Co. Hirsch & Co., not being satisfied with Walker, gave him notice to determine the agreement and shortly afterwards excluded him from the office. Walker then brought an action for winding up of partnership, and moved for an injunction and receiver. The Court of Appeal decided that there was no such partnership between Walker and Hirsch as to entitle Walker to an injunction and receiver.[3]

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The circumstances of this interesting and difficult case were considered by the Court of Appeal so peculiar that no assistance could be derived from the definitions or attempted definitions of the words "partners" and "partnership," or from the authority of reported cases, except so far as general principle might be gathered from them. The first point that was observable in the agreement in question was the mode in which it was signed. The usual form when A., B., and C. enter into partnership is that A., B., and C. each sign individually.[4] In the present case the agreement was signed, on the one hand by Walker individually, and on the

[3] If it appears that one party is the principal and the other receives his share as compensation there is no partnership, and a mere reception of a portion of the profits is not sufficient to constitute the recipient a partner. Benedict *v.* Hattrick, 35 N. Y. 405; Loomis *v.* Marshall, 12 Conn. 69; Campbell *v.* Dent, 54 Mo. 325.

[4] "Whether an agreement creates a partnership or not depends on the real meaning of the parties to it as expressed in the agreement itself." Lindley on Partnership, 18. See Macy *v.* Combs, 15 Ind. 469; Salter *v.* Ham, 31 N. Y. 321; Gray *v.* Gibson, 6 Mich. 300; Hedge's Appeal, 63 Pa. St. 273.

other by two parties not individually but as "Hirsch & Co." Walker was to receive a fixed salary, and was also to receive an eighth part of the net profits and be debited with one-eighth share of the losses, if any. The following important principle of law was then laid down. "In most cases where there is an agreement with reference to a particular business and the particular parties entering into it, that they shall share the profits, and bear the losses in certain proportions, of carrying on the business, with nothing to explain or get rid of those words, that is *primâ facie* evidence of an intention to carry on business in partnership."[5] But the question of partnership must depend upon the general terms of the agreement.[6]

*Primâ facie* evidence of partnership.

Further circumstances which were regarded by the Court of Appeal as wholly inconsistent with the notion of a general partnership, though consistent enough with that of a limited and qualified partnership, were that, in addition to salary, Walker was to receive an eighth part of the profits and bear one eighth of the losses, and that the parties were enabled to put an end to the agreement at any time on four months' notice, when the £1500 was to be paid back to Walker.

[★ 74] ★ In *Pawsey* v. *Armstrong* (18 Ch. D. 698), (which may now be considered as overruled by *Walker* v. *Hirsch*), it was laid down that an agreement to share profit and loss must be regarded as quite conclusive of the relationship of partnership between two persons who had so agreed, and that it was no more possible for one of them afterwards to say that he was not a partner, than it would be possible for a man and woman who had gone through the formal ceremony of marriage before a registrar, and satisfied all the conditions of the law for making a valid marriage, to say that they were not man and wife, because at the same time one had said to the other, "Now mind we are not man and wife." In answer to this, the Court of Appeal said that the judge did not appear to have remembered the Act for marriages before the registrar (6 & 7 Wm. IV. c. 85, s. 20), which requires that there shall be a solemn declaration between the parties, in which each of the parties shall say to the other, "I call upon these persons here

[5] Winship *v.* Bank of United States, 5 Peters, 529; Pierce *v.* Shippee, 90 Ill. 371; Perry *v.* Butt, 14 Ga. 699; Parviance *v.* McClintle, 6 S. & R. 259; Scott *v.* Colmesnell, J. J. Marsh, 416.

[6] And if they have agreed not to be partners, they are not; no matter what their responsibilities may be otherwise. Reddington *v.* Lanaham, 59 Md. 429; Gill *v.* Kuhn, 6 S. & R. 333; Pollard *v.* Stanton, 7 Ala. 761.

present to witness that I A. B. take thee C. D. to be my lawful wife (or husband), as the case may be. "If in making that declaration," said the Court, "either of them said before the registrar, 'but we do not intend to be husband and wife,' then there would not have been the legal ceremony of marriage provided for by the *Marriage Act.* If they had said that to one another secretly, either before or after the ceremony, the law is that by going through that ceremony before the registrar, they are husband and wife, whatever they may have said secretly between themselves. That case is of course entirely different from this, where the question arises upon what the parties have said in the contract which they have entered into, as to which there is no positive statute defining any form as between parties."[7]

"No doubt," said the Lord Justices, "there is in one sense a kind of partnership created, a kind of joint interest in adventure provided for; the case, however, is not to be decided by the 'short cut' suggested by the appellant—viz., by saying that because there is in this document a clause which gives him a right to a share in the profits and losses, therefore he is a partner, and has all the rights of a partner except so far as the contract has excluded them. The document is not a mere contract of loan, it is not a mere contract of service, it is not a mere contract of partnership. It has some of the elements of all those contracts.[8] The plaintiff has lent money, he is in some respects a servant, he is, to the extent of sharing in profits and losses, in the position of a partner, but not of a partner with all those rights which are contended to flow from that position. His rights as regards the profits and losses are very peculiar. The agreement is not that he shall share profits and losses, the agreement is that he is to be paid a salary in addition to one-eighth of the net profits, and to bear one-eighth of the losses thereof as shewn by the books when balanced."

An accurate definition of partnership has long been

[7] If the actual relation which the parties have assumed toward each other are those of partners any actual or presumed intention of the parties cannot suspend the consequences. Stevens *v.* Gainesville Nat. Bank, 62 Texas, 503; Rosenfield *v.* Haight, 53 Wis. 260; Duryea *v.* Witcomb, 31 Vt. 395; Brass & Mfg. Co. *v.* Sears, 45 N. Y. 797.

[8] "If it appears that the *lending* of money is used as a device to receive the benefits of a partnership without the attendant responsibilities, as where the powers are inconsistent with the lending of money the contract is one of partnership regardless of what the parties may call it." Bates on Partnership, Sec. 50.

regarded as a *desideratum* among legal authors. In *Pooley* v. *Driver* (5 Ch. D. 458, 471) (to which we shall presently allude), Jessel, M.R., after declining for himself to define partnership, and referring to the fifteen attempts at ★ definition of partnership which will be found collected in Lord Justice Lindley's Treatise on Partnership, 4th ed., p. 112, expressed an opinion that the definition found in the Civil Code of New York, "Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them," with the addition supplied by Pothier that the business must be an honest one, would be found sufficient.

[★ 75]

Definition of partnership.

Test of partnership.

The question what is the test of partnership is considered by Mr. Justice Lindley in sections 1 and 2 respectively of the chapter of his work on Partnership, under the two headings of—(1) True partnerships, the most obvious type of which is an agreement to share profits and losses; and (2) partnerships as regards third persons, *quasi* partnerships as they are called, "under which a number of persons who in consequence of certain acts done by them, are held liable for each other's conduct as if they had entered into a contract of partnership among themselves." The former of these classes of cases is that which is considered in the leading case, and the law may be taken to be settled by it that the sharing of profits is *primâ facie* evidence of partnership, but that in each case the intention of the parties is to be collected from the agreement itself.[9]

The second branch of the subject what is the test of partnership as to third parties was made the subject of an extremely careful consideration in 1862 by the House of Lords, in the great case of *Cox* v. *Hickman* (8 H. L. C. 268), the effect of which Lindley, L.J., tells us has unquestionably been to put "a great branch of partnership law on a substantially new footing."

The facts of that case were briefly as follows:—A trader had been embarrassed, and executed a trust deed; certain trustees were to carry on the business, and out of the profits pay the expenses, and divide the net residue equally amongst the creditors; the trustees accepted a bill which was dishonoured, and one of the creditors was sued upon it.

In this state of facts, the Court of Common Pleas held that the defendant was liable. The Court of Exchequer Chamber was equally divided. On an appeal

[9] See cases under note 1.

to the House of Lords, the judges consulted by the House were again equally divided. Amongst the Lords, however, unanimity prevailed, and it was decided that the defendant was not liable, and the judgments below were therefore reversed. See Lindley on Partnership, 4th ed., p. 38 *et seq.*, where the case is carefully considered. According to this decision the true test of partnership as to third parties is whether agency exists between the persons sought to be charged as patrons.

Partnership Amendment Act.

This case was followed three years afterwards by the Act to amend the Law of Partnership, 28 & 29 Vict. c. 86 (*Bovill's Act* as it is called). The provisions of that statute are as follows :

Section 1.

Section 1. That the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the ★ profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such.

[★ 76]

This section was considered in *Syers* v. *Syers* (1 App. Cas. 174), where it was held that a partnership at will was created, the extremely important case of *Pooley* v. *Driver* (5 Ch. D. 458) (discussed by the Court of Appeal in *Ex parte Tennent*, *In re Howard* (6 Ch. Div. 303), and *Ex parte Delhasse*, *In re Megevand* (7 Ch. Div. 511). These cases decide that the contract must shew on the face of it that the transaction is one of loan, that it must be signed, and that though an agreement is expressed to be made under *Bovill's Act*, and contains a declaration that the lender shall not be a partner, he will nevertheless be held to be a partner if that be the fair construction of the agreement as a whole, and that the Act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of business.[10]

Section 2.

Section 2. That no contract for the remuneration of a servant or agent or any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall of itself render such servant or

[10] If the repayment of the loan is contingent upon the profits, it is not a loan, for it is made not upon the personal responsibility of the borrower but upon the security of the business. Rosenfield *v.* Haight, 53 Wis. 260; Brigham *v.* Dana, 29 Vt. 1; Wood *v.* Vallette, 7 Ohio, 172; Horris *v.* Hillegras, 54 Cal. 463.

agent responsible as a partner therein, nor give him the rights of a partner.

Section 3. Section 3. That no person being the widow or child of the deceased partner of a trader and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

In *In re Flavell*, *Murray* v. *Flavell* (25 Ch. Div. 89), it was held that a covenant to pay an annuity for the benefit of the widow of a deceased partner created a trust in her favour, and that she was entitled to the annuity in priority to the creditors.[11]

Section 4. Section 4. That no person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business shall by reason only of such receipt be deemed to be a partner of or be subject to the liabilities of the persons carrying on such business.

Section 5. Section 5. That in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interests payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

This section does not interfere with any security which the lender has taken, as this would be to inflict a
[★77] penalty or disability and to ★ confiscate the property of the mortgagee. *Ex parte Sheil*, *In re Lonergan* (4 Ch. Div. 789); *Baddeley* v. *Consolidated Bank* (34 Ch. D. 536). All creditors must be paid in full before the lender can prove for any purpose whatever, *Ex parte Taylor*, *In re Grayson* (12 Ch. Div. 366). In *In re Stone* (33 Ch. D. 541) a loan was made to a trader on his bond, and an agreement in writing provided that

[11] Annuitants are not partners but receive the annuity as interest upon their money and if the firm becomes bankrupt they are not liable, neither can their *bonâ fide* dividends be owned by the creditors of the defunct firm. See Phillips *v.* Samuel, 76 Mo. 657; Jones *v.* Walker, 103 U. S. 444; Pitken *v.* Pitken, 7 Com. 307; Heigbe *v.* Littig, 63 Md. 391.

the lender should receive five per cent. and be instructed in the business for five years; during that time he was also to receive a sum equal to half the net profits, but the relationship was not to be construed as a partnership unless the lender should give written notice of his desire to be taken into partnership at the end of three years. This agreement was cancelled about a year afterwards, and another entered into under which the lender was to receive twenty pounds a month as interest in lieu of the interest and profits payable in respect of the advance. It was held that this arrangement fell within the first and fifth sections of *Bovill's Act*, and that the lender must be postponed in Stone's bankruptcy until all the other creditors had been paid.[12] And see *Holme* v. *Hammond* (L. R. 7 Ex. 218); *Ex parte Mills, In re Tew* (L. R. 8 Ch. 569); Lindley on Partnership, 4th ed. pp. 43 *et seq.* As to loans by wife to husband, see *post*, p. 147.

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## *Liability of Partners.*

### CLEATHER *v.* TWISDEN.

(28 Ch. Div. 340.)

Principle. *A firm of solicitors is not, in the absence of special circumstances, liable on account of money left for general investment or securities deposited for safe custody with one of the partners.*[1]

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Summary of facts. Trustees under a will deposited bonds payable to bearer for safe custody with A, a member of a firm of solicitors. The firm acted for the estate, but the entire management of the business was left to A.

[12] To constitute a loan, the money advanced must be returnable in any event independently of the success or non-success of the business or the making of profits." Bates on Ptns. 50.

[1] If money or property is procured by one partner, on behalf of the firm and within the apparent scope of his authority, it is within the custody of the firm, and the firm is liable for it, although he misappropriates it. See Clement Bates on Partnership, 476, and Alexander *v.* Georgia, 56 Ga. 478. But if money comes into the hands of one of the partners for a purpose not within the scope of their business and he misused it, the innocent partner is not liable. Adams *v.* Sturges, 55 Ill. 468; Linn *v.* Ross, 16 N. J. L. 55, and Toof *v.* Duncan, 45 Miss. 48.

The other partners had no knowledge of the deposit of the bonds with A, but letters referring to it were copied in the letter-books of the firm, charges for the letters were included in bills of costs, and cheques
[★78] were on some ★ occasions drawn by A. in the name of the firm in payment of interest on the bonds, the firm being repaid by cheques drawn by A. on his private account. The Court of Appeal (reversing the decision of Denman, J.) decided that the other partners were not liable.[2]

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The question which the Court of Appeal had to determine in the present case, in which, while substantially agreeing with the Court of first instance on matters of law, they came to a different conclusion on the facts, was as to the liability of a firm of solicitors for misappropriation of securities by one of their number. The
General law. general law with regard to cases where partners are or are not to be held liable for misappropriation by one of their members, is summed up by Mr. Justice Lindley, at pp. 303–307, in a series of propositions, the first of which has an important bearing on this subject.

The firm is liable :—

(1.) Where one partner, acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it.[3]

(2.) Where a firm in the course of its business receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm.[4]

The additional authorities cited in support of these propositions which have special reference to the liability of solicitors are, *Millett* v. *Chambers* (Cowp. 814); *Brydges* v. *Branfill* (12 Simons, 369).

[2] If the other partners have knowledge of the nature of the funds at the time of the misappropriation, they are implicated in the breach of trust, and are all at the election of the *cestui que trust* his debtors or trustees of the fund. Gillou *v.* Peterson, 89 Pa. St. 163 ; Stoddard *v.* Smith, 11 Ohio, 581 ; Emerson *v.* Durand, 64 Wis. 111 ; Trull *v.* Id., 13 Allen, 407.

[3] The great difficulty is to determine whether the act committed was within the representative authority of the partner. Stewart *v.* Levy, 36 Cal. 159.

[4] If the firm has received the benefit of the fraud committed by one partner it is for that reason they are liable. Fripp *v.* Williams, 14 S. Ca. 502 ; Strang *v.* Bradnor, 114 U. S. 555 ; Gerhardt *v.* Swaty, 57 Wis. 24 ; Manufacturers' & Mechanics' Bank *v.* Gore, 15 Mass. 75.

The firm, on the other hand, is not liable if a partner in the course of some transaction unconnected with the business of the firm obtains money and then misapplies it.[5] *Sims* v. *Brutton* (5 Ex. 802) commented on, Lindley, p. 309; *Harman* v. *Johnson* (2 E. &. B. 61); *Plumer* v. *Gregory* (L. R. 18 Eq. 621).

With regard to the law on the subject immediately before them, viz. the liability of a firm of solicitors for the default of a partner, the Court of Appeal considered that there was no difficulty. It may be regarded as settled by a series of decisions of which the following are the principal. Liability of firm of solicitors.

In *Blair* v. *Bromley* (5 Hare, 542; 2 Phil. 354) money which was left by a client with one of a firm of solicitors to be invested in a specified security was misappropriated by him, and it was decided, on the ground that the transaction in question was inside the ordinary scope of the business of solicitors that the partnership was liable.[6]

In *Harman* v. *Johnson* (2 E. & B. 61) it was held on the other hand that the receipt of money by one of a firm of solicitors from a client professedly on behalf of the firm for the general purpose of investing it as soon as he could meet with a good security, was not an act within the ordinary business of a solicitor so as, without further proof of ★ authority from his partner, to render them liable to account for the money so deposited, such a transaction being part of the business of a scrivener, and attorneys as such not necessarily being scriveners. The Court of Appeal, in *Cleather* v. *Twisden*, in commenting on this case observed that though the law may be so stated, no one could deny that a course of conduct might be pursued which might convert the act of a partner, of which the other members of the firm would not be otherwise liable, into one for which they would be responsible. [★ 79]

In *Earl of Dundonald* v. *Masterman* (L. R. 7 Eq. 504), which was cited by the Court of Appeal as containing an accurate statement of the law on the subject then dealt with, it was held that money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client

[5] Dounce *v.* Parsons, 45 N. Y. 180; Toof *v.* Duncan, (*supra*); Adams *v.* Sturges (*supra*).

[6] If the property is delivered to one partner as a representative of the firm to dispose of it in a way within the scope of the business, all the partners are liable for any misapplication or misappropriation that may occur. Peckham Iron Co. *v.* Harper, 41 Ohio, 100; Castle *v.* Bullard 23 Howard, 172.

of the firm, is money paid to the firm in the course of their professional business, and that consequently the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received. In this case the late Lord Justice (then Vice-Chancellor) James, after stating that the money received by the partner must be treated as paid to the firm, however hard that decision might be on the innocent partners, proceeded as follows:—"It is surely within the ordinary every-day practice of a firm of solicitors or attorneys to receive moneys from a client for the satisfying the demands of the creditors whom they are employed to arrange with; to receive from a client, an executor, moneys sometimes to pay the demands of government—sometimes to pay legatees and sometimes to pay into Court—in short, to receive money for any specific purpose connected with the professional business they have in hand, just as in *Harman* v. *Johnson* (2 E. & B. 61) the Court held that it was within the ordinary business of such a firm to receive moneys for the purpose of making a specific investment or mortgage. If it was within the ordinary business of the firm so to receive moneys, *cadit quæstio;* for what one partner does in the ordinary business of the firm is done by the firm. Of course it is possible that a client may so have acted, may have so lent himself to one member of the firm as to preclude himself from enforcing such liability against the other members."[7]

A case which is remarkable as illustrating at the same time both branches of the law on this subject is the well-known case of *Plumer* v. *Gregory* (L. R. 18 Eq. 621), where the previous cases of *Harman* v. *Johnson* and *Earl of Dundonald* v. *Masterman* (*ubi supra*) are reviewed along with several other authorities. In that case Jonas G and William G. were in partnership as solicitors. The plaintiff, who was a married woman entitled to £3000 for her separate use, was advised by the solicitors to invest it without her husband's concurrence, and she accordingly handed £1300 of it to the firm to be invested on a mortgage of specified real estate, viz. an advowson, and both members of the firm acknowledged the receipt of it for that purpose. The plaintiff subsequently handed over the remaining £1700 to William on his representation that it would be invested on a mortgage of some ★ real estate of another

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[7] Lindley on Partnership, Sec. 485.

client of the firm, such estate not being specifically described. Jonas died, and William afterwards fraudulently applied both sums to his own use, but continued to pay interest to the plaintiff on the whole £3000 till within a short time before his death. William's estate was insolvent, and it was held that Jonas's estate was liable to make good to the plaintiff the £1300 with interest from the date when interest was last paid by William, but not the £1700.

With regard to the question whether the partners could in the present case be held liable on the ground that the defaulting partner had acted as their agent, the Court of Appeal said three points had to be considered. First, whether they gave him express authority to take charge of the bonds; secondly, if not, whether they ratified what he did; and, thirdly, if they neither expressly authorized nor ratified his acts, whether they consented that he should have general authority to act without their knowing what he did. "It is not enough," said Bowen, L.J., "for a principal to shew that he did not know what his agent was doing, for he may have consented to leave the matter in his agent's hands; in ninety-nine cases out of a hundred partners do not know what their partner does in any particular business because they have consented not to know."

Denman, J., had come to a conclusion of fact with regard to which the Court of Appeal completely differed from him. He considered that, looking at the bills of cost, letters, press, copy letter-book, and the expressions in the letters, he must come to the conclusion that the firm knew that the partner in question was acting in the distribution of the estate. The Court of Appeal held that though no doubt he was acting in the distribution of the estate in giving advice with regard to it and "distributing it on paper," yet he could not have been considered as having dealt in the distribution of the estate in the sense that he was to be treated as having received the whole estate or its proceeds into his hands for distribution. On the whole, the Court of Appeal, after a very careful consideration of the facts of the case, came to the conclusion that though the case approached very near the line it never crossed it—that the burden of proof rested on the plaintiffs—and that under all the circumstances they must be held not to have discharged it.[8]

[8] The conversion by one partner of property which came into the possession of the firm on partnership account, is the conversion of all, and makes all liable in trover. Nisbet *v.* Patton, 4 Rawle, 119.

Criminal liability of partners.

With regard to the criminal liability of partners,[9] 31 & 32 Vict. c. 116, provides that if any person being a member of any co-partnership or being one or two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners.

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[★81] ★ *Return of Premium on Dissolution of Partnership.*

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ATWOOD *v.* MAUDE.

(L. R. 3 Ch. 369.)

Principle.

*Where a partnership entered into for a definite term in consideration of a premium is prematurely dissolved by a breach of the partnership articles by the partner receiving the premium, the general rule of the Court in the absence of special circumstances is to direct the return of a proportionate part of the premium.*[1]

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Summary of facts.

Atwood and Maude entered into partnership as solicitors for seven years, Maude paying a premium

[9] A partner is not liable to conviction for the crimes of his partner unless he has participated in them. United States *v.* Fish, 24 Fed. Rep. 585; Peterson *v.* State, 32 Texas, 477, and *contra* Whitton *v.* State, 37 Mass. where liquor was sold illegally. See also on criminal liability of partners. State *v.* Coleman, Dudley (S. Ca.) L. 32. One partner cannot arrest his co-partner on an allegation of fraud relating to the partnership property. Soule *v.* Hayward, 1 Cal. 345; Cary *v.* Williams, 1 Duer, 667. But if a partnership asset has become individual property it can then be the subject of a crime by a co-partner. Sharpe *v.* Johnston, 59 Mo. 557. A partnership may be indicted if their act is joint. United States *v.* McGinnis, 1 Abb. U. S. 120; Lemons *v.* State, 50 Ala. 130. See also upon the subject of criminal liability, Soughton *v.* State, 2 Ohio, 562; State *v.* Mohr, 68 Mo. 303; State *v.* Williams, 103 Ind. 235.

[1] If the dissolution of the partnership is by mutual agreement

of £800. Atwood knew that Maude was very inexperienced, and assigned his incompetence as a reason for demanding the premium. At the end of two years Atwood wrote a letter in which he said the partnership must be dissolved, and that he had already instructed counsel with that object. Maude then commenced proceedings, asking for the dissolution of the partnership and the return of the £800 or a proportionate part thereof. The Court of Appeal held that Maude was entitled to return of a part of the premium proportionate to the unexpired period of the term of seven years.[2]

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Reason of rule.

The ground on which the Court directs a return of premium on the premature dissolution of a partnership is "partial failure of consideration":[3] *Edmonds* v. *Robinson* (29 Ch. D. 170). The "well-settled principles" on which the Court proceeds are stated by Lord Cairns in the leading case (L. R. 3 Ch. 372) as follows:—

"If the partner who has received the premium should afterwards commit a breach of the partnership articles and himself dissolve the partnership or render its continuance impossible, the Court will not allow him to take advantage of his own wrongful act, but decrees the restitution of a proportion of the premium paid, having regard to the ★ terms of the contract and [★82] to the length of time during which the partnership has continued.[4] But, on the other hand, if the partner who has paid the premium is guilty of a like breach of the partnership articles and is himself the author of

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the terms of the agreement controls. Durham *v.* Hartlett, 32 Ga. 22. In case of dissolution by death no part of the premium is to be returned. If the claimant rescinds the partnership agreement without any excuse he cannot avail himself of his own wrong and receive a return of the premium. Bates on Partnership, 806 and 808.

[2] The general rule as to the amount of premium to be returned is to measure it by the proportion that the unexpired term bears to the whole time. Bates on Partnership, 809.

[3] Carlton *v.* Cummings, 51 Ind. 478; Dulaney *v.* Rogers, 50 Md. 524.

[4] The guilty partners are jointly and severally liable for the repayment of the proportionate part of the premium on dissolution owing to their misconduct, and the defrauded partner has a lien on the assets of the firm for the proper amount. Richards *v.* Todd, 127 Mass. 167; Pillars *v.* Harkness, Colles, 442; Boughner *v.* Black, 83 Ky. 521.

the dissolution, the Court will not allow him to found a claim to the restitution of the premium upon his own wrongful act."

"The Court," said Sir John Wickens, in *Wilson* v. *Johnstone* (L. R. 16 Eq. 606, 609), "has always treated it as a mere arithmetical question, but it might well have been treated in another way. The dissolution by the Court is a variation of the contract which the Court imposes on the parties, and the Court in so imposing it, generally treats the premium as if it were an aggregate of yearly payments made in advance, and returns to the payer the proportion attributable to that part of the term which it cuts off from that contracted for. The right of the purchaser who paid the premium, like every other right, may of course be waived or forfeited."[5]

In this judgment, Sir John Wickens stated that the only cases in which the return of premium could be refused in the case of a premature dissolution by the Court, or what was tantamount to a premature dissolution by the Court, were where there had been an actual or implied release of the right to a premium, or an actual or implied release of the right to be a partner, including under the latter head such a deliberate and serious breach of the partnership contract as might be considered equivalent to a repudiation of it altogether.[6] Mere conduct entitling the other partner to a decree for dissolution would not be enough, nor mere carelessness in keeping accounts, nor mere breach of a contract not to give credit, or the like, unless so deliberate, so continued, and so persisted in after warning, as to amount to a determination to treat the partnership articles as a nullity.[7] See Lindley on Partnership, 4th ed. p. 75, where this case is commented upon, and Lindley, L.J., expresses an opinion that the whole subject requires reconsideration by the Court of Appeal.

Arbitration clauses.

Clauses referring disputes, which may arise with regard to the partnership, are usually inserted in partnership deeds.[8] Agreements of this kind do not de-

[5] Lindley on Partnership, 73.

[6] One person can sue another whom he has taken into partnership for the premium promised to him. Blout *v.* Williams, 28 Ark. 374; Mullany *v.* Keenan, 10 Iowa, 224.

[7] Ambler *v.* Whipple, 20 Wallace, 546; Denver *v.* Roane, 99 U. S. 355; Durbin *v.* Barber, 14 Ohio, 311; Ligare *v.* Peacock, 109 Ill. 34; Rhea *v.* Vannoy, 1 Jones Eq. (N. Ca.) 282.

[8] A partner has no power to bind the firm by a submission to arbitration, but the authority may be conferred either in the deed or by parol and need not appear on the record. MacKay *v.*

prive the Courts of jurisdiction over the matters agreed to be referred, nor will the addition of a covenant not to sue in respect of such matters prevent either party from bringing them into Court, for such a covenant is an agreement to oust the jurisdiction of the Courts, and it is established, on the grounds of public policy, that any agreement to oust the jurisdiction of the Courts is void.[9]

Though an agreement not to sue on a contract is void, the same result is attainable by the parties agreeing that the award of an arbitrator shall be a condition precedent to the right to sue. This may be done by a stipulation that no right of action shall arise until matters in dispute have been referred to and ascertained by arbitration, or by a contract to pay such a sum only as shall in case of difference be ascertained by an arbitrator: Redman on Awards, p. 25.

The effect of arbitration clauses is carefully considered in *Plews* ★ v. *Baker* (L. R. 16 Eq. 564); *Willesford* v. *Watson* (L. R. 8 Ch. 473); *Law* v. *Garrett* (8 Ch. Div. 26); where the agreement was to refer all disputes to a foreign Court; and in *Piercy* v. *Young* (14 Ch. Div. 200). In this last case the arbitration clause was the shortest possible: "Any differences or disputes which may arise between the partners shall be settled by an arbitrator to be agreed upon between the parties."[10] [★83]

Jessel, M. R. (distinguishing *Willesford* v. *Watson* where Lord Selborne had decided that the provisions of the arbitration clause were in that case wide enough to include not only the construction of the document itself, but also the question as to whether the acts complained of were or were not within the terms of the matter referred to arbitration), decided with regard to the matter before him as follows: "Not only is there no authority for saying that this Court should not decide such a point, but it is the bounden duty of the

Bloodgood, 9 Johns, 285; Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395; Wilcox *v.* Singletory, Wright (Ohio), 420; Davis *v.* Berger, 54 Mich. 652; Karthaus *v.* Ferrer, 1 Peters, 222.

[9] "The submission to arbitration binds the one that executed it, for he promised on behalf of the firm and his partner's refusal is a breach by him." McBride *v.* Hogan, 1 Wendell, 326; Wood *v.* Sheppard, 2 P. & H. (Va.) 442; Jones *v.* Bailey, 5 Cal. 345; Bates on Partnership, Sec. 336.

[10] Or if the partner who at first refuses to assent to arbitration, afterwards does so his subsequent act cures the want of authority. Martin *v.* Thrasher, 40 Vt. 460; Haywood *v.* Harmon, 17 Ill. 477; Becker *v.* Boon, 61 N. Y. 317; Abbott *v.* Dexter, 6 Cushing, 108.

Court to decide whether the matter in question is one which the party proposing the reference has agreed to refer to arbitration. The great object of these clauses is to prevent the delay and expense of litigation, but we must not forget in deciding upon them that they do not deprive one of the parties, that is, the one that objects to the arbitration, of the right to resort to the ordinary tribunals of the country, and he is entitled to say, 'Shew me that I have agreed to refer this matter to an arbitrator.'"[11]

It was further decided, also in *Piercy* v. *Young* (*ubi supra*), that although a particular submission to arbitration may be revoked, a general agreement to refer to arbitration could not be revoked by one of the parties. In *Russell* v. *Russell* (14 Ch. D. 471) it was held, questioning *Willesford* v. *Watson* (*ubi supra*), that in a case where fraud is charged, if the party charged with the fraud desires a public inquiry, the Court will almost as a matter of course refuse the reference, and will say, I will not refer your character against your will to a private arbitrator. Where, however, the objection to arbitration is made by the party charging the fraud, the Court will not be satisfied with the mere desire of the party charging the fraud, but will require a *primâ facie* case of fraud to be made out before it refuses to send the case to arbitration.

Dissolution on ground of misconduct of party paying the premium.

In *Bluck* v. *Capstick* (12 Ch. D. 863) it was decided that where a partnership is dissolved before its natural determination in consequence of the misconduct of the partner who has paid the premium he is not entitled to a return of any part of it, and if he has not paid the premium he will be ordered to pay it notwithstanding the dissolution.[12]

In *Edmonds* v. *Robinson* (29 Ch. D. 170) however the Court declined to allow an addition to be made to the judgment declaring that the plaintiff, who had known all the facts at the time when judgment was given, was entitled to a return of a premium on the ground that though it had power to make such an order it ought not to be exercised unless in a case where leave would be given to bring a supplemental action.

Dissolution on ground of fraud.

In *Maycock* v. *Beaton* (13 Ch. D. 384) the Court considered that the plaintiff had been induced by the de-

[11] A surviving partner may submit to arbitration with the administrator of his deceased partner. Clanton *v.* Price, 90 N. C. 96, but he cannot arbitrate matter with the widow, he himself being administrator. Boynton *v.* Id., 10 Vt. 107.

[12] Perry *v.* Hale, 143 Mass. 540; Howell *v.* Harvey, 5 Ark. 270.

fendant's fraud to enter into ★ partnership, and gave judgment for rescission of the agreement and dissolution of the partnership, with a declaration that the plaintiff was entitled to stand in the place of the creditors of the partnership for any sums which he had paid or might pay in respect of the partnership liabilities. [★ 84]

It has been held that return of premium may be obtained (and that in an action for partnership account without rescission *in toto*) if a person knowing that he is in a dangerous state of health, conceals that fact and induces another to enter into partnership with him, but in the absence of such special grounds it would seem that sudden death being a contingency which all persons may reasonably expect, no return of premium unless expressly bargained for can be demanded on this ground. On similar principles it would seem that bankruptcy is not a ground for obtaining a proportionate return of premium unless the fact of embarrassment at the time of entering into the partnership, or *semble* afterwards, has been concealed. Lindley on Partnership, 4th ed. pp. 74, 75.

Rule does not apply where dissolution on "Equitable grounds."

The rules as to return of premium laid down in *Atwood* v. *Maude* and *Wilson* v. *Johnstone* (*ubi supra*) have no application to those cases where there is no distinct breach of the partnership articles or of good faith, and the Court dissolves the partnership on what are called "equitable grounds," *i.e.* because the continuance of the partnership would be so disadvantageous to the parties that the Court ought to put an end to it, *e.g.* on account of lunacy or gross incompatibility of temper. In these cases it is the duty of the Court to look at all the facts and do what is equitable between the parties, and the terms of dissolution as to return of premium and other matters are in the discretion of the judge, and the Court of Appeal will not interfere except on very special grounds. In such cases the dissolution is not made retrospective, but only dates from the judgment. *Lyon* v. *Tweddell* (17 Ch. Div. 529).

Novation.

In some cases it is not uncommon on the dissolution of a partnership for the persons who continue the business to agree with the retiring partner that they will take over the assets and assume the liabilities.[13] Notice is given to the creditors, and if they accede to the arrangement the liability of the new firm is accepted in lieu of the old, and thus what is called a "novation,"

[13] See Hall *v.* Jones, 56 Ala. 493; and Hopkins *v.* Carr, 31 Ind. 260; Rawson *v.* Taylor, 30 Ohio, 389; Hayes *v.* Know, 41 Mich. 529.

a term borrowed from the Civil Law, is effected. Lindley on Partnership, 4th ed. p. 435.

In *Scarf* v. *Jardine* (7 App. Cas. 345) a customer who had sued the new firm afterwards brought an action against the late partner. The House of Lords decided that, the customer having the option and having elected to sue the new firm, he could not turn round and sue the old partner.[14]

Continuation of partnership.

Where after the expiration of a term the partners continue the business without any fresh articles, the original contract is considered to have been prolonged or renewed by tacit consent. All the stipulations and conditions of the original contract remain in force which are not inconsistent with any implied term of the new [★85] contract. The ★ new contract is a contract determinable at will, and it is an implied term that each partner has a right which must be exercised *bonâ fide* and not for the purpose of deriving an undue advantage, to dissolve at any time. *Neilson* v. *Mossend Iron Co.*, 11 App. Cas. 298, where it was held an elaborate clause providing for the determination of the partnership had no longer any application.

Accounts in partnership transactions.

The practice with regard to taking accounts and inquiries in reference to partnership transactions was considered in *Barber* v. *Mackrell* (12 Ch. Div. 534), where after the usual accounts and inquiries in an administration action had been supplemented by the usual partnership accounts and inquiries, an additional account on the footing of fraudulent detention or improper application of partnership money was directed. James, L.J., pointed out that it was not necessary to prove every fraudulent abstraction, or more than one fraudulent abstraction. The moment a partner proves against his partner one fraudulent abstraction, one fraudulent entry, that is a sufficient ground for an inquiry in Chambers as to what amounts have been withdrawn, and to have every further account based on that inquiry.[15]

Notice of dissolution.

In *Hendry* v. *Turner* (32 Ch. D. 355) the parties had agreed to a dissolution, and the question was whether the Court had jurisdiction to compel the retiring partner to sign a notice of dissolution for the *Gazette*, no

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[14] There is no presumption to the effect that the creditors of the firm intend discharging the retiring partner from liability. Lindley on Partnership, 437.

[15] More *v.* Rand, 60 N. Y. 208; Richards *v.* Todd, 127 Mass. 167; Van Gilder *v.* Jack, 61 Iowa, 756, and Dunn *v.* McNaught, 38 Ga. 179.

other relief being claimed.[16] This point was settled in the affirmative, and the party who had refused to sign the notice was ordered to pay the costs.

Judgment after dissolution.

In *Kewney* v. *Attrill* (34 Ch. D. 345) judgment had been given for dissolution of partnership, and after judgment had been given, and a receiver appointed a creditor obtained judgment in the Queen's Bench Division against the firm, and an order was made giving him a charge for his judgment debt, with costs and interest at £4 per cent., on all moneys come or coming to the receiver, the intention of the Court being to preserve to him all the rights he would have had if he had issued execution and the sheriff had seized and sold the assets on the day the application was made.

Costs in partnership actions.

With regard to costs in partnership actions, the general rule is that they are payable like the costs of other administrative actions, that is to say, the assets remaining after payment of all partnership debts, including balances due to any of the partners out of the assets, and if the assets are insufficient they must be borne by the partnership proportionally. If however the action has been rendered necessary by the misconduct of a partner, the Court will order that partner to pay the costs occasioned by his misconduct, including the costs up to the trial.[17] *Hamer* v. *Giles* (11 Ch. D. 942).

Chancery Division.

The dissolution of partnership and the taking of partnership and other accounts is one of the subjects specially assigned by sect. 34 of the *Judicature Act*, 1873, to the Chancery Division.

Practice.

Great changes in practice with regard to actions in which partners are concerned have been introduced by the new Rules of Court made under the *Judicature Acts*, Rules of the Supreme Court, 1883, O. VII. ★ r. 2; [★86] O. IX. rr. 6, 7. O. XII. rr. 15, 16; O. XVI. rr. 14, 15; O. XLII. r. 10. Their effect may be shortly stated as follows:—

I. Partners may now sue or be sued in the names of their respective firms[18] (O. XVI. r. 14).

II. Service of the writ may be effected upon any one or more of the partners, or at the principal place of business upon any person having at the time of the

[16] Abrahams *v.* Myers, 40 Md. 499; Phillips *v.* Nash, 47 Ga. 218; Berry *v.* Folkes, 60 Miss. 576.

[17] O'Lone *v.* Id. 2 Grant's Ch. 125; Knapp *v.* Edwards, 57 Wis. 191; Price's Est. 81 Pa. St. 263.

[18] In the absence of a statute, partners can neither sue nor be sued in the partnership name. Leach *v.* Wagon Co. 14 Neb. 106; Whitman *v.* Keith, 18 Ohio, 134; Wilson *v.* King, 1 Morris (Iowa), 105.

service the control or management of the business [19] (O. IX. rr. 6, 7).

III. Appearance must be entered by the partners individually, but subsequent proceedings shall be in the name of the firm [20] (O. XII. rr. 15, 16).

IV. Execution may issue not only against the partnership property, but also against any person who has admitted himself to be or has been adjudged to be a partner, and against anyone who has been served as a partner and has failed to appear.[21]

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do, and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined (O. XLII. r. 10).

When the partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ shall be served upon any person sought to be made liable [22] (O. XVI., r. 14), which was probably introduced on account of the decision of the Court of Appeal in *In re Young* (19 Ch. Div 124).

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any *defendant*, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose

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[19] Service upon any one partner is not notice to the others unless the firm is sued in the firm name. Where there is no statute allowing suits in firm name, summons should be served on each partner. Mithcell *v.* Greenwald, 43 Miss. 167; Weaver *v.* Carpenter, 42 Iowa, 343; Maclay *v.* Freeman, 48 Mo. 234; Dresser *v.* Wood, 15 Kansas, 344; Feder *v.* Epstein, 69 Cal. 456; Shapard *v.* Lightfoot, 56 Ala. 506. The summons must conform to the statutory provisions both as regards service at place of business and upon the individual partners. See Clark *v.* Evans, 64 Mo. 258; Gillett *v.* Walker, 74 Ga. 291; Ladiga Saw Mill Co. *v.* Smith, 78 Ala. 108, and as to service upon an infant see Mason *v.* Denison, 11 Wendell, 612.

[20] Mayberry *v.* Bainton, 2 Harr. (Del.) 24; Bennett *v.* Stickney, 17 Vt. 531; Freeman *v.* Cathcart, 17 Ga. 348.

[21] The writ of execution follows the judgment, and execution against the partners can be levied upon the joint property or upon the separate property of any of them. Saunders *v.* Reilly, 105 N. Y. 12; Clayton *v.* May, 68 Ga. 27; Randolph *v.* Daly, 16 N. J. Eq. 313; Dean *v.* Phillips, 17 Ind. 406.

[22] Hall *v.* Lanning, 91 U. S. 160; Loomis *v.* Pearson, 1 Harper, (S. Ca.) L. 470.

behalf the action is brought. The action is then to proceed in the name of the firm, but as if the partners had been named in the writ (O. VII. r. 2). A further power is also given that any party to an action may apply by summons for a statement of the names (and note that addresses are not mentioned) of the persons who were at the time of the accruing of the cause of action co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise, as the judge may direct (O. XVI. r. 14).

In *Munster* v. *Cox* (10 App. Cas. 680) proceedings had been commenced against Railton & Company by writ, and were then continued against Railton, "trading as Railton & Co.," to judgment, which was entered by consent. The plaintiff issued execution against Railton, and then, alleging that he had since discovered that Cox was a partner, applied for leave to amend the pleadings and judgment so as to make them accord with the writ. The House of Lords decided (affirming the decision of the Court of Appeal) that the judgment against Railton alone could not be converted into a judgment against the firm.

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## ★ *Sale of Goodwill.* [★87]

### PEARSON *v.* PEARSON.

(27 CH. DIV. 145.)

Principle. *A vendor of a business is not, in the absence of express agreement, to be restrained from soliciting his old customers.*[1]

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Summary of facts. An agreement was entered into in compromise of an action between James Pearson and Theophilus

[1] "The vendor of a business and of the goodwill thereof may, in the absence of express stipulations to the contrary, set up a similar but not identical business, either in the same neighborhood or elsewhere, and may publicly advertise the fact of his having done so; but he must not solicit the customers of his old business to cease dealing with the purchaser, or to give their custom to himself. 14 Am. Law. Reg. (U. S.) 329. Goodwill may be sold the same as any other personal property. Musselman's App., 62 Pa. St. 81; Howe *v.* Learing, 19 How. 14; Dougherty *v.* Van Nostrand, 1 Hoff. 68.

Pearson, for the sale of all the estate and interest of the former in the business formerly carried on by their father and James Pearson, under the title of "James Pearson." The agreement provided that nothing therein "should prevent James Pearson from carrying on the business of a potter and earthenware manufacturer or any other business at such place as he thought fit and under the name of "James Pearson."

The Court of Appeal reversed the decision of Kay, J. and held that Theophilus Pearson was not entitled to an injunction restraining James Pearson from soliciting the customers of the old firm.[2]

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In this case the Court of Appeal overruled *Labouchere* v. *Dawson* (L. R. 13 Eq. 322), decided twelve years before, which had been "more than once doubted, followed on two or three occasions, approved by one judge and disapproved by another, and never either approved or disapproved by the Court of Appeal collectively."

The effect of the decision in *Labouchere* v. *Dawson*, as stated in the judgment of the Court of Appeal in *Pearson* v. *Pearson*, was that the vendor of a business and goodwill may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers privately by letter, personally, or by traveller, asking them to continue their custom with him and not to deal with the vendees. The principle on which [★88] ★ this decision was based was that persons are not at liberty to depreciate the thing which they have sold, or, to put the same idea in other words, "that a man cannot derogate from his own grant." This principle was dissented from by the Court of Appeal in the leading case. Cotton, L.J., said: "The case of the plaintiff

[2] Where a partner sells out all his share in the business the presumption is that he meant to include the goodwill. Churton *v.* Douglass, Johns. Eng. Ch. 174. If a certain name is valuable, another person although having the same name will be restrained from using it though it be his own, where there is strong evidence to show that the name was fraudulently used for the purpose of taking advantage of the acquired reputation of another. Fott *v.* Lee, 13 Iredell's Eq. 490; Churton *v.* Douglass, 1 Johns. Eng. Ch. 74.

is founded on contract and the question is what are his rights under the contract. There is no express covenant not to solicit the customers of the business, but it is said that such a covenant is to be implied.[3] I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing particularly, when it is a point which was in their contemplation. It is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place. I cannot see where to draw the line. If he may by his acts invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?"

Definition of "good-will."

The previous authorities on the subject of sales of goodwill are collected and reviewed in the arguments and judgments in the leading case. "Goodwill," was defined by Lord Eldon in *Cruttwell* v. *Lye* (17 Ves. 335) in the oft-quoted phrase, "As nothing more than the probability that the old customers will resort to the old place."[4] What then is the effect of such a sale in the absence of express stipulation? On this point Lord Eldon said, "Fraud would form a different consideration; but, if that effect is prevented by no other means than those, which belong to the fair course of improving a trade, in which it was lawful to engage, I should, by interposing, carry the effect of injunction to a much greater length than any decision has authorised, or imagination even suggested."

In *Churton* v. *Douglas* (9 Ch. 174) Lord Hatherley, then Wood, V.C., decided that the vendor may carry on the same business where and as he pleases, and deal with the customers of the old firm, provided only that he does not represent himself as carrying on the old business, or as being the successor of the old firm.[5]

The judgment of Lord Romilly in *Labouchere* v. *Dawson* (*ubi supra*,) the effect of which is stated above, went beyond anything which had been decided by any of his predecessors, but since the judgment of the Court of Appeal, it can no longer be regarded as law.

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[3] In Elliott's App. 1 P. F. S. M. 161; Read, J., said that the goodwill of an inn or tavern is local and does not exist independently of the house in which it is kept.

[4] Story on Partnership, Sect. 99.

[5] The question of the sale of goodwill is clearly set forth in Angier *v.* Webster, 14 Allen, 211.

In *Ginesi* v. *Cooper and Company* (14 Ch. D. 596), Jessel, M.R., commenced his judgment by citing the observation of Lord Justice James, that the command "Thou shalt not steal" is as much a portion of the law of Courts of Equity as it is of Courts of Law, and indicated his surprise that the proposition that a trader who had sold for value his business and goodwill to another man is entitled, notwithstanding, to solicit his old customers to deal with him just as if no sale had ever taken place. The injunction granted, however (the form of which is given 14 Ch. D. 603), did not
[★89] restrain dealing, and it is pointed out in ★ *Pearson* v. *Pearson* (*ubi supra*), that perhaps for this reason there was no appeal. The decision in this case was disapproved of in *Leggott* v. *Barrett* (15 Ch. Div. 306), where the Court of Appeal reversed the decision of Jessel, M. R. In this case the point was not argued in the Court of first instance, as it was considered to be completely covered by *Ginesi* v. *Cooper*. An injunction was granted, restraining the defendant from soliciting or dealing with the old customers.[6] The Court of Appeal disapproved of *Ginesi* v. *Cooper*, and restrained from "soliciting" the old customers, but not from dealing with them. "To enjoin a man," said Brett, L J., "or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited, is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like."[7] A new point of departure in the doctrine was reached by *Walker* v. *Mottram* (19 Ch. Div 355), where the Court of Appeal decided (again reversing Jessel, M.R.) that where the goodwill had not been so d voluntarily, but compulsorily, by the trustees in bankruptcy, the bankrupt could not be restrained from soliciting the customers of the old business, the obligation being in the nature of a personal obligation and not an incident of the transfer of property.[8] The interest of these

[6] In Hall's App., 60 Pa. St. 458, the defendant sold the goodwill of his business and set up the same business within a short distance of his old place of business. A decree was granted restraining him from holding himself out to the public by advertisement or otherwise as continuing his former business, or carrying it on at another place.

[7] Good faith requires that a party who has sold the goodwill of his business, should do nothing that tends to deprive the purchaser of its benefits and advantages. Hall's App. (*supra*) and McCord *v.* Williams, 15 Norris, 78.

[8] Martin *v.* Van Schaick, 4 Paige, 479.

cases is however now to a considerable degree of an historical nature, as they are to a large extent, if not altogether, practically superseded by the decision in the leading case.

Closely connected with this subject is that of "covenants in restraint of trade." The principle on which a covenant in restraint of trade is held bad is thus laid down by Best, C.J., in the case of *Homer* v. *Ashford* (3 Bing. 322): "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed by which a person binds himself not to employ his talents, his industry, or his capital in useful undertaking in the kingdom would be void, because no good reason can be imagined for any person's imposing such a restraint on himself." Covenants in total restraint of trade are absolutely void upon grounds of public policy, and such covenants, even if partial, are presumed to be void if nothing shews them to be reasonable. Covenants, however, in partial restraint of trade, where there is a fair and reasonable ground for the restriction, are good and valid.[9] Kerr on Injunctions, 2nd ed. pp. 399 *et seq*, and see *Rousillon* v. *Rousillon* (14 Ch. D. 351); *Mitchell* v. *Reynolds* (1 P. Wms. 181); *Mallan* v. *May* (11 M. & W. 665); *Allsopp* v. *Wheatcroft* (L. R. 15 Eq. 59). Convenants in restraint of trade.

In *Whittaker* v. *Howe* (3 B. 383), Lord Langdale enforced by injunction a covenant on the part of an attorney not to practise within Great Britain for twenty years. "The case cannot, however, be considered sound law. It is quite inconsistent with *Ward* v. *Byrne* (5 M. & W. 548), which was decided after mature deliberation." Kerr on Injunction, 2nd ed. p. 400.

The authorities on the subject of covenants in restraint of trade and ★ the rights of the vendor of the goodwill of a business was recently considered in *Vernon* v. *Hallam* (34 Ch. D. 748), when *Labouchere* v. *Dawson* was treated as distinctly overruled by the Court of Appeal in *Pearson* v. *Pearson*, and *Collier* v. *Chadwick* (not yet reported). In this case it was held that a covenant not to carry on the business of a manufacturer under a particular name or style, though it was unlimited in point of space, was not a covenant in restraint of trade, but merely a covenant not to use a particular name or style in trade, and was consequently valid. [★90]

[9] Goodwill of a business may form the subject of a contract of sale. Cauess *v.* Fessler, 39 Cal. 336.

In *Davies* v. *Davies* (W. N. 1887, p. 65) a covenant by a partner "to retire, so far as the law allows, from the trade or business of the partnership in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the other partners," was enforced as being not too vague, and not void as in general restraint of trade.[10]

In *Baines* v. *Geary* (35 Ch. D. 154), under an agreement for employment as a milk-carrier the servant undertook that "he would not either during the service or after being discharged or quitting such service serve or directly or indirectly interfere with any of the customers served or belonging at any time to the master his successor or assigns." It was held, having regard to *Price* v. *Green* (16 M. & W. 346), and similar cases were covenants in restraint of trade had been held to be divisible as regards space. and following *Nicholls* v. *Stretton* (7 Beav. 42, 10 Q. B. 346, 350) that the undertaking was severable and could be enforced in respect of persons who were customers during the employment.

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[★91] ★*The Vendor and Purchaser Act, 1874. 37 & 38 Vict. c. 78.*

*In re* **HARGREAVES & THOMPSON'S CONTRACT.**

(32 Ch. Div. 454.)

Principle.

*The Court has jurisdiction on a summons under the 9th section of the Vendor and Purchaser Act*, 1874, *not only to decide all questions arising out of the contract* (*except such as affect the existence or validity of the contract itself*), *but also to make any order that would be just as the natural consequence of its decision.*

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Summary of facts.

On a summons under section 9 of the Vendor and Purchaser Act, 1874, the Court was of opinion that

[10] On the subject of goodwill in general see Bell *v.* Locke, 8 Paige Ch. 75; Partridge *v.* Mench, 2 Barb. Ch. 101; McFarlan *v.* Stewart, 2 Watts, 111; Rupp *v.* Over, 3 Brewster, 133; Palmer *v.* Graham, 1 Parson's Eq. 476; Holmes and others *v.* Holmes, 37 Conn. 278. In succession of Jean Journe, 21 La. An. 391; Colladay *v.* Baird, 4 Phila. 139; D. & H. Canal Co. *v.* Clark, 13 Wallace, 311.

the minerals under a part of the property agreed to be sold belonged to the lord of the manor, and made a declaration that the vendors had not shewn a good title, and ordered the deposit to be returned. A further question arose whether the Court had jurisdiction on the summons to order interest at 4 per cent. from the date of payment of the deposit, and the purchaser's costs of investigation of the title, and the Court of Appeal decided both these points in the purchaser's favour.

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*Vendor and Purchaser Act*, 1874, sect. 9.

A new and convenient mode of settling a variety of questions arising with reference to the purchase of land which would under the old law have necessitated the institution of a suit for specific performance was provided by the 9th section of the *Vendor and Purchaser Act*, 1874. That section provides that a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times, and from time to time, apply in a summary way to a judge of the Court of Chancery in England in Chambers in respect of any requisitions or objections or any claim for compensation ★ or any other question arising [★ 92] out of or connected with the contract not being a question affecting the existence or validity of the contract, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid. "The object of the Legislature" (said Bacon, V.C. in *Thompson* v. *Ringer*, 44 L. T. N. S. 507) "in passing the Act, was to diminish frivolous suits, and afford a more cheap and speedy tribunal for determining questions between vendor and purchaser."

In *In re Burroughs, Lynn & Sexton's Contract* (5 Ch. Div. 601), the purchaser of a property which consisted principally of heath land took an objection that the title to the soil of the heath land was not shewn, but only a title to right of pasturage over it. The vendor took out a summons under the 9th section of the *Vendor and Purchaser Act* 1874, asking for a declaration that the purchaser's objections and requisitions had been sufficiently answered, and that a good title had been shewn, and that the vendors were entitled to have the contract specifically performed, and that the purchasers might

be ordered specifically to perform the same, and to pay the costs of the application. The Court of Appeal held that in proceedings under the 9th section of the *Vendor and Purchaser Act*, 1874, the parties are in exactly the same position, and with all the same rights that they would have been under a reference as to title in a judgment for specific performance; that they were therefore at liberty to produce evidence by affidavit with the cross examination thereon. The statement of the law contained in *Burroughs, Lynn & Sexton's Contract* (*ubi supra*), would seem however to be somewhat narrowed by the judgment of the Court of Appeal in the leading case: "Although the Court is not in the position in which it would be if it had the litigants before it in an action properly brought according to the established practice of the Court, still there is authority given us not only to decide the questions asked, but to make an order which would be just, as the natural consequence of what we have decided. The object of the Legislature was to enable either vendor or purchaser to obtain the decision of the Court upon some isolated point instead of being compelled to have recourse to the whole machinery which would be put in motion by an action or suit for specific performance."

Object of the Legislature.

Practice.

The practice is to take out an originating summons, which is to be intituled in the matter of the contract and in the matter of the *Vendor and Purchaser Act*, 1874, and it is not unusual for the parties to agree upon a short written statement of facts, which is signed by the solicitor for the parties, and a copy of which is left at Chambers either before or after the return of the summons. (Daniell's Chancery Practice, 1382.) The summons may be heard in Chambers, or, as is the more usual practice, adjourned into Court. Jessel, M.R., adopted the practice where the title was good and the purchaser desired it, of delivering judgment in open Court, though the question had been argued in Chambers: *Coleman* v. *Jarrow* (4 Ch. D. 165).

[★93]

Time for appealing.

★The time for appealing is 21 days from the date of simple refusal, or from the date of the perfection of the order: *In re Blyth and Young* (13 Ch. D. 416).

It was held in *Drapers Co.* v. *McCann* (1 L. R. Ir. 13) that service of a summons out of the jurisdiction under this Act may be allowed, but *quære* whether this decision can now be considered as correct having regard to *In re Busfield*, *Whaley* v. *Busfield* (32 Ch. Div. 123, 132 (see *post*, p 306) ).

Questions

The following are some of the questions which have

been determined under sect. 9 of the *Vendor and Purchaser Act*, viz.:— determined under the section.

Whether conditions of sale were misleading, *In re Marsh and Earl Granville* (24 Ch. Div. 11).

As to the vendor's right to rescind, *In re Terry and White's Contract* (32 Ch. Div. 14).

As to exercise of a power of sale, by administrator with will annexed, *In re Clay and Tetley* (16 Ch. Div. 3); by trustees, *In re Wright's Trustees and Marshall* (28 Ch. D. 93); time when it may be exercised, *In re Tanqueray-Willaume and Landau* (20 Ch. Div. 465).

As to whether consents are necessary, *Finnis to Forbes* (24 Ch. D. 587) (Charity Commissioners), *In re Earle and Webster's Contract* (24 Ch. D. 144), *Tweedie* v. *Miles* (27 Ch. D. 315) (beneficiaries).

To determine as to the validity of an appointment of a trustee under sect. 31 of the *Conveyancing Act*, 1881, in the place of a trustee who had been abroad for more than twelve months, *In re Coates to Parsons* (34 Ch. Div. 370); and see Clerke & Humphreys, Sales of Land, p. 487, for a full enumeration of cases decided. Interest on deposit.

In the leading case a question arose as to the time from which interest ought to be paid on the deposit. On this point the judgment of the Court of Appeal was as follows:—"I think interest ought to be given from the day when the deposit was paid on this ground, that at that time the vendors tried to sell what they had no title to. Therefore from the very time when this deposit was made the vendors were in the wrong. It is different from a case where in consequence of delay or otherwise the purchaser may have had a right to say the contract is at an end and he will not complete. Then it may be that the deposit would only be wrongfully held from the time when the purchaser having a right so to do had declared that he would be no longer bound by the bargain. But here from the very first the vendors were wrong in purporting to sell that which they had not, namely, the minerals as well as the surface."

[★94] ★ *Specific Performance.*

## ROSSITER *v.* MILLER.

(3 App. Cas. 1124.)

Principle.

*Where a complete contract can be collected from a correspondence between the parties, the Court will grant specific performance although it was agreed that the terms should be embodied in a formal contract, unless there was a condition suspending the final assent until the execution of the formal contract.*[1]

Summary of facts.

Rossiter and others were the proprietors of certain land, and authorised White, a land agent, to dispose of it. The land was laid out in lots, and a plan made, with conditions of sale printed on it. One of these conditions set out the price of each lot, and another required that a purchaser should, on completion, execute a deed of covenant embodying the conditions. Miller verbally offered to purchase some of the lots. White informed him that he must purchase subject to the conditions stated on the plan, and promised to lay his offer before "the proprietors." Shortly afterwards White wrote to Miller stating that "the proprietors" had accepted his offer subject to the conditions printed on the plan, that "it was taken into consideration by them in reducing the published price that you intended building at once," and that he had requested their solicitors to forward an agreement. Miller wrote

[1] Where a complainant has an effectual remedy in his own hands, chancery will not interfere. The court, for instance, will not enforce the performance of a condition, the non-performance of which would work a forfeiture, for the grantee has fixed his remedy. Fry on Specific Performance, Sec. 11, and see Marble Co. *v.* Ripley, 10 Wallace, 359; Woodruff *v.* Water Power Co., 10 N. J. Eq. 489. If a money payment will constitute a sufficient redress a chancellor will not interfere. Richmond *v.* R. R. Co., 33 Iowa, 439; Penna. Co. *v.* Del. Co., 31 N. Y. 91.

back that he would not be bound to build at any given time, or at all, and that therefore the offer had better be reconsidered "unless you are prepared to leave me at liberty to do as I think best." White wrote that his former letter was "not intended to convey a conditional acceptance of your ★ offer therein defined"; "in your own words you [★95] are at liberty to do as you think best." Held, by the House of Lords, that there was a completed contract between the parties which Miller was bound specifically to perform.[2]

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In this case the House of Lords, in reversing the decision of the Court of Appeal, and restoring the decision of Jessel, M.R., proceeded on a principle of law which, as stated in Lord Hatherly's judgment, page 1143, had been thoroughly established by a uniform line of decisions, and by precedents in the House of Lords. That principle was stated by Lord Hatherley as follows: "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then although the correspondence may not set forth in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor.'"

Lord Blackburn, page 1151, declared the law to be that quite independent of the *Statute of Frauds* there must be a complete agreement, "if not there is no contract, so long as the parties are only in negotiation; even though they have agreed on all the cardinal points, either party may retract. But the mere fact

[2] At common law one party to a contract cannot complain of a breach on the part of the other, unless he can show his own compliance with the terms of the agreement in every particular, but in equity specific performance may be decreed even if the plaintiff is not able to fulfill his contract to the letter, in which case a decree is entered with compensation for defects. Fry on Specific Performance, Sec. 4.

that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence, and determining whether the parties have really came to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." [3] And see *Bonnewell* v. *Jenkins* (8 Ch. Div. 70), decided before the judgment of the House of Lords in *Rossiter* v. *Miller*, where it was held that notwithstanding the reference to a future contract, the letters constituted a complete contract between the parties.[4] See also *Crossley* v. *Maycock* (L R. 18 Eq. 181;) *Winn* v. *Bull* (7 Ch. D. 32).

On the other hand, if there be not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then the stipulation as to the further contract is a term of the assent; there is no agreement independently of that stipulation, and no concluded contract.[5]

[★ 96] Contract by correspondence.

★ A very important case on the question whether a contract can be made out by correspondence between the parties is *Hussey* v. *Horne Payne* (4 App. Cas. 311). In *May* v. *Thompson*, to which we shall presently allude, this case was spoken of as affording a very good illustration of the difference of opinion which we find sometimes occurs between judges as to the meaning of letters. The judge of first instance "came to one conclusion as to the meaning of some of the letters, and held that there was a concluded agreement; then the Court of Appeal were unanimously of opinion that a

[3] The remedy by action for a breach of contract in such a case is extremely inadequate. See 1 Sugden, V. & P. 8th American Ed. 542.

[4] The remedy of specific performance is most frequently applied to contracts for the sale of real estate. Bispham's Eq., 4th Ed. Sec. 364.

[5] If a binding agreement has been entered into for the sale of real estate a court of equity will consider the vendor a trustee of the legal title for the benefit of the vendee and the vendee is considered a trustee of the purchase money for the benefit of the vendor. King *v.* Ruckman, 1 C. E. Green, 599; Richter *v.* Selin, 8 S. & R. 425; Malin *v.* Id., 1 Wendell, 625; McKeehnie *v.* Sterling, 48 Barb. 330.

clause in one of the letters was a condition precedent, and the House of Lords was of opinion that it was not a condition precedent, but that there was no concluded agreement."[6]

Whole series of letters must be looked at.

In *Hussey* v. *Horne-Payne*, the first two letters of the correspondence, if taken by themselves, would have constituted a complete contract, but the subsequent letters qualified their effect in such a way that the House of Lords considered that the terms of the contract had never been settled between the parties. On this point the law was thus stated by the House of Lords:—"It is one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note or your memorandum of the terms of the contract, in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them." In one of the letters written by the defendant's agent the phrase had occurred—"subject to the title being approved by our solicitors."[7] This had been considered by the Court of Appeal to be "plainly an additional term" which required acceptance, and therefore prevented the contract from being a concluded one, as it made it a condition that solicitors of his own selection should approve of the title. As the House of Lords considered that the correspondence, independently of these words, did not create a contract between the parties, it was unnecessary to decide this point, but Lord Cairns expressed a strong opinion that the words in question could not be regarded as importing a new term into the agreement, because, he said, as was pointed out in the course of the argument, "it would virtually reduce the agreement to that which is illusory.

[6] Specific performance usually rests in the judicial discretion of the chancellor. Smoot *v.* Rea, 19 Md. 398; Pickering *v.* Id., 38 N. H. 400; Sherman *v.* Wright, 49 N. Y. 231; Shenandoah Valley Rd. *v.* Lewis, 76 Va. 833; Oil Creek R. R. *v.* Atlantic & G. W. R. R., 7 P. F. Sm. 65, and King *v.* Morford, 1 Sax. (N. J.) 274; Henderson *v.* Hays, 2 Watts, 148.

[7] In a suit for specific performance a court of equity will not decree that a purchaser is to accept a doubtful title. Herzberg *v.* Irwin, 92 Pa. St. 48; Richmond *v.* Gray, 3 Allen, 25; Young *v.* Rathbone, 1 C. E. Green, 224; Hoyt *v.* Tuxbury, 70 Ill. 331; Fitzpatrick *v.* Featherstone, 3 Ala. 40; Smith *v.* Turner, 50 Ind. 372; People *v.* Stockbrokers' Building Co., 92 N. Y. 98.

It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased; he might change his solicitor from time to time. There is no *delectus personarum*. There is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, 'We do not like the title, we do not approve of the title, and therefore the agreement goes for nothing.'" [8]

[★97] ★ Lord Selborne, in his judgment in the same case, adhered to his observation in the case of *Jervis* v. *Berridge* (L. R. 8 Ch. 351, 360) that the *Statute of Frauds* "is a weapon of defence not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." It was, he said, especially important to keep that principle in view when, as in the present case, it was attempted to draw a line at one point of a negotiation conducted partly by correspondence and partly at meetings between the parties without regard to the sequel of the negotiations; which plainly shewed that the terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them.

*Statute of Frauds.*

In *May* v. *Thompson* (20 Ch. Div. 705), the Court held that no judgment for specific performance or for damages could be granted, as the time at which the purchase was to take effect was left uncertain,[9] and the subject-matter of the contract had not been agreed upon, and as the parties had contemplated a formal agreement. Jessel, M.R., in his judgment, said, "I think the decisions of our Courts as to letters have gone quite far enough, that is, in the spelling out of a contract from letters when both parties intended a formal contract to be executed. I think it very often happens that both parties use expressions in letters which, read alone, would amount to a contract, if we did not know

[8] If the vendor is able to make a good title any time before the decree, specific performance will be enforced. Fraker *v.* Brazelton, 12 Lea (Tenn.), 278; Luckett *v.* Williamson, 37 Mo. 388; Moss *v.* Hanson, 5 Harris, 379; Graham *v.* Hackwith, 1 J. Marsh, 423.

[9] Bank of Columbia *v.* Hagner, 1 Peters, 455; Tiernan *v.* Roland, 2 Harris, 429; Glover *v.* Fisher, 11 Ill. 666; Brashier *v.* Gratz, 6 Wheaton, 528; Hepburn *v.* Auld, 5 Cranch, 262.

that in fact neither of the parties intended those general expressions to constitute a contract, and in that case, if the Court lays hold of the language of the letters to make a contract, it makes a contract for the parties which the parties never intended to enter into." See *Williams* v. *Brisco* (22 Ch. Div. 441), where it was held on the construction of the correspondence that there was no binding contract between the parties, and see as to judgment where the defendant admitted in his defence that he was unwilling to perform the contract, and did not appear at the trial, *Stone* v. *Smith* (35 Ch. D. 188). The question as to what is a sufficient description of the property is considered in *Shardlow* v. *Cotterell* (20 Ch. Div. 90).[10]

Sufficient description.

In the case of a contract for the sale of land, the plaintiff must shew two things: he must shew that there is an agreement concluded between the parties, and that there is a memorandum in writing of the agreement sufficient to satisfy the requirements of the *Statute of Frauds*. The first of these points is concerned with the question of the existence of the contract. The second with the evidence rendered necessary by the *Statute of Frauds* to make the contract binding, "points often mingled in discussion, but which should be kept separate in thought"[11] (Fry on Specific Performance, 2nd ed. 119).

Contract for sale of land.

The law on the subject is thus summed up in Fry on Specific Performance, 2nd ed. p. 121. The burden of proving that there is a concluded contract rests on the plaintiff. A binding contract may be constituted by the proposal of one party and the acceptance of the other, but as the proposal has no validity without the acceptance, a ★ memorandum of offer which may be [★98] retracted until accepted, differs essentially from a memorandum of agreement, which whenever signed, is binding on the party who signs (citing *Warner* v. *Willington*, 3 Drew. 523). The acceptance of a proposal must be plain, unequivocal, unconditional, with-

Summary of law.

[10] The terms of the agreement under which the land is sold must be certain. Dodd *v.* Seymour, 21 Conn. 476; Hammer *v.* McEldowney, 10 Wright, 334; Kendall *v.* Almy, 2 Sumn. 278.

[11] Specific performance of a written contract with parol variations may be enforced as in Gillespie *v.* Moon, 2 Johns. Ch. 585; Mosby *v.* Wall, 23 Miss. 81; Tilton *v.* Id., 9 N. H. 385; Bradford *v.* Union Bank, 13 How. 57; but in some States (following the English rule) such contracts will not be enforced. Osborn *v.* Phelps, 19 Conn. 63; Climer *v.* Hovey, 15 Mich. 18; Dennis *v.* Id., 4 Rich. Eq. 307.

out variance between it and the proposal, and it must be communicated without unreasonable delay.[12]

Withdrawal of offer.

An offer to sell property may be withdrawn before acceptance without any formal notice. It is sufficient if the person to whom the offer was made has actual knowledge that the other party has done something inconsistent with the continuance of the offer, as by selling to a third person.[13] *Dickinson* v. *Dodds* (2 Ch. Div. 463).

Post office the agent of both parties.

With regard to the important question as to the time when a contract contained in letters is considered to be accepted may now be regarded as settled by the *Household Fire Co.* v. *Grant* (4 Ex. Div. 216) (where the previous authorities commencing with *Dunlop* v. *Higgins*, 1 H. L. C. 381, are reviewed) that "the post office is the common agent of both parties," and that as soon as a letter of acceptance is delivered to the post office, the contract is made as complete and final, and absolutely binding, as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

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## *Part Performance.*

### MADDISON *v.* ALDERSON.

(8 App. Cas. 467.)

Principle.

*The equity of part performance to take a case out of the 4th section of the Statute of Frauds does not extend to contracts concerning any other subject-matter than land, and the acts of part performance must be unequivocally referable to the agreement, and must be such as to change the relative position of the parties with regard to the subject-matter of the agreement.*[1]

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Summary of facts.

The plaintiff claimed, as heir-at-law of Thomas

[12] Minturn *v.* Baylis, 33 Cal. 129; Bread *v.* Munger, 88 N. C. 297; Waring *v.* Ayers, 40 N. Y. 357; Jordon *v.* Deaton, 24 Ark. 704.

[13] If a person has been guilty of *laches* or has shown backwardness in performing his part of the contract—specific performance will not be decreed. Cadwalader's Appeal, 7 P. F. Sm. 158; Dragoo *v.* Id., 50 Mich. 573; and Rose *v.* Swan, 56 Ill. 40; Hubbell *v.* Von Schoening, 49 N. Y. 326; Holgate *v.* Eaton, 116 U. S. 33; Kinney *v.* Redden, 2 Del. Ch. 46.

[1] May on Fraudulent Conveyance, 378 (Text Book Series).

Alderson who had died intestate, to be entitled to the title deeds of a farm. Elizabeth Maddison by her ★ counter-claim asked for a declaration that she [★ 99] was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that Thomas Alderson had induced Elizabeth Maddison to continue as his housekeeper for many years without salary, and to give up other prospects of establishment in life by a verbal promise that he would make a will and leave her a life interest in the farm in question. A will had been made in accordance with the promise, and signed by Thomas Alderson, but it was not duly attested, and the question arose whether the parol agreement was taken out of the *Statute of Frauds* by part performance. Held by the House of Lords, that Elizabeth Maddison's counter-claim failed.[2]

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Costs. In this case the House of Lords in upholding the decision of the Court of Appeal (7 Q. B. Div. 174) (by which the judgment of the original Court (5 Ex. D. 293), where the facts are very fully stated, had been reversed), exercised its discretionary power in the appellant's favour by dismissing the appeal without costs. "I am sorry," said Lord Selborne, "for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutory limits within which it has hitherto been confined if we were to reverse the order of the Court of Appeal."

The judge before whom the case was originally tried

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The general doctrine of part performance is recognized and well established throughout the United States. Patterson *v.* Yeaton, 47 Me. 308; Arguello *v.* Edinger, 10 Cal. 150; Ottenhouse *v.* Burleson, 11 Texas, 87; Printup *v.* Mitchell, 17 Ga. 558; Campbell *v.* Freeman, 20 W. Va. 398.

[2] If there is a verbal contract for the sale of real estate or any interest therein and is acted upon so that the parties cannot be restored to their original position neither party can refuse to perform on the ground that the Statute of Frauds has not been complied with. See Adams' Eq. 86.

and the Court of Appeal had both agreed in arriving at the conclusion that a contract was proved under which E. Maddison would certainly have been entitled to relief but for the provisions of the *Statute of Frauds*, the point upon which they disagreed was whether there was part performance sufficient, as it is technically phrased, "to take the case out of the *Statute of Frauds*." On this point the House of Lords, upholding the decision of the Court of Appeal, decided against E. Maddison's claim, and their judgments contain an extremely valuable review of the principles by which the Courts are guided in dealing with the "equity of part performance." [3]

*Statute of Frauds*, sect. 4.

The 4th section of the *Statute of Frauds* (*inter alia*) provides that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them unless the agreement upon which such action shall be [★100] ★brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

It has been settled by a long series of cases, among which may be mentioned the well-known case of *Leroux* v. *Brown* (12 C. B. 824) and the recent case of *Britain* v. *Rossiter* (11 Q. B. Div. 123), that this section of the *Statute of Frauds* does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced. From this the law as to the equitable consequences of part performance naturally results. "In a suit founded on such part performance," said Lord Selborne, "the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract and not (within the meaning of the statute) upon the contract itself. If such equities were excluded injustice of a kind which the statute cannot be thought to have had in contemplation would follow." [4]

Whether the doctrine by which acts of part performance are allowed to take a case out of the *Statute of Frauds* ever ought to have been established is a question on which there has been some considerable doubt among the highest authorities, and Lord Blackburn (8 App. Cas. p. 489) expressly says that if the matter were

[3] The difficulty in most cases is to say what will take a case out of the statute. Milliken *v.* Dravo, 17 P. F. Sm. 230.

[4] Going into possession of the estate and making improvements will be sufficient to take the case out of the statute. Freeman *v.* Freeman, 43 N. Y. 34; Dunn *v.* Stevens, 94 Ind. 181; Deniston *v.* Hoagland, 67 Ill. 265.

*res integra* he would refuse to put such a construction on the statute, and practically to interpolate into the section the words "or unless possession of the lands shall be given and accepted." Be that as it may, the doctrine has now been completely established. "If it was originally an error, it is now *communis error* and makes the law." In order, however, to prevent a recurrence of the mischief which the statute was passed to suppress, the application of "the equity of part performance" has been limited by the following principles :—

Limitations of the doctrine.

1. The act of part performance must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words (2 Amb. 587), as could be done with no other view or design than to perform that agreement. It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.[5]

2. There must be some *evidentia rei* to connect the alleged part performance with the alleged agreement. The reason which is given for this principle is that otherwise there would not be enough in the situation in which the parties are found to raise questions which might not be solved without recourse to equity.[6]

3. It is not enough that an act done should be a condition of or good consideration for a contract, unless it is as between the parties, such a part execution as to change their relative positions as to the subject matter of the contract. The acts must be such as to render non-performance a fraud.[7]

★ 4. The equity of part performance does not extend to contracts concerning any other subject matter than land,[8] *per* Lord Selborne (8 App. Cas. 474), citing [★ 101]

[5] Christy *v.* Barnhart, 2 Harris (Pa.), 260 ; Wilmer *v.* Farris, 40 Iowa, 310.

[6] Green *v.* Richards, 8 C. E. Green, 32 and 539 ; Moore *v.* Small, 7 Harris, 461.

[7] Peckman *v.* Barker, 8 R. I. 17 ; Wack *v.* Sorber, 2 Wharton, 387 ; Casler *v.* Thompson, 3 Green's Ch. 59.

[8] The fact that the contract concerns realty gives the parties a *primâ facie* right to come into equity and such contract may be enforced not only between the original parties but also between any persons claiming under them. McMorris *v.* Crawford, 15 Ala. 271; Laverty *v.* Moore, 33 N. Y. 658; Walker *v.* Kee, 16 S. C. 76; Tiernan *v.* Roland, 3 Harris, 429.

the decision of the Court of Appeal in *Britain* v. *Rossiter* (11 Q. B. Div. 123).

The following circumstances have been held insufficient for the purpose of taking a case out of the *Statute of Frauds:*

1. Acts preparatory to the completion of a contract, ancillary or introductory acts as they are sometimes called, *ex gr.* delivery of abstracts, going to view an estate,[9] &c.: *Clerk* v. *Wright* (1 Atk. 13), and *Whaley* v. *Bagenal* (1 Bro. P. C. 345).

2. The mere holding over by a tenant, "unless qualified by the payment of a different rent;"[10] *Wills* v. *Stradling* (3 Vesey, 381).

3. "Desisting from the prosecution of a purchase," *Lamas* v. *Bailey* (2 Vern. 627), where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it on an agreement that he should have part of it when so bought at a proportionate price.

4. The fact (*O'Reilly* v. *Thompson*, 2 Cox, 271) that the plaintiff had obtained from a third party a release of a right to a lease claimed by him on an agreement that the defendant would grant to the plaintiff a lease of the same premises on certain terms. Sales under a decree of the Court are excepted from the statute.

5. It has been decided, after some vacillation among the authorities, that payment of a part or even of the whole of the purchase-money is not an act of part performance.[11] *Clinan* v. *Cooke* (1 Sch. & Lef. 22); *Watts* v. *Evans* (4 Y. & C. Ex. 579).

It was held in *Buckmaster* v. *Harrop* (7 Ves. 346) (cited Fry on Specific Performance, 2nd. ed. p. 265) that payment of auction duty, being by the revenue law essential to the contract, was not an act of part performance. But see now 8 & 9 Vict. c. 15, by which the auction duties are abolished. And see further as to part performance, Fry on Specific Performance, 2nd ed. p. 252 *et seq.*

Companies and corporations.

The doctrine of part performance applies to companies and corporations, as well as to individuals: *Wil-*

[9] The mere fact that the purchase money has been paid is not sufficient. Evarts *v.* Agnes, 4 Wis. 343; Malins *v.* Brown, 4 Comstock, 403.

[10] If the vendee is already in possession of the property the continuance of the possession is not considered a part performance to take the case out of the statute of frauds. Christy *v.* Barnhart, 2 Harris, 260; Mahana *v.* Blunt, 20 Iowa, 142.

[11] Because under peculiar circumstances the purchaser can be restored to his original position by repayment. Johnson *v.* Hubbell, 2 Stock, 332; Everts *v.* Agnes, 4 Wis. 343.

*son* v. *West Hartlepool Railway Co.* (34 Beav. 187; 2 De G. J. & Sm. 475).

It was contended in the leading case that E. Maddison was entitled to succeed on the ground that the testator was bound to make good his representations to her. The House of Lords held, however, on this point, upholding the decision of the Court of Appeal and dissenting from *Loffus* v. *Maw* (3 Giff. 592), that the principle that a man is bound to make good his representation, the doctrine of "estoppel by representation," as it is called, is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro* which, if binding at all, must be binding as contracts. See *Maunsell* v. *White* (4 H. L. C. 1039); *Money* v. *Jordan* (5 H. L. C. 185).

It has been settled by a series of authorities, among which may be mentioned *Lassence* v. *Tierney* (1 Mac. & G. 551), *Warden* v. *Jones* ★ (2 De G. & J. 76), *Caton* v. *Caton* (L. R. 2 H. L., affirming L. R. 1 Ch. 137), that marriage is not an act of part performance which will take a parol contract out of the statute.[12] The *Statute of Frauds* expressly provides "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed," &c. [★ 102]

Marriage is not part performance.

In *Warden* v. *Jones*, where there was a post-nuptial agreement reciting that it was made in pursuance of an ante-nuptial agreement, Lord Cranworth disposed of all the authorities by saying, "It cannot be enough merely to say in writing that there was a previous part agreement. It must be proved there was such an agreement, and to let in such proof is precisely what the statute meant to forbid (*per* Jessel, M.R., *Trowell* v. *Shenton*, 8 Ch. D. 324).

Where, however, a father on the marriage of his daughter promised to give certain leaseholds, and then after the marriage let his son-in-law into possession, gave him the title deeds, and allowed him to expend money on the land, the case was held to be taken out of the statute: *Surcombe* v. *Pinniger* (3 De G. M. & G. 571).

Where the contract has not been put in writing by reason of the fraud of one of the parties, the case is taken out of the statute as regards that party.[13]

Fraud.

[12] Bispham's Eq., 4th ed. sec. 385.

[13] The statute was passed to prevent frauds and equity will not allow it to be used or set up for the purpose effecting a fraud.

On this principle in *Chattock* v. *Muller* (8 Ch. D. 177), where the agreement was uncertain, the Court, considering that the defendant had acted fraudulently, directed a reference to Chambers to ascertain what the plaintiff was entitled to, and ordered the defendant to convey it.

Purchase-money payable by instalments

In *Nives* v. *Nives* (15 Ch. D. 649), where the purchase-money was payable by instalments, some of which was not yet due, the vendor obtained judgment for specific performance, with a declaration of lien on the property and liberty to apply as to future instalments as they accrued due.

Remedy mutual.

It is well established that the remedy is mutual, and that the vendor may bring his action in all cases where the purchaser could sue for specific performance of the contract, and this independently of any question on the *Statute of Frauds*:[14] Fry on Specific Performance, 2nd. ed. p. 25.

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[★ 103]

## ★ *Liability of Trustees.*

### SPEIGHT *v.* GAUNT.

(9 App. Cas. 1.)

Principle.

*A trustee cannot delegate his trust,*[1] *but he may in the administration of the trust funds employ agents, bankers, brokers and others, in cases of moral necessity,*[2] *or in the usual course of business, and in the absence or negligence or default he will not be held liable for loss.*[3]

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Summary of facts.

A trustee employed a broker to buy securities of certain municipal corporations authorized by his

[14] See upon the subject generally. Sweeney *v.* O'Hara, 43 Iowa, 36; Hardesty *v.* Richardson, 44 Md. 617; Gibbeny *v.* Burmasster, 3 P. F. Sm. 332; Miller *v.* Ball, 64 N. Y. 286; Newton *v.* Swazey, 8 N. H. 9; Annan *v.* Merritt, 13 Conn. 478.

[1] Not even to a co-trustee. Pearson *v.* Jamison, 1 McLean C. C. 197; Hawley *v.* James, 5 Paige, 487.

[2] Telford *v.* Barney, 1 Iowa, 591 ; Bowen *v.* Seeger, 3 W. & S. 222; Lewis *v.* Reid, 11 Ind. 239; Abbott *v.* Rubber Co., 33 Barb. 579 ; Leggett *v.* Hunter, 19 N. Y. 445 ; Blight *v.* Schenck, 10 Barb. 285.

[3] It is not settled how far a trustee is responsible for money collected by an attorney-at-law whom he has employed, Perry

trust. The broker gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained over £15,000 on a statement that the money would have to be paid next day, which was the next settling-day. It appeared from the evidence that some of the securities were not bought and sold on the Stock Exchange, but were only obtainable direct from the corporations, though applications were sometimes made through agents. There was also evidence that the form of the bought notice would have excited the suspicions of an expert. The broker never obtained the securities, and shortly afterwards absconded, and the trust money was absolutely lost. In an action to compel the trustee to make good the loss with interest at 4 per cent., the House of Lords decided (affirming the decision of the Court of Appeal) that he was not liable.[4]

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In this case, which was described by Lord Blackburn as not only of importance to the parties themselves on account of the amount of money involved, but also of general importance with regard to the principles on which the Court acts in respect to the liability of trustees ★ to make good losses of trust funds, the House of Lords confirmed the rule laid down by Lord Chancellor Hardwicke more than 130 years before in *Ex parte Belcher* (Amb. 218). The general principle established by *Ex parte Belcher* was stated by Lord Blackburn (p. 19) to be—that where there is a usual course of business, the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed.[5] [★ 104] Principle in *Ex parte Belcher.*

That authority, said Lord Selborne (p. 4), has ever

on Trusts, Sec. 405. A trustee is required to act with such diligence in conducting the trust estate as he would if it were his own. Neff's App., 7 P. F. Sm. 91.

[4] If, however, there is any improper dealings or gross negligence on the part of the trustee he will be held liable. Taylor *v.* Roberts, 3 Ala. 86; Latrobe *v.* Tiernan, 2 Md. Ch. 474, Dowin's App., 11 Casey, 294; Clark *v.* Id., 8 Paige, 153; Monell *v.* Id., 5 Johns, 283.

[5] A trustee is entitled to the advice and assistance of the court in the execution of his trust. Dill *v.* Wisner, 88 N. Y. 160.

*Lord St. Leonards' Act.*

since been followed, and in conformity with it the statute 22 & 23 Vict. c. 35 (*Lord St. Leonards' Act*, s. 31, enacts that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability for any banker, broker, or other person with whom any trust moneys or securities may be deposited. Neither the statute, however, nor the doctrine of *Ex parte Belcher*, Lord Selborne went on to say, authorises a trustee to delegate at his own will and pleasure the execution of his trust and the care and custody of trust moneys to strangers in any case in which (to use Lord Hardwicke's words) there is no "moral necessity from the usage of mankind" for the employment of such an agency.[6] The case of *Rowland* v. *Witherden* (3 Mac. & G. 568, 574), *Floyer* v. *Bostock* (35 Beav. 603, 606), and many others, shew that trustees bound to invest trust moneys in authorised securities[7] are *primâ facie* answerable for the proper care and custody of such trust moneys until they are actually so invested,[8] and will not be exonerated from liability if in the meantime they leave them in other hands, though the hands of professional advisers or agents to whose assistance for many purposes connected with the trust they may properly have recourse.[9]

Limitations to rule in *Ex parte Belcher.*

The judgments of the Law Lords in *Speight* v. *Gaunt* would, indeed, appear to establish the following limitations to the rule of *Ex parte Belcher*:—

1. A trustee must not choose investments other than those permitted by the terms of the trust, though they may be such as an ordinary prudent man of business would select for his own money.[10]

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[6] The position of trustee is one of personal confidence and for this reason he cannot delegate his authority. Hawley *v.* James (*supra*).

[7] He cannot invest the trust funds in personal securities. Wills' App., 10 Harris, 330; Moore *v.* Hamilton, 4 Fla. 112; Harding *v.* Larned, 4 Allen, 426; Smith *v.* Id., 4 Johns. Ch. 281.

[8] In several of the United States the subject of investment by trustees is regulated by statute.

[9] The trustee must be careful to make the deposits in the name of the trust estate and not to his personal credit and should not mix the trust funds with his own; if he does he will be liable for any loss which may result. Marine Bank *v.* Fulton Bank, 2 Wallace, 252; McAllister *v.* Commonwealth, 4 Casey, 486; De Jarnette *v.* Id., 41 Ala. 709; School *v.* Kirwin, 25 Ill. 73.

[10] He must not employ the funds in trade or speculation and if he does the *cestui que trust* may take either the amount invested with interest, or the profits of the business. McKnight's Executors *v.* Walsh, 8 C. E. Green, 146; Robinett's App., 12 Casey, 174; Kyle *v.* Barnett, 17 Ala. 306. If he has a discretion as to the investments it is not good policy for him to invest in

2. He ought not to deposit the money with an agent till the investment is found, for that is in effect lending it on the agent's personal security.[11]

3. If there be no moral necessity, or sufficient practical reason, from the usage of mankind or otherwise, for the payment to the agent the trustee will be held liable.[12]

4. The usual course of business at the time of the transaction is to be taken into account. "What was at one time the usual course," said Lord Blackburn, "may at another time be no longer usual." This point he illustrated by the practice of crossing cheques, which has arisen within living memory.

Employment of agents.

The principle that trustees acting according to the ordinary course of business and as prudent men are not liable for the default of their agents, is subject, moreover, to the limitation that the agents must not ★ be employed out of the ordinary scope of their business (*Fry* v. *Tapson* 28 Ch. D. 268). In that case the trustees had, at the suggestion of their solicitor, and without exercising an independent judgment, employed a valuer who was the agent of the mortgagor, and without knowledge of the locality where the property was situated. The valuer made an inflated report, the trustees acted upon it, and were held liable for the loss thus occasioned. [★ 105]

Statutory indemnity.

It has been held in *In re Brier* (26 Ch. Div. 238) that the effect of the statutory indemnity conferred upon trustees by sect. 31 of 22 & 23 Vict. c. 35, that when an executor or trustee has properly employed an agent, and a loss has been occasioned, the burden of proof is thrown on those who seek to charge him.

The "two-thirds" rule.

The "two-thirds rule," as it is called, with regard to trustees' investments upon the security of landed property,[13] laid down by Lord Cottenham more than half a century ago, in *Stickney* v. *Sewell* (1 My. & C. 8), has been carefully considered in several recent cases. This rule has been stated in Lewin on Trusts, 8th ed. p. 325,

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personal securities. Barney *v.* Saunders, 16 Howard, 545; Holmes *v.* Dring, 2 Cox. 1; Nance *v.* Id., 1 S. C. (N. S.) 209; Swoyer's App., 5 Barr, 377.

[11] A trustee will not be liable for the failure of a bank, provided he has not suffered the fund to remain there for an unreasonable time.

[12] If he allows the funds to remain with an agent by way of investment he will be compelled to make good their loss. Perry on Trusts, Sec. 443.

[13] Mortgages on real estate are considered proper investments for trustees in the United States. Perry on Trusts, Sec. 457.

thus:—"Trustees cannot be advised to advance more than two-thirds of the actual value of the estate if it be freehold lands, and if the property consists of freehold houses they should not lend so much as two-thirds, but say one-half the actual value. The rule, however, of two-thirds or one-half is only a general one, and where trustees have lent on the security of property of less value, but have acted honestly, they have been protected by the Court and have been allowed their costs. As to buildings used in trade, and the value of which must depend on external and uncertain circumstances, trustees would not in general be justified in lending so much as one-half." In *In re Godfrey*, *Godfrey* v. *Faulkner* (23 Ch. D. 483), Bacon, V.C., said that the rule had never been applied with mathematical strictness, and declined to apply it to a case where a farm had become unlettable and unsaleable owing to unfavourable weather.

Trustees not liable.

In the subsequent case, *Smethurst* v. *Hastings* (30 Ch. D. 490), it was held by the same judge that trustees who had invested money on the speculative security of sub-mortgages of leasehold houses which were unfinished and unlet, part of an undeveloped building estate, without having an independent or trustworthy valuation, were liable to make good the loss.

Trustees liable.

In *In re Whiteley*, *Whiteley* v. *Learoyd* (33 Ch. Div. 347), where trustees, though advised by a competent solicitor and a competent surveyor, were held liable for loss occasioned by an investment on freehold brickworks, Lindley, L.J., said that the duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider. The duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

In *In re Olive*, *Olive* v. *Westerman* (34 Ch. D. 72), Kay, J., considered that the trustees had acted most incautiously, and had not obtained a proper valuation, and that they must therefore be held liable.

[★106] Trustees' investments.

★ With regard to the subject of trustees' investments "authorized by law," in the absence of express power, the effect of 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, s. 11, and the General Order of 1st Feb., 1861, made in pursuance of that Act; 23 & 24 Vict. c. 145, s. 25; 30 & 31 Vict. c. 132, and 34 & 35 Vict. c. 47, s. 13, is to authorize investments in "the permanent public funds and government securities of the United King-

dom, freehold or copyhold securities in England, Wales, or Ireland, real securities in Scotland, the stock of the Banks of England and Ireland, the old and new East India Stocks, and investments coming under the description in the Act of 1867 of 'securities the interest of which is guaranteed by Parliament.'" [14]

Metropolitan Stock under 34 & 35 Vict. c. 47, s. 13; and see Geare's Investment of Trust Funds, pp. 71 *et seq.*

As a general rule a power to invest carries with it the power to vary the investments. *In re Clergy Orphan Corporation* (L. R. 18 Eq. 280).

See generally on the subject of the leading case Geare's Investment of Trust Funds, where, at p. 115, the authorities with regard to investments by trustees are summed up in the following four propositions:—

1. In the investment of trust funds the trustees should never employ the solicitor who acts for the borrower. *Waring* v. *Waring* (3 Ir. Ch. Rep. 331).

2. Trustees when entertaining the question of investment, should not favour the tenant for life at the expense of the remainderman. *Tickner* v. *Old* (L. R. 18 Eq. 422).

3. Any conditions annexed to the power to invest or vary investments should be observed strictly. *Bateman* v. *Davis* (3 Mad. 98); but see *Stevens* v. *Robertson* (37 L. J. Ch. (N.S.) 499).

4. Trustees should avoid making any investment which subjects the trust funds to the control of any one of the trustees singly.[15] *Consterdine* v. *Consterdine* (31 Beav. 331); *Lewis* v. *Nobbs* (8 Ch. D. 591).

Application to the Court for advice.

It may here be noticed that *Lord St. Leonard's Act* (22 & 23 Vict. c. 35, s. 30), the practice under which is regulated by O. LII. rr. 19 *et seq.* of R. S. C., 1883, enables trustees and executors to apply to a judge of the Chancery Division for opinion and advice as to the management of trust property, and they are also empowered to apply to the Court by summons under O. LV. r. 3 (g). As to the question of trustees acting under advice of counsel, see leading case, *Stott* v. *Milne*, p. 118.

Practice.

[14] In Pa. legal investments are bonds and mortgages and the public debts of the United States, State of Penna. and City of Phila. at such prices as the court thinks best.

[15] Trustees are by law joint tenants, and every one is equally entitled to receive the income. Peters *v.* Beverly, 10 Peters, 562; Taylor *v.* Benham, 5 How. 233; Brice *v.* Stokes, notes 2 Lead. Cases in Equity.

[★107]

## ★ *Liability of Constructive Trustees.*

### BARNES *v.* ADDY.

(L. R. 9 Ch. 244.)

Principle.

*A stranger to a trust acting as agent of the trustees in transactions within their legal powers is not to be held liable as a constructive trustee; unless he receives and becomes chargeable with part of the trust property, or unless he acts with knowledge of a dishonest and fraudulent design on the part of the trustees.*[1]

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Summary of facts.

Addy was sole surviving trustee of a considerable fund under a will which gave him a power of appointing new trustees, but no power of reducing their number. The portion of the estate which was the subject of litigation in the present action consisted of a sum invested in consols. One moiety of the fund, spoken of as the "Addy" share, was held for the benefit of Mrs. Addy and her children. The other moiety, spoken of as the "Barnes Share," for the benefit of Mrs. Barnes and her children.

Family disputes having arisen, Addy desired to appoint Barnes in his place as sole trustee of the Barnes fund. His solicitor advised him not to do so, and pointed out the risk of the misapplication of the trust fund when it was put in the power of a sole trustee; but Addy persisted in his intention. Addy's solicitor, on his instructions, drew up a deed of appointment and indemnity, but required that it should be approved by an independent solicitor on behalf of Mrs. Barnes and her children. Barnes'

[1] A constructive trust will arise if a person obtains from a trustee the trust property without paying for it. In such a case he is held to be a trustee by construction. Hill on Trustees, 172. The rule is different with regard to a *bonâ fide* purchaser for value. Mumma *v.* The Potomac Co., 8 Peters, 281.

solicitor, acting on behalf of Mr. Barnes and her children, warned her of the risk of the proposed transaction, but on her replying that she fully ★ understood the matter and desired it to be carried through, approved the deed on her behalf. Addy's solicitor then introduced Barnes to a broker, and Addy transferred the "Barnes' share" to Barnes. The next day Barnes misappropriated the whole of the "Barnes' share" and subsequently became bankrupt. The solicitors had no knowledge of any fraudulent design on the part of Barnes, and the question was whether, under all the circumstances, they were to be held liable. The Court of Appeal decided, affirming the decision of Vice-Chancellor Wickens, that they were not to be held liable. [★ 108]

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This case is cited in Lewin on Trusts, 8th ed. p. 899, as an authority for the following proposition: "A solicitor is not liable as a constructive trustee for the consequences of acts done by such solicitor, pursuant to instructions from his clients, who are trustees, and exercising their legal powers, unless the solicitor either receive some part of the trust property or assist with knowledge in some dishonest and fraudulent design on the part of his clients." The principles established by this very remarkable case would, however, clearly appear to be by no means limited to solicitors, but to extend to all other classes of persons who act as agents for trustees.

Principle extends to all classes of agents for trustees.

Lord Selborne, in delivering judgment, pointed out that it was equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its true and proper limits. "There would be," he said, "no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."

"In this case," said the Lord Chancellor, "we have to deal with certain persons who are trustees and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That respon-

sibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort* [2] or actually participating in any fraudulent conduct of the trustee to the injury of the *cestuis que trust.*[3] But on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[4] Those are the principles, [★ 109] as it seems to me, which we ★ must bear in mind in dealing with the facts of this case. If those principles were disregarded I know not how anyone could in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.[5] But on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed on them, then the transactions of mankind can safely be carried through, and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent by reason of the fiduciary relation upon the trustees."

The Court of Appeal then considered the facts of the case before them. So far as one solicitor was concerned, there was not the slightest trace whatever of knowledge or suspicion on his part of any improper or dishonest design in the transaction. To hold him liable on account of his preparation and approval of the deed, would be not only opposed to all authority, but would render it impossible for any person safely to act as a solicitor for any retiring or incoming trustee unless he took upon himself the office of a Court of

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[2] McCoy *v.* Scott, 2 Rawle, 222; People *v.* Houghtaling, 7 Cal. 348.

[3] A trustee cannot acquire any right or title which is antagonistic to the *cestui que trust.* Ashcelot Railroad Co. *v.* Elliott, 57 N. H. 397; Staats *v.* Bergen, 2 C. E. Green, 297.

[4] Such a person becomes trustee *ex malefacio.* 20 P. F. Sm. 256; Hoge *v.* Hoge, 1 Watts, 163; Beegle *v.* Wentz, 5 P. F. Sm. 374.

[5] Constructive trusts do not fall within the statute of frauds. See Christ's App., 16 P. F. Sm. 237; Story's Eq. sec. 1198; Long *v.* Perdue, 2 Norris, 217.

Equity and satisfied himself that nothing in the transaction could possibly be called in question. The case against the other solicitor carried the point very little further. He knew that as a general rule it was not a safe thing to hand over a trust fund to a single trustee, he advised against it, and he prepared a deed of indemnity. To hold that a solicitor in such a case was a constructive trustee would be, the Court said, an alarming doctrine which they would be the first to lay down, it not having been laid down by any of their predecessors. "I have long thought," said Lord Justice James, "that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been in some more or less degree injudicious. I do not think it is for the good of *cestuis que trust* or the good of the world that those cases should be extended."

Breach of trust by solicitor.

The circumstances under which a solicitor can be struck off the rolls for participating in or committing a breach of trust have been considered in several cases.

In *In re Hall* (2 Jur. N. S. 633) a solicitor had been guilty not only of a breach of trust by misappropriating trust money, but he had also been guilty of misrepresentation by stating that the trust fund was invested. Proceedings against him were instituted by his co-trustee, who was also a solicitor, and it was urged that no order could be made except on the complaint of the clients. Stuart, V.C., said that this circumstance was wholly immaterial, and made an order striking him off the Rolls. And see *In re Chandler* (22 Beav. 253).

In *Goodwin* v. *Gosnell* (2 Coll. (Ch.) 457) a sole acting trustee and executor had improperly sold certain trust property, and the proceeds were applied principally to the use of the solicitor. The Court came to the [★ 110] conclusion, on the evidence before it, that the trustee was a mere helpless and ignorant instrument in the hands of the solicitor, without any judgment or with scarcely more judgment or volition for any effectual or substantial or useful purpose than the pen with which he was made to sign his name and ordered the solicitor to shew cause why his name should not be struck off the Rolls. The result of the case, however, was that the Court, taking into consideration the youth of the solicitor and other circumstances, abstained from proceeding further in the matter on his undertaking to pay all costs, charges, and expenses. The eloquent judgment of Lord Justice (then Vice-Chancellor) Knight Bruce

in this case, with regard to the responsibilities and duties of the legal profession, is worthy of most careful perusal.

Solicitors when not proper parties to action.

In *Burstall* v. *Beyfus* (26 Ch. Div. 35) an action was brought against certain persons and a firm of solicitors alleging a case of fraud against all the defendants in obtaining a charge on certain property which the plaintiff took under his father's will, the effect of the charge being, under the provisions of the will, to occasion a forfeiture.

The charges against the solicitor were:—

1. That they acted as solicitors for all parties;

2. That they prepared a charge which the other defendants were said to have advised the plaintiff to execute;

3. That the charge, although read over to the plaintiff, was never explained to him, and that he executed it without understanding its effect;

4. That they in common with the other defendants well knew that the effect of the charge would be to occasion a forfeiture, and that it was procured for the purpose of being oppressively used against the plaintiff to induce him to meet certain promissory notes.

The Court of Appeal decided (affirming the decision of the Court below) that the statement of claim disclosed no reasonable cause of action against the solicitors, and the Lord Chancellor expressed a doubt whether, even if it had gone on to allege that the plaintiff had suffered some loss or damage, that allegation standing alone would have been adequate to shew a cause of action.

With regard to the contention which had been raised that the solicitors could at all events be made parties for the purpose of discovery, the Lord Chancellor adhered to his previous observations in *Barnes* v. *Addy* (*ubi supra*) and applied them to the case before him as follows:—"It is obvious that if solicitors cannot be made parties to pay costs, *à fortiori* they cannot be made parties for the mere purpose of making discovery. The only question is whether the action on the face of the pleadings is frivolous and vexatious. I have no hesitation in saying that an action against solicitors without shewing any case except by alleging that they acted as solicitors in a transaction in which the plaintiff seeks relief against other parties, is vexatious, and it was rightly dismissed against them."

Cotton, L.J., added: "I agree with the Lord Chancellor that to make ★ a solicitor a party to an action [★ 111]

without seeking any relief against him except to make him pay costs or give discovery, is vexatious; if a solicitor is guilty of negligence he can be attacked in an action for negligence. If guilty of worse conduct, there are other steps that can be taken against him. But I will not encourage parties to bring a solicitor before the Court in an action such as the present."

In *Stainar* v. *Evans*, *Evans* v. *Stainar* (34 Ch. D. 470), *Barnes* v. *Addy* was commented on and distinguished. There the trustee's solicitors had received capital money as part of the trust estate. An order for payment had been made against the trustee on statements implying that he was solvent, and on his making default in payment the Court made an order that the solicitors should pay into Court the capital moneys which had come to their hands, with interest at 4 per cent.

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## *Control of Trustees' Discretion*

### MINORS *v.* BATTISON.

(1 App. Cas. 428.)

Principle. *Where judgment has been given in an action for the administration of a trust, its general effect is to prevent the trustees from acting in the administration without the sanction of the Court.*[1]

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Summary of facts. A testator, who died in 1863, left all his property, which included the proprietorship of a newspaper, to trustees upon trust to carry on the newspaper during the life of his wife, and among other trusts after her decease, "at the sole discretion of my trustees," to sell all his property, including the newspaper, and divide the proceeds among his chil-

[1] After a decree a trustee cannot exercise even a special power without the sanction of the Court. But where a power is given to trustees to do or not a particular act at their discretion, the court has no jurisdiction to command or prohibit the trustees from exercising that discretion provided their conduct be *bonâ fide*. Green *v.* McBeth, 12 Rich. Eq. 254; Eldridge *v.* Head, 106 Mass. 582.

dren. In 1866 a suit for administration was commenced, in which a decree was made, followed by an order in 1870, after the death of the widow, declaring that it was for the benefit of all parties that the newspaper should be carried on. The House of Lords, in giving judgment that there was an absolute trust for sale[2] ★ after the death of the widow, laid down the principle, though it was not necessary for the purposes of the judgment, that the effect of what had been done in the administration action was to put an end to the discretionary power of the trustees.[3]

[★ 112]

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The point decided in this case, as stated in *Bubb* v. *Padwick* (13 Ch. D. 517), was that the "mere accidental delay in converting the newspaper property was not to postpone the vesting of the shares, although the gift over was if the children died without having received their shares," but it is also always cited as the leading authority with regard to the general effect of an administration judgment on the powers and authorities of trustees.

"In my opinion," said Lord Chelmsford, "the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage."[4] "I cannot help observing," he continued, "that even assuming that the trustees had an absolute discretion, this would not prevent the appellant from being entitled to her share of the testator's residuary estate, because during the life of William Hobson (her father and the testator's son) the trustees had retired from the trust and placed themselves in the hands of the Court by the bill filed by the trustees for administration of the trusts and the order founded thereon, after which the trustees could not ex-

[2] A power to trustees to sell will not authorize a partition. Woodhull *v.* Longstreet, 3 Harr. 419.

[3] Where a suit has been instituted for the administration of the trust and a decree has been made that attracts the jurisdiction of the court, the trustee cannot afterwards exercise the power without the concurrent sanction of the court. Lewin on Trusts, 616, and Carson *v.* Id., 1 Wins. (N. C.) 24.

[4] Gould *v.* Choppel, 42 Md. 466, Chesley *v.* Id., 49 Mo. 560.

ercise any discretion with which they were invested without the sanction of the Court."

Effect of administration judgment.

In Lewin on Trusts, chapter xxiii., where the author discusses the general powers of trustees, he thus sums up the effect of the cases on the subject (8th ed. pp. 597 and 617):—"The powers assigned in the preceding pages to trustees must be taken subject to the qualification, that, if an action has been instituted for the execution of the trust, and a decree made, the powers of the trustees are henceforth *so far paralysed* that the authority of the Court must sanction every subsequent proceeding. Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing: a trustee for sale cannot sell: the committee of a lunatic cannot make repairs: an executor cannot pay debts, or deal with the assets for the purpose of investments."

In *Bethell* v. *Abraham* (L. R. 17 Eq. 24) a decree for the administration of the trusts of Lord Westbury's will had been obtained. The trustees, who had power to invest certain moneys belonging to the estate at their discretion, and who had also power to continue or change securities from time to time as to the majority of them should seem meet, applied to the Court for liberty to sell certain securities and invest the proceeds in American funds and railway stocks.[5] Infants ★ were [★ 113] interested in the estate, and the Court declined to sanction the proposed investment. In this case Jessel, M.R., laid down the principle that as long as an estate is subject to administration by the Court the Court does not allow a purchase or a mortgage or any other investment to be made without being personally satisfied of its safety.[6]

Appointment of new trustees.

In *In re Gadd, Eastwood* v. *Clark* (23 Ch. Div. 134), a question arose as to the exercise of a power of appointment of new trustees after judgment had been given for administration of the trusts of the will. The Court of Appeal decided that the effect of the judgment for administration was not to take away from the trustee the power of appointing new trustees, but to render the appointment subject to the supervision of the Court; that if he nominated a fit person, such person must be

[5] In the United States if the trustees are given a discretion as to investments they have no right to invest in personal securities. Clarke *v.* Garfield, 8 Allen, 427; Willes' App., 22 Pa. St. 330.

[6] Twaddell's Appeal, 5 Barr. 15; Perry on Trusts, Sec. 458, 3rd. ed.

appointed, and that the Court had no discretionary power to say that another person was better than the nominee of the person who had the power. If the trustee nominated an improper person the Court would call upon him to make a fresh nomination. If the trustee repeatedly nominated improper persons, that would amount to a refusal to exercise the power, and the Court could then appoint, but the power would not be destroyed by a single nomination of which the Court did not approve. In this case the Court of Appeal pointed out that the form of decree in *Middleton* v. *Reay* (7 Ha. 106), which directed the Master to approve of trustees without saving the authority of the donee of the power, was not right, and that the modern form is framed so as to preserve the trustees' power.[7]

In *In re Norris*, *Allen* v. *Norris* (27 Ch. D. 333), there was an administration action, and the continuing trustee, who was the solicitor[8] to the trustees, appointed his son, who was also his partner, to be a new trustee. The Court held that though the appointment would have been valid if made outside the Court, yet that as there was an administration action, it must withhold its sanction to the appointment in question.

In *In re Hall* (51 L. J. N. S. 901) an action had been commenced against a sole trustee who was also tenant for life, asking for a general execution of the trusts of a will, but the Court, under the power conferred by Order LV. r. 10, only ordered certain inquiries, among which was one whether new trustees had been appointed, and whether any and what steps ought to be taken for their appointment. Pending this inquiry the defendant appointed a new trustee. The Court said that the effect of the order made was in no way to interfere with the exercise of the trustees' power except so far as its exercise must necessarily clash with the particular inquiries ordered.[9] The inquiry, however, having been ordered, it was the defendant's duty not to fill up the vacancies without an application for the approval of the Court. All that the person possessing the power had to do in such a case was to take care that he appointed such a person as the Court would approve.

[7] If a trustee wishes to be relieved of his duties he must as a general rule apply to a Court of Equity to be discharged. Sheppard *v.* McEvers, 4 Johns. Ch. 136.

[8] One of several trustees may act as an agent for the others. See Lewis *v.* Reid, 11 Ind. 239; Leggett *v.* Hunter, 19 N. Y. 445.

[9] As the position of trustee is one of personal confidence he cannot delegate his office even to a co-trustee. Hawley *v.* James, 5 Paige (Ch.) 487, Pearson *v.* Jamison, 1 McLean, C.C., 197.

The power of nomination is left in him, but the Court has a power of control to see that a fit and proper person is appointed. The proper course would have been to have made an application in Chambers, ★ giving the [ ★ 114] name of the person nominated, and if it was found that there was no objection to his appointment, it would have been approved. Practice.

A further principle which may be collected from the cases is that where there is a pending action, even if no judgment for administration has been made, though the plaintiff may abandon the action at any moment, and though the trustees must not assume that a judgment will be made, but must proceed in all necessary matters in the due execution of the trust, it is nevertheless imprudent for the trustees to act under such circumstances without first consulting the Court. Lewin on Trusts, 8th ed. 617, 618.

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## *Uncontrollable Discretion.*

### GISBORNE *v.* GISBORNE.

(2 App. Cas. 300.)

Principle.

*Where an "absolute" or "uncontrollable" discretion or authority is invested in trustees the Court will not interfere with its exercise in the absence of bad faith.*[1]

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Summary of facts.

Two funds, both under the management of the Court of Chancery, were applicable to the maintenance of a lady who, since her husband's death, had been judicially declared a lunatic. The lady was absolutely entitled to one fund under her marriage settlement. The other fund had been left by her husband's will to his trustees upon trust, "in their discretion and of their uncontrollable authority," to apply the income thereof for her maintenance. The fund itself, together with so much of the income

[1] If the trustees are given such a power, the Court has no jurisdiction to command or prohibit them to do, or to forbid them to do a particular act where they have an uncontrollable discretion so long as they act *bonâ fide*. Green *v.* McBeth, 12 Rich. Eq. 214; Eldridge *v.* Head, 106 Mass. 582.

as was not applied for her benefit, passed over to other persons on her decease. The question was on which fund the maintenance of the lunatic should be charged. Held, by the House of Lords, that the trustees were entitled to exercise an absolute discretion as to paying and applying the whole or any part of the income of the testator's estate for the benefit of the widow.[2]

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[★ 115] ★ This case was well described in the argument on a case to which we shall presently refer (*In re Lofthouse*, 29 Ch. Div. 921), as the turning point in the current of authority with regard to the control which the Court will exercise over trustees in whom discretionary powers have been reposed. It will be observed that the lady's interest in the fund under her husband's will was, as Lord Cairns expressed in his judgment, "evanescent," that consequently it was obviously for her interest that the cost of her maintenance should be charged upon that fund. The usual practice of the Court in such a case would have been to save the money which was her own property, and to maintain her out of the other fund (see *In re Weaver* 21 Ch. Div. 615, *infra*, p. 11).[3] Lord Cairns in delivering judgment said that the previous decisions in cases where trustees had submitted questions to the Court, or parties interested had raised them, as to whether trusts had actually arisen and ought to be acted upon, did not at all touch the present case, where the trustees were made absolute masters of the question, and armed with a complete and uncontrolled discretion. He then referred to the rule (previously mentioned) which the Court of Chancery would have adopted if it had two funds under its control, and proceeded as follows: —"I answer that may be the case, that may be the principle (and I make no objection to the principle, I highly approve of it), by which the Court of Chancery, where it has to exercise its dis-

Usual practice as to maintenance of lunatic.

[2] Lewin says (Text Book Series p. 772). "If the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is meant to be personal, and not to be annexed to the estate or office." Hazel *v.* Hogan, 47, Mo., 277. If a trustee has an absolute discretion to apply trust funds as he thinks best and dies without exercising that power *inter vivos* he may by his will direct how they shall be applied. Library Co. of Phila. *v.* Williams, 73 Pa. St. 249.

[3] Lewin on Trusts (8th ed.) 614.

cretion, deems it expedient to proceed in the exercise of that discretion. But am I entitled, in dealing with a will such as is now before your Lordships, to set up against the discretion of the trustees, which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? To do so here would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable, shall be controlled and be subjected to that rigid and unbending rule upon which the Court of Chancery acts (for reasons of which I entirely approve), upon those occasions when it has to perform the functions which, in this instance, the trustees, and not the Court have to perform."

In *Tabor* v. *Brooks* (10 Ch. D. 273) trustees had power to apply the income of a settled fund for the benefit of the husband, wife, and children, as they "in their uncontrolled and irresponsible discretion" should think fit. In this case the Court reviewed the previous decisions of *Costabadie* v. *Costabadie* (6 Ha. 410) and *In re Beloved Wilkes's Charity* (3 Mac. & G. 440, which established the general rule that the Court will not interfere with the discretion of trustees fairly and honestly exercised; *Davey* v. *Ward* (7 Ch. D. 754), where the Court had controlled the trustees, being of opinion that they were exercising a discretionary power in an arbitrary and unreasonable manner (see also *In re Roper's Trusts*, 11 Ch. D. 272); and the leading case *Gisborne* v. *Gisborne* (*ubi supra*), and declined to control the trustees, though it was of opinion that they were exercising their discretion ★ injudiciously, there being no proof whatever of *mala fides* on their part. [★ 116]

Limited discretion of trustees.

In the case of *In re Weaver* (21 Ch. Div. 615) a testator had left property to trustees upon trust to convert and invest it, and then pay and apply the income of half of it "in such way, at such times, and in such manner as they at their authority and discretion should think fit," towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital. The question which came before the Court of Appeal on a petition presented by the committee of the lunatic, was whether the allowance for the future maintenance of the lunatic should be paid primarily out of the life interest of the lunatic, or whether it should come out of her absolute property.

It was urged by the petitioners that there was nothing in the present case to take it out of the ordinary rule, which had been established as most beneficial to the lunatic, that the life income should be first applied. The trustees, on the other hand, submitted that the matter was left to their discretion. The Court distinguished the leading case (*Gisborne* v. *Gisborne*) on the ground that in that case there was power to apply the whole or such portion of the income as the trustees might think fit, while in the present case, on the contrary, the trustees had only a discretion as to the time and manner of the application. "In this case," said Jessel, M.R., "there is an absolute trust to apply the income in the lunatic's maintenance, and there is no discretion as to what part the trustees should apply. That being so, the rule is applicable that the lunatic's property must be applied as appears to be most for her benefit. It is clear that it is best for her that her maintenance should be provided out of her life interest, for if she should recover she will have the benefit of what belongs to her absolutely."

In *Tempest* v. *Lord Camoys* (21 Ch. Div. 571), a testator had given his trustees a power to sell his real estate, exercisable at the absolute discretion, [4] with a declaration that the proceeds should be invested at the like discretion in the purchase of other real estate, and he also gave them power at their absolute discretion to raise any money by mortgage for the purpose of effecting any purchase of real estate. A suit had been commenced for the execution of the trusts of the will, and a sum of money (the proceeds of the sale of real estate) was paid into Court. Some of the family desired to purchase a certain mansion and lands, and it was proposed to apply part of the fund in Court for the purpose, and to raise the remainder by a mortgage of the purchased estate. One of the trustees refused to concur in the scheme. The Court declined to control the discretion of the dissentient trustee in refusing to make the purchase or in refusing to exercise the power of raising money by mortgage. Jessel, M.R., in delivering judgment, said: "It is very important that the law of the Court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power the Court does not enforce the exercise of the power against

[4] A trustee is bound by his office to sell the estate under every possible advantage to the *cestui que trust*. Gould *v.* Chappel, 42 Md. 466; Chesley *v.* Id., 49 Mo. 560.

the wish of the trustees, but ★ it does prevent them [★ 117] from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised. This may be illustrated by the cases of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trusts has been made, they may still exercise the power, but the Court will see that they do not appoint improper persons. But in all cases where there is a trust or duty coupled with the power, the Court will then compel the trustee to carry it out in a proper manner and within a reasonable time."

In *In re Blake*, *Jones* v. *Blake* (29 Ch. Div. 913, *post*, p. 319), real estate had been devised to trustees with a discretionary power to postpone the sale, and the Court of Appeal declined to interfere with their discretion.

In *In re Lofthouse*, *an infant* (29 Ch. Div. 921), trustees had a power to apply "all or any part of the income" to which an infant was contingently entitled, for her maintenance and education.[5] The Court of Appeal expressed a doubt whether the discretion of the trustees as to the *quantum* to be allowed could be controlled, so long as it was exercised *bonâ fide*, and said that at all events the present application (by summons in the matter of the infant) was irregular, and that the Court had no jurisdiction unless the matter were brought before them under a writ or an originating summons.

In the recent case of *In re Brown*, *Brown* v. *Brown* (29 Ch. D. 889), the trustees, who were also executors, had power to invest moneys coming to their hands or under their control, in such mode or modes of investment as they in their own uncontrolled discretion should think fit.[6] Before the commencement of an action for administration, the trustees had invested a considerable portion of the estate in the purchase of Turkish bonds, City Bank shares, on which there was a further liability, bonds of a colonial railway company, and Portuguese bonds. The Court held that the securities in question ought to be converted, though the trustees had power to postpone the conversion, but that the conversion ought not to be indefinitely postponed; as however the trustees had acted *bonâ fide* in the exercise of the very wide powers given them by the will, and as

[5] In the matter of Bostwick, 4 Johns. Ch. 101.

[6] It is not a sound exercise of his discretion if a trustee invests the trust funds in personal securities. Barney *v.* Saunders, 16 Howard, 545; Moore *v.* Hamilton, 4 Florida, 112; Harding *v.* Larned, 4 Allen, 426; Nyce's Estate, 5 W. & S. 256.

there had been no loss to the trust estate, they were allowed the sums which they had laid out.[7]

In *In re Courtier*, *Coles* v. *Courtier* (34 Ch. Div. 136), the Court of Appeal, after referring to the cases of *Nickisson* v. *Cockill* (3 De G. J. & S. 622), and *Tempest* v. *Lord Camoys* (21 Ch. D. 576, n.), stated that it was clearly settled law that where trustees have a power as distinguished from a trust, although the Court will prevent them from executing the power unreasonably, it will not oblige them to exercise it, and, being of opinion that in the case before them the power was purely discretionary, declined to interfere. See also *Marquis Camden* v. *Murray* (16 Ch. D. 161), where the Court refused to control the trustees' discretion.

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[★ 118]

## ★ *Trustees' Costs.*

### STOTT *v.* MILNE.

(25 Ch. Div. 710.)

Principle.

*The costs and expenses of trustees properly incurred in the execution of a trust are a first charge on all the trust property, both income and corpus.*[1] *The fact that counsel have advised trustees to bring an action is not conclusive that the action was properly brought, but the Court will attach considerable importance to it.*[2]

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Summary of facts.

Stott, who was beneficially entitled for life to a certain freehold estate of which Milne was trustee, brought an action against Milne for an account of the rents, and the question arose whether the costs of two actions which had been brought by Milne without Stott's authority, but under the advice of

[7] In most of the United States the subject of investment of trust funds is regulated by statute. See Perry on Trusts, sec. 459.

[1] Lewin on Trusts (Text Book Series), p. 804. The expenses of a trustee incurred in the execution of his office are treated by the court as a first lien upon the estate.

[2] A trustee is justified in employing a solicitor for the better conduct of the trust. Brady *v.* Dilley, 27 Md. 570; McElhenny's App., 46 Pa. St. 347.

counsel, for the protection of the estate, ought to be allowed, and if so, whether Milne was entitled to retain them out of the income of the estate. The Court of Appeal, while holding that the actions were not necessarily proper because advised by counsel, decided that as they were brought *bonâ fide* and were beneficial to the estate, the trustees were entitled not only to a charge upon the *corpus*, but also to retain the income until provision could be made for raising the costs out of the estate.[3]

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In this case the Vice-Chancellor of the Lancaster Palatine Court, before whom the case originally came, decided that as the actions were brought under the advice of counsel the costs must be raised and paid out of the *corpus* of the estate, but that as they were brought without the authority of Stott the costs were not chargeable against the income, and he accordingly ordered the trustees to pay the plaintiff his costs of the present action up to the hearing. There were then cross appeals, ★ one by the plaintiff with regard to the costs of the former actions, and the other by the trustees with regard to the costs of the present action. The Court of Appeal varied the decision of the Vice-Chancellor in two points. The reason given in the decree, viz., that the actions were commenced under the advice of counsel, was not a sufficient reason and ought to be varied. [★ 119]

Advice of counsel.

"I cannot say," said Lord Selborne, "that because an action is advised by counsel it is always and necessarily one which trustees may properly bring. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it."

The second point decided in the trustee's favour was that he was justified in retaining the costs out of the income, and that consequently he ought to be allowed his costs of the action which had been brought against him. The property, the Court said, was peculiarly circumstanced, as it was available for building purposes, and anything done by tenants or neighbours which would give any other persons rights over it, might cause a material depreciation in its value.

[3] If the legal proceedings were due to the trustee's own negligence he will not be allowed his costs. Kent *v.* Hutchins, 50 N. H. 92.

The trustees had, therefore, an anxious duty to perform, and it had to be borne in mind that the plaintiff after giving the trustee an indemnity had changed his mind and given him notice that he would hold him liable. Under these circumstances the Court would require to be clearly satisfied that the actions were improper, to induce it to refuse costs out of the estate, and accordingly they not only allowed the trustee his costs out of the *corpus* of the estate, but also recognised his right of retainer as against the income, and gave him his costs of the present action.[4]

"The right of trustees," said Lord Selborne, "to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and *corpus*. The trustees, therefore, had a right to retain the costs out of the income until provision could be made for raising them out of the *corpus*." [5]

Trustee's right to indemnity.

The principle that a trustee is entitled to indemnity out of the trust estate is well illustrated by the celebrated case of *Bennett* v. *Wyndham* (4 D. F. & J. 259). There a trustee, in the due execution of his trust, directed the bailiff employed on the settled estate to have certain trees felled, timber being wanted for roofing a barn on the estate. The bailiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall on a passer by, who brought an action against the trustee and recovered heavy damages.

The Court of Appeal held, reversing the decision of the Court below, that the trustee was entitled to indemnity out of the trust estate. Lord Justice Knight Bruce, in delivering judgment, said, "the trustee in this case appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act, the directing which to be done was within the due discharge of his duty. The agent makes a mistake the consequences of which subject the trustee to legal
[★120] ★liability to a third party. I am of opinion that this liability ought as between the trustee and the estate to be borne by the estate." [6]

[4] Downing *v.* Marshall, 37 N. Y. 380.

[5] Where trustees have been wrongfully appointed but acted *bonâ fide* and believed themselves to have been duly appointed they were allowed cost, charges and expenses notwithstanding the defect of the title; the same is also true if the trust is void if the trustees be without blame. Re Wilson, 4 Barr. 430; Hawley *v.* James, 16 Wendell, 61.

[6] Lewin says (p. 797 Text Book Series) "a trustee is allowed

In *Walters* v. *Woodbridge* (7 Ch. Div. 504) the question was whether a trustee was to be allowed his costs of an action which he had successfully defended in which charges of personal fraud had been made against him. The Court of Appeal decided that as the defence of the action by the trustee was for the benefit of the trust estate, he must be allowed his costs, though an incidental object of the defence of the action was the defence of his own character. They considered that the case fell within the principle that where an action is brought against a trustee in respect of the trust estate, whether it be an action of ejectment, trespass, or of any other description, and is defended by the trustee not for his own benefit but for the benefit of the trust estate. he is entitled to indemnity.

The Court, said James, L.J., is very strict in dealing with trustees, and it is the duty of the Court as far as it can to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust.[7]. The false charge was a charge against the trustee in respect of acts done by him in the due administration of the trusts and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one.

Trustees severing in their defence.

Trustees, being a joint body, are not entitled, as a general rule, to appear separately from each other or from their *cestuis que trustent* (*Farr* v. *Sheriffe*, 4 Hare, 528), or, as it is technically termed, to "sever in their defence," and only one set of costs will be allowed.

Exceptions to the rule.

Where, however, there are special circumstances, *e.g.*, where one of the trustees is charged with a breach of trust, or even in some cases when they reside at a distance from each other, severance is allowed. *Course* v. *Humphrey* (26 Beav. 402); *Prince* v. *Hine* (27 Beav. 345); *Att.-Gen.* v. *Wyville* (28 Beav. 464); *Walters* v. *Woodbridge* (7 Ch. Div. 504), where, there being charges of fraud, the severance was considered justifiable; and see *Smith* v. *Dale* (18 Ch. D. 516); *In re Love*, *Hill* v. *Spurgeon* (29 Ch. Div. 548), where the action was by one trustee against the other, and both trustees were held entitled to costs between solicitor and client; and see Daniell, Chancery Practice, p. 506, where the authorities are collected; Lewin on Trusts, 8th ed. p. 260,

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nothing for his trouble, but is allowed everything for his expenses out of pocket."

[7] Perkins *v.* Kershaw, 1 Hill's Eq. 350; Morton *v.* Barrett, 22 Me. 257.

where it is suggested that the same principle must govern trustees' transactions out of Court.

It was held in *In re Pumfrey, deceased, The Worcester City & Banking Co.* v. *Blick* (22 Ch. D. 255, that where a trustee had a right to be indemnified out of the trust estate, there is no reason why he should wait for his indemnity until the trust estate has been turned again into money under the trust. His right of indemnity gives him a right of charge or lien upon the trust estate, he has a right to come at any time and say, "I claim to have my right of indemnity, I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate, and that [★ 121] gives me the right in equity ★ to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity." "It would be extremely hard," the judge said, "upon trustees, who are treated with all proper severity and quite harshly enough by the Rules of this Court, if, when they have a right of indemnity, it should be held that they are not to be allowed to enforce that right of indemnity until the estate happens to be turned into money under the trust contained in the settlement." [8]

Priority

In *Dodds* v. *Tuke* (25 Ch. D. 617), where an action was brought against trustees under a creditors' trust deed, and the costs of all parties were ordered to be paid, and where it appeared probable that the fund would not be sufficient for the payment of all the costs in full, the trustees were held entitled to a direction for the payment of their costs, charges, and expenses in priorty to costs of all other parties.

Costs out of pocket.

Though a trustee is allowed nothing for his trouble, he is allowed everything for his expenses out of pocket. On this principle trustees have been held to be entitled to travelling expenses properly incurred,[9] to costs of solicitor and counsel, costs of opposing a Bill in Parliament and protecting the estate. *In re Earl de la Warr's Estates* (16 Ch. D. 587), and *In re Lord Rivers' Estate* (16 Ch. D. 588, n.); *McEwan* v. *Crombie* (25 Ch. D. 175); Lewin on Trusts, 8th ed. p. 260.

R. S. C. 1883, as to casts.

With regard to costs, Order LXV. r. 1, R. S. C., 1883, provides that "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court

[8] A trustee should invariably keep account of the expenses. *Ex parte* Cassell, 5 Watts, 442; Green *v.* Winters, 1 Johns Ch. 27.

[9] Towle *v.* Mack, 2 Vt. 19.

or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

It is pointed out in Morgan and Wurtzburg, Chancery Acts and Orders, 6th ed. p. 540, that the saving of the right of trustees and mortgagees to costs out of the estate is less extensive under this rule than that in the corresponding repealed rule, being restricted to the case of a trustee or mortgagee "who has not unreasonably instituted or carried on or resisted any proceedings," but that these words appear not to have made any real alteration in the law. The right of a trustee or mortgagee to his costs rests as before substantially upon contract; for improper conduct, whether of the kind specified in the rule or any other, he may be deprived of them, but not otherwise. *Cotterell* v. *Stratton* (L. R. 8 Ch. 295); *In re Chennell* (8 Ch. Div. 492); *Turner* v. *Hancock* (20 Ch. Div. 303); *In re Watts* (22 Ch. Div. 5); *In re Sarah Knight* (26 Ch. Div. 90.)

## ★*Donatio mortis causâ.* [★122]

*In re* **MEAD.** **AUSTIN** *v.* **MEAD.**

(15 Ch. D. 651.)

Principle. *A gift of a bill of exchange payable to self or order is valid as a* donatio mortis causâ *though unindorsed and though it does not fall due until after the donor's death,*[1] *but a gift of donor's own cheque if not payable until after his death is not valid as a* donatio mortis causâ.[2]

Mead had in his possession two bills of exchange

[1] Brown *v.* Id., 18 Conn. 410; Harris *v.* Clark, 2 Barb. 56; Caldwell *v.* Renfrew, 33 Vt. 213; Westerld *v.* DeWitt, 36 N. Y. 340; Waring *v.* Edmonds, 11 Md. 424; Turpin *v.* Thompson, 2 Metcalfe (Ky.), 420, where promissory notes of third persons whether endorsed or not constitutes a good *donatio mortis causâ* also the cheque of a third person may be the subject to such a gift, Gibson *v.* Hibbard, 13 Mich. 214, also a certificate of deposit, Brooks *v.* Id., 12 S. C. 422.

[2] This is so because there must in order to constitute a good

Summary of facts.

payable to himself or order, and a banker's deposit note for £2700, which required seven days' notice of withdrawal. Two days before his death, Mead, desiring to give £500 to his wife, signed the notice of withdrawal and sent it to the bank. He then signed a form of cheque which was on the back of the deposit note, "Pay self or bearer £500," and handed it and the two bills of exchange unindorsed to his wife.

The practice of the bank on withdrawal of part of a deposit was to give a fresh deposit note for the balance. Held, that there had been a valid *donatio mortis causâ* of the bills of exchange[3] but not of the cheque.[4]

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This case forms a striking illustration of the principles on which the Court proceeds in cases of gifts by way of *donationes mortis causâ*. The gift of the bills, though unindorsed, was held to be good on the authority of *Veal* v. *Veal* (27 Beav. 303). With regard to the cheque for £500, part of the deposit note for £2700, the judgment was as follows: "The authorities stand in this way. A gift of a banker's deposit note, with the view of giving to the donee the whole sum secured by it, has been held to be a good *donatio mortis causâ*.[5] A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ*.[6] To which of these two classes of decisions does the present case belong? ★In my judgment it belongs to the latter class. The effect

Deposit note.

Cheque.

[★ 123]

*donatio* be a delivery of the subject matter during the life of the donor, and the cheque is not the subject of the gift, but the money which it represents and if it is not payable until the death of the donor there can be no delivery during the donor's life. See Basket *v.* Hassell, 107 U. S. 602.

[3] The bill of exchange was accepted by the bankers before the death of the donor and as the same was capable of assignment it was valid. Second National Bank *v.* Williams, 13 Mich. 282.

[4] Notes or cheques are not valid unless the money they represent be reduced to possession during the life of the donor. Raymond *v.* Sellick, 10 Conn. 480; Smith *v.* Kittredge, 21 Vt. 238; Copp *v.* Sawyer, 6 N. H. 386.

[5] Flint *v.* Pattee, 33 N. H. 520; Brooks *v.* Id. (*supra*); Basket *v.* Hassell, 107 U. S. 602.

[6] Harris *v.* Clarke, 3 N. Y. 93; Grover *v.* Grover, 24 Pick. 340; Bates *v.* Kempton, 7 Gray, 382; Simmons *v.* Saving Society, 31 Ohio, 457.

of the notice of withdrawal given by the testator to the bank on the 23rd of May was to set free a fund of £2700 upon the 30th of May, and upon that fund the testator drew a cheque for £500, which was not payable till that day, i.e. after his death. Looking at the whole of the circumstances of the case, and at the practice of the bank, which was to give a fresh deposit note for the balance when a part of the money was withdrawn, it does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque, and according to the authorities that is not a good *donatio mortis causâ*."

Cheques.

In *Rolls* v. *Pearce* (5 Ch. D. 730) the donor, who was then living in Italy, gave his wife two cheques on a London bank. The wife indorsed the cheques, and paid them into a foreign bank. The bank negotiated the cheques in the ordinary course of business, but they were not presented for payment at the London bank until after the donor's death.

Cheque payable to bearer.

Malins, V.C., in delivering judgment, said that if these cheques had been made payable to bearer, and had not been presented for payment at the bank on which they were drawn before the donor's death, he should probably have considered that he was bound to hold that there was not a good gift. The cheques in question, however, were payable to order, and the donor knew that they could not be presented for payment either on the day they were drawn, or on the subsequent day, and the Vice-Chancellor, following the decision in *Tate* v. *Hilbert*, reported 2 Ves. 111, (which he considered to be the more accurate report), and 4 Bro. C. C. 291, that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causâ*, held that there was a good *donatio mortis causâ* of both cheques.[7]

Cheque to donor's order, unindorsed.

In *Clement* v. *Cheesman* (27 Ch. D. 631) the gift was of cheques which the donor had received for value; they were payable to the donor's order, but he had not indorsed them. It was held that there was a good *donatio mortis causâ*. The Court pointed out that the subject matter of the gift was not the donor's own cheque, but was his property, being the cheque of another man taken for value. The general rule stated in Byles on Bills, 12th ed. p. 176, was then cited with approval, viz. "that a cheque drawn by the donor upon his own banker cannot be the subject of a *donatio mortis causâ*,

[7] Starr *v.* Id., 9 Ohio St. 74; McKenzie *v.* Downing, 25 Ga. 669.

because the death of the drawer is a revocation of the banker's authority to pay[8] (see, however, *Rolls* v. *Pearce*, *supra*). Here, however, the Court said the donor was dealing with the cheque of another man, which stands entirely on the same footing as a bill of exchange or promissory note, which, according to *Veal* v. *Veal* (27 Beav. 303), may be a good *donatio mortis causâ*.[9] For this purpose there is no difference between the cheque of another man and a bill of exchange or promissory note. See further on the subject of cheques *Bouts* v. *Ellis* (17 Beav. 121, 4 D. M. & J. 249); *Bromley* v. *Davenport* (L. R. 6 Eq. 275); *Hewitt* v. *Kaye* (L. R. 6 Eq. 198); *Beak* v. *Beak* (L. R. 13 Eq. 489).

Bill of exchange.

Promissory note.

[★ 124]

★ The English law concerning *donatio mortis causâ* is based upon the Civil Law.[10] The following is the definition given by Justinian, Inst. lib. 2, tit. 7, 1: "*mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat ut, si quid humanitûs ei contigisset, haberet is qui accepit; sin autem supervixisset is qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt persomnia.*" (A gift *mortis causâ* is one made in expection of death;[11] when a person gives upon condition that if any fatality happen to him, the receiver shall keep the article; but that if the donor should survive, or if he should change his mind, or if the donee should die first, then the donor shall have it back again. These gifts *mortis causâ* are in all respects put upon the same footing as legacies.) In this latter respect, as we shall presently see, the Roman Law differed from the English Law. Abdy & Walker's Institutes of Justinian, p. 119; Hunter's Roman Law, p. 915, 2nd ed.

Essentials of a *donato mortis causâ*.

There are three essentials of a *donatio mortis causâ*.

1. The gift must be with a view to the donor's death.[12]

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[8] The gift is not complete until the death of the donor and it may be resumed by him at any time until his death which must occur within a reasonable time after delivery. Dole *v.* Lincoln, 31 Me. 422; Gratton *v.* Appleton, 3 Story, 755.

[9] The essential requisite necessary to constitute a *donatio mortis causâ* is, that it be made in peril of death. Champney *v.* Blanchard, 39 N. Y. 111; Knott *v.* Hogan, 4 Metcalfe (Ky.), 99.

[10] A *donatio mortis causâ* depends not upon an equitable but a legal title, and the claim of the donee is not essentially an equitable right. Bispham's Eq. (4th Ed.) Sec. 70; Ward *v.* Turner, (4th American Ed.) 2 Leas. Cas. Eq. 1205 and notes.

[11] See Michener *v.* Dale, 23 Pa. St. 59; 2 Kent's Com. 444; Register *v.* Hensley, 70 Mo. 195.

[12] Gourley *v.* Linsenberger, 51 Pa. St. 345; Thompson *v.* Id., 12 Texas, 327.

2. There must be an express or implied intention that the gift should only take effect on the donor's decease by his existing disorder.[13] This point is well illustrated by the case of *Edward* v. *Jones* (1 My. & Cr. 233), where it was held that a voluntary gift of a bond indorsed but not under seal could not take effect as a *donatio mortis causâ* because an absolute gift was intended, and it could not take effect as a *donatio inter vivos* because it was incomplete.

3. There must be delivery of the subject matter of the donation to the donee or someone on his behalf.[14]

*Bill of Exchange Act*, 1882.

With regard to the subject of gifts of cheques and bills of exchange by way of *donatio mortis causâ* the following provisions of the *Bills of Exchange Act*, 1882, should be noticed. Sect. 73 defines a cheque as a bill of exchange drawn on a banker payable on demand, and declares that, except as otherwise provided, the provisions of that Act applicable to a bill of exchange payable on demand shall apply to a cheque. As to negotiation sect. 31 provides that—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. (2) A bill payable to bearer is negotiated by delivery. (This would seem to obviate the difficulty raised in *Rolls* v. *Pearce*, *supra*, as to the validity of a *donatio mortis causâ* of a cheque payable to bearer). (3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

By sect. 75 the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1) Countermand of payment; (2) Notice of the customer's death.

*Customs and Inland Revenue Act*, 1881.

The *Customs and Inland Revenue Act*, 1881 (44 & 45 Vict. c. 12). Sect. 38 (2), provides that the personal or moveable property to be included in an account shall comprise (*inter alia*) "any property taken ★ as a *donatio mortis causâ* made by any person dying on or after the 1st of June, 1881." [★ 125]

Compared

A *donatio mortis causâ* resembles a legacy, and dif-

[13] Jones *v.* Brown, 34 N. H. 439; Virgin *v.* Goither, 42 Ill. 39; Gass *v.* Simpson, 4 Cold. (Tenn.) 288.

[14] The cases are remarkable for the great strictness with which they regard the necessity and certainty of delivery. There must be a delivery consisting of the manual tradition of the subject of the gift or something which is tantamount to or a substitute for such delivery. Cose *v.* Dennison, 6 R. I. 88; Cutting *v.* Gilman, 41 N. H. 147; Grymes *v.* Hone, 49 N. Y. 17; Resch *v.* Senn, 28 Wis. 286; Blasdel *v.* Locke, 52 N. H. 238; Campbell's Estate, 7 Pa. St. 100; Carr *v.* Silloway, 111 Mass. 24.

with a legacy and a *donatio inter vivos.*

fers from a gift *inter vivos* [15] in the following respects: (1) It is ambulatory and incomplete during the donor's life.[16] It may be revoked by resumption or by the recovery of the donor from the same illness. It cannot, however, be revoked by a subsequent will, though it may be satisfied by a legacy; (2) It may be made to the wife of the donor; [17] (3) It is subject to legacy duty; [18] (4) It is liable for debts on deficiency of assets.[19]

A *donatio mortis causâ*, on the other hand, differs from a legacy in the following respects: (1) It does not require probate, as it takes effect at one *sub modo* (*i.e.*, conditionally), but as to duty see 44 & 45 Vict. c. 12, sect. 38, *ante*, p. 124; (2) It requires no assent from the executor or administrator to perfect the donee's title. See Williams on Executors, 8th ed. 776 *et seq.*

Gifts by way of *donatio mortis causâ* have been held valid in the following instances, in addition to those which we have previously noticed.

Banknotes. Banknotes.—*Shanley* v. *Harvey* (2 Ed. Rep. 125); *Ashton* v. *Dawson* (Sel. Ch. Cas 14); *Miller* v. *Miller* (3 P. Wms. 356); *Hill* v. *Chapman* (2 Bro. C. C. 612.)

Bonds. Bonds.—*Snellgrove* v. *Bailey* (3 Atk. 214); *Duffield* v. *Elwes* (1 Bligh, N. S. 543).[20]

Deposit notes. Deposit note given by a bank to the donor.—*Amis* v. *Witt* (33 Beav. 619); *Moore* v. *Moore* (L. R. 18 Eq. 474); *Dunne* v. *Boyd* (L. R. 8 Eq. 609).[21]

Keys. Keys as affording the means of obtaining possession of the thing given.—*Ward* v. *Turner* (2 Ves. Sen. 443); *Jones* v. *Selby* (Prec. Ch. 300); *Smith* v. *Smith* (2 Stra. 955).[22]

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[15] After the subject of a gift *inter vivos* is delivered to the donee, the gift is consummated and cannot afterwards be revoked. McCarty *v.* Kearnon, 86 Ill. 291.

[16] Michener *v.* Dale (*supra*).

[17] *i.e.* without the intervention of a third person and is subject to donor's debts on a deficiency of assets. Smith's Eq. Sec. 221.

[18] It is different from a legacy as it does not require probate. Gass *v.* Simpson (*supra*); Basket *v.* Hassel (*supra*).

[19] The donee takes subject to the claims of creditors. Mitchell *v.* Pease, 7 Cush. 350; Bloomer *v.* Id., 2 Bradf. 339.

[20] A bond of the donor is good and no indorsement or other writing is necessary to transfer such bond. Wells *v.* Tucker, 3 Binney, 366; Waring *v.* Edmonds, 11 Ind. 424.

[21] This applies to delivery of a bank book or certificate of deposit. Hill *v.* Stevenson, 63 Mc. 364; Sheedy *v.* Roach, 124 Mass. 472; Dean *v.* Dean, 43 Vt. 337; Camp's App., 36 Conn. 88; Pierce *v.* Saving Bank, 129 Mass. 425, but the delivery of the donor's cheque alone on the bank is not a valid *donatio mortis causâ*, Nicholas *v.* Adams, 2 Wharton, 17; Meach. *v.* Id., 24 Vt. 591; neither is an order upon the bank good as such a gift. Consler *v.* Snowden, 54 Md. 175.

[22] This is symbolic delivery, but if the subject matter of the

Mortgage.—*Richards* v. *Syms* (Barnard Ch. Cas. 90); *Hurst* v. *Beach* (5 Madd. 351), *Duffield* v. *Elwes* (1 Bligh, N. S. 543).[23] Mortgage.

Policy of insurance.—*Witt* v. *Amis* (1 Best & Sm. 109); *Amis* v. *Witt* (33 Beav. 619).[24] Policy of insurance.

Receipt for money.—*Moore* v. *Darton* (4 De G. & Sm. 517).[25] Receipt for money.

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## ★ *Real Property Limitation Act, 1874.* [★126]

### SUTTON *v.* SUTTON.

(22 Ch. Div. 511.)

*After twelve years from the last payment of interest or acknowledgement in writing of debt the personal remedy of the mortgagee upon the covenant is barred, as well as the remedy against the land.* Principle.

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The plaintiff brought an action in 1882 on a covenant contained in a certain indenture executed in May, 1868, for payment of £1850 with interest at 5 per cent., together with all the costs "relating to the said indenture and attending the execution of the trusts and powers contained therein." Summary of facts.

The defence was that the indenture of May, 1886, was in fact a mortgage on certain lands, and that no part of the principal nor any interest thereon had been paid by the defendant since November, 1869, which was more than twelve years before the commencement of the action, and the defendant claimed the benefit of the *Real Property Limitation Act*, 1874, and of all *Statutes of Limitation*.

The Court of Appeal decided on demurrer that the plaintiff was not entitled to recover.

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gift will permit of a more perfect delivery it must be made as a symbolic delivery will not suffice. Parrish *v.* Stone, 14 Pick. 203; Sessions *v.* Mosely, 4 Cush. 87.

[23] Durke *v.* Hicken, 61 Cal. 346.

[24] Trough's Est., 75 Pa. St. 115; Westerlo *v.* DeWitt (*supra*).

[25] A valid *donatio mortis causâ* may also be made of any obligation due to donor by donee, and such gift is a discharge of the debt.

The plaintiff in this case, it will be observed, brought his action in a very peculiar form, doubtless in order to avoid the effect of the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57). The plaintiff claimed on a covenant, but the defence brought out that the deed in which the covenant was contained was a mortgage of land, and thus the neat point was raised, which was disposed of by the Court on demurrer, whether the plaintiff was precluded from relief by the *Real Property Limitation Act*, 1874.

Form of action.

[★ 127]

Section 8.

★ Sect. 8 of that important statute, which came into operation 1st January, 1879, provides that "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 twelve years next after a present right to receive the same shall have accrued to some 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 but within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one, was given." The provisions of this section were most carefully considered in the leading case by the Court of Appeal. After pointing out that the object of the *Statutes of Limitation* was to give legislative authority to that which had previously rested on judicial decision, viz., the presumption of payment after a certain lapse of time, they proceeded to construe the words, "no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage," where they observed that the order of the words probably intended was to bring together "action at law" and suit at equity. It had been contended that the effect of these words was not to prevent the recovery of any sum of money secured by a mortgage, but that they applied only to the recovery of the money so far as it could be recovered by a sale of the land or by the receipt of the rents, *i.e.* so far as it could be got out of the land.

To this Jessel, M.R., said there were two objections—(1) that it put words into the section which were not to be found there; and (2) that it gave no meaning to

the words which were in the section, because you could not get the money as against the land at the time when the Act was passed except by a suit in the Court of Chancery.

A further reason, which though not conclusive was nevertheless entitled to weight against this interpretation, was that it would be absurd that you should get rid of the greater, viz., the liability of the land, and retain the less, the personal liability to pay. The primary object of the Act, the Court said, was no doubt to bar actions for the recovery of land or for enforcing charges thereon, but this section had gone beyond that point, and according to its true construction the action on a covenant in mortgage, being an action to recover money charged upon land, was barred by it after twelve years.

Collateral bond.

It was held in the case of *Fearnside* v. *Flint* (22 Ch. D. 579), which came before the Court very soon after the leading case, and is reported in the same volume of the Law Reports, that the fact that the mortgage debt was secured by a collateral bond given by the mortgagor made no difference, and that the debt was barred by the lapse of twelve years since the last payment of interest or written acknowledgement of the mortgage debt.

[★128]

★On this point the Court said "the decision of the Court of Appeal in *Sutton* v. *Sutton* has determined that a sum of money secured by a mortgage upon land, and also secured by a covenant of the mortgagor in the mortgage deed, is to be treated as one and the same sum; so that when the right of suit or action in respect of the land is gone, the right on the covenant ceases also. It appears to me that no distinction can exist between a covenant contained in a mortgage deed and a collateral bond given at the same time as the mortgage." (See *post*, p. 129, as to the further point which arose in this case on sect. 10 of the same Act, 37 & 38 Vict. c. 57).

Collateral bond by surety.

The principle of the cases of *Sutton* v. *Sutton* and *Fearnside* v. *Flint* was held not to apply to a case where a collateral bond had been given by a surety to secure a mortgage debt conditioned to be void on payment by the mortgagor of the principal and interest in *In re Powers, Lindsell* v. *Phillips* (30 Ch. D. 291). The Court of Appeal here approved of the decision in *Fearnside* v. *Flint*, and said that to hold otherwise would be to give a different effect to an instrument because it was not written on the same sheet of paper. Here, how-

ever, the proceeding were not between the same parties, and they were to enforce a different debt not charged on land, and therefore the cases of *Sutton* v. *Sutton* and *Fearnside* v. *Flint* had no application.

Section 9.

The next section (9) of the *Real Property Limitation Act*, 1874, provides that the Act is to be read in connection with the *Statute of Limitations* (3 & 4 W. IV. c. 27) as if six years were substituted in that Act for ten and twelve for twenty, and with the supplementary enactment (7 W. IV. & 1 Vict. c. 28) as if twelve years were there now substitued for twenty years. These statutes were considered by the Court of Appeal in the important case of *Horlock* v. *Ashberry* (19 Ch. D. 539), where it was held that the payment, to come within 1 Vict. c. 28, must be a payment of principal or interest made by the mortgagor or some person bound to pay principal or interest on his behalf, and that consequently payment of rent by a tenant required to do so by notice from the mortgagee is not sufficient. In this case it was laid down (p. 548) that the principle on which all the *Statutes of Limitation* are based is that the payment to take a case out of the operation of the statute must amount to an acknowledgment by the person making the payment of his liability and an admission of the title of the person to whom the payment is made; and see *Chinnery* v. *Evans* (11 H. L. C. 129); *Heath* v. *Pugh* (7 App. Cas. 235).

Possession by mortgagee of part of the mortgaged land.

In *Kinsman* v. *Rouse* (17 Ch. D. 104) it was held that where a mortgagee had been in undisturbed possession of part of the mortgaged land for more than twenty years the right of the mortgagor to redeem was barred by sect. 28 of the *Statute of Limitations* (3 & 4 Will. IV. c. 27) although he held possession of the remainder of the mortgaged land.

Mortgage paid off. Legal estate.

Where a mortgage on real estate had been paid off but no reconveyance executed the legal estate of the mortgagee was held to be extinguished by thirteen years' adverse possession of the mortgagor. *Sands to Thompson* (22 Ch. D. 614).

[★129]

Section 10.

★ Sect. 10 of the *Real Property Limitation Act*, 1874, provides that after the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if

there were not any such trust. When this section is read in conjunction with sect. 25, sub-sect. 2, of the *Judicature Act*, 1873, which provides that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any *Statute of Limitations*," there appears at first to be some inconsistency. This, however, is explained by the fact that the section of the *Judicature Act* applies between trustee and *cestui que trust*, and preserves the personal remedy, while the 10th sect of the *Real Property Limitation Act* applies between the land charged, though secured by way of trust, and the persons entitled to the charge, and bars the remedy against the land. Lewin, 8th ed. p. 885, citing *Fearnside* v. *Flint* (*ubi supra*) and *Hughes* v. *Cole* (27 Ch. D. 231). *Judicature, Act*, 1873, sect. 25, sub-sect. 2.

*Newbould* v. *Smith* (33 Ch. Div. 127), affirming 29 Ch. D. 882, is a case of much importance with regard to the rights of mortgagees. The action was brought by the administratrix of Newbould, a solicitor, who died in 1880, to obtain foreclosure or sale of two mortgage securities, one of which had been vested in Newbould, while the other had since his death been transferred to his administratrix. The defendants pleaded the *Statute of Limitations* with regard to both properties.

In 1863 Newbould, lent £430 to Smith on property in Montague Street. There was an adjustment of account in 1866, and the balance due on the mortgage was settled at £350. After this there were no entries relating to the Montague Street mortgage, but there was an entry in Newbould's diary dated September, 1878, "Smith, C. E. Cash on account of rent and interest £50."

The second consisted of property which Smith in 1863 had mortgaged to clients of Newbould's. Up to February, 1866, when the adjustment of account took place with regard to the Montague Street property, Newbould paid the interest and brought it into his account with Smith. After 1866 Newbould continued to pay the interest, and there was evidence of one of the mortgagees that he received interest from Newbould in the belief that it was paid through him by Smith. There was also a letter from Newbould to the mortgagee in which he stated that he had paid to their account a sum received from Smith for interest, but there was no further evidence to connect Smith with the payments, and no proof that Newbould had acted as his solicitor after 1866.

The Court of Appeal affirmed the decision of the Court below, and held that the plaintiff's remedy in respect of both properties was barred by the statute.

[★ 130] ★ In *Blake* v. *Gale* (32 Ch. Div. 571) mortgagees of real estate had assented to the distribution of the personal estate of the mortgagor among his residuary legatees, and more than 20 years afterwards, their security having proved insufficient, they claimed against the residuary legatees, and it was held that after such a lapse of time they were not entitled to recover on the ground that their right was purely equitable, and that under the circumstances it would be inequitable to allow it to be enforced.

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## *Dealings with Reversioners.*

### EARL OF AYLESFORD *v.* MORRIS.

(L. R. 8 Ch. 484.)

Principle. *The Court has jurisdiction to relieve expectant heirs against unconscionable bargains.*

Summary of facts. The Earl of Aylesford, who was entitled as tenant in tail expectant on the death of his father, who was in ill health, to large estates, had contracted considerable debts during his minority, and shortly after attaining his majority was introduced by a creditor to Morris, a money-lender, who advanced him £6800 on his acceptance at three months for £8000, and a policy effected at Lord Aylesford's cost. When the acceptance became due an arrangement was entered into under which Lord Aylesford received a small sum and gave acceptances for £11,000. The Court of Appeal ordered all securities to be given up upon payment of the sums actually advanced, with interest at five per cent. per annum.

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History of the law. A very full history of the law with regard to the relief which Courts of equity have granted to expectant heirs and reversioners may be found in the judgments

of the Court of Appeal in the leading case, and of the House of Lords in *O'Rorke* v. *Bolingbrook* (2 App. Cas. 814).

★ "The principle," said Lord Hatherley in the latter case, "on which equity originally proceeded to set aside such transactions was for the protection of family property, but this principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms." [★ 131]

"There is," said Lord Selborne in the leading case (L. R. 8 Ch. 489), "hardly any older head of equity than that described by Lord Hardwicke in *Earl of Chesterfield* v. *Janssen* (2 Ves. Sen. 125, 127) as relieving against the fraud 'which infects catching bargains with heirs, reversioners, or expectants, in the life of the father,' &c. 'These' (he said) 'have been generally mixed cases,' and he proceeded to note two character always found in them. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain."

Lord Selborne then proceed to shew how in the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; considered by Lord Brougham (in *King* v. *Hamlet*, 2 My. & K. 456, where held that if the transaction was known to the father or person in *loco parentis* of the expectant, no relief could be granted) to be an indispensable condition of equitable relief, though Lord St. Leonards, whose opinion was approved by Lord Selborne, dissents from that opinion (Sug. V. & P. 11th ed. p. 316). "The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class), excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges (see Lord Hardwicke's judgment in *Chesterfield* v. *Janssen*, 2 Vesey, 125) have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the

bud the fortunes of families is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case. But the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; ★ and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it."

[★ 132]

Advancement of goods.

It was held in several cases, that where, in the words of Lord Thurlow in *Barker* v. *Vansommer* (1 Bro. C. C. 149), there is "an advancement of goods" for the purpose of being resold instead of money to supply the necessities of the expectant heir or reversioner, Equity will treat the transaction as merely colourable and grant relief. See also *Waller* v. *Datt* (1 Ch. Ca. 276; 1 Dick. 8), *Barny* v. *Beak* (2 Ch. Ca. 136), and *King* v. *Hamlet* (2 My. & K. 456).

Jurisdiction.

There was at first, Lord Hatherley tells us in *O'Rorke* v. *Bollingbroke*, considerable oscillation of opinion with regard to the jurisdiction, but it was at last settled. The usury laws were repealed by 17 & 18 Vict. c. 90. A further change was introduced by 31 Vict. c. 4, which provides as follows:—"No purchase made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of under value."

Repeal of usury laws 31 Vict. c. 4.

"(2) The word purchase in this Act shall include every kind of contract, conveyance or assignment, under or by which any beneficial interest in any kind of property may be acquired.

"(3) This Act shall come into operation on the first day of January, one thousand eight hundred and sixty-eight."

In *Webster* v. *Cook* (L. R. 2 Ch. 542) the borrower was entitled to the income of property subject to

the payment of two jointure rent-charges, and of the interest on mortgages which reduced the income to a small amount. In consideration of an advance of £1000, to which £400 was afterwards tacked on at £5 per cent. per month, he assigned the income by way of security for £3300 repayable on the death of the first life annuitant, £1 per cent. per annum to be paid in the meantime, and redeemable on payment of £1500 at the end of a year. The Court of Appeal held that the borrower's interest in the income was not a reversion, and that neither transaction could be set aside.

In *O'Rorke* v. *Bolingbroke* (2 App. Cas. 814), the question was whether the sale of a reversion could be set aside. The vendor of the reversion had only just attained his majority, and he had no separate and independent advice, but there being no evidence of fraud on the part of the purchaser, the House of Lords refused to set aside the sale.

In this case Lord Hatherley entered into an elaborate consideration of those decisions and rules by which the Court of Chancery has been governed in regard to the dealings of persons whom the Court thinks to be in need of its special protection and care, with reference to interests which other persons may obtain in their property, without, as it appears to the Court, sufficient consideration or advice on the part of those who are in need of special protection. He traced the history of the law from the early cases collected in a note to *Davis* v. *The Duke of Marlborough* (2 Sw. 108, 139, n.), among which is particularly mentioned the decision of Lord Nottingham in *Berny* v. *Pitt* (2 Vern. ★ 14), and expressed an opinion that, having regard [★ 133] to the habitual protection afforded by the Court of Equity to the young and inexperienced, the vendor ought to be relieved from his improvident bargain. The majority of the House of Lords, however, held that the transaction ought to be allowed to stand. There was strong evidence that the purchaser believed that the tenant for life, the vendor's father, who died some three months after the transaction was completed, was a good life at the time, but the House of Lords expressed an opinion that if the purchaser had known that the father was in bad health, or was only ignorant because he had neglected to make proper inquiries, or had neglected to take some steps which according to the rules of equity he ought to have taken, their decision would have been different.

The following statement of the present state of the

Present state of the law

law as to the sale of reversions by Lord Selborne in the leading case was cited with approval by the House of Lords in *O'Rorke* v. *Bolingbroke*. The usury law, however, proved to be an inconvenient fetter upon the liberty of mercantile law. "The arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable as well as to unconscionable bargains. Both have been abolished by the legislature, but the abolition of the usury laws leaves the nature of the bargain capable of being a note of fraud in the estimation of this Court, and the Act as to sales of reversion (31 Vict. c. 4) is carefully limited to purchases made *bonâ fide* and without fraud or unfair dealing, and leaves under value still a material element in cases in which it is not the sole ground for relief. Those changes of the law have in no degree altered the *onus probandi* in those cases, which in the language of Lord Hardwicke rises from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness, a presumption of fraud. Fraud does not mean here deceit or circumvention, it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *primâ facie* to raise the presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact just and reasonable."

In *Nevill* v. *Snelling* (15 Ch. D. 679), the last case upon the subject, the defendant, a money-lender who kept a "Peerage," was in the habit of sending to sons of peers circulars in which he offered to lend money to any amount on personal security. Such a circular was sent by him to the plaintiff, who was the third son of the Marquis of Abergavenny, and was then under age. The plaintiff, while still under age, applied to the defendant for a loan of £50. The money was advanced on the security of a promissory note for £65, payable in three months, with interest at 60 per cent. per annum. After the plaintiff came of age further sums were advanced on similar terms, imperfectly understood by him. The plaintiff was not entitled to any property, ★ either in possession or in reversion. It appeared that the money was advanced by defendant on the credit of vague general expectations, and in the hope of extorting payment from some relation. Denman, J., in delivering judgment, in which all the pre-

[★ 134]

vious cases are noticed, said: "The real question in every case seems to me to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at the full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look at all the circumstances."

It may be observed that in the leading case a portion of the plaintiff's liability was in respect of sums of money advanced to him during his minority. Since the decision of *Aylesford* v. *Morris*, however, the law has been very materially altered in this respect by the *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), coming into operation on the 7th August, 1874.

*Infants' Relief Act*, 1874.

Sect. 1.

Sect. 1 provides that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void." This is followed by a proviso that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter except such as now by law are voidable.

Sect. 2.

Sect. 2 provides that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. (Note, however, that a fresh promise made after majority, *Northcote* v. *Doughty* (4 C. P. D. 385), *Ditcham* v. *Worrall* (5 C. P. D. 410), is not like a mere ratification, as *Coxhead* v. *Mullis* (3 C. P. D. 439), within the statute. See further as to dealings with reversioners: *Croft* v. *Graham* (2 De G. J. & S. 155); *Savery* v. *King* (L. R. 5 H. L. 627); *Miller* v. *Cook* (L. R. 10 Eq. 641); *Tyler* v. *Yates* (L. R. 11 Eq. 265; 6 Ch. 665); *Beynon* v. *Cook* (L. R. 10 Ch. 389).

Fresh promise made after majority.

Confirmation and acquiescence.

Voidable transactions may be validated by confirmation or acquiescence, but there can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not at the time of the supposed ratification the means of forming an independent judgment. *Savery* v. *King* (*ubi supra*).

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[★135]

## ★ *Agreement for a Lease.*

### WALSH *v.* LONSDALE.

(21 Ch. Div. 9.)

Principle.

*Since the Judicature Acts a tenant holding under an agreement for a lease, of which specific performance would be decreed,*[1] *stands in precisely the same position as if the lease had been executed, and every branch of the Court must give him the same rights.*[2]

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Summary of facts.

Lonsdale agreed to grant, and Walsh agreed to take, a lease of a mill called the Province Mill for seven years at a rent of 30*s.* a year for each loom, the looms not to be less after the first year than 540. The lease was to contain the usual provisions "and particularly those inserted in a lease of the Newfield Mills." The lease of the "Newfield Mills" contained a stipulation that there should always be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the

[1] Specific performance will be decreed where there is an agreement for a lease. Farley *v.* Stokes, 1 Parsons, 422; Furnival *v.* Crew, 3 Atkyns, 83.

[2] A mere agreement for a lease does not imply a covenant for quiet enjoyment during the term. Brashier *v.* Jackson 6, Meeson & Welsby, 549, and the agreement to lease raises an implied covenant on the part of the lessor that he has the power to demise and if the lessee is prevented from entering at the commencement of his term by the unlawful holding over of the former tenant, it is not an eviction by good title, and the lessee cannot maintain an action against the lessor on the implied covenant for quiet enjoyment. Cozens *v.* Stevenson, 5 S. & R. 421.

yearly rent due and unpaid for the period previous to the demand. Walsh was let into possession of the premises, and for two years and a half paid rent quarterly, but not in advance. Lonsdale then served a notice demanding immediate payment of the sum of £1013 14*s.* which was made up of £840 for one whole year's rent of the mill in advance, together with a sum for rent which had accrued from the last quarter day, and a sum for insurance. Two days later Lonsdale put in a distress for the amount demanded. The Court of Appeal decided that Lonsdale was not to be deprived of the security of the distress except on the terms of Walsh paying £810, being the amount of the dead or fixed rent at the rate of 30*s.* a loom for 540 looms.

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★ The principle on which the decision in this case is based is thus stated by Jessel, M.R.: "There is an agreement for a lease under which possession has not been given. Now since the *Judicature Act* the possession is held under the agreement, there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease.[3] He holds therefore under the same terms as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say 'I have a lease in equity and you only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that, being a lessee in equity, he cannot complain [★ 136]

[3] Somewhat resembling a lease is an agreement to lease which vests no legal title in the would-be tenant but gives him a right to maintain an action for damages. Weaver *v.* Wood, 9 Barr. 220.

of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

*Ground Game Act*, 1880.

The principle of *Walsh* v. *Lonsdale* was held to apply to a case which arose on the construction of the *Ground Game Act*, 1880, *Allhusen* v. *Brooking* (26 Ch. D. 559). There the question was whether the landlord's right to the ground game on the land was preserved by the operation of the saving clause (sect. 5), which is as follows :—"Where at the date of the passing of this Act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land." The defendant held as tenant from year to year expiring after the Act came into operation, and he had also an equitable interest under an agreement prior to the Act for a lease of fourteen years, which was to commence from the expiration of the legal interest, and reserved to the landlord all game (except rabbits, with regard to which the tenant was to have certain rights). It was held that the agreement for a lease must be treated as equivalent to a lease,[4] and that the reservation of the game thus came within the operation of the saving clause.

*Bankruptcy Act*, 1883, sect, 56.

On the same principle, it was decided in *Ex parte Monkhouse, In re Maughan* (14 Q. B. D. 956), that the right of a trustee in bankruptcy to disclaim property of an onerous character, under sect. 55 of the *Bankruptcy Act*, 1883, extended to an agreement for a lease. Field, J., in delivering judgment, said, "Since the *Judicature Acts* there is now no distinction between a lease and an agreement for a lease, because equity looks upon that as done which ought to be done.[5] Consequently after the execution of the agreement for a lease, this ★ debtor had a property vested in him,

[★ 137]

[4] The distinctive difference between a lease and an agreement to lease is that the former are words of present demise, or else it is expressed that possession is to be taken on a certain day, always provided there be no contrary expression, nor any prior duty to be performed. Jackson and Gross, on Landlord and Tenant, par. 23 & 24.

[5] Whenever a court of equity interposes to compel the performance of an act which has covenanted to be performed, it always treats the subject as if it had been performed at the time contracted. See Jordan *v.* Cooher, 3 S. & R. 585; Reeve's Domestic Rel. title Chancery, 446. "This is a very important maxim, and one which lies at the foundation of many of the great doctrines in equity." Bispham's Eq. (4th ed.) sec. 44.

that is to say, he had land which was burthened with onerous covenants."

A notice issued by the authorities of Somerset House (*Weekly Notes*, 1884, p. 559) directed the attention of "house agents, builders, and the public generally" to the provisions contained in sect. 96 of the *Stamp Act*, 1870, with regard to the stamping of agreements and subsequent leases. That section provides as follows:— Stamping of agreements for lease.

(1) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped is to be charge with the duty of sixpence only.

By the joint operation of the *Statute of Frauds* (29 Car. II. c. 3), and 8 & 9 Vict. c. 106, s. 3, every lease of corporeal hereditaments for a term exceeding three years from the making thereof, now requires to be by deed.[6] See Shelford's Real Property Statutes, 8th ed. p. 633.

Sect. 4 of the *Conveyancing Act*, 1882, provides that where a lease is made under a power, any preliminary contract for or relating to it, shall not for the purposes of deduction of title, form part of the title or evidence of the title to the lease. See note to Clerke & Brett's Conveyancing Act, 1882, p. 22. *Conveyancing Act*, 1882, sect. 4.

In *Coatsworth* v. *Johnson* (55 L. (Q.B.) 220), cited *ante*, p. 43, a provisional draft lease for 21 years[7] had been signed by the parties, containing, *inter alia*, a covenant with regard to the cultivation of the farm. The plaintiff entered into possession, but before any rent was due the defendant, the landlord, gave him notice to quit for breach of the covenant and turned him out of possession. The plaintiff then brought his action for trespass. The Court of Appeal held that the plaintiff was a mere tenant at will, that no Court would make a decree for specific performance in favour

[6] If it is not in writing the tenancy then becomes a tenancy at will. If however possession is taken and held for longer than one year and rent is paid and received a tenancy from year to year is created. Clayton *v.* Blakey, 2 Smith's Leading Cases, 180 and note page 55; Pugh *v.* Good, 3 W. & S. 56.

[7] In Penna. if a lease is made for over twenty-one years it must be in writing and recorded in the office of the Recorder of Deeds in the county in which the premises are situated, or else it will be void as to subsequent grantees. 1 Smith's Laws, 422.

of a plaintiff who was himself in default by the breach of a covenant, and that consequently he was not entitled to recover; and see *Cox* v. *Bishop* (8 De G. M. & G. 815), followed in *Haywood* v. *Brunswick Building Society* (8 Q. B. Div. 403, 408, 410).

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[★ 138] ★ *Restrictive Covenants.*

AUSTERBERRY *v.* CORPORATION OF OLDHAM.

(29 Ch. Div. 750.)

Principle.

*The doctrine of* Tulk *v.* Moxhay *is confined to restrictive covenants, and will not be extended to a covenant to lay out money or do any other act so as to bind a purchaser taking with notice of the covenant.*

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Summary of facts.

John Elliott conveyed a slip of land, bounded on both sides by other lands which belonged to him, to the trustees of a road company, who covenanted with John Elliott, his heirs and assigns, that they, their heirs and assigns, would make and maintain the road, and allow the user by the public subject to tolls. John Elliott sold his lands to Austerberry and the trustees sold the road to the Corporation of Oldham, both parties having notice of the covenant. The Court of Appeal decided that Austerberry could not enforce the covenant against the Corporation.

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In this case the Court of Appeal applied, and treated as settled the law with regard to restrictive covenants which had been discussed in the previous cases of *Haywood* v. *Brunswick Building Society* (8 Q. B. Div. 403), and the *London and South Western Railway Co.* v. *Gomm* (20 Ch. Div. 562).

Principle of *Tulk v. Moxhay.*

*Tulk* v. *Moxhay* (2 Phill. 774), the celebrated "Leicester Square Case," characterised in *Haywood* v. *Brunswick Building Society* (*ubi supra*) as the leading case in which the equitable doctrine "was brought to a

focus," decided by Lord Chancellor Cottenham in 1848, established the principle which has ever since been adopted with regard to what are called "restrictive covenants." The principle laid down in that decision was that "a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding ★ upon subsequent purchasers at law." [1] "The [★ 139] question," said Lord Cottenham, "is not whether the covenant runs with the land, but whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased." [2]

"That the question does not depend upon whether the covenant runs with the land is evident from this, that if there were a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.[3]

This case has since been followed and extended, and the decision of Lord Brougham in *Keppel* v. *Bailey* (2 M. & K. 517), so far as it ignores the effect of taking with notice of a restrictive covenant, must now be considered as overruled: *Luker* v. *Dennis* (7 Ch. D. 227), and see the notes to *Spencer's Case* (1 Smith's Leading Cases, p. 98), where the question is discussed under the subject of "covenants running with the land."

The doctrine of *Tulk* v. *Moxhay* has since been recognized in a great number of cases which will be found

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[1] See Redwine *v.* Brown, 10 Ga. 311; Herrin *v.* McIntyre, 1 Hawks, (N. Ca.) 410; Chase *v.* Weston, 12 N. H. 413; Snyder *v.* Jones, 10 Wendell, 184; Le Ray de Chaumont *v.* Forsyth. 2 Pa. St. 574: Thompson *v.* Saunders, 5 Monroe (Ky.), 358; Williams *v.* Wetherbee, 1 Aikens (Vt.), 239; Wheeler *v.* Sohier, 3 Cushing, 222, and Griffin *v.* Fairbrother, 1 Fairfield (Me.), 91.

[2] Where a person has parted with all his interest in the land, he parts also with all right to or control over the covenants which run with it, and he can only regain that right over them by being made liable upon his own covenants and satisfying that liability. Rawle on Covenants for Title, 359; Vancourt *v.* Moore, 26 Mo. 98; Allen *v.* Little, 36 Me. 170.

[3] If a vendee has notice of a covenant which does not run with the land, equity will compel his observance of it. Brew *v.* Van Deman, 6 Heisk, 433; Frye *v.* Partridge, 82 Ill. 267; Pollock on Covenants, 229.

collected in Kerr on Injunctions, 2nd ed. 428; Seton on Decrees, 4th ed. 184, the principal of which are noticed in *Keates* v. *Lyon* (L. R. 4 Ch. 218), and *Renals* v. *Cowlishaw* (9 Ch. D. 125, and 11 Ch. Div. 866).

In *Keates* v. *Lyon* (*ubi supra*), Sharp sold part of an estate to Langton, who entered into restrictive covenants for himself, his heirs, and assigns with Sharp, his heirs, executors and administrators, as to building on the purchased property, but there were no covenants by Sharp in reference to the land retained. Sharp subsequently sold other parts of the same estate to other purchasers, but there was no evidence as to the contents of their conveyances, nor that they had any notice of the covenants entered into by Langton. Sharp afterwards re-purchased from Langton the lots which he had sold him. It was held that the benefit of Langton's covenants did not in equity pass to the other purchasers, and that Sharp could make a title to the repurchased land free from the covenants.

In *Renals* v. *Cowlishaw* (9 Ch. D. 125; 11 Ch. Div. 866), the owners of a residential estate of adjoining lands sold part of the latter to the defendant's predecessors in title, subject to restrictive covenants on the user of the land in favour of the vendors and their assigns. Afterwards the same vendors sold the residential estate to the plaintiff's predecessor in title; the conveyance contained no reference to the restrictive covenants, and there was no contract or representation that the purchasers were to have the benefit of them, and in fact it contained a different restrictive covenant on the user of the estate. It was held that the plaintiffs, the assignees of the residential estate, were not entitled to enforce the restrictive covenants against the defendants. The Court of Appeal thought that the case was governed by *Keates* v. *Lyon* (*ubi supra*), and
[★ 140] *Child* v. *Douglas* (2 Jur. (N.S.) 950), and ★ James, L.J., in delivering judgment, said: "To enable an assign to take the benefit of restrictive covenants, there must be something in the deed to define the property for the benefit of which they were entered into."[4]

In this case it was pointed out that the previous cases of *Mann* v. *Stephens* (15 Sim. 517); *Eastwood* v. *Lever*

[4] The rule appears to be in favor of vesting in every purchaser the benefit of all prior covenants which have been entered into by the former vendors, and this, though each vendor may only have covenanted against his own acts. Withy *v.* Mumford, 5 Cowen, 137; Bickford *v.* Page, 2 Mass. 460; Markland *v.* Crump, 1 D. & B. N. Ca. 94; Booth *v.* Starr, 1 Conn. 241.

(4 D. J. & S. 114) were like *Western* v. *Macdermott* (L. R. 1 Eq. 499; L. R. 2 Ch. 72), which was a case "of reciprocal rights, both parties deriving title under a deed embodying a general building scheme, where the covenants were designed to maintain the general character of the neighbourhood." The general law on the subject as collected from the cases was thus summed up by Hall, V.C., in a judgment with which James, L. J., expressed his entire approval: "Any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant, and this right, that is the benefit of the covenant, enures to the assign of the first purchaser, in other words runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others, where his vendor has contracted with him that he shall be the assign of it, that is have the benefit of the covenant. And such contract need not be express, but may be collected from the transaction of sale and purchase." Hall, V.C., then went on to say that in considering this, certain matters were of importance: (1) The expressed or otherwise apparent purpose or object of the covenant in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property. (2) Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into. (3) If he is not, whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; a point which may not be so important is whether the purchaser claiming the benefit of the covenant has entered into a similar covenant. In a subsequent portion of the judgment the Vice-Chancellor added that the cases established "that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of

Summary of law.

each portion of the estate so retained, or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject matter of the purchase."

[★141] ★The line of cleavage between the old series of authorities, which commenced with *Tulk* v. *Moxhay*, and the latter class of decisions which culminate in the leading case, is marked by the case of *Haywood* v. *Brunswick Building Society* (8 Q. B. Div. 403). There land had been granted in fee in consideration of a rent-charge and a covenant to build, and keep in good repair, and when necessary to rebuild. It was held that the assignee of the grantee, who took with notice of the covenant, was not liable on the covenant to repair. The Court of Appeal held that a covenant to repair, being a covenant which could only be enforced by making the owner put his hand in his pocket, and not being a mere restrictive covenant, was not within the rule of *Tulk* v. *Moxhay*, and could not be enforced. "I think," said Lindley, L.J., after noticing the previous authorities, "that the result of these cases is that only such a covenant as can be complied with without expenditure of money, will be enforced against the assignee on the ground of notice."

In *London and South Western Railway Company* v. *Gomm* (20 Ch. D. 562) the plaintiff company conveyed certain superfluous land to the adjoining owner, who covenanted that he would at any time, when required by six months' notice, reconvey to the company at a fixed price. Gomm, who purchased with notice of this covenant, was called upon by the company to reconvey, and on his refusal an action was brought for specific performance. The Court of Appeal in dismissing the action expressed their most cordial assent to the decision in *Haywood* v. *Brunswick Building Society* (*ubi supra*).

The doctrine of *Tulk* v. *Moxhay*, the Court said, was confined to restrictive covenants and ought not to be extended to affirmative covenants compelling a man to lay out money or do any other act of an active character. "The purchaser," said Jessel, M.R. (p. 283) in discussing the reason of the rule in *Tulk* v. *Moxhay*, "took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice, he was freed from the burden."

In *Andrews* v. *Aitken* (22 Ch. D. 218) it was held in

an action for specific performance of a contract, that a covenant to build houses on the land the rent of which should be double the value of the rent secured by the deed was unusually restrictive. It was contended that according to the law as settled by *Haywood* v. *Brunswick Building Society* and *London and South Western Railway Company* v. *Gomm* (*ubi supra*), the defendant could not be called upon to put his hand in his pocket and lay out money on building a house. To this it was answered by the Court that although the plaintiff "could not be called upon to build the house, he might be called upon to allow the house to be built, and the difficult question might arise with regard to the extent to which the liability existed. He might be harassed in an action relying on *Spencer's Case*, or on *Cooke* v. *Chilcott* (3 Ch. D. 694), which, although undoubtedly more or less infringed upon, was not expressly overruled, or in an action founded upon the fact that he had agreed to take subject to the covenant."

★ In *Sayers* v. *Collyer* (28 Ch. D. 103) it was held, [★ 142] explaining the old case of *Duke of Bedford* v. *Trustees of the British Museum* (2 My. & K. 552), that a change in the character of the neighborhood which had not been caused by the plaintiff's conduct, was not a ground for refusing him the benefit of restrictive covenants, but that he had by his acquiescence lost his right to enforce the covenant either by injunction or damages.

In *Nottingham Patent Brick & Tile Co.* v. *Butler* (16 Q. B. D. 791), Lindley, L.J., stated the law to be as decided in *Harrison* v. *Good* (L. R. 11 Eq. 338), that it is an inference of fact in each case whether the purchasers are bound *inter se* by such covenants, and that the mere fact that the vendor does not bind himself expressly to enforce the covenants which he takes for the benefit of the purchasers, is not material.

## *The Married Women's Property Act, 1882.*

### REID *v.* REID.

(31 Ch. Div. 402.)

Principle.

*Sect. 5 of the Married Women's Property Act, 1882, is limited to property the title to which accrues since the 1st of January, 1883, and accordingly when a woman married before 1st January, 1883, has acquired a title to property in remainder or reversion before that date, such property does not become separate property by falling into possession after that date.*

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Summary of facts.

A woman married in 1871 was entitled under a settlement made in 1874 to a reversionary interest in the proceeds of the sale of certain real estate, and on the death of the tenant for life in February 1883 she brought an action asking for a declaration under the *Married Women's Property Act*, 1882, that she was entitled for her separate use to her share and interest under the deed of 1874, or in the alternative that the whole of such share might be settled on her or her children.

[★143] ★ The Court of Appeal decided that she was not entitled to the declaration that the property in question was her separate property, but remitted the question as to her equity to a settlement to be dealt with by the judge from whom the appeal was brought.

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The decision of the Court of Appeal in this case settled the law on the construction of sect. 5 of the *Married Women's Property Act*, 1882, which, in the words of Cotton, L.J., had given rise to a most singular variety of judicial opinions, which are noticed in the argument, p. 404.

Sect. 5.

Sect. 5 provides that every woman married before

the commencement of this Act (1st of January, 1883), shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

In coming to a conclusion with regard to the meaning of this section, the Court of Appeal, while recognising the principle embodied in the maxim "*omnis nova constitutio futuris formam imponere debet non preteritis*," i.e. that except in special cases the law ought to be construed so as to interfere as little as possible with vested rights; and allowing some slight degree of weight to the consideration that if the words of a statute are ambiguous, of two constructions, the more convenient construction (that is to say, the construction which leads to less inconvenience) ought to be adopted, proceeded chiefly upon the precise words employed by the legislature. Little or no assistance, they said, could be derived from the cases which had been decided on covenants with regard to after-acquired property contained in marriage settlements. The reason for this is well stated in the judgment. Cases on marriage settlements, as pointed out in *In re Clinton's Trusts* (L. R. 13 Eq. 295, 305), cited in the judgment, "must be approached with the presumption that the object and intention of the settlement is to prevent the husband acquiring property of the wife which falls into possession during the coverture." Section 5 of the Act, on the contrary, being to some extent retrospective, and applying as it does to persons married before the Act, is limited to property the title to which accrues after the Act, and there is consequently "no presumption that it is not intended to be confined to property in which the husband at the commencement of the Act had not any interest."

It had been contended on behalf of the claim of Mrs. Reid, that there might be five kinds of accruer of title, either vested, contingent, in ★ possession, in reversion, or in remainder, and that if any one of them happened after 1st Jan. 1883, the property was to be treated as separate property. The Court of Appeal however decided that according to the fair construction of the section one title only was dealt with. The words, in their opinion, were introduced to preclude an argument which might otherwise have been raised as to the nature of the title [★ 144]

which was so to first accrue. It might have been contended, if those words had not been introduced, that the accruer of the title in reversion or contingency was not an accruer of title within the meaning of the Act. "I think," said Fry, L.J., "the object of these words is to make it clear that all property in which the married woman first acquires a title after the commencement of the Act comes within the operation of this section, whatever the nature of that title may be."

*Married Women's Property Act*, 1870.

The *Married Women's Property Act*, 1870, (33 & 34 Vict. c. 93), specifically assigned to the Court of Chancery the business of deciding all questions as to property declared by the Act to be separate property of the wife and the appointment of trustees of policies of assurance. That Act has been repealed (subject to a saving clause) by sect. 22 of the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), and the effect of this repeal is to take from the Chancery Division a department of business which would have otherwise devolved upon it under sect. 34 of the *Judicature Act*, 1873. Sect. 17 of the Act of 1882 expressly enables any judge of the High Court of Justice to determine all questions between husband and wife as to the title to or possession of property. Except, indeed, so far as the provision in sect. 11, that trustees of policy moneys may be appointed by any Court having jurisdiction under the provisions of the *Trustee Act*, 1850, or the Acts amending or extending the same (as to the practice under which see *In re Soutar's Policy Trust*, 26 Ch. D. 236), may be taken to give the Chancery Division something in the nature of a peculiar jurisdiction; anything in the nature of a special assignment of business to either division of the High Court is conspicuous by its absence.

Jurisdiction.

The following are the principal sections of the *Married Women's Property Act*, 1882, with notes on the more important points which have been made the subject of judicial interpretation.

Married woman to be capable of holding property and of contracting as a *feme sole*.

Section 1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner, as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in

tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered ★ by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. [★ 145]

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn. Contract of married woman.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*. Married woman carrying on trade.

This section, in the case of a woman married before the commencement of the Act, only applies to property acquired after 1st January, 1883: *In re Harris' Settled Estates* (28 Ch. D. 171), where this question arose as to the necessity of a separate examination under sect. 50 of the *Settled Estates Act*, 1877; and see *Riddle* v. *Errington* (26 Ch. D. 220), where it was held under the same section that no separate examination was necessary as the marriage was after 1st January, 1883. Not retrospective.

It was held in *In re Price*, *Stafford* v. *Stafford* (28 Ch. D. 709) (following *Willock* v. *Noble*, L. R. 7 H. L. 580), that sect. 1, sub-sect. 1, enables a married woman to dispose by will only of property of which she is seised or possessed during coverture, and as a consequence a will made by a married woman during coverture must be re-executed after she becomes discovert, in order to render it effectual to dispose of property acquired after the coverture has come to an end; and see *In re Young*, *Trye* v. *Sullivan* (28 Ch. D. 705), where it was held that balances of accounts and investments kept in the joint names of husband and wife survived to the wife on her husband's death, but did not pass under a will she had executed during coverture. A contract by a married woman entered into since the commencement of the Act binds the separate property that she has at Will of a married woman made during coverture.

the time of making the contract, but sect. 1, sub-sect. 4, does not enable a married woman to bind by contract any separate property which she may possibly acquire in the future: *In re Shakespear, Deakin* v. *Lakin* (30 Ch. D. 169).

A married woman has a right to sue alone in respect of a tort committed before the commencement of the Act: *Weldon* v. *Winslow* (13 Q. B. Div. 784). A married woman may petition alone: *In re Outwin* (31 W. R. 374).

Gift to husband, wife, and a third party.

In *In re March, Mander* v. *Harris* (27 Ch. Div. 166), a testatrix who died after 1st January, 1883, by her will executed before that date, gave her property to C. J. M. and J. H., and E. his wife, "to and for their own use and benefit." It was held by the Court of Appeal that the will must be construed in accordance with the old law, and that C. J. M. took one moiety, J. H. took a [★146] quarter, and E. H. his wife took ★the other quarter for her separate use. "In my opinion," said Cotton, L.J., "the Act was not intended to alter any rights excepting those of the husband and wife *inter se*. What the effect will be when words similar to these occur in a will made after the Act came into operation, I do not say."

It was held in *Conolan* v. *Leyland* (27 Ch. D. 632) that sub-sects. 3 and 4 have no retrospective operation, but an order made by consent after 1st January, 1883, referring to arbitration a dispute in respect of a contract made before that date, was held to be an agreement binding a married woman's separate property which she had at or after the date of such agreement; and see *Turnbull* v. *Forman* (15 Q. B. Div. 234), where the previous decisions of *Pike* v. *Fitzgibbon* (17 Ch. Div. 544), *Bursil* v. *Tanner* (13 Q. B. D. 691), *Weldon* v. *Winslow*, and *Conolan* v. *Leyland* are considered.

Torts against a married woman.

As to torts committed against a married woman, see *Weldon* v. *Neal* (32 W. R. 828) and *Weldon* v. *De Bathe* (14 Q. B. Div. 339, 345), in which it was held, that where a house had been acquired by a married woman since the *Married Women's Property Act*, 1870, out of her own earnings and was her own sole occupation, she was entitled to sue alone in an action for trespass a person who entered against her will, and though authorized by her husband was not doing anything incident to or connected with a desire of the husband to live there with his wife.

Money lent by husband to wife.

It was held in *Butler* v. *Butler* (16 Q. B. Div. 372) that a husband can now maintain an action against his

wife and charge her separate estate with money lent by him to her after marrirge, and for money paid by him for her after marriage at her request, whether made before or after marriage. See as to covenants to settle after-acquired property, *Williams* v. *Mercier* (10 App. Cas. 1), *In re Garnett, Robinson* v. *Gandy* (33 Ch. Div. 300); and as to restraint on anticipation, *In re Dixon, Dixon* v. *Smith* (35 Ch. Div. 4), where *Pike* v. *Fitzgibbon* (*ubi supra*) was distinguished, and *Draycott* v. *Harrison* (17 Q. B. D. 147), where it was held that an order for committal under the *Debtors Act*, 1869, could not be made. An interesting question has been raised whether the effect of sub-sect. 2 is to render a married woman, in cases other than that mentioned in sub-sect. 5, liable to bankruptcy, see the note in Wolstenholme and Turner's Conveyancing Act, 4th ed. p. 156. It is submitted, however, as suggested by the present author (Bankruptcy Act, 1883, p. 72), that if any such change had been contemplated by the Legislature it would have been embodied in express and definite language, and that in the absence of any such provision the general *status* of married women in respect of the law of bankruptcy must be regarded as unaltered. The express provision that a married woman may be made a bankrupt if trading apart from her husband, would seem to imply, on the principle *expressio unius exclusio alterius*, that she is, except under these peculiar circumstances, not subject to the bankruptcy law. The words used by Lord Cairns in *Ex parte Holland, In re Heneage* (L. R. 9. Ch. 310), would seem with slight alteration to be applicable to the present subject.

Covenant to settle after-acquired property.

Bankruptcy of married woman.

★"It may be that the Legislature may have overlooked this result. It may be that to be logically consistent it ought to have gone on to provide some way by process of bankruptcy, or some process analogous to bankruptcy, to reach her separate property and make an equitable division of it. But has it done so? In my opinion it has not done so by an express provision, and it would be straining the words, which have a technical meaning, to extend them so as to bring married women under the law of bankruptcy, an antecedent law to which before this Act they were not liable;" and see *Ex parte Jones, In re Grissell* (12 Ch. Div. 484), under the *Bankruptcy Act*, 1869, and the *Married Women's Property Act*, 1870, where the point was decided in the negative, though the married woman had separate estate and had contracted engagements after marriage. A great change in the law is introduced by section 2,

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Property of a woman married after the Act to be held by her as a *feme sole*.

which provides that every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

Sect. 3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. It was held in *In re Tuff, Ex parte Nottingham* (W. N. 1887, p. 80), that this sect. only applies where the husband is a sole trader, and accordingly where a married woman lent her own money to a trading partnership of which her husband was a member, she was entitled on the bankruptcy of the partnership to prove against the joint estate in competition with other creditors.

Execution of general power.

Sect. 4 provides that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act. See as to the previous law *Vaughan* v. *Vanderstegan* (2 Drew. 363), where the appointed property was held liable on the ground of fraud; the *London Chartered Bank of Australia* v. *Lemprière* (L. R. 4 P. C. C 572), *In re Harvey's Estate, Godfrey* v. *Harben* (13 Ch. D. 216), *Hodges* v. *Hodges* (20 Ch. D. 749).

Sects. 6, 7, 8, 9.

Sections 6, 7, 8, 9 makes provision with regard to stock, etc. to while a married woman is entitled or which is transferred to her, joint investments and stock in names of married women and others, while sect. 10 makes provision against fraudulent investments with the money of the husband.

Sect. 10.

Sect. 11.

Sect. 11 deals with the ★ subject of policies of insurance. See as to this *In re Adam's Policy Trusts* (23 Ch. D. 525), where it is stated that this Act practically leaves matters in the same position as they were in under the Act of 1870.

[★148] Policies of insurance.

Married woman as an executrix or trustee.

Sect. 18, to be read along with sect. 24, which frees the husband from all liability "unless he has acted or intermeddled in the trusts or administration" provides that a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*. In the very recent case of *In re Hawksworth* (W. N. 1887, p. 113), the Paymaster-General declined to part with the fund belonging to a married woman without the receipt of the husband, and the Court added to the order the words "on her separate receipt."

Saving of existing settlements and the power to make future settlements.

Sect. 19 provides that nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Covenant to settle after-acquired property.

In *In re Whitaker*, *Christian* v. *Whitaker* (34 Ch. D. 227), a married woman became entitled on the death of her father in 1884 to a share of personalty not limited to her separate use, and the question was whether this was bound by a covenant to settle after-acquired property contained in her ante-nuptial settlement made in 1873. It was held that under sects. 5 and 19 of the *Married Women's Property Act*, 1882, the property was bound by the covenant. The following reasons were

given by the Court of Appeal for its decision: "There is no controversy at all that if we decide the question apart from this Act of Parliament of 1882, the property would be bound by the covenant to settle. That is unarguable; it is plain. Now what does the Act say? Sect. 19 says that nothing in this Act shall interfere with or affect any settlement made before marriage or [★149] to be made after marriage. ★ What does that mean? It means that you cannot by this Act affect the rights of the parties under the settlement. The property is bound by the covenant as if the Act had never passed." And see further as to this section *In re Stonor's Trusts* (24 Ch. D. 195) *In re Queade's Trusts* (33 W. R. 816).

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## *The Settled Land Acts.*

*In re* **JONES.**

(26 CH. DIV. 736.)

Principle. *The person entitled to receive the income of settled land is tenant for life within the meaning of the Settled Land Act*, 1882, *though he derives no income from the estate.*

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Summary of facts. Colonel Grey was entitled to the surplus income of settled land after payment of the interest on incumbrances and an annuity. The rents, after payment of the interest, were insufficient to pay the annuity, and there was no probability that there would be any income for Colonel Grey to receive for many years to come. Held, by the Court of Appeal (affirming the decision of Bacon, V. C.), that Colonel Grey was entitled to exercise the powers of a tenant for life.

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This case has been selected as affording a good illustration of the sweeping changes effected by the *Settled Land Act*, 1882, which came into operation on the 1st of January, 1883. The Court was here compelled by the wording of the Act to give judicial sanction to "the start-

ling paradox," as Lord Justice Lindley termed it, "that a man could be entitled to income of land, though there was no income for him to receive"; nay, more, when there was no chance of his receiving any income for a considerable time. "You must," said the Court of Appeal, "look at the terms of the settlement to see what the person is entitled to, and not to the accidental circumstance ★ that the intention of the testator has been to some extent defeated by reason of the income which he intended the party to take not being actually realised in consequence of the state of the property." [★ 150]

Scope and purpose of *Settled Land Act*, 1882.

The Act has no preamble to afford a guide to the intention of the legislature, and it is therefore all important in construing it to bear steadily in mind its general scope and purpose. "This," said Lord Selborne in *In re Hazel's Settled Estates* (29 Ch. Div. 83), "is a statute which ought to be expounded in furtherance and not in derogation of the important objects of public policy for which it was passed." The general object of the *Settled Land Act*, as was said, in *Cardigan* v. *Curzon-Howe* (30 Ch. D. 536); *In re Clitheroe Estates* (28 Ch. D. 378), (affirmed 31 Ch. Div. 135) "was to confer upon the present generation of landowners the means of alienation which they had become deprived of in the process of time by the ingenuity of conveyancers, and to enable tenants for life of settled land to sell, partition, lease and otherwise dispose of settled land freed from the restrictions which by the general law previously existing, and by the numerous statutes applicable to the subject, had up to the time of passing the Act prevented tenants for life from so dealing with settled land." "The object of the Act," said the late Mr. Justice Pearson, who had more to do with construing it than any other of our judges, "was to grant a tenant for life very large powers for his own benefit, and to take settled land out of settlement, and to substitute for it *ex mero motu* for any purpose whatever, even for mere caprice, the value of it in pounds, shillings and pence": *Wheelwright* v. *Walker* (23 Ch. D. 752); *In re Duke of Newcastle's Estate* (24 Ch. D. 137); *In re Chaytor's Settled Estate Act* (25 Ch. D. 654). The object of the Act is to create powers of sale in many cases in which previously no powers of sale existed, and to give additional powers in other cases where there were limited powers under existing settlements, *per* Baggallay, L.J., *In re Jones* (26 Ch. Div. 738).

A point which it is important to bear in mind in reading the *Settled Land Act* is that several terms of

constant occurrence in it have, by reason of the definitions contained in the Act itself (sect. 2), and the decisions bearing upon them, a very special meaning, and contain a great deal more than is comprehended in their usual significance.

Settlement. The definition of the term "settlement" in sect. 2, sub-sect. 1, is expressly retrospective, and includes, in addition to deeds, wills and agreements for settlement, all the various instruments there enumerated, or any number of instruments by which any land or estate, or interest in land, is limited to or in trust for any person by way of succession. "Settled land" is defined by sub-sects. 2 and 3 of sect. 2.

Estate or interest. An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

[★151] Land. ★ Land, and any estate or interest therein, which is the subject of a settlement, is, for the purposes of this Act, settled land, and is, in relation to the settlement, referred to in this Act as the settled land, and in sub-sect. 4, the question whether land is "settled land" is to be determined by the state of facts, &c., when the settlement takes effect. "Land" includes leases for years, remainders, reversions, rent-charges, advowsons, and even mortgage debts: *Grey* v. *Jenkins* (26 Beav. 351); but it should be observed that the greater number of the provisions of the Act are applicable only to corporeal hereditaments: *Clerk's Settled Land Act*, p. 4. It was decided in the case of *Sir J. Rivitt-Carnac's Will* (30 Ch. D. 131) that land also included titles of honor; and it would also doubtless be held to include New River shares, River Avon shares, River Don shares, and shares of tolls in lighthouses: *Attorney-General* v. *Jones* (1 Mac & G. 574). The term "tenant for life" has an even more elastic meaning.

Tenant for life. Sect. 2 (sub-sect. 5) defines "tenant for life" to mean the person who is for the time being beneficially entitled to possession of settled land for life, and sub-sect. 6 provides for the case of joint tenants and tenants in common.

In addition to this, sect. 58 of the Act enumerates no less than nine other limited owners who, when their estate and interest is in possession, are to possess the powers of sale and leasing, &c., which are given by the other clauses of the Act to the tenant for life.

Sect. 59 makes an infant absolutely entitled in possession to settled land, a tenant for life. Infant.

Sect. 60 provides that if any person, who is a tenant for life under the Act, be an infant, the powers of the tenant for life are to be exercised by the trustees of settlement, or the person nominated by the Court. A married woman entitled to property for her separate use is by sect. 61 entitled to act as a tenant for life. Married woman.

Sect. 62 provides for the case of the tenant for life being a lunatic. Lunatic.

Sect. 8 of the *Settled Land Act*, 1884 (47 & 48 Vict. c. 18), provides that the estate of the tenant by the curtesy (see sect. 58 of the *Settled Land Act*, 1882) is to be deemed an estate arising out of a settlement made by his wife. Tenant by curtesy.

The statutory powers of the tenant for life are most carefully guarded by sects. 50, 51, 52. They are incapable of assignment, release, or forfeiture, and any contract not to exercise any of them, or any prohibition or limitation of their exercise is to be treated as void. They are moreover "cumulative," *i.e.* additional to any powers conferred by a settlement, and in case of conflict with such powers the statutory powers are to prevail (sects. 56 and 57). Powers of tenant for life.

Those all-important personages—the "trustees of the settlement," are defined by sect. 2, sub-sect. 8, as, "the persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement ★ declared [ ★ 152] to be trustees thereof for purposes of this Act, are, for purposes of this Act, trustees of the settlement." Trustees of the settlement.

All "capital money" must be paid either to the trustees of the settlement or into Court (sect. 22), and if there are no trustees of settlement within the definition of the Act, nothing can be done by the tenant for life in exercise of the powers mentioned in sect. 45, until such trustees are appointed, as notice must first be given to them, *Wheelwright* v. *Walker* (23 Ch. D. 752), and sect. 5 of the *Settled Land Act*, 1884 (47 & 48 Vict. c. 18), provides by way of legislative reversal of the decision in *Ray's Settled Estates* (25 Ch. D. 464), that notice of a general intention to make a sale, exchange, partition or lease shall be sufficient, and enables the trustee to waive the notice or to except less than one month's notice. Capital money. Notice to trustees.

Application to the Court.

One of the main objects of the Act is to preclude the necessity of the application of the Court. It is still, however, imperative in some cases to apply to the Court, while in other cases there is an option of dealing with the trustees or going to the Court.

The cases under which it is imperative to apply to the Court are as follows:

1. Sect. 10. To authorize the variation of building or mining lease, according to the circumstances.

2. Sect. 31 (3). To obtain directions as to enforcing, carrying into effect, varying and rescinding contracts.

3. Sect. 36. To approve of proceedings for protection or recovery of land settled or claimed to be settled, and give directions as to costs, &c.

4. Sect. 37 (3). For sale or purchase of heirlooms.

5. Sect. 38. Appointment of trustee under the settlement for the purposes of the Act. See *In re Wilcock* (34 Ch. D. 508).

6. Sect. 44. As to the difference between tenant for life, and trustee of the settlement respecting exercise of powers of Act, &c.

7. Sect. 56. As to questions or doubts under this section.

8. Sect. 60. Where tenant for life, &c., is an infant, and there are no trustees of the settlement, "trustees of the settlement" under this section include trustees appointed by the Court under sect. 38: *In re Countess of Dudley and London and North Western Railway Company* (35 Ch. D. 338).

9. Sect. 7 of the *Settled Land Act*, 1884, as to exercise of powers given by sect. 63 of the *Settled Land Act*, 1882.

By sect. 46 (sub-sect. 6), and sect. 47, the Court has a general power to make such order as it thinks fit, and to give directions as to raising and paying costs, charges and expenses, both where they are payable out of *corpus* and where they are thrown upon the tenant for life.

Option of dealing with the trustees or going to the Court.

The cases in which, under the *Settled Land Act*, there is the option of dealing with the trustees of the settlement, or going to the Court are as follows:

1. Sect. 15. As to the sale or lease of principal mansion-house, demense, &c.

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2. Sect. 22. As to payment of "capital money arising under the ★ Act," in order to its being invested or applied. See *Cookes* v. *Cookes* (34 Ch. D. 498).

3. Sect. 26. As to approval of scheme for the improvement and expenditure of capital money thereon.

4. Sect. 34. As to application of money paid for lease, &c., or reversion, and note that all decisions on sect. 74 of the *Lands Clauses Consolidation Act*, are applicable to this section: *Cottrell* v. *Cottrell* (28 Ch. D. 628).

5. Sect. 35. As to cutting and sale of timber.

Practice under the *Settled Land Act*, 1882.

With regard to the practice under the *Settled Land Act*, 1882, sect. 46, sub-sect. 1, provides that all matters within the jurisdiction of the Court under the Act, shall, "subject to the Acts regulating the Court," be assigned to the Chancery Division, and sub-sect. 3 of the same section declares that every application to the Court shall be by petition or by summons at chambers; but now the rules under the *Settled Land Act*, 1882 (r. 2), provide that all applications to the Court, under the Act, may be made by summons in chambers, and if in any case a petition shall be presented without the direction of the Judge, no further costs shall be allowed than would be allowed upon a summons. It was held, however, in *In re Bethlehem and Bridewell Hospitals* (30 Ch. D. 541), that the Court has a discretion to allow the costs of a petition when such a mode of procedure is cheaper and more expeditious, but that the choice of procedure is at the risk of the applicant. It may be well to point out that although the *Settled Land Acts*, 1882 & 1884, now hold the field, and the provisions of the *Settled Estates Act*, 1887 (40 & 41 Vict. c. 18), are almost wholly superseded by them, the only section of the old Act which is actually repealed by sect. 64 of the *Settled Land Act* is sect. 17.

*Settled Estates Act*, 1877.

Sect. 3 of the *Settled Estates Act*, 1877, provides that all causes and matters commenced or continued under this Act, shall, subject to the provisions of the *Judicature Act*, be assigned to the Chancery Division, and it may still occasionally be desirable to have recourse to its provisions, as in the recent case of *Farnell's Settled Estates* (33 Ch. D. 599; 35 W. R. 250), and see *Clerke's Settled Land Act*, p. 18, where several cases are mentioned where it may be desirable or expedient to adopt the machinery of the *Settled Estates Act*. The notice which was issued by the practice Masters on the 31st June, 1884, provides that all summonses under the *Settled Land Act*, 1882, shall be entitled as directed by the rules under that Act, but shall be in other respects in the form prescribed by the Rules of the Supreme Court, 1883. All proceedings under the Act in County Courts must be commenced by petition.—County Court Rules, 1886 (O. LXXVII.)

Investment of capital moneys.

The investment or other application of capital money arising under the Act is dealt with by sections 21 *et seq.*

By sect. 22, sub-sect. 5, the capital money while remaining uninvested and after investment is to be considered as land.

Authorized improvements.

The "authorized improvements" are enumerated in sect. 25.

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By sect. 26 (the marginal note of which is strangely misleading) the ★ tenant for life, when he is desirous that capital money should be applied in "authorized improvements," is to submit a scheme for the approval of the trustees of the settlement, or of the Court.

The effect of these sections was considered in *In re Hotchkin's Settled Estates* (35 Ch. Div. 41), where it was held that the scheme must be submitted before the works were commenced.

Where in a settlement the trustees had power to pay for improvements out of income, a tenant for life was nevertheless held entitled under the *Settled Land Act* to require capital money to be laid out under a proper scheme, in improvements: *Clarke* v. *Thornton* (35 Ch. D. 307).

Cases decided under the Act.

The following cases in addition to those already noticed, have been decided on points arising under the *Settled Land Act*, 1882:—

Capital money.

*Capital money—*

Application of, to discharge of incumbrances affecting part of the estate: *In re Chaylor's Settled Estate Act* (25 Ch. D. 651), and see *Re Esdaile, Esdaile* v. *Esdaile* (54 L. T. 637).

Not applicable to payment of charges payable by instalments created by the tenant for life under the *Improvement of Land Act*, 1864, and other Acts prior to the *Settled Land Act*, 1882: *In re Knatchbull's Settled Estate* (29 Ch. Div. 588).

Not applicable to erection of "Silos," where they are experimental and not certainly improvements: *In re Broadwater Estate* (33 W. R. 738).

Practice. *Semble* trustees should appear separately from tenant for life on application for payment of capital money for improvements under sect. 21.

Liverpool 3½ per cent. Corporation Stock, in the absence of evidence as to its condition, held not to be an authorized investment of: *In re Maberly, Maberly* v. *Maberly* (34 W. R. 771).

*Costs.*— Costs.

Proceedings successfully prosecuted to establish a claim to an earldom, in consequence of which estates were recoved, held to be "proceedings taken for the protection of settled land," of which the costs were payable out of the settled estate: *In re Earl of Aylesford's Settled Estates* (32 Ch. D. 162).

*Heirlooms*— Heirlooms.

Sale of, ordered, with liberty for tenant for life to bid: *In re Brown's Will* (27 Ch. D. 179).

Order for sale of, where settled so as to devolve with a title or dignity: *In re Sir J. Rivett-Carnac's Will* (30 Ch. D. 136).

Application of proceeds of sale of, to discharge of incumbrances: *In re Duke of Marlborough's Settlement* (30 Ch. D. 127, 32 Ch. Div. 1);—in improvements: *In re Houghton Estate* (30 Ch. D. 102).

Trustee of settlement with power of sale is trustee for the purposes of the Act, including the sale of heirlooms: *Constable* v. *Constable* (32 Ch. D. 233).

★ *Mansion-house*— [★ 155]

Where the tenant for life has mortgaged his interest to its full value, and the trustees of the settlement do not consent, the Court will not order a sale on his application, without full information and the consent of the mortgagees: *In re Sebright's Settled Estates* (33 Ch. Div. 429). Mansion-house.

*Tenant for Life*— Tenant for life.

Tenant for years determinable on life, held not to be: *In re Hazle's Settled Estates* (25 Ch. D. 654).

Held to possess a power of sale under the Act over and above that which was conferred on the trustees by a private Act: *In re Chaytor's Settled Estate Act* 25 Ch. D. 651).

Order for sale under *Settled Estates Act*, 1877 (unless stayed—as *semble* it may be—by the Court), prevents power of sale by: *In re Barrs-Haden's Settled Estates* (49 L. T. 661). Similarly as to order giving powers of leasing under *Settled Estates Act*, 1877: *In re Poole's Settled Estates* (32 W. R. 956).

Lunatic, committee of, cannot give valid notice unless he has obtained previous authority from the Court of Lunacy: *In re Ray's Settled Estates* (25 Ch. D. 464). (*Vide supra*, p. 152, as to another point decided in this case.)

Of conditional life estate, held to possess power of sale and to be entitled to income of proceeds: *In re Paget's Settled Estates* (30 Ch. D. 161); and see *In re Hale and Clark* (34 W. R. 624).

Life estate, subject to a term of years, vested in trustees for accumulation and payment of charges, held (following the leading case of *In re Jones*, *ubi supra*) to confer power of a tenant for life within the meaning of sect. 58: *In re Clitheroe's Estate* (31 Ch. Div. 135); but where a person who took certain interests as tenant for life had no estate or interest in possession until the determination of a term, he was held during its continuance not to have the powers of a tenant for life: *In re Strangways*, *Hickley* v. *Strangways* (34 Ch. Div. 423).

Trust to apply rents for benefit of A. and for his wife and children, does not constitute A. or A. and wife tenant for life: *In re Atkinson*, *Atkinson* v. *Bruce* (31 Ch. Div. 577).

Sale of copyholds by, where trustees have not been admitted, only one fine payable: *In re Naylor and Spendla's Contract* (34 Ch. D. 423).

Notice to trustees by, more than a month before day fixed for completion, held sufficient: *Duke of Marlborough* v. *Sartoris* (32 Ch. D. 616).

Where settled land was taken by a railway company subject to beneficial leases and the money paid into Court, tenant for life, who was in receipt of the rents from the leaseholds, held not entitled to income of purchase-money: *In re Griffith's Will* (49 L. T. (N.S.) 161.

[★ 156] Trustees of settlement

★*Trustees of Settlement*—

No necessity for appointment as trustees of settlement had full powers: *In re Garnett, Orme and Hargrave's Contract* (25 Ch. D. 595).

Appointment of: *In re Wright's Trusts* (25 Ch. D. 662; *In re Harrop's Trusts* (24 Ch. D. 717).

Authorized to sell property of infant *cestuis que trust* out of Court: *In re Price*, *Leighton* v. *Price* (32 W. R. 1009).

Absolute trust for sale, concurrence of children constituting tenant for life not required where: *Taylor* v. *Poncia* (25 Ch. D. 646).

Trustee with power of sale with consent of others is trustee for purposes of the *Settled Land Act: Constable* v. *Constable* (32 Ch. D. 233).

## *Right of Retainer by Executor or Administrator.*

*In re* ROWNSON. FIELD *v.* WHITE.

(29 Ch. Div. 358.)

Principle. *An executor or administrator cannot retain a debt in respect of which, if vested in another person, no action could be maintained.*[1]

Summary of facts. An administratrix claimed to retain £500 and interest on the ground that her father, who had died intestate, had made a verbal promise to her husband in consideration of her marriage to give her £500 as her portion, and that he had never fulfilled his promise.

The Court of Appeal decided that the administratrix had no right of retainer.

In this case an attempt was made to very seriously extend the doctrine of Retainer. The rule is thus laid down in Williams on Executors (8th ed. p. 1043); "As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it ★is another of his privileges that he has a right to retain [★157] for his own debt due to him from the deceased in preference to all other creditors of equal degree.[2] This remedy arises from the mere operation of law on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt."[3] The right of retainer has not

[1] An executor or administrator has a right to pay one debt in preference to another when they are in the same degree. Williamson, Exr. 1039.

The right of an executor or administrator to retain extends to debts due to him jointly with others, or in the character of trustee as well as to those due to him solely on his own right. Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; Williams *v.* Purdy, 6 Paige, 166; Stephens *v.* Harris, 6 Ired. Eq. 57; Enders *v.* Brune, 4 Rand. 483.

[2] The common law right of retainer has been established in New York. Smith *v.* Kearney, 2 Barb. 533.

[3] In the United States, preference among equal creditors is not favoured, still less that of an executor or administrator's retainer for his own debt. Henderson *v.* Ayers, 23 Texas, 96; Hubbard *v.* Id., 16 Ind. 25; Smith *v.* Downey, 3 Ired. Eq. 268.

Not altered by 32 & 33 Vict. c. 46.

been altered by *Hinde Palmer's Act* (32 & 33 Vict. c. 46), which abolishes the distinction between specialty and simple contract debts in the administration of the estate of every person dying on or after the 1st of January, 1870: *Wilson* v. *Coxwell* (23 Ch. D. 964).

The general rule, said the Court of Appeal in the leading case, with regard to the duty of an executor has been laid down long ago. It is stated in Comyns' Digest, that it is a *devastavit* if an executor or an administrator pay that which need not be paid. But on

Exception as to Statute of Limitations.

that general rule an exception has undoubtedly been engrafted in the case of a debt not enforceable by reason of the *Statute of Limitations*. "Since the time, at all events, of Lord Hardwicke it has been said (with a passing dissent on the part of an eminent common law judge in *McCulloch* v. *Dawes* (9 D. & R. 40, 43), and now it is established law both in Courts of Equity and Law, that no executor is compellable to take advantage of the *Statute of Limitations* against debts otherwise justly owing. An executor may pay a statute-barred debt if he thinks fit; he is not bound to plead the statute and he is not guilty of a *devastavit* if he does not plead it."

The Court of Appeal then considered the case before them. There was no authority whatever, though the case must have arisen thousands of times, for allowing payment of a debt which was not enforceable by reason of the *Statute of Frauds*. "There is to my mind," said Bowen, L.J., "this difference also between a case under the *Statute of Limitations* and a case under the 4th sections of the *Statute of Frauds*. The *Statute of Limitations* does not destroy the debt, but only the remedy, and it has been held that an executor may waive that defence in the case of a debt which existed and which appears to be well founded. But a parol contract within the *Statute of Frauds*, though not void to all intents and purposes but capable of being dealt with for certain purposes as a valid agreement, is incapable nevertheless of being enforced in an action either directly or indirectly. And if you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator." The Court accordingly came to the conclusion that the anomaly, the single exception as to payment or retainer of debts barred by the *Statute of Limitations*, was not to be extended to a case where the *Statute of Frauds* prevented the enforcement of the debt.

"The right of retainer, as it produces inequality, is never assisted." *Hopton* v. *Dryden* (Pre. Ch. 179; 2 Eq. Cas. Abr. 450), cited in *In re Jones, Calver* v. *Laxton* (31 Ch. D. 447), where it was held with reluctance, following the authorities of *Richmond* v. *White* (12 Ch. D. ★ 361), and *In re Birt, Birt* v. *Burt* (22 Ch. D. 604), that the appointment of a receiver puts an end to the right of retainer. Right of retainer is never assisted. [★ 158]

This principle was also recognised in *In re Harrison, Latimer* v. *Harrison* (32 Ch. D. 395), where the executor was, however, allowed priority in respect of assets which he had received before the appointment of the receiver, and handed over to him, but not in respect of a sum which he had subsequently paid as surety for the testator. Principle of retainer.

The principle on which an executor's right of retainer is based was discussed in the case of *Talbot* v. *Frere* (9 Ch. D. 568). In that case, A. mortgaged policies of insurance to B. and C., who were partners, and then died insolvent, having appointed his wife his executrix, who subsequently died, leaving B. her executor. B. and C. received the policy moneys, and after paying their mortgage debt, &c., there was a surplus, which they claimed to retain as against a judgment creditor in satisfaction of a simple contract debt.

The right of retainer was claimed in two characters, first because the parties were mortgagees in possession, and were therefore entitled to retain the balance for their simple contract debt; and, secondly, because one of them was an executor of the mortgagor's estate. It was held that they were not entitled to retain it in either character. The principle, said Sir George Jessel, is preference, not retainer. It could not be alleged, if the testator lent his creditor a horse, that the creditor could, after the testator's death, keep the horse until the debt was paid; or, if the testator put bonds which are payable to bearer in the creditor's hands for safe custody only, the creditor not being a banker or a person by law having a right of general lien, that he could keep the bonds because he was a creditor. The same principle would apply whether it was a bag of sovereigns or a bond payable to bearer, or a horse.[4]

[4] In a few States the English doctrine of retainer still prevails. Page *v.* Patton, 5 Peters, 303; U. S. Digest, 1st Series, Exr. and Adm. 3011–3023; but the better American policy insists that creditors of equal rank shall have the same opportunity. In Missouri and New York the right of retainer has been abolished. Treat *v.* Fortune, 2 Bradf. Sur. 116; Nelson *v.* Russell, 15 Mo. 356; and see Wright *v.* Id., 72 Ind. 149; Dana *v.* Prescott, 1 Mass. 200; Willey *v.* Thompson, 9 Met. 329.

Retainer not affected by *Judicature Act*, 1875, sect. 10.

In *Lee* v. *Nuttall* (12 Ch. Div. 61) the question arose whether an executor's right of retainer was affected by the change in the law made by the 10th section of the *Judicature Act*, 1875, which provides that in the administration by the Court of the assets of any person who may die after the commencement of the Act (2nd of November, 1875), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities (and also in the winding-up of insolvent companies), the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the Law of Bankruptcy, with respect to the estate of persons adjudged bankrupt. (Note that now by sect. 125 of the *Bankrupcy Act*, 1883, the estate may be administered in bankruptcy). The Court of Appeal in delivering judgment said:—"Under the law as it stood before the *Judicature Act*, 1875, an executor had a right to retain a debt due to himself as against all creditors of equal degree out of all moneys coming to his hands, and this right was not lost by his paying them into Court. This right is not affected by the [★159] *Judicature Act*, 1875, sect. 10, ★ relating to secured and unsecured creditors. The Legislature never intended to treat an executor having a right of retainer as a secured creditor; if his right to retain was in the nature of a security, he would have it as against creditors of a higher degree, and could retain as against everybody. The sole object of the section was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realising or valuing his security. The section was never intended to apply to retainer by an executor."[5]

In *Jones* v. *Evans* (2 Ch. D. 420) a creditor had bequeathed a debt which he had proved in an administration action, to the executrix of the estate, and it was held that there was no right of retainer.

An heir or devisee, as he cannot be sued for simple

[5] As to whether an executor or administrator who has a claim against the estate is bound to present it within the time allowed other creditors, see Sanderson *v.* Id., 17 Fla. 820. He cannot sue himself at law to recover a debt due him by decedent. Perkins *v.* Ipsam, 11 R. I. 270.

contract debts, has no right of retainer in respect of them, though, *semble*, when the estate is not charged with debts he would be entitled to retain a debt to which he is entitled by specialty in which the heirs are bound : *In re Illidge*, *Davidson* v. *Illidge* (27 Ch. Div. 478). Heir or devisee has no right of retainer.

It was held in *In re Campbell* (16 Ch. D. 198) that an executor's right of retainer is not lost by his commencing an administration action on behalf of himself and all other creditors and submitting to account in the usual way. Not lost by commencing administration action.

An executor has no right of retainer against real estate, *Walters* v. *Walters* (18 Ch. D. 182), and his right of retainer is limited to assets coming into his possession or under his control, or paid into Court during his lifetime, and this right so limited, if claimed by the executor during his lifetime but not exercised, passes to his representatives : *In re Compton*, *Norton* v. *Compton* (30 Ch. D. 15), restricting *Wilson* v. *Coxwell* (23 Ch. D. 764). The same case decided (following the authority of *Loane* v. *Casey* (2 W. Bl. 965)) that the executor may retain in respect of damages for the breach of a pecuniary contract for which there is a certain standard or measure. No right of retainer against real estate. Right is limited.

The same principles would seem clearly to apply to the case of administrators.

It was held in *In re Hubback*, *International Marine Hydropathic Co.* v. *Hawes* (29 Ch. Div. 934), that a balance order under the *Companies Act*, 1862, obtained against executors, does not destroy the executor's right of retainer even though made prior to notice of the retainer, and that one of several executors is entitled to a right of retainer in respect of a mortgage debt due from the testator to a body of trustees of whom that executor is one. Balance order.

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## ★ *Judgment in Mortgage Actions.* [★160]

### DYMOND *v.* CROFT.

(3 Ch. D. 512.)

*A mortgagee may, since the Judicature Act, combine in one action the personal remedy on the covenant with the remedy by foreclosure.* Principle.

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A mortgagee brought an action for foreclosure,

Summary of facts.

and claimed by his writ an order directing personal payment of the mortgage debt as well as the usual judgment for foreclosure. The Registrar declined to insert the order for personal payment, as being contrary to the practice of the Court of Chancery in foreclosure suits, but Jessel, M.R., directed that the judgment should be drawn up as claimed by the writ.

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Mortgagee's double relief under *Judicature Act*, 1873.

In this case the mortgagee claimed to be entitled by reason of the *Judicature Act* to a double relief—viz., to obtain not only the judgment for foreclosure which a Chancery Court could have given him, but also the judgment on the covenant which he would have obtained in a Common Law Court. "Both forms of relief," said Jessel, M.R., "are expressly claimed. There is no reason now why they should not be combined, and the judgment may be drawn up accordingly." "Before the *Judicature Act*," said the Court of Appeal in *Farrer* v. *Lacy Hartland & Co.* (31 Ch. Div. 42, 49), "a mortgagee had two rights, which were enforced in different tribunals—an action at law against the mortgagor personally, and a suit in equity against the mortgaged property. If he desired judgment on the covenant against the mortgagor he could have brought an action at common law, and if he succeeded he got an immediate judgment for principal, interest, and costs of that action. If he wished to foreclose his mortgage he must have proceeded in a Court of Equity, in which a different account from that in the action at law would have been directed, and the costs of suit would have been added to his costs as mortgagee. The *Judicature Act* has enabled the two rights to be enforced together by one proceeding in one [★ 161] and the same ★ Court." And see observations to the like effect in *Bissett* v. *Jones* (32 Ch. D. 637). A form of the combined judgment given in *Dymond* v. *Croft* is to be found, 3 Ch. D. p. 516, but it has since been to a great extent superseded by the more elaborate judgments drawn up in the subsequent cases. See *Greenough* v. *Littler* (15 Ch. D. 93) for the form of foreclosure judgement where the mortgage debt is payable by instalments, and *Hunter* v. *Myatt* (28 Ch. D. 181), where the form of judgment in *Grundy* v. *Grice* (Seton on Decrees, 4th ed. p. 1036) was modified.

In *Farrer* v. *Lacy, Hartland & Co.* (31 Ch. Div. 42), (where the previous authorities are cited, and where an elaborate form of order settled and approved by the

Court of Appeal will be found at p. 51), the mortgagee brought his action, claiming—(1) an account of what was due to him for principal, interest, and costs under his security, including the costs, charges, and expenses of an abortive sale; (2) payment of what was due; (3) foreclosure or sale of the mortgaged property. The defence was that the mortgagee vendor had by his agent the auctioneer been guilty of negligence in the conduct of the sale in accepting for the deposit a cheque which was subsequently dishonoured, without first inquiring into the solvency or *bona fides* of the alleged purchaser, and the defendant further contended that the plaintiff was not entitled to immediate payment, but that six months ought to be allowed from the date of the certificate finding the amount due. The first point was disposed of in the plaintiff's favour, the Court deciding that the acceptance of a cheque for the deposit was the practice in 99 cases out of 100. "Persons cannot be expected to come to sales with large sums of money in their pocket, and, moreover, I am not prepared to say that a mortgagee vendor is bound to require a deposit at all from the bidder, for it is open to him to sell by private contract, in which case no deposit is, as a general rule, required. No doubt, the custom, which has almost the force of a rule, is to take a deposit on sales by auction, but it is an equally prevalent custom to take a cheque for the amount.

Payment of deposit by cheque.

"Sales conducted in the ordinary way are much more likely to succeed than those which are hampered by numerous and unusual restrictions. But the argument does not stop there, for it is said that the mortgagee is not entitled to these costs because the sale had become abortive by taking Peach's cheque. How did that render it abortive? If payment in cash had been insisted upon here, there would have been either cash or no cash forthcoming, and if no cash, the result would have been that Peach's offer would have been off and the sale at large again."

With regard to the next objection, Fry, L. J., said: "It has been contended that the result of the *Judicature Acts* has been to preclude the plaintiff in his action on the covenant, now that it is brought in the Chancery Division, from obtaining immediate payment, and that as by sect. 25, sub-sect. 11, of the *Judicature Act*, 1873, the rules of equity are now to prevail, payment is to be postponed for six months. ★ No rule of equity exists [★ 162] that a sum immediately payable at law shall not be payable for six months; and in my judgment if at the

hearing the amount due should be proved, agreed to, or admitted, there should be an order for immediate payment, with so much of the costs only as would have been incurred if the action had been on the covenant simply. There is no obligation to postpone payment, but I think it is competent to the judge to postpone payment for such a time as he may think reasonable; nothing that I am saying must be treated as in any way interfering with the discretion of a judge. The strict right which the Court may, if it will, give effect to, is immediate payment of the sum ascertained at the hearing."

Equitable mortgage.

In *Lees* v. *Fisher* (22 Ch. Div. 283), the Court of Appeal decided that for the future the judgment for foreclosure in the case of an equitable mortgage ought not, as in the form given in Seton on Decrees, 3rd ed. vol. ii. p. 1146, to omit the word "foreclose," but ought to contain directions that upon default the mortgagor will be foreclosed, that the hereditaments will be discharged from all equity of redemption, and that a conveyance from the mortgagor to the mortgagee must be executed.

Default of appearance.

In *Bissett* v. *Jones* (32 Ch. D. 635) the defendant did not appear, and the plaintiff claimed under Order XIII. r. 3 immediate judgment for a specific sum for principal and interest, and under Order XV. an account and foreclosure. He was held entitled to judgment for the liquidated amount, notwithstanding the fact that an account had been asked, but not to foreclosure, Chitty, J., declining to follow his own previous decision on this point in *Smith* v. *Davies* (28 Ch. D. 650), and see *Blake* v. *Harvey* (29 Ch. D. 827).

Where a defendant admits at the hearing that the whole of the principal sum is due from him to the plaintiff, immediate payment will be ordered. *Instone* v. *Elmslie* (34 W. R. 592).

Practice.

In *Law* v. *Philby* (35 W. R. 401) special attention was directed to the following point of practice, viz.: When a mortgagee seeks, on motion for judgment, not only foreclosure, but also a personal order for payment on the mortgage-moneys, against a mortgagor who has made default in delivering a defence, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the order for payment is claimed.

Period or periods for redemption.

The question as to whether, in cases where there are several incumbrances, one period should be fixed, or whether there should be successive periods for redemption, has been considered in several cases which will be

found collected under *Smith* v. *Olding* (25 Ch. D. 462), *Platt* v. *Mendel* (27 Ch. D. 246), (where the reason of the rule is elaborately considered), *Doble* v. *Manley* (28 Ch. D. 664). In the latter case Chitty, J., states the practice which had been unanimously adopted by the judges whom he had consulted, viz:—

That where the defendants did not appear, one time only should be fixed for redemption whether the statement of claim alleged that they ★ were entitled or only [★ 163] that they claimed to be entitled to incumbrances. To fix several successive periods was to make a decree as between co-defendants which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them.

*Conveyancing Act*, 1881, sect. 15.

It may here be noticed that a completely novel right has been conferred upon mortgagors by sect. 15 of the *Conveyancing Act*, 1881. That section, which is retrospective in its operation and is to have effect "notwithstanding any stipulation to the contrary," provides that where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee instead of reconveying and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs, and the mortgagee shall by virtue of this Act be bound to assign and convey accordingly.

The section, however, is not to apply in the case of a mortgagee being or having been in possession. The provisions of this section were considered in *Alderson* v. *Elgy* (26 Ch. D. 567), where it was held that a tenant for life of mortgaged premises who has failed to keep down the interest and who has obtained the usual order permitting him to redeem the mortgage, is not of right entitled under sect. 15 of the *Conveyancing and Law of Property Act*, 1881, to require the mortgagee to transfer the mortgage debt and premises to a third person.

*Conveyancing Act*, 1882, sect. 12.

Section 12 of the *Conveyancing Act*, 1882, passed in consequence of *Teevan* v. *Smith* (20 Ch. D. 724), provides that the right of a mortgagor under sect. 15 of the *Conveyancing Act*, 1881, to require a mortgagee instead of reconveying to assign the mortgage debt and convey the property to a third person, shall belong to and be capable of being enforced by each incumbrancer or by the mortgagor, notwithstanding any intermediate

incumbrance, but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

Mortgagee in possession.

The question as to the circumstances under which a mortgagee can be charged as a mortgagee in possession was much discussed recently in the Court of Appeal in *Noyes* v. *Pollock* (32 Ch. Div. 53). The principle on which a mortgagee is so charged was well explained in *Lord Kensington* v. *Bouverie* (7 D. M. & G. 134, 157), cited with approval in the judgment of Bowen, L.J. (pp. 63, 64).

"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. It is part of his contract that he should do so." "If the mortgagee is in receipt of the rents [★ 164] and ★ profits, the account is taken against him as if he were in possession, and he is answerable not only for what the tenants pay, but for not letting the property if he could have done so, and for not getting the full rents from the tenants if they could have paid them, and he is looked upon as if he had taken upon himself the control and management, including letting and making allowances to tenants, and getting the best rent from them he can. In order to hold that a mortgagee, not in actual possession, is in receipt of the rents and profits, in my opinion it ought to be shewn not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives them in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate."

Practice.

A great change as to practice was introduced by the Rules of December, 1885, Order LV. rr. 5A and 5B, enabling "any mortgagee or mortgagor whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage whether legal or equitable, to take out as of course an originating summons returnable in the chambers of a

Judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require (that is to say)—sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.

5 B. "The person to be served with the summons under the last proceeding shall be such person as under the existing practice of the Chancery Division would be the proper defendant to an action for the like relief as that specified by the summons."

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## ★ *Rights of Pledgee of Personal Chattels.* [★ 165]

### CARTER *v.* WAKE.

(4 CH. DIV. 605.)

Principle. *A mere pledgee of personal chattels is not entitled to foreclosure.*[1]

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Summary of facts. Wake deposited with Carter Canada Railway Bonds as security for a debt. Carter claimed to be entitled to a foreclosure decree, and stated that if the bonds, which were then at a considerable discount but redeemable at par after some years, were sold at all, they would be insufficient to pay his debt, but that he had calculated that if he were allowed to foreclose he could repay himself in full when the bonds were redeemed. The Court decided that Carter was only entitled to an order for sale.[2]

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[1] According to American authorities the remedy of a pledgee is two-fold; he may file a bill in chancery in the nature of a foreclosure bill and proceed to a judicial sale, or he may after having given due notice to the pledgor to redeem, and of the intended sale, sell without judicial process. Case *v.* McCabe, 35 Mich. 101; Diller *v.* Brubaker, 2 P. F. Sm. 502; Worthington *v.* Tormey, 34 Md.; Strong *v.* Nat. Mechanics' Bank Association, 45 N. Y. 718, 2 Kent's Com. 582.

[2] As to damages for a wrongful sale by the pledgee, see Fisher *v.* Brown, 104 Mass. 259, and Johnson *v.* Stear, 15 C. B. (N. S.) 330, note by American Editor.

The plaintiff in this action claimed to be in the same position as an equitable mortgagee of land by deposit of deeds.[3] Jessel, M.R., however decided that he was a mere pledgee of chattels. "The principle," he said, "upon which the Court acts, in the case of a mortgage by deposit of title deeds of land, is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and where the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on. But where there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and, therefore, as carrying with it all the remedies incident to such mortgage.[4] None of this reasoning applies to a pledge of chattels;[5] the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title."[6]

Deposit of title deeds contrasted with pledge.

Nature of pledge.

It should be remembered that a pledge, as distinguished from a mortgage, is a security by way of bailment[7]—for which actual or constructive delivery is essential—of a personal chattel by which a special or qualified property therein, sufficient to support an action against a person who wrongfully converts it, is vested in the pledgee, the general ★ property remaining in the pledgor. A special agreement that the pledgee shall have a power of sale does not alter the character of the transaction or turn it into a mortgage. (Fisher on Mortgages, 4th ed. pp. 72, 76).

[★ 166]

[3] Mortgages created by deposits of title deeds, and the vendor's lien for purchase money, while they are mortgages of equitable interest do not result in the creation of an independent equitable title but are in their nature liens. See Jarvis *v.* Dutcher, 16 Wis. 307; Griffin *v.* Id., 3 C. E. Green, 104; Hackett *v.* Reynolds, 4 R. I. 512.

[4] In the following cases agreements to give a mortgage have been held to create a lien. Bank *v.* Carpenter, 7 Ohio, 21; Matter of Howe, 1 Paige, 125; Hall *v.* Id., 50 Conn. 104; American note to Russell *v.* Id., 4 Leading Cases Eq. 934, and cases therein cited.

[5] A pledge differs from a mortgage in that a mortgage conveys the thing mortgaged to the mortgagee upon conditions which if broken the property remains absolutely in the mortgagee while in a pledge the general property is never conveyed to the pledgee but only a special property in the thing pledged. American note to Coggs *v.* Bernard, 1 Smith's Lead. Cas. 384.

[6] Williams on Personal Property, 46.

[7] Bailment is defined by Sir William Jones (on Law of Bailment) to be a delivery of the goods in trust, on a contract expressed or implied, that the trusts shall be duly executed, and the goods redelivered as soon as the trust or use for which they were bailed shall have elapsed or be performed.

The principle on which *Carter* v. *Wake* was decided was distinguished in *General Credit and Discount Co.* v. *Glegg* (22 Ch. D. 549), were railway shares, which had been given as security, were actually transferred to the lenders whose names were placed on the registers of the respective companies. It was held that as the legal interest was vested in the mortgagees they were entitled to foreclosure.

Deposit of blank.

The position of equitable mortgagees of shares by deposit of transfers, was carefully considered by the Court of Appeal in *France* v. *Clark* (26 Ch. Div. 257). In February, 1881, France, who was the registered holder of ten fully paid up shares, deposited the certificates with Clark to secure £150 together with a deed of transfer signed by him, in which the consideration, the date, and the name of the transferee were in blank. Clark subsequently deposited the certificate and transfer with Quilhampton as security for £250, and in April, 1881, died insolvent. Quilhampton then filled in his own name as transferee on the deed of transfer, and on the 24th of June sent in the transfer for registration. On the 27th of June France's solicitors wrote to the company not to register the transfer, and also gave notice to Quilhampton of France's claim. A certificate that the shares belonged to Quilhampton was signed on June 30th. The company's register shewed an entry of the transfer under date the 24th of June, but it appeared from the evidence that no consent of the directors could have been obtained before June 30th. Held by the Court of Appeal, that Quilhampton had no title against France except to the extent of France's liability to Clark.

[★167]

## ★*Mortgage.*

*Priorities.*

### NORTHERN INSURANCE *v.* WHIPP.

(26 Ch. Div. 482.)

Principle.

*A legal mortgagee will be postponed to a subsequent equitable mortgagee*[1] (1) *when he has assisted in or connived at a fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate;*[2] (2) *when he has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.*[3]

*But the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.*[4]

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Summary of facts.

Crabtree, who was manager of the plaintiff company, executed a legal mortgage of his freehold for £4500 to the company, delivered the title deeds to them, and received the money. The deeds were placed in the company's safe, of which Crabtree had a duplicate key. Crabtree took the deeds out of the safe, mortgaged the property to Mrs. Whipp, who

[1] A mortgagee whose mortgage is recorded will not be postponed merely because he knew that the mortgagor was making a subsequent conveyance of the premises and did not make known his title. Jones on Mortgages, Sect. 603.

[2] See Marston *v.* Brackett, 9 N. H. 336; Paine *v.* French, 4 Ohio, 318; Brinckerhoff *v.* Lansing, 4 Johns. Ch. 65.

[3] If the mortgagor and mortgagee combine in any way to induce another person to loan money upon the estate, in ignorance of the first mortgage this fraud will postpone the mortgagee's own mortgage. Chester *v.* Green, 5 Humph. (Tenn.) 26; Miller *v.* Brigham, 29 Vt. 82; Pratt *v.* Squier, 12 Met. (Mass.) 494.

[4] Negligence is not fraud, though it may be evidence of it. Jones on Mortgages, Sect. 604.

had no notice of the company's mortgage, and handed over the deeds. The Court of Appeal decided that the company was entitled to priority over Mrs. Whipp.

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The Court of Appeal in this remarkable case elaborately reviewed the authorities upon the subject, and considered that they justified the conclusions which have been stated above with regard to the circumstances under which a legal mortgagee will or will not be postponed ★ to a subsequent equitable incumbrancer. The problem to be determined (on which, as stated in *Manners* v. *Mew* (29 Ch. Div. 727), the judgment in the present case has settled and stated the law in the clearest possible manner) was what conduct in relation to the title deeds on the part of a mortgagee who has the legal estate is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage. The question, the Court stated, is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate.[5] The assistance or connivance in the fraud leading to the creation of the equitable estate may be sufficiently evidenced by the omission to use ordinary care in inquiring after or keeping title deeds.[6]

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Circumstances under which legal mortgagee may be postponed.

Applying then these conclusions to the facts of the case before them, the Court came to the conclusion that, though there was gross carelessness on the part of the plaintiffs in the mode in which they allowed their directors to deal with the securities, there was nothing in it evidencing any fraud. Again, there was no proof that the company had constituted Crabtree their agent with authority to raise money, but on the contrary, in their

[5] A mortgage which has once obtained priority does not lose its place by being held by one under an unrecorded assignment. Douglass *v.* Peele, 1 Clarke (N. Y.), 563; and if a mortgagee has a notice of a prior unrecorded mortgage or there are equities such that his own mortgage is subject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities the assignee is entitled to hold the mortgage as a prior lien upon the land, solely on the ground that it was recorded first. Jones on Mortgages, Sect. 558; Corning *v.* Murray, 3 Barb. (N. Y.) 652.

[6] An equitable mortgage may be created by deposit of the title deeds. Carey *v.* Rawson, 8 Mass. 159; Jarvis *v.* Dutcher, 16 Wis. 307; Mandeville *v.* Welch, 5 Wheaton, 277.

opinion the evidence went too far to negative the existence of such an authority. The present case consequently did not fall under either of the classes of cases in which, according to the authorities, a legal mortgagee ought to be postponed by the Court to a subsequent equitable incumbrancer.

Two categories of cases.

The cases upon the subject, the Court of Appeal said, fell into two categories:—

(1) Those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds.[7]

(2) Those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them.

These two classes of cases, the Court went on to say, would not be found to differ in the principles by which they were to be governed, but to differ much in the kind of fraud which was to be most naturally looked for.

The first category of cases was divided into the four following classes:

Legal mortgagee not obtaining possession of title deeds.

1. Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed either to a prior equitable estate, as in *Worthington* v. *Morgan* (16 Sim. 547), or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer* (21 Ch. D. 124).[8] In these cases the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee who was in fact misled by the mortgagor taking advantage of the conduct of the legal mortgage, could, as against him, take advantage of the fraudulent intent.

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2. Where the legal mortgagee has made inquiry for the deeds, and ★ has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston* (12 Ves. 130), *Hewitt* v. *Loosemore* (9 Hare, 449), *Agra Bank* v. *Barry* (L. R. 7 H. L. 135).[9]

3. Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt* v. *Elwes* (2 De G. F. & J. 578), *Ratcliffe* v.

[7] The English law in regard to possession of title deeds has generally no application in this country owing to the general system of registry.

[8] Berry *v.* Mutual Ins. Co., 2 Johns. Ch. 603.

[9] When the mortgage is registered notice is given to all the world, and there is no necessity for the mortgagee to have possession of the title deeds. Evans *v.* Jones, 1 Yeates (Pa.), 174.

*Barnard* (L. R. 6 Ch. 652) and *Colyer* v. *Finch* (5 H. L. C. 905).

4. Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of raising money on security of the estate, and he has exceeded the collateral instructions given him: In these cases the legal mortgagee has been postponed, as in *Perry-Herrick* v. *Attwood* (2 De G. & J. 21). This case was decided, not on the ground that the legal mortgagees had been guilty of fraud, but on the ground, that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority.

Legal mortgagee parting with title deeds.

The second category, *i.e.* the cases where the mortgagee having received the deeds has subsequently parted with them or suffered them to fall into the hands of the mortgagor, were divided into the following classes:

1. Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as in *Peter* v. *Russell* or *Thatched House Case* (1 Eq. Cas. Abr. 321), *Martinez* v. *Cooper* (2 Russ. 198).

2. Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: *Briggs* v. *Jones* (L. R. 10 Eq. 92). In such cases the Court has on the ground of authority postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick* v. *Attwood* (*ubi supra*). The Court there considered the last point summarized in the head-note, and decided that there was no authority for the proposition that the legal mortgagee could be postponed by reason of mere negligence in the custody of the deeds. The whole course of decisions, they said, "impliedly negatived the proposition that the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure, as if title deeds were in the eye of the law analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having that possession or control." This doctrine was moreover expressly repelled by the judgment of the

House of Lords in the *Agra Bank* v. *Barry* (L. R. 7 H. L. 157), where it was said that the duty of investigating title and inquiry after deeds is not a duty which a purchaser or mortgagee owes to the possible
[★170] holder of a latent title or security. It is ★merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design, inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstance of each particular case. The Court of Appeal, however, suggested that if in any case it could be shewn that the prior legal mortgagee had undertaken any duty as to the custody of the title deeds towards any given person, had neglected that duty and had thereby injured the person to whom he owed the duty, the legal estate might be postponed by reason of the negligence.

In *National Provincial Bank of England* v. *Jackson* (33 Ch. Div. 1) the Court of Appeal decided that the principle laid down in the leading case, that a legal mortgagee will not be postponed to a subsequent equitable mortgage on the ground of any mere carelessness or want of prudence, did not apply as between equitable claims. In that case two ladies, whose freehold property was subject to a mortgage, were induced by their brother J. to convey their shares to him in consideration of a debt alleged to be due to him, and payment of a sum of money. There was no consideration whatever for the deeds as there was no money due, nor was any payment made. The deeds were never read over or explained to the ladies, but were signed in full reliance on J.'s statement. Next day J. deposited the deeds at the plaintiff bank as security for a loan, and the bank manager was told by J. that the ladies were not to receive any consideration for their conveyances, although the conveyances recited the alleged debt and consideration money. The manager communicated with the bank's solicitor, but did not tell him that in fact there had been no consideration for the conveyances, and the title was accordingly accepted. Held, by the Court of Appeal, that the conveyances were voidable, and that the bank, being by their negligence

chargeable with constructive notice of the fraud, must have their equity postponed to that of the ladies. See also *Lloyd's Banking Company* v. *Jones* (29 Ch. D. 221), where the holder of the legal estate was postponed to an equitable incumbrancer on the ground of negligence in omitting to inquire for title deeds, and *Manners* v. *Mew* (29 Ch. Div. 725), where the previous authorities are reviewed, and it was held that the legal mortgagee, who had asked for the deeds and had received a reasonable excuse for their non-production, ought not to be postponed.

Building Society mortgagees, title to legal estate.

It was held in *Fourth City Mutual Benefit Building Society* v. *Williams* (14 Ch. D. 140), that where the legal estate in land has been vested in a building society as mortgagees and the society is paid off and gives the statutory receipt under the Act of 1874, the legal estate is vested in the person who is best entitled to call for it, *ex. gr.* an equitable mortgagee who is first in point of time; and see *Peace* v. ★ *Jackson* (L. R. 3 Ch. 676), [ ★ 171] *Robinson* v. *Trevor* (12 Q. B. Div. 423), (where the right was limited to the amount advanced to pay off the building society,) and *Sangster* v. *Cochrane* (28 Ch. D. 298).

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## *Mortgage Security.*

*Ex parte* **ODELL**, *In re* **WALDEN.**

(10 Ch. Div. 76.)

Principle.

*The Court regards the substance of a transaction, and if though in form a sale it is in reality a mortgage, it will be treated as a mortgage.*[1]

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Summary of facts.

Cochrane advanced Walden £150 to pay out an execution, and upon the same day two documents

[1] If the agreement is in substance a mortgage, its form cannot deprive the debtor of his equity of redemption, and the courts lean strongly in favor of construing agreements to be mortgages rather than conditional sales. Carpenter *v.* Snelling, 97 Mass. 452; Todd *v.* Campbell, 8 Casey, 250; Robinson *v.* Willoughby, 65 N. Ca. 520; Wing *v.* Cooper, 37 Vt. 179; Wilson *v.* Patrick, 34 Iowa, 370; Peterson *v.* Clark, 15 Johns. 205; Cornell *v.* Hall, 22 Mich. 377; Ruffler *v.* Womack, 30 Texas, 332.

were executed, one an inventory of the furniture in Walden's house, at the foot of which was a receipt for £150 for the "absolute" sale to Cochrane "of the above-mentioned articles;" the other was an agreement in writing, by which Cochrane let Walden the same furniture for two months for £170, to be repaid on 18th September, or such other time as might be agreed upon; and power was given to Cochrane in certain specified events to determine the agreement and take possession of the goods, sell them, and pay the surplus (if any) to Walden, who on the other hand was to make good any deficiency. On payment of the £170, together with costs, charges, and expenses payable under the agreement, the goods were to become the property of Walden. Held, by the Court of Appeal, that the two documents constituted a mortgage and required registration as a bill of sale.[2]

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[★172] ★ The Court of Appeal in this case proceeded upon the principle which Lord Justice Lindley had adopted in the previous case of *Cochrane* v. *Matthews* (cited in note, p. 80), of looking "at the substance of the transaction."[3] The machinery adopted in both cases by the persons who made the advances was the same,—it was not an ordinary mortgage, but a sale and a demise, *e.g.* the mortgagee had no intention of buying the property with a view of keeping it, but he merely took it as a security for the money advanced. In both cases the party who paid the money acquired the property, but only on an agreement that he should redemise it to the true owner. The two pieces of paper, said the Court in *Cochrane* v. *Matthews* (p. 81, note), are portions of one transaction and cannot be separated as if they were unconnected with each other. They constitute one transaction just as much as if the two pieces of paper

[2] Cotterell *v.* Long, 20 Ohio, 464; Davis *v.* Clay, 2 Mo. 161; Hunter *v.* Hatch, 45 Ill. 178; Huoncker *v.* Merkey, 102 Pa. St. 465; Moore *v.* Wade, 8 Kansas, 381; Phœnix *v.* Gardner, 13 Minn. 430.

[3] The question whether a conveyance is a conditional sale or a mortgage is determined by a consideration of the circumstance peculiar to each case. Edrington *v.* Harper, 3 J. J. Marsh, 354; Heath *v.* Williams, 30 Ind. 495; Davis *v.* Stonestreet, 4 Ind. 101.

had been one piece of parchment. No doubt there are two pieces of paper, but we cannot fritter the case away by saying the transaction is to be regarded differently accordingly, as part of it is on one piece of paper and part of it on another, or because one part of it may be on blue paper and another on white paper. That is a piece of the machinery. "What we have got here," said the Court of Appeal in *Ex parte Odell* (p. 85), "is the evidence of two contemporaneous documents, both executed as part and parcel of the same transaction as much contemporaneous as it is possible for two documents to be, and those two documents together constitute the real transaction between the parties. The real transaction which took place, as evidenced by the two documents now before us, was a Bill of Sale of goods for the purpose of securing a debt, the goods being in truth and in substance redeemable upon the payment of the debt with the interest thereby stipulated. The form adopted, a sale and a demise, seems to be wholly immaterial.[4] You cannot defeat the operation of the *Bills of Sale Act* by putting part of the transaction in one document and the other part in another document. Both documents should have been registered as a Bill of Sale. Together they constitute a Bill of Sale with a defeazance."

The leading case *Ex parte Odell* and *Cochrane* v. *Matthews* (*ubi supra*), where distinguished in *North Central Wagon Co.* v. *Manchester, Sheffield, &c. R. Co.* (32 Ch. D. 477). In that case a colliery company being in want of money applied to the plaintiffs for assistance, the plaintiffs paid £1000 to or on behalf of the colliery company, and took receipts and an invoice in which the £1000 was described as the purchase money for 100 railway waggons. Simultaneously the plaintiffs and the colliery company executed an agreement by which the plaintiffs let the 100 waggons to the colliery company for a term of three years certain at a rental payable quarterly, which represented £1000 and interest at 7 per cent. for the three years. The agreement authorized the plaintiffs, when a quarter's rent was in arrear. to seize the wagons and put an end to the agreement, and the colliery company had an option only exercisea ble in the event of ★ all payments of interest, &c., being [★ 173] duly made, of purchasing all or any of the waggons at

[4] The rights of a person under a mortgage are very different from those under a conditional sale. Conway *v.* Alexander, 7 Cranch, 218; Flagg *v.* Mann, 14 Pick. 467.

1s. each.[5] It was held by the judge of first instance that this transaction was in substance a loan, and that the agreements, receipts and invoices constituted a bill of sale which required registration. The Court said the transaction was clearly covered by *Ex parte Odell*, and even more completely by *Cochrane* v. *Matthews* (*ubi supra*), where, with a certain degree of ingenuity and a good deal of care, the transaction was made to consist of two particular documents, but the judge before whom it came, grappling with the sense of the case and the meaning of the law, treated them as only one document intended to evade the *Bills of Sale Act*. The Court of Appeal (35 Ch. Div. 191), however, distinguished the case from *Ex parte Odell* on the ground that here there was a complete contract for sale and purchase independently of the invoices and receipts, and in consequence held that the documents did not constitute a bill of sale.

In deciding whether a transaction is to be treated as a mortgage or a sale with opinion of repurchase, the rule of the Court is that the inadequacy of the consideration, the value of the property, the taking by the grantee of immediate possession under the conveyance and the payment by him or by the grantor of the costs of the transaction or of insurances and other outgoings of the property, will be taken into consideration as favouring the conclusion that the transaction was intended to be a mortgage, but will not be conclusive upon the question whether a doubtful instrument was intended to take effect by way of mortgage or of sale.[6]

"Once a mortgage always a mortgage."

The principle that the Court looks at the substance and not at the form of the transaction, is at the foundation of much of the law on the subject of mortgages. This may be illustrated by the established rule "once a mortgage always a mortgage," [7] *i.e.* that an estate cannot be at one time a mortgage and at another time cease to be a mortgage by one and the same deed; that the law (departing from the principle *modus et conventio*

[5] A contract of repurchase may upon its face show that the parties really intended an absolute sale with the privilege to the vendor to repurchase on certain terms. Hanford *v.* Blessing, 80 Ill. 188; and on the other hand, a deed showing that it was executed to secure the payment of a loan of money, shows upon its face that it is a mortgage. Montgomery *v.* Chadwick, 7 Iowa, 114.

[6] It is sometimes necessary to resort to evidence outside of the instrument to determine the character of the transaction. McCarron *v.* Cassidy, 18 Ark. 34; Rich *v.* Doane, 35 Vt. 125; Snyder *v.* Griswold, 37 Ill. 216; Parrish *v.* Gates, 29 Ala. 254.

[7] Jones on Mortgages, Sect. 7.

*vincunt legem*), will control even an express agreement of the parties, and that equity will let a man loose from his agreement, and even against his agreement, admit him to redeem a mortgage;[8] 1 Vern, 192. Coote on Mortgages, p. 16, 2nd ed.

In *In re Alison*, *Johnson* v. *Mounsey* (11 Ch. Div. 284) a security for money lent was made in the form of a conveyance to the lender, in trust to sell, and it was held that such a security was simply a mortgage and nothing more.[9] In this case the Court distinguished the case of *Locking* v. *Parker* (L. R. 8 Ch. 30), where the sale had taken place before the time limited by the *Statute of Limitations* had expired, in which James, L. J., said, "I am of opinion that this is nothing more than a common mortgage security taken by way of a trust for sale, and I entirely concur with what was said in *Kirkwood* v. *Thompson* (2 H. & M. 392); it is not for a Court of Equity to be making distinction between forms instead of attending to the real substance and essence of the transaction. In these cases it was pointed out that a security in ★ the form of a trust for sale [★174] differs from an ordinary mortgage as regards remedies, in that the mortgagee cannot commence an action for foreclosure, but is limited to his remedy by sale. This distinction, however, makes no substantial difference in his position; the transaction is a mortgage and nothing more."

Conveyance on trust for sale.

It may be here desirable to notice that the law with regard to that peculiar form of mortgage which formed the subject of contention in the leading case, viz., the bill of sale, has been practically revolutionised by the *Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 Vict. c. 43).

*Bills of Sale Acts.*

The Acts of 1854 (17 & 18 Vict. c. 36) and 1866 (28 & 29 Vict. c. 96) are repealed, with the usual saving clauses as to instruments executed under their provisions. Bills of sale executed between the 1st of January, 1879, and 1st November, 1882, are governed by the Act of 1878 (41 & 42 Vict. c. 31), and those ex-

[8] "A man cannot by any form of language part with his equity of redemption in favour of the mortgagee at the same instant of the creation of the mortage." Bispham's Eq. (4th Ed.) 153 and Rogon *v.* Walker, 1 Wis. 528; Jaques *v.* Weeks, 2 Watts. 261; Clark *v.* Condit, 3 C. E. Green, 358; Pritchard *v.* Elton, 38 Conn. 434; Wilson *v.* Drumrite, 21 Mo. 325 and see Glendenning *v.* Johnson, 33 Wis. 347, for an exceptional case.

[9] Yates *v.* Id., 21 Wis. 473; Cottrell *v.* Long, 20 Ohio, 464; Danzeisen's Appeal, 23 P. F. Sm. 65; McIntyre *v.* Shaw, 6 Allen, 83; Church *v.* Cole, 36 Ind. 35.

ecuted on and after the 1st November, 1882, by the joint operation of the Acts of 1878 and 1882.

Definition of bills of sale.

Sect. 4 of the Bills of Sale Act of 1878 defines bills of sale to include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, and then proceeds to enumerate a variety of other instruments which are not to be included within the meaning of the expression Bill of Sale. Sect. 3 of the Act of 1882 provides that "Bills of Sale" and other expressions in that Act have the same meaning as in the "principal Act," *i.e.*, the Act of 1878, except as to bills of sale or other documents mentioned in section 4 of the principal Act, which may be given "otherwise than by way of security for the payment of money," to which last-mentioned bills of sale and other documents the Act of 1882 does not apply.

See on the subject of Bills of Sale the following important cases: *Davis* v. *Burton* (11 Q. B. Div. 537); *Hetherington* v. *Groom* (13 Q. B. Div. 789); *Roberts* v. *Roberts* (13 Q. B. Div. 794); *Allam* v. *Munday* (14 Q. B. Div. 43); *Ex parte Close* (14 Q. B. Div. 386); *Ex parte Parsons* (16 Q. B. Div. 532); *Ex parte Stanford* (17 Q. B. Div. 259); *Davis* v. *Rees* (17 Q. B. Div. 408); *Re Morrit* (18 Q. B. Div. 222).

## UNION BANK OF LONDON *v.* INGRAM.

(20 Ch. Div. 463.)

Principle.

*The Court has now, under the Conveyancing Act*, 1881, *s.* 25, *jurisdiction to order a sale of mortgaged property at any time before the foreclosure has become absolute.*[1]

Summary of facts.

The Union Bank of London, as second mortgagees brought an action for redemption and foreclosure of certain property against the first mortgagee in possession, six subsequent incumbrancers, and the trustee in bankruptcy of the mortgagor. A complicated judgment was made, allowing successive rights of redemptions and foreclosures to the Bank, the six incumbrancers, and the trustee in bankruptcy. The Bank redeemed the first mortgagee, and then applied to the Court for an order for sale. Evidence was produced that the utmost value of the property was less than the amount due to the Bank. The Court of Appeal decided that the property should be sold.[2]

In this case there was no opposition to the order for sale sought for by the Bank, but the only question was whether there was jurisdiction to make the order, and this was answered in the affirmative by the Court of Appeal.

[1] In the Federal courts the sale is usually made by the marshall of the district or by a master especially appointed. Jones on Mortgages, Sect. 1608; Blossom *v.* Railroad Co., 3 Wallace, 196. A sheriff, master, trustee or referee when making the sale is acting as the agent of the Court. Mayer *v.* Wick, 15 Ohio, 548; Heyer *v.* Deaves, 2 Johns. Ch. 154.

[2] It may sometimes happen that the mortgages describes the property in separate parcels and the amount due on the mortgage might be raised by a sale of a portion of the property; it may, however, be necessary for the protection of the rights of subsequent incumbrances that the property should be sold altogether. Gregory *v.* Campbell, 16 How. 417.

*Conveyancing Act*, 1881, sect. 25.

The 25th section of the *Conveyancing Act*, 1881, which was considered by the Court of Appeal in the leading case as materially enlarging the power contained in the now repealed *Chancery Procedure Act* (15 & 16 Vict. c. 86), provides that

(1) Any person entitled to redeem mortgaged property, may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

[★176] ★(2) In any action whether for foreclosure or for redemption or for sale or for the raising and payment of any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money, or in the right of redemption, and notwithstanding the dissent of any other person and notwithstanding that the mortgagee or any person so interested does not appear in the action and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including if it thinks fit the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.[3] Sub-section 3 enables the Court to order security for costs.

Effect of the section.

The Court considered in the leading case that the words "instead of foreclosure" were designedly omitted after the words "direct a sale;" it was accordingly held that a sale could be ordered at any time before the judgment for foreclosure became absolute. "The Act," the Court said, "is an enabling and remedial statute," giving the Court a very beneficial power, and that it ought therefore to be construed liberally. "One effect of it," said Jessel, M.R., "is to allow a mortgagor whose property is worth more than the mortgage money but who cannot raise it to obtain a sale and get the benefit of the surplus. The Court has power to impose terms so as to take care that no injustice shall be done to anyone, and I think that the legislature has given it jurisdiction to make the order at any time before foreclosure absolute."

Order for sale before trial.

In *Woolley* v. *Coleman* (21 Ch. D. 169), it was held that the Court had power in a redemption action to make an order for sale on an interlocutory application before the trial of the action. In this case security for

[3] Goldsmith *v.* Osborne, 1 Eds. (N. Y.) Ch. 560; Md. Building Society *v.* Smith, 41 Md. 516.

costs was ordered, but in *Davies* v. *Wright* (32 Ch. D. 220), where an equitable mortgagee asked for a sale, the judge to whom the question was left by consent gave the conduct of the sale to the defendant, the mortgagor, as it was more to his interest that the best price should be obtained, and considered that security for costs need not be given.[4] Conduct of sale.

In *Wade* v. *Wilson* (22 Ch. D. 235), where the plaintiff at the trial of a foreclosure action asked for a sale and the defendant did not appear, the Court ordered an account of what was due to the plaintiff to be first taken and then that only so much of the property should be sold as would be sufficient to satisfy the plaintiff's claim.[5]

The authority of the leading case of the *Union Bank* v. *Ingram* was cited in vain in *The Merchant Banking Company of London* v. *The London and Hanseatic Bank* (55 L. J. Ch. 479). There there was an action for foreclosure by a first mortgage of a building estate at Manchester. The estate was insufficient to cover the first mortgage, but the second mortgagees and the mortgagor produced evidence that the value of the property had increased and was likely to increase continuously by reason of the *Manchester Ship Canal Act*, and they asked for a sale, offering at the same time to pay into Court a sum sufficient to cover the costs. The Court considered that the ★ discretion which the [★177] Court had reposed in it by sect. 25 of the *Conveyancing Act*, 1881, ought to be judicially exercised, that it was not just that the rights of the mortgagee should be postponed by a speculative sale, and the application must therefore be refused.

The remedy of an equitable mortgagee by deposit of title deeds independently of the *Conveyancing Act* was considered in *James* v. *James* (L. R. 16 Eq. 153), where the official records were consulted; *Backhouse* v. *Charlton* (8 Ch. D. 444), *York Union Banking Co.* v. *Artley* (11 Ch. D. 205) (and see other cases referred to in Seton on Decrees, 4th ed. p. 1133), where it was held that when the deposit is accompanied by an agreement Mortgagee by deposit of title deeds.

[4] The costs depend very much on the statutes and practice of the different States and are generally within the discretion of the Court. Garr *v.* Bright, 1 Barb. 157; Jones on Mortgages, Sect. 1603.

[5] A sale in parcels may be required by statute or by the court, and in determining how the premises shall be sold, the court will direct the sale to be made in such manner that the parties having equities subject to the mortgage shall not be prejudiced. Blazey *v.* Bright, 74 Ill. 299; De Forest *v.* Farley, 62 N. Y. 628.

to execute a legal mortgage, the equitable mortgagee is entitled either to foreclosure or sale, but it is to be remembered that by sect. 2, sub-sect. 6, of the *Conveyancing and Law of Property Act*, 1881, mortgage is defined to include "any charge on any property for securing money or money's worth;" and in *Oldham* v. *Stringer* (33 W. R. 251) it was held that the effect of the 25th section of the *Conveyancing Act*, when taken in conjunction with this extended definition of the term mortgage, is to enable the Court to order a sale in lieu of a foreclosure at the request of an equitable mortgagee by deposit of deeds, though the deposit was not accompanied by any agreement to execute a legal mortgage.

The position of a mortgagee exercising his power of sale was much considered in *Warner* v. *Jacob* (20 Ch. D. 220), where it was held that a mortgagee in exercising his power of sale is not, except as to the surplus of the proceeds of sale over the mortgage money, a trustee for the mortgagor even if the mortgage is in the form of a trust for sale, and that if he exercises his power *bonâ fide* for the purpose of realising his debt, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless the price is so low as to be evidence of fraud. In *Martinson* v. *Clowes* (21 Ch. D. 857, affirmed W. N., 1885, p. 41) the property was sold in lots by auction by a building society who were mortgagees selling under their power of sale, and their secretary openly bid for and purchased two lots on his own account, and it was held that the sale must be set aside.

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[★178] ★ *Consolidation of Mortgages.*

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JENNINGS *v.* JORDAN.

(6 App. Cas. 698.)

Principle

*The Court leans against the extension of the doctrine of the consolidation of Mortgages.*[1]

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Summary of facts.

Thomas Tale mortgaged Blackacre to Merrit, and settled the equity of redemption on his daughter on

[1] See Thomas' Appeal, 6 Casey, 378; Anderson *v.* Neff, 11 S. & R. 208; Lamson *v.* Sutherland, 13 Vt. 309; Phelps *v.* Ellsworth, 3 Day, 397; Rowan *v.* The Sharp's Rifle Mfg. Co., 29 Conn. 282.

her marriage. He subsequently mortgaged Whiteacre to John Tale. The two mortgages became vested in Jennings. The question was whether Jennings had a right to consolidate the two mortgages as against the persons entitled under the settlement, and the House of Lords held that he had no such right.[2]

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The general principle on which the doctrine of consolidation of mortgages is based was thus stated by Lord Selborne in his judgment in the leading case (in which the decision of the Court of Appeal in 1858 in *Tassell* v. *Smith* (2 De G. & G. 713) was overruled):—

Statement of the principle of consolidation.

"A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence is called 'Equity of redemption') may within certain limits and against certain persons (entitled to redeem all or some of them) 'consolidate' them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all."

"This doctrine of consolidation," Lord Selborne went on to say, "is well established, and cannot now be altered except by the legislature, whether it originally rested on a sound equitable foundation or not."[3] It may be here noted that this judgment was delivered shortly before the passing of the *Conveyancing and Law of Property Act*, 1881, which came into operation 1st Jan. 1882, and, as we shall presently shew, modified to some extent the law as to consolidation.

Reason for the rule.

The reason for the rule is thus explained in the judgment of the Court of Appeal in the leading case (13 Ch. Div. 646). The rule of consolidation proceeded on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates unless ★ he paid all that was due, though secured on a different estate. The mortgagor was coming [★ 179]

[2] Consolidation of mortgages is somewhat similar to the doctrine of tacking, both of which are extremely harsh and inequitable and do not exist to any extent in the United States. Parkist *v.* Alexander. 1 Johns. Ch. 399; 4 Kent's Com. 178 and 179; Green *v.* U. S. Bank, 1 Cai. Cas. in Error, 112.

[3] The doctrine appears to be doubtful and will not be extended or encouraged. See cases under note 1. The doctrine is recognized in Connecticut. See Chamberlain *v.* Thompson, 10 Conn. 251.

into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate.

The doctrine, the Lord Chancellor pointed out, applied when all the mortgages, whether originally made to the same mortgagee or having come into the same hand by subsequent transfers, are redeemable at the same time by the same person. It also applied to the case where, after that state of things had once existed, the equities of redemption had become separated by the act of the person in whom they had been combined. The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor, of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one.[4] The mortgagee cannot lose that right, because the mortgagor thinks fit to separate the equities of redemption.

The question to be decided in the leading case was whether the right to consolidate existed,[5] where the mortgage on one property was not created till after the equity of redemption in the other property had been parted with, in other words, whether the right of the purchaser of the equity of redemption ought to be affected by claims to consolidate arising out of acts of the mortgagor subsequent to the sale, and this point was after an elaborate review of the authorities decided in the negative.

In *Harter* v. *Coleman* (19 Ch. D. 630), the problem which the Court had to determine was thus stated by Fry, J.:—

"A mortgagor mortgages Whiteacre to A, and he mortgages Blackacre to B. He then conveys the equity of redemption in Whiteacre to C, and subsequently A

[4] Equity or redemption exists in favor of any one who has an interest in land and would be the loser by a foreclosure. Scott *v.* Henry, 13 Ark. 112; Farnum *v.* Metcalfe, 8 Cush. 46; Bogut *v.* Colburn, 27 Barb. 330; Platt *v.* Square, 12 Metcalfe, 494.

[5] A doctrine somewhat similar to that of consolidation and tacking is where a mortgage is given to secure future advances. United States *v.* Hooe, 3 Cranch, 89; Allen *v.* Lathrop, 46 Ga. 133; Ladue *v.* The Railroad Co., 13 Mich. 380; Bank of Commerce's Appeal, 8 Wright, 423.

and B both assign their first mortgage to D, or which would come to the same thing, B transfers his mortgage to A. Can D in the one case or can A in the other consolidate the mortgage as against C, the assignee of the equity of redemption of one of the two mortgaged properties?"

It will be noticed that the two cases differ in this respect. In *Jennings* v. *Jordan* the assignment of the equity of redemption of Whiteacre took place before the mortgage on Blackacre. In *Harter* v. *Coleman* the assignment of the equity of redemption was subsequent to the mortgage on Blackacre.

In both cases however there was the same essential element in common, that the assignment of the equity of redemption was previous to the union of the mortgages in the same person.

This question was considered in the judgment on principle as well as on authority. The principle on which the Court proceeded with ★ regard to the consolidation of mortgages, was that the mortgagor or his assignee when asking for the assistance or the mercy of the Court on the ground of his equity, must himself do equity. The question then was, what equity must he do? And here the cases were held to establish the principle that the assignee was only subject to those equities to which his assignor was liable at the date of the assignment, and that the contingency of a right to consolidate arising out of the subsequent union of the two mortgages is not an equity, it is the possibility or contingency of an equity, but it is not an equity. The equity does not exist until that contingency has happened. [★ 180]

And again, in a subsequent part of the judgment (19 Ch. D. 639), Fry, J., said, "My decision rests on this—the purchaser of an equity of redemption from the mortgagor takes it subject to all the equities which affected it in the hands of the assignor at the time of the assignment, but not to any equities subsequently arising. The equity to consolidate arising from a subsequent union in the same person of that mortgage with another is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased."

In *Andrews* v. *City Permanent Benefit Building Society* (44 L. T. (N.S.) 641) it was held that notice of a covenant to observe the rules of the society, one of which provided that in case the society "should hold from a member more than one mortgage, such member should not have power to redeem one property alone without

the consent and concurrence of the board," enabled the society to consolidate against a second mortgage, although one of the mortgages was subsequent in date to the security of the second mortgagee.

*Conveyancing Act*, 1881, sect. 17.

Sect. 17 of the *Conveyancing and Law of Property Act*, 1881, provides that (1) a mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them. The effect of this section is to render the application of the doctrine of consolidation a question of contract between the parties, and in the absence of a contract to exclude the Act there will be no consolidation.

In *De Caux* v. *Skipper*, *Tee* v. *De Caux* (31 Ch. Div. it was held, overruling *Clapham* v. *Andrews* (27 Ch. D. 679), that in cases where there was no consolidation the costs of a redemption action must be apportioned rateably between the properties.

The current of modern decisions has been against the extension of the doctrine of consolidation.[6] It has been held not to apply unless default has been made on all the securities in respect of which consolidation is claimed, *Cummins* v. *Fletcher* (14 Ch. Div. 699), nor to a bill of sale so as to enable the grantee to apply the surplus proceeds of a sale to a prior mortgage, and thus [★ 181] defeat the rights of the execution ★ creditor, *Chesworth* v. *Hunt* (5 C. P. D. 266), nor to a case where one of the mortgage securities (a leasehold) ceased to exist, *In re Raggett* (16 Ch. D. 117), nor (but see *Barrow* v. *Manning*, W. N. 1880, 108) was consolidation allowed so as to interfere with the rights of persons claiming under a voluntary settlement of one of the properties, *In re Walhampton Estate* (26 Ch. Div. 391), and see also *Baker* v. *Gray* (1 Ch. D. 491), *Cracknall* v. *Janson* (11 Ch. Div. 1), *Bird* v. *Wenn* (33 Ch. D. 215), for other modern cases where it was held that there was no right of consolidation. The doctrine of consolidation of mortgages applies to legal or equitable, to real and personal property, and in an action whether for foreclosure or redemption; and see, further, Coote on Mortgages for other applications of the rule.

[6] See cases cited under Note 1. See also Marsh *v.* Lee and Notes 1 Lead. Cas. Eq. 615 (4th Eng. Ed).

## *Mortgagee's Costs.*

### NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES.

(31 Ch. Div. 582.)

Principle

*A mortgagee is entitled to be allowed all costs which he reasonably incurs in relation to the mortgage debt.*[1]

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Summary of facts.

Games deposited with the Bank certain title deeds and writings accompanied by a memorandum by which he charged the lands to which the deeds and writings related, and agreed upon request to execute a legal mortgage. The Bank commenced an action in the Queen's Bench Division for the balance due from Games, and recovered judgment for the amount due, and costs to be taxed.

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A surety had given a promissory note for part of Games's debt to the Bank, and after the judgment some correspondence took place with the surety, from whom nothing could be recovered. The Bank called upon Games to execute legal mortgages, and prepared the deeds and corresponded with Games, who refused to execute the mortgages.

The Bank then commenced an action for foreclosure against Games, ★ and claimed to be entitled to the following charges: (1) Costs of the action in the Queen's Bench Division. (2) Costs of correspondence with the surety. (3) Costs of investigating Games's title. (4) [★182]

[1] A decree which simply orders the payment of the sum due, without finding the amount is erroneous. Tompkins *v.* Wiltberger, 56 Ill. 385; and a mortgagee is not entitled to costs of a foreclosure which has proved defective through an error of his own, whereby a new foreclosure is rendered necessary. Schmidt *v.* Potter, 35 Iowa, 426. The mortgagee, whether he be defendant or complainant, if he obtains the decree, is entitled to the costs of the suit. Concklin *v.* Coddington, 1 Beas. (N. J.) 250; Benedict *v.* Gilman, 4 Paige, 58; and without reference to success, see Slee *v.* Manhattan Co., 1 Paige, 48.

Costs of preparing the legal mortgages. (5) Costs of correspondence with Games as to the legal mortgage. The Court of Appeal disallowed items (1) and (3), but allowed items (2), (4), and (5).

The Court of Appeal in this case, in which it very materially altered the decision in the Court below, proceeded on the principle laid down by Lord Cottenham in *Dryden* v. *Frost* (3 My & Cr. 670, 675) in the following terms: "The Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity." In *Dètillin* v. *Gale* (7 Vesey, 583, 585) Lord Eldon says that the "mortgagee ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him." [2]

Costs of action in Queen's Bench Division.

The costs of the action in the Queen's Bench Division (item (1) ) were disallowed on the ground that they were excluded by the special terms of the order made for taxation, which had only given charges and expenses incurred after a certain date, and the costs in question incurred before that date had not been taxed until afterwards.

Costs of investigation of title.

The costs of the investigation of the title (item (3) ) were also disallowed. If, said the Court of Appeal, the contract had been to call upon the mortgagor to get in the legal estate wherever it was, an investigation of title might have been necessary; but as the mortgagor only agreed to mortgage his estate and interest, it was unnecessary to look into the title any further than to see in what form the mortgages ought to be drawn.

Cost of preparing the mortgage deed.

Item (4), viz. the costs of the preparation of the legal mortgage, were allowed by the Court of Appeal. It had been argued that the rule that a mortgagee was to have his costs did not apply to the costs of proceedings between the mortgagor and mortgagee. The Court of Appeal declined to accede to this argument. The plaintiffs had an equitable mortgage containing an agreement to execute a legal mortgage. They reason-

[2] If the mortgagee acted oppressive and demanded a larger sum than was due costs will be denied him, and in some cases awarded against him. Lage *v.* Van Doren, 14 N. J. Eq. 208; Van Buren *v.* Olmstead, 5 Paige, 9; or he may be made to pay the full costs if he has rejected a tender of the full amount due him. Pratt *v.* Stiles, 4 Abb. (N. Y.) Pr. 150.

ably demanded a legal mortgage, and therefore their costs in relation to it ought to be allowed. "They will be allowed any charges and expenses properly incurred in or in reference to the preparation of the drafts, which will give them all they are entitled to in respect of such inspection of the deeds as was necessary."

Costs of correspondence with surety.

The Court then dealt with items (2) and (5), viz. (2) the cost of the correspondence with the surety, and (5) the costs of the correspondence with Games, the mortgagor, as to the preparation of the legal mortgage.

Costs of correspondence with mortgagor.

With regard to the costs of the correspondence with the surety it had been contended that as the mortgagee had two distinct positions—that of a creditor, and of a person holding security—he could not charge against the mortgagor his costs incurred in the latter character. ★ To this the Court of Appeal answered: "A [★ 183] mortgagee is a creditor, he has also a security for the debt, and whether he is trying to get his money from the mortgagor, or from a surety, or out of the mortgaged property, he is trying to enforce his rights as mortgagee. The costs of the correspondence with the surety must therefore be allowed. The costs of the correspondence with the mortgagor are even more clearly relative to the position of the plaintiffs as mortgagees."

The following passage from Seton on decrees, 4th ed. p. 1059, was cited with approval as containing a statement of law justified by the authorities: "Both in foreclosure and redemption actions the mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property, for its protection or preservation, recovery of the mortgage money, or otherwise to questions between him and the mortgagor, and to add the amount to the sum due to him on his security for principal and interest. The general rule is that the plaintiff in a foreclosure action is only entitled, in addition to his account for principle and interest, to an account of the costs in that action, and that to entitle him to an account of further costs he must make out a special case: *Bolingbroke* v. *Hinde* (25 Ch. D. 795), where under the circumstances it was held that the plaintiff had made out a sufficient case for the allowance of further costs.

The subject of mortgagees' costs was also considered in *In re Watts*, *Smith* v. *Watts* (22 Ch. Div. p. 12 and 13), where it was laid down that mortgagees cannot be deprived of their costs unless they misbehave themselves, and that the fact that a mortgagee under a

wrong impression of the law had *bonâ fide* made a claim which could not be supported, and had been disallowed by the Court, was no reason for depriving him of his costs.[3] In the recent case of *Bird* v. *Wenn* (33 Ch. D. 219) it was held, following *In re Watts*, *Smith* v. *Watts* (*ubi supra*), that "it was only in a rare case that costs ought to be given against a mortgagee who brings forward a case which is fairly open to argument."

In *Johstone* v. *Cox* (19 Ch. Div. 17) a question arose as to the priority of incumbrancers, and the order originally made might have led, as the Court of Appeal, "to a parody on the administration of justice" by sweeping away the entire fund. An appeal was allowed as a question of principle was involved, and the general rule was laid down to be that "the costs of incumbrancers are allowed to be added to their securities if any difficult questions arise as to the priority of incumbrancers, and so on; and unless there has been something vexatious or something unusual in his conduct, the incumbrancer gets his costs if the fund is sufficient to pay them."

The Court, however, has a discretion in priority cases, and can order one or other of the parties to pay the costs if a case for it is made out. *Harpham* v. *Shacklock* (19 Ch. Div. 207, 215).[4]

In *Crozier* v. *Dowsett* (31 Ch. D. 67), where both plaintiff and defendant lived in the same place, and an action was brought to foreclose a mortgage for under
[★184] £66, it was held, following *Simons* v. ★*McAdam* (L. R. 6 Eq. 324), that the plaintiff was only entitled to such costs as he would have obtained in the County Court. And see *Scotto* v. *Heritage* (L. R. 3 Eq. 212; *Brown* v. *Rye* (L. R. 17 Eq. 343), where the costs of proceedings in the Court of Chancery were allowed.

See further as to mortgagees' and trustees' costs, *ante* p. 121.

[3] Jones on Mortgages, Sect. 1603; Loftus *v.* Swift, 2 Sch. and Lef. 642.

[4] A second mortgagee is ordinarily entitled to costs. Young *v.* Id., 17 N. J. Eq. 161.

## *Costs of Solicitor-Trustee.*

*In re* **CORSELLIS, LAWTON** *v.* **ELWES.**

(34 Ch. Div. 675.)

Principle.

*A solicitor-trustee is not, as a general rule, and in the absence of express authorization, entitled to make any profits out of business which is done by himself or his firm in matters relating to the trust.*[1]

*Where, however, business is done in an action, whether hostile or not, or even in friendly proceedings on behalf of himself and his co-trustee, the solicitor or his firm may receive the usual charges if there has been no greater cost than would have been incurred if the solicitor or his firm had acted for the co-trustee alone.*[2]

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Summary of facts.

A solicitor, who on the death of his co-trustee became the sole trustee under a will which contained no power to charge for professional services, claimed to be entitled to costs in respect of four transactions.

1. Profit costs in respect of an application for the maintenance of an infant on a summons by next friend, in which the solicitor-trustee and his co-trustee were respondents and in which the solicitor-trustee's firm had acted through their London agents as solicitors for the respondents.

2. Profit costs in respect of business done by the

[1] It is a fundamental principle in the law of trusts that a trustee cannot use the position for his own personal advantage. Kepler *v.* Davis, 30 P. F. Sm. 157; Green *v.* Winter, 1 Johns. Ch. 36. This rule is enforced very strictly. Bœrum *v.* Schenck, 41 N. Y. 182; Blauvel *v.* Ackerman, 5 C. E. Green, 141; Washington R. R. Co. *v.* Alexandria R. R. Co., 19 Grat. 592.

[2] A trustee may employ a solicitor whenever it is necessary to do so in the ordinary course of business. Bowen *v.* Seegar, 3 W. & S. 222; Sinclair *v.* Jackson, 8 Cowan, 543, and any allowance to him is made in the discretion of the Court. Walker *v.* Id., 9 Wallace, 743; Berryhill's App., 11 Casey, 245.

[★ 185] same ★ London agents for a receiver appointed in the administration action.

3. The profit costs of the preparation by the solicitor-trustee's firm of leases which he had granted as trustee of the estate.

The Court of Appeal decided that the solicitor-trustee was entitled to the profit costs of the application for maintenance, but not to any of the other costs.[3]

A further question arose as to whether the solicitor-trustee's partner must account to the trust estate for fees received for manorial business in respect of a manor belonging to the trust estate to which the partner had been appointed steward by the co-trustees.

The Court of Appeal held that as the partner had received the fees as steward and not as solicitor, he was not bound to account for them to the trust estate.

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Trustee may not profit by his office.

The principle is well established by a long series of authorities, among which may be mentioned the cases of *Robinson* v. *Pett* (3 P. W. 251) and *Docker* v. *Somes* (2 M. & K. 664) that a trustee shall not make a profit of this office,[4] and accordingly it has been held that in the absence of any special authority trustees or executors who are factors, brokers, commission agents, auctioneers, or bankers cannot derive any profit in the way of business from the estate committed to their charge.[5] (Lewin on Trusts, 8th ed. pp. 275–280, where the authorities are collected). The general rule with

[3] In the United States trustees are allowed their expenses reasonably, and properly incurred. Toosle *v.* Mack, 2 Vt. 19; McElhenny's Appeal, 10 Wright, 347; Green *v.* Winter, 1 Johns. Ch. 37.

[4] He cannot buy up any debt or charge to which the trust estate is liable at less than is actually due thereon and then collect the amount in full from the estate. Shoomaker *v.* Van Wyck. 31 Barb. 457; Parshall's App., 15 P. F. Sm. 235; Michoud *v.* Girod, 4 Howard, 503.

[5] The rule is not as strict in the United States as in England and trustees and other fiduciary officers are allowed compensation for their services. Wistar's App., 4 P. F. Sm. 63. The amount is either fixed by statute or is regulated by the court to which the trustee renders his account. For authorities see Perry on Trusts, sect. 918.

regard to the position of solicitor-trustees may be stated as follows: a trustee whether expressly or constructively such, or an executor or administrator who is a solicitor, cannot charge for his professional labours, is allowed nothing for his time or trouble, but will be allowed merely his expenditure—his costs out of pocket, unless there be a special contract or direction to that effect[6] (Lewin on Trusts, 8th ed. 281); and the same rule is also stated in *In re Barber*, *Burgess* v. *Vinicome* (34 Ch. D. 77, 81), and in the leading case, 34 Ch. Div. 681. This principle, as was stated in the former of these cases, is based upon the consideration that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict. If it were not the rule, a trust estate might be heavily burdened by reason of business being done by a trustee or executor employing himself on behalf of the estate.[7] One of the principle exceptions to this general rule was established by the decision of Lord Cottenham in *Cradock* v. *Piper* (1 Mac. & G. 664), where it was held not to apply to a case ★ where several co-trustees were made defendants to a suit, this "being a matter thrust upon them and beyond their own control, so that one of the trustees who was a solicitor and acted first for himself, second for his co-trustees, and thirdly for the *cestui que trust*, was held entitled to receive the full costs, it being admitted that the costs had not been increased through his conduct. Lewin on Trusts, 8th ed. p. 282; 34 Ch. D. 81.

*Cradock v. Piper.*

[★ 186]

Trustees defendants in a suit.

In deciding the first question in the leading case, viz. that relating to the summons for maintenance, in the solicitor's favour, Cotton, L.J., expressed himself as follows: "It is said that the exception established by *Cradock* v. *Piper* would only apply to costs in a hostile action, and that this was not an action at all, but only a summons, and that therefore the exception ought not to apply. Undoubtedly the proceeding was not in any hostile action, but was commenced by a summons; but in my opinion it would be frittering away the decision which we ought not to overrule by saying that it only applies to a hostile action, no such limitation being laid down by Lord Cottenham. Therefore I am opinion

Summons for maintenance.

[6] The same rule exists in the United States as to expenditures and costs. But if they are incurred unnecessarily and against the remonstrances of the *cestui que trust* they will not be allowed. Berryhill's App., 11 Casey 245; Walker *v.* Walker, 9 Wallace, 743.

[7] See contra, Stearley's App., 38 Pa. St. 525, and Lowne's App., 1 Grant, 373.

that the rule by way of exception established in *Cradock* v. *Piper* does apply to the first part of the costs. Those costs the defendant the trustee ought not to be required to bring into account."[8]

Receiver's accounts.

The second item, viz. the "profit costs" for work done by the trustee's firm in respect of the passing of the receiver's accounts, was disallowed by the Court of Appeal on the following principle:—The receiver and the trustee's firm acting for him were in a position not hostile but adverse to the interest of the estate. The two positions were inconsistent, as the duty of the trustee was to get all he could from the receiver, and to obtain the disallowance of any payments to which he was not legally entitled, while the receiver was seeking to avoid being charged with more than he admitted to be due from him, and to maintain all his payments. The previous case of *Lincoln* v. *Windsor* (9 Ha. 158), followed by *Whitney* v. *Smith* (L. R. 4 Ch. 513), was distinguished on the ground that it did not appear there that the trustee-solicitor was acting adversely to the trust estate.

Costs of preparing leases.

The third item, viz. the costs incurred with reference to leases, was also disallowed, though they had been paid by the tenants. The Court proceeded upon the principle that although the costs were paid by the tenants by arrangement in the ordinary course of business, the business was done on the employment of the landlord, who in this case was the trustee himself.

Memorial fees.

With regard to the fees received by the trustee's partner in respect of manorial business, the Court considered that these fees, "fixed fees," "customary manorial fees," did not arise from any duty which the trustee ought to have discharged gratuitously to the estate, and were not payment for costs in respect of business where the trustee was acting in any way adversely to the estate, and that, there being no suggestion of improper conduct with regard them, the trustee ought not be charged with the profits in respect of them.

[★187] Older cases on the subject.

★In several of the older cases solicitor-trustees have been allowed their costs under the special circumstances. It was held in *Clack* v. *Carlon* (7 Jur. (N.S.) 441) that where one member of a firm of solicitors, who was a trustee, employed his partner to act as his solicitor in the trust business, under an

[8] "It is a cardinal principle in the management of a trust that the trustee may lose, but he cannot gain." Bispham's Eq. (4th ed.) Sect. 148.

agreement that the trustee should not participate in any way in the profits of the business, the partner was entitled to his full costs.

A country solicitor defending a suit as trustee in Chancery through his town agent was held entitled to be allowed as against the estate that proportion of the whole costs which his town agent would be entitled to receive. *Burge* v. *Brutton* (2 Ha. 373).

In *Whitney* v. *Smith* (L. R. 4 Ch. 513) a solicitor-trustee who had sold out part of the trust estate and invested it on mortgage, acted also for the mortgagor, and it was held that he need not account to the estate for the professional charges paid by the mortgagor.

In *In re Ames, Ames* v. *Taylor* (25 Ch. D. 72), a testator by his will empowered any trustee who might be a solicitor to transact any business occasioned by the trusts, powers, or provisions of his will, "whether such business be usually within the business of a solicitor or not," and "to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto." The Court held that, having regard to the terms of the will, a solicitor-trustee was entitled to be allowed not only professional costs, but all costs and charges properly incurred, and the matter was referred back to the Taxing Master to review his taxation on that principle.

*In re Ames* was distinguished in *In re Chapple, Newton* v. *Chapman* (27 Ch. D. 584). There a testatrix appointed her solicitor, who prepared her will, one of her two executors and trustees. She then stated that it was her desire "that the said Ralph Chapman, who is my solicitor, shall continue to act as such in the matters relating to my property and affairs, and shall make the usual professional charges. I expressly direct that he shall notwithstanding his acceptance of the office of trustee and executor of this my will, and his acting in in the execution thereof, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendance, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of my said will, or the management and administration of my trust estate, real or personal, as if he, not being himself a trustee or executor thereof, were employed by the trustee or executor, and he shall be entitled to retain out of my trust moneys, or to be allowed and to receive from his co-trustee (if any) out of the same moneys, the full amount of such charges, any

rule of equity to the contrary notwithstanding, nevertheless without prejudice to the right or competency of the said Ralph Chapman to exercise the authority, control, judgment, and discretion of a trustee of my said will."

[★188] The Court pointed out that the direction that the solicitor-trustee ★ was to be allowed to make the usual professional or other proper and reasonable charges which was to be found in *In re Ames* (*ubi supra*), did not occur in the present case, and expressed an opinion that a form which had been referred to enabling the solicitor to charge for business, "including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed in person by a trustee not being a solicitor," was one which no solicitor ought to put in its entirety into a will drawn by himself unless the testator had expressly instructed him to insert those very words.

It was held in *In re Donaldson* (27 Ch. D. 544) that where one of a body of mortgagees is a solicitor, and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor whether the mortgagees are trustees or not. "Trustees," the Court said, "are obliged to protect their trust property, and must of necessity frequently employ a solicitor for that purpose, and they are entitled to the costs they have so incurred.[9] I cannot allow that when a solicitor happens to be a trustee he is to be treated as for the time being suspended from practice or struck off the Rolls so far as regards the matter in which he is a trustee. I do not think a solicitor is to be deprived of civil rights because he is a trustee. If he were a sole surviving trustee and had to file a bill for foreclosure of mortgaged property it could not be said he was not entitled to the cost of the suit, on the contrary, he would be entitled to all his costs."

The cases of *Cradock* v. *Piper* and *Broughton* v. *Broughton* (*ubi supra*) were recently considered in *In re Barber*, *Burgess* v. *Vinicome* (34 Ch. D. 77). There a testratrix appointed H, a solicitor, who was also one of the attesting witnesses of the will, and her daughter executor and executrix and trustees of her will, and declared that H. should be entitled to charge and to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an executor.

The executrix proved the will, and a creditor's action

[9] Lewin *v.* Reid, 11 Ind. 239.

was instituted against her in which she employed H.'s firm as her solicitors. H. subsequently proved the will and was made a defendant to the action. The question arose, on an application made by the executrix, as to whether H. was entitled, on the principle of *Cradock* v. *Piper*, to profit costs up to the time when he was made a defendant in the action, the Court having previously declared that as H. was an attesting witness, the clause in the will allowing him professional charges was rendered nugatory, but this declaration was made "without prejudice to any of his rights apart from the clause in the will." Inquiry was made at the Taxing Master's office, and it was found that the decision of *Cradock* v. *Piper* (*ubi supra*) had always been acted upon. The Court held that H. was entitled to profit costs of the action, but not to profit costs for business not done in the action, and that this principle must be applied as well to costs incurred before as after the time when he proved the will.

[★ 189] Solicitor appearing in person.

★ In *London Scottish Benefit Society* v. *Chorley* (13 Q. B. Div. 872, affirming 12 Q. B. D. 452), it was held that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered.

Coke on Costs.

"The key to the true view of the law of costs," the Court of Appeal said, "is contained in a passage in Lord Coke's Commentary. 'Here is express mention made but of the costs of his writ, but it extendeth to all the legal costs of the suit but not to the costs and expenses of his travel and loss of time, and therefore "costages" cometh of the verb "conster," and that again of the verb "constare," for these "costages" must "constare" to the Court to be legal costs and expenses.' What does Lord Coke mean by these words? His meaning seems to be that only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law, private expenditure of labour and trouble by a layman cannot be measured. Professional skill when it is bestowed, is accordingly allowed for in taxing a bill of costs. It would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk."

## *Solicitor and Client.*

### McPHERSON *v.* WATT.

(3 App. Cas. 254.)

Principle.

*An English solicitor (like a "Scotch writer" and "advocate of Aberdeen") stands in a confidential relation to his client, and any purchase from his client in which the fact that he is purchasing for himself is concealed, will be set aside.*[1]

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Summary of facts.

Two ladies, who were trustees and acted in the trust principally through their brother Hugh McPherson, were desirous of selling four houses. John Watt, "an Aberdeen advocate," who acted as agent [★ 190] with regard to the ★ sale in question, advised McPherson not to advertise the houses, and promised to endeavour to find a purchaser. Shortly afterwards he introduced Dr. Thomas Watt, his brother, as purchaser, and a sale to him was effected for £1900. The trustees believed that Dr. Thomas Watt was the sole purchaser, but there had been a previous arrangement between the brothers that John Watt should have two of the houses at half the price. Held, by the House of Lords, that the sale must be set aside.[2]

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In this case, as was stated in the judgment of the House of Lords, there was no controversy whatever as to the law of the case, and no serious controversy as to the fact. The only question was, how the law was to

[1] Transactions between solicitor and client are subject to the closest scrutiny and the onus of showing its fairness lies on the solicitor who must prove the absence of undue influence. See Henry *v.* Raiman, 1 Casey, 354.

[2] The utmost good faith is recognized on the part of a legal advisor; the fear is lest the client might be imposed on. Trotter *v.* Smith, 59 Ill. 240; Smith *v.* Brotherline, 12 P. F. Sm. 461; but see Perry *v.* Dicken, 105 Pa. St. 83.

be applied to the particular state of facts with which the Court had to deal. The Scotch Court of Session, reversing the decision of the primary Court, had held that the transaction was valid. The House of Lords, however, came to the conclusion that whether Watt was a gratuitous adviser or a paid adviser, he was not only an adviser but the only adviser *in hac re*, i.e. in the particular transaction in question. That as there was this confidential intercourse and fiduciary relationship between them, full disclosure ought to have been made; and as this had not been done the purchase could not stand.[3]

Lord Cairns, in delivering judgment, cited with approval the "pointed observations" made by Lord St. Leonards in the case of *Lewis* v. *Hillman* (decided some years before by the House of Lords, 3 H. L. C. 607, 630), which, as he said, did not lay down any new rule of law, but simply re-stated well-established principles which had already been applied in numerous cases. "Take," said Lord St. Leonards, "the case of a sale of any kind which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported; yet if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale that cannot be supported."

"Though," said Lord O'Hagan, "there has been the completest faithfulness and fairness, the fullest information, the most disinterested counsel and the fairest price, and though the client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded, if the purchase be made covertly in the name of another without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist."[4]

"The law, both in England and in Scotland," said Lord Blackburn, ★ "is that in such cases we do not [★191] enquire whether it was a good bargain or a bad bar-

[3] The rule will apply so long as the relation of solicitor and client continues and even after it has ceased, if the transaction takes place under the influence of that relation. Bispham's Eq., Sect. 236, and Henry *v.* Raiman (*supra*).

[4] Bispham's Equity (4th Ed.), Sec. 236.

gain before we set it aside. The mere fact that you, being in circumstances which made it your duty to give your client advice, have put yourself in such a position that being the purchaser yourself you cannot give disinterested advice, your own interests coming in conflict with his, that mere fact authorizes him to set aside the contract if he chooses so to do."

It must, however, be remembered that, as stated in the judgment in this case (pp. 266–270), a solicitor is not affected by the absolute disability to purchase which attaches to a trustee; it is not impossible for him to purchase the property of his client. "If he purchases from his client," said Lord Blackburn, "in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger."

In all cases in which the circumstances render it the solicitor's duty to give advice to his client, he cannot be allowed to deal with his client without divesting himself of the character of solicitor and putting himself, as it is said, "at arm's length" from his client.[5]

The principle of the leading case was considered and limited in a very peculiar manner in *In re Cape Breton Company* (26 Ch. D. 221; affirmed 29 Ch. Div. 795). In this case the Court held that there was no difference in the many cases collected in the argument, beginning with *Rothschild* v. *Brookman* (2 Dow. & C. 188), and ending with *Macpherson* v. *Watt*, as to the rule of the Court where an agent has bought or sold without giving notice to his principal that he was the buyer or the seller of the property. The mere fact that the agent does not disclose that he is a purchaser or seller, or that he is interested in the purchase or sale, in cases where the principal might say, "It was your duty to give me advice," gives the latter a right to say, "I have an option to set the purchase aside if I please, or let it stand if I prefer to do so. This may be a very fair and proper bargain, but I do not choose to let it stand."

[5] "The presumption of fraud is more or less strong according to the peculiar relation which the parties occupy to each other." Bispham's Eq. Sect. 234.

The principal is entitled, if he does not choose to affirm the contract, to rescind it. There, however, his rights end. He is not entitled to say, "I will insist upon holding you to the bargain and upon your paying me back the excess of price which I contend I have paid you.

With regard to gifts to solicitors by their clients, the authorities are considered in *Morgan* v. *Minet* (6 Ch. D. 645). "The law," said the Court in that case, "is as plainly settled on the subject as any law existing in this country, that while the relationship of solicitor and client subsists the solicitor cannot take a gift from his client.[6] It is not said that the relation prevents a client bestowing his bounty upon ★ his solicitor, but what the [★ 192] law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor that relation must be severed. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; and then the client may as well give to a solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough if it be established. These Courts have not those golden scales which are said to be used in the mythological heaven to regulate the destinies of mankind. Gifts to solicitor.

"You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused."[7]

In *Rhodes* v. *Bate* (L. R. 1 Ch. 252), (a leading case on the subject of dealings with persons in fiduciary relations recently considered in *Mitchell* v. *Homfray* 8 Q. B. Div. 587), it was laid down that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person, ought not to stand in the same position as a gift of a man's whole property or a liability involving it; *mala fides* must be shewn in order to set aside such a benefit. To carry the principle to this extent, the Court of Appeal said, would interfere too much with the rights of property and disposition, and would be re-

[6] A gift from a client to a counsel is void. See Greenfield's Est., 2 Harris, 489, but a client may in his will make a gift to his counsel even if the will be drawn by the counsel. Mitchell v. Homfray, 2 Lead. Cas. Eq. 390.

[7] Merrit v. Lambert, 10 Paige, 352; Mott v. Horrington, 12 Vt. 199.

pugnant to the feelings and practice of mankind. A solicitor may, however, in the absence of undue influence,[8] take a benefit under a will, and that even though he himself may have prepared it: *Walker* v. *Smith* (29 Beav. 394), *Hindson* v. *Weatherill* (5 D. M. & G. 301); see further on the subject of dealing between solicitor and client, *Hunter* v. *Atkins* (3 My. & K. 113), *Tomson* v. *Judge* (3 Drew. 306), and Kerr on Fraud, pp. 114 *et seq.*, where the authorities on the subject are collected.

Solicitor taking mortgage from client.

In *Cockburn* v. *Edwards* (18 Ch. Div. 449) it was held that a solicitor lending money to his client and taking security from him, must take it in the ordinary form, unless he points out to his client anything that is unusual; but this doctrine was held not to apply to a case which was not an ordinary mortgage transaction, but an arrangement for giving the client time for paying a debt presently payable, and where the solicitor had inserted an immediate power of sale: *Pooley's Trustee* v. *Whetham* (33 Ch. Div. 111, 122).

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[★193] ★ *Charge in favour of Solicitor.*

GREER *v.* YOUNG.

(24 Ch. Div. 545.)

Principle.

*The 28th section of the Solicitors Act*, 1860, *confers upon the Court a discretionary power to create a charge upon property recovered or preserved. Such charge is independent of contract and is in the nature of salvage.*

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Summary of facts.

Mrs. Greer, her daughter, and certain infants were the beneficiaries under the will of W. J. Greer, of which Young and Pollock were joint trustees. Pollock committed breaches of trust by which a large portion of Greer's estate was lost. Pollock died insolvent in 1873, and in a suit of *Middleton* v. *Pol-*

[8] Buchanan *v.* Gibbs, 26 Kansas, 277; McKinney *v.* Hensley, 74 Mo. 326; Falk *v.* Turner, 10 Mass. 494; Shaw *v.* Ball, 55 Iowa, 55.

*lock*, instituted the same year for the administration of his estate, a dividend in respect of the loss occasioned by the breaches of trust was ultimately obtained by Young.

In 1874 Mrs. Greer and her daughter commenced the present action, *Greer* v. *Young*, and obtained a declaration that Young was jointly liable with Pollock, which resulted in a dividend in Young's bankruptcy. The Court of Appeal decided that the solicitors who had acted in *Greer* v. *Young*, but not in *Middleton* v. *Pollock*, were entitled to a charge on the dividend recovered in Young's bankruptcy, but not on the dividend recovered in *Middleton* v. *Pollock*.

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*Solicitors Act*, 1860, sect. 28.

In the leading case the Court of Appeal, in deciding partly in favour of and partly against the charge which was claimed by the solicitor, settled authoritatively the principle upon which the 28th section of "*The Solicitors Act*, 1860" (23 & 24 Vict. cap. 127), is to be interpreted. That section provides that "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or ★ proceeding [★ 194] in any court of justice, it shall be lawful for the Court or judge to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property (recovered or preserved) of whatsoever nature, tenure or kind the same may be." The section then goes on to provide that the Court or judge may make orders for taxation of and for raising and payment of such costs, charges, and expenses out the property, that all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void, and concludes with a proviso that "no such order shall be made by any Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is borrowed by any Statute of Limitations."

With regard to this last proviso, it was held in *Baile* v. *Baile* (L. R. 13 Eq 497. 509) that the statute could not run in the plaintiff's favour while the proceedings

were going on with the solicitor on the record as the plaintiff's solicitor and the receiver in possession.

Discretionary power in the Court.

"The legislature," said Lord Selborne, in *Pinkerton* v. *Easton* (L. R. 16 Eq. 490), "has given not a charge, but a power to the Court to create a charge, for a solicitor's costs, upon 'property recovered or preserved' when meritorious services of the solicitor have resulted in such recovery or preservation." The Act gives a discretionary power to the Court. A solicitor has no absolute right to the charge, but only power to ask the Court in the exercise of its discretion to make the charge.

The principle on which the Court proceeds in exercising this discretionary power is next to be considered.

Principle of salvage.

"The law of salvage—it was said in *Bulley* v. *Bulley* (8 Ch. Div. 479, 484) in language which was alluded to with approval by the Court of Appeal in the leading case—is well enough known, depending upon plain principles, not the subject of any particular statute (except the *Shipping Acts*), nor depending upon any statutory enactment. A ship at sea about to founder is saved by some other vessel. Then there comes the question of the right of the salvors to be paid the money coming to them out of that ship and its contents. There is no inquiry as to who is the owner of the ship. Nobody ever heard of such a thing. They may settle among themselves their averages or anything else. The law is, if you save a sinking ship, you shall be paid what is just out of the value of that ship. That is the principle of the *Solicitors Act* referred to, for the words are distinct and clear, and carry into effect plainly that principle."

"The section," said the Court of Appeal in the leading case (24 Ch. Div. 556), "is a very general one. It applies to every case in which a solicitor is employed. It authorises a charge, not on the mere interest of the plaintiff but on all property recovered in the action whatever for the plaintiff only, or for him in connection with others. It ★ appears clear to me that it is a salvage section. The solicitor is treated as a salvor who has recovered or preserved something in a time of danger by his work and labour. Into whatever hands it may fall, it is charged with the salvage."

[★ 195]

The Act does not allow the solicitor to be a mere volunteer, but it is sufficient that he should be *bonâ fide* employed by some person interested. He must be a solicitor—there is nothing in the Act which says that he must be the solicitor of the person whose property is

preserved, and it must be by reason of the employment that the property is preserved for somebody ; in that case the statute gives power to the Court to give him a charge. Where the Court comes to the conclusion that the property was recovered in the suit it is no objection that the solicitor was not employed by the person whose property was recovered, or that that person could not have employed the solicitor.

It does not depend on contract. Contract does away with the notion of salvage. Therefore it is immaterial whether the property belongs to an infant; it is immaterial whether the person whose property is recovered employed the solicitor.

Undoubtedly the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff or of the defendant which is recognized in the action, and to determine whether a fund has been recovered in the action it is material to consider what is the interest of the plaintiff or defendant. But to say that the Court has only to charge the interest of the plaintiff or the defendant, would be to repeal the Act. It will be for the Court to decide whether he has such an interest as will justify a charge being made.

Solicitor discharged before trial of action.

In *In re Wadsworth, Rhodes* v. *Sugden* (29 Ch. Div. 517), it was held that a solicitor, when property has been recovered or preserved in an action through his instrumentality, is entitled to a charge under the Act, though his client may have discharged him before the trial of the action, but that in such a case his lien would be subject to a charge of the solicitors for the time being. It was held in the same case, however, that a sum of money which had been paid into Court as security for the plaintiff's costs, and which subsequently became repayable to him on the action coming to a successful issue, was not property preserved within the meaning of the Act; the judge expressing an opinion that the sum in question had been imperilled and not preserved.

In *Dallow* v. *Garrold, Ex parte Adams* (13 Q. B. D. 543, affirmed 14 Q. B. D. 543), where *Faithfull* v. *Ewin* (17 Ch. Div. 495) and the other authorities are reviewed, it was laid down that all persons of business when dealing with a fund obtained by litigation, must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful, and that it is always right to make the order in favour of the solicitor unless he has been guilty of some

[★ 196] ★ *mala fides* or has stood by while the fund was being dealt with so as unfairly to prejudice the position of others.

Practice. The order declaring the charge, which may be made though the action has come to an end (*Heinrich* v. *Sutton*, 6 Ch. 865; *Jones* v. *Frost*, 7 Ch. 773), may be obtained either on petition (*Brown* v. *Trotman*, 12 Ch. D. 880; 48 L. J. Ch. 862; 41 L. T. 179; 28 W. R. 164) or on summons (*Clover* v. *Adams*, 6 Q. B. D. 622; *Hamer* v. *Giles*, *Giles* v. *Hamer* (M. R.), 11 Ch. D. 942; 48 L. J. Ch. 508; 41 L. T. 270; 27 W. R. 834), and the other parties to the action should not be served (*Brown* v. *Trotman*). The petition or summons must be intituled in the action, but not necessarily in the matter of the Act or of the solicitor (*Hamer* v. *Giles*, *Giles* v. *Hamer*).

Solicitor discharging himself. A solicitor discharging himself *pendente lite* (see *Robins* v. *Goldingham*, 19 W. R. 429) must deliver up all necessary papers to the new solicitor without prejudice to the lien, the latter undertaking to return them undefaced on the conclusion of the action and to allow access to them (*Robins* v. *Goldingham*, 13 Eq. 440). Daniell's Chancery Practice, p. 1975, *et seq.*; Morgan and Wurtzburg Chancery Acts and Orders, p. 16.

General lien of solicitor. In addition to the charge given to a solicitor by statute on property preserved, he is also entitled to a general lien for professional charges an all papers and documents, and also to articles of his client in his possession, delivered to be exhibited to witnesses. (*Friswell* v. *King*, 15 Sim. 191.)

Distinction between statutory charge and lien upon papers. A material distinction between a charge under 23 & 24 Vict. cap. 127, sect. 28, and the lien which a solicitor has upon papers, &c., deposited in his hands by a client, is that the former extends only to the costs of the particular action or matter under which the fund arises, but it may be actively enforced while the right of a solicitor to retain possession of the deeds, papers, &c., is a general one extending to all professional costs, but cannot be actively enforced.

The rule was laid down in *Belaney* v. *Ffrench* (L. R. 8 Ch. 918), that "a solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment. There is no foundation for such a claim to lien, and it cannot be allowed." This case was followed in *In re Boughton*, *Boughton* v. *Boughton* (23 Ch. D. 169), where the form of order is given, and distinguished in *In re Capital Life Insurance Association* (25 Ch. Div. 408); and see *In re Hutchinson*,

*Hutchinson* v. *Norwood* (34 W. R. 637), where the cases are collected.

It was held in *In re Galland* (31 Ch. D. 296), that in a case where the retention of a client's papers by a solicitor would embarrass in either prosecuting or defending a pending action, the Court has jurisdiction, upon giving security or payment into Court of a sum sufficient to answer the solicitor's claim, to order delivery of the papers before taxation. In this case the Court of Appeal expressed an opinion that the jurisdiction on this point has been extended by O. IV., r. 8, R. S. C. 1883, which enables the Court to make an order for delivery of specific ★ property other than land, on which a lien is claimed, on payment into Court of the amount claimed. [★ 197]

The position of solicitors of trustees—a subject on which the Court considered it important that parties should know what their rights were—was discussed in and contrasted with that of trustees themselves in the case of *Staniar* v. *Evans* (34 Ch. D. 470).

Solicitor to trustees.

"The person employed by trustees to act as their solicitor with respect to a trust estate, is commonly enough said to be a solicitor to the trust estate. But that is an inaccurate way of describing his position. He is not solicitor to the trust estate. He has no retainer from the trust estate, and he is not employed by the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs. The solicitor of the trustees has no lien whatever upon the trust estate for those costs. That is the general rule. There are certain exceptions to it by which a trustee-solicitor may in that character have a better claim. He may, for instance, have got a statutory charge by an order of Court in respect of his having recovered or preserved either the whole of the trust fund or some part of it. He may possibly have some lien on documents in his hands. He may have a right, as between himself and his client, to go against that client's share of the trust estate. But except in those cases, he has no claim on the trust estate."

## *Conversion by Court or Trustee.*

### STEED *v.* PREECE.

(L. R. 18 Eq. 192.)

Principle.

*When a conversion is rightly made either by the Court or a trustee, all the consequences of conversion must follow*[1] *unless there be an equity in favour of reconversion*[2]

Summary of facts.

In this case real estate had been conveyed to trustees in trust for two infants, John Preece and Edward Preece, as tenants in common in tail with cross remainders between them. A suit was instituted for administration ★ of the trusts, a decree for sale made, the estate sold, and the purchase money paid into court. Half of the fund in court was paid to John Preece, who had attained his majority, and the other half was carried over to the separate account of Edward Preece; and under these circumstances the infant would have been absolutely entitled to that moiety if he had attained twenty-one. On the death of Edward Preece under twenty-one, John Preece executed a disentailing deed and presented a petition to have the money paid to him. Held, that he was not entitled.

[★198]

*Ackroyd v. Smithson.*

This case forms a new point of departure in the elaboration of the doctrine of conversion, the broad principle of which was settled by the well-known case of *Ackroyd* v. *Smithson* (1 Bro. C. C. 503), in which Lord Eldon, then John Scott, made his celebrated ar-

[1] Hocker *v.* Gentry, 3 Metcalfe (Ky.), 463; *Ex parte* McBee, 63 N. C. 332; Peters *v.* Beverly, 10 Peters, 532; Thomas *v.* Wood, 1 Md. Chan. 296.

[2] Snell's Eq. 160. Reconversion may take place by act of the party or by election. Bailey *v.* Alleghany Nat. Bank, 104 Pa. St. 425; Beatty *v.* Byers, 6 Harris, 105. No inference can be drawn from lapse of time that there is an intention to reconvert. Beatty *v.* Byers (*supra*), also Jones *v.* Caldwell, 97 Pa. St. 442.

gument. "Mr. Scott," said one of the judges, when soon after he attempted to argue the reverse doctrine, "I have read your argument in that case of *Ackroyd* v. *Smithson*, and I defy you or any man in England to answer it. I won't hear you!" (Campbell's 'Lives of the Chancellors,' vol. vii. p. 56.)

General principle of conversion.

The general principle on which the doctrine of "Conversion" is based is thus stated by the Court of Appeal in the recent case of *Attorney-General* v. *Hubbuck* (13 Q. B. Div. 275, 289). "It is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be or which ought to be done as done already, and impresses upon the property that species of character for the purpose devolution and title into which it is bound ultimately to be converted."[3] This principle was considered as settled law "established universally by the cases" in *Fletcher* v. *Ashburner* (1 Bro. C. C. 500), decided in the year 1779.

In *Ackroyd* v. *Smithson* a testator after giving certain legacies ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds, and the residue to be given to certain legatees, two of the legatees in the lifetime of the testator, and the shares so lapsed went, so far as they consisted of personal estate, to the next of kin, and so far as they consisted of real estate to the heir-at-law. The effect of the case was thus stated by Sir George Jessel in *Steed* v. *Preece:*

Effect of *Ackroyd v. Smithson.*

"All that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will,[4] and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide ★ that if the Court or a trustee sell more than [★199] is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the persons entitled at the time of the sale."[5]

The decision in *Steed* v. *Preece* (in which the previous

[3] Parkinson's Appeal, 8 Casey, 455; Kane *v.* Gott, 24 Wendell, 641; Arnold *v.* Gilbert, 5 Barb. 190; Thomas *v.* Wood, 1 Md. Chan. 296; Ellison *v.* Wilson, 13 S. & R. 330.

[4] 1 Jarman on Wills, 530; Nagle's Appeal, 1 Harris, 260.

[5] If the proceeds of realty and personalty are blended together so as to form a common fund it will be considered as an absolute conversion. Morrow *v.* Brenizer, 2 Rawle, 185; Craig *v.* Leslie, 2 Wheat. 563; Burr *v.* Sim, 1 Wharton, 252.

decisions of Vice-Chancellor Shadwell in *Jermy* v. *Preston* (13 Sim. 356), and of Lord Romilly in *Cooke* v. *Dealey* (22 Beav. 196), were questioned), as stated in *Foster* v. *Foster* (1 Ch. D. 588), proceeded on the principle that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of conversion must follow, if there be no equity in favour of the heir or any one else for reconversion. Its principle was adopted in *Arnold* v. *Dixon* (L. R. 19 Eq. 113) and *Wallace* v. *Greenwood* (16 Ch. D. 362), where it was decided that an order for sale of a married woman's share of real estate made with her consent under sect. 6 of the Partition Act, 1876, operates as a conversion. In *Hyett* v. *Meaken* (25 Ch. D. 735) the question was whether a share of real estate which had been ordered to be sold but not actually sold passed to the heir or next of-kin of an intestate, and it was held that the order for sale effected a conversion as far as its date and before any sale has taken place. In this case nearly all the previous authorities are reviewed, and the result of them is stated as follows :—" that if in an action for administration of an estate the Court, in the exercise of its undoubted jurisdiction, makes an order for the sale of the estate, the order for sale will amount in itself to a conversion." [6] The general statement that an order for sale by the Court amounts to a conversion is subject to the qualification laid down in *Steed* v. *Preece*, "unless there be an equity for reconversion." [7]

Equity for reconversion.

An equity for reconversion was discovered two years after the decision in *Steed* v. *Preece*, in *Foster* v. *Foster* (supra), where the question was whether there had been conversion with regard to real estate of a share to which infants were entitled, sold under the judgment in a partition action, and it was held that the effect of sect. 8 of the Partition Act, 1868 (31 & 32 Vict. c. 40), incorporating the provisions of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), created an equity for reconversion into realty.[8]

*Foster* v. *Foster* (1 Ch. D. 589) was followed in *Mildmay* v. *Quicke* (6 Ch. D. 553). There Mrs. Quicke, a married woman, was entitled, subject to her husband's right to curtesy, to one-eighth share of certain real estate

[6] In the case of a will, the conversion takes place from the death of the testator.

[7] Reconversion will not take place generally unless all the parties interested so elect. Willing *v.* Peters, 7 Barr, 290; Beatty *v.* Byers (*supra*).

[8] Snell's Prin. of Eq. 160.

which was made the subject of a partition action. The plaintiff in the action was entitled to one-eighth, and he made an offer for Mrs. Quicke's one eighth, which was accordingly sold to him by order of the Court. Mrs. Quicke then died, and a question arose between her husband and her two infant daughters, coheiresses, as to who was entitled to the purchase money of the one-eighth share. Jessel, M.R., decided in favour of the coheiresses. "The result," he said, "was that the money for this share of the married woman became as much liable to be disposed of in her favour and in favour of those claiming under her as if the whole estate had been sold and the married woman's share of the purchase money carried to a separate ★ account. It appears to me clear that whenever you have a person that cannot consent, and you import the provisions of the Leases and Sales of Settled Estates Act, you must understand them as saying that the purchase money is to be laid out in land to be settled to the same uses, and as the married woman in this case had not conveyed by deed and had not herself consented to anything, for her alleged consent was really the consent of her husband, there was nothing which changed the destination of the money, and it was still liable to be laid out in land." [★ 200]

Conversion of partnership property.

The rule of the Court with regard to the conversion of partnership property in the absence of any binding agreement between the parties to the contrary was thus stated in *Darby* v. *Darby* (3 Drew. 495), cited with approval in *Attorney-General* v. *Hubbuck* (10 Q. B. D. 488, affirmed 13 Q. B. Div. 275).

"Irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out.[9] What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership." [10]

[9] Darby *v.* Darby, 3 Drew, 506.

[10] After the partnership liabilities and equities have been satisfied the surplus derived from the sale of real estate will go

On this principle it was held in *Attorney-General* v. *Hubbuck* (*ubi supra*), where the previous authorities are reviewed, that probate duty is payable on a deceased partner's share of the partnership realty, irrespective of the question whether there is any actual conversion.

The principle on which the Courts proceed in deciding whether an order for sale of a married woman's share of real estate in a partition action operates as a conversion was thus stated by Jessel, M.R., in *Wallace* v. *Greenwood* (16 Ch. Div. 62). "It may be said however that a married woman is in a different position to an infant, because she is absolute owner of her real estate subject to her husband's estate as tenant by the curtsey, and that if she sells, the purchase-money becomes his estate subject only to her equity to a settlement. That is true, but the Act has enabled her to judge for herself whether she shall sell or not. She could no doubt have sold her estate before the Act by a deed acknowledged under the *Fines and Recoveries Act*, but now, instead of selling by a deed acknowledged, she sells by statute, that is to say, by giving her consent. That being so, if the married woman consents there is conversion, if she does not consent, it does not appear to me that conversion will follow."

Conversion directed by deed or will. [★ 201]

Where conversion is absolutely directed by deed it takes place from the date of the deed;[11] where by will from the date of the testator's death. See *In re Lewis*, *Foxwell* v. *Lewis* (30 Ch. D. 654, 656), ★ where the law was summed up as follows:—"Whenever real estate has been converted into personalty, or according to the doctrine of a Court of Equity is to be treated as having been converted into personalty, it must then descend as personalty unless some person who is absolutely entitled to it has shewn in some way that he has elected to take it as real estate. Almost anything will be enough to shew such an intention, but there must be something." See *In re Gordon* (6 Ch. D. 531), where remaining in possession and receiving the rents for nine years without taking any steps to have the estate sold was regarded as sufficient evidence of an election to take the property

to the real and not to personal representatives; this is the general rule throughout the United States. Shearer *v.* Id., 98 Mass. 107; Hale *v.* Plummer, 6 Ind. 121; Dilworth *v.* Mayfield, 36 Miss. 40; Long *v.* Waring, 25 Ala. 625; Parson's on Partnership, 371; Foster's Appeal, 24 P. F. Sm. 397; Tillinghast *v.* Champlin, 4 R. I. 173.

[11] *i. e.* takes place from the date of the delivery of the deed. Bispham's Eq. 4th Ed. Sect. 320.

as real estate. See also *In re Davidson, Martin* v. *Trimmer* (11 Ch. Div. 341).[12]

Money paid into Court under sect. 69 of the *Land Clauses Consolidation Act*, 1845, *i.e.* in cases where the parties are under disability, is treated as not converted (*In re Harrop*, 3 Drew. 726; *Kelland* v. *Fulford*, 6 Ch. D. 491). Where the parties are competent to convey, and the money is paid into Court under sect. 78, the purchase-money is treated as personalty. (Morgan and Wurtzburg's Chancery Acts and Orders, p. 36, and see *In re Tugwell* (27 Ch. D. 309) ). Notice to treat by a railway, &c., company does not effect a conversion (*Haynes* v. *Haynes*, 1 Dr. & Sm. 426, and see *Ex parte Walker*, Drew. 508), but where the price is fixed, the property is regarded as converted[13] (*Ex parte Hawkins*, 13 Sim. 569; *In re Pigott and the Great Western Railway Company*, 18 Ch. D. 146).

*Lands Clauses Consolidation Act*, 1845.

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## *Misrepresentation and Fraud.*

### REDGRAVE *v.* HURD.

(20 Ch. Div. 1.)

Principle.

*Where a contract is induced by a material representation which is untrue, it is no defence to an action for rescission that the party to whom the representation was made had the means of discovering, and might with due diligence have discovered, its untruth, and that he made a cursory and incomplete inquiry into the facts.*[1]

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Summary of facts.

Redgrave, a solicitor, advertised in florid terms for a partner, "an efficient lawyer who would not

[12] The doctrine of conversion is applied to all cases where the general intention of the testator is sufficiently manifest to give the property to the donee in a condition different from that in which it exists at the time that the will goes into effect. See Stagg *v.* Jackson, 1 Comstock, 206; Phelps *v.* Pond, 23 N. Y. 69; Roland *v.* Miller, 100 Pa. St. 47.

[13] It is the duty to convert, which creates the equitable charge.

[1] In a case of fraud equitable relief will be granted either where the fraud consists of a positive misrepresentation or where there is a wilful concealment of a fact. Torrey *v.* Buck, 1 Green's Chan. 366; Smith *v.* Richards, 13 Peters, 26.

If the misrepresentation is made with the intention to deceive

[★ 202] object to ★ purchase the advertiser's suburban residence, value £1600—no premium for business or introduction." Hurd replied by letter, and interviews were held in the course of which Redgrave represented that the business was worth £300 to £400 a year, and produced summaries of business done during the last three years, which shewed gross receipts not quite amounting to £200 a year. Hurd inquired how the difference was made up, and Redgrave shewed him a quantity of letters and papers, which he stated related to other business he had done. Hurd did not examine any of the letters and papers but only looked cursorily at them, and ultimately agreed to purchase the house and share in the business for £1600. He paid a deposit of £100, took possession of the house, but soon afterwards, finding that the business was valueless, gave up possession and refused to complete the purchase. Redgrave commenced an action for specific performance of the contract; Hurd, on the other hand, counter-claimed for rescission of the contract, return of the deposit and damages. Held, by the Court of Appeal, that Hurd was entitled to rescission and return of the deposit, but not to damages.[2]

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In this case the Court of Appeal, while reversing the decision of the Court below with regard to the specific performance of the contract and also with reference to that portion of the counter-claim which asked for rescission, upheld its judgment upon the point that Hurd was not entitled to damages which he claimed on the ground of deceit practised by the plaintiff in respect of the agreement. The last point was first disposed of by the judgment of the Court of Appeal by deciding that

Damages.

the defendant was not entitled to damages "because he

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the other party it will vitiate the transaction. Harding *v.* Randall, 15 Me. 332; Reese *v.* Wyman, 9 Ga. 439; Taymon *v.* Mitchell, 1 Md. Ch. 496; Hough *v.* Richardson, 3 Story, 659. It is the duty of the party to know the truth; a misrepresentation is presumed to be fraudulent. See Bigelow on Fraud, 56 *et seq.*

[2] Leake on Contracts, 188; Lowe *v.* Trundle, 78 Va. 65; York *v.* Gregg, 9 Texas, 85; Thompson *v.* Lee, 31 Ala. 292; Oswald *v.* McGehee, 28 Miss. 340.

had not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor had he pleaded the allegations themselves in sufficient detail to found an action for deceit." [3] The second point dealt with by the Court of Appeal was the question of the rescission of the contract. Before stating the principles on which the Court is guided with regard to the rescission of contracts, Jessel, M R., pointed out that there were certain observations contained not only in text books but even in observations delivered in the House of Lords ★ inconsistent with the law as now settled, and that there had also existed a difference between the rules of Courts of Equity and the rules of Courts of Common Law, which has now disappeared by reason of the provision in sect. 25, sub-sect. 11, of the *Judicature Act* providing that in all cases of conflict the rules of equity are to prevail.

Rescission of the contract.

[★ 203]

The broad rule of equity on the subject was conclusively settled by the decision of the House of Lords in *Reese River Mining Company* v. *Smith* (L. R. 4 H. L. 64), and the principle which may now be considered as established is that it is not necessary in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. Two reasons have been given for this principle: one that it was the duty of the party making the false representation to have found out its falsehood before he made it; the other that a man ought not to be allowed to retain the advantage gained by a false statement.[4]

The third point in the case, which the Court of Appeal (reversing the Court below) decided in the defendant's favour, was on the question of specific performance. This was disposed of by the following statement:—"If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.'" "I take it," said Jessel, M.R., "to be a settled doctrine of equity, not only as regards specific performance but

Specific performance.

[3] A person is answerable even if the assertion of the untruth was made with good intentions and without designing any fraud. Leake on Contracts, 187; Bispham's Eq. 4th Ed. Sect. 214; Bankhead *v.* Alloway, 6 Cold. (Tenn.) 75.

[4] No person can be held responsible for a misrepresentation made through an honest mistake. Cabot *v.* Christie, 42 Vt. 126; Fisher *v.* Mellen, 103 Mass. 503.

also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the *Statutes of Limitations*." The delay counts only from the time when by due diligence the fraud might have been discovered.

Action of deceit.

In *Smith* v. *Chadwick* (9 App. Cas. 187), in which the House of Lords affirmed the decision of the Court of Appeal (20 Ch. Div. 27, where the facts are fully stated), the action was an action of deceit, on account of fraudulent misrepresentation by which the plaintiff said he had been induced to take shares in a company. The prospectus of the company contained the material statement by which the plaintiff alleged that he had been deceived, "that the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum." The statement, if taken to mean that the works had actually turned out produce of that value, was untrue, but if meant in the sense that the works were capable of producing that amount, was true." The plaintiff swore, in answer to interrogatories, that he understood the meaning of the statement to be "that which the words obviously conveyed," but he was not asked either in examination or cross-examination what interpetration he had put on the words:[5] The plaintiff, in fact, as the case was put by the Court of Appeal (20 Ch. Div. 49), said he had been deceived, but did not "condescend to particulars," and did not tell in what respect he had been deceived. The House of Lords decided, affirming the decision of the Court

[★ 204] of Appeal, that the plaintiff ★was not entitled to succeed. "In an action of deceit," said the Lord Chancellor, "it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made considered with reference to the object for which they were made, the knowledge or means of knowledge of the persons making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts;[6] and

[5] According to modern authorities a man has no more right to assert what he does not know to be true, than to state what he knows to be false. Smyth *v.* Dye, 15 Mo. App. 585; Hubbell *v.* Meigs, 50 N. Y. 489.

[6] The representation must be false in point of fact, it must be a misrepresentation of something that is a matter of fact and not of mere opinion or judgment. Bennett *v.* Judson 21 N. Y. 238; Tyler *v.* Black, 13 How. 230; Curry *v.* Keyser, 30 Ind. 214; Stow *v.* Bozeman, 29 Ala. 397; Watts *v.* Cummings, 9 P. F. Sm. 84; Sawyer *v.* Prickett, 19 Wallace, 146.

secondly, he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief influencing his conduct.[7] The plaintiff has not satisfied the burden of proof which under the circumstances was incumbent upon him." Action of deceit.

"I cannot myself see," said Lord Blackburn, "what difficulty there could have been in the plaintiff's saying in answer to the defendant's interrogatory, 'I understand the meaning of the representation as to turnover to be that Messrs. Hannay's works had actually during the past year turned out produce that at present prices would be worth more than a million, and that was untrue, for they never produced half as much.' When I say this, I mean of course if the plaintiff could truly swear to that effect.[8] If he did not understand it, there was of course a very good reason for not so swearing."

The action in *Smith* v. *Chadwick*, as has been already stated, was an action of deceit. It was brought in the Chancery Division, but the indorsement was that the plaintiff claimed for damages sustained by his having been induced to take and pay for shares by the fraudulent misrepresentations of the defendant. It was pointed out by Lord Blackburn, following what had been said in *Arkwright* v. *Newbold* (17 Ch. Div. 320), that an action for deceit is a common law action, and must be decided on the same principles whether brought in the Chancery Division or the Common Law Division, there being no such thing as an equitable action for deceit. The difference in the mode of trial, however, if the case be tried in the Chancery Division, makes a difference with regard to the province of the Court of Appeal.

Here Lord Blackburn (modifying to some extent the observations of Jessel, M.R., in the Court of Appeal) laid down the following important principles: 1. The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause and saw the witnesses and their demeanour. On the other hand, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the

[7] A man may also be responsible for a false representation even if he has no interest in the deception. Weed *v.* Case, 55 Barb. 547. A person when dealing with another has a right to rest on his assertion of a fact. Mead *v.* Bunn, 32 N. Y. 295.

[8] A person has not the right to rest upon the opinion of another, unless the one so giving the opinion does so as an expert. Picard *v.* McCormick, 11 Mich. 68, and Kost *v.* Bender, 25 Mich. 515.

evidence, the Court of Appeal should deliver its judgment the other way. 2. If it is proved that the defendant, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is not an inference of law, *i.e.*, an inference that must be made, but a fair inference of fact that he was induced to do so by the statement. It is proper evidence to be left to a jury, but its weight as evidence must greatly depend upon the degree [★205] to which the action of the plaintiff was ★likely to be influenced by it, and in the absence of all other grounds upon which the plaintiff might act.[9]

A circumstance which Lord Blackburn said ought to be borne in mind by the tribunal which had to decide the question of fact, is that the plaintiff under the present law can be called as a witness on his own behalf, and if he is not so called, or being so called, does not swear that he was induced by the representations in question to enter into the contract, much weight is added to the doubts whether the inference that he was deceived by the misrepresentation was a true one.[10]

The *dicta* of Jessel, M.R., in *Redgrave* v. *Hurd*, were recently considered in *Hughes* v. *Twisden* (34 W. R. 498) along with the comments in *Smith* v. *Chadwick* (9 App. Cas. 196), and *Smith* v. *Land and House Property Corporation* (28 Ch. Div. 16), where the Court stated the law to be that in such a case there is not a presumption of law, but that the misrepresentation is to be regarded as "an important piece of evidence from which, if there is nothing else, the Court may draw the inference of fact that the plaintiff was induced by the statement to enter into the contract," [11] and in the case before it the Court declined to draw such an inference.

It may be noticed in passing that in the course of the argument in *Smith* v. *Chadwick* (9 App. Cas. 189), Lord Blackburn expressed an opinion that probably the discrepancies between expressions of equity and common law judges are greatly owing to the fact that at

[9] A man may praise the value of his own wares and depreciate the value of that which he buys and it is no fraud. Adams *v.* Soule, 33 Vt. 549; Gatly *v.* Holcomb, 44 Ark. 216; French *v.* Griffin, 3 C. E. Green, 279.

[10] McClellan *v.* Scott, 24 Wis. 81; Paddock *v.* Fletcher, 42 Vt. 389; Clarke *v.* Dickson, 6 C. B. (N. S.) 453.

[11] As to the puffing of values see Vazie *v.* Williams, 8 Howard, 134; Pennock's Appeal, 2 Harris, 449; Faucett *v.* Currer, 115 Mass. 20; Trust *v.* Delaplaine, 3 E. D. Smith, 219.

common law questions of fact are for the jury, and it is necessary for the judge to separate them clearly from the questions of law; whereas, in equity, the judges have to determine both law and fact, and it is sometimes impossible to understand whether their decisions were meant to be inferences of fact or law.

Unauthorized misrepresentation by agent.

In *Mullens* v. *Miller* (22 Ch. D. 194), a surveyor who was employed to find a purchaser of a leasehold house, made certain untrue statements, unauthorized by the owner, with regard to the value of the property. The owner also made misleading statements to the purchaser. It was held that the false statements by the agent,[12] independently of those made by the owner, were sufficient to disentitle the owner to specific performance of the contract, on the ground that an agent, whether he be employed to sell a house or to find a purchaser, has authority to describe it and make true representations as to its value, and if he makes untrue representations and induces a contract, his principal cannot have specific performance.[13]

In *Smith* v. *Land and House Property Corporation* (28 Ch. Div. 7) an hotel was advertized for sale as let to a most desirable tenant, the vendors were aware of circumstances that shewed that he was not a desirable tenant. The chairman of the defendant company, whose evidence was not shaken on cross-examination, and believed by the judge who saw and heard him, swore that the company would not have purchased but for the representation as to the tenant. The Court of Appeal affirmed the decision, dismissing an action for specific performance.

In *Edgington* v. *Fitzmaurice* (29 Ch. Div. 459) the directors of a ★ company invited subscriptions for debentures, stating that they had certain objects for the development of their business in view, their main, and practically their only object being to obtain means to pay off pressing liabilities. The plaintiff advanced money on the erroneous belief that the prospectus offered him a charge upon the company, and stated that he would not have taken the debentures unless he had understood that he was to have such a charge, and that he also relied on the fact that the company wanted money [★ 206]

[12] It makes no difference if the misrepresentations are made by an agent, an attorney or by a partner. Blair *v.* Bromley, 2 Phillips' Ch. 354; Fitzsimmons *v.* Joslin, 21 Vt. 129.

[13] Misrepresentation of values may become material in resisting specific performance. Tyler *v.* Black, 13 How. (U. S.) 231; Spalding *v.* Hedges, 2 Barr. 240; Best *v.* Stow, 2 Sand. Ch. 298.

for the purposes stated by the prospectus. The Court of Appeal held that, there being a material statement influencing his conduct, he was entitled to bring an action for deceit. The law on the subject was stated in their judgment in the following manner:—

"In order to sustain his action, the plaintiff must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the defendant, or that he made it not caring whether it was true or false.[14] It is immaterial whether he made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also immaterial with what object the lie is told, as laid down in Lord Blackburn's judgment in *Smith* v. *Chadwick*, but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. Lastly, when you have proved that the statement was false, you must further shew that the plaintiff has acted upon it and has sustained damage by so doing: you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting."[15]

Action on deceit and action on misrepresentation contrasted.

In an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed, although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true: *per* Cotton, L.J. (17 Ch. Div. 301, 320).

Summary of the law as to voidable contract to take shares in a company.

The principles on which the Courts proceed with regard to the important subject of the repudiation of voidable contracts to take shares was thus summed up by the Court of Appeal in *In re Scottish Petroleum Company* (23 Ch. Div. 413, 429), where the authorities on the subject are collected. 1. Every person who has agreed to become a member of a company and whose name has been entered on the register of members is

[14] A man has no right to rely on what another says he intends to do. Grove *v.* Hodges, 5 P. F. Sm. 519; Long *v.* Woodman, 58 Maine, 49.

[15] "If the party to whom the representation is made resorts to inquiries on his own account and shows by his conduct that he relies upon them he cannot complain of a misrepresentation." Pratt *v.* Philbrook, 33 Me. 17; Glasscock *v.* Minor, 11 Mo. 655; Clark *v.* Everhart, 13 P. F. Sm. 347; Tindall *v.* Harkinson, 19 Ga. 448.

liable as a contributory in the event of the company being wound up. This is in substance the combined effect of the 23rd, 38th, and 74th sections of the *Companies Act*, 1862. 2. The proposition thus generally stated is subject to the application of the well-recognised rule in equity, that a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted, is entitled to rescind such contract provided he does so within a reasonable time after his discovery of the fraud.[16] In such cases the contract is voidable, not void.[17] 3. This last-mentioned rule in its ★ application to contracts to take [★ 207] shares in a company which is subsequently ordered to be wound up, has been modified to this extent, that the contract must be avoided, or that must be done which is recognised as equivalent to avoidance, before the commencement of the winding-up.

Fraud of directors and agents.

The law with regard to frauds of directors and agents of companies was much considered in *Cargill* v. *Bower* (10 Ch. D. 502), where it was held, explaining *Peek* v. *Gurney* (L. R. 6 H. L. 377) and following *Weir* v. *Barnett* (3 Ex. D. 32), that a director is not liable for fraud of his co-directors or the agents of the company, *ex. gr.* that of issuing a fraudulent prospectus, unless he has either expressly authorized or tacitly permitted its commission; and see *In re Denham & Co.* (25 Ch. D. 752), where it was held that the director was not liable as the books of account had been kept and audited by duly appointed and responsible officers, and there was no ground for suspecting fraud.

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[16] A person must make use of any means they may have of information. Brown *v.* Leach, 107 Mass. 364; Wright *v.* Gully, 28 Ind. 475.

[17] Crossman *v.* Penrose Ferry Bridge Co., 2 Casey, 69; Custar *v.* Titusville Gas & Water Co., 3 P. F. Sm. 385.

## *Family Arrangements.*

### WILLIAMS *v.* WILLIAMS.

(L. R. 2 Ch. 294.)

Principle.

*A family arrangement may be upheld although there were no rights in dispute at the time of making it, and the Court will not be disposed to scan with much nicety the quantum of the consideration.*[1]

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Summary of facts.

John Williams, who was possessed of real estate of socage, gavelkind, borough English tenure, and also leaseholds and other personal property, died in 1831, leaving a wife and two sons, John and Samuel. After his death a will was found, by which J. Williams the elder gave all his property, subject to certain provisions, for his wife and his two sons equally. The will was unwitnessed and was accordingly not admitted to probate. It was proved that at an interview soon after John declared that "the property shall be not mine nor thine, but
[★ 208] ours." The widow never asserted any ★ rights, and indeed stated that she did not claim her right to dower because her sons were carrying out their father's instructions, and for the rest of her life she was supported by her two sons out of the "proceeds of their joint business and the income of their father's estate." The two brothers carried on business in partnership for 20 years, and treated the whole of the property as belonging to them equally. The partnership was then dissolved, and between 1852 and 1857 there was considerable litigation between the brothers. In 1858 Samuel died, and his representatives and devisees in trust instituted a suit al-

[1] Family compromises if made in good faith are favored in equity. Stub *v.* Lies, 4 Watts, 43; Burkholder's App., 9 Outerbridge, 39.

leging that a family arrangement had been made between the two brothers, and asking that the estates should be equally divided. The Court of Appeal held that there was sufficient evidence of a family arrangement, and decreed accordingly.[2]

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In this case the Court of Appeal considerably extended the principles upon which family arrangements had been previously upheld. (1) There was no agreement in writing, and the arrangement could only be implied from the conduct of the parties. (2) As was pointed out in the judgment of Lord Chelmsford, there was here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved; the appellant was merely prompted by respect for his father's intentions and by his affection for his brother, both most excellent and praiseworthy motives, but scarcely sufficient to constitute such a consideration as would convert an act of kindness into a binding engagement. The general principle upon which the Court proceeds with regard to compromises in the nature of family arrangements, and made to "save the honour of a family, was stated by Lord Hardwicke in the case of *Stapilton* v. *Stapilton* (1 Atk. 2), decided in the year 1739. "The Court always considers the reasonableness of the agreement, and will be glad to lay hold of any just ground to carry it into execution and to establish the peace of a family." "From the case of *Stapilton* v. *Stapilton*," said Lord Chancellor Sugden in *Westby* v. *Westby* (2 D. & War. 503), "down to the present day, the current of authorities have been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have ★ been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers." [3] [★ 209]

General principle.

In the present case, the Lord Chancellor said that if

[2] Bell *v.* Lawrence, 51 Ala. 160; Brandon *v.* Medley, 1 Jones Eq. 313; Good *v.* Kerr, 7 W. & S. 253; Triggs *v.* Reed, 5 Humph. 529.

[3] Shartel's App., 14 P. F. Sm. 25; Wilen's App., 9 Out. 121.

there had been no consideration whatever, the arrangement would in all probability not have been treated as binding on the parties, but then there was some consideration to support the arrangement in the circumstances of the case. The borough English property which Samuel had left in the common stock along with his share in the stock-in-trade of the business, was of some, though of trifling value. Another fact which was to be taken into account was that the widow was a party to the arrangement, and had relinquished her rights in order to carry it into effect.[4]

Quantum of consideration.

It is a well-established principle that in cases of this description the amount of the consideration is not carefully regarded by the Court. The present case accordingly was treated as upon the same footing as the other cases which had been decided with regard to family arrangements. "It was strongly argued for the appellant," said Turner, L.J., "that this case does not fall within the range of those authorities, that those cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not, and could not be any doubtful or disputed right; but this I think is a very short-sighted view of the cases as to family arrangements.[5] They extend, as I apprehend, much farther than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates upon an arrangement between the father and the eldest son on his attaining twenty-one, may well be considered as a branch of these cases, and certainly this Court does not in such cases inquire into the *quantum* of consideration."[6]

Similar principles were laid down in *Persse* v. *Persse* (7 Cl. & Fin. 280), where the House of Lords decided that, having regard to the ages and relative situation of the parties and other circumstances, there was some consideration, and not very inadequate consideration, for the arrangement which had been entered into. In

[4] Kerr on Mistake and Fraud, 403; Taylor *v.* Patrick, 1 Bibb. 168.

[5] "If the terms of the arrangement are unconscionable, or the evidence shows that the mind of the parties have not, in fact, come together, relief will be refused." Bispham's Eq. (4th ed.), Sec. 189, and Wistar's App., 30 P. F. Sm. 484.

[6] Mere inadequacy of consideration is not sufficient to set a transaction aside. Slater *v.* Maxwell, 6 Wallace, 273; Bedel *v.* Loomis, 11 N. H. 9.

that case, Lord Cottenham, after commenting on the fact that the father might well have been anxious for the reunion of the two estates, proceeded as follows :— "By what scale of money consideration are these objects to be estimated? The impossibility of estimating them has led to the exemption of family arrangements from the rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection."

Compromise.

In order that a compromise should be binding there must be *uberrima fides*—full disclosure of everything material.[7] To make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection [8] (*Maxon* v. *Payne*, L. R. 8 Ch. 881). This point is well illustrated by the ★ case of *Gordon* v. *Gordon* [★ 210] (3 Swanston, 400), where an agreement between two brothers for the division of the family property was set aside after nineteen years, on the ground that the younger brother knew that there had been a ceremony which was called a private marriage and concealed this knowledge, and Lord Eldon said that whether he did so designedly "or in an honest opinion of the invalidity of the ceremony and of a want of obligation on his part to make the communication, the Court could not sanction the arrangement."

Concealment of material facts.

The practice with regard to compromises has been made the subject of consideration in several recent cases.

In *De Cordova* v. *De Cordova* (4 App. Cas. 692) it was held that a secret arrangement, even though not legally binding, was sufficient to vitiate a compromise.

In *Gilbert* v. *Endean* (9 Ch. D. 259), Jessel, M.R., stated, though the point was not necessary for the decision of the matter before him, that where the object is not to supply a technical defect, but to decide a substantial question between the parties, a new action ought to be brought.

In *In re Birchall*, *Wilson* v. *Birchall* (16 Ch. Div. 43), it was held that though the Court can approve a compromise on behalf of infants, it cannot force a compromise upon them against the opinion of their legal advisers. Jessel, M.R., stated that it was his own prac-

[7] Family arrangements in order to be upheld in equity must be made with full disclosure. Stub *v.* Lies (*supra*).

[8] In such transactions, distress and necessity will be presumed to exist and the onus of proving that the consideration is an adequate one is thrown on the purchaser. Maston *v.* Marlow, 65 N. C. 695; Poor *v.* Hazelton, 15 N. H. 564; Boynton *v.* Hubbard, 7 Mass. 112; Larrabee *v.* Id., 34 Maine, 477.

tice and that of his predecessor to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so. "If the opinion given is only that of a junior counsel and there is a leader, I ask the leader in Court whether he agrees with the junior's opinion, and this was also Lord Romilly's practice."

Withdrawal of consent to compromise.

Where the Court has gone into the merits of the case and assented to a deliberate compromise, a party who has instructed counsel will not be allowed to retract his consent, but a consent given by inadvertence may be withdrawn at any time before the order is drawn up: *Davis* v. *Davis* (13 Ch. D. 861); and see *Harvey* v. *Croydon Rural Sanitary Authority* (26 Ch. Div. 249), where the previous cases are considered. Counsel and attorney have, unless forbidden, authority to compromise, but not out of Court: *Swinfen* v. *Swinfen* (18 C. B. 485) *Fray* v. *Vowles* (1 Ell. & Ell. 839); *Prestwich* v. *Poley* (18 C. B. (N.S.) 806); *Chown* v. *Parrott* (14 C. B. (N.S.) 74).

In *In re Cockcroft, Broadbent* v. *Grove* (24 Ch. D. 94), it was held that an order of compromise made in the presence of the parties, and sanctioned by the Court, would have been fatal to a claim if otherwise good.

It was held in *In re Norwich Provident Insurance Society, Bath's Case* (8 Ch. Div. 334), that a company has, as incident to its existence, the same power of avoiding litigation by a compromise as an individual possesses.

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[★211]

## ★*Conversion of wasting Securities.*

### MACDONALD *v.* IRVINE.

(8 Ch. Div. 101.)

Principle.

*The rule of* Howe *v.* Earl of Dartmouth *is to be applied unless upon the fair construction of the will there is a sufficient indication of intention against it. The burden of proof in every case rests upon the person who says it is not to be applied.*[1]

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A testator, after giving certain specific legacies,

[1] In the United States where specific goods as corn, wine, or

gave the residue of his estate, which consisted *inter alia* of Egyptian Bonds called "Khedive Bonds," and household furniture to his nephew. After the date of the will he married, and subsequently made a codicil, by which he gave to his wife for her life "all the income dividends and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him, or over which he had any power of disposition or appointment until after her decease," and subject thereto revived and confirmed his will. Summary of facts.

The Court of Appeal decided that the estate must be converted in accordance with the rule in *Howe* v. *Earl of Dartmouth*.[2]

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A variety of questions arose in this case, but the only one which it is here proposed to consider was whether the rule of *Howe* v. *Lord Dartmouth* (as it is called), settled by the decision of Lord Eldon (7 Vesey, 137) in 1802, was to be applied or not to the facts before the Court. That rule was stated in the judgment in the leading case (8 Ch. Div. 121) as follows:—"that where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and accordingly the Court effectuates the presumed intention of the testator by the conversion into investments approved by the Court of so much of the personalty as is at the death of the testator of a wasting or perishable or insecure nature, and also of ★ reversionary interests." In the leading case there was this peculiarity, that there was no tenancy for life created by the will, and accordingly the will *per se* could not possibly afford any evidence or indication of intention of the testator as to how the property was to be enjoyed. Subsequently the testator married. He then Rule of *Howe* v. *Earl of Dartmouth*. [★212]

hay, are left to a certain individual for life and a remainder over, the remainder is void and the first taker takes absolutely. But if the gift is of articles which are not consumed but only worn or deteriorated by use a remainder over is good.

[2] If the gift is residuary, the property, no matter of whatever kind, must be sold and the interest on the amount realized paid to the tenant for life. Homer *v.* Shelton, 2 Metcalfe, 194; Covenhoven *v.* Shuler, 2 Paige, 132; Calhoun *v.* Furgeson, 3 Rich. Eq. 165; Kinnard *v.* Id., 5 Watts, 108; Saunders *v.* Haughton, 8 Ired. Eq. 217.

by a codicil introduced a tenancy for life in favour of his wife, and in other respects confirmed his will, which would otherwise have been revoked by sect. 18 of the *Wills Act* (1 Vict. c. 26). "If," said James, L.J., "the testator had simply inserted in the will as the first gift, 'I give to my wife the income, dividends, and annual produce of my entire estate,' I think that would not have been according to the fair construction of the decided cases, any indication of an intention that she was to have anything more than the income, dividends, and annual produce of the whole of the estate, that is to say, of that which would remain of the estate after the debts, funeral and testamentary expenses had been paid, and the property had been converted and properly dealt with according to the duties imposed upon his legal personal representatives. The other words, that he postponed the payment of all legacies, the distribution of all estates vested in him or over which he had a power of disposition, until after her decease, meant nothing more than that he intended the life estate of his wife to be paramount to any gift however clear and specific."[3] The two clauses taken together were therefore not in the opinion of the Court sufficient to indicate an intention to take the case out of the ordinary rule of conversion established by *Howe* v. *Lord Dartmouth.*

It is also settled by the authorities (8 Ch. Div. 124) that the rule must be applied unless upon the fair construction of the will there is found a sufficient indication of intention that it is not to be applied, the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case.

In the celebrated case of *Brown* v. *Gellatly* (L. R. 2 Ch. 751) the testator, who was a shipowner and merchant, directed his executors to realise his personal estate "when and in such manner as they should think fit without being personally responsible for such realisation," and gave them power to sail his ships for the benefit of his estate until they could be satisfactorily sold. He then left his residuary estate to tenants for life with remainders over, and gave his executors the most ample discretionary powers to invest or to allow to remain as invested, his funds in certain specified securities. Three questions arose in the case: first, as to the ships which had earned large profits; secondly, as to the authorized securities; thirdly, as to the "un-

[3] Freeman *v.* Cook, 6 Ired. Eq. 379; Eichelberger *v.* Barnetz, 17 S. & R. 293; Rogers *v.* Id., 7 Watts, 19.

authorized securities" which were not proper for the investment of trust moneys. With regard to the first point, the Court of Appeal decided (distinguishing *Green* v. *Britten* (1 De G. J. & S. 649), where there was an absolute prohibition against converting the ships for seven years except in an event which did not happen) that the testator intended that they should be converted cautiously, and that accordingly, as in *Meyer* v. *Simonsen* (5 De G. & S. 723), a value should be set upon them as at the death of the testator, and that the tenant for life was entitled to ★ 4 per cent on such value, and [★ 213] that the residue must be invested and become part of the estate. As to the second point, the Court held that the tenant for life was entitled to the actual income of the authorised investments. Thirdly, as to the "unauthorised" investments, that the tenant for life, according to the rule of *Dimes* v. *Scott* (4 Russ. 195), followed in *Taylor* v. *Clarke* (1 Hare, 161), was only entitled to the interest of so much consols as would have been realised by a sale of the unauthorized investments and investment of the proceeds in consols.[4]

In *Gray* v. *Siggers* (15 Ch. D. 74) the testator after giving perishable property to trustees, of whom his wife was one, on trust to pay the income to his wife for life, and then to his grandchildren, added a declaration in the following terms—"That the trustees are at liberty to retain the leasehold property in specie, and any other investment held by the testator, for such period as they in their discretion may think fit." Vice-Chancellor Malins held that though if the case had rested on the first part of the will taken alone, it would have been clearly brought within the principle of *Howe* v. *Earl of Dartmouth* (*ubi supra*) and *MacDonald* v. *Irvine* (*ubi supra*), the very precise declaration contained in the will took it completely outside that rule.

In *In re Chancellor, Chancellor* v. *Brown* (26 Ch. Div. 42), a testator had devised and bequeathed his real and personal estate, the bulk of which consisted of his business and the premises on which it was carried on, to trustees upon trust to sell and convert, and invest the proceeds and pay the income to his wife for her life and after her death to her children. The trustees had power to postpone conversion, and there was the usual declaration that until sale the net rents, profits, and income should be paid to the persons to whom the income would be payable if the sale had not actually been made.

[4] Hill on Trustees, 388; Yates *v.* Yates, 28 Beav. 637; Williamson *v.* Williamson, 6 Paige, 303.

The will contained no reference to his business, and the executors carried it on for nearly two years. The Court of Appeal decided that the profits of the business were to be treated as income on the ground that the executors had an implied authority to carry on the business, and that the testator had expressly directed that the profits of his estate were to be treated as income.[5]

"It is quite true," said the Court of Appeal, "that the discretionary powers exercised by trustees are not to affect the rights of beneficiaries, but when a testator himself expressly directs what shall be done with the income accruing during the period the sale is postponed, the general rule does not apply, and we are at liberty to give effect to the plainly expressed intention of the testator. It would be a strong thing to say that the sale of his business was not contemplated by the testator, and could not be postponed by his trustees for a reasonable period. To postpone the sale of the business involved the continuing it in the meantime. The testator has therefore directed that his business shall be carried on until it is sold, and that the profits of it until sale shall be paid to the person entitled to the income of his trust estate."

See Seton on Decrees, 4th ed. pp. 999 *et seq*, where the very numerous cases on conversion of wasting securities are collected.

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[★214]

## ★*Locke King's Acts.*

*In re* **NEWMARCH, NEWMARCH** *v.* **STORR.**

(9 CH. DIV. 12.)

Principle.

*A charge of "debts" or "just debts" on part of a testator's real estate in aid of his personal estate and in exoneration of his other real estate, is not a sufficient expression of intention within the meaning of Locke King's Acts to exonerate the mortgaged estates from the payment of the mortgaged debt.*

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Newmarch, the testator in this action, had mort-

[5] The leaning of the court is in favor of treating gifts as far as possible specific, and they will seize hold of very slight circumstances to do it. 2 Spence's Eq. 42 and 554 and authorities there cited.

gaged the whole of his real estate except seven cottages for £1000. By his will he devised his real estate in the following manner:— Summary of facts.

1. A close called "Bean Butts" and the seven cottages to trustees for his wife and children.

2. A house and garden to his daughter and her children.

3. His mill with the lands in his own occupation and the residue of his real estate to his sons, "charged nevertheless in aid of my personal estate and in exoneration of my other real estate with the payment of my just debts." The Court of Appeal decided that all the real estates subject to the mortgage must contribute rateably (i.e. in proportion to their respective values) towards the payment of the £1000 mortgage debt.

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The law with regard to the mode in which mortgage debts are to be borne has been completely changed by three Acts:

1. *Locke King's Act* (17 & 18 Vict. c. 113), applying only in cases where the person dies on or after the 1st January, 1855. *Locke King's Act.*

2. 30 & 31 Vict. c. 69, applying in the construction of the will of any person who may die after the 31st December, 1867. *Locke King's Act Amendment Act.*

★ 3. 40 & 41 Vict. c. 34, applying to any testator or intestate dying after the 31st December, 1877. [★ 215] 40 & 41 Vict. c. 34.

In cases not falling within the operation of any of these statutes the heir-at-law or devisee was entitled as a general rule to have the land exonerated from the mortgage debt out of the general personal estate. There were, however, certain exceptional cases in which under the old law, i.e. before 17 & 18 Vict. c. 113, the mortgaged land had to bear its burden. These cases, which will be found very fully discussed with the authorities establishing them in Jarman on Wills, vol. ii. p. 634 *et seq.*, may be shortly summarised as follows:— (1) Where there were express words or a plain intention of the testator that the devisee should take *cum onere*, i.e. subject to the mortgage debt. In order to effect this, there must be sufficient to indicate an intention, not only to charge the real estate, but also to

exonerate the personalty, "subject to the mortgage or incumbrance thereupon" being treated as merely descriptive of the incumbered condition of the property. (2) Where the charge was in its nature real, as in the case of a jointure or of pecuniary portions to be raised out of land. (3) Where the debt was not contracted by the person who died last seised or entitled, but the land came to him *cum onere* unless he manifest an intention to adopt it.

17 & 18 Vict. c. 113.

*Locke King's Act* (17 & 18 Vict. c. 113) provides "that where any person shall after the thirty-first day of December one thousand eight hundred and fifty-four die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgaged debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgaged debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgaged debts charged on the whole thereof. Provided always that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January one thousand eight hundred and fifty-five." The interpretation of this Act has given rise to a good many difficulties which are now of little more than antiquarian interest, having to a large extent been removed by the subsequent legislation in the Amendment Act presently noticed. (See *Eno* v. *Tatham* (4 Giff. 181; 3 D. J. & S. 443); *Moon* v. *Moon* ★ (1 D. J. & S. 602), *Elliott* v. *Dearsley* (16 Ch. Div. 322); and cases collected in Seton on Decrees, 4th ed. pp. 899, 900; Jarman on Wills, 6th ed., vol. 2, pp. 647 *et seq.*)

[★ 216]

*Locke King's Amendment Act* (30 & 31 Vict. c. 69) provides that— 30 & 31 Vict. c. 69.

(1) In the construction of the will of any person who may die after the thirty-first day of December one thousand eight hundred and sixty-seven a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

(2) In the construction of the said Act and of this Act the word mortgage shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

With regard to this latter Act, Jessel, M.R., in the leading case observed, "It was a construing and explaining Act; it did not profess to amend the former Act, but to set aside the interpretation that had been put upon it; it was, in fact, a polite way of overruling the decision of the Court of Chancery."

Three points were considered in the leading case—

1. Do the Acts apply at all where there is a question of contribution between devisees of different portions of an estate subject to one mortgage debt?

2. Supposing this question to be answered in the affirmative, what is a sufficient declaration of contrary intention in a will to satisfy the Acts?

3. Whether the will in question contains a sufficient declaration of a contrary intention.

With regard to the first point it was held that the words "any other real estate of such person" mean "other real estate not descended or devised to such heir or devisee," not "other real estate not comprised in the mortgage," and that consequently the words amounted to an express enactment that unless the testator has signified a contrary or other intention, the different parts of the charged estate shall in the hands of the devisees bear proportionate parts of the mortgage debt according to their value. Points 2 and 3 were disposed of as follows. Since 30 & 31 Vict. c. 69, a mere charge of debts on personalty does indicate a sufficient intention to exonerate the mortgaged estate, and the words in the present will "just debts" and "in aid of my personal estate and in exoneration of

my other real estate," were treated as merely amounting to a declaration that the real estate was to be exonerated only to the same extent as the personalty was aided, and as by *Locke King's Act* the personal estate is not liable, their practical effect was nothing.

It was held in *Harding* v. *Harding* (L. R. 13 Eq. 493) that the Act 30 & 31 Vict. c. 69, did not apply to the case of an intestate. This ★ and other deficiencies were supplied by 40 & 41 Vict. c. 34, which provides that the Acts mentioned in the schedule (i.e. 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69) hereto shall as to any testator or intestate dying after the thirty-first of December, one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised aments of whatever tenure which shall at the time of or possessed of or entitled to any land or other heredit- his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money, and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

[★ 217]

40 & 41 Vict. c. 34.

In *In re Rossiter*, *Rossiter* v. *Rossiter* (13 Ch. D. 355), a testator by a will dated in 1877 directed his executors to pay all his just debts, funeral and testamentary expenses, in exoneration of his real estate. The question was how a debt due on the security of part of his real estate was to be borne. It was held that the mortgaged estate must primarily bear the mortgage debt. Jessel, M.R., in delivering judgment, said that *Locke King's Amendment Act* was exactly intended to meet such expressions as these. The testator, he said, was under the mistaken notion that his debts and funeral and testamentary expenses were primarily charged on his real estate, but the Act expressly said that a direction was insufficient to exonerate the mortgaged estate. "Why," asked his Lordship, "should I make a difference because the testator did not know the law. In my opinion there is nothing here referring by necessary implication to any debt charged by way of mortgage on the real estate."

The three statutes were considered in *In re Cock-*

*croft*, *Broadbent* v. *Groves* (24 Ch. D. 94), where they were spoken of, probably with reference to the drafting only, as affording by no means a favourable specimen of legislation. In that case a testator had contracted to buy real estate, and had paid a deposit. In 1881 he specifically devised the real estate to his daughter for life, with remainder to her children, but the will did not contain any intimation either express or implied that the purchase-money should be paid out of the personal estate, which was rather less than the balance of the purchase-money. The testator having died without having completed the purchase, an action for specific performance was commenced against his executors and trustees, which was compromised on the terms that the contract should be rescinded and that the vendor should retain the deposit and be paid his costs, and this compromise was afterwards confirmed by an order made in the administration action in the presence of the tenant for life and the trustee, and with the sanction of the Court.

It was held that this was a case of "vendor's lien," to which the ★ Act of 1877, 40 & 41 Vict. c. 34, applied; that accordingly all the devisees were entitled to, was the real estate charged with the unpaid purchase-money, in other words to nothing, and that in any case all claim was barred by the order of compromise. [★218]

The law on this subject was recently considered in the case of *In re Smith*, *Hannington* v. *True*, *Giles* v. *True* (33 Ch. D. 195), where the previous decisions in *Sackville* v. *Symth* (L. R. 17 Eq. 153) and *Gibbins* v. *Eyden* (L. R. 7 Eq. 371) were followed, and *Brownson* v. *Lawrance* (L. R. 6 Eq. 1) dissented from. A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely to do with as she thinks proper;" and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage. The Court decided that the mortgage debt must be borne rateably by all the properties comprised in the mortgage. North, J., in delivering judgment, said: "I can find nothing else in the will to take the case out of the general rule except the words 'absolutely to do with as she thinks proper.' But that is no more than a gift to the widow in fee, it does not say that she is not to take the house subject to its pro-

portion of the mortgage debt. It would come to this, that every devise of an absolute interest in real property would be an expression of a 'contrary or other intention.'"

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## *Voluntary Settlements.*

### FREEMAN *v.* POPE.

(L. R. 5 Ch. 538.)

Principle.

*A voluntary settlement may be set aside under* 13 *Eliz. c.* 5, *without proof of actual intention to defeat, hinder or delay creditors, if, under the circumstances, the instrument will necessarily have that effect.*[1]

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Summary of facts.

The settlor, who was under pressure from his creditors, made a voluntary settlement of certain property for the benefit of Julia Pope. The settlement withdrew from his assets such an amount as to render them insufficient to pay his debts. Held, by the Court of Appeal, that the settlement must be set aside.[2]

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[★ 219] ★ This case is always cited as the leading authority upon the subject of settlements "with intent to delay or defraud creditors." In *In re Ridler*, *Ridler* v. *Ridler* (22 Ch. Div. 74), see *post*, p. 220, Jessel, M.R., in the course of the argument (p. 78), asked, "Do you dispute

[1] A voluntary alienation of property, is, as a rule, void against creditors. 2 Kent's Com. 441. Note to Sexton *v.* Wheaton, 1 Am. Lead. Cas. 37. A fraudulent intention will vitiate a settlement and may be implied from the circumstances; but a voluntary settlement will be good as against subsequent creditors unless made with a fraudulent intention. The mere fact that a conveyance is voluntary is not, of itself, sufficient indication of fraud. Horlan *v.* Maglaughlin, 9 Norris, 217; Sexton *v.* Wheaton, 8 Wheaton, 229; Mattingly *v.* Nye, 8 Wallace, 370; Salmon *v.* Bennett, 1 Conn. 525.

[2] If a settlement be made with a fraudulent intention it is void. See Haymaker's App., 3 P. F. Smith, 306; Mosley *v.* Gainer, 10 Texas, 393; Poague *v.* Boyce, 6 J. Marsh, 70; Florence Sewing Machine Co. *v.* Zeigler, 58 Ala. 221.

the law as laid down in *Freeman* v. *Pope*?" and was at once met by an emphatic negative.

The judge before whom the case originally came, and whose decision setting aside the settlement was upheld by the Court of Appeal, seems to have felt a difficulty whether if the case had come before him as a special juryman, he could have arrived at the conclusion that the settlor had any intention to defeat or delay his creditors. On this point the Court of Appeal stated that, were it necessary to decide the point, they would very probably have concluded that the settlor's mind was so full of considerations of kindness and generosity for the lady whom he intended to benefit that he forgot the higher claims of his creditors.

The fact, however, being once established that the settlor had not left sufficient property outside the settlement to pay his debts, it was unnecessary "to speculate as to what was passing in his mind." "It is established," said Lord Hatherley, "by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consquence of the settlement [3] (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

Where intention must be proved.

"There is," said Giffard, L.J., "one class of cases in which an actual and express intent is necessary to be proved, as in *Holmes* v. *Penney* (3 K. & J. 90) and *Lloyd* v. *Attwood* (3 De G. & J. 614), where the instruments sought to be set aside were founded on valuable consideration,[4] but where the instrument is voluntary, then the intent may be inferred in a variety of ways; for instance, if after deducting the property which is the subject of the voluntary settlement sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of

[3] If the property which the settlor has remaining after making the settlement is sufficient to discharge all his debts, there is no ground for impeaching the transaction and such conveyance will be good as against subsequent creditors unless the grantor makes the voluntary settlement when about to, and after he has made the settlement enters into a hazardous enterprise. Williams *v.* Davis, 19 P. F. Sm. 21; Snyder *v.* Christ, 3 Wright, 499.

[4] Clements *v.* Moore, 6 Wallace, 312.

a judge in leaving the case to the jury to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors the law would infer that he intended by making the voluntary settlement to defeat and delay them."

The same view of the law is also expressed in *Ridler* v. *Ridler* (noticed *post*) (12 Ch. Div. p. 82).

13 Eliz. c. 5. The statute 13 Eliz. c. 5, which was stated by Lord Mansfield in *Cadogan* v. *Kennett* (Cowp. 434) to be declaratory of the Common Law, provides that all feoffments, gifts, grants, and conveyances of lands or goods or any profit thereof by writing or otherwise [★ 220] made with ★ intent to delay, hinder, or defraud creditors or others of their lawful actions, debts, damages, &c., shall be utterly void against the creditors or persons having the right to such actions, debts, &c.[5] Sect. 2. Sect. 6. 2 imposes penalties and forfeitures on all persons who are parties to fraudulent conveyances. By sect. 6, however, the Act is not to extend to any estate or interest in land for good consideration and *bonâ fide* conveyed to any person not having at the time notice of the fraud.[6] The principle on which this statute proceeds (which, it will be observed, is not, like 27 Eliz. c. 4, confined to lands) was stated by Lord Hatherley in the leading case to be that persons "must be just before they are generous, and that debts must be paid before gifts can be made."[7] See the decisions on the statute collected in Chitty's Statutes, 4th ed. vol. ii. 1263 *et seq.*, and the notes to *Twyne's Case*, 1 Smith's Leading Cases, p. 1; and see *Ex parte Russell*, *In re Butterworth* (19 Ch. Div. 588), *Dutton* v. *Thompson* (23 Ch. Div. 278), *In re Maddever*, *Three Towns Banking Company* v. *Maddever* (27 Ch. Div. 523).

Principle of the Act.

In *Ridler* v. *Ridler* (22 Ch. Div. 74), where the previous authorities on the subject are collected, a father gave a bank a written guarantee for repayment of the balance on his son's account not to exceed £1,000. Five years afterwards, when the son's account was overdrawn by £1,500, the father made a voluntary settlement of the whole of his property except certain furni-

[5] Thompson *v.* Dougherty, 12 S. & R. 448; Ammon's App., 13 P. F. Sm. 284.

[6] The consideration will not avail if the *bonâ fide* be wanting, Bispham's Eq. (4th Ed.), Sect. 243.

[7] A conveyance to a wife or child will not be valid as against creditors. Bump on Fraudulent Conveyances, 248; also 249, 250.

ture worth about £200, and a debt due from the son to him of £1,500. The son subsequently became bankrupt, and after the father's death the bank sought to set aside the settlement. Held, that the settlement must be set aside.[8] In the course of the argument Lord Selborne pointed out that where the prospect that the person subject to the liability will be called upon, is so remote that it would not enter into anyone's calculations, it would seem that the existence of the contingent liability would not make a settlement bad. For instance, if a person had taken shares in the Glasgow Bank at a time when everybody believed them to be a valuable property, it would be difficult to hold that a settlement made by him while the bank was in good credit was invalid, though the liability ultimately turned out ruinous.

The doctrine of *Freeman* v. *Pope* was very recently considered in *Ex parte Mercer*, *In re Wise* (17 Q. B. Div. 290), where the question was whether a post-nuptial settlement which had been executed under somewhat peculiar circumstances (there being a pending action for breach of promise of marriage against the settlor at the time when he executed the settlement) was fraudulent and void as against the trustee in bankruptcy, and the Court held that there was not sufficient evidence to justify a judge or jury in finding that it was "intended to delay, hinder, or defraud creditors" within 13 Eliz. c. 5.[9] The actual decision in the leading cases is doubtless consistent with that in *Ex parte Mercer*, *In re Wise* (*ubi sup.*), though certain *dicta* contained in the latter judgment (pp. 299, 300) would appear to be irreconcilable with the statement of the law contained in *Freeman* v. *Pope*.

Settlement for valuable consideration.

Voluntary settlements must be carefully distinguished from settlements for valuable consideration where, as pointed out in the leading ★ case, an actual fraudulent [ ★ 221 ] intent must be proved.[10] It was laid down in *Columbine* v. *Penhall* (1 Sm. & G. 228) that where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settle-

Marriage settlement.

[8] Property conveyed in fraud of creditors may be reached by a creditor's bill. See Spader *v.* Davis, 2 Johns. Chan. 280, tried in 1821.

[9] The statute of 13 Eliz. has been substantially re-enacted and its provisions adopted in most of the United States. 2 Kent Com. 440.

[10] Bispham's Equity (4th Ed.), Sect. 243.

ment; and see *Bulmer* v. *Hunter* (L. R. 8 Eq. 46), where the previous authorities are collected, *In re Johnson*, *Golden* v. *Gillam* (20 Ch. D. 389), where a settlement by a widow of the whole of the property on consideration of the settlor's daughters' paying her debts connected with her farm and maintaining her, was supported as a family arrangement although it defeated one of her general creditors.[11] See also Davidson's Conveyancing, vol. iii. pt. i. p. 628, and Seton on Decrees, 4th ed. p. 1372. Sects. 29 and 47 of the *Bankruptcy Act*, 1883, introduce very considerable alterations into the law with regard to settlements, and it is to be observed that neither of these sections is (as was sect. 91 of the *Bankruptcy Act*, 1869) confined to traders. By sect. 29 the Court is empowered to refuse or suspend an order of discharge, &c., &c. By sect. 47 all settlements except (1) ante-nuptial settlements, (2) settlements in favour of *bonâ fide* incumbrancer or purchaser for value, (3) post-nuptial settlements of property acquired in right of the wife after marriage, are void against the trustee in bankruptcy if the settlor becomes bankrupt within two years of the date of the settlement. They are also void if the bankrupt becomes bankrupt within ten years, unless the parties claiming under the settlement can prove (1) that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property settled; (2) that the settlor's interest in the property settled had passed to the trustee of the settlement on the execution thereof.

*Bankruptcy Act*, 1883.

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[★222]

## ★ *Marshalling*

### WEBB *v.* SMITH.

(30 Ch. Div. 190.)

Principle.

*Assets will not be marshalled in favour of a creditor to the prejudice of another man's rights.*[1]

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Summary of facts.

Smith & Co., a firm of auctioneers, had in their hands two sums of money belonging to Canning,

[11] As to a settlement from husband to wife, see Wickes *v.* Clark, 8 Paige, 151 ; Penna. Salt Mfg. Co. *v.* Neal, 4 P. F. Sm. 9; Mellon *v.* Mulvey, 8 C. E. Green, 198.

[1] Throughout the United States the general rule is that the

one consisting of part of the proceeds of the sale of a brewery on which they were entitled to a particular lien for their charges in connection with sale, the other the balance of the price of some furniture sold by them for Canning. Canning, who owed Webb £503, wrote to Smith & Co., requesting them to pay Webb the £503 on the completion of the purchase of the brewery, and to charge the same to his account. Smith & Co. wrote to Webb acknowledging the receipt of the letter, and subsequently paid Canning the balance of the furniture fund and appropriated the brewery money in part payment of their charges in respect of the sale. Webb claimed that Smith & Co. ought to have marshalled the funds and paid themselves out of the furniture fund, so as to leave the brewery money available for payment of his debt; but the Court of Appeal decided that the doctrine of marshalling did not apply.

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This case was characterised by the Court of Appeal as one of considerable importance, "in which an experiment was tried for the first time with regard to the doctrine of marshalling," the difficulty arising from certain expressions of Lord Eldon in the old case of *Aldrich* v. *Cooper* (8 Vesey, 382, 396) explained in the leading case at page 200. The general principle of marshalling, as stated in *Trimmer* v. *Bayne* (9 Vesey, 209, 211) by Sir W. Grant, whose statement was cited with approval by the Court of Appeal, is "that a person having resort to ★ two funds shall not by his choice [★ 223] disappoint another having one only." [2] The same principle is thus more elaborately stated and illustrated by Cotton, L.J., in the leading case: "If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteacre, and must leave Blackacre

right of marshalling is usually enforced through the equities of subrogation and contribution. The equity of marshalling assets cannot be used to prejudice those who have an equal or superior equity against the debtor on the subject of marshalling. See Bruner's App., 7 W. & S. 269; American note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 260; Reynolds *v.* Tooker, 18 Wendell, 591; Ayers *v.* Husted, 15 Conn. 504; Johns *v.* Reardon, 11 Md. 465.

[2] Cheesebrough *v.* Millard, 1 Johns. Ch. 409; Ramsey's App., 2 Watts, 228; Briggs *v.* The Planter's Bank, 1 Freeman's Ch. 574.

so that B., the other creditor, may follow it and obtain payment of his debt out of it: in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go." [3]

Application of the doctrine of marshalling.

Two further cases of the application of the doctrine of marshalling were also pointed out in the same judgment, viz., where under the old law specialty creditors were compelled first to resort to real assets, and secondly where two funds were in Court, and the Court, in order to do justice, enforced marshalling as between the parties. In the present case the Court of Appeal, while deciding that the letter addressed by Canning to Smith & Co., coupled with the acknowledgment of the letter to Webb, constituted an equitable assignment in favour of the latter, held that the doctrine of marshalling did not apply. The peculiar circumstance on which the leading case turned was this: Smith & Co. had, on the authority of *Robinson* v. *Rutter* (4 E. & B. 954), a particular lien on the brewery fund. Now it is an established principle that assets are not to be marshalled so as to prejudice another man's rights. Why then should Smith & Co. resign their lien and adopt an inferior position.

This point was illustrated by an Admiralty case, *The Arab* (5 Jurist, N. S. 417), in which the holder of a bottomry bond tried to compel the crew of a ship to waive their right of maritime lien for wages for services rendered, and to sue the owners, who were perfectly solvent. The holder of the bottomry bond had only a remedy against the ship, whereas the crew had also a personal remedy by action of debt against the owners. The Judge of the Court of Admiralty held that he had no jurisdiction to restrain the proceedings of the crew against the ship, and to compel them to resort to a personal remedy against the shipowners: and the reason given was that there were not two funds under the control of the Court. "In the present case," said Lindley, L.J., "there were not two funds to which the Defendants could resort, that is, two funds standing

[3] The right may be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. Thompson *v.* Murray, 2 Hill's Ch. 213; N. Y. Steamboat Co. *v.* N. J. Steamboat Co., 1 Hopkins, 460.

upon an equal footing. The defendants had a superior right of lien as to the fund produced by the sale of the brewery. I think, however, that they could not have deprived the plaintiff of the benefit of his charge, if there had been two funds to which they might have resorted under equal circumstances."[4]

The doctrine of marshalling was also carefully considered in *Dolphin* v. *Aylward* (L. R. 4 H. L. 486). In that case Lord Westbury said: "The doctrine of marshalling is no more than this, that where one person has a clear right to resort to two funds, and another person has ★ a right to resort to one only of these two [★ 224] funds, the latter may say that, as between himself and the double creditor, that double creditor shall be put to exhaust the security upon which the single creditor (if I may so call him) has no claim. But it would be utterly impossible to apply that doctrine to a case where the single creditor security is in truth himself bound to the party entitled to the other."[5] And see pages 502 and 503, where Lord Hatherley suggests cases where the doctrine of marshalling might apply, and as to marshalling securities see *Ex parte Salting*, *In re Stratton* (25 Ch. D. 148), where *Ex parte Alston* (L. R. 4 Ch. 168) was followed.

Widow's paraphernalia.

The doctrine of marshalling is also applied in favour of the widow's right to paraphernalia which, with the exception of her wearing apparel, are liable for her husband's debts, but not until after all his other assets, real and personal, have been exhausted. If, therefore, the paraphernalia are taken by creditors, the widow is entitled to reimbursement by means of marshalling against all assets, both real and personal, except, perhaps, lands specifically devised. Williams, Real Assets, p. 118, where an opinion is expressed that since 3 & 4 Wm. IV. c. 104, the widow has a clear right to marshal against specific devisees. See further on this subject Macqueen, Husband and Wife, 3rd ed. p. 114; Law of Husband and Wife, Edwards and Hamilton, p. 238, where the authorities are collected.

It must, however, be remembered that the law with regard to the gifts of articles of the nature of paraphernalia, "paraphernal articles" as they are called, has

[4] West *v.* The Bank of Rutland, 19 Vt. 403; Moses *v.* Ranlet, 2 N. H. 488; Findlay *v.* Hosmer, 2 Conn. 350.

[5] Hannegan *v.* Hannah, 7 Blackf. 355, and American note to Aldrich *v.* Cooper (*supra*); Kendall *v.* The New England Co., 13 Conn. 394; Lodwick *v.* Johnson, Wright's Oh. R., 498; Dorr *v.* Shaw, 4 Johns. C. R. 17.

been materially altered by the *Married Women's Property Act*, 1882, which render's gifts to a wife by her husband her separate property, so that the mere fact of the articles being of a paraphernal nature will not necessarily render them paraphernalia, and so liable to be disposed of by the husband in his lifetime, and subject to the claims of his creditors during his life and after his death, but that clear evidence will be required to shew that they were given with the intention of being paraphernalia and not separate property. (Macqueen, Husband and Wife, p. 115.)

Charities. The Court will not marshal assets in favour of a charity, but it will give effect to a direction to marshal.[6] If a testator give his real estate and personal estate consisting of personalty savouring of realty as leaseholds and mortgage securities, and also pure personalty to trustees upon trust to sell and pay his debts and legacies and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate and the personalty savouring of realty, in order to leave the pure personalty for the charity.[7] See Tudor's Charitable Trusts, p. 85, and notes to *Corbyn* v. *French*, Tudor s Real Property Cases, 561 *et seq.*, where the authorities are collected. In *Mogg* v. *Hodges* (2 Vesey, 52), Lord Hardwicke stated the principle to be that though the Court would always marshal in furtherance of justice, he did not consider himself warranted in setting up an equity contrary to the rules of the Court in order to support a bequest which was contrary to law.

[★ 225] ★The rule of the Court in such cases is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of it to fail as would in that way be payable out of the prohibited fund.[8] Per Lord Cottenham in *Williams* v. *Kershaw* (1 Keen, 275, n.); and see *Robinson* v. *Governors of the London Hospital* (10 Hare, 19); *Johnson* v. *Lord Harrowby* (Johns. 425); *Miles* v. *Harrison* (L. R. 9 Ch. 316), following Lord Selborne's decision in *Wills* v. *Bourne* (L. R. 16 Eq. 487).

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[6] Note to Aldrich *v.* Cooper, 2 Lead. Cas. Eq., 103.
[7] Adams on Equity, *276.
[8] Thompson's Exrs. *v.* Norris, 5 C. E. Green, 489.

## *Fraud on a Power.*

### HENTY *v.* WREY.

(21 Ch. Div. 332.)

Principle.

*There is no rule of law that every power for raising portions for children is subject to the limitation that the portions are not raisable under it unless the children live to want them.*[1]

*The Court will not infer that an appointment is a fraud upon a power unless there are such cogent facts that it cannot reasonably come to any other conclusion.*[2]

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Summary of facts.

Sir B. P. Wrey had a power under a settlement to charge portions for younger children on real estate, and to fix the ages and times at which the portions should vest. In 1828 he appointed £10,000 in favour of his three infant daughters, aged nine, seven, and one respectively, with an absolute power to himself to revoke and reappoint; four years afterwards he appointed that the portions of his three daughters should vest immediately. Two of the daughters having died infants and spinsters, one in 1836, aged fifteen, and the other in 1845, aged eighteen, Sir B. P. Wrey in 1851 appointed £5000 to his surviving daughter on her marriage, and ★ subsequently assigned the other £5000 by way [★ 226] of mortgage to Henty. Held, by the Court of Appeal, that Henty was entitled to have the £5000 raised.[3]

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[1] The will generally contains provisions for raising the portions for the children, and a term of years is usually carved out of the estate, and limited to trustees to secure the payment of these charges. Hill on Trustees, 365; Hawley *v.* James, 5 Paige, 318; 2 Spence's Eq. 390.

[2] If the appointment is exercised in favor of a stranger instead of for the benefit of the person who was the object of the power, the appointment will be considered fraudulent. Bispham's Eq. (4th Ed.), Sec. 256.

[3] "Where portions are effectually charged on land, the trus-

Principle of *Aleyn* v. *Belchier*.

Power of appointment must be exercised *bonâ fide*.

The old case of *Aleyn* v. *Belchier* (1 Eden, 132), decided in 1758, proceeded upon the principle that "no point is better established than that a person having a power of appointment must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void." Two questions, one of fact, the other of law, arose in the leading case. First, whether as a question not of law, but of fact, the appointment made by Sir B. P. Wrey was a fraud on the power; and, secondly, whether there was a general rule established by the cases with regard to charges on land created under powers of appointment, under which the Court was bound, even in the absence of proof of fraudulent intent, to set aside the appointment which had been made. This alleged rule had been stated in the Court below to proceed on the principle that such a power being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. Before approaching the consideration of the peculiar circumstances of the case before them in connection with the exercise of the power, the Court of Appeal pointed out that plainer or more emphatic words as regarded the right of directing the portions to be vested at any time which the appointor should think fit, could not be imagined. It was not merely directed that the money should be vested at such age, day, or time, but that it should be an interest vested in and to be paid to the child or children at such age, day, or time as the donee of the power should think fit. It came therefore to this, that on the words there could be no question that the parties to this deed intended that the appointor (acting of course *bonâ fide*) should be the judge of the period at which the portions should vest. It was left to him to decide that question, and therefore, unless there was some rule of law which said that notwithstanding the plain meaning of the expressions used, effect could not be given to the intention expressed by them, effect must be so given. The rule contended for was opposed to principle, "the principle being that such contracts or settlements are to have effect given to them according

tects usually take a power of selling or mortgaging for the purpose of raising them; although that power is not expressly given by the terms of the instrument." Hill on Trustees, 366.

to the intention," and opposed also to the modern rules of construction.

In dealing with the question of fact the Court of Appeal wholly distinguished the facts of the present case from the facts of the celebrated case of *Lord Hinchinbroke* v. *Seymour* (1 Bro. C. C. 395), discussed in Lord St. Leonards on Powers, Chance on Powers, pp. 141, 463, and Farwell on Powers, p. 326. The facts of that case, as illustrating the principle that the Court will not permit a party to ★ execute a power for his own [★ 227] benefit, were thus shortly summed up by Lord Eldon in *McQueen* v. *Farquhar* (11 Vesey, 467): "In Lord Sandwich's case" (Lord Hinchinbroke became Lord Sandwich), "a father having a power of appointment and thinking one of his children was in a consumption, appointed in favour of that child. And the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child." With regard to the present case the Court pointed out that here there was not one child but there were three children in whose favour the appointment was made.[4] "Did the father," said Jessel, M.R., "expect the three children to die in his lifetime? Why should he? It has been laid down over and over again that even in a will the legatees are assumed by the testator to survive him. Does a father assume that his children will die? There is not a scintilla of evidence to shew anything of the kind, that he assumed it or that he had any ground for assuming it. The child, who was one year old, no doubt died afterwards, but not until fifteen years afterwards; and the other child, who was then four years old, died afterwards at eighteen years of age. Therefore the times of death do not afford any inference at all that they were likely to die at this early age, and why should the father have such a horrible intention imputed to him that he appointed to his three little daughters on the assumption that they would die in his lifetime and that he would thereby obtain the benefit? I am shocked at such an inference being drawn without any ground whatever." The judgment then went on to shew that the appointment which really took effect was not the appointment of 1828, but the confirmatory appointment of 1832, and that there was this cogent reason for making the appointment, that other-

[4] Wherever the appointment is made with a view by the trustees, to his obtaining the fund, it is a fraud on his power of appointment. Bispham's Eq. (4th Ed.), Sec. 256; Hill on Trustees, 367.

wise the children would be left without provision, and there were these further advantages, that the Court could give maintenance and advancement out of the fund, and any surplus of the income would be available for future maintenance, when increased maintenance was required. These were reasons for making the appointment vest at once; it would be a benefit to the children and never could do them any harm.

Fraud not to be presumed.

"When you see," said Jessel, M.R., "that there was a reason for appointing portions, and making them vest immediately, with a view to the benefit of the children, you are not to impute to the father an intention to commit a fraud upon the power."

With regard to the general question of law involved in the case, Jessel, M.R., elaborately reviewed the authorities, and stated that no such principle existed as that laid down in the Court below, prohibiting the raising of a portion in the event of a child dying under twenty-one and unmarried. The whole law on the subject was summed up by Lindley, L.J., in the five following propositions :—

Summary of the law.

1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.[5]

[★ 228]

★ 2. That where the language of the power is clear and unambiguous effect must be given to it.

3. That where upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

4. That where upon the true construction of both instruments the portion has vested in the appointee, the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried.

5. That appointments vesting portions charged on land in children of tender years who die soon afterwards, are looked at with suspicion, and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.

Whether fraud

As a general rule an appointment which is partially bad will be wholly set aside :[6] *Daubeny* v. *Cockburn* (1

[5] Lewin on Trustees, p. 539 (Text Book Series).

[6] If an appointment is bad in part, it is generally invalid in toto. But if a good appointment has been made in favor of

Mer. 626), but where the portion vitiated by fraud can be clearly separated the other portion may be sustained :[7] *Topham* v. *Portland* (1 De G. J. & S. 517) ; *Rowley* v. *Rowley* (Kay, 242). vitiates whole appointment.

In *In re Kirwan's Trusts* (25 Ch. D. 373) a power of appointment was exercised by codicil under arrangements which involved a threat to revoke the will previously made unless they were carried into effect, and it was held that the appointment preceeded upon a bargain which was contrary to the nature of the power, and was therefore invalid.

In *In re Turner's Settled Estates* (28 Ch. Div. 205), where the previous authorities will be found collected, an arrangement for resettlement was made with the trustees prior to the exercise of the power, but it was held by the Court of Appeal, "looking at all the circumstances of the case," that it had not been shewn that the bargain was the reason for the appointment, or that if there had been no such bargain there would have been no appointment, and accordingly it was decided that the appointment was valid.

In *In re D'Angibau*, *Andrews* v. *Andrews* (15 Ch. Div. 228), the different classes of powers were classified by Jessel, M.R., in the following manner :— Classification of powers.

1. A power simply collateral, *i.e.* a power given to a person who has no interest whatever in the property over which the power is given,[8] *e.g.* where executors have a power to sell land.

2. A power in gross, *i.e.* a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power The most familiar instance is that of a tenant for life with a power of appointment after his death.

3. A power appendant or appurtenant, *i.e.* a power exercisable by a person who has an interest in the property, which interest is capable of being affected, dimin-

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any one child it will not be invalid owing to a fraudulent appointment to another, provided the two can be separated. Rowley *v.* Rowley, 1 Kay, 242; Bispham's Eq. (4th ed.), sect. 257.

[7] If an appointment is bad in part, it is generally invalid in toto. But if a good appointment has been made in favor of any one child it will not be invalid owing to a fraudulent appointment to another, provided the two can be separated. Rowley *v.* Rowley, 1 Kay, 242; Bispham's Eq. (4th ed.), sect. 257.

[8] If the donee of a discretionary power acts *bonâ fide* and with his own good judgment and with a purpose of carrying out the intention of the donor the fact that he promises to exercise the power in a certain way does not disqualify him. See Williams' App., 23 P. F. Sm. 249.

ished, or disposed of to some extent by the exercise of the power, *e.g.* power of a tenant for life to grant leases. The two latter classes of powers are sometimes [★ 229] grouped together as ★ powers not simply collateral. See as to powers generally, *Edwards* v. *Slater* and *Alexander* v. *Alexander*, in Tudor's Real Property Cases.

*Illusory Appointments Act.*

*The Illusory Appointments Act*, 1 Wm. IV. cap. 46, provided that no appointment shall be invalid on the ground that an unsubstantial, illusory, or nominal share only is left to any one or more objects of the power. See *Gainsford* v. *Lunn* (L. R. 17 Eq. 405); *In re Capron's Trusts* (10 Ch. D. 484). The law has been further altered by *The Powers Law Amendment Act*, 37 & 38 Vict. c. 37 (which passed 30th July, 1874, which provides:—

1. That no appointment which from and after the passing of this Act shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power.

2. This is followed by a proviso that nothing in the Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power which shall declare the amount or share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.

Sect. 52 of the *Conveyancing Act*, 1881 (44 & 45 Vict. cap. 41), see *McGibbon* v. *Abbot* (10 App. Cas. 653), which is retrospective, enables a person to whom any power, whether coupled with an interest or not, is given by deed to release, or contract not to exercise the power. See *Eyer* v. *Eyer* (49 L. T. 259), where it was held that the power could not be destroyed, as it was coupled with a duty.

Sect. 6 of the *Conveyancing Act*, 1882 (45 & 46 Vict. c. 39), which is also retrospective, confers similar power of disclaimer on any person to whom a power, whether coupled with an interest or not, is given, and provides (2) that on such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

## ★ *Removal of Restraint on Anticipation.* [★230]

*In re* WARREN'S SETTLEMENT.

(52 L. J. Ch. 928.)

Principle.

*The Court has not, under sect.* 39, *of the Conveyancing Act*, 1881, *a general power of removing the restraint on anticipation*,[1] *but only a power to make binding a particular disposition of property by a married woman if it be for her benefit.*[2]

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Summary of facts.

Property had been settled upon trust to pay the income to the wife for life without power of anticipation, and then to the husband for life if surviving, then to the children of the marriage, and in default of children for the husband absolutely. The parties had been married for twenty-eight years without having any children, and there was medical evidence that it was almost impossible for the lady to have any issue. The Court of Appeal declined to remove the restraint on anticipation.[3]

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*Conveyancing Act*, 1881, sect. 39.

The 39th section of the *Conveyancing Act*, which came into operation on the 1st January, 1882, confers a completely new power upon the Court with reference to property settled upon married women with restraint upon anticipation. It provides—(1) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. (2) This section applies only to judgments or orders made after the commencement of this Act.

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[1] See Bishop on Married Women, 844.

[2] Pa. Co. *v.* Foster, 35 Pa. St. 135; Elliott *v.* Wade, 47 Ala. 464; Devy *v.* Darden, 38 Miss. 64; Wright *v.* Talmage, 15 N. Y. 312.

[3] See Wells *v.* McCall, 64 Pa. St. 207.

Principle on which the Court acts.

In the leading case, the Court laid down the general principle upon which it acts with regard to removing the restraint on anticipation under this power.[4] The judge of first instance having reluctantly refused the application, an appeal was brought by the husband, wife and trustees, and an offer was made, in the event of the Court declining to make a general order removing the restraint on anticipation, to give an undertaking to purchase an annuity for the wife's life. The Court of Appeal, in delivering judgment, said:

[★ 231] ★ "All that the *Conveyancing Act* authorizes the Court to do is, notwithstanding a restraint on anticipation, to bind by an order a disposition of a married woman—that is, if a married woman has made a disposition which the Court thinks for her benefit, the Court makes that particular disposition binding; but the Act did not give the Court power generally to remove the restraint. The Court has, no doubt, in certain cases allowed funds to be parted with on the ground of a woman being past child-bearing, but in those cases security had been given for the property to be refunded, if necessary. Latterly, the Court has discouraged that sort of arrangement. The Court would be setting a bad example if, in a case like this, it were to sanction any disposition by a married woman which would defeat the interests of any children who might be born."

History of doctrine.

The history of the doctrine of restraint on anticipation attached to property belonging to a married woman for her separate use commences a little more than a century ago. In 1785 a post-nuptial settlement was made in pursuance of a decree of the Court of Chancery on the marriage of Miss Vernon, by which real estate had been vested in trustees upon trust during the wife's life, to pay the income as the wife should from time to time appoint, and default for her separate use, and there was a similar trust as to the dividends of a sum of stock, excepting that the words from "time to time" were omitted in the power.

A few months after the wife joined the husband in incumbering her life interest, the incumbrancers took proceedings to enforce their security, and Lord Thurlow, who had made the decree directing the settlement, felt himself constrained to decide in their favour. The

[4] Restraint upon alienation was first sustained by Lord Thurlow, in Pybus *v.* Smith, 3 Brown's Ch. 340, and afterwards affirmed in Jackson *v.* Hobhouse, 2 Merivale, 487 by Lord Eldon, Cord on Rights of Married Women, Sect. 361, note.

story is well told by Lord Eldon in *Jones* v. *Harris* (9 Vesey, 493). "So in *Pybus* v. *Smith* (1 Ves. Jun. 189), the Court settled the property in order to protect it with all the anxious terms then known to conveyancers. In a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument, and the same judge who had made such efforts to protect her was, upon authority, obliged to withdraw that protection. In a subsequent case, in which Lord Thurlow became a trustee of Miss Watson's settlement, he inserted words 'and not by anticipation' which he hoped would take the case out of Lord Hardwicke's doctrine." From the time when these words were inserted by Lord Thurlow, this has been the usual formulary, and the effect of it, for the purpose of excluding the power of disposition, has never been questioned. The words, however, though almost universally employed, are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument, it is sufficient: Lewin on Trusts, 8th ed. p. 781, where the cases as to the words which have and have not been held effectual for the purpose, will be found collected.

It was settled by the great case of *Tullett* v. *Armstrong* (1 Beavan, 1; 4 My. & Cr. 377), that the restraint on anticipation along with the ★ separate use [★ 232] stand or fall together, cease during discoverture and revive upon the subsequent marriage [5]

In *Wright* v. *Wright* (2 J. & H. 647) various sums of Government stock were bequeathed to a woman upon trust for her separate use without power of anticipation. The bequests were made to her *simpliciter* and without the intervation of any trustee. Afterwards, having attained her majority while still a spinster, she sold the stock, spent part of the proceeds and invested the remainder in shares in a banking company and Canada bonds, *i. e.* (as was stated in the judgment) in property totally inconsistent with the principles which govern all ordinary investments of trust money. The woman subsequently married, and Lord Hatherley (then Vice Chancellor Wood) decided that as the woman when unmarried and *sui juris* had, instead of allowing the property to remain *in statu quo*, converted it from its original form, the separate use was at the end.

The ground of this decision was that a contrary decision would lead to the absurd consequence, that a

[5] Roberts *v.* Mosely, 51 Mo. 282.

person about to marry a lady with a handsomely furnished house, would be bound to inquire into the history of every article of furniture, and of the money with which every table and chair was purchased; and if it should turn out that any article of furniture had been purchased with money produced, however remotely, by the lady's separate use, the husband must, in the event of his marrying the lady, be considered as adopting the property in that state, and bound not to interfere with it.

It has been established by a series of authorities, *In re Cunynghame's Settlement* (L. R. 11 Eq. 324); *In re Michael's Trusts* (46 L. J. Ch. 651), that a restraint on anticipation which infringes the rule against perpetuities is invalid. These cases with several others, were considered and followed, though with obvious reluctance, by Jessel, M.R., in *In re Ridley*, *Buckton* v. *Hay* (11 Ch. D. 645), who expressed an opinion that not one of the judges had considered the real point, namely, whether a restriction on alienation of the class was valid, and intimated that the point was open for a reversal by the Court of Appeal.

The property of a married woman has been held liable for ante-nuptial debts notwithstanding the restraint on anticipation:[6] *Sanger* v. *Sanger* (L. R. 11 Eq. 470); *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773); *In re Hedgely*, *Small* v. *Hedgely* (34 Ch. D. 379).

It was held in the celebrated case of *Pike* v. *Fitzgibbon* (17 Ch. Div. 454) that the only property which could be bound by a judgment was separate estate to which she was entitled at the time of entering into the contract free from restraint on anticipation; but see now *Married Women's Property Act*, 1882, sect. 1, subsect. 5 (*ante*, p. 143), and see *In re Shakespear*, *Deakin* v. *Lakin* (30 Ch. D. 169).

The important question whether where a bequest is made to a married woman for her separate use absolutely, followed by a clause restraining her from anticipation, the restraint is effectual, was settled by the case of *In re Brown*, *O'Halloran* v. *King* (27 Ch. Div. 411), where the previous authorities, *In re Ellis' Trusts* (L. R. 17 Eq. 409), ★ *In re Croughton's Trusts* (8 Ch. D. 460); *In re Clarke's Trusts* (21 Ch. D. 748), as well as a number of the older cases, are considered. The prin-

[★ 233]

[6] A donor may make his own terms and the conditions upon which the money is to be paid or applied and exclude it from creditors. Keyser *v.* Mitchell, 17 P. F. Sm. 473; Eckert *v.* McKee, 9 Bush (Ky), 355; Nichols *v.* Eaton, 1 Otto, 716; Stuart *v.* Wilder, 17 B. Monroe (Ky.), 55.

ciple thus settled is that the restraint is effectual when the testator has shewn an intention that the trustees should keep the investment and only allow the married woman to have the enjoyment of it in the way of income, and does not depend on the question of whether there is a gift of "an income bearing fund" or a sum of cash, or on the accident as to how the money is invested at the death of the testator, or at any other time.

In *Hodges* v. *Hodges* (20 Ch. D 749) the Court acting on the evidence of the married woman's consent afforded by an affidavit made by her and a letter written to her solicitors strongly urging them to obtain the money, ordered a fund which belonged to her for her separate use without power of anticipation, to be paid out to her to enable her to pay her debts. In *Musgrave* v. *Sandeman* (48 L. T. 215) the Court sanctioned a compromise affecting an annuity which belonged to a married woman without power of anticipation, but directed her to attend for her separate examination as to her consent.

The authority of *Hodges* v. *Hodges* (*ubi supra*) is altogether questioned in Macqueen's Husband and Wife, 3rd ed. p. 324, where it is said to be overruled by the leading case of *In re Warren* (*ubi supra*).

In *In re Glanvill*, *Ellis* v. *Jackson* (31 Ch. Div. 532), the Court of Appeal held that it had no jurisdiction to disregard the restraint on anticipation on the ground that it appeared to the Court to be just to do so, and it accordingly held that only income which had accrued before the act on which the claim against the separate estate was founded, viz the improper institution of an administration action, could be attached to meet costs. It should be observed that this action was brought before the commencement of the *Married Women's Property Act*, 1882, by the married woman by her next friend, and the Court guarded themselves against expressing an opinion as to how the question would be decided in the case of a married woman suing without a next friend under the provisions of that Act.

In *In re Jordan*, *Kino* v. *Picard* (34 W. R. 270), a married woman was entitled to a share of residuary estate under a will which contained a proviso that in any case any person entitled for life under that will should charge, alien, or assign his interest, or any part thereof, either wholly or partially, or should become bankrupt, or should do or suffer any act, deed, or thing whereby such interest or any part thereof should become aliened or alienable, assigned or assignable, unto,

or vested in or charged in favour of any other person or persons, then and in every such case the life or other interest of every such person should be forfeited and should cease and determine. The Court declined to remove the restraint on anticipation.

*Married Women's Property Act*, 1882.

The effect of the restraint on anticipation is expressly preserved by sect. 19 of the *Married Women's Property Act*, 1882 (see *ante*, p. 148).

See further on the subject of restraint on anticipation Macqueen's Husband and Wife, 3rd ed. pp. 312 *et seq.*

[★ 234]

At page 316 it is ★ suggested that "as the separate use no longer as a general rule depends upon limitation, but arises by statute, its connection with the restraint upon anticipation is therefore less intimate than it was before the Act. Formerly a spinster entitled to property limited to her separate use without power of anticipation could not upon her marriage, unless she executed a formal settlement, reject the restraint while retaining the separate use. It is now otherwise, and it may be presumed that slight circumstances will be held sufficient to manifest an intention on her part to cast off the fetter."

It was held in *Re Landfield's Settled Land* (30 W. R. 377) that when an order was made on a petition under the *Settled Estates Act*, binding the interest of a married woman restrained from anticipation, the petition did not require to be entitled under the *Conveyancing Act*, as the order was made under the general power of the Court, and, *semble*, this would apply to a summons under the *Settled Land Act*.

## *Equity acts in personam.*

### EWING *v.* ORR EWING.

(9 App. Cas. 34.)

Principle.

*Equity acts in personam, that is to say, the Court has a personal jurisdiction to enforce contracts and trusts.*[1]

Summary of facts.

A testator domiciled in Scotland left personal estate in Scotland over £400,000 and in England

[1] It was against the *person* that the jurisdiction of the Court of Chancery was originally acquired. See Great Falls Mfg. Co. *v.* Worster, 23 New Hamp. 462.

over £25,000, and heritable property in Scotland, and he made his will in Scotch form and appointed six persons (two resident in England and four in Scotland) to be his executors and trustees. The trustees obtained confirmation of the will in Scotland which was sealed by the English Court.

An infant legatee resident in England brought an action for the administration of the estate, and before it came on for trial the trustees removed all the English personalty into Scotland. The question was whether ★ this action could be brought. The [★ 235] House of Lords held (affirming the decision of the Court of Appeal) that the English Court had jurisdiction as to the whole estate.[2]

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The House of Lords in this important case applied the doctrine established by *Penn* v. *Lord Baltimore* (1 Ves. Sen. 444), decided in 1750 by Lord Hardwicke, that a Court of Equity has power by judgment *in personam* over property situated out of its jurisdiction.[3] In the present case the apellants, who were trustees and executors of the testator's will, urged, among other contentions, that as the will had been confirmed in Scotland, they thereby became officers of a Scottish Court, and consequently accountable and amenable only to Scotch Courts, so far as all property locally situate in Scotland was concerned, and that as the testator had been domiciled in Scotland, his personal estate could only be administered in Scotland. These contentions were disposed of by Lord Selborne, by pointing out that the only effect of confirmation of a will in Scotland, like probate in England, was to complete the title of the executors to moveables within the local jurisdiction, that the law of domicil had not the effect of controlling the *forum* of administration, and that where executors who were also trustees had taken out probate, their acceptance of the trust must be considered as extending to

[2] A State Court cannot send its processes into another State neither can it deliver the possession of land in another jurisdiction; but it may make a decree and can enforce the transfer of the title. Bispham's Eq. (4th Ed.), Sect. 47.

[3] Mr. Justice Strong, in Muller *v.* Dows, 4 Otto, 444, recognizes the doctrine and says that a State Court of Equity having jurisdiction of the person may decree a conveyance by him of land in another state and can enforce that decree by process against the defendant.

the whole property subject to the will. "These arguments failing," Lord Selborne then proceeded, "the jurisdiction of the English Court is established upon elementary principles. The Courts of Equity in England are and always have been courts of conscience operating *in personam*[4] and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the colonies, and in foreign countries (*Penn* v. *Lord Baltimore*). A jurisdiction against trustees, which is not excluded *ratione legis rei sitæ* as to land, cannot be excluded as to movables because the author of the trust may have had a foreign domicil, and for this purpose it makes no difference whether the trust is constituted *inter vivos* or by a will or *mortis causâ* deed." It had always been the practice of the English Court of Chancery (as was said by James, L.J., in *Stirling-Maxwell* v. *Cartwright* (11 Ch. Div. 523)) "to administer as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad." "The jurisdiction of the Court of Chancery," added Lord Blackburn, "is *in personam*. It acts upon the person whom it finds within the jurisdiction, and compels him to perform the duty which he owes to the plaintiff."

The Court acting *in personam* will enforce equities with regard to land outside its jurisdiction unless it is violating or interfering with any law or rule of the foreign county :[5] *Ex parte Pollard* (Mont. & ★ Ch. 239). Thus it has been long established that the Court will enforce specific performance of a contract for sale :[6] *Archer* v. *Preston* (1 Vern. 77), and see Fry on Specific Performance, 2nd ed. pp. 45 *et seq.* Judgment for fore-

[★ 236]

[4] The maxim that equity acts *in personam* does not mean that the jurisdiction of the Chancellor extends to rights of action for personal injuries. Bispham's Eq. (4th Ed.), Sect. 47.

[5] The question that equity acts *in personam* is of great importance in suits of foreclosure against railroad companies whose line of railroads extends through more than one state, and a decree of foreclosure and sale of the entire property of a railroad laying in more than one state is valid, if decreed by a court which has jurisdiction of the defendants *in personam*. See Muller *v.* Dows, (*supra*) ; McElrath *v.* The Pittsburgh and Steubenville R. R. Co., 5 P. F. Smith, 189 ; Macgregor *v.* Id., 9 Iowa, 65.

[6] Schrœppel *v.* Hopper, 40 Barb. (N. Y.) 25 ; Cathcart *v.* Robinson, 5 Peters, 278 ; but in Pa. see Kaufman's App., 4 P. F. Sm. 383.

closure, *Toller* v. *Cartaret* (2 Vern. 495); *Paget* v. *Ede* (L. R. 18 Eq. 118), may be given, but not for partition;[7] and see in Seton on Decrees, 4th ed. p. 450, a lengthy enumeration of cases where receivers have been appointed over real and personal property abroad.

In *In re Hawthorne. Graham* v. *Massey* (23 Ch. D. 743), the principle authorities upon the subject of the jurisdiction of the Court in respect of land situate in foreign countries are cited and considered. The action was brought to recover a portion of the proceeds of sale of real estate in Saxony, and for an account. The title to the property in question was in dispute, and both parties were resident in this country.

The Court dismissed the action for want of jurisdiction, and remarked that the leading case, *In re Orr Ewing*, seemed to go further than any other in the plaintiff's favour, but that it was not aware of any case where a contested claim depending upon the title to immovables in a foreign country strictly so called, being no part of the British Dominions or possessions, had been allowed to be litigated in this country simply because the plaintiff and defendant happened to be in this country, and pointed out the danger of error that might arise if English Courts were to entertain jurisdiction with regard to contested claims as to land depending upon questions of foreign law.[8]

It was held in *In re Matheson Brothers, Limited*, (27 Ch. D. 225), (following *In re Commercial Bank of India* (L. R. 6 Eq. 517), that the Court had jurisdiction to wind up an unregistered joint stock company formed and having its place of business in New Zealand, but having a branch office, agents, assets and liabilities in England, and that the pendency of a foreign liquidation did not affect the jurisdiction. It was decided, however, in *In re Lloyd Generale Italiano* (29 Ch. D. 219), that the Court has no jurisdiction where the foreign company only carries on its business by means of agents, and has no branch office in England; and see *In re Commercial Bank of South Australia* (33 Ch. D. 174), where a winding up order was made, the judge expressing an opinion that it would be ancillary to the winding-up order in Australia.

Law according to which

With regard to the law according to which contracts

[7] A Court cannot issue a commission for the partition of lands which do not lie within its jurisdiction. Port Royal R. R. Co. *v.* Hammond, 58 Ga. 523 ; Glen *v.* Gibson, 9 Barb. 634.

[8] If the land itself is to be dealt with its foreign jurisdiction will be a bar to the relief sought. Smith's Equity, 30.

contracts are construed.

concerning real and personal estate are to be construed, the following rules have been established:—

Contracts concerning real property, wherever made, are construed according to the *lex loci rei sitæ*, i.e., the law of the country where the property is situated.

Contracts with regard to movable property are construed according to the *lex loci contractus*, i.e., the law where the contract is made, unless the contract is to be performed somewhere else, when it is governed by the *lex loci solutionis*, i.e., the law of the place where the contract is to be performed.

[★ 237] Agreement contrary to English law.

★ If an agreement contrary to the policy of English law is entered into in a country by the law of which it is valid, an English Court will not enforce it. *Roussillon* v. *Roussillon* (14 Ch. D. 351).

The case of *Ewing* v. *Orr-Ewing* came again before the House of Lords in 1885 (10 App. Cas. 453). Here, however, the House of Lords had to deal with a wholly different set of facts and circumstances. At the time when the decree for administration was made in England, no suit concerning the trust in question had been commenced in Scotland, but subsequently the Scotch jurisdiction was invoked by the plaintiffs (or "pursuers" as they are called in Scotch law), who constituted the majority in number and interest of the beneficiaries under the testator's will. Four of the residuary legatees commenced an action in Scotland against the trustees, and the Court of Session made a declaration "that the trustees were bound to adminster the estate in Scotland, subject to the Scotch law and under the authority and jurisdiction of the Scottish Courts alone: and that they were not entitled to place the estate under the Control of the English Court, or any other foreign tribunal." The House of Lords, under these circumstances, held that it could not be maintained that the Scotch Court was bound to abstain from the exercise of his own "independent and unquestionable jurisdiction over the trustees and trust property in Scotland, on the mere ground that there had been a previous decree for administration in England." The trust, as pointed out by the House of Lords was Scottish in form; the testator was a domiciled Scotchman; if any questions should arise under the terms of the trust, Scottish law must be applied to their solution; the whole trust estate was, *de facto*, in Scotland; and neither the trustees nor the pursuers desired it to be removed from that country.[9] The question was accord-

[9] A trustee residing in one State may be compelled to make a

ingly settled by the rule of "*forum conveniens*"; in other words, the "citerion of greater convenience." The House of Lords came to the conclusion that balance of convenience was in favour of the administration of the estate in Scotland instead of England, but they struck out as "unsupported either by statute or authority," a declaration which had been inserted in the judgment of the Court of Sessions affirming the exclusive jurisdiction of the Scotch Court, and adhered most strictly to all that had been said in the leading case (9 App. Cas. 38 *et seq.*), with regard to the jurisdiction of the English Court. "That decision," said Lord Selborne, "turned upon the doctrine of trusts, and upon the authority of a Court of Equity to act *in personam* against trustees personally present within and subject to its jurisdiction, whatever may be the *situs* of the subject matter of trust, or the domicil of any deceased person by whom (whether by deed *inter vivos* or by testamentary instrument), that trust might have been created."

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## ★ *Notice.* [★ 238]

### PATMAN *v.* HARLAND.

(17 Ch. D. 353)

Principle. *Where a purchaser or lessee has notice of a deed relating to and forming part of the chain of title, he has notice of the contents of the deed.*[1]

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Summary of facts. Patman conveyed to Hervè two freehold plots of land, part of a building estate, subject to certain restrictive covenants, one of which was to the effect that private dwelling-houses only should be erected. Hervè subsequently conveyed the two plots, subject to the same covenants, to Harland. Harland, who

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conveyance of real estate situated in another State. Vaughn *v.* Barclay, 6 Wharton, 392.

[1] The purchaser may have either actual or constructive notice. As to actual see Williamson *v.* Brown, 15 New York, 354, and constructive, Bell *v.* Twilight, 2 Foster, 500; McCray *v.* Clark, 1 Norris (Pa.), 461.

had erected a dwelling-house on one plot, granted a lease of the plot to Miss Bennett for seven years for the purposes of an art college, and the lease contained a provision that Miss Bennett should be at liberty to erect a studio "of corrugated iron on a brick foundation" in the garden of the premises, and to use the premises as a school of art, but not otherwise for carrying on any trade, business, or employment. Neither Miss Bennett or her solicitor had any knowledge of the restrictive covenant until shortly before the commencement of the action, and she had proceeded to erect the studio, which was nearly completed.[2] The Court did not then think fit to grant a mandatory injunction[3] for the removal of the studio, but restrained Miss Bennett from proceeding with its construction.

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In this case, the defendant, though ignorant of the restrictive covenant which affected the property, was held to be bound by it on the principle established, as Jessel, M.R., said, for more than a century, and treated by Lord Eldon as settled law that one who takes a
[★ 239] lease has ★ constructive notice of the lessor's title. The lessee is bound to make reasonable inquiry into that title, to require "the usual title, whatever that title may be. If the lessor had a conveyance made to him the day before that would not do, the lessee must ask for the conveyance to him and a fair reasonable deduction of title."[4]

Suppose, however, that there has been a representation made by the lessor that there is no restrictive covenant. Does this representation do away with the effect of the constructive notice? The law on that point was stated in the leading case as follows:—

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[2] A person who has no notice will not be affected by notice on the part of his immediate vendor. Bispham's Eq. (4th ed.) 265.

[3] Such an injunction is not granted except in rare and peculiar cases. See Washington Univ. *v.* Green, 1 Md. Ch. 97, and the Court will, on a final hearing, require the abatement of the nuisance. Lemborn *v.* The Covington Co., 2 Md. Ch. 409.

[4] A vendee who has notice of a prior equity may resist its enforcement under cover of want of notice in his immediate vendor. Church *v.* Id., 1 Casey, 278; Dana *v.* Newhall, 13 Mass. 498; Halstead *v.* Bank of Kentucky, 4 J. Marsh, 554.

"Notice of a deed relating to and forming part of the chain of title is notice of the contents of that deed and it is no excuse for not inspecting the deed that the intending purchaser was told that it did not affect the title. If as a fact it does affect the title the purchaser is bound by it."

It was pointed out, however, that if the purchaser was told of a deed which might or might not affect the title—as in *Jones* v. *Smith*[5] (1 Hare, 43, 1 Phil. 244), where the statement was that there was a marriage settlement, but that it did not affect the land in question—and was told at the same time that it did not affect the title, he would not be bound by constructive notice. The rule on this subject was stated in *Williams* v. *Williams* (17 Ch. D. 443) as follows;—"If a man has notice that there is a deed or document, and at the same time has notice that that deed or document is either entirely worthless or does not affect the property with which he is going to deal, he is put so completely off his guard that a Court of Equity does not treat him as fixed with knowledge of the document or the effect of it."

*Vendor and Purchaser Act*, 1874, sect. 2.

It had been contended that the effect of the first provision in sect. 2 of the *Vendor and Purchaser Act*, 1874, preventing an intended lessee or assignee from calling for the lessor's title, was to alter the rule as to the lessee having constructive notice of his lessor's title. This point was disposed of in the judgment as follows:—"What the *Vendor and Purchaser Act* does is this, in order that a lessee may obtain a lessor's title it makes an express stipulation to that effect necessary, whereas, formerly, the rule was the other way, that, without express stipulation the lessee had a right to the title. Formerly if the lessee had expressly stipulated not to look into his lessor's title, it would not have affected the constructive notice. This is the meaning of the doctrine: you may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be liable to the consequences of shutting your eyes.[6] If, therefore, the lessee had formerly expressly bargained to take a lease without looking into the lessor's title, the lessee would have been bound by constructive notice, and now, if the lessee says nothing, it is exactly the same as if formerly he had bargained expressly not to look into the lessor's title."[7]

[5] See Reed *v.* Gannon, 50 N. Y. 345.

[6] Boxheimer *v.* Gunn, 24 Mich. 379; Babcock *v.* Lisk, 57 Ill. 329.

[7] Where it is the duty of a person to demand the production

Notice according to the time-honoured division is either "actual[8] notice" or "constructive notice," or, as Lord Chelmsford preferred to call it in *Espin* v. *Pemberton* (3 De G. & Jones, 547), "imputed notice," *i.e.* "evidence of notice, the presumption of which is so [★ 240] violent, that the ★ Court will not even allow of its being controverted," *Plumb* v. *Fluitt* (2 Anst. 438).

When a person purchases property where a visible state of things exists, which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected with notice:[9] *Allen* v. *Seckham* (11 Ch. Div. 790, 795), where the previous authorities are considered. And see *Morland* v. *Cook* (L. R. 6 Eq. 282); *Davies* v. *Sear* (L. R. 7 Eq. 427); *Attorney-General* v. *Biphosphated Guano Co.* (11 Ch. Div. 327); Dart's V. & P. vol. i. p. 453.

In *Caballero* v. *Henty* (L. R. 9 Ch. 447), an action was brought by the vendor for specific performance of a contract to purchase a freehold public-house. The conditions of sale contained a statement that it was in the occupation of a tenant, and that it was to be sold subject to the tenancies then existing. The public-house was in fact in lease for a term of which eight years were unexpired, but the defendants stated that they had inferred that the tenancy was from year to year, and that the object of their purchase was to obtain a public-house for the purpose of extending their own business as brewers. The Court of Appeal held (affirming the decision of the Court below, and practically overruling *James* v. *Lichfield* (L. R. 9 Eq. 51) and *Phillips* v. *Miller* (9 C. P. 190)), that specific performance of the contract must be refused. The doctrine of *Daniels* v. *Davison* (16 Ves. 249), that a purchaser who has notice that parties are possession is bound to inquire what their tenancies are, has no application to cases where the matter still rests in contract.

If there is anything in the nature of the tenancies

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of title deeds he will be held to have notice of all the facts of which the production would have informed him. See Kellog *v.* Smith, 26 N. Y. 18.

[8] The court in Flagg *v.* Mann, 2 Sumn. 556, suggested the division of actual notice into direct, or positive notice and indirect, implied or presumptive notice.

[9] Billington *v.* Welsh, 5 Binney, 129; Money *v.* Ricketts, 62 Miss. 209; Davis *v.* Hopkins, 15 Ill. 519; Hughes *v.* U. S. 4 Wallace, 232; Chesterman *v.* Gardner, 5 Johns. Ch. 32.

which affects the property sold, the vendor is bound to tell the purchaser, and let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it." *Caballero* v. *Henty* (*ubi supra*).

A very great change in the law with regard to constructive notice has been introduced by the *Conveyancing Act*, 1882. Sect. 3, provides:— *Conveyancing Act*, 1882, sect. 3.

(1) A purchaser shall not be prejudicially affected by notice of any interest, fact, or thing, unless:—

(i.) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. This sub-section is a legislative reversal of *Hargraves* v. *Rothwell* (1 Keen. 160), and see ★ *Cave* v. *Cave* (15 Ch. D. 639), where notice was not imputed as the solicitor was a party to the fraud. [★241]

(2.) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

The section (sub-s. 4), with a saving as to pending action, applies to purchases made before or after the commencement of the Act (1st Jan., 1883).

This section was considered in *In re Cousins* (31 Ch. D. 671), where it was stated to be clearly intended for the protection of purchasers to some extent against that refined doctrine of imputed notice which had been found to work very grievous injustice to honest men, the notice being implied in a very refined manner, and brought home to a man who knew nothing about the matter, and who found that, though he had acted per-

fectly honestly, he was postponed by reason of the doctrine of the Court. In this case, Cousins, in 1875, mortgaged his share in certain trust property to Pepper, but the deed did not disclose any previous charge, and there was the usual covenant that Cousins had good right to assign free from incumbrance. In 1881, Pepper's executors gave notice of this mortgage and of a further charge to the trustees of the property. Prior to 1875, Cousin's share had been mortgaged and charged, and a solicitor named Banks, who still continued to act for the trustees, had acted professionally for all parties in this matter. Banks stated that on one occasion he had prepared a notice in regard to one of the prior incumbrances, and put it in the box containing the trust papers which was in his custody, but that on a subsequent occasion he considered a notice immaterial. No such notice however could be found, and no direct notice of the charges was given to the trustees prior to that given by Pepper's executor in 1881. It was held that the Court could not impute constructive notice of the prior charges to Pepper from the fact that Banks had acted as solicitor throughout and that as Pepper's executors had been the first to give notice, his charge was entitled to priority.

See note to this section in Clark and Brett's Conveyancing Acts, 2nd ed. p. 20, where it is pointed out that the line of succession of the authorities having been broken by this section, the Courts will be much slower to impute constructive notice to a purchaser, and that *Hervey* v. *Smith* (22 Beav. 299; 1 K. & J. 389), *Penny* v. *Watts* (1 Hall & T. 266; 1 Mac. & G. 150); *Davies* v. *Thomas* (2 Y. & C. Ex. Cas. 234), and *Hamilton* v. *Royse* (2 S. & L. 315), would almost certainly be decided differently according to the new law.

## TROTT *v.* BUCHANAN.

(28 Ch. D. 446.)

Principle.

*The general personal estate in the primary fund for payment of debts, and funeral and testamentary expenses, unless the testator has either by express words or necessary implication exonerated it.*[1] *This rule applies where the real estate is charged either by deed or will, but not where specific personal estate is so charged.*

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Summary of facts.

John Trott by deed conveyed certain real and personal estate to trustees on trust after his decease to sell and pay his debts and funeral expenses out of the proceeds of sale, and hold the balance on trust for his sons and their children. He subsequently by will, after reciting the deed, left all the residue of his property not comprised in the deed for the benefit of his wife and granddaughter. It was held that the estate must be resorted to for the payment of debts in the following order:—

1. Personalty comprised in the deed.
2. General personal estate.
3. Realty comprised in the deed.

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In this case the Court proceeded upon the principle laid down nearly one hundred and eighty years before in the case of *French* v. *Chichester* (2 Vern. 568; 3 Bro. P. C., 2nd ed. p. 16), the records of which were fortunately preserved in Lincoln's Inn Library to supple-

[1] The personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance, for the payment of debts, of every description. Williams on Executors, *1205. A testator may, if he pleases, give the personal estate as against his heir or any other real representatives, discharged from the payment of his debts and legacies. Id. *1212.

ment the meagre statement of facts given in the report.

This case came twice before the Court. On the first occasion it was supposed that nothing but real estate remained subject to the trusts of the deed, but it was subsequently discovered that personal estate in the shape or two mortgage debts was comprised in it. It will be observed that the gift for the benefit of the wife and granddaughter was a gift of residue, and it [★ 243] was contended that this, taken along with ★ the recital of the deed in the will, exonerated the personal estate. Pearson, J., disposed of this point as follows:—"The testator does not, as he might have done, give to his wife all his real and personal estate not comprised in the trusts of the deed, but he gives her all the residue of his real and personal estate not comprised in the trusts of the deed. There is not a single previous gift in the will. It is not, therefore, a gift of the residue after deducting previous gifts, but still it is a gift of 'residue,' To my mind this can mean nothing else but the residue after making those deductions which by law ought to be made. The words are so strong as to exclude any inference that the testator intended to interfere with the operation of the ordinary rule of law that personal estate is the primary fund for the payment of debts, or that he intended the trust property to be employed in the exoneration of the personal estate."

In his second judgment, where the two classes of property, the real and personal, comprised in the trust deed came to be considered, Pearson, J., said that, though as regards real estate the rule of law was completely established, which said that the personal estate must bear the debts, unless a testator had by express words or by some expression of intention of the strongest kind said that it was to be otherwise, the same rule did not apply to personal estate specifically appropriated for the payment of debts.[2] Here there was a positive recital of the trust deed, a declaration that the trusts of it were for the payment of the testator's debts, and an express gift to the widow of the residue not comprised in the deed. He accordingly decided that the intention of the testator was that the personal estate comprised in the deed should be the primary fund for the payment of his debts, next the general

[2] A sale of land under a charge of legacies not only discharges it from those legacies but also from the debts of the testator. See Holiday *v.* Summerville, 2 P. & W. 533.

personal estate, and lastly the realty comprised in the deed. It must, however, be remembered that the principle of the law which exonerates realty and onerates personalty as to the payment is controlled to a very large extent by the operation of *Locke King's Act* and the amending statutes.

Subject to the provisions of *Locke King's Act* (17 & 18 Vict. c. 113) and the *Amending Acts* (30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34), as to which see *ante*, pp. 214 *et seq.*, the following is the order of the application of assets for the payment of debts:—[3]

1. The general personal estate unless expressly or by implication exempted.
2. Lands expressly devised to pay debts.
3. Estates which descend to the heir.
4. Real or personal property devised or bequeathed charged with debts.
5. General pecuniary legacies *pro ratâ*.
6. Specific legacies and real estate devised whether in terms specific or residuary are liable to contribute *pro ratâ*.
7. Real and personal property which the testator has power to appoint, and which he has appointed by his will or by voluntary deed.
★ 8. Widow's paraphernalia. See *ante*, p. 224. [★ 244]
9. Land in a foreign country which is governed by the *lex loci rei sitæ*, and therefore not liable for any debts which the law of the foreign country would not cast upon it.

See further Jarman on Wills, 4th ed. vol. ii. p. 622, and Theobald on Wills, 3rd ed. p. 570; and see *Tomkins* v. *Colthurst* (1 Ch. D. 626), *Farquharson* v. *Floyer* (3 Ch. D. 109), where the previous decisions are collected, and *Hensman* v. *Fryer* (L. R. 3 Ch. 420) is not followed.

The result of the authorities as to the liability for payment of debts of real estate in the hands of executors has been summed up as follows:—

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[3] In Pennsylvania by act of February 24, 1834, Sect. 21, the prescribed order of the payment of debts is 1st, Funeral expenses, medicine furnished and medical attendance during last illness, servant's wages for one year; 2d, Rents for one year; 3rd, All other debts except those due the Commonwealth. And where there is not sufficient assets to pay the debts of decedent and legacies in full the order of abatement of the legacies are, first, The residuary estate; second, Real estate devised for the payment of debts; third, Real estate charged with the payment of debt; fourth, Real estate devised in the residum; fifth, General legacies; seventh, *Donationes mortis causâ*.

"Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them.[4] The same rule applies whether the executor takes the whole beneficial interest, as in *Henvell* v. *Whitaker* (3 Russell, 343), or only a life interest, as in *Finch* v. *Hattersley* (3 Russell, 345 n.), or no beneficial interest at all, as in *Hartland* v. *Murrell* (27 Beav. 204). But in all cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate." *In re Bailey* (12 Ch. D. 268); and see Jarman on Wills, 4th ed. vol. ii. p. 565; *In re Tanqueray-Willaume and Landau* (20 Ch. Div. 462); *Kitford* v. *Blaney* (31 Ch. Div. 56); *Ashworth* v. *Munn* (34 Ch. Div. 391).

Specific bequest.

The law with regard to the exemption of personal estate specifically bequeathed was thus stated by the House of Lords in *Robertson* v. *Broadbent* (8 App. Cas. 815), "If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally and *in statu quo* to the legatee, which could not be if it were subject to the payment of general and testamentary expenses, debts, and pecuniary legacies.[5] As against creditors the testator cannot wholly release it from liability for his debts, but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state or condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate.

Portions.

Where portions had been charged on real estate and the general personal estate was insufficient for payment of debts, it was held that the portioners were not bound to contribute to the deficiency, and that the real estate must contribute in proportion to its full value: *In re Saunders-Davies*, *Saunders-Davies* v. *Saunders-Davies* (34 Ch. D. 482), where the authorities are collected.

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[4] Land is asset for the payment of debt. See Gregg *v.* Smith, 1 Dallas, 481; Wootering *v.* Stuart, 2 Yeates, 483.

[5] The two requisites of this kind of a bequest, *i.e.*, a specific legacy is that it must exist amongst the testator's effects at the time of his death, or he may direct his executor to purchase a certain article and hand it over to the legatee, and it must be distinguished from the whole or other portions of the testator's estate. Eckfeld's Est., 7 W. N. of C. 19; Wallace *v.* Id., 3 Foster, 149; Snyder *v.* Boyer, 10 Watts, 54; Boker's Est., 3 Rawle, 229.

A charge of "testamentary expenses" is held to include the costs of an administration action: *Miles* v. *Harrison* (L. R. 9 Ch. 316); *Harloe* v. *Harloe* (L. R. 20 Eq. 471). Testamentary expenses.

The practice with regard to costs where real and personal estate are administered in one action was settled by *In re Middleton, Thompson* ★ v. *Harris* (19 Ch. Div. 552) and *Patching* v. *Barnett* (51 L. J. (Ch.) 74). The rule is that the costs of an administration action, so far as they had been increased by the administration of the real estate, are to be borne by the real estate. It was also laid down in *In re Middleton* (*ubi supra*) that where the estate is insufficient the plaintiff is not necessarily entitled to his costs in priority to the defendants. Costs. [★ 245]

## *Time the Essence of the Contract.*

### TILLEY *v.* THOMAS.

(L. R. 3 Ch. 61.)

*Time is not of the essence of a contract unless it is made so either by the express stipulations between the parties, the nature of the property, or the surrounding circumstances.*[1] Principle.

Charles Thomas agreed to purchase a lease of a house from J. J. Tilley, "possession to be given" on a certain day. Tilley, who had notice that Thomas required the house for immediate residence, tendered possession on the day named, which Thomas refused to accept, on the ground that Tilley had failed to shew a good title. Tilley commenced a suit for specific performance, alleging that he had Summary of facts.

[1] Generally in a court of law the time in which a contract is to be performed is as much the essence of it as any other part. Hill *v.* School District, 17 Me. 316; Warren *v.* Bean, 6 Wis. 120; Cromwell *v.* Wilkinson, 18 Ind. 365; Barrett *v.* Hard, 23 La. An. 712. But equity regards time somewhat differently, and if the time was not the essence of the contract and the party acted in good faith, equity will grant relief. Hild v. Linne, 45 Texas, 476; Brashier *v.* Gratz, 6 Wheaton, 528; Hill *v.* Fisher, 34 Me. 143; Thurston *v.* Arnold, 43 Iowa, 43; Pedrick *v.* Post, 85 Ind. 255.

since deduced a good title. The Court of Appeal dismissed the suit with costs.[2]

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In the leading case the Court of Appeal confirmed and applied the rule previously laid down by Lord Justice Turner in *Roberts* v. *Berry* (3 D. M. & G. 284). Lord Cairns expressed that rule as follows: "A Court of Equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for the completion or steps toward completion, if it can do justice between the parties, and if, as Lord Justice Turner said in *Roberts* v. *Berry*, there is nothing in the express stipulation between the parties, the nature of the property or the surrounding ★ circumstances, which would make it inequitable to interfere with and modify the legal right.[3] This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.[4] Of the three grounds mentioned by Lord Justice Turner, express stipulations require no comment. The nature of the property is illustrated by the case of reversions, mines, or trades. The surrounding circumstances must depend on the facts of each particular case."[5]

[★246]

The principle on which the Court proceeds is that time is of the essence of the contract whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. The intention may be either express or implied, and the point that time is of the essence of the contract should be made by the party insisting upon it, without delay.[6]

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[2] The question as to whether time is the essence of a contract arises generally in cases of bill for specific performance. Bishop on Contracts, 1148. If time is the essence of a contract equity will not grant relief to one who unreasonably delays. Ditto *v.* Harding, 73 Ill. 117.

[3] The time may be waived by the parties to a contract. Jordan *v.* Rhoades, 24 Ga. 478; Eyster *v.* Parrott, 83 Ill. 517; Fox *v.* Harding, 7 Cushing, 516.

[4] The parties may make time an essence of the contract either where the subject renders it such, Griffin *v.* City Bank, 58 Ga. 584, or have made it such by the form of their contracting. Thurston *v.* Arnold (*supra*); Taylor *v.* Tongworth, 14 Peters, 172; Hicks *v.* Aylsworth, 13 R. I. 562.

[5] When there is no agreement as to the time when a contract is to be performed, it must be executed within a reasonable time. Myers *v.* De Mier, 52 N. Y. 647; Cocker *v.* Franklin, 3 Sumner, 530; Sawyer *v.* Hammett, 15 Me. 40.

[6] If the delay operates as an injury, time will be considered

Fry on Specific Performance, 2nd ed. p. 464; *Hipwell* v. *Knight* (1 Y. & C. Ex. 401).

Sect. 25 of the *Judicature Act*, 1873, provides that stipulations in contracts as to the time or otherwise which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contract in a Court of Equity shall receive in all courts the same construction and effect as they would have heretofore received in equity.[7]

The following are some of the principal cases in which, from the nature of the property or other circumstances, time has been considered of the essence of the contract:—Where the property was of a wasting character, as *e.g.* a leasehold for a short unexpired term, *Hudson* v. *Temple* (29 Beav. 536, 543); where the purchaser required the property for an immediate purpose, as in the leading case of *Tilley* v. *Thomas* (L. R. 3 Ch. 61): and see *Webb* v. *Hughes* (L. R. 10 Eq. 281), where the vendors were beneficially interested, and were a fluctuating body (*ex. gr.* a dean and chapter); where delay might give the purchase-money to persons other than those who signed the contract, *Carter* v. *Dean of Ely* (7 Sim. 211); where a patent was sold in order that the purchase-money might be applied in obtaining foreign patents, *Payne* v. *Bonner* (15 L. J. Ch. 227); where property was of fluctuating value, *Weston* v. *Savage* (10 Ch. D. 736); *Withy* v. *Cottle* (T. & R. 78), *Pollard* v. *Clayton* (1 K. & J. 462), *ex. gr.* foreign stock of varying value, *Doloret* v. *Rothschild* (1 S. & S. 590); a mining lease, *Macbryde* v. *Weekes* (22 Beav. 533); a reversion, on the ground that it might become an estate in possession during the delay, and that its sale is in general evidence of pressing want of money, *Newman* v. *Rogers* (4 Bro. C. C. 391), *Spurrier* v. *Hancock* (4 Ves. 667), *Hipwell* v. *Knight* (1 Y. & C. Ex. 401); and see *Patrick* v. *Milner* (2 C. P. D. 342), where, under the circumstances, it was held that time was not of the essence of the contract; a life annuity, a life estate, which may determine by the death of the *cestui que vie*, *Withy* v. *Cottle* (T. & R. 78); land purchased in order to erect a mill, *Wright* v. *Howard* (1 S. & S. 190); property purchased for mercantile purposes, ★ *Walker* v. [★ 247]

material. Bellas *v.* Hays, 5 S. & R. 427; Myers *v.* De Mier (*supra*).

[7] This act requires the courts of law to follow the equity rules on the subject. 36 & 37 Vict. c. 66, sect. 25. There is also some American legislation to the same effect. Bishop on Contracts, Sect. 1348.

*Jeffreys* (1 Ha. 341), *Coslake* v. *Till* (1 Russ. 376); contract for the supply of coal, *Pollard* v. *Clayton* (1 K. & J. 462).

When a public-house is sold as a going concern, time is of the essence of the contract, *Day* v. *Luhke* (L. R. 5 Eq. 336); *Cowles* v. *Gale* (L. R. 7 Ch. 12). In *Weston* v. *Savage* (10 Ch. D. 736) it was held that, the agreement being for the sale of a public-house as a going concern, and time being consequently of the essence of the contract, the plaintiff was not bound to wait until the time fixed for the completion of the contract had arrived, but could rescind the contract at once when he found that the lessor had an option to determine the lease, and that he was entitled to a return of his deposit with interest.[8]

In *Reuter* v. *Sala* (4 C. P. Div. 239) the Court of Appeal regarded time as the essence of a contract for the purchase of paper for a certain day. "It was argued," said the Court, "that the rules of Courts of Equity are now to be regarded in all Courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable."

Tendency of modern decisions.

The tendency of modern decisions has been to hold persons concerned in contracts relating to land bound, as in other contracts, to regard time as material, and this principle has been applied with the greater strictness where the property was connected with trade. Dart's V. & P. 5th ed. vol. i. p. 420.

Notice.

Though time is not originally of the essence of the contract, it may be made so by notice.[9] The law on this subject is thus stated by Lord St. Leonards in his Vendors and Purchasers, 13th edition, p. 227: "When time is not made of the essence of a contract by the contract itself, although a day for performing it is named, of course neither party can strictly make it so after the contract; but, if either party is guilty of delay, a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given."

In order to make time of the essence of a contract

[8] Lucas *v.* Godwin, 3 Bing. (N. Ca.) 744.

[9] Voorhees *v.* De Meyer, 2 Barb. 37; Steele *v.* Branch, 40 Cal. 4.

after the contract has been entered into the time fixed by the notice must be a reasonable one, and the question of reasonableness must be determined at the date when the notice is given: *Crawford* v. *Toogood* (13 Ch. D. 153). Where under the circumstances, as the abstract was not a very simple one, and as there would probably be questions arising on the title, a notice of five weeks given in the long vacation was not regarded as reasonable. Where time is not originally of the essence of a contract for the sale of land, it cannot be made so by notice unless there has been some default or unreasonable delay by the other party:[10] *Green* v. *Sevin* (13 Ch. D. 589).

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## ★ *Presumption of Advancement.* [★ 248]

### FOWKES *v.* PASCOE.

(L. R. 10 Ch. 343.)

Principle.

*Where in the case of a purchase in the name of another there is a presumption of resulting trust,*[1] *and evidence against such presumption, the Court is in the position of a jury, and will take into consideration all the circumstances of the case.*[2]

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Summary of facts.

Sarah Baker was a widow lady who had large sums of stock standing in her own name and other considerable property. Her only child, a son, had died, leaving a childless widow, who married again and had a son, John Irving Pascoe, and a daughter. In March 1843 Sarah Baker invested £500, viz. £250 in the names of herself and her companion,

[10] The justice of individual cases may require that the Court shall treat time as an essence of the contract and hold the parties to the consequences. Shaw *v.* Turnpike, 2 Pa. 454; Potter *v.* Tuttle, 22 Conn. 512; Kemp *v.* Humphreys's, 13 Ill. 573; Kirby *v.* Harrison, 2 Ohio, 326.

[1] Page *v.* Id., 8 N. H. 187; R. R. Co. *v.* Lampson, 47 Barb. 533; Willard *v.* Id., 6 P. F. Sm. 119; Depeyster *v.* Gould, 2 Green's Ch. 480; Butler *v.* Rutledge, 2 Coldwell (Tenn.), 4; Perry *v.* Head, 1 A. K. Marsh, 47.

[2] Resulting trusts are excepted from the statute of frauds, 29 Car. 2, c. 3 Sect. 8. See Hoxie *v.* Carr, 4 Eng. (Ark.) 525.

and £250 in the names of herself and John Irvine Pascoe. Subsequently in the same year she made her will and gave the residue of her estate to her daughter-in-law, Elizabeth Ann Pascoe, for life, and after her death among her children. She made further subsequent purchases in the names of herself and John Irving Pascoe, and also transferred stock into the names of herself and John Irving Pascoe, so that at the time of her death there was standing in the joint names of herself and John Irving Pascoe the sum of £7000. John Irving Pascoe deposed that the £7000 was intended as a gift to him, and his evidence was supported by that of his wife and two servants. Mrs. Baker never provided for the children of her daughter-in-law, but John Irving Pascoe had lived with her for some years before his marriage, and she had made him a handsome pre-
[★249] sent on that event. Held, by ★ the Court of Apperl, that John Irving Pascoe was entitled to the £7000 stock, and that there was no ademption of the residuary bequest.[3]

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The principle question to be determined in this case, the facts of which, as the Court of Appeal said, were singular in this respect, that nothing like them appears to have occurred in any of the reported cases, was whether under all the circumstances a resulting trust was to be presumed, and the Court of Appeal, on this point differing wholly from the conclusion at which Jessel, M.R., had arrived, decided that the evidence in favour of a gift having been made rather than of a trust having been created, was absolutely conclusive. Before, however, we consider by what reasoning and on what principles the Court of Appeal felt itself bound to decide the question before it in this particular manner it is necessary first to understand the general rules

[3] Where money is furnished to a legatee it may be a gift or an advancement or a loan; if it is a gift it is outright and doest not effect the legacy. See King's Est., 6 Wharton 307; Miller's Est., 4 Wright, 57. The declaration of the donor after the transaction and to a third party is evidence to show whether the donor intended a gift or an advancement. Lawson's App., 11 Harris, 85; Story's App., 2 Norris, 89.

of law applicable to the subject illustrated by the leading case.

The 8th sect. of the *Statute of Frauds* (see p. 12) provides that trusts arising by implication or construction of law do not require to be created by writing.[4] Hence it has been long established, as stated in the judgment to the well-known case of *Dyer* v. *Dyer* (decided in the year 1788) (2 Cox, 92), that the trust of a legal estate, whether freehold, copyhold or leasehold, whether taken in the names of the purchaser and others jointly or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase money,[5] and it goes on a strict analogy to the rule of common law that where a feoffment is made without consideration, the use results to the feoffer.[6] This principle has been extended to purchases of personalty; if a man takes a bond or purchases an annuity, stock, or other chattel interest in the name of a stranger, the equitable ownerships results to the person from whom the consideration moved[7] (Lewin on Trusts, 8th ed. p. 164). This principle, however, does not apply, and the Court will not assist the purchaser, if the purchase be made with a view to defeat the policy of the law, *ex. gr.*, where property was purchased by A. in the name of B., in order to give B. a vote for a parliamentary election. *Groves* v. *Groves* (3 Y. & J. 163); *May* v. *May* (33 Beav. 81).

In certain cases, however, where the purchase has been made in the name of another there is a presumption that the purchase is by way of advancement or provision. The general law upon this subject has been well summed up by Jessel, M.R. (who was not ashamed to confess that the authorities very much embarrassed him), in *Bennet* v. *Bennet* (10 Ch. Div. 474): "The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that

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[4] And may be of either realty or personalty, but not of perishable property. Union Bank *v.* Baker, 8 Hump. 447; Perry on Trusts, sect. 130.

[5] Paul *v.* Chonteau, 14 Missouri, 580; Robinson *v.* Id., 22 Iowa, 427; Williams *v.* Brown, 14 Ill. 200; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Bear *v.* Koenigstein, 16 Neb. 65; Poage's Adm., 2 Texas, 150; Bickel's App., 5 Norris, 204.

[6] Edwards *v.* Id., 39 Pa. St. 369; Bostlemen *v.* Id., 24 N. J. Eq., 103.

[7] Kelly *v.* Jeaness, 50 Me. 445; Creed *v.* Lancaster Bank (*supra*).

[★ 250] person to make a provision for the other, and we find either a ★ purchase or investment in the name of the other or in the joint names of the person and the other of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other, and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift, in other words, the presumption of gift arises from the moral obligation to give." In this case a widowed mother borrowed a sum of £3000 for her son's benefit, and subsequently claimed to be a creditor in the administration his estate. It was held upon the evidence that the £3000 was to be considered not as a gift but as a loan, and that the mother was entitled to recover.

The doctrine of advancement, as was stated in this case, arises from the presumption of an intention on the part of the person to discharge his duty to another, and applies not only to the case of a parent, but also to any person who has put himself *in loco parentis*, i.e. has taken upon himself the duty of making provision for him: *Ex parte Pye* (18 Ves. 140) approved of in *Powys* v. *Mansfield* (3 My. & Cr. 359, 367). It is to be observed that in *Bennet* v. *Bennet* (*ubi supra*) the Court held (dissenting from the statement of the law in *Sayre* v. *Hughes* (L. R. 5 Eq. 381) ), that no presumption of advancement arose in the case of a mother as in that of a father.[8] "In the case of a father you have only to prove the fact that he is the father, and when you have done that the obligation arises [9] but in the case of a person *in loco parentis* you must prove that he took upon himself the obligation. But in our law there is no moral legal obligation—I do not know how to express it more shortly—no obligation according to the rules of equity on a mother to provide for her child: there is no such obligation as a Court of Equity recognizes as such." "In the case of a mother," he went on to say,—"this is the case of a widowed mother—it is easier to prove a gift than in the case of a stranger. In the case of a mother, very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child." It must, however, be remembered that sect. 21 of the *Married Women's Property Act*, 1882, provides that "a married woman having separate prop-

[8] Williams on Ex'rs, * 1069.
[9] Supra, * 1069.

erty shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren." It may perhaps be considered as doubtful, having regard to this enactment, whether a married woman having separate property is not as much as the father under a "moral legal obligation" to provide for her children.

The rule of the Court with regard to the question whether a resulting trust has arisen, was laid down by the Court of Appeal in the leading case (L. R. 10 Ch. 352) as follows:—

"When there is once evidence to rebut the presumption the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to ★ disregard the [★ 251] circumstances of the investment and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption."

"The presumption," the Court went on to say, "must beyond all question be of very different weight in different cases. In some cases it would be very strong indeed. If for instance a man invested a sum of stock in the name of himself and his solicitor the inference would be very strong indeed that it was intended solely for the purpose of trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift, and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift.

"In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail even if the Court might not believe that the fact was in accordance with the presumption; yet if there is evidence to rebut the presumption, then, in my opinion, the Court must go into the actual facts."

The presumption of advancement has been held to arise where the purchase was made in the name of an illegitimate grandchild, the father being dead, *Ebrand* v. *Dancer* (2 Ch. Ca. 26), *Beckford* v. *Beckford* (Lofft. 490), the nephew of a wife who had been adopted, *Currant* v. *Jago* (1 Coll. 261), but not in the case of an illegitimate grandson whose father was alive, *Tucker* v.

*Burrow* (2 H. & M. 515), nor in favour of a deceased wife's sister who was living with the purchaser as his reputed wife but not legally married, *Soar* v. *Foster* (4 K. & J. 152). The question of advancement being a question of the purchaser's intention, evidence antecedent to or contemporaneous with or immediately after the purchases, so as to form part of the same transaction, may be admitted to rebut it; subsequent declarations, except so far as they prove intention at the time, are inadmissible. "And it seems the subsequent acts and declarations of the father may be used against him by the son,[10] though they cannot be used in his favour, and so the subsequent acts or declarations of the son may be used against him by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father, but not otherwise; for the question is not what did the son, but what did the father mean by the purchase. (Lewin on Trusts, 8th ed. p. 176.) With regard to the presumption of advancement, it was laid down in *Dyer* v. *Dyer* that reasons which partake of too great a degree of refinement should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout this principle of law of presumption, that a purchase is an advancement *primâ facie*, is not to be frittered away by mere refinements: [★252] *Finch* v. ★ *Finch* (15 Ves. 43, 50).[11] A strong illustration of this principle is afforded by the rule that if the father purchases in the name of an adult son, and receives the rents and acts as owner, the presumption of advancement is not rebutted: *Grey* v. *Grey* (2 Sw. 596); Lewin on Trusts, 8th ed. pp. 173–174.[12]

In the case of *Garrett* v. *Wilkinson* (2 De G. & Sm. 244) money was lent out in the name of a son who was acting as solicitor for his father, and it was held that the burden of proof was shifted, and that there was no presumption of advancement.

In *In re Eykyn's Trusts* (6 Ch. D. 115), where the question of the introduction of the name of a stranger in case of an investment in the joint names of husband

[10] The declarations must be direct and certain. See Cairns *v.* Colburn, 104 Mass. 247; Cartwright *v.* Wise, 14 Ill. 417.

[11] Where the partners to the transaction are alive and give evidence, there is no occasion to resort to any presumption. Lewin on Trusts, p. 277 (Text Book Series).

[12] The advancement to the son is a question of intention. Butler *v.* Ins. Co., 14 Ala. 777; Johnson *v.* Matsdorf, 11 John. 91; Slack *v.* Id., 26 Miss. 290.

and wife came for the first time before the Court, it was held (following *Fowkes* v. *Pascoe*) that investments in the joint names of the husband, wife, and strangers were on the husband's death to be treated as advancements for the benefit of the wife.[13]

In the recent case of *Standing* v. *Bowring* (31 Ch. Div. 282) a widow lady 86 years of age transferred a sum of £6000 consols into the joint names of herself and her godson. The Court considered that it was established by evidence that she was aware when she did this that she would be able during her lifetime to receive the dividends, and that if her godson survived her, which seemed probable, he would become entitled as survivor to the consols so transferred, and decided accordingly that she could not claim a retransfer on equitable grounds.

It was held by the Court of Appeal in *Ex parte Cooper* (W. N. 1882, p. 96), that the equitable doctrine of advancement has no application to money paid by a father to a son where nothing beyond the fact of payment is proved. The onus of proof lies on the person who claims repayment, and when the parties to such a transaction are alive and give evidence, there is no occasion to resort to any presumption, as the question is one of fact.[14]

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## ★ *Satisfaction.* [★ 253]

### TUSSAUD *v.* TUSSAUD.

(9 Ch. D. 363.)

Principle. *The doctrine of satisfaction is founded on the presumption against double portions, but this presumption may be rebutted whether in a deed or a will by parol evidence of intention.*[1]

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In February, 1867, Francis Tussaud, on the mar-

[13] McGovern *v.* Knox, 21 Ohio St. 552.

[14] Lewin on Trusts, p. 279 (Text Book Series).

[1] The doctrine of satisfaction has been regarded with much disfavor and the presumption on which it is founded is liable to be rebutted by slight circumstances. See Wesco's App., 2 P. F. Sm. 195; Strong *v.* Williams, 12 Mass. 391; American notes to Chancey's Case, 2 Lead. Cas. Eq. (4th American Ed.) 782; Van Riper *v.* Id. and 1 Green, Ch. 1, where the doctrine is admitted and some of its qualifications illustrated.

Summary of facts.

riage of his daughter, Mrs. White, covenanted with the trustees of her settlement that his executors or administrators should within six calendar months after his death if he survived his wife, but if not, then within six calendar months after her death, transfer to the trustees the sum of £2000 consols to be held on the trusts of the settlement, which were (1) for such persons as Mrs. White with the consent of the trustees should by any writing or by will appoint, and in default of appointment (2) for Mrs. White for life for her separate use, then (3) for husband for life and after death of survivor (4) for children, sons at twenty-one, daughters at twenty-one or marriage, and in default of children (5) for Mr. White absolutely.

In 1871 Francis Tussaud paid the trustees £1000, which was accepted by them as satisfying his covenant to the extent of a moiety. In 1873 Francis Tussaud died, having by his will and codicil bequeathed £2800 to the trustees of his will in trust for (1) Mrs. White for life for her separate use without power of anticipation, and after her decease (2) for such of her children as should attain twenty-one in equal shares, and if there were no children who [★254] attained a vested interest, the fund ★ was to fall into the residue and go to the testator's own sons. The Court of Appeal decided, reversing the decision of Jessel, M.R., that the provision for Mrs. White under the will and codicil was not to be considered as a satisfaction for Francis Tussaud's liability under the covenant in the settlement.[2]

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The first point decided by the Court of Appeal was that certain evidence of declarations made by the testator rebutting the presumption that he intended to satisfy the covenant in the settlement by the bequest in favour of Mrs. White was admissible. It was, they said, established upon the authority of decided cases,

[2] The cases in which the doctrine of satisfaction has been applied have nearly all arisen under wills. Bispham's Eq. (4th Ed.), Sec. 538; Snell's Eq., 194.

and according to the opinion expressed in all the books, as well as the uniform course of practice, that parol evidence was admissible to rebut a presumption although not to raise a presumption. The Court considered that there was no distinction for this purpose between the case of a deed and a will, and approved of what is laid down in Taylor on Evidence, 8th ed. vol. i. p. 1042, that where there are two instruments and where the circumstances are such that the Court of Equity raises a presumption that one is in satisfaction of the other, there the Court will receive evidence of declaration of the parties to rebut such presumption: but where there is *primâ facie* no presumption in equity, there the Court will not allow evidence to be given to raise a presumption and to shew the intention of the parties.

Parol evidence admissible.

"The law which I have to apply," said Jessel, M.R., in his judgment, "is by no means easy to apply, though I take it the long series of authorities have pretty well settled what the law is." In the present case there was no difference between the Court of first instance and the Court of Appeal on any question of law, the point and the only point on which they differed was that Jessel, M.R., considered that there was not that important and substantial difference between the two settlements made by Francis Tussaud for the benefit of his daughter, Mrs. White, which would make the two provisions of a different nature.[3] The Court of Appeal, on the other hand, came to the conclusion that there were such differences between the two provisions as to satisfy them judicially that the testator did not, in making his will, suppose himself to be substantially satisfying the obligations of the settlement, and on this ground they reversed the decision.

"The question arises," said the Court of Appeal, "whether both portions are to be paid. You look at the will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law which only arises in the absence of an expressed intention to give a double portion.[4] That is entirely independent of the

[3] Where the testator gives twice to the same person the court will consider, *primâ facie* that he intended it as two gifts; this is the doctrine laid down in Hurst *v.* Beach, 5 Mad. 351, and followed by Chancellor Kent in Dewitt *v.* Yates, 10 Johns. 156; also Minor *v.* Ferris, 22 Conn. 371; Jones *v.* Creveling's Exrs., 4 Harrison, 127.

[4] If the two gifts are given *simpliciter*, i.e. with no expression of the motive of the gifts, then the legatee will take both, but if

construction of the will where parol evidence is only admissible to remove a latent ambiguity, *ex. gr.* where
[★ 255] two ★ legatees are of the same name: see Jarman on Wills, 4th ed. vol. i. pp. 429 *et seq.* When you came to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence[5] to rebut such presumption."

The parol evidence which was thus admitted did not, however, in the opinion of the Court of Appeal, aid the case of Mrs. White and her children. The question accordingly turned upon the language of the instruments themselves. The question, said the Court of Appeal, must be, is there sufficient on the face of the will to shew that the testator did not intend the provision thereby made to be in lieu of that made by the settlement, or, in other words, to satisfy his obligation under that instrument? In arriving at a conclusion on this question, we must, of course, look at the settlement, for the purpose of seeing what the obligations of the testator under that instrument, and the provision thereby made for his daughter's family were. What we have to consider is well expressed by Lord Colonsay in the case of *Lord Chichester* v. *Coventry* (*ubi supra*) in these words: "But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other."[6] It must be remembered that slight differences between the two provisions will not be sufficient to prevent the presumption from arising. Slight differences, however, in the words of Sir John Leach, in *Weall* v. *Rice* (2 R. & M. 268), are such "as, in the opinion of the judge, leave the two provisions substantially of the same nature;" and he adds, "every judge must decide that question for himself." Here the Court of Appeal pointed out that under the settlement Mrs. White, with the consent of the

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in the case of each gift a motive or intention is expressed which is the same in the two cases there is a presumption that the testator did not intend to give a second gift; but only to re-express his intention of the first gift. See Snell's Prin. of Eq., 198.

[5] Parol evidence is admissible for the purpose of correcting a mistake in a written instrument. Wharton's Evidence, Sect. 1019; Cumming *v.* Balgin, 37 N. J. Eq., 476; Stockbridge *v.* Hudson Iron Co., 107 Mass. 290.

[6] See notes to Ex parte Pye, 2 Lead. Cas. Eq. (4th American Ed.) 782.

trustees, had an absolute power over the fund. She had no such power under the will. Under the settlement Mr. White took a life interest after his wife, and in certain events an absolute interest. Under the will he had no interest, and the fund, if no child of Mrs. White took a vested interest, went over to the testator's sons. These were held by the Court of Appeal to be such substantial differences between the two provisions as to rebut the presumption against double portions.

Definition of satisfaction.

The following definition of satisfaction given, or rather adopted, in the notes to *Chancey's Case* by White and Tudor, 6th ed. vol. ii. p. 382, was cited with approval by the House of Lords in the great case of *Lord Chichester* v. *Coventry* (L. R. 2 H. L. 71, 95), where the law on this subject is very carefully considered.

"Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee."

The doctrine of satisfaction, as stated by the late Mr. Haynes in his Outlines of Equity, 5th ed. p. 291, may be said to arise generally under one of the two following states of circumstances:—

[★256] ★ First, When a father or person filling the place of a parent makes a double provision for a child or person standing towards him in a filial relation.

Secondly, When a debtor confers by will or otherwise a pecuniary benefit on his creditor.[7]

The first class of cases, *i.e.* of double provision, may occur in two ways. I. Either the father first gives to his child by will a legacy, and then on some other occasion—more commonly on the marriage of that child—makes a pecuniary provision for it, or II. The father, on the occasion of marriage, or on some other occasion, agrees to make a provision for a child, and subsequently makes a bequest to that child by will, as in *Lady Edward Thynne* v. *Earl and Countess of Glengall* (2 H. L. C. 131). It is to be remembered that the doctrine of satisfaction in the case of double provision only applies in cases of parent and child or its equivalent, *i.e.* where a person stands *in loco parentis* (see ante, p. 250). "It is a doctrine," as Lord Eldon said, in the well-known case of *Ex parte Pye* (18 Ves. 150), "in the application of which legitimate children have been very harshly treated."

There is a material difference in the practical appli-

[7] If a debtor gives a legacy to his creditor which is equal to or greater in amount than the debt, it is presumed to be intended as a satisfaction of the debt. See 2 Spence's Equity, 605.

Court leans against double portions.

cation of the general rule of equity which presumes against double portions to children in cases of ademption and in cases of satisfaction.[8] In a case of "ademption,"[9] the will, a revocable instrument, is first, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator when he makes his will is under a liability which he cannot revoke or avoid. He can only put an end to it by payment or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation.

The question whether a gift in a will is to be considered as a satisfaction of a portion given by settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, is one of intention. It is certainly easier to arrive at a conclusion as to that intention where the will precedes the settlement, then where the settlement is first and the will follows. In the case where the revocable instrument is first, and a portion is given by it, if the event of marriage, or any other occasion for advancing a child, should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely, or *pro tanto*.[10] But where an irrevocable settlement is followed by a will it is not easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other: *Cooper* v. *Macdonald* (L. R. 16 Eq. 257); *Tussaud* v. *Tussaud* (*ubi supra*); *Chichester* v. *Coventry* (L. R. 2 H. L. 71, 82).

[★ 257] ★ In *In re Lawes* (20 Ch. Div. 81) the testator, standing *in loco parentis* to his reputed son, Thomas Lawes the younger, executed a bond to secure the payment of £10,000 to him four years afterwards, and

[8] If two bequests occur in the same instrument the presumption is strongly in favor of repetition, but if they occur in different instruments then the presumption is in favor of cumulation. Dewitt *v.* Yates, 10 Johns. 156; and Jones *v.* Creveling's Executors (*supra*).

[9] The question of ademption is one of fact and not of intention. Rogers *v.* French, 19 Geo. 316; Swoope's App., 27 Pa. St. 58.

[10] Adams on Equity, sect. 104.

subsequently, shortly before the time when the money was due, entered into an agreement to take him into partnership, and it was provided by the articles that the capital should consist of £37,500 to be brought in by the testator, of which £19,000 should be considered as belonging to Thomas Lawes the younger. The testator died without having paid any part of the £10,000 so secured. It was held by the Court of Appeal that the benefit under the partnership articles was to be taken in satisfaction of the £10,000 due under the bond. The principle of the cases on this subject was stated by the Court of Appeal (explaining the decision of Sir W. Grant in *Bengough* v. *Walker* (15 Ves. 507)) as follows:—"Where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest, but where he does refer to the value the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy, and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shews his intention to give a definite amount."

What is a portion?

A question which was discussed by Jessel, M.R., in the course of his judgment was "what is a portion." No one, he said, would imagine that a gift of a necklace by a father to his daughter could be a portion. There must be a sum of such an amount as that it would reasonably be presumed to be a portion. It has been decided that such a sum is a portion whether given absolutely to her or given to her for life with a power of appointment (*Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71) or settled in the ordinary way. The question was raised whether the whole sum was to be regarded as a portion, or whether the interest of the husband was to be deducted. The Courts of Equity, "with their usual common sense," said No; that is also a settlement to the daughter; it is the way in which a prudent father would settle it. Thus it was held in *Lady Thynne* v. *Earl of Glengall* (2 H. L. C. 131) that a gift by will to a daughter for life with remainder to her children, and in *Weall* v. *Rice* (2 Russ. & My. 251) that a gift to a daughter for life, then to the husband for life, and then to the children, were portions.

Debt, when

With regard to the second head of the doctrine of satisfaction it has been established by the authorities

satisfied by legacy.

that if a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, it shall be presumed, in the absence of any intimation of a contrary intention, on the principle *debitor non presumitur donare*, that the legacy was meant by the testator as a satisfaction of the debt. This rule, however, though it has long prevailed, "has met with the censure of several eminent judges; and the Courts have inclined to lay hold of any minute circumstances whereupon to ground an exception to it. ★ Thus it has been held that the presumption of satisfaction shall not be made where the debt was not contracted till after the making of the will, or where it was a bill of exchange or negotiable security, or where the legacy was contingent or uncertain or not payable immediately or of a different nature from the debt, or of a specific chattel;[11] and see further in Williams on Executors, 8th ed. 1302 *et seq.*

[★ 258]

In *Montagu* v. *Earl of Sandwich* (32 Ch. Div. 525), Lord Sandwich covenanted, in the settlement which was made on the marriage of his second son, to pay him an annuity of £1000 a year for life, and to charge the annuity on a sufficient part of the real estate of which he should die seised in fee with powers of distress and entry, and the settlement contained a proviso that nothing therein should prevent Lord Sandwich from at all times during his life dealing with his real estate as fully and effectually as he might have done if the settlement had not been executed so only that sufficient real estate were left charged with the annuity, or from devising any part of it clear from all liability in respect of the annuity, provided his intention to exonerate such part of the real estate from liability were in such devise clearly expressed. Lord Sandwich subsequently made his will, devising all his real estate, "subject to the charges and incumbrances thereon," in strict settlement on his first and other sons in tail male successively. He bequeathed his personal estate principally among his children, giving his second son legacies, the income of which when invested amounted to considerably more than £1000 a year. The Court of Appeal disagreed considerably in their view of this case, but in the result the majority came to the conclusion that the presumption against a double portion prevailed, and

[11] The subject of the satisfaction of portions, legacies and debts is fully discussed in notes of *Ex parte* Pye (*supra*), and the rules on the subject are generally the same in this country as in England.

that the second son was not entitled to claim both the annuity and the bequest.[12] One of the judges stated that he felt no confidence that they were giving effect to the real intention of the testator, no confidence that the presumption when applied in this particular case might not be leading them away from the true wish of the testator, yet on the ground that it would be wrong to break through precedent he recorded his judgment in favour of the appeal as a sacrifice made upon the altar of authority.

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## ★ *Contribution among Sureties.* [★259]

### STEEL *v.* DIXON.

(17 Ch. D. 825.)

Principle. *The principle as between co-sureties is equality of burden and benefit.*[1]

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Summary of facts Money was advanced to Robison on the security of a promissory note, which Dixon, Gurney, Steel and Chater signed as sureties. Dixon and Gurney only consented to sign on the terms of certain property being assigned to them by Robison as security. Steel and Chater had no knowledge of this arrangement, but it was held that they were entitled to share in the benefit of the security held by Dixon and Gurney.[2]

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[12] In New York it has been held that the intention of the testator that a subsequent gift or advancement shall operate as a satisfaction of a legacy cannot be presumed. Langdon *v.* Astor's Ex'rs, 3 Duerr, 477.

[1] See Bispham's Eq. (4th Ed.), Sect. 328. Each surety is responsible only for his proportionate part of the amount actually paid. Bonney *v.* Seeley, 2 Wendell, 481; Hickman *v.* McCurdy, 7 J. Marsh, 555. The rule in equity is that the burden of the debt is divided among the solvent sureties and the party paying recovers from each of the others an amount dependent upon the number of those who are actually able to pay. McKenna *v.* George, 2 Rich. Eq. 15; Breckinridge *v.* Taylor, 5 Dana, 110.

[2] Co-sureties are always entitled to the benefit of any compromise. See City of Keokuk *v.* Love, 31 Iowa, 119.

The Court in deciding this case, there being no English authority bearing precisely upon the subject, was guided to some extent by the precedents of American decisions, but chiefly by the general principle applicable to co-sureties as established by the well-known case of *Dering* v. *Earl of Winchelsea* (Cox, 318), decided just a century ago, the short effect of which was stated by the Court to be that "as between co-sureties there is to be equality of the burden and of the benefit."[3] "When I say quality I do not mean necessarily equality in its simplest form, but what has been sometimes called proportionate equality. The result of the case of *Dering* v. *Earl of Winchelsea* (was expressed by Baron Alderson in *Pendlebury* v. *Walker* (4 Y. & C. Ex. p. 441) in these terms, that 'where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety.' I hold, therefore, that the result of *Dering* v. *Earl of Winchelsea* is to require that the ultimate burden, whatever it may be, is, as between the co-sureties, to be borne by them in proportion to the shares of the debt for which they have made themselves responsible."[4]

[★ 260] ★"If that be the case," the judge continued, "it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, as between himself and his co-sureties, to bring that into hotchpot, in order

[3] Van Winkle *v.* Johnson, 11 Oregon, 469; Mills *v.* Hyde, 19 Vt. 59; Campbell *v.* Mesier, 4 Johns. Ch. 334.

[4] At law the co-surety was compelled only to contribute his *pro ratâ* proportion, having regard to the whole number of sureties, without reference to the fact that some of the sureties might be insolvent, but in equity the burden of the debt is divided among the solvent sureties and the party paying can recover for each of the others his proportionate part of the contribution; thus, where the plaintiff was one of four sureties on a note being compelled to pay, brought suit against his colleagues and recovered a judgment against each, for one-fourth of the entire amount of the costs, interest and principle, but not for an attorney's fee which was provided for on the face of the note, as he was not compelled to pay it. Acres *v.* Curtis, Supreme Court of Texas, 4 S. W. Rep. 551; Stothoff *v.* Dunham, 19 N. J. Law, 182; Henderson *v.* McDuffee, 5 N. H.; Morrison *v.* Poyntz, 7 Dana, 307.

that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require." [5]

It was however expressly pointed out in the judgment in *Steel* v. *Dixon* (17 Ch. D. 832), that the equity which raises the surety's right to have all benefits brought into hotchpot, may be varied or departed from.[6] This might happen in two ways:

1. The co-sureties for whose benefit the security would otherwise enure, might renounce or contract themselves out of the benefit.

2. One co-surety might by reason of his default in performing his duty towards another co-surety estop himself from asserting the equity which he would otherwise have had against him.[7]

If some of the sureties are insolvent the solvent sureties are obliged to contribute the loss proportionately among them.[8] *Hitchman* v. *Stewart* (3 Drew. 271), where the decree, stated in Seton on Decrees, p. 1181, orders certain of the defendants to pay so much of the costs as had been occasioned by their resisting contribution.

The principle of equal contribution between co-sureties was applied in *MacDonald* v. *Wentfield* (8 App. Cas 733) to successive indorsers of a bill of exchange, and see *In re Arcedekne*, *Atkins* v. *Arcedekne* (24 Ch. D. 709), where the judgment in the leading case of *Steel* v. *Dixon* is cited with approval.

In the recent case of *In re McMyn*, *Lightborne* v. *McMyn* (33 Ch. D. 575), it was held that a co-surety who had satisfied a judgment obtained by the creditor against the debtor and her co-surety, was entitled to stand in the place of the judgment creditor, and thus obtain

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[5] It does not make any difference if the sureties are bound at different times or by different instruments provided that they are bound by the same debt and occupy the position of co-sureties. Stout *v.* Vance, 1 Robinson (Va.), 169; Warner *v.* Price, 3 Wend. 397; but if each is a distinct suretyship the right of contribution does not exist. Langford *v.* Perrin, 5 Leigh, 552.

[6] The various liabilities of co-sureties often depends upon the understanding between the parties to the transaction which may be shown in a suit to enforce contribution. Barry *v.* Ransom, 12 N. Y. 462; Hendricks *v.* Whitmore, 105 Mass. 23.

[7] One of several defendants who has been guilty of a breach of trust who has paid a decree against them all cannot enforce contribution from the others. Herr *v.* Barber, 2 Mackey, (D. C. Repts.) 545.

[8] Breckenridge *v.* Taylor (*supra*); McKenna *v.* George, 2 Rich. Eq. 15.

priority over the unsecured creditors [9] in an administration action (see *In re Maggi*, 20 Ch. D. 545) although she had not brought action or obtained an assignment of the judgment.

It was laid down in the old case of *Ranelaugh* v. *Hayes* (1 Vern. 189, 2 Ch. Cas. 146), that "although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable the Court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him." [10] *Wooldridge* v. *Norris* (L. R. 6 Eq. 410), but see *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (22 Ch. D. 561).

By the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97, sect. 5), a surety who pays off a debt secured by judgment or bond is entitled to have assigned to him every judgment specialty or security held by the creditor in respect of such debt. See *Furgusson* v. *Gibson* (L. R. 14 Eq. 379); *Forbes* v. *Jackson* (19 Ch. D. 615), where the previous authorities are reviewed.

[★ 261] ★ It was held in *Ex parte Young, In re Kitchen* (17 Ch. Div. 668) (following the authority of an American case), that in the absence of special agreement a judgment or award against the principal debtor is not binding on the surety. The surety is entitled to have the liability proved against him in the same way as it is proved against the principal debtor.

Law as to disclosure.

In *Davies* v. *London and Provincial Insurance Company* (8 Ch. D. 469), it was held that under the circumstances an agreement of suretyship must be rescinded on the ground of non-disclosure. The law was stated as follows: In some cases there must be complete disclosure, *ex. gr.* in contracts between agent and principal, solicitor and client (see *ante*, pp. 189 *et seq.*), guardian and ward, trustee and *cestui que trust;* in another class of cases there must be complete disclosure of all material facts, *ex. gr.* in partnership, marine insurance (see *post*, p. 267). Suretyship, however, is not a contract [11] *uberrimæ fidei*, and there is no obligation

[9] Erb's Appeal, 2 Pa. St. 296; Clason *v.* Morris, 10 Johns. 524; Foster *v.* Trustees, 3 Ala. 302.

[10] If the principal debtor is insolvent the surety may proceed against him before paying the debt, so as subject particular assets to the payment of the debt. Bishop *v.* Day, 13 Vt. 81; McConnell *v.* Scott, 15 Ohio, 401.

[11] The doctrine of contribution is not so much founded on contract, as on the principal of equity and justice, that where the interest is common the burden also shall be common. Russell *v.* Failer, 1 Ohio (N. S.), 327; White *v.* Banks, 21 Ala. 705; Campbell *v.* Meiser, 4 Johns. C. R., 334.

to make the fullest disclosure, but very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid.

Surety, how discharged.

The surety is discharged if time is given to the principal debtor without the surety's assent.[12] If the creditor binds himself not to sue the principal debtor for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety—in the immense majority of cases not damaging him to the extent even of a shilling—must operate to deprive the creditor of his right of resource against the surety, though it may be for thousands of pounds. *Per* Cockburn, L.J., who seems to have greatly disapproved of the principle, though he speaks of it as being so firmly established that it can only be altered by the legislature. The creditor may, however, reserve his rights against the surety, *Owen* v. *Homan* (4 H. L. C. 997); *Webb* v. *Hewitt* (3 K. & J. 438); and see generally as to the discharge of the surety by variation of the contract, and by acts of the creditor affecting or altering his position, Seton on Decrees, 3rd ed. p. 1189 *et seq.*, where the numerous authorities on the subject (to which may be added *Rainbow* v. *Juggins* (5 Q. B. D. 422), where it was held that the surety was not discharged) are elaborately reviewed.

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## ★*Life Insurance.* [★262]

*In re* **LESLIE, LESLIE** *v.* **FRENCH.**

(23 Ch. D. 552.)

Principle.

*A stranger or a part owner of a policy of life insurance cannot acquire a lien on the proceeds of the policy for premiums paid by him except* (1) *by contract*, (2) *as trustee*, (3) *by subrogation to the trusts of a trustee*, (4) *as mortgagee.*[1]

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Mrs. French, a widow, effected a policy on her

[12] Everly *v.* Rice, 20 Pa. St. 297; N. H. Savings Bank *v.* Colcord, 15 N. H. 123.

[1] See Hodgson *v.* Id., 2 Keen, 704; and Bliss on Life Insurance, page 750.

Summary of facts.

own life for £5000. Soon after she married Mr. Leslie, the testator, and handed the policy to him. Subsequently, on the marriage of their daughter with Mr. Trevelyan, Mr. Leslie covenanted to pay £6000 on the death of his wife to trustees on the trusts of the settlement. He then assigned the policy to the trustees of the settlement as security and covenanted with them to pay the premiums during the life of his wife. Mr. Leslie paid the premiums until his death, and after his death his executors continued to pay them out of his estate. The question then arose whether his estate was entitled to a lien or charge on the policy for the amount of the premiums paid by him and his executors. The Court decided that there was no right to any lien or charge.[2]

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Lien or charge, how created.

In this case Fry, L.J., whose judgment was adopted by Pearson, J., elaborately reviewed the authorities with regard to the cases where a lien or charge may be created upon the moneys secured by a policy in favour of the person who pays the premiums to keep the policy on foot. The authorities, he said, established that such a lien or charge can be created in favour of a mere stranger or part owner in only four cases, viz.:

1. By contract by the beneficial owner.[3] This, he said, was illustrated by the case of *Aylwin* v. *Witty* (30 L. J. Ch. 860), where a mortgagor ★ had contracted with a mortgagee to pay the premiums on a policy, and the sureties, who had paid premiums, were held entitled to a lien on the policy moneys on the principle that by contract they were entitled to all the mortgagee's securities, and see *ante*, pp. 259 *et seq.*

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2. By reason of the right of trustees to indemnity out of their trust property for money expended by them in its preservation.

3. By subrogation or substitution, *i.e.* when a person who, at the request of a trustee, has advanced money

[2] The right to the money to be received from the policy may be assigned without any reference to the policy. Wood *v.* Phœnix Mut. Life Ins Co., 22 La. An. 617.

[3] The payment of a premium, without any contract with the person entitled to the benefit of the policy, gives no title to it. Bliss on Life Insurance, 546; Burridge *v.* Row, 1 Y. & C. C. C., 183.

for the preservation of the property is allowed to stand in his place and succeed to his right of indemnity.

4. By reason of the right of a mortgagee to add to his charge any money paid by him to preserve his property.

These points were illustrated by the cases of *Clack* v. *Holland* (19 Beav. 262), where trustees, not having a charge under the circumstances, could not create a charge in favour of the persons from whom they had borrowed the money, *Gill* v. *Downing* (L. R. 17 Eq. 316), where mortgagees were held entitled to a lien co-ordinate with their title, and *Todd* v. *Moorehouse* (L. R. 19 Eq. 69), where trustees were held entitled to create a lien by subrogation, *i.e.* to give their rights to those who had paid at their request. These were the only cases in which, according to the authorities, a lien or charge could be created on the policy. Fry, L.J., there considered on principle the question of payment by a mere stranger without contract and without request. Such a payment was in the eye of the law a mere impertinence, and no action could lie for the money. The law as to "confusion," a term borrowed from the Roman Law, was equally clear. "If I pour my gold into your heap, or put my silver into your melting pot, or turn my corn into your granary, I have no right to an account or any relief against you, but on the contrary I have actually transferred the property in what was mine to the person with whose property I have mingled it."

Renewal of leaseholds.

Another argument in the plaintiff's favour was based on the well-established principle that, if a tenant for life renews leaseholds and dies before the expiration of the renewal, his estate is entitled to a lien on the interests in remainder, proportionate to the unexpired portion of the renewed term. This argument was answered by pointing out that the equities governing the relation of tenant for life and remainderman are peculiar, and that there was no analogy whatever between the case of a tenant for life making such a payment and the case of Mr. Leslie paying premiums on a policy over which he had full control at every moment of his life, and which, but for his contract on his daughter's marriage he could have sold or surrendered without the consent of his wife.

Acquiescence.

It had been also contended that the plaintiff was entitled to a lien, on the ground of the acquiescence of the other person interested in the policy, on the principle that when one persons allows another to expend

money upon his property, and stands by during such expenditure, a lien is created in favour of the person [★264] making the ★ expenditure. To this it was answered that no such lien is created, except in the case of a person who makes the payment under a belief in the validity of his own title, while in the present case there was nothing whatever to shew that Mr. Leslie acted under any mistake with regard to his rights in the policy, and on the other hand it was certain that during a considerable part of the period covered by his payments he was in possession of the opinion of counsel as to his legal rights.

The position of a person who pays premium upon a policy of life insurance was carefully considered in *Falcke* v. *Scottish Imperial Insurance Co.* (34 Ch. Div. 234), where the previous authorities were reviewed, and it was held that the owner of the equity of redemption of a policy did not obtain a lien by payment of premiums, and the Court of Appeal expressed an opinion that the doctrine of salvage has no application to the payment of premium on a policy.

Payment into Court.

Prior to the decision of the case to which we shall presently refer there was some degree of conflict and confusion among the authorities as to whether an assurance company was justified in paying policy money into Court under the *Trustee Relief Act*, 1847.

In *Desborough* v. *Harris* (5 D. G. M. &. 439) Lord Cranworth proceeded on the principle that the relation which existed between a company who had granted an ordinary policy of life assurance and the policy holder was, as was decided with regard to banker and customer, simply that of debtor and creditor. In *In re Hall* (10 W. R. 37), a case of a "family policy," Lord Hatherley (then Vice-Chancellor Wood) proceeded on the principle that the company being a stakeholder, was justified in paying the money into Court under the *Trustee Relief Act*. There were two subsequent cases, one before Lord Romilly, *In re United Kingdom Life Assurance Company* (34 Beav. 493), and another before Vice-Chancellor Wood, *In re Webb's Policy* (L. R. 2 Eq. 456), in both of which, as Jessel M.R., pointed out (9 Ch. D. 80), the point came before the Court only incidentally with reference to the payment of costs. In the latter case, Wood, V.C., speaking of the *Trustee Relief Act*, said, "The object of the Act was to relieve not only trustees, executors, and administrators, but other persons having trust moneys in their hands, and to enable them to obtain a cheap and efficacious mode

of having the rights of the parties settled. It is in every way desirable that this form of proceeding should be encouraged rather than otherwise."

It may here be pointed out that the tendency of modern cases is in quite a different direction, and that the Court has latterly been disinclined to allow the costs of payment of money into Court under the *Trustee Relief Acts*. The previous authorities were all reviewed and considered by Jessel, M.R., in *In re Haycock's Policy* (1 Ch. D. 611) and *Matthew* v. *Northern Assurance Co* (9 Ch. D. 80). In the latter case Pechi effected with the Northern Assurance Company a policy on his life which provided that "the capital, stocks and funds of the company should be liable to pay" the sum of £500 within three ★ months after due proof of his death. Pechi assigned his policy to the firm of G. & Co. After Pechi's death, Buchanan, who claimed to be entitled as surviving partner of the firm of G. & Co., assigned the policy to Matthew. Due notice of both assignments was given to the company. There were conflicting claims by Matthew and Pechi's executor's, and the company paid the money into Court under the *Trustee Relief Act*. Held, that the company had no sufficient justification for paying the money into Court under the *Trustee Relief Act*, and the principle was laid down that a life assurance company is not justified in paying policy moneys into Court under the *Trustee Relief Act* unless they are moneys "belonging to a trust." Jessel, M.R., in delivering judgment, said that he had no doubt that no such contention as that raised in the present case would have been raised if the action had been brought at common law before the passing of the *Judicature Act*. Nothing, he said, could be more fatal to the interests of this company than to hold that they were mere trustees who had executed an equitable assignment of their stock in favour of every policy holder, and he accordingly decided that it was meant to be an ordinary policy of insurance, and that it had in fact a covenant to pay so far as the capital and stock of the company would extend. There was no trust at all. The company was simply to pay to the assured, his heirs, executors, or assigns. The case therefore did not fall within the *Trustee Relief Act* at all, and that answered the question at once. It must however be carefully borne in mind that this case was decided under the law before the *Judicature Act*. Sub-sect. 6 of the 25th sect. of the *Judicature Act*, 1873, which deals with the assignment of debts and choses in action, con-

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*Judicature Act*, 1873, sect. 25, sub-sect. 6.

cludes with a proviso that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees. It was pointed out in *In re Sutton's Trusts* (12 Ch. D. 175) that this section only applies to absolute assignments, and that as the banking company in that case were not trustees they ought not to have paid the money into Court under the *Trustee Relief Act;* as however the petitioners had submitted to the jurisdiction by petitioning under that Act, the trustees were allowed their costs.

The present state of the law is by no means clear, but the language of sect. 25, sub-sect. 6, of the *Judicature Act*, 1873, would seem to warrant the conclusion that in cases of absolute assignments insurance companies have now the option of paying the money into Court "in conformity with the provisions of the *Trustee Relief Act*," even though there be no trust, and with precisely the same risk as to costs as if they were individual trustees.

[★266] *Policies of Assurance Act*, 1867.

★ The effect of the *Policies of Assurance Act*, 1867, (30 & 31 Vict. c. 144),—which anticipated to some extent as regards policies of life insurance, as 31 & 32 Vict. c. 86, subsequently did with regard to marine policies, the general procedure of the *Judicature Act*, 1873, sect. 25, sub-sect. 6, cited *ante*, p. 265, with regard to the assignment of *choses in action*,—was recently considered in *Newman* v. *Newman* (28 Ch. D. 674). Sect. 1 of this Act (which was passed "in order to avoid the necessity of joining the assignor of the policy in action against the insurance office" (28 Ch. D. 680)), enacts that any person or corporation being or becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys.

By sect. 3 no assignment made after the passing of

the Act (August 20, 1867) of a policy of life assurance shall confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the amount of such policy, or the monies assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their or one of their principal places of business, and the date on which such notice shall be received shall regulate the priorty of all claims under any assignment: and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if the Act had not been passed.

By sect. 5 the assignment may be made either by indorsement or by a separate instrument in the words or to the effect set forth in the schedule. See *Crossley* v. *City of Glasgow Life Assurance Company* (4 Ch. D. 421) (overruled on another point in *Webster* v. *British Empire Mutual Life Assurance Company*, 15 Ch. Div. 169), where it was held that there was no equitable assignment; and see *Curtius* v. *Caledonian Fire and Life Insurance Company* (19 Ch. Div. 534). An agreement in writing to execute a valid mortgage of a policy which was deposited, was held not to be an assignment within the meaning of the Act: *Spencer* v. *Clarke* (9 Ch. D. 137).

It was held in *Newman* v. *Newman* (*ubi supra*) that a first incumbrancer who had not given the statutory notice was not to be postponed to a second incumbrancer who, having had notice of the prior charge, had given the office the statutory notice, had given such notice. The statute, the Court said, was not intended to affect the rights of persons claiming interest in the money outside the insurance office. It was intended to give a simpler remedy against an insurance office, and also to give facilities to insurance offices in settling claims by enabling them to recognize as the first claim the claim of the person who first gave such notice as required by the statute. It was not ★ intended to enact that a person who had advanced money upon a second charge with notice of the first and made subject to it, should, by giving statutory notice to the office, exclude the person who had the prior incumbrance. [★ 267]

Concealment and misrepresentation.

The question as to whether a life insurance policy is vitiated by concealment or misrepresentation of fact was carefully considered by Jessel, M.R., in *London Assur-*

*ance* v. *Mansel* (11 Ch. D. 363), and by the House of Lords, *Thomson* v. *Welms* (9 App. Cas. 671), in both of which cases the policies were held to be void. In the latter case, Lord Blackburn, whose observations certainly seem to go further than those of Jessel, M.R., recognising a distinction betwen the law with regard to marine insurance and that which respects the other contracts, summed up the present state of the law as follows:—

"In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and *primâ facie* at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life or fire (see *per* Lord Eldon, C., in a Scotch appeal on a fire insurance, *Newcastle Fire Insurance Co.* v. *Macmorran & Co.* (3 Dow. 262)). No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies."

It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract, and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material. Lord Blackburn stated that for the last fifty years it has been usual to insert a term in the contract that if the statements of the assured are untrue the premiums should be forfeited, and in the case before him, being of opinion that the declaration "that the foregoing statements were true," should be the basis of the policy, and that accordingly the truth of the particulars, including the statement that the insured was "of intemperate habits," was warranted, decided against the validity of the policy.

Policy effected by creditor.

In *Bruce* v. *Garden* (L. R. 5 Ch. 32) an army agent, to whom an officer was largely indebted on the balance of their account, effected in his own name at different times six policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest

on the balances including the premiums. The officer had attended at the insurance ★office when the policies were effected, but there was no evidence that the account had ever been shewn to him, or that he knew that he was charged with the premiums in the account. "The Court," said Lord Hatherly, in delivering judgment, "requires distinct evidence of a contract—that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor." In the present case the Court was of opinion that no such contract had been established, and accordingly the army agent was held entitled to the policy moneys." [★ 268]

Principle of the cases.

The following principle is to be extracted from the cases on this subject. Where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shews that the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays his debt, which it was directly or indirectly at his expense effected to secure. This is an application of the maxims, *Qui sentit onus sentire debet et commodum*, and *Secundum naturam est commoda cujusque rei eum sequi quem sequuntur incommoda: Courtenay* v. *Wright* (2 Giff. 337–351).

With regard to cases where the transaction takes the form of the grant of an annuity with a right of repurchase, and the grantee effects an insurance on the life of the grantor by way of security, the law was summed up in *Gottlieb* v. *Cranch* (4 D. M. & G. 440–444) as follows:—

The mere circumstance that a purchaser of an annuity insures the life on which the annuity depends, does of course not give to the person or estate that pays the annuity an interest in the policy. In that simple state of things the policy belongs merely to the person who has chosen to effect it for his own protection or advantage. It generally, or often, happens that when an annuity is purchased the amount of the annuity, or the price to be given, is fixed on the principle of obtaining for the purchaser a certain amount per cent. for his purchase money, and enough also to insure on the ordinary terms the life on which the annuity depends. And in addition to these cases, see *Lea* v. *Hinton* (5 D. M. & G. 823) *Drysdale* v. *Piggott* (8 D. M. &

G. 546), and the recent case of *Preston* v. *Neele* (12 Ch. D. 760), where the previous authorities are reviewed, and *Gottlieb* v. *Cranch* and *Knox* v. *Turner* (*ubi supra*), are followed.

*Life Assurance Companies Acts.*

Life assurance were made the subject of special legislation by three Acts of Parliament passed in three successive years—33 & 34 Vict. c. 61; 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41—which are to be cited as the *Life Assurance Companies Acts*, 1870 to 1872.

By sect. 3 of the Act of 1870, which is to be read along with sect. 1 of the Act of 1871 and sect. 1 of the Act of 1872, every company commencing the business [★ 269] of life assurance within the United Kingdom ★ is required to deposit £20,000 in the Court of Chancery, to be returned as soon as its life assurance fund accumulated out of the premiums shall have amounted to £40,000.

By sect. 4, which is to be read along with sect. 2 of the Act of 1872, the life funds are to be kept separate. By subsequent sections elaborate statements are required to be made by life insurance companies. Sects. 14 and 15 prescribe the conditions on which alone amalgamations are to be permitted. By sect. 21, passed on account of the decision in *In re European Life Assurance Society* (L. R. 9 Eq. 122), the Court may order the winding-up of any company in accordance with the *Companies Act*, 1862, on the application of one or more policy-holders or shareholders, upon it being proved to the satisfaction of the Court that the company is insolvent; and in determining whether or not the company is insolvent, the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts, but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a *primâ facie* case shall also be established to the satisfaction of the judge.

Sect. 22 enables the Court, where a company is proved to be insolvent, to reduce the contracts upon such terms and subject to such conditions as the Court thinks just, in the place of making a winding-up order. See *In re Great Britain Mutual Life Assurance Society* (20 Ch. Div. 351).

Novation.

A great change was introduced by sect. 7 of the Act of 1872 dealing with the subject of "novation" by policy-holders, which caused so much controversy in the liquidations of the Albert and European Assurance

Companies. See Buckley on Companies, 4th ed. p. 331. For the future, no policy-holder of a company amalgamated with or transferred to another shall by reason of payment of premium, or any other act, be deemed to have abandoned any claim which he would have had against his original company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

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## ★ *Election.* [★270]

*In re* VARDON'S TRUSTS.

(31 Ch. D. 275.)

Principle. *The doctrine of election is founded on the presumption of a general intention that effect shall be given to every part of an instrument, but this presumption may be rebutted be evidence of a particular intention inconsistent with the general intention.*[1]

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Summary of facts. A settlement had been made on the marriage of Mr. Walker and Miss Vardon, then an infant, by which £5000 was settled upon trust that the income should be paid to her for her separate use with restraint upon anticipation, and she also covenanted to settle all after-acquired property upon trusts the effect of which was to give Mr. Walker the first life interest with an ultimate trust in default of children for Mrs. Walker. The question was whether she could take a sum of over £8000, which was after-

[1] "The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same instrument from having effect according to its construction." Gable *v.* Daub, 4 Wright (Pa.), 217; O'Reilly *v.* Nicholson, 45 Mo. 160; Reaves *v.* Garrett, 34 Ala. 558; Brown *v.* Pitney, 39 Ill. 468.

wards bequeathed to her for her separate use without making compensation out of her life estate in the £5000. The Court of Appeal decided, reversing the decision of Kay, J., that the lady was not put to her election.[2]

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Basis of doctrine.

The principle on which the doctrine of election is based was stated in the recent case of *In re Lord Chesham, Cavendish* v. *Dacre*, (31 Ch. D. 466), to be that a donee shall not be allowed to approbate and reprobate, but if he approbates he shall do all in his power to confirm the instrument which he approbates;[3] and see *Rogers* v. *Jones* (3 Ch. D. 688). And the question in the leading case was whether this principle was applicable to the facts before the Court. It will be observed that the settlement had been executed while Mrs. Walker was an infant.

Mrs. Walker contended, said the Court of Appeal, that she is entitled to retain the benefit under the settlement because it was ★ income settled to her separate use without power of anticipation, and that she is entitled to the benefit under the will because the will which gave it to her was operative, and the covenant which would take it away from her was inoperative, and it is evident that her contention must prevail unless she can be reached by the doctrine of election. In determining this point, the Court of Appeal finding, as Lord Justice Fry said, a conflict of opinion (see the cases noticed in p. 281) in the Courts of first instance, and an absence of any decision either of the House of Lords or the Court of Appeal, felt itself at liberty, and therefore bound, to decide the question before it upon principle. The principle upon which it proceeded was this: "The doctrine of election rests not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it.[4] This general intention is not repelled by shewing that the circumstances which

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[2] In order that a person must make an election two things are necessary, the testator must make a valid gift of his own property and affect to dispose of property which is not his own. Bispham's Eq. (4th Ed.), Sect. 298.

[3] Pemberton *v.* Id., 29 Mo. 409; Brown *v.* Ricketts, 3 Johns. Ch. 533.

[4] Van Duyne *v.* Id., 1 McCart. 49; Marriott *v.* Badger, 5 Md. 306; Clay *v.* Hart, 7 Dana, 1; Wilbanks *v.* Id., 18 Ill. 17.

in the event gave rise to the election were not in the contemplation of the author of the instrument.[5] It may, however, be repelled by a declaration in the instrument itself of a particular intention." The authorities for this proposition were *Cooper* v. *Cooper* (L. R. 7 H. L. 71), and p. 404 of Mr. Swanston's celebrated notes to the cases of *Dillon* v. *Parker* and *Gretton* v. *Haward* (1 Swan. 359 *et seq.*) It may be here noticed that a large portion of the learning on the subject of election now possesses merely an antiquarian interest.

Effect of restraint upon anticipation.

"What," asked the Court of Appeal, "is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do.[6] This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it. This conclusion appears to us consonant with the general understanding of men and women in England at the present day.

"A provision for a married woman who is restrained from anticipation is regarded as giving the highest security known to the law that the married woman shall, come what may to herself and her husband, have from half year to half year some moneys paid into her very hands to increase her comforts or supply her with maintenance. And this security would be seriously imperilled if by the doctrine of election she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband or squander at her choice."

The Court of Appeal illustrated this by supposing Mrs. Walker, put ★ to her election, taking the £8,000 [★ 272]

[5] A person will not be put to his election upon a doubtful construction, and the intention to raise an election must clearly appear. Stokes' Estate, 11 P. F. Sm. 144; Havens *v.* Sackett, 15 N. Y. 365.

[6] Nix *v.* Bradley, 6 Rich. Eq., 43; Weeks *v.* Sego, 9 Ga. 201.

and losing her annual income of the £500. In that case, if she lost the £8,000, "she might pass the rest of her life in that very poverty and need against which the inalienable provision of the settlement was designed to protect her.

It may now be considered as settled that the principle of the doctrine of election is compensation, not forfeiture.[7]

There must, as was pointed out in the old case of *Bristowe* v. *Ward* (2 Ves. Jun. 336), always be some free disposable property given to the person, which can be made a compensation for what the testator takes away.

Summary of law.

The doctrine of election was very carefully considered by Jessel, M.R., in *Pickersgill* v. *Rodger* (5 Ch. D. 163–6), where he sums up the law as follows: "Before you attribute an intention to a testator or testatrix to dispose of that which does not belong to him or her, you must be satisfied from the form of the instrument that it does dispose of the property which does not belong to him or her—and that is all.[8] The presumption, in the absence of evidence to the contrary, is, that the testator by his will intends merely to devise or bequeath that which belongs to him, and that presumption is in favour of those who contend against the legatees. On the other hand, it is only a presumption which may be rebutted even by parol evidence; and it may be rebutted by evidence shewing that, under a misapprehension of law, the testator believed that the property which did not belong to him did really belong to him.[9]

"Any disappointed legatee is entitled to say, 'You shall not take the benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which the testatrix intended me to take.' Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee may say to the devisee, 'You are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me. That means

[7] Key *v.* Griffin, 1 Rich. Eq. 67; Stump *v.* Findley, 2 Rawle, 174; Van Dyke's Appeal, 10 P. F. Sm. 490.

[8] Philadelphia *v.* Davis, 1 Wharton, 490, and American note to Streatfield *v.* Id., 1 Lead. Cas. Eq. 333, where last case is criticised. Shroder *v.* Id., 1 Kay, 578.

[9] Cases of no little difficulty sometimes arise where the testator assumes to deal with property in which he has but a limited interest. Bispham's Eq., Sect. 303.

that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation.

"If you follow out that doctrine you will see that the persons taking the property so devised or bequeathed, takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed of."

Election implied.

Election may be implied from acquiescence or conduct. In order, however, to be binding it must be by a person who has positive information as to his right to the property, and with that knowledge really means to give that property up :[10] *Dillon* v. *Parker* (1 Swanston, 359); *Wilson* v. *Thornbury* (L. R. 10 Ch. 248.)

[★273] Infant.

★With regard to election by infants the usual practice is to direct an inquiry what would be most beneficial to the infant. In other cases, the Court has elected for the infant without a reference to Chambers: Seton on Decrees, pp. 933–936.

Married women.

Can a married woman elect during coverture? *Cooper* v. *Cooper* (L. R. 7 H. L. 53) would seem to be an authority that she could not, for there an inquiry was directed to ascertain what was for her benefit and that of her children, but the matter seems not to have been argued. The point is discussed in *Smith* v. *Lucas* (18 Ch. D. 544), where the Master of the Rolls decided that as a general rule she could, but that she could not elect without the assistance of a Court of Equity so as to make the covenant binding on property thereafter acquired.[11]

It was held in *Rogers* v. *Jones* (3 Ch. D. 688) that the right to compensation is not put an end to by the death of the person who was put to his election, but survives against his estate, and may be enforced by an action for damages as in that case.

The doctrine of election applies to property of every kind and to interests of every description, and it is immaterial whether the donor does or does not know that he has

[10] He is entitled to know the value of the properties before he elects. Kreiser's Appeal, 19 P. F. Sm. 200.

[11] Parties competent to make an election must be *sui juris* and a court of equity will sometimes *elect* on behalf of infants and married women.

no right to dispose of the property in respect of which the election has to be made:[12] Watson's Compendium of Equity, 2nd ed. pp. 177–8, citing *Wilson* v. *Lord J. Townshend* (2 Ves. Jun. 697); *Graves* v. *Forman*, cited 3 Ves. 67; *Webb* v. *Lord Shaftesbury* (7 Ves. 480); *Whistler* v. *Webster* (2 Ves. Jun. 367); *Welby* v. *Welby* (2 V. & B. 199). It arises principally in the case of wills "because deeds being generally matters of contract the contract is not to be interpreted otherwise than as the consideration which it expresses requires. It has been held to apply to voluntary deeds, to cases of contract for valuable consideration resting in articles, to contracts for value completely executed by conveyance. *Per* Lord Selborne, *Codrington* v. *Lindsay* (L. R. 8 Ch. 578–587), where the authorities are collected.

Powers of appointment.

The doctrine also applies to the exercise of powers of appointment: *Whistler* v. *Webster* (2 Ves. Jun. 367); and see *Wollaston* v. *King* (L. R. 8 Eq. 165), where it was held not to apply as between two clauses in the same will: *Coutts* v. *Acworth* (L. R. 9 Eq. 517); *White* v. *White* (22 Ch. D. 555); and see *In re Swinburne*, *Swinburne* v. *Pitt* (27 Ch. D. 696).

A case which is sometimes confounded with the doctrine of election, though in reality wholly distinct from it, is where a testator makes two distinct gifts of his own property, one beneficial and the other onerous, and the question is whether the donee is entitled to elect to accept the first and disclaim the second.

The rule in cases of this description is stated in *Guthrie* v. *Walrond* (22 Ch. D. 573–577) to be this, viz. that when two distinct legacies or gifts are made by will to one person he is as a general rule entitled to take one and reject the other, but that his right to do so may be rebutted if there is anything in the will to shew that it was the testator's intention that that option should not exist.[13] Where there is ★ a single and undivided gift, that is *primâ facie* evidence that the gift should be regarded as one, but even in such a case the Court would sometimes be able to discover some subtle indication of an intention that the legatee should be at liberty to take part of the gift and leave the rest.[14]

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[12] See Bispham's Equity (4th Ed.), Sect. 303.

[13] In order for a person to elect he must make an intelligent choice with full knowledge of all the circumstances. A bare acquiescence is not sufficient. Anderson's App. 12 Casey, 476; Cox *v.* Rogers, 27 P. F. Sm. 167; Duncan *v.* Id., 2 Yeates, 302.

[14] If a party has once elected, he is estopped from asserting the right he has chosen to abandon. Bigelow on Estoppel, 503; Mills *v.* Hoffman, 92 N. Y. 181.

In *In re Chesham, Cavendish* v. *Dacre* (31 Ch. D. 466), where a testator who died in 1882 had left certain chattels by his will upon trust for sale for the benefit of his two younger sons, and all the residue of his estate to his eldest son, and the chattels had previously been settled upon trust to go and be held with a mansion-house of which the eldest son was tenant for life, it was held that as the eldest son had no interest in the chattels which he could make over for the benefit of the younger sons by way of compensation, the doctrine of election did not apply, and further, that the "engrafted doctrine of compensation" does not apply to the case of a person electing to take under the instrument that gives rise to the election, and that the eldest son was not bound to make compensation out of the residue given to him by the will.

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## *Infants.*

*In re* **AGAR-ELLIS. AGAR-ELLIS** *v.* **LASCELLES.**

(10 Ch. Div. 49.)

Principle.

*A father has a right to control the religious education of his infant children,*[1] *but such right may be forfeited or abdicated.*[2] *The Court requires a stronger case to induce it to interfere with the father than with a testamentary guardian.*[3]

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A Protestant on his marriage with a Roman

[1] The guardianship of his children is not the privilege of a father, but it is his duty cast upon him by considerations of public welfare. Bispham's Eq. (4th Ed.), 546.

[2] Where the habits or the mode of life of the father or the treatment of his children is such as to seriously injure the child's body or morals or to jeopardize its property the custody of the child will be committed to a proper person. People *v.* Merceir, 25 Wendell, 64; *In re* Waldron, 13 Johns. 418. The mere fact that a father is insolvent is no ground for taking his children away from him; the court has also refused to take the custody of the children away from the father on the charge that he was living in adultery as he did not bring the child in contact with the woman. State *v.* Baird, 6 C. E. Green, 384; Commonwealth *v.* Addicks, 5 Binney, 520.

[3] A father is the only one who can appoint a testamentary guardian of his children and where the father does appoint a testamentary guardian the natural right of the mother must yield to the will of the father. See Van Houten's Case, 2 Green C. R. 220.

Summary of facts.

Catholic lady gave her a promise which was assumed by the Court to be "absolute, unconditional, and unqualified," that all the children should be brought up as Roman Catholics. Immediately after the birth of the first child the husband determined that all his children should be brought up as Protestants, and gave express directions to that effect, but the mother, without the father's knowledge, so [★275] ★ indoctrinated the children (who were all girls, and were at the time of the institution of the proceedings of ages varying from nine and a half to twelve and a half years), that at last they broke into open revolt and refused to go to a Protestant place of worship. The Court of Appeal refused to examine the children privately, and declined to make any declaration that the children ought to be brought up as members of the Church of England, but granted an injunction to restrain the mother from taking them to confession, or to any church or place of worship where worship was performed otherwise than according to the rites and ceremonies of the Church of England as by law established.[4]

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In this case the Court of Appeal, while omitting the declaration as to the religion in which the children were to be brought up "so as to throw on the father the whole responsibility of doing then and during the remaining years of his children's respective minorities what was right and proper," upheld in other respects the decision of the judge of first instance.

The Court first pointed out that it was on principal and authority settled so as to be beyond question or argument that the ante-nuptial promise was in point of law absolutely void. The husband had in the plainest terms expressed his determination so to treat it, and to assert and act upon his legal rights, the performance of

[4] The general rule is that in matters of religious belief the court will generally respect the creed of the father but the rule may be modified by peculiar cases. And in the appointment of a guardian for an infant, the court will regard the expressed desire of the deceased parents in reference to the religious education of the infant. Graham's Appeal, 1 Dallas, 136; Underhill *v.* Dennis, 9 Paige, 202.

which he was entitled to say he considered to be his paramount paternal duty. As between the husband and the wife therefore the question is to be determined as if there had never been any such promise, and just as if she or her husband had embraced a new faith after the marriage. This preliminary point disposed of, the Court addressed itself to the great question before it, viz. that as between the father and the children themselves, or rather as between the father and the law, "which is bound to protect the children from any abuse of the parental power." "The right of the father," said James, L.J., "to the custody and control of his children is one of the most sacred of all rights. No doubt the law may take away from him the right, or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct[5] or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all, or he may have abdicted such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the ★ children.[6] But in the absence of some conduct [★ 276] by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with no doubt a corresponding legal duty, but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with."

"The only point," the judgment went on to say, "upon which there was any doubt, was whether the Court should interfere at all, whether the Court, recognizing the father's undoubted right as king and ruler in his own family, could be called on by him to be ancillary to the exercise of his jurisdiction, and whether he ought not to be left to enforce his commands by his own authority within his own domain." On the principle, however, that the conduct of the mother was a wrong to the children as well as to the father, the Court considered that the injunction ought to be granted, and that it was its duty, pronouncing what it deemed the law to

[5] State *v.* Grigsby, 21 Am. Law Reg. (N. S.) 805.

[6] If the children cannot associate with their father without moral contamination or if, because they associate with him others will shun their society the court will refuse to give the father possession of his children.

be, to leave the matter to his sense of parental duty and to his conscience.

A further point of importance arose in the leading case. The Court was pressed privately to examine the children and to satisfy themselves by that examination that the children had, in the language of *Stourton* v. *Stourton* (8 D. M. & G. 760), "received religious impressions to a depth and an extent rendering dangerous and improper any attempt at important changes in them, and so to satisfy themselves that the father was about to abuse his parental authority by seeking to disturb such religious convictions."

The Lords Justices pointed out that that case was the case of a testamentary guardian, a case of mere and pure trust, which is essentially under the jurisdiction of the Court and under a jurisdiction always exercised with the widest judicial discretion, and the same is to be said of all the cases in which the Court had so acted.

Testamentary guardian.

A testamentary guardian (24 Ch. Div. 327) is a creature of the law, and nature has nothing to do with it. But the law of England has recognized the natural rights of a father, not as guardian of his children but as the father, because he is the father. In the present case the Court considered that it had no right to sit in appeal from the father's decision. "He is," they said, "quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, to be judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him."[7]

The case of *In re Agar-Ellis* came again before the Court of Appeal (24 Ch. Div. 317). The father, after the decision in the leading case, removed the children from the care of their mother, allowed the mother to visit them only once a month, and required that all correspondence between the mother and children should pass through his hands or be subject to his supervision. Four years afterwards one of the daughters attained sixteen years of age, and a petition was presented by the mother and daughter praying that the daughter might be allowed to spend her next vacation with her
[★ 277] mother, and for the future the mother ★ might have free access to her daughter, and that there might be unrestricted communication between them. The petition

[7] If it is necessary for the proper care of the child's person and property a court of chancery may appoint a guardian. Miner *v.* Id., 11 Ill. 43; Story's Eq. Juris. Sect. 1341. In the matter of Wollstoncraft, 4 Johns. Ch. 80.

was strongly opposed by the father, and the Court of Appeal, affirming the decision of Pearson, J., declined to interfere. It would seem, however, somewhat doubtful whether, having regard to the legislation which we shall now proceed to notice, the decision of the Court in the last mentioned case would not now be different.

Statute law.

The law with regard to the guardianship and custody of infants which had previously been dealt with by several statutes, has recently been materially altered by the *Guardianship of Infants Act*, 1886 (49 & 50 Vict. c. 27).

The Act which abolished feudal tenures (12 Car. II. c. 24) enabled a father, even though a minor, to appoint guardians for his legitimate (*Sleeman* v. *Wilson*, L. R. 13 Eq. 36) children by deed or will. But since the *Wills Act* (1 Vict. c. 26) a minor can only appoint a guardian by deed. Under this the wishes of a mother were regarded with reference to the appointment of a guardian (*In re Kaye*, L. R. 1 Ch. 387), but she had no power to appoint a guardian, and her guardianship was superseded in case the husband appointed a guardian.

*Talfourd's Act* (2 & 3 Vict. c. 54) enabled the Court to give a mother access to and custody of her children under seven years of age, and this period was extended by the *Infants Custody Act*, 1873 (36 & 37 Vict. c. 12, repealing 2 & 3 Vict. c. 54). The latter Act was considered in *In re Taylor* (4 Ch. D. 157), *In re Besant* (11 Ch. D. 508), *Besant* v. *Wood* (12 Ch. D. 605), *In re Holt* (16 Ch. D. 115), and in *In re Elderton* (25 Ch. D. 220), where the principle was laid down that the Court, in determining what are the mother's rights, will take into account three matters—"the paternal right," "the marital duty," and "the interest of the infants."[8] *In re Ethel Brown* (13 Q. B. D. 614).

The provisions of the *Infants Custody Act*, 1873, would appear however to be to a large extent superseded by the sweeping changes in favour of maternal rights which have been introduced by sect. 5 of 49 & 50 Vict. c. 27.

Sect. 2 of that Act provides that on the death of the father the mother, if surviving, shall be guardian either alone, if no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or

[8] Infants of tender years have been left *ex necessitate* with the mother though her principles were of an immoral tendency. Commonwealth *v.* Addick (*supra*), but they were afterwards removed on arriving at a more advanced age. 2 S. & R. 174.

if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother.[9]

Sect. 3 enables the mother of any infant by deed (but note that if an infant she could not exercise this power by deed as an infant, as the father can under the statutory power conferred by 12 Car. II. c. 24), or will to appoint guardians after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they are to act jointly.

[★ 278] ★ (2.) And also enables her to make a *provisional* nomination of some fit person or persons to act jointly with the father after her death, "and the Court, after her death, if it be shewn to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, or make such other order in respect of the guardianship as the Court shall think right."

(3.) In the events of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper.

Sect. 4 provides that guardians under this Act are to have the power of guardians appointed under 12 Car. II. c. 24.[10]

A great change with regard to the position of the mother is introduced by sect. 5, which enables the Court to make orders as to custody. It provides that "the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well

[9] In Pennsylvania by the act of 1833 a devise of a guardianship by any other than the father is void, but a father may be estopped from refusing to permit a certain person to act as a guardian to his children, as where a grandfather made a devise to the child upon condition that a person named in his will should be its guardian, and the acceptance by the father of a benefit will estop him from afterwards objecting. Vanartsdalen *v.* Id., 14 Pa. 384.

[10] This statute has been generally adopted or re-enacted in the United States. See Act of Va., 1798, V. R. C. vol. I. 240; Purdon's (Pa.) Dig., Title Wills, Chase's Stat., Ohio, vol. III. 1788; Elmer's N. J. Digest, Title Wills.

of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."

Sect. 6 enables the High Court of Justice (but it is to be noted that by sect. 9 all applications to the High Court are to be made to the Chancery Division) [11] in its discretion, on being satisfied that it is for the welfare of the infant, to remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and also, if they shall deem it to be for the welfare of the infant, to appoint another guardian in place of the guardian so removed.

With regard to the general subject of the custody and education of infants, sect. 25, sub.-sect. 10 of the *Judicature Act*, 1873, enacts that in all questions relating thereto, the rules of equity shall prevail, but it was decided in the case of *In re Goldsworthy* (2 Q. B. D. 75) that though the rules of equity are to prevail, the Common Law Division has a concurrent jurisdiction. But see p. 277 as to applications under the *Guardianship of Infants Act*, 1886.[12]

Other Acts of importance relating to infants are the *Marriage Act* (4 Geo. IV. c. 76), enabling the Court of Chancery, in case of father, mother, or guardian being *non compos mentis*, &c., and consequently unable to give a proper consent to an infant's marriage, to give its judicial approval to the marriage; and the *Infants' Settlement Act* (18 & 19 Vict. c. 43), (one of the late Vice-Chancellor Malins' Acts), which enabled infants, (males not under the age of twenty, and females not under the age of seventeen), with the sanction of the Court of Chancery, to make binding marriage settlements. This statute was recently made the ★ subject [★279] of very careful consideration in the cases of *In re Sampson and Wall, Infants* (25 Ch. D. 482), and in *In re Phillips* (34 Ch. D. 467), where it was held that the Court had jurisdiction where a female infant had mar-

[11] The Court of Chancery has a general supervisory power over the persons and estates of infants. People *v.* Wilcox, 22 Barb. 178; Mather *v.* Andrews, 1 Johns. Ch. 99; Preston *v.* Dunn, 25 Ala. 507.

[12] Generally throughout the United States the powers and duties of a guardian are entirely local and cannot be exercised in other States. Sabin *v.* Gilman, 1 N. H. 193; Armstrong *v.* Lear, 12 Wheat. 156; Cox *v.* Williamson, 11 Ala. 343.

ried under the age of seventeen, to direct a settlement of her property to be executed. "It is just as necessary," the Court said, "and perhaps more so, to extend the protection of the Act to a female infant under seventeen as to one over that age. To hold otherwise would be to afford additional facilities to needy adventurers anxious to get hold of the property of infants."[13]

Practice.

Business under this Act is specially assigned to the Chambers of the Chancery Division by the Rules of the Supreme Court, O. LV. r. 2 (10), while rule 26 of the same order specifies the evidence which must be produced on such applications.

See as to making an infant a ward of Court, *De Pereda* v. *De Mancha* (19 Ch. D. 451) and *Brown* v. *Collins* (25 Ch. D. 56), where the previous cases are reviewed, and it was considered doubtful whether the mere carrying over a fund to the separate account of an infant, in an action to which the infant is not a party, constitutes the infant a ward of Court. Among other cases which are of importance on the subject of the custody of infants may be mentioned[14] *Shelley* v. *Westbrook*, cited in *Lyons* v. *Blenkin* (Jack. 267); *Andrews* v. *Salt* (L. R. 8 Ch. 622); *Re Clarke* (21 Ch. D. 217).

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[13] The Court of Chancery has a power over, the property of the ward which extends only to the personal property and the income of the real estate; the court has no power to direct a sale of the real estate for any purpose; that power rests exclusively with the legislature of the State. Rivers *v.* Durr, 46 Ala. 418; Rogers *v.* Dill, 6 Hill, 415; Williamson *v.* Berry, 8 Howard, 495.

[14] Foster *v.* Alston, 6 How. (Miss.) 406.

## ★*Receiver—Equitable Execution.* [★280]

### ANGLO-ITALIAN BANK *v.* DAVIES.

(9 CH. DIV. 275.)

### *Ex parte* EVANS, *In re* WATKINS.

(13 CH. D. 252.)

### SALT *v.* COOPER.

(16 CH. D. 544.)

Principle.

*The Judicature Act*, 1873, *has much enlarged the powers of the Court as to appointing a receiver.*[1] *A judgment creditor may obtain equitable execution against the debtor's equitable interest in land by the appointment of a receiver without commencing a fresh action, and without suing out a writ of elegit.*[2]

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Summary of facts.

In the first of these cases the Court of Appeal decided that a judgment creditor, who could not get possession of the land under a writ of *elegit* as the legal estate was outstanding in a mortgagee, was entitled to obtain the benefit of his judgment by the appointment of a receiver, and expressed an opinion, though it was not absolutely necessary for the purposes of the decision, that the *Judicature Act* had conferred upon the Court additional powers of appointing receivers, and that the appointment

[1] A receiver will be appointed when equitable rights are in danger of being injured by a holder of the legal title. Kerr on Receivers, 2nd Am. Ed. 53. The court may take property out of the hands of a guardian or executor and appoint a receiver. Liddell's Ex'rs. *v.* Starr, 4 C. E. Green, 163, also where there is a dispute as to the probate of a will, but the court will not interfere to appoint a receiver unless there is proof that the legal title is in danger of being abused. Schlecht's App., 10 P. F. Sm. 172, where there is a violation of partnership rights a receiver may be appointed. Slemer's App., 8 P. F. Sm. 168; Gowan *v.* Jeffries, 2 Ashmead, 304; Morey *v.* Grant, 48 Mich. 326; Barnes *v.* Jones, 91 Ind. 161.

[2] Osborne *v.* Heyer, 2 Paige, C. R. 342; Kerr on Receivers, 55 to 65.

might be made on motion in the action in which the judgment was obtained.[3]

In the second case the judgment creditor obtained the appointment of a receiver without suing out a writ of *elegit*. It was held that the appointment operated as an immediate delivery of the land in execution and constituted the creditor a "secured creditor" in the bankruptcy of the debtor.[4]

[★281] ★In the third case it was held that equitable execution obtained in the original action after final judgment, was good, though in this particular instance it was defeated by the fact that the property was legally though not actually in the possession of a receiver[5] who had been appointed by a Court of Bankruptcy a short time before.

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The judgments in these three cases contain a very full discussion of the law on the subject of the appointment of receiver at the instance of judgment creditors in cases where the debtor has only an equitable interest in the land. Jessel, M.R., in his judgment in the first case, lamented that the important question there raised was capable of argument. "There is an unsatisfied and undisputed judgment against the defendant for many thousand pounds. The defendant is in possession of freehold land in fee simple of which he is receiving the rents.[6] That land happens to be subject to a mortgage, and the legal estate being outstanding in the mortgagee, the

[3] Generally the appointment of a receiver is a matter which rests in the discretion of the court, but this discretion may be the subject of error. Milwaukee R. R. Co. *v.* Soutter, 2 Wallace, 521. The rules which are followed are pointed out in Blondheim *v.* Moore, 11 Md. 364; see also Maynard *v.* Railey, 2 Nevada, 313; Crawford *v.* Ross, 39 Ga. 44; Tomlinson *v.* Ward, 2 Conn. 391.

[4] Where a receiver is appointed the holder of the legal estate is restrained from interfering with the prosecution of the creditor's remedy. If there is an equity of redemption the judgment creditor is suffered to redeem. Smith *v.* Wolf, 104 Pa. St. 381; Shamwold *v.* Lewis, 7 Sawyer, C. C. Rep. 148.

[5] The possession of a receiver will be protected from interference by third persons. Kerr on Receivers. (2nd Am. Ed.), Chap. 6.

[6] An ordinary chancery receiver does not become liable for, of leased premises by entering upon them in order to take possession of and to sell and dispose of the goods and effects of the lessee under order of the Court. Gaither *v.* Stockbridge, ct. App. Md., 9 Atl. Rep. 632.

judgment creditor cannot obtain possession of it under the ordinary writ of *elegit*. It is gravely urged that, notwithstanding the Act of Parliament which applies equitable rules to all matters, the owner of the land can, by reason of the outstanding mortgage, remain in possession and receive the rents in defiance of the judgment creditor until the trial of the action, if indeed the argument does not go the length of saying that the judgment creditor has no remedy."

27 & 28 Vict. c. 112. *Judgment Act*, 1864.

The first section of the *Judgment Act* (27 & 28 Vict. c. 112), the language of which, as pointed out by Jessel, M.R., in *Anglo-Italian Bank* v. *Davies* (9 Ch. D. 282), fits in neither with the preamble of the Act nor the ordinary knowledge of judgment law possessed by those acquainted with the subject, provides that "No judgment, statute or recognisance to be entered up after the passing of this Act, shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute or recognisance." It had been decided by the Court of Appeal in *Hatton* v. *Haywood* (L. R. 9 Ch. 229), that the order of a Court appointing a receiver[7] amounted to a delivery in execution within the meaning of the words "other lawful authority," or in other words that the appointment of a receiver operated as "an equitable execution" (and see further on this subject *In re South*, L. R. 9 Ch. 369).

In *Anglo-Italian Bank* v. *Davies*, which is generally cited as the leading case on the subject, the creditor, who had recovered judgment in an action in the Chancery Division, sued out an *elegit*, and finding that the defendant's real estate was subject to legal mortgages, and could not be taken in execution by the sheriff, then commenced his action in the Chancery Division. The Court of Appeal in this case commented on the useless and absurd form of issuing a writ of *elegit*, ★ which was decided by Lord Cottenham in *Neate* v. *Duke of Marlborough* (3 My. & Cr. 407) to be necessary, and granted the appointment of a receiver, intimating an opinion at the same time that the application might have been in the original action. In *Ex parte Evans*, *In re Watkins* (11 Ch. D. 691, 13 Ch. Div. 252), the Court definitely decided that the issue of a writ of *elegit* [★ 282]

[7] The Court will not appoint a receiver until the defendant be first heard in reply to the application unless the necessity be of the most stringent character. Mays *v.* Rose, 1 Freeman Ch. 703; Ladd *v.* Harvey, 1 Foster, 514; Vosshell *v.* Hynson, 26 Md. 83.

in the case of an equitable interest in land was "a useless, absurd, and idle form, and wholly unnecessary now there is only one system of judicature." See also *Smith* v. *Cowell* (6 Q. B. Div. 75), where it was held that the application for a receiver was rightly made in the original action.

In *Salt* v. *Cooper*, Jessel, M.R., decided that so long as final judgment in an action remains unsatisfied, the action is a cause or matter pending within the meaning of section 24, sub-section 7, of the *Judicature Act*, 1873 (and see, further, as to where a matter is "pending," *In re Claggett*, *Fordham* v. *Claggett* (20 Ch. D. 637), and that consequently the Court after final judgment can grant equitable execution by the appointment of a receiver in the action in which the judgment has been obtained, though the writ has not been indorsed with a claim for a receiver.

*Judicature Act*, 1873, sect. 25, sub-sect. 8.

Sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, provides (*inter alia*) that a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be "just or convenient"[8] that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.[9]

In *Pease* v. *Fletcher* (1 Ch. D. 273) a receiver was appointed over the whole property comprised in the plaintiff's mortgage as to part of which the plaintiff was legal and part equitable mortgagee.

In *In re H.'s Estate*, *H.* v. *H.* (1 Ch. D. 276) (where the form of order is given), the defendant, a trustee, being on the eve of bankruptcy, a receiver was appointed on an *ex parte* application before service of the writ.[10]

Interim receiver.

A receiver is not duly constituted until he has given security: *Edwards* v. *Edwards* (2 Ch. D. 291). Accordingly in pressing cases, an *interim* receiver may be appointed without security: *Taylor* v. *Eckersley* (2 Ch. Div. 302).

In *Cockburn* v. *Cockburn* (1 Ch. D. 690) it was said

[8] A receiver will not be appointed on the ground of public convenience, or because there happens to be no other means of collecting or taking care of a fund. Thompson *v.* Allen Co., 115 U. S. 550.

[9] The powers of a receiver are limited and his possession of property is the possession of the Court. Kerr on Receivers, Chap. 7.

[10] See Orphan Asylum *v.* McCartee, Hopkins, 429; Blondheim *v.* Moore (*supra*).

that if the appointment of a receiver is the substantial object of the action, the endorsement of the writ should claim it, but this is not essential : *Norton* v. *Jover*, W. N., 1877, p. 206 ; *Salt* v. *Cooper* (*ubi supra*). Endorsement of writ.

In *In re Radcliffe, deceased* (7 Ch. D. 733), Jessel, M.R., said that the only way to prevent an executor from preferring a creditor, was for the plaintiff in an administration action, upon issuing the writ, immediately to apply for and obtain a receiver.[11] The authority of this *dictum*, however, was doubted by the Court of Appeal in *Phillips* v. *Jones* (28 S. J. 360). Administration action.

It is not the modern practice as formerly to allow the receiver to carry on an action in the name of a bankrupt executor or administrator : *In re Hopkins, Dowd* v. *Hawtin* (19 Ch. D. 61).

[★ 283] ★ Equitable execution was also granted by the appointment of a receiver against debts and sums of money payable to a judgment debtor to which garnishee proceedings were not applicable, *e.g.* taxed costs directed to be paid to a solicitor out of a fund standing in the Palatine Court: *Westhead* v. *Riley* (25 Ch. D. 413). Judgment debtor.

In *Arden* v. *Arden* (29 Ch. D. 702) it was held that a judgment creditor who had obtained equitable execution by the appointment of a receiver subject to existing incumbrances, obtained no priority by giving notice of the appointment of receiver to the trustee of the judgment debtor.

A receiver may be appointed in a proceeding commenced by originating summons: *Gee* v. *Bell* (35 Ch. D. 160); *Weston* v. *Levy* (31 S. J. 364). Originating summons.

In *Searle* v. *Choat* (25 Ch. Div. 723), where a receiver had been appointed after judgment in an action in the Queen's Bench Division, and the order was made "without prejudice to the rights of any prior incumbrancers," it was held that a person prejudiced by the conduct of the receiver in giving notice to tenants to pay their rents to him ought not to have commenced a fresh action without leave of the Court, but that his proper course was to apply for such relief as he might be entitled in the action in which the receiver was appointed.

In *In re Fowler*, *Fowler* v. *Odell* (16 Ch. D. 723), the tenant for life of leasehold houses had been allowed to receive the rents, and as the houses were not kept in Leaseholds.

[11] The Court will not act upon slight grounds to take property out of the hands of an executor or administrator and appoint a receiver ; but if waste or improper use of the funds or misconduct can be proved the Court will then so act. Beverly *v.* Brooke, 4 Gratton, 208.

repair according to the covenants in the lease, the Court, at the instance of one of the trustees, appointed a receiver for the purpose of keeping the houses in repair.

Married woman's property.

The mode of enforcing a claim against the separate property of a married woman is to obtain equitable execution by an order appointing a receiver or directing the trustees to pay. Such an order may be obtained in an action brought for that purpose, or, *semble*, where proceedings are already pending it may be made in those proceedings without any fresh action. See *In re Peace & Waller* (24 Ch. Div. 405, 407), where the previous authorities are considered and the form of order given.

In *Fuggle* v. *Bland* (11 Q. B. D. 711), where judgment had been obtained against defendants, husband and wife, the plaintiff was, on an *ex parte* application, appointed receiver of the income of the reversionary interest to which the wife was or might be entitled under the will.

Mortgages. *The Conveyancing Act*, 1881, sect. 19.

Section 19 of the *Conveyancing Act*, 1881, confers upon a mortgagee, where the mortgage is made by deed, "a power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property or any part thereof." The section however applies only so far as a contrary intention is not expressed in the deed (sub-sect. (3)), and only where the mortgage deed is executed after the commencement of the Act (sub-sect. (4)), and the mortgagee is only entitled to appoint a receiver (sect. 24 (1)), when he has become entitled to exercise the power of sale conferred by the Act (see sect. 20 (1), (2), (3)).

[★284] Receiver appointed on application of legal mortgagee.

★ In *Tillett* v. *Nixon* (25 Ch. D. 238) a legal mortgagee brought an action for foreclosure and moved for the appointment of a receiver. It was objected that the application was wholly unnecessary. The Court however held that where an action is pending and the parties are at arm's length, it is more desirable that a receiver should be appointed by the Court, though the appointment might have been made under the *Conveyancing Act*, 1881, without coming to the Court.

Receiver and manager and injunction.

A legal mortgagee of an hotel, who was prevented by the mortgagor from taking possession under the mortgage, was held entitled to the appointment of a receiver and manager and an injunction. *Truman & Co.* v. *Redgrave* (18 Ch. D. 547), where the form of order is given.

Receipt of rents in

See as to receipt of rents by receiver in foreclosure actions *Jenner-Fust* v. *Needham* (31 Ch. D. 500), not

followed in *Hoare* v. *Stevens* (32 Ch. D. 194), but upheld on appeal (32 Ch. Div. 582), and followed in *Peat* v. *Nicholson* (34 W. R. 451), and distinguished in *Coleman* v. *Llewellin* (34 Ch. Div. 143). foreclosure action.

A mortgagee in possession is entitled to the appointment of a receiver notwithstanding he has been paid all his interest and costs out of rents received by him while in possession, which he was ordered to pay over to the receiver, and that he has surplus rents in his hands: *Mason* v. *Westoby* (32 Ch. D. 206). One object of the *Judicature Act* (the Court said in this case) was "to enable the Court by the appointment of a receiver to relieve a mortgagee from the great burden imposed upon him by his entering into possession of the mortgaged property." Mortgagee in possession.

In *In re Pope* (34 W. R. 693) a judgment creditor without first issuing an *elegit* obtained equitable execution by an order for a receiver over land which was subject to an equitable mortgage. The equitable execution was not registered under 27 & 28 Vict. c. 112, and the debtor subsequently sold to a *bonâ fide* purchaser without notice. The Court of Appeal held that as the appointment of the receiver operated as a delivery of the land in execution, and as there is no necessity to register execution, when land has been actually delivered in execution, the purchaser was not protected. Judgment creditor.

It was held in *Yorkshire Banking Company* v. *Mullen* (35 Ch. D. 125), in a foreclosure action against mortgagor in possession, an order having been made for the appointment of a receiver and for the tenants to attorn and pay their rents in arrear and growing rents to such receiver, that the possession of the mortgagor being rightful he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver. Foreclosure action, mortgagor in possession.

It was held in *In re Coney*, *Coney* v. *Bennett* (29 Ch. D. 993) (following the decision in *Stanger Leathes* v. *Stanger Leathes*, only reported W. N. 1882, p. 71), that the Court had jurisdiction to enforce a judgment for payment of money by a defaulting trustee who had ★ absconded, by the appointment of a receiver of his equitable interest in property in this country. Trustee. [★ 285]

The order may be made by a judge in Chambers: *In re Llewellyn*, *Lane* v. *Lane* (25 Ch. D. 66), where, by consent, an immediate appointment was made. Order in Chambers.

A receiver is a trustee of money in his hands, and cannot plead the *Statute of Limitations* until his final

accounts have been passed and the recognizances vacated: *Seagrim* v. *Tuck* (18 Ch. D. 296).

Practice. The practice with regard to the security, &c., where receivers are appointed, is contained in R. S. C., O. L., r. 16 *et seq.*

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## *Privileged Communications.*

### LYELL KENNEDY.

(9 App. Cas. 81.)

No. 2.

Principle. *Knowledge, information, and belief solely derived from privileged communications are privileged.*[1]

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Summary of facts. Interrogatories were administered to the plaintiff, some of which asked as to his knowledge, information, and belief upon matters which were relevant to the defendant's case. The plaintiff's answer to these interrogatories was that he had no personal knowledge of any of the matters inquired into, and that such information as he had received in respect of them had been derived by him from his solicitors or their agents, who had procured it for the purpose of defending his title, and he submitted that he ought not to be required to make further answer. The House of Lords decided (confirming the decision of the Court of Appeal) that the answer was sufficient.[2]

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The House of Lords in this case considered very carefully the nature and limits of the privilege which the policy of the law has established with regard to com-

[1] No one can be compelled to disclose to the court any communication between himself and his legal adviser. Hemenway *v.* Smith, 28 Vt. 701: Bigler *v.* Reyher, 43 Ind. 112; Barker *v.* Kuhn, 38 Iowa. 392.

[2] A communication to be privileged must be made upon a proper occasion, from a proper motive and must be based upon reasonable or probable cause. Briggs *v.* Garret, 1 Amerman (Pa.), 404.

munications between parties and their professional advisers.[3] The defendant as well as the plaintiff is entitled "to search his opponent's conscience and to inquire from him ★ not only what he has seen or known himself, but all of which he has acquired knowledge or belief from his agent." This rule, however, is subject to three limitations— [★286]

Limitations of rule as to discovery.

1. A client has a privilege to prevent his legal adviser from disclosing any information which he obtains when so employed.[4]

2. The privilege extends to all papers which the legal adviser[5] has prepared for his client. Your opponent has no right to say "shew me your brief."[6]

3. Opinion and belief derived from privileged communications is privileged. You cannot ask "what is the belief which you have derived from reading that brief?" It was pointed out, however, that if a man has certain knowledge in the ordinary course of things independently of his solicitor, he cannot claim privilege because he learnt it also from his solicitor; *ex. gr.* if he was told by his solicitor's brief that a tombstone was in a certain place, and if he then went and saw it, he could not claim privilege.[7]

Foundation of rule.

"The foundation of this rule," said Lord Brougham in the well-known passages from his judgments in *Bolton* v. *Corporation of Liverpool* (1 Mylne & K. 94, 95) and *Greenhough* v. *Gaskill* (1 Mylne & K. 103), "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice

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[3] Stephen's Law of Ev., article 115; Conn. Life Ins. Co. *v.* Schafer, 94 U. S. 457; McClellan *v.* Longfellow, 32 Me. 494.

[4] But if the legal adviser became acquainted with any fact otherwise than in his character as such, the client cannot prevent its production. Coon *v.* Swan, 30 Vt. 6, so as to communications not relating to his professional employment. Carroll *v.* Sprague, 59 Cal. 655.

[5] The expression, legal advisers, includes barristers, solicitors, their clerks and interpreters. Sibley *v.* Waffle, 16 N. Y. 180; Jackson *v.* French, 3 Wendell, 337.

[6] Stephen's Law of Ev., Article 119. When a person is entitled to refuse to produce a document he cannot be compelled to give oral evidence of its contents. Wescott *v.* Atlantic Co., 3 Metcalfe, 282; Durkee *v.* Leland, 4 Vt. 612.

[7] Neither can a client combine with his attorney to keep papers from being produced by putting them in the latter's possession. People *v.* Sheriff, 29 Barb. 622, but papers which are professional communications are still protected. Pulford's App., 48 Conn. 247.

which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings." "If such communications were not protected no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights, and no man could safely come into a court either to obtain redress or to defend himself."

"Truth," said Lord Justice Knight Bruce in *Pearse Pearse* (1 De G. & Sm. 28, 29), "like all other good things, may be loved unwisely,—may be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."

In *Slade* v. *Tucker* (14 Ch. D. 824) it was held that a pursuivant of the Heralds College employed with regard to a pedigree was not a legal adviser, and that privilege could not be claimed.

In *Foakes* v. *Webb* (28 Ch. D. 287) the action was for specific performance, and the plaintiff interrogated the defendant as to whether certain interviews had not taken place and certain correspondence passed between the defendant's solicitor and a third party in reference to the agreement. The defendant declined to answer on the ground of privilege, but the Court held that as [★ 287] the solicitor would have been ★ obliged to answer such a question if put to him in the witness box, the client was bound to answer.

In *Bidder* v. *Bridges* (29 Ch. D. 30) the plaintiffs were held entitled to refuse to answer certain interrogatories on the ground that they were practically directed at discussing the evidence by which the plaintiffs intended to prove their case at the hearing. In this case the judges of the Court of Appeal, were by consent of the parties, placed in the position of arbitrators, and they settled what parts of the interrogatories ought to be answered.

It was held in *Eden* v. *Weardale Iron and Coal Company* (34 Ch. Div. 223), that third parties who were opposing the plaintiff's claim had put themselves in the position of "opposite parties" to the plaintiff, and the plaintiff had a right to examine them by interroga-

tories. In the same case it was also held on similar grounds that the third parties might interrogate the plaintiff (35 Ch. Div. 287); and see *Molloy* v. *Kilby* (15 Ch. Div. 162), where it was held that co-defendants were not "opposite parties;" see also *Brown* v. *Watkins* (16 Q. B. D. 125), and *Shaw* v. *Smith* (18 Q. B. Div. 196), where *Brown* v. *Watkins* (*ubi sup.*) is explained, and the principle is laid down thus: "by 'opposite parties' is meant parties 'between whom there is some question in conflict, some right to be adjusted in the action.'"

In *Minet* v. *Morgan* (L. R. 8 Ch. 361), where the previous authorities are reviewed, Lord Selborne cited with approval the principle laid down in *Lawrence* v. *Campbell* (4 Dr. 490): "As regards an English solicitor it is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity.[8]

Summary of authorities.

The effect of the authorities (which will be found collected in the argument (17 Ch. Div. 676)) was thus summed up by the Court of Appeal in *Wheeler* v. *Le Marchant* (17 Ch. Div. 675, 682). The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened with a view to the defence or prosecution of such litigation. So again, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a dealing which is not the subject of litigation, provided it be a com-

[8] No legal adviser is permitted, whether during or after the termination of his employment as such to disclose any communication unless with his client's express consent. It is immaterial whether the client is, or is not, a party to the action in which the question is put to the legal adviser. Bacon *v.* Frisbie, 80 N. Y. 394; Burnham *v.* Roberts, 70 Ill. 19; Cross *v.* Riggins, 50 Mo. 335; also Blackburn *v.* Crawford, 3 Wallace, 175, where the client's waiver was implied. After the client's death his executor or administrator cannot waive. Westover *v.* Ætna Life Ins. Co. 99 N. Y. 56.

munication made to the solicitor in that character and for that purpose.[9]

This case was approved of in *Pearce* v. *Foster* (15 Q. B. Div. 114), where it was held that documents which the plaintiff stated on affidavit had been partially prepared by the plaintiff's solicitor in an action previously brought against a party other than the present defendant, were privileged.

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[★288] ★ *Discovery in Action for Recovery of Land.*

LYELL *v.* KENNEDY.

(8 App. Cas. 217.)

Principle.

*In an action for the recovery of land the plaintiff has the same right to discovery as a plaintiff in any other action.*[1]

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Summary of facts.

The plaintiff, who claimed as assignee of the coheiresses of a deceased intestate owner of the fee, brought his action in the Chancery Division to recover possession of real estate with mesne profits. The defendant pleaded continuous possession for over twelve years, and claimed the benefit of the *Statute of Limitations*. The plaintiff interrogated the defendant as to the pedigree and heirship of his assignors, and as to alleged admissions that he was in possession of the land as trustee. Held, by the House of Lords, that the interrogatories must be answered in substance, subject to any privilege against particular discovery which the defendant might be entitled to claim.

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Former practice.

Prior to the decision of the House of Lords in this remarkable case, in which the plaintiff, claiming by a

[9] A communication made in furtherance of any criminal purpose is not privileged. Dedley *v.* Beck, 3 Wis. 274.

[1] It is a rule of chancery practice that a party shall not be compelled to make discovery of his title deeds when they simply support his own title, but only when they support the title of his adversary. Cullison *v.* Bossm, 1 Md. Ch. 95; Thompson *v.* Engle, 3 Gr. Ch. (N.S.) 271; 2 Story's Eq. Jur. sect. 1490.

legal title, brought an action in the Chancery Division to recover possession of real estate and mesne profits, it was regarded as the settled practice (and the Court of Appeal proceeded upon that principle) that a plaintiff in ejectment claiming by a legal title was not entitled to any discovery even of matters relevant to his own case.'

This practice was supposed to be founded upon the principle that a plaintiff in ejectment at law must succeed (if at all) by the strength of his own title, and that it was against public policy to assist him in searching into the evidence of the defendant's title.

The decision of the Court of Appeal was, however, based upon wholly insufficient material, as the single case of *Horton* v. *Bott* (2 H. & N.) 249) was deemed to be practically decisive of the controversy. The result of subsequent research among the authorities (which are ★ most elaborately reviewed in Lord Selborne's [★ 289] judgment), brought to light no less than fifty-seven cases in the time of Queen Elizabeth, and a series of cases from the time of Lord Nottingham, in which bills of discovery were filed in equity in aid of ejectments at law. The result was an unanimous reversal by the House of Lords of the previous unanimous decision of the Court of Appeal. Lard Bramwell in delivering judgment disposed of the question as follows :

"As a general rule a party to a suit in the Superior Courts has, to support his own case, a right to discovery from his opponent. This must be because the law supposes that the ends of justice will be furthered thereby. But it is said that the case of a plaintiff seeking to recover land is an exception to this rule. I cannot agree. Such an exception can only exist because justice in such suits would not be furthered by such discovery, or because it is not desirable it should be. It seems to me impossible to say the former. The truth will be got at by the same means in suits to recover land as in other suits. We are driven therefore to the only other reason, viz., that in such suits it is not desirable that justice should be furthered thereby, which is impossible. Why should it not? Why not by all the means by which it is furthered in other suits? It was said that public policy is opposed it. Why? It is said that the plaintiff in such a suit recovers on the strength of his own title. But the truth is, a plaintiff

[2] Stephen's Digest of the Law of Ev., 12, Berry *v.* Paddin, 11 Allen 577; Boston *v.* Richardson, 105 Mass. 351; Hosford *v.* Ballard, 39 N. Y. 147.

always, if he recovers, does so on the strength of his own title. If the action is for the detention of a chattel, the plaintiff must shew a title to it. If on a bill of exchange, he must shew the defendant is a party. I see no reason in principle for the defendant's contention."

In *Emmerson* v. *Ind, Coope & Co.* (33 Ch. Div. 223), an action was brought in the Chancery Division to recover possession of land. The defendants pleaded possession, and objected to production of documents on the ground that they were purchasers for value without notice, and they also objected to produce certain of the documents on the further ground that none of them proved or tended to prove the plaintiff's case.[3] The Court of Appeal held that in the present case the old rules of practice as to bills of discovery did not apply, and that the action being one for relief, the plaintiff, being put to proof of her title, had all the ordinary rights of discovery of matters tending to support her title. It was, however, held that the plaintiff was not entitled to discovery of the documents which the defendants swore did not prove or tend to prove her case, though the defendants did not swear that the documents contained nothing impeaching the defendants' title, for a plaintiff, the Court of Appeal said, must recover by the strength of his own title, and is not entitled to discovery for the purpose of shewing that the defendant has not a title.

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[★ 290] ★*Discovery of Documents.*

**HALL** *v.* **TRUMAN, HANBURY & CO.**

(29 Ch. Div. 307.)

Principle. *The Court will watch with care and some jealousy any attempt to obtain discovery of documents by interrogatories.*

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Summary of facts. The defendant had made a sufficient affidavit of documents, and the plaintiff subsequently administered a general roving, searching interrogatory as

[3] There is a strong presumption that a person having the possession of property is the owner thereof. See Vining *v.* Baker, 53 Me. 544; Rawley *v.* Brown, 71 N. Y. 85.

to documents. Held, by the Court of Appeal (confirming the decision of Kay, J.), that the defendant ought not to be compelled to answer.

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History of the law on discovery of documents.

The history of the subject of discovery of documents is told in the judgment of the Court of first instance in the leading case. How some thirty years ago every motion day was much taken up by motions for the production of documents. How to every set of interrogatories or other discovery as to documents, there was appended a common form of interrogatory. How a regular war was carried on, generally by motions in Court, as to the sufficiency of the answers or as to documents alleged to be privileged. How this flourishing of weapons before the trial became a most formidable inconvenience, and how at last in 1852 by the *Chancery Amendment Act* a power was conferred on the Court to make an order for production of documents on oath by either party. It was then finally settled by the two cases of *Manby* v. *Benicke* (8 D. M. & G. 470) and *Piffard* v. *Beeby* (L. R. 1 Eq. 623) that a party who had made or who was willing to make the usual affidavit as to documents, might decline to answer any interrogatory as to documents. The question which was discussed in the present case was whether the new rules under the *Judicature Act* have altered the practice in this respect.

R. S. C. 1883, O. XXXI. r. 12.

The present Order XXXI. r. 12, provides that any party may, without filing any affidavit, apply to the Court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or judge may either refuse or adjourn the same, if satisfied that such discovery is not ★ necessary or not necessary at [★ 291] that stage of the cause or matter, or make such order either generally or limited to certain classes of documents as may in their or his discretion be thought fit. The latter paragraph of this rule which seems to very materially increase the discretionary power of the Court, is new. It was pointed out by the Court of first instance in the leading case (p. 314) that there is no specific provision in the rules as they now stand as to cross-examination, nor as to any right to interrogate with regard to documents.

General practice as to ordering further affidavit of documents.

The general practice with regard to ordering a further affidavit of documents (which had been previously considered with much care by the Court in *Jones* v. *Monte Video Gas Company* (5 Q. B. D. 556)) was thus stated in the leading case. A party who has made an affidavit of documents cannot be ordered to make a further affidavit unless, either upon the face of the affidavit itself, or of the documents referred to in it, or in his pleading there in something which affords a presumption that he has in his possession other relevant documents besides those the possession of which he has admitted.

In the recent case of *Sumsion* v. *Pictor* (30 S. J. 468) the Court of Appeal declined to interfere with the discretion of the judges who had refused to order a further affidavit of documents, and said that they would not go minutely into the documents upon such an application. The principle of the rule, they stated, was that in order to justify the requiring of a further affidavit, it must be shewn, not only that there were probably other documents in the defendant's possession, but that those documents were probably relevant to the issues in the action. If it appeared that they could not possibly be relevant to the issues, it would be wrong to require a further affidavit to be made.

In *British and Foreign Contract Co.* v. *Wright* (32 W. R. 413) it was laid down that the Court will, as a rule, refuse discovery of documents before the delivery of the statement of defence, and see *Hancock* v. *Guerin* (4 Ex. D. 3). See also *Union Bank of London* v. *Manby* (13 Ch. Div. 239), where in an action for redemption against a mortgagee in possession the order was made before defence, and *Egremont Burial Board* v. *Egremont Iron Ore Co.* (14 Ch. D. 158), where the order was refused.

Place for production of documents.

It was pointed out in *Brown* v. *Sewell* (16 Ch. Div. 517) that the old Chancery Practice founded on the rule that documents ought to be deposited at the Record and Writ Clerk's Office (now by 42 & 43 Vict. c. 78 the Central Office), and that to allow them to be produced at the solicitor's office was an indulgence, still prevails, and that if an order is made for production of documents at the office of the producing party's solicitor, that party, even if ultimately successful, is not entitled to his solicitor's costs of production, or to his own of inspecting the documents of the other party. The Common Law practice is different, and it was suggested in *Brown* v. *Sewell* that a rule ought to be made mak-

ing the practice of both divisions uniform. No such rule, however, has yet been issued. See further on this subject Bray on Discovery, pp. 176 *et seq.*

[★ 292] ★ In *Prestney* v. *Corporation of Colchester* (24 Ch. Div. 376) the common order for production of documents at the solicitor's office in London was made against the defendants with regard to some thousands of documents, which consisted principally of ancient charters and books of account, some of which had been injured by fire, and could not be safely moved. It was held by the Court of Appeal that after an order for production of documents, the judge or his successor may at any time make a fresh order appointing a different place if the circumstances render it advisable, and the Court of Appeal will not interfere with his discretion except on special grounds. In the present case a direction was added that the order should be without prejudice to any application the plaintiffs might make with reference to the production of any particular documents which they might desire to inspect in Court, and that the defendants should undertake to pay any additional costs caused by the alteration in the place of production.

Change in place of production of documents.

In *Dadswell* v. *Jacobs* (34 Ch. Div. 278), a singular action was brought against an agent claiming production of documents to a person appointed by the plaintiffs. The defendant objected to produce the documents on the ground that the person appointed was a clerk of a rival and unfriendly house of business. The Court of Appeal decided, distinguishing the case of *Brown* v. *Perkins* (2 Ha. 540), that the defence was reasonable, and at the same time expressed a doubt whether an action would lie at all for the sole purpose of obtaining production and inspection of documents by a particular agent named by the plaintiff.

It will be observed that in the leading case the plaintiff failed in his attempt to obtain by means of interrogatories a second affidavit as to documents—or, as the Court of Appeal put it, "to put the defendant a second time on the rack" with regard to the discovery of documents. The Court, however, pointed out that there might be cases where such interrogatories would be allowed. If, they said, the Court is satisfied that, notwithstanding the affidavit, there is or may be some specified relevant document or documents in the possession of the party whom it is desired to interrogate, it may possibly be right to allow an interrogatory to be put whether that particular document, or those particular

Cases where interrogatories might be allowed.

documents, is or are in his possession. But a *primâ facie* case must be shewn before such an interrogatory can be permitted, and it should be made the subject of a special application. It might, for instance, the Court said, where there was an issue as to a particular document, be proper to allow a special interrogatory as to that. In all cases the matter was for the discretion of the judge, but in no case would it be right to allow, as was asked in the present case, "a general roving, searching interrogatory to be put."

R. S. C. 1883, O. XXXI. r. 15.

O. XXXI. r. 15 of the Rules of the Supreme Court, 1883, enables every party to a cause or matter to obtain, by notice in writing, production and liberty to take copies of any document to which reference is made in pleadings or affidavits, The rule then proceeds as follows :—

[★ 293]

★ And any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being the defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice, in which case the Court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or judge shall think fit.

The latter words beginning with "in which case," &c., are an addition to the rule of 1875. It was pointed out, *Quilter* v. *Heatley* (23 Ch. Div. 42), that there is a broad distinction between applications for documents referred to in the pleadings where production must be ordered at once unless some special reason *contra* be shewn, and general applications for discovery of documents relating to the matters in question in the action.

## *Place of Trial.*

### PHILLIPS *v.* BEALE.

(26 Ch. Div. 621.)

Principle.

*A plaintiff has a right to lay the venue of an action in any place he pleases (subject to the order of the Court if it should think it expedient to change the venue), even though the action is one which is assigned to the Chancery Division.*[1]

Summary of facts.

The plaintiff in this action claimed (*inter alia*) foreclosure. The writ was issued out of the Liverpool District Registry and marked "Chancery Division," but the statement of claim named Liverpool as the place of trial, and the plaintiff gave notice of trial at the next Liverpool assizes without a jury. Two days before the assizes the defendant applied to the judge of the Chancery Division in chambers to change the venue to London. The judge made the order, but the Court of Appeal reversed his decision.[2]

[★ 294]

★ This case, which was characterized by the Court of Appeal as of considerable importance, arose on the provision contained in Order xxxvi., rule 1, with regard to place of trial. The rule (which, as we shall presently see, modifies considerably the corresponding rule

R. S. C. 1883, O. xxxvi. r. 1.

[1] It is a general principle that the transfer of a cause must be in the manner prescribed by statute. Wells on Jurisdiction of Court, Sect. 126. If the motive in changing the place of trial is evidently delay the change will not be granted. Smith *v.* Prior, 9 Wendell, 499. The application must also be timely, and laches will waive a right of change. Quinn *v.* Van Pelt, 12 Hun. (N. Y.) 633, and Hoffman *v.* Sparling, Id. 83.

[2] If the transfer is made the substituted court has the same power over the case as if the case had originally commenced there. Clark *v.* Sawyer, 48 Cal. 138.

in the Orders of 1875) is as follows :—"There shall be no local venue for the trial of any action except where otherwise provided by statute. Every action in every division shall, unless the Court or a judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the defendant or his solicitor within six days after appearance. Where no place of trial is named, the place of trial shall, unless the Court or a judge shall otherwise order, be the county of Middlesex." To this the Rule of the Supreme Court passed in Oct. 1884 adds :—"The provisions of Order xxxvi., rule 1, shall apply to every action, notwithstanding that it may have been assigned to any judge." The words of the Order, said the Court of Appeal, are precise, and they expressly apply (and herein the present order differs materially from the corresponding rule in the R. S. C. 1875) to every action whether assigned to the Chancery Division or not. The result, therefore, is that the plaintiff has a right to place the venue where he pleases, subject to the order of the Court if it should think expedient to change the venue. The Vice-Chancellor in the present case had not based his order on convenience or the place of residence of the witnesses,[3] but had changed the venue simply because the action, being one for foreclosure, was specially assigned to the Chancery Division.[4] The Court of Appeal considered that this was not a sufficient reason, and that it was opposed to the provisions of the Order. The Court also pointed out (and special stress is laid upon the fact in *Powell* v. *Cobb*, to which we shall presently refer) that the defendant, in applying to change the venue just before the trial, was too late, and had further shewn no good ground for his application. The Lords Justices accordingly decided that though the judge had a discretion it was a discretion which under the circumstances they ought to control.

In *Cardinall* v. *Cardinall* (25 Ch. D. 772) the Court, in directing the action to be tried in the Chancery Division, proceeded on the principle that if the action is one of those which is assigned to the Chancery Di-

[3] See Park *v.* Carnley, 7 How. Pr. 355; American Exchange Bank *v.* Hill, 22 How. Pr. 29.

[4] Sometimes a want of jurisdiction will justify a transfer, instead of a dismissal. Morgan *v.* Lloyd, 12 Wendell, 266: Henderson *v.* Allen, 23 Cal. 520; Britain *v.* Cowan, 5 Humph. 316; Leary *v.* Reagen, 115 Mass. 558.

vision, and the question raised is a mixed one of law and fact, where the verdict of a jury would not decide the case, but the judge would have afterwards himself to decide the whole matter at issue between the parties, it was not intended that such a case should be sent to be tried by a jury.

In *Powell* v. *Cobb* (29 Ch. Div. 486) it was held by the Court of Appeal that the Court has a discretion with regard to actions assigned to the Chancery Division, as soon as the nature of the issues is clearly seen, to allow a change of venue, and that the Court of Appeal will be slow to interfere with such discretion. In this case the plaintiff sought to set aside certain deeds on the ground of fraud, and named "*Cardigan*" in his statement of claim as the place of trial. The defendant moved ★ before issue joined that the action should be [★ 295] tried in the Chancery Division without a jury. The Court considered that every part of the claim related to equitable relief, that there was not a single issue suggested upon which the verdict of the jury would decide aye or no, but a great number of ingredients to determine whether the indentures should be set aside at all, and if so, to what extent they should be set aside. It was held accordingly that as the additional expense would probably be small, the balance of convenience, having regard to the special nature of the case, was in favour of trial in the Chancery Division. The Court of Appeal, in upholding this order, disposed of an objection which had been urged, that the pleadings were not closed, and that the application was therefore premature. If, they said, the pleadings had not disclosed the issues which would have to be tried, the objection would have been a very formidable one, because such an order ought not to be made till the judge had an opportunity of seeing what the issues were, and judging from their nature whether the case ought to be tried with a jury or without a jury, or where it ought to be tried. As however in the present case it was admitted that no amendment was required, and the plaintiff had no wish to bring forward any new facts, it was held that there was no ground for interfering with the judge's discretion. In the recent case of *Shroder & Co.* v. *Myers & Co.* (34 W. R. 261), in the Queen's Bench Division, it was held that the Court would not change the venue laid by a plaintiff unless the defendant can shew some serious injury and injustice to his case by a trial at that venue.[5]

[5] The most usual cause for change of venue is that an impartial

In *Green* v. *Bennett* (32 W. R. 848) an action which involved a difficult question of vendor's lien concerning lands in Cornwall, was brought in the Chancery Division, and the plaintiff gave notice of trial for the Exeter Assizes, and the defendant moved to change the venue to Middlesex, so as to have the trial in the Chancery Division. The Court held on the one hand (following *Cardinall* v. *Cardinall*) that the circumstance that the action would be tried more speedily at the assizes, was not a ground for deciding in the plaintiff's favour. It also held on the other hand, as in the leading case, that the fact that the action had been rightly brought in the Chancery Division did not supply a sufficient reason for the change of venue. As, however, the Court was of opinion that the balance of convenience as regard the parties and witnesses was in favour of a trial in London, and as it considered that the trial at the assizes would only be nominal, and that the further consideration would probably be adjourned to London for the disposal of the difficult point of law involved, the venue was changed to Middlesex.

Naming place of trial.

Order xx. rule 5, provides that the statement of claim must in all cases in which it is proposed that the trial should be elsewhere than in Middlesex, shew the proposed place of trial. The effect of this Order in conjunction with Order xxviii. rule 2, dealing with the subject of amendment, was carefully considered by the Court of Appeal in *Locke* v. *White* (33 Ch. Div. 308), [★ 296] where it was held that the power ★ which the plaintiff possesses of naming a place of trial other than Middlesex must be exercised in the original statement of claim. If he omits to do so, he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim, he cannot alter it in an amended statement of claim.[6]

trial may be secured. A general allegation of the existing prejudice in a certain community is sufficient reason to grant the change. Taylor *v.* Gardner, 11 R. I. 182; Clark *v.* People, 1 Scam. 120; Burrows *v.* People, 11 Ill. 121. The court has no jurisdiction, if the parties by mutual consent agree to the change of venue. Walsh *v.* Ray, 38 Ill. 30; Pierson *v.* Finney, 37 Ill. 29.

[6] The mere fact that a county is the plaintiff in an action for the recovery of a forfeiture, is not sufficient ground for a change of venue. State *v.* Merrihew, 47 Ia. 112. Where there are several joint defendants they must all unite in the application in order to secure a change of venue. Sailly *v.* Button, 6 Wendell, 508; Rupp *v.* Swineford, 40 Wis. 28.

*Admissions.*

[FREEMAN *v.* COX.

(8 CH. D. 148.)

Principle.

*The principle on which the Court now proceeds in ordering payment of money into Court is that an accounting party who does not dispute that the money is owing by him will be deemed to have made a sufficient admission.*[1]

Summary of facts.

Notice of motion was served upon the defendant in an administration action for payment of certain moneys into Court. There was an affidavit shewing that the defendant had received the money. The defendant did not appear on the motion, and an order was made that he should pay the money into Court.

Extension of the principle on which money was ordered to be paid into Court.

The Master of the Rolls in this case went beyond the furthest point reached by any of the previous authorities. There being no precedent for the order which he was asked to make, he announced his intention to "make a precedent." "It seems to me," he said, "that the principle on which the Court has ordered payment of money into Court, has been that the defendant must admit that the money is in his hands for the purpose of the application." In the present case there was the affidavit of the plaintiff that the money had been received, the service of notice of motion on the defendant, and his non-appearance. This was held to be a sufficient admission, "the principle being to make the

[1] Admission may be implied from acts and conduct. Hayes *v.* Kelley, 116 Mass. 300; Lefevre *v.* Johnson, 79 Ind. 554; Foster *v.* Persch, 68 N. Y. 400; Wiggins *v.* Burkham. 10 Wallace, 129. If statements are made in a judicial proceeding silence does not admit their truth if there is no opportunity to respond. People *v.* Willett, 92 N. Y. 29; Johnson *v.* Holliday, 79 Ind. 151. Neither does "silence give consent" if the circumstances are such as would naturally call for a reply or explanation. Kelley *v.* People, 55 N. Y. 565; Drury *v.* Hervey, 126 Mass. 519.

defendant pay into Court what he does not dispute to be owing from him." [2]

[★297] In *London Syndicate* v. *Lord* (8 Ch. Div. 84) a decree had been ★ made for taking the account of a partnership, and two accountants, one representing the plaintiff, the other the defendant, who had been directed by the chief clerk to investigate the accounts, made a report that a certain sum was due from the defendant. The chief clerk had not made his certificate, and it was objected that it would be improper to act upon the report of the accountants, as it was "nothing but materials to inform the mind of the Court." The Court of Appeal reversed the decision of Bacon, V.C., and ordered the money to be paid into Court. Jessel, M.R., in delivering judgment, in which he traced the history of the principles on which the Court has acted from time to time in ordering payment of money into Court, said: "It has been held in the Court of Chancery for many years that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into Court.[3] There is not, as far as I know, any virtue in one mode of admission rather than another. What the Court has to be satisfied of is that the defendant has admitted the amount to be due." The order for payment into Court was accordingly made; Thesiger, L.J., adding that he should like to see the jurisdiction applied to the same extent in the Common Law Division.

The new power of making judgment and orders upon admissions which was conferred upon the Courts by the orders made under the *Judicature Act* has been somewhat enlarged by the Rules of the Supreme Court, 1883. The present order (xxxii. r. 6) provides that "any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleading or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he

R. S. C. 1883, O. xxxii. r. 6.

[2] It was sworn that the affidavit reached the hands of the administrator and Sir Geo. Jessel, though he declined in accordance with the rule in equity, to rely simply on the proof afforded by the affidavit, was yet induced to hold that the silence of the defendant in not disputing the facts deposed to was a sufficient admission of their truth. See Taylor on Ev., 701 (Text Book Series); Greenfield Bank *v.* Crafts, 2 Allen, 269; Wesner *v.* Stein, 97 Pa. St. 322.

[3] The burden of proof to show that an admission is sufficient, rests upon the person who wishes the Court to believe it is sufficient. Stephen on Evidence, Article 96. and Mallory *v.* Griffey, 85 Pa. St. 275; MacDougal *v.* Central R. R. Co., 63 Cal. 435; Indianapolis R. R. Co. *v.* Horst, 93 U. S. 291.

may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order or give such judgment as the Court or Judge may think just." It is to be observed that the words "on the pleading or otherwise" are in addition to the rule contained in the previous order. Under this rule orders have been made for foreclosure: *Rutter* v. *Tregent* (12 Ch. D. 758); in partition actions: *Gilbert* v. *Smith* (2 Ch. Div. 686), *Burnell* v. *Burnell* (11 Ch. D. 213); in partnership actions: *Thorp* v. *Holdsworth* (3 Ch. D. 637). Foreclosure. Partition.

In *Dunn* v. *Campbell* (27 Ch. D. 254) (stated in the notes to *Hampden* v. *Wallis*, 27 Ch. D. 251) the defendant in a partnership action had to his account furnished before action, made himself out a creditor for £6000 by crediting himself with £16,000 found due to him by arbitration. Jessel, M.R., holding that the arbitration was *ultrà vires*, deducted the £16,000 from the account and ordered the defendant to bring into Court the balance so turned against him. Partnership action.

In *Hampden* v. *Wallis* (27 Ch. D. 251) a motion was made to compel a trustee to pay into Court to the credit of the action a sum of money and also to deposit in Court certain bonds. There was a recital in the settlement which the defendant had executed, that the bonds had been transferred into the name of the defendant and his co-trustee, and this was supplemented by an affidavit shewing that the ★ co-trustee had not accepted the trusts of the settlement, and that the defendant was sole trustee. There was also a letter written before action in which the defendant distinctly admitted that he had received the money, and a further letter, written after action, which the Court regarded as amounting to an additional admission.[4] Further circumstances in the case were that the defendant's defence had been struck out, and that an affidavit which he had made could not be read as he had not attended for examination when ordered to do so. The Court held that in all these circumstances there was a sufficient admission, and ordered the money to be paid into Court. [★ 298]

The history of the successive advances which have

[4] Phillips *v.* Middlesex, 127 Mass. 262; Whiton *v.* Snyder, 88 N. Y. 299; but if the admissions were made before his appointment as trustee they would not be competent as admissions. Brooks *v.* Gross, 61 Me. 307; Church *v.* Howard, 79 N. Y. 415; Heywood *v.* Heywood, 10 Allen, 105.

History of the practice.

been made by the Court in ordering payment of money into Court is told in *Hampden* v. *Wallis* (*ubi supra*). The old Chancery practice was not to order money into Court unless an admission was to be found by the answer. This practice was modified, and admissions in the proceedings were held sufficient. The effect of the decision in *London Syndicate* v. *Lord* (*ubi supra*) was that for the purpose of founding an order for payment of money into Court, one mode of admission is as good as another, and that if the defendant does not answer an affidavit made against him or appear, silence in his case will be taken as consent, and an order will be made against him.

In *Phillips* v. *Homfray* (W. N. 1884, p. 171), which was an action for trespass and for wrongfully taking coal from under the land of the plaintiffs, inquiries had been directed, and in the answer of the defendants there were admissions that a certain quantity of coal had been gotten, and that the marked value at the pit mouth was a certain sum, but there were no admissions as to deductions, charges, &c. The plaintiffs took out a summons asking that the amount calculated to be due upon the admissions should be ordered to be paid into Court. The Court refused to make the order, and dismissed the summons with costs.

In *Porrett* v. *White* (31 Ch. Div. 52), White, who was one of the trustees of a settlement, wrote letters to Porrett, his co-trustee, admitting that he had received part of the trust fund and invested it in an improper manner. Porrett commenced an action for the administration of the trust, and after the defendant had appeared, took out a summons to have the money paid into Court, which he supported by an affidavit stating the facts and making exhibits of the letters which had passed between them. The defendant did not answer the affidavit or adduce any evidence. The Court of Appeal, in delivering judgment in the plaintiff's favour, said that "whatever doubt there might have been if the case depended on the letters alone, the fact that the affidavit has not been answered by the defendant brings it within the decision of the late Master of the Rolls in *Freeman* v. *Cox*. His lordship there said that he would make a precedent, and it is one which, in my opinion, we shall do right in following." An opinion was intimated in this case that the new words "or otherwise" in Order XXXII. r. 6 (*supra*) were wide enough to include the admissions contained in the letters written before action brought.

★ *Scandal.* [★299]

## CHRISTIE *v.* CHRISTIE.

(L. R. 8 Ch. 499.)

Principle. *Charges of an offensive or injurious nature will be expunged as scandalous unless they would be admissible as evidence to shew the truth of any allegation material to the relief sought.*[1]

Summary of facts. The plaintiffs, who constituted the well-known firm of Christie, Manson & Woods, auctioneers, sought to restrain the defendants, W. H. Christie and C. J. Christie, from issuing a prospectus of a company to be formed for the purpose of acquiring, working, and carrying on the well-known business of "Christie & Christie," and their pleadings contained allegations that one of the defendants had been adjudicated bankrupt, and committed for trial on a charge of fraud, and other statements of an offensive character. The Court of Appeal held that the allegations must be expunged as scandalous with costs as between solicitor and client.[2]

The reasons for the decision in this case were thus given in the judgment of the Court. "If, on the one hand," said Lord Selborne, "it is important and necessary to adhere to the rule that everything relevant to the issue between the parties must be admitted to be averred, however it may bear on the character of the

[1] The Court and jury, and not the witnesses are the proper persons to construe the words. Olmstead *v.* Miller, 1 Wendell, 510. The Court possesses the power to strike out scandalous matter from the proceedings. Strauss *v.* Meyer, 48 Ill. 385; Downing *v.* Marshall, 37 N. Y. 382; King *v.* Sea. Ins. Co., 26 Wendell, 62.

[2] Where there is a preservation of a right the policy of the law controls the individual right of redress. See Townsend on Slander and Libel, 384.

parties, it is no less important to keep scandal off the record. The sole question in such a case is whether the matter alleged to be scandalous has a tendency—or in other words, would be admissible in evidence—to shew the truth of any allegation in the bill that is material with reference to the relief that is prayed. It is argued that it may tend to prove misrepresentation in the prospectus. If the meaning of that argument is that because a man committed a criminal offence two years ago he is to be presumed likely to commit a fraud now, the answer is that our law does not admit of any [★300] such mode of proof." "Our law," ★ added Mellish, L.J., "does not allow you to prove that a man has a bad character for the purpose of shewing that because he has a bad character it is probable he will have committed a certain crime."

In *Atwool* v. *Ferrier* (14 W. R. 1014) a bill filed for the purpose of winding up a partnership which had been terminated eight years before, and obtaining accounts, contained a statement that the defendant had made fraudulent misrepresentations as to the value and profits of the business with the object of inducing the plaintiff to enter into partnership. Lord Hatherley, then Wood, V.C., said that the serious charge of fraud in the passage to which objection was taken was a little disguised by the way in which it was expressed, but the plaintiff, willing to wound, but yet afraid to strike, had on this occasion struck sufficiently for the Court to interpose. The charge, he said, was wholly irrelevant, as the plaintiff had got rid of the partnership more than eight years before, and was only asking for an account. He accordingly ordered the obnoxious allegation to be expunged.

Definition of scandal.

The cases on the subject will be found collected in Daniell's Chancery Practice, p. 386, where the following definition of scandal taken principally from Wyatt's P. R. p. 383, is given. "Scandal consists in the allegation of anything which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some persons with a crime not necessary to be shewn in the cause, to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous." On the present occasion we need only mention the principal cases in which the subject of scandal has been discussed in the Courts in modern times.

Scandalous matter

In *Cracknall* v. *Janson* (11 Ch. D. 13) the question arose whether scandalous matter, reflecting on a person

not a party to the action, could be struck out on the application of the person affected by it. It was unnecessary in the present case to determine the question, as the scandalous matter was so small that it was considered undesirable to put the parties to the inconvenience and expense of picking it out. On the general question, however, Fry, J., observed, "I do not think that the arm of the Court is so much shortened as that. I think that when the attention of the Court is called to scandalous matter, be it by a party to the action who is not injured, or by the proper motion of the Court, or by a stranger, the arm of the Court is long enough to direct that the person who has defiled its records by scandalous matter shall pay the costs of it." (See similar or stronger observations in *Coffin* v. *Cooper* (6 Vesey, 514). affecting a stranger to the action.

In *Coyle* v. *Cumming* (40 L. T. (N.S.) 455) a married woman brought an action by her next friend against her husband to have their marriage settlement rectified so as to accord with an alleged ante-nuptial agreement, and for an injunction to restrain him from interfering with her property or molesting her. The statement of claim alleged that the wife having been deserted by her husband had refused to return to him, "having heard, as the fact is, that a verdict was ★ obtained against him for criminal assault." The Court ordered the allegation to be expunged. [★ 301]

It is a long-established rule that nothing which is relevant can be scandalous: *Lord St. John* v. *Lady St. John* (11 Vesey, 539). This principle was applied in *Millington* v. *Loring* (6 Q. B. Div. 190), where the Court of Appeal said that the mere fact that the pleadings stated something scandalous did not make them scandalous within the meaning of the rule.

In *Fisher* v. *Owen* (8 Ch. Div. 645) the question was whether interrogatories which tended to incriminate the defendant must be struck out as "scandalous, irrelevant and not put *bonâ fide* for the purposes of the action." It was held by the Court of Appeal that the interrogatories were relevant to the matter in issue, and therefore were not scandalous, and could not be struck out, and that the remedy of the defendant was to decline to answer, on the ground that his answer might tend to incriminate him.

"If the defendant," the Court said (p. 651), "were a witness in the box you could not prevent the plaintiff putting the question, though the defendant might decline to answer, and thereby probably subject himself

or herself to some disadvantage before the tribunal, whether composed of judge or judge and jury ; and I I do not see what authority we have to prevent the plaintiff from availing himself of this mode of enquiry of the defendant without calling the defendant as a witness."

Costs.

The present rule contains a new provision expressly enabling the Court to order the costs of the application to be paid as between solicitor and client. This was the usual practice previously. The reasons for the rule will be found discussed in the leading case at p. 507, where it is stated that the principle appears to be that the offending party must pay to the other parties the whole expense to which they have been put by his introduction of the libellous matter.

In *Coyle* v. *Cumming* (*ubi supra*) the costs as between solicitor and client were ordered to be paid by the next friend.

Scandalous matter in a bill of costs.

In the recent case of *In re Miller and Miller* (33 W. R. 210) it was held that the Court had jurisdiction to expunge scandalous matter contained in a bill of costs, but as the solicitors had written to say that the scandalous matter had been inserted by mistake, &c., and tendered an apology, only party and party costs were ordered to be paid. The precedent which was followed in this was the case of *Erskine* v. *Garthshore* (18 Vesey, 114 , decided by Lord Eldon, with reference to scandalous allegations contained in a statement of facts carried in before a master (corresponding to a statement brought before a chief clerk at the present day), where the principle was laid down "that there was no one proceeding before the Court which if made the vehicle of scandal and impertinence the Court would not examine with the view to reform it."

## ★ *Amendment.* [★302]

### TILDESLEY *v.* HARPER.

(10 Ch. Div. 393.)

Principle. *Leave to amend will generally be given unless the Court is satisfied that the party applying is acting malâ fide, or that by his blunder he has done some injury to the other side which cannot be compensated by costs or otherwise.*[1]

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Summary of facts. The statement of claim contained an allegation that the donee of a power had received a certain sum as "a bonus, in fact a bribe," to induce him to grant a lease. The defence denied the receipt of that particular sum, but contained no general denial. The Court of first instance treated the denial as evasive, refused leave to amend, and at once gave judgment for the plaintiff. The Court of Appeal held that leave to amend ought to have been given.[2]

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In this case the judge of first instance had held the defendant most strictly to his pleading, and treated the fact that he had not denied as equivalent to an admission. The Court of Appeal, in reversing this decision, explained the principle on which the Court proceeds in allowing amendments as follows:—"It is important that the rules of the Court should be enforced, but this may be done at too great a price. A party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance

Principle on which amendment is allowed.

[1] Amendments may occur during the progress of a case, before it is at issue, or after an issue has been joined, but before judgment has been entered upon a verdict; but amendments are always limited by due consideration of the right of the opposite party. Stephen on Pleading, 110, and 2 Tidd's Practice (8th ed.), 753.

[2] Amendments are matters of right and a refusal to allow them are good grounds for reversal on writ of error; but the power does not extend to defects in substance. See 1 Paine, 486. 2 Archbold's Practice, 230, 231.

of the stake between the parties. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."

In *Attorney-General* v. *Corporation of Birmingham* 15 Ch. Div. 423), a decree had been made granting a perpetual injunction, but suspended for five years, against the Corporation of Birmingham as the sanitary authority. At the end of the five years the plaintiffs desired to enforce the injunction, but meanwhile a District Board had succeeded to the rights and duties [★303] of the Corporation of Birmingham. The ★ Court of Appeal decided that the action could not be amended, and that the only mode to enforce a judgment against persons who had subsequently obtained a title was to commence a new action.[3]

Amendment of special case.

In *In re Taylor's Estate*, *Tomlin* v. *Underhay* (22 Ch. Div. 495), the Court of Appeal held that a special case could not be amended after a decision had been given upon it. It was here laid down that the proper course where a special case has been stated in an action and a decision given upon it under a mistake of facts, but no subsequent order had been made carrying the decision into effect, is for the Court to disregard it, direct the action to go to trial, and then order inquiries to ascertain the real facts.

Plaintiff ordered to amend.

In *Harris* v. *Jenkins* (22 Ch. D. 481) the plaintiff claimed a declaration that he was entitled to a private right of way and for an injunction against obstruction. The Court held that the defendant ought to know by what title the plaintiff claimed, whether by grant or prescriptive user, or otherwise he might be seriously embarrassed when he came to trial. "I think also," said Fry, J., "that the plaintiff ought to shew with reasonable precision and exactitude the *termini* of the right of way and the course which it takes. It may be sufficient to state the names of the closes of land through which it passes, or to refer to their numbers in the tithes commutation map of the parish." The plaintiff was accordingly ordered to amend his statement of claim.[4]

In *Hipgrave* v. *Case* (28 Ch. Div. 356) the plaintiff claimed specific performance of a contract to sell the

[3] Stephen on Pleading, 165, 3 Blackstone's Com. 407.

[4] A sheriff's omission to sign his return to a writ may be amended. Dewar *v.* Spence, 2 Wharton, 211; also Weidel *v.* Roseberry, 13 S. & R. 178.

lease, stock-in-trade, fixtures and goodwill of a business, and alleged that he was willing to perform his share of the contract, but that the defendant refused to do so. He also claimed in the alternative £100 as liquidated damages. The defendant alleged false representation on the part of the plaintiff, and denied that the plaintiff was able and willing to perform the contract. After the close of the pleadings the plaintiff gave notice that unless the defendant completed the purchase within a week, he would re-sell the businees, which he accordingly did. The Court of Appeal decided that as there had been no amendment of the pleadings (which at that stage of the action ought not to be allowed) the plaintiff could not maintain his alternative claim for damages.[5] The Lord Chancellor, in delivering judgment, after pointing out that the plaintiff ought to have amended when he did the act which rendered specific performance impossible, or at all events at the original hearing of the action, continued: "I cannot regard this as a merely technical matter. It appears to me to be a matter of substance. The defendant comes to the trial to meet the case set up by the plaintiff upon the record, viz., a case entitling the plaintiff to specific performance or to damages in substitution for performance. I think we are regarding the substance of the case in holding the plaintiff bound by the form of the claim which he has deliberately elected to make, and in not transforming his claim into a different claim, and the pleadings into different pleadings, at this stage of the proceedings. For these reasons I do not think we ought to give the relief that is now asked for."

[★304] ★ The leading case of *Tildesley* v. *Harper* (*ubi supra*) was cited with approval by the Court of Appeal in *Steward* v. *North Metropolitan Tramways Company* (16 Q. B. Div. 556), where, upholding the decision in 16 Q. B. D. 178, they held that the defendants ought not to be allowed to amend their defence, because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance. In that case the rule of the Court was thus stated: "The rule of conduct of the Court in such a case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can

Rule of the Court.

[5] New causes of action cannot be introduced by an amendment. Tatham *v.* Rawey, 82 Pa. St. 130.

be made without injustice to the other side.[6] There is no injustice if the other side can be compensated by costs, but if the amendment will put them into such a position that they must be injured, it ought not to be made whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."[7]

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## *Service out of Jurisdiction.*

*In re* **EAGER. EAGER** *v.* **JOHNSTONE.**

(22 CH. DIV. 86.)

Principle. *Since the Judicature Acts the Court has no power to give leave for service out of the jurisdiction except in the cases specified in R. S. C.* 1883, *O. XI.*

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Summary of facts. An action was brought for the administration of the estate of E. R. Eager. The whole estate was situated in Ceylon, and an application was made for leave to serve the writ of summons on the sole defendant, a British subject resident in Scotland, who was the executor and trustee of Eager's will. The defendant was charged with breach of trust and his removal sought. The Court of Appeal refused the application.

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In this case Jessel, M.R., delivered judgment as follows: "The new rule is exhaustive: the old practice is no longer applicable. This ★ case is admitted not to be within the rule, therefore we cannot order service. The application must be refused."

[★ 305]

Order XI. of the Rules of the Supreme Court, which

[6] Where a jury in announcing the verdict makes a mistake as to the proper amount of damages assessed, the mistake may be corrected before the jury is discharged, even though the Court has recorded the erroneous amount. Pepper *v.* City of Phila., 4 Amerman (Pa.), 97.

[7] A *scire facias* to revive and continue a lien of judgment cannot be amended to one of debt or assumpsit for this would be changing not only the form but the cause of action. Murphy *v.* Crawford (to use), 114 Pa. St. 496.

is a statutory reversal of the old practice as laid down in the old leading case of *Drummond* v. *Drummond* (L. R. 2 Ch. 32), where the former authorities are reviewed, enumerates the following seven cases in which service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge.

R. S. C. 1883, O. XI.

Cases where service out of jurisdiction may be allowed.

(*a*) The whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits) or

(*b*) Any act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action, or

(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction, or

(*d*) The action is for the administration of the personal estate of any deceased person who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee which ought to be executed according to the law of England, or

(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which according to the terms thereof ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland, or

(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof, or

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

In *Société Générale de Paris* v. *Dreyfus Brothers* (29 Ch. D. 238), where, under the circumstances, the Court allowed service of a writ for an injunction, but reserved the question of costs, the judge dwelt with much emphasis on the great inconvenience and annoyance of a foreigner being brought to contest his rights in this country; and expressed a strong opinion that the Court ought to be exceedingly careful before it allowed service out of the jurisdiction, and pointed out that the course of legislation indicated that the Legislature also had been of that opinion. According to the old rule

given under the Orders of 1845, the Court had an absolute power to order service out of the jurisdiction. This power was contracted in 1875, and still further contracted by the present Rules of 1883. In this case it was laid down that even in the cases enumerated in the Order, the Court has got a discretion as to whether the case is a reasonable one, and whether it should allow service out of the jurisdiction, and that it will go [★ 306] into ★ evidence to ascertain the merits of the case. And see under the Rules of 1875, *Fowler* v. *Barstow* (20 Ch. Div. 240), overruling on this point *The Great Australian Gold Mining Co.* v. *Martin* (5 Ch. D. 1).

The authorities on this subject are most carefully considered in *In re Busfield*, *Whaley* v. *Busfield* (32 Ch. Div. 123), where the Court decided that there was no jurisdiction to authorize service of an originating summons out of the jurisdiction.

In this case the Court affirmed the principle laid down in the leading case that Order xi. was intended to form a complete code upon the subject, and to shew when such service could and when it could not be effected, and stated the law as follows:—"Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute a Court has no power to exercise jurisdiction over any one beyond its limits."

Statement of the law on the subject.

Service out of the jurisdiction may also be allowed of amended copies of writs of summons, or notices in lieu of service thereof, upon defendants added or substituted (Order xvi. r. 13) and also of the following documents:

Third party notices under Order xvi. r. 48: *Swansea Shipping Co.* v. *Duncan* (1 Q. B. D. 644): Counterclaims, *In re Luckie*, *Badham* v. *Nixon*, W. N. 1880, p. 12.

Service out of the jurisdiction cannot be allowed of the following documents:

Service out of jurisdiction not allowed.

An originating summons: *In re Busfield*, *Whaley* v. *Busfield* (*ubi supra*).

A summons or order to tax a solicitor's costs: *Re Maughan*, *Ex parte Brandon* (22 W. R. 748).

A summons for taxation of costs, *Ex parte Brandon* (34 W. R. 352).

Orders made during the winding-up of a company, *In re Anglo-African Steamship Co.* (32 Ch. Div. 348).

Petitions under the *Trustees Relief Act*, 1847 (10 & 11 Vict. c. 96), and see Piggott on Service out of the Jurisdiction (2nd ed. pp. 17 and 18).

It was held in *In re Nathan, Newman & Co.* (35 Ch. Div. 1), (distinguishing *In re Anglo-African Steamship Co., ubi supra.*), that a notice under the General Order of Nov. 11, 1862, r. 30, of an appointment to settle the list of contributories of a company, may be served out of the jurisdiction in manner provided by r. 60.

Time for appearance.

It having become necessary in the opinion of the authorities, "having regard to the increased facilities given by the General Post Office, consequent upon the great extension of railway and steamboat communication within the last thirty or forty years," to revise the table of times for appearance after service out of the jurisdiction, an order was issued for that purpose dated 15th July, 1886. The time allowed for entering appearance is generally double the ordinary time it takes to search the place where the defendant probably may be found, and ★ to this there is in each case added the [★ 307] eight days allowed for appearance when service is within the jurisdiction, with a slight addition when the place is difficult of access; and the order proceeds to say that it will also be generally advisable to allow a certain area for service.

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*De minimis non curat lex.*[1]

## WESTBURY-ON-SEVERN RURAL SANITARY AUTHORITY *v.* MEREDITH.

(30 Ch. Div. 387.)

Principle.

*When the the value of the subject-matter is under £10, an action cannot, in the absence of special circumstances, be maintained in the High Court of Justice in respect of any matter which before the Judicature Act could only have been dealt with by the Court of Chancery.*

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Summary of facts.

The plaintiffs, the Rural Sanitary Authority of Westbury-on-Severn, had expended a sum of £6

[1] Courts of justice do not in general take trifling and immaterial matters into account. Broom's Legal Maxims, 142, and for application of the maxim see Davis *v.* Sabita, 13 P. F. Sm. 90; Carr *v.* McGovern, 66 Pa. St. 457.

19*s.* 1*d.* on the execution of drainage works upon premises within their district belonging to Meredith, who was liable under the *Public Health Act*, 1875, to repay the amount expended with interest. The plaintiffs claimed a declaration that the £6 19*s.* 1*d.* was a charge upon the premises, and that if necessary it might be enforced by a sale; and asked for a receiver. The Judge dismissed the action, and the Court of Appeal confirmed his decision.

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The plaintiffs in this case found themselves in a strange position. The action sought to enforce a charge, and it therefore could not, before the *Judicature Act*, have been brought in a common law court. Nor could it under the former practice have been maintained in the Court of Chancery, for the old rule of that Court (Rule 1 of Order IX. Consolidated Orders, 1860) was "that every suit, the subject matter of which is under the value of £10, shall be dismissed, unless it be instituted to establish a general right, or unless there
[★308] shall be some other ★special circumstance, which, in the opinion of the Court, shall make it reasonable that such suit should be retained." The Court of Appeal were unable to find any authority for the proposition that the jurisdiction had been enlarged so as to enable the High Court to give an equitable remedy in aid of a common law demand, and as they held that the *Judicature Act* had not conferred any new right of relief, but had only given to the High Court the jurisdictions which the Court of Chancery and the Court of Common Law had before, the plaintiffs were without remedy so far as the High Court was concerned. To crown all, the plaintiffs in the present case, who might beyond question have enforced their remedy in a County Court, had allowed the six months within which proceedings must then be taken to go by, and the Court of Appeal, while deciding that they could do nothing for the plaintiffs on the application before them, declined to express any opinion as to whether they had any possible means of obtaining relief.

The question whether the smallness of the amount involved should preclude a plaintiff from relief in the Court of Chancery has been discussed in several cases in ancient and modern times.

In the very old case of *Parrot et alii* plaintants. *Paw-*

*let* defendant, Carey's Reports 103 (21 Eliz.), the suit being for the benefit of the poor of a parish, was "retained" though under the value of 40*s.* per annum.

In *Cocks* v. *Foley* (1 Vernon, 359 (1865) ) a bill was allowed to lie in equity (there being difficulties in the case which precluded the plaintiff from relief at law) for quit rents of the value of three and two shillings respectively, which, it was alleged, had been constantly paid time out of mind.

In *Beckitt* v. *Bilbrough* (8 Hare, 188) the sum recovered was only £9, and it was contended that the plaintiff ought not to be allowed his costs. It was held, however, that as at the time when the plaintiff commenced his action the state of his information was such that he was justified in believing he might possibly recover over £20, the defendant who alone was bound to give him information, had refused to give any, and the plaintiff had at each stage offered to abandon the suit on reasonable terms, the cost must follow the result of the suit.

To come to modern times, in *Seaton* v. *Grant* (L. R. 2 Ch. 459) a bill was filed by the plaintiff, who was the holder of five shares which he had purchased for the purpose of qualifying himself for his present litigation (on behalf of himself and all the other shareholders in a company except the defendants), impeaching certain transactions on the ground of fraud. The defendant moved to have the bill taken off the file, or to have all further proceedings stayed, and one of the objections advanced was that the plaintiff's interest was merely nominal, and that if the whole amount claimed were recovered and divided among the shareholders represented by the plaintiff, his share would be about forty shillings. The Court of Appeal overruled this objection, saying that they were not prepared to apply the ordinary ★ rule as to less than £10 value to such a case, [★309] and that the aggregate interest of all the shareholders was amply sufficient to sustain the suit.

In *In re National Assurance and Investment Association, In re Cross* (L. R. 7 Ch. 223), a solicitor had carried a claim in a winding-up on behalf of a creditor to a successful result, and he applied to the Court for a lien for the amount of his costs, £1 15*s.*, on the dividend payable to his client. The judge of first instance refused the application, and the matter came before the Court of Appeal, where it was urged that the case was a "representative" one which would govern some hundreds of others, and that if the smallness of the amount

were made an objection to a solicitor enforcing his lien, it would be an encouragement to solicitors to make out large bills of cost. James, L.J., however, said that, unless so ordered by the House of Lords or some other competent Court, he would not allow an appeal for the sum of £1 15*s.*, and he dismissed the appeal with costs. See generally as to actions where the amount involved is small, Broome's Legal Maxims under the heading, "De minimis non curat lex."

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## *Practice since the Judicature Acts.*

### NEWBIGGIN-BY-THE-SEA GAS COMPANY *v.* ARMSTRONG.

(13 Ch. D. 310.)

### NURSE *v.* DURNFORD.

(13 Ch. D. 764.)

Principle.

*Where no rule of practice is laid down by the orders under the Judicature Acts, and there is a variance between the former practice of the Courts of Chancery and Common Law, that practice which is considered by the Court to be the better and more convenient, is to prevail.*

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Summary of facts.

In both these cases solicitors had commenced actions without the authority of the persons whose names were employed as plaintiffs. The actions were dismissed, and the solicitors, in accordance with
[★310] the practice which had ★ previously prevailed in the Common Law Courts, were ordered to pay all costs. the costs of the plaintiffs as between solicitor and client, and the costs of the defendants as between party and party.

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Unauthorized use by solicitor of name of a plaintiff.

The practice which had prevailed in the Court of Chancery with regard to cases where a solicitor had employed the name of a person as plaintiff without his authority, had been completely different from that which was established with regard to similar cases in the Com-

mon Law Courts. According to the established practice of the Court of Chancery (recognized by the Court of Appeal in *Palmer* v. *Walesby* (L. R. 3 Ch. 732)) as stated by Jessel, M.R., in the leading cases, the defendant was left to get his costs from the person named as plaintiff, who had afterwards to get those costs over from his solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of his solicitor. The practice of the Common Law Courts, on the other hand, was to serve the defendant with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant.

Former common Law and Chancery practice contrasted.

Jessel, M.R., after stating the former practice in the old Court of Chancery, and contrasting the two different practices, proceeded as follows :—"The question is, which practice is now to be followed. Since the passing of the *Judicature Act* that must be left to the Court to determine. By the 21st section of the *Judicature Act*, 1875, it is enacted that in cases where no new method of procedure is prescribed the old practice is to prevail, but where there is a variance in the practice it does not say which practice. I have no hesitation in saying that I think the common law practice in this case is founded in natural justice and ought to be followed in the future."

Common Law practice adopted.

Similar observations with regard to the more sensible practice adopted by the Common Law Courts are contained in the judgment in *Nurse* v. *Durnford* (13 Ch. D. 764). In that case it appeared that the London agents in question who were ordered to pay costs, had inserted the name of Walker, the plaintiff whose name had been employed without his authority, in the ordinary course of business, acting on the instructions of his co-executor, and assuming that a proper retainer had been obtained by Nurse, the country solicitor, since deceased, who had been joined as co-plaintiff. The Court expressed an opinion that the London agents would have a right of proof against the estate of Nurse for all the costs which they would have to pay.

In *In re Savage* (15 Ch. D. 557), Jessel, M.R., though under the circumstances he made no order in favour of the applicants as to costs, stated the general rule to be that a solictor who acted without authority should be made to pay the costs.

★ It was held in *Wray* v. *Kemp* (26 Ch. D. 169) that a retainer to a country solicitor did not justify an action [★311]

in which the names of the London agents appeared as principals and not as agents for the country solicitor. The Court said that the usual practice where country solicitors had been retained of substituting the name of the London agents for that of the country solicitors, however reasonable as between the solicitors themselves, did not make the London agents the solicitors of the party, and pointed out, following the observation of Kindersley, V. C., in *Atkinson* v. *Abbott* (3 Drew. 251), that a solicitor ought to see that he has his retainer very carefully worded, especially when given on behalf of an ignorant and uneducated person.

The principle of *Nurse* v. *Durnford*, *In re Savage*, and *Wray* v. *Kemp* (*ubi supra*) was reluctantly followed in *In re Scholes and Sons* (32 Ch. D. 245), where an extremely technical objection to an order for taxation of costs was allowed to prevail. A firm of London agents, acting for country solicitors duly authorized, obtained an order for taxation of costs, but the names of the London agents were endorsed on the petition for taxation as principals. The order for taxation was discharged on the application of the client, but without costs, Pearson, J., expressing regret that he could not make the applicants pay costs.

Cases where the "better and more convenient practice" has been adopted.

The following are some of the principal cases in which the Court has decided, in accordance with the principle laid down in *Newbiggin-by-the Sea Gas Company* v. *Armstrong*, that a certain practice is to be adopted as the better and more convenient.

In *Atherley* v. *Harvey* (2 Q. B. D. 524) it was held that the Chancery practice against allowing criminating interrogatories to be put must be followed; but see *Fisher* v. *Owen* (8 Ch. D. 654, and R. S. C. 1883, Order xxxi, r. 6).

In *In re Radcliffe* (7 Ch. D. 733) the rule of equity was allowed to prevail, that if an executor or administrator after the commencement of a creditor's action and before judgment voluntarily pays any creditor in full, the payment is good even though he may have notice of the action before payment.

The old Chancery rule, that where a party was in contempt for not paying costs ordered to be paid, the proceedings should be stayed, was upheld in *In re Youngs, Doggett* v. *Revitt* (3 Ch. Div. 239) (notwithstanding *Morton* v. *Palmer* (9 Q B. D. 89), where the Queen's Bench Division declined under the circumstances to proceed on that principle), and in *In re Neal*, *Weston* v. *Neal* (31 Ch. D. 437), but it was laid down in *In re*

*Wickham, Marony* v. *Taylor* (35 Ch. Div. 272) that the jurisdiction to stay proceedings does not depend on any old practice of the Court of Chancery, but is founded and ought to be exercised on the principle and for the purpose of preventing vexation and oppression; and see *Randle* v. *Payne* (23 Ch. D. 288), and *Martin* v. *Earl Beauchamp* (25 Ch. Div. 12), where proceedings were stayed for the same reason until payment of costs of previous proceedings.

The practice of the Chancery Division in exercising the jurisdiction ★ over solicitors under sect. 87 of the [★312] *Judicature Act*, 1873, prevails, and the Court will not grant a rule *nisi*: *Re Copp* (32 W. R. 25).

In *La Grange* v. *McAndrew* (4 Q. B. D. 210) the rule of equity was adopted, and the Divisional Court dismissed the action where the plaintiff had failed to comply with an order requiring him to give security for costs, without requiring the defendant to first abandon the order for security.

In *Grant* v. *Holland* (3 C. P. D. 180) the Divisional Court decided, notwithstanding an ingenious argument founded on sect. 87 of the *Judicature Act*, 1873, that the rule of equity should prevail, and that an order made in an application to change the solicitor in a pending action should not contain a provision for the costs of the solicitor so removed. "The absence of the mention of costs," said the Court, "in no way interferes with the solicitor's lien upon any fund in Court, or upon the papers in the Court" (to which may be added that the solicitor might have in addition a charge upon the property preserved by means of his services, as to which see *ante* p. 193 *et seq.*).

In *Thomas* v. *Palin* (21 Ch. Div. 360) it was held, in accordance with the common law practice, that it is no longer necessary that a copy of an order which is served should have the endorsement previously required by the old Consolidated Order XXIII. r. 10, stating the consequences of failing to obey the order. The reason is that while under the old practice an attachment could be obtained as a matter of course, under the present practice (R. S. C. 1883, O. XLIV. 2) it cannot be issued without leave and on notice. "Under the present practice," said the Court, "the party against whom the application is made has notice, and if he comes to the Court and gives an excuse for non-obedience to the order the Court will listen to him. Every man served with an order of the Court must know that it is not a *brutum fulmen*, but will be enforced somehow and that

the Courts do not make orders which cannot be enforced. Where an attachment is moved for, the party will be heard if he has any reason to give why he should not be attached."

In *Harvey* v. *Croydon Union Rural Sanitary Authority* (26 Ch. Div. 249) the practice of the Queen's Bench Division was adopted, viz. that where a consent to an order is given by counsel with the authority of his client, it cannot be arbitrarily withdrawn, though if there be mistake, surprise, or any sufficient ground, an application may be made to set it aside. See further as to orders by consent, *Attorney-General* v. *Tomline* (7 Ch. D. 388); *Michel* v. *Mutch* (34 W. R. 251).

The practice of the Common Law Division prevails with regard to making a reference to arbitration under an agreement, a rule of Court: *Jones* v. *Jones* (14 Ch. D. 593); and see as to specifying the grounds of objection in a notice of motion to set aside an arbitrator's award, *Mercier* v. *Pepperell* (19 Ch. D. 58).

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[★313] ★*Jurisdiction of the Court of Appeal.*

FLOWER *v.* LLOYD.

(6 Ch. Div. 297.)

Principle.

*The Court of Appeal has now complete power to rehear an action so as to substitute a proper judgment or order for any judgment or order which it deems to have been improperly made, but it has no jurisdiction to rehear an appeal.*

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Summary of facts.

Judgment had been given by the Court of Appeal dismissing an action for an infringement of a patent. The plaintiff then applied for a rehearing of the appeal with fresh evidence, on the ground that the defendants had fraudulently concealed parts of their process of manufacture from an expert who had been sent down by the Court to inspect their works, but the Court Appeal decided that they had no jurisdiction to rehear the appeal.

The judges of the Court of Appeal in deciding this case proceeded on the principle that it was all-important the Court of Appeal should itself set the example to other bodies of obeying the law, and should not attempt to enlarge its jurisdiction beyond that which Parliament has chosen to give it. "This Court," said Jessel, M R., "has very large powers conferred upon it by the *Judicature Act* with reference to the disposing of appeals, but beyond that it has no jurisdiction. It is a Court of Appeal and nothing more." The 4th section of the *Judicature Act*, 1873, provides that the Supreme Court "shall consist of two permanent divisions, one of which, under the name of 'Her Majesty's High Court of Justice,' shall have and exercise original jurisdiction, . . . and the other of which, under the name of 'Her Majesty's Court of Appeal,' shall have and exercise appellate jurisdiction with such original jurisdiction as may be incident to the determination of any appeal." This section is to be read in connection with sect. 18 of the same Act, and with Order LVIII. conferring upon the Court very ★ sweeping powers in rehearing actions, of allowing amendments, admitting further evidence, drawing inferences of fact, making such further or other order as the case may require. The general effect of the Act and rules on this subject may be summed up in the following statement collected from the judgments in the leading case.

Judicature Act, 1873, sect. 4.

R. S. C. 1883, O. LVIII.

[★ 314]

The Appeal Court is not a part of the High Court. Both are parts of the Supreme Court. The High Court is one part, the Supreme Court another part. The power of the Court of Appeal in rehearing actions is to substitute a proper order for the order which they consider to have been improperly made by the High Court. Its original jurisdiction is limited to that which is necessary for the determination of any appeal, and the amendment, execution, and enforcement of any order made on such appeal.

An appeal is in the nature of a rehearing, *Laird* v. *Briggs* (16 Ch. D. 663), *Mapleson* v. *Quilter* (9 Q. B. Div. 672). The Court of Appeal has power not merely to make any order which ought to have been made by the Court below, but also to make such further order as the case may require, *i.e.* to make such order or judgment as ought to be made at the time when the appeal comes before it. The Court of Appeal proceeded on this principle in *Quilter* v. *Mapleson* (*ubi supra*), which affords a very striking illustration of the powers of the Court in this respect. There the plaintiff obtained

An appeal is a rehearing.

judgment in July, 1881, to recover possession of Her Majesty's Theatre, Haymarket, under a proviso of re-entry for breach of a covenant to insure. The defendant appealed next month. A stay of proceedings had been granted and continued, so that the plaintiff never obtained possession. On the 1st January, 1882, the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), came into operation. The appeal came on for hearing afterwards, and the Court of Appeal under sect. 14 of that Act granted relief against the forfeiture. The rule, they said, was intended to enable the Court of Appeal to do complete justice, and if the law was altered, to make such order as the case required, according to the law existing when the matter came before them.

The same principle that an appeal is a rehearing is also well illustrated by the case of *Laird* v. *Briggs* (16 Ch. D. 663). There at the trial the judge had refused leave to amend. The Court of Appeal decided that there was no necessity for a separate application to them for leave, as the whole matter would be open on the hearing of the appeal, when the Court could give leave to amend (as it subsequently did (19 Ch. D. 22)) if it thought proper.

The practice of the Court with regard to appeals is stated in a memorandum (1 Ch. Div. 41), but the only portion of it material for the present purpose is that all summonses which finally settled the rights of parties, such as summonses under winding-up orders or in administration suits, are to be heard by the full Court of Appeal.

Time for appealing.

In *Curtis* v. *Sheffield* (21 Ch. Div. 1) an interesting history is given of the great change which has been made in latter days with regard to the time for appealing. (1) For a long time there was no limit of [★315] ★time; (2) then the time was limited to twenty years unless there were special grounds, (3) Then by the General Order of 7th August, 1852, the time for appeal was reduced to five years. (4) Finally, under the present rules the limit of time is one year in the absence of special circumstances. "Not only," Jessel, M.R., continued, "has opinion varied as to the period of appeal, but opinion has varied as to the grounds upon which appeal should be allowed after time, and in that respect also the rules have become more stringent." This case was considered in *Fussell* v. *Dowding* (27 Ch. D. 241), where it was held that in the absence of special circumstances, *ex. gr.* collusion, fraud or irregularity,

an order to revive a suit or carry on proceedings therein for the mere purpose of appealing against a decree ought not to be made after the time now limited for an appeal, viz. a year.

With regard to the time for appealing, Order LVIII. r. 15 (practically embodying the effect of previous decisions), provides that no appeal to the Court of Appeal from any interlocutory order, or from any order whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal. As to what orders are interlocutory and what are final, see the cases collected in the Annual Practice.

R. S. C. 1883, O. LVIII. r. 15.

Security for costs of appeal.

Interlocutory and final orders.

It was held in *In re Smith*, *Hooper* v. *Smith* (26 Ch. Div. 614), that where an application is refused, and the judge adds special directions as to costs, that is to be treated as a simple refusal, and the time for appealing was from the date of refusal.

The order in the ordinary form for foreclosure judgment is final, and the appeal can be heard even though after the notice was served the foreclosure has been made absolute: *Smith* v. *Davies* (31 Ch. D. 595). An order made on originating summons is an order made in an action, and is consequently appealable at any time within a year. *In re Fawsitt*, *Galland* v. *Burton* (30 Ch. Div. 231). It was decided in *Christopher* v. *Croll* (16 Q. B. Div. 66) that an appeal was "brought in time" when notice of motion was served in the prescribed period.

Foreclosure judgment.

Originating summons.

An order made on a summons by a creditor in an administration action stands in a somewhat singular and anomalous position. It is interlocutory for the purpose of determining the time within which an appeal must be brought, but for all other purposes it is final. *In re Compton*, *Norton* v. *Compton* (27 Ch. D. 392).

A judge's order is always subject to appeal unless it

[★ 316] is expressly ★ forbidden: *Pollock* v. *Rabbitts* (21 Ch. Div. 466), where an appeal was allowed from the order of a judge settling the form of a conveyance.

Evidence on appeal.

An important point of practice with regard to the admission of evidence on appeals was decided in *Ex parte Jacobson*, *In re Pincoffs* (22 Ch. Div. 312). When a judge of first instance expresses his willingness to decide in the defendant's or respondent's favour without hearing his evidence, his counsel may either accept the decision on these terms or insist on having the evidence read; but even in the former case the Court of Appeal has power to allow the evidence to be adduced before reversing the decision. By a somewhat singular omission no provision has been made in the rules under the *Judicature Act* for substituted service of notice of appeal, but the Court has jurisdiction in a proper case to make an order for substituted service: *Ex parte Warburg*, *In re Whalley* (24 Ch. Div. 364).

Substituted service of notice of appeal.

Extension of time for appealing.

The rule with regard to extension of time was stated in *In re Manchester Economic Building Society* (24 Ch. Div. 488), where the decision in *In re New Callao* (22 Ch. Div. 484) was approved as follows. In order that the appellant may be relieved from lapse of time it is not necessary to shew that there is something in the conduct of the respondent which entitled the appellant to be relived; it is sufficient if he satisfies the Court that there is something either in the acts of the respondent or from other circumstances which entitled him to be relieved, and to be allowed to appeal notwithstanding the time had lapsed.

Appeal from judgment by default.

The Court of Appeal has, it would seem, jurisdiction to hear an appeal from a judgment by default, but such appeals will be discouraged as being likely to "flood" the Court of Appeal with the hearing of actions in the first instance. The proper course is for a party to apply to the judge who heard the cause to set aside the judgment and rehear the action: *Vint* v. *Hudspith* (29 Ch. Div. 324). An application for an extension of time in such a case may be made at the same time as the application to set aside the judgment if the action is still pending: *Bradshaw* v. *Warlow* (32 Ch. Div. 403); *In re Indian, Kingston and Sandhurst Mining Company* (22 Ch. D. 83).

Security for costs of appeal.

An application for security for costs of an appeal must be made promptly. As a general rule it is too late if it is made when the appeal is in the paper for hearing. The Court will, however, take into account special circumstances; see in *In re Clough*, *Bradford*

*Commercial Banking Company* v. *Case* (35 Ch. Div. 7). *Semble*, the Court will be more strict in enforcing promptness where application is made on the ground of poverty than where it is on the ground of the appellant being out of the jurisdiction. A limited company appealing alone from a winding-up order will generally be ordered to give security for costs: *In re Photographic Artists Association* (23 Ch. Div. 370). There is no rule exempting an insolvent appellant from giving security of costs of appeal on the ground that the case involves a question of law not previously considered by a Court of Error: *Farrer* v. *Lacy, Hartland & Co.* (28 Ch. Div. 482).

★ The Court of Appeal decided in *Washburn and Moen Manufacturing Company* v. *Patterson* (29 Ch. Div. 48) to resort to the old practice (which had been for some time abandoned), viz., that when an order has been made for an appellant to give security for costs and he has not done so within a reasonable time (and as a general rule three months is more than a reasonable time), an immediate order will be made dismissing the appeal, unless there are extenuating circumstances. In *United Telephone Company* v. *Bassano* (31 Ch. Div. 630), the appellant became bankrupt before the appeal was ready. It was held, under the circumstances, that, though bankrupt, he had still a sufficient interest to entitle him to go on with the appeal, and an order was made dismissing the appeal unless within a specified time the bankrupt gave security or his trustee became a party to the proceedings. In *In re McHenry* (17 Q. B. Div. 351) the deposit paid by a bankrupt on a bankruptcy appeal was ordered to be increased by £100 on the ground that he had already engaged in "protracted litigation—always unsuccessful and always troublesome and expensive—with his present opponents." A singular order was made in *Willmot* v. *Freehold House Property Company* (W. N. 1885, p. 65) directing £5 security for costs of the appeal against an order directing security for costs. [★ 317]

Bankruptcy of appellant pending appeal.

In *In re Strong* (31 Ch. Div. 273) a solicitor appealed from a "mixed" order, as the Court of Appeal called it, which, in addition to striking him off the rolls, ordered an account of moneys which he had received and directed payment within a month of the amount found due. The Court ordered security for costs, but expressed an opinion that if the appeal had been simply from the "penal" order striking the solicitor off the rolls, security for costs would not have been required.

It was held in *In re Gilbert*, *Gilbert* v. *Hudlestone* (28 Ch. Div. 549), that where an appeal is brought by leave from an order as to costs, which are left by law to the discretion of the judge, the Court of Appeal will have regard to his discretion and will not overrule the order, unless there has been a disregard of principle or misapprehension of facts.

Appeal for costs.

Where the jurisdiction of the judge to inflict costs arises from the party being guilty of a breach of injunction or other misconduct, an appeal lies as to costs alone. "It is an appeal against the finding, by means of which the judge clothes himself with the jurisdiction to inflict costs:" *In re Milton* (53 L. J. (Q. B.) 65); *Stevens* v. *Metropolitan District Railway Company* (29 Ch. Div. 60, 73).

Where an action has been dismissed with costs for want of prosecution there is no appeal: *Snelling* v. *Pulling* (29 Ch. Div. 85). See *In re McClellan*, *McClellan* v. *McClellan* (29 Ch. Div. 495), as to costs where the matter was pending on October 24th, 1883.

Mortgagee's costs.

A mortgagee deprived of costs on the ground of misconduct may appear, but if the judge, notwithstanding misconduct, allows a mortgagee's costs, the mortgagor has no right of appeal, as the fact of misconduct brings the costs within the discretion of the judge: *Charles* v. *Jones* (33 Ch. Div. 80).

[★318]

Staying proceedings.

★ It was held in *Cropper* v. *Smith* (24 Ch. Div. 305) that the effect of the rules is to give a concurrent jurisdiction to the Court of Appeal and the Court below to stay proceedings, but that the application must first be made to the Court below. The application to the Court of Appeal must be made within a reasonable time, but as it is not an appeal it need not be made within twenty-one days.

Fund in Court.

It is not the practice of the Court to retain a fund in Court which has been ordered to be paid out, merely because there is an appeal from the order pending; there must be some special circumstances: *Bradford* v. *Young* (28 Ch. Div. 18).

Married woman appealing *in formâ pauperis*.

A married woman, who had sued without a next friend not *in formâ pauperis*, applied for leave to appeal *in formâ pauperis*, and it was held by analogy to the present practice, Order xvi. rr. 22, 23, 24, of R. S. C. 1883, that the husband as well as the appellant herself must make the required affidavit of poverty: *In re Roberts*, *Kiff* v. *Roberts* (33 Ch. Div. 265).

Alteration of order.

It was held in *In re Swire*, *Mellor* v. *Swire* (30 Ch. Div. 239), that when an order made by the Court of Ap-

peal was drawn up, passed, and entered in such a form that it might be contended that the Court had decided questions which were not before it, and which it never meant to decide, the order ought to be altered. The Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains matter which does not express the judgment the Court in fact delivered, it has jurisdiction which it will in a proper case exercise to correct its record, that it may be in accordance with the order really pronounced. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, the Court said, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal.

In this case, however, as the applicant had not adopted the usual and proper practice of applying to vary the minutes, he was ordered to pay the costs of the application.

Judgment or order obtained by fraud.

An interesting and important question was discussed in the leading case as to the mode of obtaining relief against a judgment or order obtained by fraud. The Court of Appeal, in refusing the motion for a rehearing of the appeal, said that if there were no other remedy they should be disposed to think that the relief asked ought to be granted, as they should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place ; but they were satisfied that there was another remedy. The old practice remaining wherever it has not been altered by the new rules, it became necessary to consider the former rule in the Chancery Courts, and this was that where a decree had been obtained by fraud it was to be impeached by a new suit (and for this purpose it was necessary in the great majority of cases to obtain the leave of the Court to commence the suit) in which the issue of fraud and of fraud alone was raised.

[★319] ★A separate action was subsequently brought (10 Ch. Div. 327) to set aside the judgment obtained in *Flower* v. *Lloyd*. The Court of Appeal dismissed the action, and James, L.J., took occasion to deliver some observations, one of his colleagues assenting and the other dissenting, in which he expressed considerable doubts whether such an action could be maintained. "Where," he asked, "is litigation to end if a judgment obtained in an action fought out adversely be-

tween two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given?" But see the judgment of Jessel, M.R., in the leading case (6 Ch. D. p. 299), from which it would seem clear that a judgment obtained by fraud might (with leave) be impeached by an original action. See *Priestman* v. *Thomas* (9 P. D. 70, 210).

See *Abouloff* v. *Oppenheimer & Co.* (10 Q. B. Div. 295) where it was held that a foreign judgment obtained by fraud could not be enforced in an English Court even though the foreign court had decided that the fraud had not been committed.

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## *Administration Judgments and Orders.*

*In re* BLAKE. JONES *v.* BLAKE.

(29 Ch. Div. 913.)

Principle.

*The former practice of the Court, that a person interested in the residue was entitled as of course to a full administration of the estate, is now completely altered, and all applications for administration judgments or orders are at the risk of the applicants.*[1]

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Summary of facts.

A testatrix left the residue of her real and personal estate to trustees upon trust to sell with all convenient speed, with power to postpone the sale at their discretion and hold the proceeds in trust for her children and grandchildren in equal sixth shares. The trustees advertised the residuary estate for sale

[1] In most of the States of the Union where a testator has made a will and has either failed to appoint an executor or the executor he has named has died, or renounces, or becomes disqualified in any way there is a certain order of appointment fixed by statutes in the various States which regulate the appointment of a person to administer the estate. The residuary legatee is not entitled to appointment.

by auction, and an ★ application was made in behalf [ ★ 320]
of two residuary legatees, one of whom was an infant, asking (*inter alia*) that the trustees might be ordered to abstain from selling the real estates, for certain accounts, and if and so far as should be necessary, general administration. The Court of Appeal (varying the order of Kay, J.) refused to interfere with the trustees' discretion as to selling the estate, directed certain inquiries, and declined to make any general order for administration.

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In no single department of modern equity has a greater revolution been introduced than in the practice which concerns the administration of estates. "Formerly," said the Court of Appeal, in delivering judgment in the leading case, "if anyone interested in a residuary estate instituted a suit to administer the estate, he had a right to require, and as a matter of course obtained the full decree for the administration of the estate; and the Court, even if it thought that, although there were really questions which required decisions, those questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the questions." Former practice.

It was held, however, in *Croggan* v. *Allen* (22 Ch. D. 101–104)—where the plaintiff, who had instituted an administration action after her solicitors had expressed themselves satisfied with the accounts, was not only not allowed, but was ordered to pay certain costs—following Lord Westbury's decision in *Bartlett* v. *Wood* (9 W. R. 817, 818), that no costs ought to be given out of the estate for any proceedings except those which are in their origin directed with some show of reason and a proper foundation for the benefit of the estate, or which have in their result conducted to that benefit. Costs of improper administration.

The great changes which have been wrought in the practice as to administrations are contained in R. S. C., 1883, Order LV. rr. 3 *et seq.*, under which application may be made for the determination of the questions and matters there mentioned, by means of an originating summons, without an administration of the estate or trust, and in Order LV. r. 10, and Order LXV. r. 1,

which, according to the judgment of the Court of Appeal in the present case, are to be read together.

Order LV. r. 10 provides that it shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order. The effect of this "most salutary rule" [★ 321] (Order LV. r. 10 was considered in *In re* ★ *Barnard*, *Edwards* v. *Barnard* (32 Ch. Div. 447), where it was regarded as doubtful whether a joint creditor of a partnership firm could take out an originating summons for the administration of the estate of a deceased partner. The result of this order, taken by itself, was thus stated by Cotton, L. J.: "Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, there the right of the party to have the decree or order is not taken away, but the Court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled."

The provisions of Order LV. r. 10, are supplemented by the rule as to the costs of administrations. Order LXV. r. 1, provides on this subject, that, subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge.

Combined effect of O. LV. r. 10. & O. LXV. r. 1.

The Court of Appeal stated the combined effect of the two orders to be that if a party comes and insists that there is a question to be determined, and, for the purposes of determining that question, asks for an administration judgment, the Court cannot refuse the judgment, unless it sees that there is no question which requires its decision; but if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the Court can, and ordinarily ought to, make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary or possibly vexatious application to the Court. The object of the present orders is to prevent the general administration of estates

when the question in dispute can be otherwise properly determined.

It was also laid down in the leading case, dissenting from the view expressed in *In re Wilson, Alexander* v. *Calder* (28 Ch. D. 457), that the mere fact that one of the litigants is an infant is not sufficient reason for making an administration order at the expense of the estate.

Originating summons.

It was held in *In re Carlyon, Carlyon* v. *Carlyon* (35 W. R. 155), that Order LV. r. 3, did not apply to a question arising between the trustees of a will and the trustees of a settlement of another person, which could not under the former practice have been determined in an administration action.

Practice.

When an action is for the administration of personal estate a creditor may sue on behalf of himself. It was decided, however, in *In re Royle* (5 Ch. D. 540), following *Worraker* v. *Pryor* (2 Ch. D. 109), that in a creditors' action for the administration of real and personal estate where there is no devise of real estate to trustees with power to sell and give receipts, a plaintiff must sue "on behalf of himself and all the other creditors," and the writ was directed to be amended accordingly.

It should be remembered, however, that R. S. C. 1883, O. xx. r. 4 ★ provides that "Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ." [★ 322]

The Court however has a power by O. xx. r. 1 (*e*), in cases where a plaintiff delivers a statement of claim without being required to do so (a voluntary statement of claim as it is called in the marginal note), to make such order as to the costs occasioned thereby as shall be just; and even under the old practice the general rule would seem to have been established by *Green* v. *Coleby* (1 Ch. D. 693), that in administration actions statements of claim ought not to be delivered.

Title of action.

The writ and pleadings in administration actions ought to be entitled "In the matter of the estate of A. B., deceased. Between C. D., plaintiffs, and E. F., defendants."

Order LV. r. 10, R. S. C., Dec. 1885, provides that: Upon an application for administration or execution of trusts by a creditor or beneficiary under a will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court or a judge may, in addition to the powers already existing:—

(*a*) Order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings:

(*b*) When necessary to prevent proceedings by other creditors, make the usual judgment or order for administration, with a proviso that no proceedings are to be taken under such judgment or order without leave of the judge in person.

Order LV. r. 15, provides that: No order for general administration or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person, or other property held upon any trust, or the parties entitled thereto, shall be made except by the judge in person.

Wilful default.

Where a case of wilful default is alleged, but the judgment gives no relief on that footing, the claim however not being dismissed, the Court may at any subsequent stage of the proceedings, if evidence of wilful default is brought forward, direct inquiries on that footing: *In re Symons*, *Luke* v. *Tonkin* (21 Ch. D. 757). Allegations of fraud and wilful default ought to be disposed of at the hearing: *Smith* v. *Armitage* (24 Ch. D. 727). After a common administration judgment, leave must be obtained in order to bring an action on the footing of wilful default: *Laming* v. *Gee* (10 Ch. D. 715). The burden of proof is on the party making the charge: *In re Brier*, *Brier* v. *Evison* (26 Ch. Div. 238), and an inquiry as to wilful default cannot be obtained adversely unless one instance at least of wilful default is proved: *In re Youngs*, *Doggett* v. *Revett* (30 Ch. Div. 421).

Costs.

It is the settled rule that the plaintiff in a legatee's administration action is entitled to his costs between solicitor and client, where the estate is insufficient for [★323] the payment of legacies in full, provided it is ★ sufficient to pay debts, but not otherwise. The rule applies even where there is a contest between the plaintiff and another legatee as to the proper mode of dividing the fund. *In re Harve*, *Wright* v. *Woods* (26 Ch. D. 179); *In re Wilkins*, *Wilkins* v. *Rotherham* (27 Ch. D. 703).

In *In re Vowles*, *O'Donoghue* v. *Vowles* (32 Ch. D. 243), a sole executor became bankrupt, after an administration judgment against him. He was a debtor to the estate, and it was held, following *In re Basham*, *Hannay* v. *Basham* (23 Ch. D. 195), that as his debt

would be discharged by his bankruptcy he must be allowed his costs subsequent to the bankruptcy, but his prior costs must be set off against his debt. In *In re Griffiths, Griffiths* v. *Lewis* (20 Ch. D. 465), the action was against the executor of a defaulting executor whose estate was insolvent, and it was held that as he was before the Court in a double capacity he was entitled to the costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the estate.

Foreign creditors.

It was held *Batthyany* v. *Walford* (33 Ch. D. 625) that the plaintiff was entitled to an administration judgment in this country, but that the amount of his claim must be determined in the Courts of the foreign country where the liability (in respect of waste) arose. Foreign creditors are entitled to dividends *pari passu* with English creditors in the administration of the English estate of a deceased person domiciled abroad: *In re Klœbe, Kannreuther* v. *Geiselbrecht* (28 Ch. D. 175).

Absent parties.

The practice of the Court with regard to binding absent parties in cases where under Order XVI. r. 33 *et seq.* a judgment or order for administration of a trust estate is obtained without serving some of the parties interested, was much considered in *May* v. *Newton* (34 Ch. D. 347), where it was stated as follows:—"The effect of all those rules is that persons interested in the property which is being administered and whose rights or interests may be affected by an order directing accounts or inquiries are not bound—at any rate when they ought to be served with notice of such order—unless they are so served or unless such a representation order is made as I have mentioned. If service upon them is dispensed with, or if under Order XVI. r. 46, the Court proceeds in the absence of any one representing them, they are not bound."

Claim against estate of deceased person.

There is no rule of English law which precludes a claimant from recovering on his own testimony against the estate of a deceased person although the Court will generally require such corroboration: *In re Hodgson, Beckett* v. *Ramsdale* (31 Ch. Div. 177); *Maddison* v. *Alderson* (8 App. Cas. 467, 469; *ante*, p. 98). This would appear to overrule the *dicta* of Jessel, M.R., on this point in *In re Finch, Finch* v. *Finch* (23 Ch. Div. 267–271), where, however, the rule is spoken of rather as a rule of prudence than a rule of law.

By Order LV. r. 2 (16), applications for orders on the further consideration of any cause or matter where the

[★324] order to be made is for the ★distribution of an insolvent estate or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders, are to be made in Chambers, but a plaintiff will not be disallowed his costs where the distribution of the estate gives rise to questions of difficulty: *In re Barber, Burgess* v. *Vinnicombe* (31 Ch. D. 665).

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## *Injunction*

### DAY *v.* BROWNRIGG.

(10 Ch. Div. 294.)

### GASKIN *v.* BALLS.

(13 Ch. Div. 324.)

### NORTH LONDON RAILWAY CO. *v.* GREAT NORTHERN RAILWAY CO.

(11 Q. B. Div. 30.)

Principle.

*The effect of sect.* 25, *sub-sect.* 8, *of the Judicature Act*, 1873, *with regard to injunctions has not been to give any new rights to parties who had previously no rights enforceable at law or in equity, but simply to enable the High Court without being hampered by its old rules, to grant an injunction whenever it is just or convenient so to do, for the purpose of protecting or asserting the legal rights of the parties.*[1]

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Summary of facts.

In the first of these cases the plaintiffs alleged that their house had been called "Ashford Lodge" for sixty years, and that the defendants, whose adjoining house had been called "Ashford Villa" for forty years, had recently changed the name of their house to "Ashford Lodge," and that this caused considerable expense and damages and extreme and in-

[1] Injunctions are either interlocutory or perpetual. Kerr on Injunctions, Chap. 2; Kershaw *v.* Thompson, 4 Johns. Ch. 610.

creasing personal ★ inconvenience and annoyance [★ 325] to the plaintiffs. The Court of Appeal decided that there was no case for an injunction.[2]

In the second case defendant purchased part of an estate which was subject to restrictive covenants against building beyond a certain line. Some buildings had been erected by his predecessor, but there had been acquiescence for five years, and the defendant after his purchase erected further buildings beyond the line, and continued to build despite the plaintiff's protest. The plaintiff then commenced an action, and applied for a mandatory injunction to have all the buildings removed. The Court of Appeal granted a mandatory injunction as to buildings erected after the time when the defendant had acquired his title, but refused to interfere with the other buildings.[3]

In the third of these cases the Court refused to issue an injunction to restrain a party from going on with an arbitration which might be futile, vexatious, and cause delay.

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These cases have been grouped together as settling the principles by which the Court is now governed as to the exercise of its extremely important jurisdiction with regard to injunctions. The 25th section of the *Judicature Act*, 1873, sub-sect. 8, provides (*inter alia*) that an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just. In all the three cases the Court was pressed by the argument that the effect of this section of the *Judicature Act* was to extend the principles upon which the Courts proceed in granting injunctions, and in all of them the Court declined to extend its jurisdiction beyond the point to

[2] See 16 U. S. Statutes at Large, 210, and said act declared unconstitutional in Trade Mark Cases, 10 Otto, 82.

[3] Watertown *v.* Cowen, 4 Paige, 510; Scott *v.* Burton, 2 Ashm. 325.

which it had been carried by cases decided before the *Judicature Act*.

In the first of the leading cases, *Day* v. *Brownrigg* (10 Ch. Div. 294), the Court of Appeal disclaimed the power of legislation which the plaintiff's counsel had asserted to exist in the Court. There was, they said, no authority for the proposition that a man had a legal right to the use of any name he chose to affix to any part of his landed property, whether consisting of a house or land, to the exclusion of all other Her Majesty's subjects. "It appears to me," said James, L.J., [★ 326] "there is no ★ damage alleged, there is no legal right alleged, the violation of which was the cause of damage.[4] That being so, it is not for this Court to say that because somebody is doing something which it thinks not quite right, a thing which ought not to be done by one person to another, it should interfere. This Court can only interfere where there is an invasion of a legal or equitable right;" and he subsequently added that the power given to the Court by sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, to grant an injunction in all cases in which it should appear to the Court to be "just or convenient" to do so, did not in the least alter the principles on which the Court should act.[5]

In the second leading case, *Gaskin* v. *Balls* (13 Ch. Div. 324), the Court of first instance had ordered the removal of the buildings which the defendant found on the property when he bought it, but the Court of Appeal considered that it would be going further than any decided case to enforce the covenant against the defendant in respect of acts done before he became owner, and without any complaint at the time. In the matter of injunctions, they said, the *Judicature Act* has done nothing to alter the principles which have been laid down as to the exercise of its powers, where principles have been established as being just and convenient.

In the third leading case, *North London Railway Co.* v. *Great Northern Railway Co.* (11 Q. B. Div. 30),

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[4] If the complainant's legal right is admitted, his right to an injunction is plain; but if he has no legal right the injunction will be refused. Washburn's App., 105 Pa. St. 480. See Carlisle *v.* Cooper, 6 C. E. Green, 576; McCallum *v.* Germantown Water Co., 4 P. F. Smith, 40; Gardner *v.* Newberg, 2 Johns. Ch. 162.

[5] If the damage is slight, or the injury merely contingent the court will not grant an injunction as damages at law will be an adequate remedy. Webber *v.* Gage. 39 N. H. 186; Richards' App., 7 P. F. Sm. 105; Health Dept. *v.* Purdon, 99 N. Y. 241; Bemis *v.* Upham, 13 Pick. 169; Thebaut *v.* Canova, 11 Fla. 143.

the Court of Appeal, in refusing to grant the plaintiffs an injunction on the ground that the defendants were not interfering with any legal right of the plaintiffs or inflicting on the plaintiffs that which the law considers a wrong, laid down clearly the principle on which the Court proceeds.

In *Beddow* v. *Beddow* (9 Ch. D. 89) (where the Court restrained an arbitrator from acting on the ground that he was an unfit person), Jessel, M.R., after pointing out that the extensive jurisdiction given to the Common Law Courts by the *Common Law Procedure Act* is now vested by the *Judicature Act* in the High Court, stated the result of the two Acts of Parliament to be that "the Court had an unlimited power to grant an injunction in any case where it would be right or just to do so, and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." These words, which would seem to have given rise to some misapprehension, were explained by Cotton, L.J. (11 Q. B. Div. 40), as follows:—"If there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, and the circumstances do not render it inconvenient or unadvisable to interfere, but render it convenient and advisable to interfere, the Court may protect that right by giving the remedy which previously would not have been given, namely, an injunction." [6]

The Court of Appeal then considered the decisions of Jessel, M.R., in *Aslatt* v. *Corporation of Southampton* (16 Ch. D. 143), *Stannard* v. *Vestry of St. Giles, Camberwell* (20 Ch. D. 190), and *Hedley* v. *Bates* (13 Ch. D. 498). In the two latter cases, where the plaintiff would have had a right to apply to a Common Law Court for a prohibition, ★ the Chancery Court instead of sending [★ 327] him away to get such a prohibition granted an injunction against going to a wrong tribunal. But there was this common element in all the cases where injunctions had been granted, that there was a legal right which might have been asserted in some Court. This principle however had no application to such a case as that of the *North London Railway Co.* v. *Great Northern Railway Co.*, where the arbitrator had no jurisdiction—where no

[6] Butch *v.* Lash, 4 Iowa, 215. The tendency of the modern decisions in cases of injunctions is against the old rule which required the prior establishment of the legal right. Bispham's Eq. (4th Ed.), Sect. 440.

legal right was interfered with, and accordingly the Court of Appeal declined to grant an injunction.

"All that was done," said the Court of Appeal, "by this section (sect. 25, sub sect. 8, *Judicature Act*, 1873), was to give to the High Court"—which, as is subsequently stated, "amalgamates in itself all the jurisdictions which had previously existed"—"power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights which according to law were previously existing and capable of being enforced in some or one of the different divisions which are now united in the High Court. The sole intention of the section is this, that where there is a legal right which was, independently of the *Judicature Act*, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right."

In *Street* v. *Union Bank of Spain and England* (30 Ch. D. 156) the Court, following the leading case of *Day* v. *Brownrigg*, declined to grant an injunction to restrain the use of a cypher address—the case, in its opinion, being not one of legal injury but simply of inconvenience.[7]

It was held in *London and Blackwall Railway Company* v. *Cross* (31 Ch. D. 354), distinguishing the leading case of *North London Railway Company* v. *Great Northern Railway Company*, that the Court has no general jurisdiction to restrain persons from acting without authority, and accordingly an injunction to restrain a person from taking proceedings out of Court in the name of a person who had given no authority to use it, was refused.[8]

Undertaking as to damages.

In doubtful cases where damage may be occasioned to the defendant, in the event of an injunction or interim restraining order proving to have been wrongly granted, the Court will require the plaintiff, as a condition of its interference in his favour, to enter into an undertaking to abide by any order it may make as to damages.

It was laid down in *Griffith* v. *Blake* (27 Ch. Div. 474, 477), dissenting from the *dictum* in *Smith* v. *Day* (21

[7] Rhodes *v.* Dunbar, 7 P. F. Sm. 274 ; Mohawk Bridge Co. *v.* Railroad, 6 Paige, 554 ; Bradsher *v.* Lea, 3 Ired. Eq. 301.

[8] Equity will interfere by injunction to restrain proceedings at law. Davis *v.* Hoopes, 33 Miss. 173 ; Lyme *v.* Allen, 51 N. H. 242 ; Metler *v.* Id., 3 C. E. Green, 270 ; Vennum *v.* Davis, 35 Ill. 568 ; Ferguson *v.* Fisk, 28 Conn. 501 ; Lyon's App., 11 P. F. Sm. 15.

Ch. D. 421), that whenever the usual undertaking is given, and the plaintiff ultimately fails on the merits, the rule, in the absence of special circumstances, is to grant an inquiry as to damages, though the plaintiff was not guilty of any misrepresentation, suppression, or other default in obtaining the injunction An application for an injunction may be made by the plaintiff either *ex parte* or on notice.[9] If by any other party, then on notice to the plaintiff, and at any time after appearance by the party who makes the application (R. S. C. 1883, O. L. r. 6.)

[★ 328] Interlocutory injunction.

★ The nature of an interlocutory injunction is well illustrated by *Preston* v. *Luck* (27 Ch. Div. 497), where, there being *primâ facie* a contract between the parties, the Court of Appeal thought it right to keep things *in statu quo*, so that if the plaintiff succeeded, the defendant would have been prevented from meanwhile dealing with the property so as to make the judgment ineffectual. The Court is not deciding finally upon the rights of the parties, but it must be satisfied that there is a serious question to be tried, and a probability that the plaintiffs are entitled to relief (*per* Cotton, L.J.).[10]

It was held in *Wimbledon Local Board* v. *Croydon Rural Sanitary Authority* (32 Ch. Div. 421), distinguishing *Bolton* v. *London School Board* (7 Ch. D. 766), that a motion to discharge an *ex parte* injunction obtained by misrepresentation is proper, though the injunction is about to expire.[11] The following are some of the more important cases on the subject of injunction which have been decided in recent years :—

Company.

A company in voluntary liquidation may be restrained from distributing its assets among its shareholders without providing for future rent and liabilities under a lease: *Gooch* v. *London Banking Association* (32 Ch. Div. 41). Proceedings against a company before a magistrate may be restrained pending the hearing of a

[9] An *ex parte* injunction is only granted in urgent cases where delay might produce an irreparable injury. It is granted to the plaintiff before the appearance of the defendant ; but he is allowed an early opportunity to move to dissolve the injunction and if he fully denies all the circumstances the injunction will usually be dissolved. Dennis *v.* Green, 8 Ga. 197 ; Wood *v.* Paterson, 4 Md. Ch. 335 ; Livingston *v.* Id., 4 Paige, 111 ; Hollister *v.* Barkley, 9 N. H. 230 ; Joyce on Injunctions, 1.

[10] Adams on Equity, 357.

[11] The injunction will not be dissolved if the answer is evasive or if there is extreme improbability in its allegations. Little *v.* Marsh, 2 Ired. Eq. 18 ; Moore *v.* Hylton, 1 Dev. Eq. 429, and Ward *v.* Van Bokkelen, 1 Paige, 100 ; Poor *v.* Carlton, 3 Sumner, 70 ; Authorpe *v.* Comstock, Hopkins R. 143.

petition for winding up.[12] *In re Briton Medical and General Life Assurance Association* (32 Ch. D. 503).

Husband and wife.

Where a house had been settled upon a married woman for her separate use, and proceedings were pending between husband and wife at the suit of the wife for divorce or judicial separation and the parties were living apart, an interim injunction was granted to restrain the husband from going to and using the house for his own purposes :[13] *Symon* v. *Hallett* (24 Ch. Div. 346).

Lectures.

Where a lecture is delivered to an audience limited and admitted by ticket, an injunction may be obtained to restrain the publication for profit of notes taken, and the fact that the publication is in shorthand characters does not make any difference.[14] *Nicols* v. *Pitman* (26 Ch. D. 374), following *Abernethy* v. *Hutchinson* (3 L. J. Ch. (O. S.) 209; 1 H. & T. 28).

Libel.

It was held in *Prudential Assurance* v. *Knott* (L. R. 10 Ch. 142) (Kerr on Injunction, p. 2) that an injunction could not be granted to restrain the publication of a libel, but the law on this point has long been altered. See *Thorley's Cattle Food Company* v. *Massam* (6 Ch. D. 682), considered in *Saxby* v. *Easterbrook* (3 C. P. D. 339); *Halsey* v. *Brotherhood* (19 Ch. Div. 386); *Quartz Hill Consolidated, &c., Company* v. *Beall* (20 Ch. Div. 501), where it was held that there was jurisdiction to interfere in an interlocutory application, but that it is to be exercised with great caution:[15] *Hill* v. *Hart-Davies* (21 Ch. D. 798); *Hayward & Co.* v. *Hayward & Sons* (34 Ch. D. 198).

Slander.

Oral slander was restrained in *Hermann Loog* v. *Bean* (26 Ch. Div. 306.)

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[12] Bills to restrain corporate actions are quite frequent throughout the United States and are used in case of municipal corporations of a private character. Grand Trunk R. W. *v.* Cooke, 29 Ill. 237 ; People *v.* New York, 32 Barb. 102 ; Schofield *v.* Eighth, etc., 27 Conn. 499 ; Dodge *v.* Woolsey, 18 Howe, 341 ; Mathews *v.* Skinner, 62 Mo. 329 ; Nazro *v.* Ins. Co. 14 Wis. 295 ; Sturges *v.* Knapp, 31 Vt. 1 ; Curtenius *v.* Hoyt, 37 Mich. 583 ; Manderson *v.* Bank, 4 Casey, 379 ; Newark Road Co. *v.* Elmer, 1 Stockton, 754.

[13] Interim orders are sometimes made pending litigation. Kerr on Injunctions, 199.

[14] See Bowen *v.* Hall, 20 Am. Law Reg. 587 ; Kemble *v.* Kean, 6 Sim. 333.

[15] It lies upon the plaintiff to prove that the defendant's statements are false and an interlocutory injunction will not be granted unless the applicant shows that "irreparable damage" will ensue from the continuance of the act complained of. Odgers on Libel and Slander, 256, (Text Book Series).

An interlocutory injunction concludes on right. Kerr on Injunctions, Chap. 2.

The subject of the obstruction of ancient lights[16] was carefully considered in *Parker* v. *First Avenue Hotel Company* (24 Ch. Div. 282, ★ 288), where it was held that there was no conclusion of law or necessary inference of fact that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45 from the vertical, and that the question of obstruction is to be determined by the evidence in each case. See further on the subject of light *City of London Brewery* v. *Tennant* (L. R. 9 Ch. 212); *Hackett* v. *Baiss* (L. R. 20 Eq. 497); *Theed* v. *Debenham* (2 Ch. D. 165); *Holland* v. *Worley* (26 Ch. D. 578), where it was held that the Court can exercise its discretion as to awarding damages in lieu of injunction and will take into consideration the circumstances, *ex. gr.* that the property is situated in the centre of London: *Scott* v. *Pape* (31 Ch. Div. 554), where the previous authorities are collected; *Harris* v. *De Pinna* (33 Ch. Div. 238); *Greenwood* v. *Hornsey* (33 Ch. Div. 471). Light. [★ 329]

In *Newson* v. *Pender* (27 Ch. Div. 43) the Court granted an injunction on the grounds (1) that the plaintiff had shewn an intention of preserving his ancient lights; (2) that the balance of convenience was in favour of granting an injunction rather than allowing the building to proceed.[17]

The general rule is that the Court will not grant an interlocutory injunction restraining the mortgagee from exercising his power of sale except on the terms of the mortgagor paying into Court the amount sworn by the mortgagee to be due for principal, interest and costs. This rule does not apply where the Court can see, on the terms of the deed, that the amount alleged cannot be due, *Hickson* v. *Darlow* (23 Ch. Div. 690), nor where the mortgagee was, at the time of taking the mortgage, solicitor of the mortgagor, for then the Court will immediately inquire into all the circumstances and will not allow the solicitor to exercise his unqualified rights as mortgagee, but only subject to the control of the Court and in a fair and equitable manner. *Macleod* v. *Jones* (24 Ch. Div. 289–297). Mortgage.

[16] It is a nuisance obstruct light and air to which the owner of a building is legally entitled. Sutcliff *v.* Isaacs, 1 Parson's Eq. 494. The rule upon the subject of ancient lights in the United States differs from English rule. Chevry *v.* Stein, 11 Md. 1; King *v.* Miller, 4 Halstead, Ch. 559; High on Injunctions, Sect. 553.

[17] No injunction can be obtained simply because a disagreeable object is erected in view, or that a pleasant outlook is shut off. Volmer's Appeal, 11 P. F. Sm. 118.

Negative stipulation.

An injunction may be granted to restrain the breach of a negative stipulation although the contract was one of which specific performance would not be granted:[18] *Donnell* v. *Bennett* (22 Ch. D. 835), in which the well-known case of *Lumley* v. *Wagner* (1 D. M. & G. 604) is considered.

Patent.

In *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Company* (25 Ch. Div. 1), the Court, in the absence of any evidence of the violation of a contract, refused to grant an interim injunction to restrain the *bonâ fide* issue of a trade circular warning against an infringement of a patent.[19]

In *United Telephone Company* v. *Dale* (25 Ch. D. 778) the Court intimated a strong opinion that an injunction granted to restrain the sale of a complete machine would be violated by a sale of the component parts of the machine in such a manner that they might be easily put together by any one.

Under the *Patents, Designs and Trade Marks Act*, 1883, (46 & 47 Vict. c. 57), the applicant, as a condi-
[★330] tion precedent to his obtaining ★ an injunction, must shew that there is no infringement on his part: *Barney* v. *United Telephone Company* (28 Ch. D. 394). In such an action the validity of the patent cannot be tried, the only issue being infringement or no infringement:[20] *Kurtz* v. *Spence* (33 Ch. D. 579).

Penal statute.

It was held in *Cooper* v. *Whittingham* (15 Ch. D. 501) that where a statute creates a new offence and enacts a penalty, *ex. gr.* as in this case, the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), the person proceeding under the statute is not confined to the recovery of the penalty, but the ancillary remedy by injunction may still be claimed as well. This case was considered in *Hayward* v. *East London Waterworks Company* (28 Ch. D. 138), where it was held that the statutory remedy by penalties provided by the *Waterworks Clauses Act*, 1847, had not ousted the jurisdiction of the Court to restrain the company by injunction from cutting off the supply of water, but that the injunction would not be granted except pending proceedings for the settlement of the dispute

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[18] The mere fact that there has been a breach of a covenant is sufficient ground for the Court to interfere by injunction. St. Andrews Church's Appeal, 17 P. F. Sm. 518.

[19] In the case of patents the right to interfere by injunction can be exercised only by the U. S. Courts. Curtis on Patents, 495; Slemmer's App., 8 P. F. Sm. 155.

[20] Shelly *v.* Brannan, 4 Fisher's Patent Cases, 198; Sickles *v.* Gloucester Mf'g Co., 1 Id. 222.

as to value, or upon an undertaking by the plaintiff to commence proceedings within a short period.

*Quia timet* action.

In *Fletcher* v. *Bealey* (28 Ch. D. 688) it was laid down that there must be two necessary ingredients for a *quia timet* action, *i. e.* an action to restrain and apprehended injury. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage, will, if it comes, be very substantial.

Railway company.

In *Allgood* v. *Merrybent and Darlington Railway Company* (33 Ch. D. 571), the Court granted an injunction at the instance of an unpaid vendor of lands to restrain a railway company from running trains over the land—and this notwithstanding the probable inconvenience to the public, who were treated as having no rights as such against an unpaid vendor.[21]

Riparian owner.

A lower riparian owner was held not entitled, in the absence of any damage, to an injunction in respect of water which had been taken from the river and returned unpolluted and undiminished :[22] *Kensit* v. *Great Eastern Railway Company* (27 Ch. Div. 122).

Solicitor and client.

In *Little* v. *Kingswood Colliery Company* (20 Ch. Div. 733), an injunction which had been granted to restrain a solicitor from acting for the antagonist of his former client, was on appeal dissolved by consent, the solicitor undertaking not to disclose his client's secrets;[23] and see *In re Flint*, *Coppock* v. *Vaughan* (W. N. 1885, p. 163).

Notice of injunction.

In order to justify a committal for breach of an injunction the order need not be served if the respondent had notice of it *aliunde* and knew that the plaintiff intended to enforce it. Notice may be given by telegram, but the Court will decide whether under the circumstances the party had in fact notice of the injunction: *In re Bryant* (4 Ch. D. 98); *Ex parte Langley*, *In re Bishop* (13 Ch. Div. 180).

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[21] McIntyre *v.* Story, 80 Ill. 127; Jarden *v.* P. W. & B. R. R., 3 Wharton, 502; Wilkin *v.* City of St. Paul, 33 Minn. 181; Bonaparte *v.* C. and A. R. R., Baldwin, 205.

[22] A party who has diverted water from its proper channel, may be compelled by a mandatory injunction to restore it. McCollum *v.* Morrison, 14 Fla. 414; Corning *v.* Troy Iron Co., 40 N. Y. 191; Green *v.* Canny, 137 Mass. 64.

[23] If a person has gained possession of a secret by means of a confidential relation an injunction will be granted, restraining him from divulging it. Peabody *v.* Norfolk, 98 Mass. 452; Kerr on Injunctions, 181.

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